

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Motion of Northeast Ohio)
Public Energy Council for a Limited Waiver of)
Rule 4901:1-10-29(H), Ohio Administrative)
Code.)

Case No. 22-0806-EL-WVR

**MEMORANDUM CONTRA DYNEGY MARKETING AND TRADE, LLC’S
MOTION FOR LEAVE TO FILE REPLY MEMORANDUM INSTANTER
IN SUPPORT OF MOTION TO INTERVENE**

I. INTRODUCTION

Dynegy Marketing and Trade, LLC (“Dynegy”) has chosen to abuse the Public Utilities Commission of Ohio’s (“PUCO”) rules in this proceeding in an attempt to harass and prejudice Northeast Ohio Public Energy Council (“NOPEC”). Dynegy filed a motion to intervene in this matter on August 31, 2022, and requested the PUCO to make an expedited ruling. Requesting expedited treatment required NOPEC to file its memorandum contra Dynegy’s motion within seven (7) days, rather than the customary fifteen (15) day period. By making an expedited request, Dynegy was forbidden from filing a reply—“unless specifically requested by the commission, the legal director, the deputy legal director, or the attorney examiner.” Ohio Administrative Code (“O.A.C.”) 4901-1-12(C). NOPEC filed its memorandum within the expedited seven (7) day period as required. No reply was requested of Dynegy; but, Dynegy filed a reply anyway, in violation of the PUCO’s rules, on September 13, 2022. NOPEC followed the PUCO’s rules—Dynegy did not.¹

¹ The irony should not be lost on the PUCO that Dynegy filed a complaint against NOPEC making (unfounded) allegations that NOPEC has violated certain PUCO rules (Case NO. 22-817-EL-CSS); yet, Dynegy is so willing to flout the PUCO’s rules by filing this improper reply memorandum.

More than anything, Dynegey's improper reply exposes its major character flaw. It attempts to intervene in this case because it assumed a business risk by agreeing to supply all customers returning to the standard service offer ("SSO") at the existing SSO price. When customers actually returned and its risk failed, Dynegey asked the PUCO to change the rules (and harm NOPEC's customers) by preventing their right to return to SSO pricing. Similarly, in seeking an expedited ruling on its motion to intervene, Dynegey assumed the risk that it had forfeited any right to file a reply to NOPEC's memorandum contra the motion. Dynegey hoped that the PUCO would take immediate action to stop NOPEC's customers from returning to the SSO. That risk also has failed and, once again, when Dynegey didn't get its way, it asks the PUCO to change its rules.

Dynegey's motion for leave to file its reply motion *instanter* should be denied and its reply memorandum stricken

II. ARGUMENT

Dynegey has no right to file a reply in support of any motion for which it requested an expedited ruling under O.A.C. 4901-1-12(C). See, *e.g.*, *In re Investigation into Long-Term Sols. Concerning Disconnection of Service*, Case No. 04-1503-GE-UNC, Entry (November 23, 2004), at 9-10. See, also, *In the Matter of the Application of Black Fork Wind LLC*, Case No. 09-546-EL-BGN, Entry (July 1, 2010), at 2 ("[I]n a situation where, as here, an expedited ruling is sought, the last sentence of Rule 4906-7-12(C), O.A.C., [similar to O.A.C. 4901-1-12(C)] permits the filing of a reply memorandum only upon the request of the Board or of the ALJ."); *Communications Options, Inc. v. ValTech Communications*, Case No. 04-656-TP-CSS, Entry (March 25, 2005), at 2. (When the PUCO's "rules do not provide for a reply to a memo contra" a reply memorandum filed *instanter* will not be considered); *In re Joint Application of Northern Ohio Cellular Tel. Co., et al.*, Case No. 89-1861-RC-ATC, 1991 WL 11811217, Finding and Order (March 28, 1991), at ¶ 6

(denied motion to file a reply instanter to a reply memorandum under O.A.C. 4901-1-12); *In re Cols. Southern Power Co.*, Case No. 11-346-EL-SSO, Entry on Rehearing (January 30, 2013), at 5-6 (withdrawal of reply to memorandum contra application for rehearing because rules do not recognize the filing of replies).

To be fair, the PUCO has permitted the filing of replies under O.A.C. 4901-1-12(C) in unique circumstances to prevent prejudice and so that the PUCO is fully informed as to the merits of the issues before it. See, e.g., *In re DP&L*, Case No. 16-395-EL-SSO, Entry (July 11, 2016). Dynegy's motion satisfies neither criterion. It seeks permission to file its reply to (1) explain NOPEC's alleged inconsistent position taken in a prior proceeding² and (2) to attempt to distinguish Dynegy's affiliate's³ indistinguishable return of customers to the standard service offer.⁴

A. Dynegy will not be prejudiced if its motion to file a reply instanter is denied and its improper reply stricken.

Dynegy attempts to shoehorn its improper reply into the PUCO's September 7, 2022 entry requiring NOPEC file a show cause pleading by September 28, 2022.⁵ However, in that same entry, the PUCO permitted any person, including Dynegy, to file comments to NOPEC's pleading. It is incomprehensible how Dynegy could be prejudiced if its motion to file instanter were denied (and its improper reply stricken) when Dynegy can raise its "concerns" through comments submitted in response to the show cause order. On this basis alone, Dynegy's motion should be denied.

² *In re Suvon, LLC d/b/a FirstEnergy Advisors*, Case No. 20-103-EL-A GG ("*FirstEnergy Advisors*").

³ Dynegy Energy Services (East), LLC ("DESE").

⁴ See Dynegy Motion at 1; Reply Memorandum at 3.

⁵ *Id.*; Reply Memorandum at 5.

Moreover, as discussed below, Dynegy cannot be prejudiced when its reply comments will have no effect on the PUCO's merit determination on Dynegy's motion to intervene.

B. Dynegy's motion to file a reply instanter will not provide the PUCO with information to assist in the merit determination on Dynegy's motion to intervene.

Dynegy's reply does not provide additional information that would assist the PUCO in making a merit determination on Dynegy's motion to intervene. It seeks only to offer alleged inconsistencies in NOPEC's position in the prior *FirstEnergy Advisors* case, and attempts to distinguish the identical alleged harm caused by DESE's customers return to the SSO.

1. NOPEC's position is not inconsistent with its position in *FirstEnergy Advisors*

Dynegy claims that in the *FirstEnergy Advisors* certification case, NOPEC inconsistently argued that it had the right to intervene. Dynegy fails to comprehend the difference in the procedural posture of that case. FirstEnergy Advisors had filed a certification application placing its fitness to provide service at issue. Dynegy's motion to intervene in this case was not precipitated by NOPEC filing a certification case. NOPEC filed a mere Notice of Material Change in Business Operations, which presents no justiciable issue under O.A.C. 4901:1-24-11(A).⁶ Dynegy's failed attempt to show an inconsistency in NOPEC's positions does absolutely nothing to assist the PUCO in determining the merits of Dynegy's intervention request.

2. Whenever DESE's and NOPEC's customers return to the SSO, Dynegy has the obligation to serve them at existing rates, whether it likes it or not.

Dynegy also claims that DESE's return of customers to the SSO is distinguishable from NOPEC's return of its customers, because DESE's customers returned at the expiration of their

⁶ Dynegy also incorrectly characterizes the PUCO's call for "comments" in response to its show cause order as a quasi-judicial proceeding. Reply Memorandum at 2. Quasi-judicial proceedings are characterized by notice and hearing, which the PUCO has not ordered. O.A.C. 4901:1-24-11(A).

aggregation term.⁷ This is a distinction without a difference. DESE actively promoted that its customers could return to the SSO any time the SSO price was lower.⁸ And DESE's customers' return required Dynegy to serve them at current SSO prices—just like Dynegy is required to do for NOPEC's customers. Dynegy fails to comprehend that, had NOPEC not acted in its customers' best interests by returning them to the SSO in September 2022, they would have returned at the expiration of the program in January 2023 anyway—and Dynegy's obligation to serve would have been the same. Dynegy's failed attempt to distinguish DESE does absolutely nothing to assist the PUCO in determining the merits of Dynegy's intervention request.

III. CONCLUSION

NOPEC trusts the PUCO will see Dynegy's motion for what it is and is not. It is not a serious attempt to assist the PUCO in making a merit decision on Dynegy's intervention request or to prevent prejudice. It is an opportunistic attempt to bombard NOPEC (and the PUCO) with meaningless pleadings to harass NOPEC, by requiring a response and by using exaggerated hyperbole in an attempt to prejudice NOPEC in the PUCO's eyes. NOPEC respectfully requests that the PUCO deny Dynegy's motion to file a reply *instante* and to strike its improper reply.

⁷ Reply Memorandum at 5.

⁸ See NOPEC Memorandum Contra Dynegy Motion to Intervene at 2.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing pleading was served upon the persons listed below by electronic transmission this 28th day of September 2022.



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Summary: Memorandum Contra Dynegy Marketing and Trade, LLC's Motion for
Leave to File Reply Memorandum Instanter in Support of Motion to Intervene
electronically filed by Teresa Orahod on behalf of Dane Stinson