

**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

**NORTHEAST OHIO PUBLIC ENERGY COUNCIL’S REPLY
TO FIRSTENERGY’S MEMORANDUM CONTRA NOPEC’S
MOTION FOR LEAVE TO FILE A MOTION TO INTERVENE**

I. INTRODUCTION

The Northeast Ohio Public Energy Council (“NOPEC”) filed a motion for leave to file a motion to intervene in this proceeding on May 29, 2020.¹ NOPEC was aware that its motion to intervene was untimely because the Attorney Examiner set an intervention deadline of October 9, 2018.² However, NOPEC explained that exceptional circumstances warranted its intervention out of time, as provided in O.A.C. 4901-1-11(F). Specifically, since the intervention deadline, this proceeding has changed dramatically:

1. At the time this proceeding was initiated, FirstEnergy Solutions (“FES”) was a competitive retail electric service (“CRES”) provider that was affiliated with the FirstEnergy Ohio electric distribution utilities (“EDUs”).³ The Audit Report⁴ prepared in this proceeding examined whether FES’s relationship with the EDUs violated the Commission’s corporate separation rules. The Audit Report was filed on May 14, 2018, with its

¹ Contemporaneously with its motion for leave, NOPEC also filed a motion to intervene.

² See Entry of September 20, 2018.

³ The EDUs include The Cleveland Electric Illuminating Company, The Toledo Edison Company, and Ohio Edison Company.

⁴ 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 (filed May 14, 2018) (“Audit Report”).

recommendations; however, FES emerged from bankruptcy in February 2020, as an unaffiliated CRES provider, Energy Harbor LLC.⁵

2. During FES's transition to non-affiliated Energy Harbor, another EDU affiliate, Suvon, LLC d/b/a FirstEnergy Advisors ("FirstEnergy Advisors") sought certification as a CRES provider on January 17, 2020, proposing to compete directly against NOPEC as an aggregator. See Case No. 20-103-EL-AGG (the "*Certification Case*").
3. NOPEC intervened in the *Certification Case* on the bases that FirstEnergy Advisors' operations would violate the Commission's corporate separation rules, primarily by co-mingling its management and control with the EDUs and using the EDUs' brand name "FirstEnergy." FirstEnergy Advisors did not contest that NOPEC had a real and substantial interest in the *Certification Case* and the Commission granted it intervention, finding it to be "reasonable."⁶
4. By Finding and Order issued April 22, 2020, the Commission granted FirstEnergy Advisors' application in the *Certification Case* and indicated that it would consider the corporate separation issues NOPEC raised in *Certification Case* in the instant proceeding. By entry issued April 29, 2020, in the instant proceeding, the Attorney Examiner took administrative notice of FirstEnergy Advisors' certification application, as supplemented, for consideration of the corporate separation issues NOPEC raised in the *Certification Case*.
5. By transferring the issues raised, and the application submitted, in the *Certification Case* to this proceeding, the Commission has shifted the focus of this proceeding from the EDUs' relationship with FES to their relationship to FirstEnergy Advisors. In its Entry on Rehearing issued June 17, 2020, the Commission denied the applications for rehearing filed by NOPEC, Office of Ohio Consumers' Counsel and the Retail Energy Supply Association, effectively terminating NOPEC's participation in the *Certification Case*. The instant proceeding is the only remaining case in which NOPEC can protect its interests with respect to the issues it first raised in the *Certification Case*.

At the time of the October 9, 2018, intervention deadline, NOPEC could not have reasonably foreseen that FirstEnergy Corp⁷ would form and seek certification (on January 17, 2020) of a brand new affiliated power broker/aggregator to compete in Ohio's competitive retail electricity market. Nor could NOPEC have foreseen that this proceeding would be used to address

⁵ Indeed, in their Supplemental Reply Comments filed June 15, 2020, the EDUs assert that this change was so dramatic that the Audit Report and this proceeding are moot.

⁶ *Certification Case* at 4.

⁷ FirstEnergy Corp is the holding company parent of the EDUs and FirstEnergy Advisors.

whether this new affiliated power broker/aggregator's management structure would violate the Commission's corporate separation rules. These extraordinary circumstances warrant NOPEC's intervention in this case after the intervention deadline.

II. ARGUMENT

The EDU's raise two arguments to support their request to deny NOPEC's motion for leave to file its motion to intervene: (1) NOPEC's "motion for leave" to file a motion to intervene is untimely and (2) NOPEC has failed to state extraordinary circumstances.

A. NOPEC's "motion for leave" to file a motion to intervene is timely.

Confusingly, the EDUs argue that NOPEC's "motion for leave" to file a motion to intervene is untimely. The Commission's rules impose no time limit to file a motion for leave to intervene. If the EDUs intend to argue that NOPEC's contemporaneously filed motion to intervene is untimely, NOPEC admits as much. That's why it filed the motion for leave in the first place. To the extent that the EDUs complain that NOPEC's motion to intervene was filed a year and a half after the intervention deadline is of no consequence. NOPEC could not have foreseen in October 2018 that a new EDU affiliate would seek certification as an aggregator in January 2020. Nor could NOPEC have foreseen that the Commission would transfer consideration of FirstEnergy Advisors' corporate separation issues to this case, together with its full application. NOPEC sought intervention within a month of learning of the Commission's action and on the date supplemental comments were due. The Commission should ignore the EDUs' confusing and unfounded argument that NOPEC's motion for leave to file a motion to intervene is untimely.

B. NOPEC has stated extraordinary circumstances.

The EDUs assert that NOPEC has not stated extraordinary circumstances to seek intervention in this case because (1) its intervention in the *Certification Case* has no precedential effect in this case, and (2) NOPEC's reliance on the Attorney Examiner's approval of the Retail

Energy Supply Association's ("RESA") untimely intervention is misplaced. The EDUs' arguments are just plain wrong.

1. NOPEC has a real and substantial interest in the corporate separation issues involving FirstEnergy Advisors.

In its motion for leave to file a motion to intervene, NOPEC indicated that it was granted intervention in the *Certification Case* because of its real and substantial interest in addressing these corporate separation concerns.⁸ The EDUs comment that the Commission did not address whether NOPEC has a real and substantial interest. The EDUs are wrong. The Commission expressly found that NOPEC's motion was "reasonable" and should be granted.⁹ In finding NOPEC's motion to be reasonable under its rules, the Commission necessarily found that NOPEC has a real and substantial interest in the corporate separation issues raised in the *Certification Case*.

Moreover, the EDUs do not contest that NOPEC has a real and substantial interest in the corporate separation issues to be addressed in the instant proceeding. They oppose only NOPEC's motion for leave to file a motion to intervene. They have not filed a memorandum contra NOPEC's contemporaneous motion to intervene, and thus NOPEC's motion to intervene is unopposed. Because the EDUs contest only the timeliness of the motion to intervene and do not contest NOPEC's substantive interests in this proceeding, the Commission should grant the uncontested motion to intervene once it permits the motion's filing pursuant to O.A.C. 4901-1-11(F).

⁸ NOPEC Motion for Leave to File a Motion to Intervene at 5.

⁹ *Certification Case*, Finding and Order (April 22, 2020) at 4.

2. The extraordinary circumstances surrounding NOPEC's untimely intervention is nearly indistinguishable from the circumstances surrounding RESA's late-filed intervention; indeed, NOPEC's case is more compelling.

In its motion for leave to file a motion to intervene, NOPEC noted that the Attorney Examiner had approved RESA's motion for leave to intervene under virtually indistinguishable circumstances. The EDUs fail at attempts to substantively distinguish the two motions.

- NOPEC and RESA each filed initial and reply comments in this proceeding on December 31, 2018 and January 7, 2019, respectively. Neither filed a motion to intervene by the October 2018 due date.
 - NOPEC commented on FES's use of the FirstEnergy name.
 - RESA commented on FES's use of the FirstEnergy name, the FES/FirstEnergy Service Company management structure, and the EDUs' provision of competitive products.
- On January 15, 2019, the Attorney Examiner stayed RESA's pending complaint case against the EDUs, filed April 25, 2018. The complaint alleged that the EDUs were providing competitive services in violation of the Commission's corporate separation rules. The Attorney Examiner stayed the complaint case pending the outcome of the instant proceeding because of a commonality of corporate separation issues.¹⁰
- On January 29, 2019, RESA filed its motion for leave to intervene and motion to intervene in the instant case.
- On April 29, 2020, the Attorney Examiner granted RESA's untimely motion to intervene in the instant case, stating that it could not have foreseen at the time intervention was due that the Attorney Examiner would stay the complaint case pending the outcome of this proceeding.

NOPEC's position is substantively indistinguishable. At the time intervention was due (October 9, 2018), NOPEC could not have reasonably foreseen that the corporate separation issues it raised in the *Certification Case* – along with FirstEnergy Advisors' certification application – would be transferred to this case for review. In fact, NOPEC's circumstances are even more compelling because it could not have reasonably foreseen that FirstEnergy Corp would create a new subsidiary to compete against NOPEC as an aggregator, or that the subsidiary would have nearly the identical management team as the EDUs. Moreover, RESA's right to pursue its

¹⁰ See Case No. 18-736-EL-CSS, Entry (January 15, 2019) at 3.

interests in the complaint case merely was stayed. NOPEC's interest in pursuing the same interests in the *Certification Case* was terminated by the April 22, 2020 Finding and Order, and June 17, 2020 Entry on Rehearing.

The EDUs' attempt to distinguish NOPEC's circumstances from RESA's by claiming that NOPEC was aware of the instant proceeding and actively participated by filing comments and reply comments. However, RESA also participated by filing initial and reply comments on December 31, 2018, and January 7, 2019, respectively.

The EDUs also attempt to distinguish NOPEC's circumstances by claiming that it waited a year and a half to intervene. The timeframe is immaterial. What is material is when NOPEC and RESA learned of circumstances that were heretofore unforeseen. RESA filed its motion for leave to intervene within a month after learning the Attorney Examiner had stayed its complaint case. NOPEC also intervened within a month after it learned the Commission had transferred to this proceeding the corporate separation issues that NOPEC first raised in the *Certification Case*—as well as FirstEnergy Advisors' certification application.

The EDU's attempts to distinguish RESA's and NOPEC's circumstances simply fail - they are indistinguishable.

III. CONCLUSION

Based on the foregoing, NOPEC respectfully renews its requests that the Commission grant it leave to file its motion to intervene in this proceeding and grant its unopposed motion to intervene.

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 *Reply* was sent by, or on behalf of, the undersigned counsel to the following parties of record this 22nd day of June 2020.



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Summary: Reply of Northeast Ohio Public Energy Council to FirstEnergy's Memorandum
Contra NOPEC'S Motion for Leave to File a Motion To Intervene electronically filed by Teresa
Orahood on behalf of Dane Stinson