

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Review of Ohio Edison )  
Company, The Cleveland Electric )  
Illuminating Company, and The Toledo )  
Edison Company's Compliance with R.C. )  
4928.17 and Ohio Admin. Code Chapter )  
4902:1-37.

Case No. 17-974-EL-UNC

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**MOTION TO INTERVENE OF  
NORTHEAST OHIO PUBLIC ENERGY COUNCIL**

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Pursuant to R.C. 4903.221, and O.A.C. 4901-1-11, the Northeast Ohio Public Energy Council (“NOPEC”) respectfully requests that the Public Utilities Commission of Ohio grant NOPEC’s motion to intervene in this proceeding. The reasons supporting NOPEC’s motion to intervene are contained in the accompanying Memorandum in Support.

Respectfully submitted,



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**MEMORANDUM IN SUPPORT**

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**I. INTRODUCTION**

The Northeast Ohio Public Energy Council (“NOPEC”) is a regional council of governments established under R.C. Chapter 167, and is the largest governmental retail energy aggregator in Ohio. It is comprised of approximately 235 member communities in nineteen (19) Ohio counties. NOPEC provides retail electric aggregation service to approximately 500,000 retail electric customers located primarily in the Cleveland Electric Illuminating Company and Ohio Edison Company service territories. NOPEC seeks to intervene in this proceeding to ensure that its customers continue to receive meaningful benefits from electric deregulation, as the General Assembly intended when it enacted R.C. 4928.20.

On May 14, 2018, an independent auditor filed its report in this proceeding after conducting a Commission-ordered investigation into the FirstEnergy electric distribution utilities’ (the “EDUs”)<sup>1</sup> compliance with their corporate separation plan.<sup>2</sup> The Audit Report focused on the EDUs’ relationship with FirstEnergy Solutions Corp. (“FES”), which at that time was the EDUs’ sole affiliated competitive retail electric service provider. By Entry of September 20, 2018, the

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<sup>1</sup> The FirstEnergy Ohio EDUs are The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company. Their parent holding company is FirstEnergy Corp (“FEC”).

<sup>2</sup> See SAGE Management Consultants, LLC Final Report for Compliance Audit of the FirstEnergy Operating Companies with the Corporate Separation Rules of the Public Utilities Commission of Ohio (May 14, 2018) (“Audit Report”).

Attorney Examiner set October 9, 2018 as the deadline to intervene in this case. The Northeast Ohio Public Energy Council (“NOPEC”) did not formally intervene.<sup>3</sup> However, pursuant to a subsequent Attorney Examiner entry, NOPEC timely filed initial and reply comments to the Audit Report on December 31, 2018 and January 7, 2019, respectively.

Since this case commenced, FES filed for bankruptcy, was divested from the EDUs’ parent holding company (FEC), and emerged from bankruptcy as a power marketer, Energy Harbor, LCC, on February 27, 2020.<sup>4</sup> With FES’s divestiture, many of the Audit Report’s specific findings as to the EDUs’ relationship with FES have become superseded by the same issues presenting themselves with the emergence of the EDUs’ new competitive retail electric service affiliate, FirstEnergy Advisors.

During FES’s transition to becoming Energy Harbor, a separate EDU affiliate (Suvon, LLC d/b/a/ FirstEnergy Advisors (“FirstEnergy Advisors”)) filed an application with the Commission for certification as a power broker and aggregator on January 17, 2020.<sup>5</sup> NOPEC (jointly with the Office of the Ohio Consumers’ Counsel) moved to suspend the application on the basis that FirstEnergy Advisors’ certification would result in the EDUs’ non-compliance with certain of the Commission’s corporate separation rules. NOPEC also moved to intervene in the *Certification Case*, citing the same corporate separation violations that would result from FirstEnergy Advisors’ certification. The Attorney Examiner suspended the application as requested,<sup>6</sup> and the Commission granted NOPEC’s unopposed motion to intervene.<sup>7</sup> By subsequent finding and order, the Commission ordered that the corporate separation issues presented by NOPEC and the other intervenors in the *Certification Case* be addressed in this proceeding.<sup>8</sup>

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<sup>3</sup> Contemporaneously with this pleading, NOPEC has filed a motion for leave to intervene out of time pursuant to O.A.C. 4901-1-11(F).

<sup>4</sup> See Case No. 00-1742-EL-CRS, Finding and Order (May 6, 2020).

<sup>5</sup> See Case No. 20-103-EL-AGG (January 17, 2020) (“*Certification Case*”).

<sup>6</sup> *Certification Case*, Entry (February 11, 2020).

<sup>7</sup> *Certification Case*, Order (April 22, 2020) at 3.

<sup>8</sup> *Certification Case*, Order (April 22, 2020) at 5.

By entry in this case, the Attorney Examiner *sua sponte* took administrative notice of FirstEnergy Advisors' application and supplement (filed April 1, 2020) in the *Certification Case*.<sup>9</sup> With FES's divestiture and FirstEnergy Advisors' certification as a power broker and aggregator, the focus of this proceeding has shifted to whether the EDUs' relationship with FirstEnergy Advisors (not FES) is compliant with applicable corporate separation rules. NOPEC has a real and substantial interest that this relationship does not abuse the EDUs' market power to NOPEC's detriment as a governmental aggregator competing with FirstEnergy Advisors. It also has the related overall interest that its residential and small commercial aggregation customers continue to receive meaningful benefits from electric deregulation, as the General Assembly intended when it enacted R.C. 4928.20.

## **II. LAW & ARGUMENT**

NOPEC moves to intervene in this proceeding. R.C. 4903.221(B) and O.A.C. Rule 4901-1-11(A)(2) govern intervention in Commission proceedings. Substantially similar in substance, these provisions provide that the Commission may consider the following in determining whether to grant intervention:

- (1) The nature and extent of the person's interest;<sup>10</sup>
- (2) The legal position of the person seeking intervention and its relation to the merits of the case;<sup>11</sup>
- (3) Whether intervention would unduly delay the proceeding or unjustly prejudice any existing party;<sup>12</sup>
- (4) The person's potential contribution to full development and equitable resolution of the issues involved in the proceeding;<sup>13</sup> and
- (5) The extent to which the person's interest is represented by existing parties.<sup>14</sup>

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<sup>9</sup> Entry (April 29, 2020) at 3.

<sup>10</sup> R.C. 4903.221(B)(1) and O.A.C. 4901-1-11(B)(1).

<sup>11</sup> R.C. 4903.221(B)(2) and O.A.C. 4901-1-11(B)(2).

<sup>12</sup> R.C. 4903.221(B)(3) and O.A.C. 4901-1-11(B)(3).

<sup>13</sup> R.C. 4903.221(B)(4) and O.A.C. 4901-1-11(B)(4).

<sup>14</sup> R.C. 4903.221(B)(5) and O.A.C. 4901-1-11(B)(5).

NOPEC has a real and substantial interest in this proceeding. FirstEnergy Advisors' application in the *Certification Case* (administratively noticed in this proceeding) lists three "managers" of its limited liability company. Managers of a limited liability company are responsible for its management, and have substantially the same responsibilities and authority as the directors of a corporation. FirstEnergy Advisors' three managers (Chuck Jones, Dennis Chack, and Steve Strah) each holds a senior position with FirstEnergy Service Company,<sup>15</sup> and managers Jones and Strah also serve as directors of each of FirstEnergy's Ohio EDUs. NOPEC's interest is in creating and maintaining a level playing field in Ohio's competitive retail market. That goal is recognized as the formal policy of this state (R.C. 4928.02) and is threatened when a competitive retail electric service ("CRES") provider such as FirstEnergy Advisors is controlled by its non-competitive EDU affiliates. In this case, the control over the Ohio EDUs and FirstEnergy Advisors is so consolidated in so few people that the identity and interests of each entity is nearly undistinguishable, to the point where each uses the same brand name "FirstEnergy." Moreover, in exercising their joint control, the managers necessarily will receive non-public, competitive information from both the regulated and non-regulated affiliates. NOPEC is concerned that this consolidation of power will lead to market power abuses whereby the joint managers take actions to benefit one entity to the detriment of the other, and justify it internally as benefitting the corporate good as a whole.

NOPEC's concern with this proposed management structure, and anti-competitive sharing of competitive market information between the regulated utilities, certainly will affect other aggregators and brokers in the State, such as NOPEC, who will not be privy to the same improperly shared utility information that FirstEnergy Advisors gains. The prohibited sharing of non-public information will be made easier, because both the EDUs and FirstEnergy Advisors share the same

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<sup>15</sup> The Audit Report found, at page 39, that FirstEnergy Service Company "primarily serves the FirstEnergy regulated operating companies," and that it was "problematic" for the FES vice president to attend Service Company executive meetings with other Service Company executives who were focused on the regulated utility operations.

physical offices at 76 South Main Street, Akron, Ohio. No way exists to separate the senior managers' and officers' knowledge, thoughts and ideas, especially when they share offices every day in the same building.

NOPEC's legal position is clear. The EDUs' and FirstEnergy Advisor's combined management structure violates R.C. 4928.17. R.C. 4928.17(A)(1) requires that FirstEnergy Advisors must be operated as a *fully separated affiliate* from the EDUs and the Commission's rules state so. See, also, O.A.C. 4901:1-37-04(A)(1) ("Each electric utility and its affiliates that provide services to customers within the electric utility's service territory shall function independently of each other."); see, also, O.A.C. 4901:1-37-04(A)(3) ("A electric utility's operating employees and those of its affiliates shall function independently of each other.").<sup>16</sup> Each manager's knowledge of the business plans and opportunities arising from his regulated duties cannot be separated from his knowledge of the knowledge the business plans and opportunities arising from his CRES duties, and vice versa. Moreover, the shared employee provisions of O.A.C. 4901:1-37-04(A)(4) do not apply because sharing senior management under these circumstances would violate several provisions of the Code of Conduct contained in O.A.C. 4901:1-37-04(D)(3), (4) and (6).

In addition, FirstEnergy Advisors intends to use the "FirstEnergy" trade name, which violates O.A.C. 4901:1-37-04(D)(7), (8) and (9).

NOPEC's intervention will not unduly delay this proceeding. No hearing has been scheduled in this proceeding. The Commission has ordered that supplemental comments and supplemental replies be filed by May 29, and June 15, 2020, respectively. NOPEC will meet those deadlines.

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<sup>16</sup> See, also, Ohio Admin. Code 4901:1-37-04(A)(2) and (4) related to shared facilities and shared employees, service and facilities, which provide that the structural safeguards may be waived if the sharing does not violate the code of conduct. Ohio Admin. Code 4901:1-37-04(A)(1) and (3) do not provide for this waiver.

NOPEC's intervention will not unjustly prejudice any existing party. Because of its extensive participation in the *Certification Case*, NOPEC will contribute to a full development of the issues presented in this proceeding. NOPEC will work cooperatively with others in the case in order to maximize case efficiency, where practical, to reach an equitable resolution of all issues.

Finally, NOPEC submits that no current party represents its interests. NOPEC's position is unique as a certified governmental aggregator that will be directly affected by FirstEnergy Advisors' certification as an aggregator and broker controlled by the regulated utilities. NOPEC also has an interest in assuring that the electric market design in Ohio, which affects its member customers, are lawful, in accordance with Ohio laws, rules and orders and not anti-competitive. NOPEC's aggregation includes both residential and small commercial electric customers. Disposition of this proceeding without its participation will impair or impede NOPEC's ability to protect those interests.

### **III. CONCLUSION**

Based on the foregoing, NOPEC respectfully request that its motion to intervene be granted.

Respectfully submitted,



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### **CERTIFICATE OF SERVICE**

In accordance with O.A.C. 4901-1-05, the PUCO's e-filing system will electronically serve notice of the filing of this document upon the following parties. In addition, I hereby certify that a service copy of the foregoing *Motion to Intervene* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 29<sup>th</sup> day of May 2020.



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