BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Suvon, LLC d/b/a FirstEnergy Advisors For Certification as a Competitive Retail Electric Service Power Broker and Aggregator in Ohio.	)))))	Case No. 20-0103-EL-AGG

SUVON, LLC D/B/A FIRSTENERGY ADVISORS' REPLY IN SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER

I. INTRODUCTION

NOPEC wants this case to be about everything except the law. Indeed, the sole issue raised in FirstEnergy Advisors' Motion for Protective Order is not even discussed by NOPEC until page six of its Memorandum Contra. While NOPEC may want to make this dispute about the level of the burden imposed by its requests, this is irrelevant. The substance of NOPEC's discovery requests is irrelevant. NOPEC has no right to discovery. In fact, no discovery is needed because the Staff has already recommended FirstEnergy Advisors' Application be approved.[1] Therefore, the Motion for Protective Order should be granted.

II. ARGUMENT

A. There is no universal right to discovery in every Commission case.

NOPEC claims that "under the PUCO's rules, discovery may begin immediately after a proceeding is commenced."[2] Vistra and OCC joined this argument. While this is generally true, there is no universal right to discovery in every Commission case. Instead, the Commission has reasonably drawn a distinction between cases where a hearing is scheduled and other types of

[1] Staff Review and Recommendation dated April 7, 2020.
[2] NOPEC's Memorandum Contra FirstEnergy Advisors' Motion for Protective Order at 3.

cases. In the former, discovery is often appropriate. In the latter, there is no way to determine what information is reasonably likely to lead to the discovery of admissible evidence or whether requests would impose an undue burden. There is no mechanism by which discovery can be admitted. As a result, when no hearing has been established, there is no automatic right to discovery.

The right outcome here is clear. The Entry suspending consideration of the Application made no provision for discovery or intervenor participation of any kind. The Staff has completed its review of the Application and has recommended that the Application be approved.[3] As such there is no justification for requiring discovery in this matter.

1. Ohio precedent is clear.

As discussed in detail in FirstEnergy Advisors' Motion for Protective Order, the Commission has already addressed this exact issue in at least two cases, both of which establish that discovery is not available as a matter of right at any time in every single Commission case.[4] First, in *In re Matter of the Review of Chapter 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, the Commission addressed comments related to the Commission's procedural rules contained in Chapter 4901-1. OCC requested that the Commission add the definition of "proceeding" to the rules and define it as "any filing, hearing, investigation, inquiry or rulemaking which the Commission is required or permitted to make, hold or rule upon."[5] AEP Ohio and AT&T Ohio argued against OCC's definition, arguing that "contrary to OCC's view, there is no right of participation in every matter brought before the Commission," and that if OCC's definition were adopted, it would have significant consequences,

[3] Staff Review and Recommendation dated April 7, 2020.
[4] *See* FirstEnergy Advisors' Motion for Protective Order at 5–6.
[5] *In re Matter of the Review of Chapter 4901-1, 4901-3, and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order at ¶ 7 (Dec. 6, 2006).

including making every case filed with the Commission a 'proceeding' and thus allowing intervention and discovery in every case."[6] The Commission agreed, and outright rejected OCC's request. In so doing, the Commission also held:

> If OCC's proposal were adopted, any interested person would have the right to intervene, conduct discovery, and present evidence in any Commission case. **The Commission does not believe that such rights exist.** In addition, OCC's proposed definition would eliminate the Commission's discretion to conduct its proceedings in a manner that it deems appropriate and would unduly delay the outcome of many cases. The request is denied.[7]

Likewise, in another matter, the Commission held:

> The Commission's procedural rules and its governing statutes convey significant discretion and flexibility on the governance of its own proceedings. This is particularly so for proceedings where no hearing is required by law. There is no right to an evidentiary hearing in this proceeding or to the full discovery process normally reserved for cases where a hearing is required.[8]

Accordingly, as these cases make clear, there is no universal right to discovery in every Commission case.

2. *Verde* and the other cases NOPEC and Intervenors Cite are not factually analogous.

To support its claim that "discovery can be held prior to [the PUCO's] determination whether to hold a hearing," NOPEC and Vistra rely on case support that is materially different than the instant case, and thus does not lend credence to NOPEC's claims.[9]

NOPEC and Vistra first rely upon *Verde*[10], claiming that Verde asserted arguments similar to FirstEnergy Advisors' arguments, when Verde asserted that "efficiency required that discovery

[6] *Id.* at ¶ 8.
[7] *Id.* at ¶ 9 (emphasis added).
[8] *In re Triennial Review Regarding Local Circuit Switching*, Case No. 03-2040-TP-COI, Entry on Rehearing at ¶ 8 (Oct. 28, 2003).
[9] Memorandum Contra at 6–8, Vistra Memorandum Contra at 3.
[10] *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail Electric Services Supplier, et al.*, Case Nos. 11-5886-EL-CRS and 13-2164-GA-CRS, Entry (Mar. 3, 2020) ("*Verde*").

not commence until after intervention is granted and a procedural schedule established."[11] As a preliminary matter, NOPEC calls *Verde* a Commission Order.[12] *Verde* was actually an Attorney Examiner Entry. Making matters worse, Verde did not actually make the arguments that FirstEnergy Advisors makes in its Motion for Protective Order. Instead, Verde raised other arguments not at issue here, and thus the Attorney Examiner did not have cause to address the arguments FirstEnergy Advisors raised in this case. The Attorney Examiner certainly did not address them in the Entry. Because of this, it is inappropriate to compare an Attorney Examiner Entry where an issue was not raised to a Commission decision expressly addressing the point NOPEC raises here.

Further, it is noteworthy to examine the circumstances of the *Verde* Entry. The *Verde* Entry suspended the consideration of the license application.[13] At the same time, the Attorney Examiner also expressly established a process for intervenor participation, comments, and discovery.[14] When the Attorney Examiner did this in *Verde*, it established the scope of the case and permitted the parties to determine the appropriate scope of discovery.

Comparing *Verde* to the instant case, when FirstEnergy Advisors' Application was suspended the Attorney Examiner did not establish a process for intervenor participation, comments, and discovery.[15] Instead, the February 11, 2020 Entry suspended the Application "in order for the Commission and Staff to further review this matter.[16] The Entry did not authorize intervention, a comment period, or discovery. This is a material distinction because without a hearing or intervenor comment mechanism in this case, there is no way to determine what the

[11] Memorandum Contra at 6.
[12] *See* Memorandum Contra at 6.
[13] *Verde* Entry at ¶ 9.
[14] *Verde* Entry at ¶ 11.
[15] *See* Entry (Feb. 11, 2020).
[16] Entry (Feb. 11, 2020) ¶ 6.

appropriate scope of discovery may be or if discovery is appropriate at all. In light of the fundamental differences between the *Verde* entry and this case *Verde* is not relevant.

The *Verde* case also did not have the dispute which is evident in this case over the appropriate scope of the proceeding. And, as discussed below, intervenors in this case want to litigate Ohio's corporate separation, shared service, and branding rules. Because that dispute over the scope of the case was not present in *Verde*, NOPEC's reliance on *Verde* is inaccurate.

Likewise, NOPEC and Vistra's reliance on *In re Columbia Gas of Ohio*, Case No. 11-5351-GA-UNC, is also misplaced, as the scenario is materially different from the instant case.[17] *Columbia* was a case concerning an application for authority to implement a capital expenditure program—a case where a procedural schedule setting deadlines for comments and intervenor participation is customary. *Columbia* was also an Attorney Examiner Entry, not a Commission Order. Further, what NOPEC fails to reveal in its argument incorrectly claiming that "the PUCO found that intervenors could seek discovery prior to the PUCO's determination whether to hold a hearing,"[18] is that Columbia had already been served with, and responded to without objection, one set of discovery before it sought a motion to stay discovery.[19] As already explained above, that is not the case here.

Moreover, it should be noted that in ultimately deciding to allow the parties "to continue the discovery process" that had already begun, the Attorney Examiner—not the Commission—clarified that "discovery should not reach beyond these proceedings and must be limited to the subject matter of the application before the Commission."[20] No matter what NOPEC tries to insinuate, the parties were not granted unfettered access to seek discovery on any and all matters

[17] Memorandum Contra at 6–7.
[18] Memorandum Contra at 6.
[19] *Columbia* Entry at ¶¶ 7–8.
[20] *Columbia* Entry at ¶ 8.

they so desired. Accordingly, because *Columbia* is drastically different than the factual scenario in this case, NOPEC's reliance on *Columbia* fails to provide any support for NOPEC's claimed entitlement to discovery rights in this case.

Vistra also relies upon a 2013 case involving DP&L's request to sell certain generating assets.[21] However, that case is also not analogous to this case. In *DP&L*, the Commission established an intervenor comment period in a proceeding where a hearing was specifically required.[22] It was only after the Commission had specifically required intervenor participation and comments that DP&L sought an order staying discovery until its request to waive the required hearing was addressed by the Commission.[23] In *DP&L* a hearing was required and DP&L sought a waiver,[24] while in application cases no hearing is anticipated. In *DP&L* the Commission already held that it would be accepting intervenor comments, whereas no intervenor comment period has been established in this case. Accordingly, *DP&L* does not support Vistra's position. *DP&L* merely illustrates the general rule in cases where, unlike here, a hearing is anticipated by Commission rules and practice.

Notably absent from NOPEC's arguments and fatal to NOPEC's position is a 2005 Commission Order.[25] In 2005, Cinergy moved for approval of a change of control. According to NOPEC's theory in this case, once the *Cinergy* proceeding was filed, any proposed intervenor

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[21] Vistra Memo Contra at 3 (citing *In the Matter of the Application of Dayton Power and Light Company for Authority to Transfer or Sell its Generation Assets*, Case No. 13-2420-EL-UNC, Entry, at ¶ 9 (May 30, 2014)("DP&L").
[22] DP&L at ¶¶ 2-7.
[23] *Id*. at ¶8.
[24] *Id*. at ¶ 9 ("Pursuant to Ohio Adm.Code 4901:1-37-09(D), the Commission shall set a hearing with respect to any application that proposes to alter the jurisdiction of the Commission over a generation asset. Until the Commission makes a decision on DP&L's waiver request, this case should proceed as if it were going to hearing.")
[25] In the Matter of the Joint Application of Cinergy Corp. on Behalf of the Cincinnati Gas & Electric Co. & Duke Energy Holding Corp. For Consent And Approval of a Change of Control of the Cincinnati Gas & Electric Company, Case No. 05-732 et al, December 12, 2005 Order ("Cinergy").

would have an automatic and immediate right to discovery.[26] However, that is not what the Commission did in *Cinergy*. Instead, the Commission issued an Entry staying discovery and setting up a process where Staff would examine the application and make a recommendation as to whether the Commission should approve it. This is the same procedure the Commission uses in broker applications. OCC sought rehearing claiming that the Commission erred by staying discovery. OCC relied on the same statutes on which NOPEC and Vistra rely here. The Commission specifically rejected OCC's demand for intervenor discovery.[27] The Commission also specifically addressed whether discovery was appropriate in cases, like this one, where no hearing has been established.

> "In addition, we would also note that Rule 4901-1-16(H), O.A.C., would allow OCC to commence discovery, even though its motion for intervention has not yet been granted. However, since, in this case, we have not yet determined whether a hearing will be held, we find that it is not appropriate to lift the stay on discovery."[28]

As the Commission has repeatedly specifically held that proceedings, like this one, where no hearing will be held are not appropriate for discovery, NOPEC's argument lacks merit. There is no reason to rely on Attorney Examiner entries which did not expressly address these points when the Commission has already addressed this point directly multiple times.

B. The scope of this matter is contained in OAC 4901:1-24-10(B).

1. The issues in the case are limited to the technical, managerial, and financial requirements to serve as a broker.

This is the type of case envisioned when the Commission previously indicated why discovery is not appropriate in all cases. A simple review of NOPEC's Memorandum Contra shows that NOPEC wants this case to be about Ohio's corporate separation rules, regulations governing

[26] Memorandum Contra at 3-4.
[27] Cinergy at ¶ 13.
[28] Cinergy at ¶14.

the use of shared service employees, the use of a brand associated with a regulated utility, and a host of other issues.[29] On the other hand, the Ohio Administrative Code expressly states that this case should be targeted at whether FirstEnergy Advisors has met the criteria to serve as a broker. Staff agrees, which is why Staff recently recommended the Application be approved.[30] Thus, there is a fundamental disagreement regarding the appropriate legal scope of this proceeding.

As this is an application case, the scope of this matter is governed by OAC 4901:1-24-10(B). Specifically, the Commission will consider the information contained in the applicant's application, supporting attachments and evidence, and recommendations of its Staff. Contrary to NOPEC's unsupported arguments, comments, recommendations, and discovery from intervenors are notably absent from the application process.[31] NOPEC has no authority to broaden the scope of this proceeding to other issues it would like to address, as demonstrated in its discovery requests. Accordingly, any discovery in this matter about matters outside of the Application itself is premature absent further procedural guidance.

NOPEC also accuses FirstEnergy Advisors of "regulatory hubris" for properly stating that it is inappropriate to require FirstEnergy Advisors to respond to discovery requests in a case which does not involve NOPEC, regarding issues which neither FirstEnergy Advisors nor the Commission have agreed are properly relevant to this case.[32] Obviously FirstEnergy Advisors, as the applicant, is responsible for providing information to the Commission and, as such, has a role in establishing the scope of the proceeding. It is not "hubris" to acknowledge plain language in the Administrative Code.

[29] *See* Memorandum Contra at 10.
[30] Staff Review and Recommendation dated April 7, 2020.
[31] Memorandum Contra at 9.
[32] Memorandum Contra at 9.

2. There is no procedural mechanism for NOPEC to participate.

In addition to a dispute over the appropriate legal scope of the proceeding, there is also a dispute over the procedural posture. Repeatedly in its Memorandum Contra, NOPEC claims discovery is needed to prepare for hearing.[33] However, no hearing has been set and typically hearings are not set in broker application cases.

Likewise, contrary to NOPEC's unsupported claim, "evidence" does not include discovery issued by NOPEC and OCC.[34] NOPEC claims that the PUCO will make its decision based on "evidence" which NOPEC claims includes the materials produced "in response to NOPEC's, OCC, and other intervenors' discovery."[35] NOPEC first misunderstands what "evidence" is. Discovery responses are not evidence unless incorporated into something else, such as a hearing exhibit. Accordingly, NOPEC's claim that discovery issued by NOPEC to FirstEnergy Advisors would constitute "evidence" lacks merit.

NOPEC is also wrong about the legal definition of "evidence." OAC 4901:1-24-10(B) states: "In evaluating an application, the commission will consider the information contained in the applicant's application, **supporting attachments and evidence**, and recommendations of its staff." In context, it is clear that "evidence" references only supporting materials provided with an application. There would otherwise be a comma after the word "attachments" and the word "and" would be removed. The word "evidence" is certainly not intended to encompass anything which may be requested intervenors in this case.

[33] *See* Memorandum Contra at 7, 9.
[34] *See* Memorandum Contra at 9.
[35] Memorandum Contra at 9.

C. Engaging in any discovery prior to having a demonstrated need or plan for a hearing is unduly burdensome.

Finally, NOPEC makes no credible argument to refute that engaging in discovery prior to having a demonstrated need or plan for a hearing is unduly burdensome. Instead, NOPEC makes outlandish claims that FirstEnergy Advisors is engaging in "gamesmanship with the PUCO's rules" and is "using any excuse to conceal its relationship with its affiliated EDUs from Ohio's consumers."[36] NOPEC also incorrectly argues that "FirstEnergy Advisors makes the outrageous claim that providing full responses to each of NOPEC's interrogatories constitutes an 'undue burden or expense'" and that FirstEnergy Advisors fails to support its claims.[37] Vistra makes the similar claim that even if there is no right to discovery at this point, FirstEnergy Advisors must show each request is unduly burdensome before a protective order can be granted.[38] The Intervenors misunderstand this process.

Engaging in any discovery prior to having a demonstrated need or plan for a hearing is unduly burdensome because FirstEnergy Advisors cannot be expected to provide the requested information until such time as the Commission determines whether or not it will conduct a hearing in this case. Simply put, there is no need for discovery to prepare for a hearing if there is not going to be a hearing. Because there has been no case schedule established to date, nor is there any hearing or briefing process by which the information requested in the discovery requests could be utilized, requiring FirstEnergy Advisors to engage in discovery at this juncture would impose an undue burden on FirstEnergy Advisors.

[36] Memorandum Contra at 5.
[37] Memorandum Contra at 4–5.
[38] Vistra Memorandum Contra at 6.

D. FirstEnergy Advisors is not required to seek a new Protective Order in response to discovery from every intervenor.

Vistra claims that Ohio Admin. Code 4901-1-24(B) requires that FirstEnergy Advisors wait until each separate intervenor seeks discovery and then seek protective order from that specific intervenor.[39] Vistra cites no authority supporting such a standard, and for good reason.

As shown by the correspondence attached to the FirstEnergy Advisors' Motion for Protective Order, and the numerous briefs regarding this issue, there can be no dispute that NOPEC and FirstEnergy Advisors have a fundamental disagreement as to whether discovery is appropriate at this point. As such, it was appropriate to raise this issue for decision.

It is also appropriate to apply this ruling with regard to any discovery which may be issued in this proceeding by other intervenors. While several of NOPEC's requests were improper, this Motion was not filed to address those deficiencies. Instead this Motion addresses the question of whether discovery is appropriate at this point. As that answer applies equally to all prospective intervenors it is appropriate to provide intervenors with notice and opportunity to be heard on this issue.

[39] Vistra Memorandum Contra at 7.

III. CONCLUSION

For the foregoing reasons, FirstEnergy Advisors respectfully requests that its Motion for Protective Order be granted, and the Commission order that discovery not be had because it would impose an undue burden on FirstEnergy Advisors to engage in discovery when no hearing has been established, and there is no reason for permitting discovery without knowing the scope of the case.

Respectfully submitted,

/s/ N. Trevor Alexander

N. Trevor Alexander (0080713)
Kari D. Hehmeyer (0096284)
CALFEE, HALTER & GRISWOLD LLP
1200 Huntington Center
41 South High Street
Columbus, Ohio 43215
Tel: (614) 621-7774
Fax: (614) 621-0010
talexander@calfee.com
khehmeyer@calfee.com

Attorneys for Suvon, LLC d/b/a FirstEnergy Advisors

CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 8th day of April 2020. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ N. Trevor Alexander
Attorney for Suvon, LLC d/b/a FirstEnergy Advisors

Summary: Reply in Support of Motion for Protective Order electronically filed by Mr. Trevor Alexander on behalf of Suvon, LLC