

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE APPLICATION OF
THE EAST OHIO GAS COMPANY DBA
DOMINION ENERGY OHIO FOR
APPROVAL OF AN ALTERNATIVE FORM OF
REGULATION TO ESTABLISH A CAPITAL
EXPENDITURE PROGRAM RIDER
MECHANISM.

CASE NO. 19-468-GA-ALT

ENTRY

Entered in the Journal on August 20, 2020

{¶ 1} The East Ohio Gas Company dba Dominion Energy Ohio (Dominion or Company) is a natural gas company and a public utility as defined by R.C. 4905.03 and R.C. 4905.02, respectively. As such, Dominion is subject to the jurisdiction of this Commission.

{¶ 2} Under R.C. 4929.05, a natural gas company may seek approval of an alternative rate plan by filing an application under R.C. 4909.18, regardless of whether the application is for an increase in rates. After an investigation, the Commission shall approve the plan if the natural gas company demonstrates, and the Commission finds, that the company is in compliance with R.C. 4905.35, is in substantial compliance with the policies of the state as set forth in R.C. 4929.02, and is expected to continue to be in substantial compliance with state policy after implementation of the alternative rate plan. The Commission must also find that the alternative rate plan is just and reasonable.

{¶ 3} Pursuant to R.C. 4929.111, a natural gas company may file an application under R.C. 4909.18, 4929.05, or 4929.11, to implement a capital expenditure program (CEP) for any of the following: any infrastructure expansion, infrastructure improvement, or infrastructure replacement program; any program to install, upgrade, or replace information technology systems; or any program reasonably necessary to comply with any rules, regulations, or orders of the Commission or other governmental entity having jurisdiction. In approving the application, the Commission shall authorize the natural gas company to defer or recover both of the following: a regulatory asset for post-in-service carrying costs (PISCC) on the portion of the assets of the CEP that are placed in service but

not reflected in rates as plant in service; and a regulatory asset for the incremental depreciation directly attributable to the CEP and the property tax expense directly attributable to the CEP. A natural gas company shall not request recovery of the PISCC, depreciation, or property tax expense under R.C. 4929.05 or R.C. 4929.11 more than once each calendar year.

{¶ 4} In Case No. 11-6024-GA-UNC, et al., the Commission modified and approved Dominion's application for authority to implement a CEP for the period of October 1, 2011, through December 31, 2012. *In re The East Ohio Gas Company dba Dominion East Ohio*, Case No. 11-6024-GA-UNC, et al., Finding and Order (Dec. 12, 2012). Subsequently, in Case No. 12-3279-GA-UNC, et al., the Commission modified and approved Dominion's application to implement a CEP for the period of January 1, 2013, through December 31, 2013. *In re The East Ohio Gas Company dba Dominion East Ohio*, Case No. 12-3279-GA-UNC, et al., Finding and Order (Oct. 9, 2013).

{¶ 5} In Case No. 13-2410-GA-UNC, et al., the Commission modified and approved Dominion's application to implement a CEP in 2014 and succeeding years, pursuant to R.C. 4909.18 and 4929.111. The Commission also approved Dominion's request for accounting authority to capitalize PISCC on program investments for assets placed in service but not yet reflected in rates; defer depreciation expense and property tax expense directly attributable to the CEP; and establish a regulatory asset to which PISCC, depreciation expense, and property tax expense are deferred for future recovery in a subsequent proceeding. Dominion was authorized to accrue deferrals under the CEP until the accrued deferrals, if included in rates, would cause the rates charged to the Company's General Sales Service customers to increase by more than \$1.50 per month. Additionally, the Commission noted that the prudence and reasonableness of Dominion's CEP-related regulatory assets and associated capital spending would be considered in any future proceedings seeking cost recovery, at which time the Company would be expected to provide detailed information regarding the expenditures for the Commission's review. *In re The East Ohio Gas Company dba Dominion East Ohio*, Case No. 13-2410-GA-UNC, et al., Finding and Order (July 2, 2014).

{¶ 6} On February 27, 2019, in the above-captioned case, Dominion filed a notice of intent to file an application for approval of an alternative rate plan under R.C. 4929.05. In the notice, Dominion stated that the application would request approval to establish a CEP rider mechanism (CEP Rider). On March 29, 2019, Dominion filed a notice of intent to file an alternative rate plan application for an increase in rates, notice of test year and date certain, and attached exhibits. Dominion noted that the notice of intent was sent to the mayor and legislative authority of each affected municipality. Dominion also notified the Commission that the Company is using a test year of the 12 months ending December 31, 2018, and a date certain of December 31, 2018. Finally, on May 1, 2019, Dominion filed its alternative rate plan application, along with supporting exhibits and testimony, pursuant to R.C. 4909.18, 4929.05, 4929.11, and 4929.111.

{¶ 7} By Entry dated September 11, 2019, the Commission deemed Dominion's application filed as of August 23, 2019. Additionally, the Commission selected Blue Ridge Consulting Services, Inc. (Blue Ridge) to assist the Commission with the audit of Dominion's CEP and associated CEP costs and deferrals. Blue Ridge was directed to file a final audit report with the Commission by February 26, 2020. By Entry dated January 10, 2020, the attorney examiner granted Dominion's request for a 60-day extension, with the final audit report being due on April 27, 2020.

{¶ 8} On April 27, 2020, Blue Ridge filed its audit report. Further, on May 11, 2020, Staff filed its report of investigation pursuant to Ohio Adm.Code 4901:1-19-07(C).

{¶ 9} By Entry dated May 27, 2020, the attorney examiner established a procedural schedule in this matter, with objections and motions to intervene being filed by June 10, 2020; expert testimony being filed by August 10, 2020; and a hearing commencing on August 17, 2020, at 10:00 a.m.

Motions to Intervene

{¶ 10} R.C. 4903.221(B)(1)-(4) and Ohio Adm.Code 4901-1-11(B)(1)-(4) state that the Commission should consider the following criteria with regard to motions to intervene:

- (1) The nature and extent of the prospective intervenor's interest;
- (2) The legal position advanced by the prospective intervenor and its probable relation to the merits of the case;
- (3) Whether the intervention by the prospective intervenor will unduly prolong or delay the proceedings;
- (4) Whether the prospective intervenor will significantly contribute to full development and equitable resolution of the factual issues.

In accordance with Ohio Adm.Code 4901-1-11(B)(5), the Commission also considers the extent to which the prospective intervenor's interest is represented by existing parties.

{¶ 11} On May 8, 2019, the Office of the Ohio Consumers' Counsel (OCC) filed a motion to intervene. No memorandum contra was filed. Upon review, the attorney examiner finds that OCC's motion is reasonable and that it should be granted.

{¶ 12} On June 25, 2019, the Northeast Ohio Public Energy Council (NOPEC) filed a motion to intervene. NOPEC explains it is a regional council of governments established under R.C. Chapter 167, is the largest governmental retail energy aggregator in Ohio, and is comprised of approximately 220 member communities in 17 Ohio counties. NOPEC provides energy aggregation service to approximately 900,000 residential and small business retail customers in the state, including retail natural gas customers in Dominion's service territory. NOPEC states it has a real and substantial interest in this proceeding, pursuant to R.C. 4903.221 and Ohio Adm.Code 4901-1-11, to ensure Dominion collects reasonable CEP deferred costs and investments from NOPEC's natural gas aggregation

customers located in Dominion's territory. NOPEC contends its intervention will not unduly delay this proceeding or unjustly prejudice any existing party, and it will work cooperatively with parties to maximize case efficiency, where practical, to reach an equitable resolution of all issues. Finally, NOPEC submits that, because no current party represents its unique interests in assuring that rates to its natural gas aggregation customers are just and reasonable, disposition of this proceeding without its participation will impair or impede its ability to protect those interests.

{¶ 13} On July 10, 2019, Dominion filed a memorandum contra NOPEC's motion to intervene. Dominion believes NOPEC has failed to demonstrate it has standing to intervene because it has not shown that its role as a governmental aggregator procuring natural gas commodity authorizes it to represent the customers it supplies in a proceeding concerning Dominion's distribution rates. Dominion explains that the CEP Rider, which is a rate for distribution service, does not propose any changes to NOPEC's area of responsibility, which is to provide commodity and transportation services to its members. Further, Dominion contends NOPEC's theory of intervention, having customers in common, is overbroad and would justify intervention by every entity, of any type, doing business with Dominion's customers. Instead, Dominion argues the standard of intervention requires a more present and immediate risk, and without an actual, legally cognizable interest at risk, NOPEC's motion to intervene must fail.

{¶ 14} Additionally, Dominion notes NOPEC's pleading fails to offer any factual allegations to satisfy the Commission's other criteria under R.C. 4903.221 and Ohio Adm.Code 4901-1-11. For example, Dominion asserts NOPEC does not offer any specific legal position it intends to advance which is related to the merits of its application; NOPEC does not describe how it will significantly contribute to the full development and equitable resolution of the factual issues underlying Dominion's application; and NOPEC does not explain why OCC is not able to adequately represent residential customers in Dominion's service territory. Absent a showing of these factual allegations, Dominion requests the Commission to deny NOPEC's motion.

{¶ 15} On July 17, 2019, NOPEC filed a reply to Dominion’s memorandum contra. NOPEC clarifies that it is seeking to intervene in this proceeding to protect the interests of its member communities and the residential and business customers in those NOPEC member communities participating in NOPEC’s gas aggregation program and not to protect its own interest as a certified governmental aggregator. NOPEC argues, pursuant to R.C. Chapter 167, it has authority to act on behalf of its member communities regarding a broad range of issues of common concern. According to NOPEC, R.C. 4929.26 does not limit it only to procuring natural gas commodity supply for its constituents; rather, the procurement of commodity supply is only one of the many actions NOPEC can take on behalf of its member communities under R.C. 167.03. NOPEC argues that, under this statutory authority, it can intervene in local distribution companies’ regulatory proceedings that will increase its constituents’ overall price for natural gas service. In further support, NOPEC points to its plan of operation and governance (POG), adopted by each NOPEC member community after the two public hearings required by R.C. 4929.26(C), which expressly provides that NOPEC “may participate in regulatory proceedings and represent the interests of customers regarding *** regulated [distribution] rates.” *In re the Application of Northeast Ohio Public Energy Council for Certification as a Governmental Aggregator for Natural Gas Service*, Case No. 02-1688-GA-GAG (*Certification Case*), Renewal Certification Application (July 25, 2018), POG at § 2.5.2. Further, NOPEC indicates it has previously participated in approximately 68 electric and natural gas proceedings at the Commission. Additionally, NOPEC notes it has been granted intervention in proceedings involving the recovery of utilities’ distribution costs, including each of the FirstEnergy operating companies’ electric security plan (ESP) proceedings.

{¶ 16} Next, NOPEC touches upon each of the factors identified in R.C. 4903.221(B) and Ohio Adm.Code 4901-1-11(B) to further support its intervention. First, NOPEC claims the nature and extent of its interest, pursuant to the POG, is to represent residential and small commercial constituents of its Dominion member communities in this regulatory proceeding that proposes a significant increase in distribution rates. Second, NOPEC’s legal

position is that its constituents have an interest in the rates Dominion seeks to recover through the CEP Rider being just, reasonable, and lawful. Third, because it filed for intervention prior to a procedural schedule being issued and deadline for intervention being set, NOPEC believes it has established it will not unduly delay the proceeding.¹ Moreover, NOPEC points out no party to the proceeding, including Dominion, has claimed that its interests are prejudiced by NOPEC's intervention. Fourth, NOPEC asserts it has considerable experience in proceedings before the Commission, which will lead to a more well-developed record. Finally, NOPEC argues OCC does not represent all of its interests because OCC is representing only residential customers in Dominion's service territory. NOPEC argues its interests are broader and it aims to represent the interests of small commercial customers, including NOPEC's member communities, which are themselves small commercial customers, as well as residential customers. NOPEC notes its residential and small commercial constituents are facing substantial increases to their monthly bills under the proposed CEP Rider, with residential monthly rates proposed to increase by \$3.89 and small commercial monthly rates proposed to increase by \$11.06 (App. Ex. A at 5). However, NOPEC indicates it is willing to consolidate positions and testimony with OCC when possible to effectuate an efficient hearing process. Therefore, because this proceeding is the only forum where the reasonableness of rates for residential and commercial customers will be considered, NOPEC argues its absence from this proceeding will impair or impede its ability to protect its constituents' interests.

{¶ 17} Though not customarily allowed by the Commission's rules, on July 24, 2019, Dominion filed a motion for leave to file a surreply and a surreply to NOPEC's July 17, 2019 reply. Dominion seeks leave to file the surreply because NOPEC raises a new allegation in its reply. Notably, Dominion points out that NOPEC did not indicate it was seeking to intervene in order to advocate on behalf of its member communities and the residential and business customers in those member communities in its initial motion to intervene. Overall,

¹ The attorney examiner established the procedural schedule in this proceeding by an Entry dated May 27, 2020.

Dominion believes that, while NOPEC's member communities and their constituents may share a common interest in just and reasonable delivery rates, this alone does not give NOPEC standing to intervene in this proceeding. Specifically, Dominion believes NOPEC must make a showing that it is properly authorized to speak on their customers' behalf in this proceeding.

{¶ 18} To bolster the above point, Dominion first argues that the laws cited by NOPEC as authorizing its representation of distribution customer interests are limited to aggregation services. Dominion notes that R.C. 167.03(C) requires an "appropriate action" by its "governing bodies" to authorize NOPEC to perform specific "functions and duties." According to Dominion, NOPEC has not demonstrated that its member communities have actually granted NOPEC authorization to intervene in cases solely concerning distribution costs, as is the case here. Dominion further notes that the only authorization claimed by NOPEC, the POG, was adopted under R.C. 4929.26 and not R.C. 167.03. Dominion argues the plain language of this statute limits NOPEC's authorization to competitive retail natural gas service issues, a topic on which its CEP Rider application has no bearing. Thus, even if the POG authorized NOPEC to act as a representative in proceedings unrelated to aggregation services, Dominion contends the General Assembly did not seek to provide NOPEC with such broad-ranging powers under R.C. 4929.26. Moreover, Dominion argues that relying on R.C. 167.03 to expand the scope of R.C. 4929.26 would violate the general canon of statutory interpretation that "when there is a conflict between a general provision and a more specific provision in a statute, the specific provision controls." *Blackstone v. Moore*, 155 Ohio St.3d 448, 2018-Ohio-4959, 122 N.E.3d 132, ¶ 22. Consequently, according to Dominion, even if the POG clearly authorized NOPEC to pursue its customers' general interests in any and all general rate-setting matters, the POG would be invalid because it would go beyond the authorization contained in R.C. 4929.26.

{¶ 19} Next, Dominion argues that the POG and municipal ordinances, under which NOPEC derives its authority, do not allow NOPEC to represent constituents in pure distribution cases. Dominion finds the clear and express focus of the POG to be acquisition

of natural gas supply. Dominion notes that, even Section 2.5.2, the clause NOPEC points to as a source of its authority, concerns the acquisition of competitive prices and terms for natural gas supply and not the provision of distribution service. *Certification Case*, Renewal Certification Application (July 25, 2018), POG at § 2.5.2. Further, Dominion argues NOPEC's opt-out notice for Dominion's customers and the terms of the conditions of the supplier, NextEra Energy Services Ohio, LLC, which are attached to NOPEC's renewal certification application, do not reveal that the agency relationship between NOPEC and the customer pertains to distribution service. *Certification Case*, Dominion Opt-Out Notice (July 10, 2020) at 3. Moreover, Dominion states ordinances filed in Case No. 02-1688-GA-GAG since NOPEC filed its renewal application in July 2018 all note that the POG is adopted "for the purpose of establishing and implementing" a natural gas aggregation program. *See, e.g., Certification Case*, Village of Lakemore, Ohio, Ordinance Number 1646-2019 (June 24, 2019) at Section 1. Overall, Dominion believes the POG, the notices, and the ordinances unmistakably establish that NOPEC's purpose and role is to act as an agent for member communities in connection with their natural gas aggregation program. Though a single clause of a single sentence of the POG does contemplate participation in regulated proceedings, according to Dominion, this is only in connection with the administration of an aggregation program, which is consistent with the narrow purpose of R.C. 4929.26. Therefore, Dominion does not believe the POG allows NOPEC to act as an agent for the member communities on any and all issues before the Commission, including cases solely affecting distribution rates.

{¶ 20} Though Dominion concedes there may be a situation where NOPEC could properly intervene in a distribution case which affects its commodity sales service or aggregation program, Dominion also does not believe this proceeding is such a situation. Dominion explains base rate cases often directly affect the terms and conditions of commodity services, and indirectly through changes to the price, terms, and conditions of transportation, storage, and pooling services. Dominion states, if it were proposing changes to any of those services, it would not oppose NOPEC's motion. However, Dominion

reiterates this proceeding does not concern commodity service or any service indirectly affecting it, and the CEP Rider will be charged to end-use customers. Consequently, Dominion does not believe NOPEC's participation in this proceeding is appropriate.

{¶ 21} Dominion also argues that NOPEC's participation in ESP cases, such as those for the FirstEnergy operating companies, does not support intervention in this one. Dominion alleges there is a difference in the scope of issues litigated in an ESP proceeding as compared to this proceeding. Dominion explains the core, mandatory purpose of an ESP proceeding is to establish a standard service offer (SSO), which relates to the supply and pricing of electric generation service, and the price, terms, and conditions of generation service clearly and directly impinge on the concerns of an aggregator. R.C. 4928.143(B)(1)-(B)(2)(h). On the other hand, Dominion states the CEP Rider does not raise any issues related to Dominion's SSO, any other form of commodity sales service, or the terms, conditions, or charges relating to customer shopping for retail natural gas supply service. Dominion reiterates that this case concerns the recovery of Dominion's CEP investments, and related PISCC, depreciation expense, and property tax expense. Further, Dominion clarifies the CEP Rider is related to distribution rates, and does not raise various ancillary issues such as revisions to general tariffs or the terms of transportation and pooling service, which may be addressed in a general base rate proceeding. Therefore, while NOPEC may have been granted intervention in an ESP case, Dominion does not believe that justifies intervention in this matter.

{¶ 22} On August 8, 2019, NOPEC and OCC filed a joint memorandum contra Dominion's motion for leave to file the surreply. NOPEC and OCC argue that intervention in Commission proceedings should be "liberally allowed so that positions of all persons with a real and substantial interest in the proceedings can be considered by the [Commission]." *Ohio Consumers' Counsel v. Pub. Util. Comm.*, 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 20. Initially, NOPEC and OCC disagree with Dominion's representation that NOPEC raised, for the first time, in its July 17, 2019 reply that it was intervening on behalf of its member communities. Instead, NOPEC and OCC believe

NOPEC indicated its basis for intervention as a regional council of governments under R.C. Chapter 167 in its motion for intervention and also detailed the various municipalities, townships, counties, and residential and commercial customers NOPEC represents in Dominion's service territory.

{¶ 23} Further, NOPEC and OCC challenge Dominion's assertion regarding a purported conflict between R.C. Chapter 167 and R.C. 4929.26. They clarify NOPEC was created to address issues of mutual concern, such as joint aggregation of natural gas and issues related to a distribution rate case. In that regard, NOPEC and OCC believe Dominion misrepresents the nature of the NOPEC member communities' ordinances and resolutions. According to NOPEC and OCC, the POG itself does not represent the full extent of NOPEC's derived authority from its constituents; rather, there are other community ordinances and resolutions which require the community in question to join NOPEC, sign the NOPEC agreement, and adopt NOPEC's bylaws and NOPEC's natural gas program agreement (Agreement). The Agreement provides that NOPEC was established under R.C. Chapter 167 for the purpose of carrying out an electricity aggregation program and any additional program members may approve. Consequently, NOPEC and OCC argue NOPEC is not relying on R.C. 167.03 to expand the scope of R.C. 4929.26 because NOPEC authority is not limited to providing electric aggregation service.

{¶ 24} Further, NOPEC and OCC note NOPEC frequently intervenes in Commission cases involving distribution rates, even if they involve issues unrelated to commodity sales service. For example, NOPEC and OCC note the Commission permitted NOPEC to intervene in two cases involving the FirstEnergy companies, such as the companies' last ESP case, Case No. 14-1297-EL-SSO, regarding the companies' distribution modernization rider, and Case No. 17-2436-EL-UNC, regarding a grid modernization issue. NOPEC and OCC argue Dominion incorrectly limits NOPEC's ability to participate in distribution rate cases only when they involve related commodity sales services. NOPEC and OCC then add that NOPEC has protected its members' interests on broader policy issues, such as the Commission's investigation of the impact of the Tax Cuts and Jobs Act (TCJA) of 2017 on

regulated utilities, Case No. 18-47-AU-COI, and the FirstEnergy companies' TCJA case, Case No. 18-1604-EL-UNC. NOPEC and OCC claim that, in these cases, NOPEC had a substantial interest that the benefits of the tax cuts be passed through to its members and their constituents.

{¶ 25} Finally, NOPEC and OCC argue neither NOPEC, nor any other representative organization, is required to prove authorization from its members before intervening in a Commission proceeding. NOPEC and OCC contend NOPEC's authority is clear under the law and upon the request of member communities. NOPEC and OCC believe Dominion's position that NOPEC must prove its internal authorization before intervening in this case is akin to requiring Dominion to prove that it had internal authorization to file its application in this proceeding. Further, NOPEC and OCC argue Dominion's argument, if accepted, could block many other organizations appearing in their representative capacities before the Commission. Because of these reasons, NOPEC and OCC respectfully request that the Commission deny Dominion's motion for leave to file a surreply and NOPEC renews its request that its motion to intervene be granted.

{¶ 26} On August 15, 2019, Dominion filed a reply in support of its motion for leave to file the surreply. Essentially, Dominion argues that NOPEC's arguments in support of its intervention have been evolving since its initial motion for intervention. Dominion notes that, in that filing, NOPEC only made a single reference to R.C. Chapter 167. This reference, according to Dominion, only serves to identify NOPEC's identity and did not put Dominion on notice regarding NOPEC's basis for intervention. Dominion claims that only after it opposed NOPEC's intervention, on the grounds that the CEP Rider proposes no change to any service affecting NOPEC's role as an aggregator or affecting its customers' interests in the acquisition of the natural gas commodity, NOPEC introduced altogether new arguments concerning its rights and powers under R.C. Chapter 167. Consequently, despite whatever action the Commission takes on the underlying request to intervene, Dominion believes it would be prejudiced if not permitted to address the arguments newly raised in NOPEC's reply.

{¶ 27} Moreover, Dominion argues NOPEC's and OCC's August 8, 2019 memorandum contra puts forth yet another, new argument from NOPEC. Dominion notes NOPEC now argues that R.C. 167.03 permits it to accomplish any act a political subdivision itself could perform under Ohio law. Dominion contends NOPEC cites no legal authority for this unlimited interpretation of R.C. 167.03, nor does NOPEC address the clear statutory requirement that R.C. 167.03(C) can only be implemented by an "appropriate action of the governing bodies of the members." Once again, Dominion argues NOPEC's operating agreements and bylaws, which are filed with the Commission, indicate the organization's purpose and agency is limited to governmental aggregation of natural gas. While the Agreement does contemplate NOPEC members approving subsequent agreements to establish additional programs, Dominion can find evidence of only two such authorizations, one allowing NOPEC to undertake a natural gas opt-out program and another for it to competitively acquire retail natural gas supply. Without reference to any other agreements authorizing additional actions under R.C. Chapter 167, Dominion does not believe NOPEC has appropriate authority from its members to intervene in this proceeding or any other Commission proceeding, on delivery rate issues that do not affect the aggregated purchase of electricity and natural gas.

{¶ 28} Dominion clarifies it is not claiming that customers do not have a real and substantial interest in its recovery of distribution costs in this proceeding and that it is not seeking to increase the cost of natural gas without their input. However, Dominion's position is that NOPEC is not the party who should be asserting an interest in this case because NOPEC's role was never defined by its members to include the representation of constituents in proceedings concerning delivery rates. Dominion also believes that such a role is inconsistent with the statutory authorization contained in R.C. 4929.26. Because NOPEC has not established that it can advocate on its members' behalf on issues that go beyond the aggregation programs that state law and local ordinances have authorized, Dominion requests that the Commission exercise its discretion to grant its motion for leave to file its surreply and to deny NOPEC's motion to intervene in this proceeding.

{¶ 29} On April 28, 2020, NOPEC filed a motion to amend the motion to intervene it originally filed on June 25, 2019. NOPEC indicates that its members held an annual meeting on November 12, 2019, during which the members amended the organization's bylaws to provide clarity regarding the authority NOPEC has to initiate, intervene, or participate in various proceedings. The relevant portion of the bylaws provides:

Section 12. Authorization of the Council to Initiate, Intervene, and Participate in Federal and State Proceedings.

Pursuant to R.C. Chapter 167, the Agreement, these Bylaws and Ohio law, the Members authorize the Council to initiate, intervene, and/or participate in any utility or other case or proceeding, federal or state, that relates to any electric or natural gas rate, charge, policy, service, regulation, rulemaking, practice or condition affecting any Council Member or Council electricity or natural gas aggregation customer, including, without limitation, those involving transmission, distribution, generation, production, commodity, market design, competition, or otherwise. The Chairman and/or the Executive Director of the Council are authorized to engage legal counsel and consultants in connection with the Council's involvement in any such case or proceeding.

NOPEC represents it is requesting to amend its motion to intervene for the sole purpose of clarifying its authority and believes this change will not delay the proceeding. NOPEC also requests the Commission to grant the motion to amend and renews its request regarding the motion to intervene.

{¶ 30} On May 13, 2020, Dominion filed a memorandum contra NOPEC's motion to amend the motion to intervene. Dominion characterizes the issue at hand as whether the broad authorization in NOPEC's amended bylaws fixes the defect in NOPEC's intervention. Citing to cases, Dominion answers the question in the negative because it does not believe NOPEC can demonstrate it can legally represent the supply customers in its member communities on the non-supply-related issues in this case. *In re The East Ohio Gas Co.*, Case No. 12-380-GA-GPS, Entry (Apr. 20, 2012) (finding that OCC did not have authority to participate in enforcement proceeding concerning Dominion's compliance with gas pipeline safety rules); *In re Ohio Edison Co.*, Case No. 89-04-EL-EFC, Entry (Apr. 20, 1989) (finding

that, since union had no legally cognizable interest in proceeding to set utility's electric fuel rate, it lacked standing to intervene).

{¶ 31} Dominion reiterates this case does not concern commodity service or any service indirectly affecting NOPEC's purchase of natural gas and it is not proposing tariff changes or program changes that would affect commodity, transport, storage, or pooling services. Dominion believes NOPEC's role was never intended or defined by its operating agreements to include the representation of supply customers in its member communities in proceedings concerning delivery rates. Dominion also reminds the Commission that NOPEC cannot take on a role beyond the scope of the statutory authorization contained in R.C. 4929.26. NOPEC, according to Dominion, cannot rely on the general authority in R.C. 167.03(C) to expand the specific scope of NOPEC's statutory authority under R.C. 4929.26. While the amended bylaws may answer the question of fact as to whether the member communities actually did attempt to grant such authority to NOPEC to intervene in cases concerning distribution rates, Dominion contends the question of law as to whether that granting of authority was legally valid remains unresolved. Dominion argues the statutory scheme under R.C. 4928.20 and R.C. 4929.26 defines NOPEC's authority. Dominion explains NOPEC was established for one purpose, to aggregate to negotiate the purchase price of electricity, pursuant to R.C. 4928.20, and it has authority to negotiate the price of aggregated natural gas, as provided for under R.C. 4929.26. Beyond this, Dominion argues NOPEC cannot further expand its purpose without the authorization of the General Assembly. For these reasons, Dominion believes 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 and Dominion once again requests the Commission to deny the motion to intervene.

{¶ 32} Finally, on May 15, 2020, NOPEC filed a reply to Dominion's memorandum contra NOPEC's April 28, 2020 motion to amend. According to NOPEC, the crux of Dominion's opposition to NOPEC's intervention is that NOPEC has failed to establish its governing body has approved such action. Further, based upon this purported lack of

authority, NOPEC states Dominion has reasoned that NOPEC's authority to intervene in Commission proceedings is limited by R.C. 4929.26 to matters involving natural gas supply, not distribution. NOPEC disagrees with Dominion and does not believe it is legally required to demonstrate its members have authorized its actions when intervening in Commission cases. Further, NOPEC represents that its amended bylaws make clear it is now authorized to intervene in utility distribution cases, including this proceeding. Turning to the arguments Dominion has raised regarding the limitations on NOPEC's authority due to R.C. 4929.26, NOPEC notes that R.C. 1.51 is the rule of statutory construction on point, which provides:

If a general provision conflicts with a special or local provision, they shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevails.

For purposes of R.C. 1.51, NOPEC finds no conflict between R.C. 167.03(C) and 4929.26 because the statutes are complementary. NOPEC explains R.C. 167.03(C) authorizes a regional council of governments, such as NOPEC, to perform any act that one of its political subdivisions is authorized to do individually, including intervening in utility distribution cases, and to engage in a governmental aggregation program created by R.C. 4929.26. Consequently, NOPEC respectfully requests the Commission to reject Dominion's argument and grant the motion to intervene.

{¶ 33} Upon review of the motion to intervene originally filed by NOPEC on June 25, 2019, and the associated filings, the attorney examiner finds that the motion for intervention should be granted, as well as Dominion's July 24, 2019 motion for leave to file its surreply and NOPEC's April 28, 2020 motion to amend. Initially, as NOPEC and OCC recognize, the Supreme Court of Ohio has instructed the Commission to liberally allow intervention in proceedings before the Commission unless there is evidence establishing that intervention would unduly prolong or delay the proceedings. *Ohio Consumers' Counsel v. Pub. Util.*

Comm., 111 Ohio St.3d 384, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 20. There have been no allegations that NOPEC's involvement has unreasonably delayed this proceeding.

{¶ 34} Turning to the arguments raised by Dominion, the attorney examiner finds neither persuasive. The Company has essentially maintained that (1) NOPEC did not demonstrate its governing body gave it authority to intervene in this case and (2) even if such authority is granted, NOPEC does not have standing to intervene here because R.C. 4929.26 limits its role to gas aggregation. With regard to the first argument, NOPEC has demonstrated that its members amended its bylaws on November 12, 2019, thereby granting the council the authority to participate in various types of proceedings, including those involving distribution rates. Consequently, pursuant to R.C. 167.03(C), NOPEC members took "appropriate action" and authorized NOPEC to intervene in a distribution rate proceeding such as the one at hand. Further, considering Dominion's second argument, the attorney examiner agrees with NOPEC and OCC in that there is no purported conflict between R.C. Chapter 167 and R.C. 4929.26. As NOPEC has noted, NOPEC frequently intervenes in Commission cases unrelated to commodity sales service to represent the interests of its constituents, including matters related to grid modernization and the impact of the TCJA. *See, e.g., In re the Application of Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co. for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan*, Case No. 14-1297-EL-SSO, Entry (Dec. 1, 2014); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co. Application For Approval of a Distribution Platform Modernization Plan*, Case No. 17-2436-EL-UNC, et al., Entry (Jan. 29, 2019). Based on past Commission precedent, the attorney examiner finds that the Commission has not confined NOPEC to intervening in matters solely related to commodity sales pricing or aggregation. Therefore, the attorney examiner grants NOPEC's motion to intervene.

Updated Procedural Schedule

{¶ 35} On August 6, 2020, Dominion and Staff filed a joint motion for continuance and amended procedural schedule. Dominion and Staff request that the hearing currently scheduled for August 17, 2020, be continued to September 14, 2020, and the deadline for the filing of expert testimony be moved from August 10, 2020, to August 31, 2020. Dominion and Staff make this request to continue engaging in settlement discussions. Dominion and Staff indicate that OCC and NOPEC do not object to the proposal or the request for an expedited ruling.

{¶ 36} Upon review, the attorney examiner finds that the joint motion is reasonable and that it should be granted. The hearing in this proceeding shall be rescheduled to commence on September 14, 2020, at 10:00 a.m. Due to the continued COVID-19 state of emergency declared by the governor in Executive Order 2020-01D, and given the passage of Am. Sub. H.B. 197, the hearing will be held using remote access technology. The attorney examiner will issue an additional entry with details regarding the Webex technology that will be utilized for the hearing.

{¶ 37} It is, therefore,

{¶ 38} ORDERED, That OCC's motion to intervene be granted. It is, further,

{¶ 39} ORDERED, That NOPEC's motion to intervene be granted, in accordance with Paragraphs 33 and 34. It is, further,

{¶ 40} ORDERED, That Dominion's July 24, 2019 motion for leave to file its surreply be granted. It is, further,

{¶ 41} ORDERED, That NOPEC's April 28, 2020 motion to amend be granted. It is, further,

{¶ 42} ORDERED, That the hearing in this matter be rescheduled to September 14, 2020, in accordance with Paragraph 36. It is, further,

{¶ 43} ORDERED, That a copy of this Entry be served upon all persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

/s/Anna Sanyal

By: Anna Sanyal
Attorney Examiner

SJP/hac

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in

Case No(s). 19-0468-GA-ALT

Summary: Attorney Examiner Entry granting OCC's motion to intervene; granting NOPEC's motion to intervene in accordance with Paragraphs 33 and 34; granting Dominion's motion for leave to file its surreply; granting NOPEC's motion to amend; and, rescheduling hearing electronically filed by Heather A Chilcote on behalf of Anna Sanyal, Attorney Examiner, Public Utilities Commission