

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

Dynergy Marketing and Trade, LLC,)	
)	
Complainant,)	
)	
v.)	Case No. 22-817-EL-CSS
)	
Northeast Ohio Public Energy Council,)	
)	
Respondent.)	

**MEMORANDUM CONTRA
MOTION TO INTERVENE BY TRANSALTA MARKETING AND TRADE, LLC**

I. INTRODUCTION

Transalta Energy Marketing (U.S.) Inc. (“Transalta”) is the latest standard service offer (“SSO”) supplier seeking to interject itself into this proceeding to avoid its contractual commitment to serve SSO customers. Transalta raises many of the same arguments Dynergy Marketing and Trade, LLC (“Dynergy”) regarding why it has a right to intervene in this proceeding. Transalta states that it seeks to intervene in this proceeding to “defend its interest in maintaining a robust and competitive market for electric service, including the default [SSO] auctions.”¹

In its Motion to Intervene, however, Transalta indicates that it is primarily blaming NOPEC for its own failures in assessing the risk of being an SSO supplier. Transalta’s true concern is protecting its financial interest as an SSO supplier in FirstEnergy’s service territories. Interestingly, Transalta fails to mention that as an SSO supplier, it: (i) is contractually obligated to

¹ Transalta Motion to Intervene at p. 3.

supply a certain percentage of FirstEnergy's SSO load on a firm basis;² (ii) knows FirstEnergy's SSO load can and will fluctuate during the relevant delivery period depending on the number of shopping customers; and (iii) contractually acknowledged that the quantity of SSO supply that Transalta is obligated to deliver is determined by FirstEnergy's SSO load, "which may be different from the amount indicated in the Solicitation."³ Emphasis added. In other words, Transalta accepted the business risk of serving more SSO customers than expected when it bid into the SSO auction and signed FirstEnergy's SSO Supply Agreement. Transalta is now attempting to avoid its contractual commitments by attacking NOPEC in this proceeding. NOPEC's mere filing of a Notice of Material Change in this docket does not convey intervention rights upon Transalta because the filing does not trigger a "quasi-judicial proceeding." *Ohio Domestic Violence Network v. Pub. Utilities Comm.*, 1994-Ohio-165, 70 Ohio St. 3d 311, 315, 638 N.E.2d 1012, 1016. Therefore, Transalta has no right of intervention under R.C. 4903.221.

II. LAW AND ARGUMENT

As set forth below, Transalta fails to satisfy the PUCO's long-standing criteria for intervention as set forth in O.A.C. 4901-1-11.

A. Transalta has not demonstrated a real and substantial interest to intervene in this case.

R.C. 4903.221 provides individuals and entities who "may be adversely affected by a [PUCO] proceeding" the right to "intervene in such proceeding." (Emphasis added) The Ohio Supreme Court has held that R.C. 4903.221 "clearly contemplates intervention in quasi-judicial

² FirstEnergy Master SSO Supply Agreement ("SSO Supply Agreement"), ¶ 2.1(a). See https://www.firstenergycbp.com/Portals/0/SupplierDocuments/Master_SSO_Supply_Agreement_20160810.pdf

³ SSO Supply Agreement, ¶ 2.1(b). The SSO Supply Agreement defined "Solicitation" as "the competitive bidding process by which the counterparty, quantity, pricing and other terms of this Agreement are established." (emphasis added).

proceedings, characterized by notice, hearing, and the making of an evidentiary record.” *Ohio Domestic Violence Network v. Pub. Utilities Comm.*, 1994-Ohio-165, 70 Ohio St. 3d 311, 315, 638 N.E.2d 1012, 1016.

The impetus behind Transalta’s Motion to Intervene was NOPEC’s filing of its Notice of Material Change regarding NOPEC’s return of Standard Program Price customers to the SSO. NOPEC filed this notice pursuant to O.A.C. 4901:1-24-11(A)(1), which required NOPEC to file the notice in its initial certification case. The mere filing of a notice of material change does not trigger a “quasi-judicial proceeding” that creates a right to intervention. A right to intervene due to filing a notice of material change would attach only if the PUCO provides notice and an opportunity for a hearing under O.A.C. 4901:1-24-11(A)(2). Even then, the issue would be limited to whether NOPEC continues to have the ability to provide service as a result of the change in its operations, which it clearly does. The issue would not be whether customers can return to the SSO. The PUCO’s rules do not prevent the return, the SSO agreements that bind Transalta to serve its share of all returning SSO load, and even Transalta’s sister company recognizes Transalta’s service obligation. NOPEC’s Notice of Material Change is just that—a notice. It does not trigger a quasi-judicial proceeding or a right to intervene.

Transalta claims that the Commission has established “quasi-judicial proceeding” by allowing parties to submit comments in this case. This is false. NOPEC has not received notice of any alleged violations and no hearing has been established. As such, no right to intervene has been created by the Commission’s September 7, 2022 Entry. *In Re Annual Report Required by R.C. 4933.123 Regarding Service. Disconnections for Nonpayment*, PUCO Case No. 21-548-GE-UNC, Entry (Oct. 6, 2021) (“R.C. 4903.221 contemplates intervention in quasi-judicial proceedings

characterized by notice, hearing, and the making of an evidentiary record. None of the required elements of a quasi-judicial proceeding are present in this matter.”)

The PUCO has denied motions to intervene in dockets where no hearing was held or required because the dockets did not constitute “quasi-judicial proceedings”. *In the Matter of the Commission’s Promulgation of Rules for Competitive Retail Natural Gas Service and its Providers Pursuant to Chapter 4929, Revised Code*, Case No. 01-1371-GA-ORD, *et al.*, Second Finding and Order at pp. 3-4 (May 14, 2003). In addition, the PUCO previously refused to expand the definition of “proceeding” to include “any filing, hearing, investigation, inquiry, or rulemaking which the Commission is required or permitted to make, hold, or rule upon”. *In Re Rev. of Chapters 4901-1, 4901-3, & 4901-9 of Ohio Adm. Code*, Case No.06-685-AU-ORD, Finding and Order at ¶ 7 (Dec. 6, 2006). The PUCO rejected this proposed definition of “proceeding” because it would mean “any interested person would have the right to intervene, conduct discovery, and present evidence in any Commission case” *Id.* at ¶ 9. There is not right to intervene in “any filing,” and Transalta certainly does not have that right in a purely ministerial filing or merely because the PUCO requested comments in a proceeding.

PUCO and Ohio Supreme Court precedent demonstrate that NOPEC’s filing a notice of material change does not create a right of intervention. As such, Transalta’s Motion to Intervene should be denied.

B. The legal positions Transalta intends to advance are not related to the merits of a proceeding.

Transalta’s Motion to Intervene demonstrates that it plans to use this docket to complain about the alleged impacts NOPEC’s decision had on Transalta or Ohio energy markets. Transalta intends to make general and vague allegations regarding NOPEC’s actions. Transalta’s claims, however, do not relate to the narrow legal questions set forth in the Commission’s September 7,

2022 Entry. It is apparent from Transalta's Motion to Intervene that it intends to generally attack NOPEC for dropping Standard Price customers to their respective EDUs. However, Transalta fails to specify any rule or statute violated by NOPEC. This is an obvious attempt by Transalta to duplicate the efforts of Dynegy and attack NOPEC without citing any rule being violated by NOPEC. The Commission should not allow Transalta to intervene in this proceeding to make general allegations regarding NOPEC's actions without any clear indication of the legal position it will take.

C. Transalta's intervention would unduly delay a resolution of this proceeding.

As Transalta acknowledges in its Motion to Intervene, NOPEC's return of Standard Price customers to the SSO is a moot issue because the Commission granted NOPEC's waiver in Case No. 22-806-EL-WVR. The only purpose of Transalta's involvement at this juncture would involve Transalta voicing its opinion regarding the impact of NOPEC's actions. Transalta can submit comments in this proceeding as established by the September 7, 2022 Entry to explain its position on NOPEC's return of Standard Price customers to the SSO. This does not require intervention.

However, it is likely that Transalta seeks intervention to engage in a campaign against NOPEC much like Dynegy has already done in this case. This will ultimately result in overbroad and unwarranted discovery requests that go well beyond the narrow scope of this proceeding. Such actions will only delay a final resolution of this proceeding and complicate the issues for the Commission's consideration. Furthermore, Transalta has no right to interject itself into Dynegy's complaint case, so its unwarranted involvement will unjustifiably shift the burden in this case to NOPEC. Transalta cites only one PUCO case to support its claim that it is entitled to intervene in a complaint case. *In re Complaint of the City of Cleveland & WPS Energy Service, Inc. v. The Cleveland Elec. Illum. Comp. & FirstEnergy, Corp*, Case No. 01-174-EL-CSS, at ¶ 3 (Mar. 29,

2001). (“*City of Cleveland*”). Although the Commission allowed intervention in the City of Cleveland case, the PUCO granted intervention on a limited basis for certain intervenors noting that “it has long held that [precedent] is not a sufficient basis for intervention [in complaint cases].” *Id.* at ¶ 4. Transalta should not be permitted to intervene here because it can file comments in the certification case.

The Commission should deny Transalta’s Motion to Intervention because Transalta’s intervention will only serve to delay this case.

D. Transalta will not contribute to an equitable resolution of factual issues.

As discussed above, Transalta does not have a real and direct interest in this docket. Any potential issues that Transalta intends to raise can be addressed through comments, and do not require intervention. As Transalta’s Motion to Intervene demonstrates, it is very likely Transalta will duplicate the position of Dynegy and other suppliers in this proceeding.

E. Transalta’s purported interests can be protected by the submittal of comments in the certification case.

Because NOPEC has already dropped Standard Price customers to their respective EDUs, Transalta no longer has no justiciable issue or interests to protect. It is apparent from Transalta’s various pleadings that Transalta intends to call into question the SSO supply structure in Ohio or the current governmental aggregation rules. The PUCO should not allow Transalta to misuse the intervention process in this case to advance its self-serving interests of avoiding its contractual commitments as an SSO supplier and/or shape the SSO structure in Ohio.

To the extent that PUCO wishes to entertain Transalta’s concerns, this can be done through the comment period established by the September 7, 2022 Entry. Transalta’s intervention in this case is unnecessary to protect NOPEC’s purported interest.

III. CONCLUSION

For the foregoing reasons, the PUCO should deny Transalta's Motion to Intervene in this case.

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 4th day of October 2022.



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Trade, LLC electronically filed by Teresa Orahod on behalf of Dane Stinson