

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of The East Ohio Gas Company)
d/b/a Dominion Energy Ohio for Approval of) Case No. 19-0468-GA-ALT
an Alternative Form of Regulation.)

**MEMORANDUM CONTRA OF THE EAST OHIO GAS COMPANY D/B/A
DOMINION ENERGY OHIO TO THE MOTION TO AMEND MOTION TO
INTERVENE OF NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

Nearly a year ago, the Northeast Ohio Public Energy Council (NOPEC) filed a motion to intervene. Several months later, in November 2019, its members executed amended bylaws purporting to authorize NOPEC to represent their interests in cases *not* involving natural gas supply. NOPEC now seeks to amend its motion to intervene to call attention to its revised bylaws. Unfortunately for NOPEC, this latest maneuver is too little, too late. Granting leave to amend the motion to intervene would be futile because the amendment will not cure the fatal defects that The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO or the Company) has previously called attention to. The motion for leave to amend should be denied.

I. ARGUMENT

While leave to amend a pleading or motion is usually freely granted, the Commission need not grant leave to amend where doing so would be futile. *State ex rel. McDougald v. Greene*, 2020-Ohio-2782, ¶ 14. The question raised by NOPEC’s motion to amend is whether the broad authorization in its amended bylaws fixes the defects in NOPEC’s intervention. The answer is no. NOPEC still lacks standing to intervene in this proceeding, even after the amended bylaws, because NOPEC cannot demonstrate that it can legally represent the supply customers in its member communities on the non-supply-related issues in this case. *See, e.g., In re The East Ohio Gas Co.*, Case No. 12-380- GA-GPS, 2012 WL 1439026, Entry (Apr. 20, 2012) (OCC did not have authority to participate in enforcement proceeding concerning DEO’s compliance with

gas pipeline safety rules); *In re Ohio Edison Co.*, Case No. 89-04-EL-EFC, 1989 WL 1731757, Entry (Apr. 20, 1989) (since union had no legally cognizable interest in proceeding to set utility's EFC rate, it lacked standing to intervene);

NOPEC is an organization established to negotiate the purchase of electricity and natural gas supplies for its member communities. This case has nothing to do with commodity service or any service indirectly affecting NOPEC's purchase of natural gas. The Company's proposal is for approval of a new distribution rate, the CEP Rider, to be charged to end-use customers—period. DEO is not proposing tariff changes or program changes that would affect commodity, transport, storage, or pooling services. And NOPEC's role was never intended or defined by its operating agreements¹ to include the representation of supply customers in its member communities in proceedings concerning delivery rates.

¹ The foundational documents that established NOPEC and natural gas aggregation programs confirm the limits of NOPEC's role and its statutory authority. The November 8, 2000 Agreement Establishing the Northeast Ohio Public Energy Council, for example, provides:

WHEREAS, certain municipal corporations, counties, townships and regional councils of government of the State of Ohio have determined to enter into this Agreement Establishing the Northeast Ohio Public Energy Council for the purpose of carrying out a cooperative program for the benefit of the members acting as governmental aggregators to arrange for the purchase of electricity by the electric customers in these political subdivisions served by the operating utility companies of FirstEnergy Corp. *pursuant to the authority provided under Ohio Revised Code Section 4928.20*, and promoting any other cooperative program which may be approved, from time to time, in accordance with this Agreement and the Bylaws described below;

(*Id.* at 1 (emphasis added).) Similarly, the Natural Gas Program Agreement of the Northeast Ohio Public Energy Council recognizes:

The Board of Directors of the Council, established pursuant to the Council Agreement, shall have, in addition to its powers and duties under the Council Agreement and the Bylaws adopted by the representatives to the Council, the power and authority to oversee

As DEO has argued in prior pleadings, NOPEC cannot take on a role beyond the scope of the statutory authorization contained in R.C. 4929.26, even if its members so desired. (DEO Sur-Rep. at 5-6.) NOPEC’s authority as a natural gas aggregator and the extent of its powers are a product of state statute. R.C. 4929.26(A) provides that a municipality, township, or county may adopt an ordinance or resolution to “aggregate automatically ... competitive retail natural gas service” for the retail loads in its area. R.C. 4929.26(C) provides that the local government, upon adopting aggregation, “shall develop a plan of operation and governance for the aggregation program so authorized.” NOPEC cannot rely on the general authority in 167.03(C) to expand the specific scope of NOPEC’s statutory authority under R.C. 4929.26. *Blackstone v. Moore*, 155 Ohio St. 3d 448, 2018-Ohio-4959, ¶ 22. So while the amended bylaws may answer the question of fact whether the member communities actually did attempt to grant such authority to NOPEC to intervene in cases concerning distribution rates, the question of law whether that granting of authority was legally valid remains unresolved. NOPEC derives no authority from R.C. 167.03(C) in and of itself. The appropriate actions that its members take to empower NOPEC must be consistent with the purpose for which it was created. Actions that seeks to authorize NOPEC to pursue its customers’ general interests in any and all general rate-setting matters go well beyond the authorization contained in R.C. 4929.26, and the purpose of NOPEC as defined by its operating agreement and the agreement that establishes natural gas aggregation programs.

and manage the operation of the Gas Aggregation Program in accordance with the NOPEC Natural Gas Aggregation Program Plan of Operation and Governance adopted *pursuant to division (C) of Section 4929.26 of the Revised Code*.

(*Id.* at 2 (emphasis added).) See *In re Northeast Ohio Public Energy Council*, Case No. 02-1688-GA-GAG, Correspondence (Feb. 20, 2020) re City of Green, Summit County, Ohio, pp. 4, 14.

The amended bylaws do not define NOPEC’s authority; the statutory scheme under R.C. 4928.20 and R.C. 4929.26 defines its authority.

NOPEC’s motion to amend, by offering its clarification in the form of its amended bylaws, does not salvage its motion to intervene. When you drill down to the core of the issue, NOPEC is a creature of statute, in this instance specifically R.C. 4929.26. And its member communities cannot authorize it to take action, such as to intervene in this proceeding, which goes beyond the statutory authority of the regional organization, and the authorization provided for in its agreements. It was established for one purpose: to aggregate to negotiate the purchase price of electricity, as provided under R.C. 4928.20. It has expanded that purpose to include aggregation to negotiate the purchase price of natural gas, as provided for under R.C. 4929.26. It cannot further expand its purpose without the authorization of the General Assembly, and to date, it has not established any other additional programs under its operating agreement except for the aggregation programs allowed for by law. For these reasons, NOPEC is not authorized to represent the gas supply customers of its member communities in distribution rate proceedings that do not affect the commodity services. The amended bylaws do not change this.

II. CONCLUSION

For the good cause provided herein and in DEO’s other pleadings on this subject, DEO requests that the Commission exercise its discretion to deny NOPEC’s motion to amend its motion to intervene, grant DEO’s motion for leave to file its Surreply, and deny NOPEC’s motion to intervene in this proceeding.

Dated: May 13, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a courtesy copy of the foregoing pleading was served by electronic mail upon the following individuals on May 13, 2020:

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Summary: Memorandum Memorandum Contra to the Motion to Amend Motion to Intervene of Northeast Ohio Public Energy Council electronically filed by Mr. Christopher T Kennedy on behalf of The East Ohio Gas Company d/b/a Dominion Energy Ohio