BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Initial Certification Application of Suvon, LLC d/b/a FirstEnergy Advisors to Provide Aggregation and Broker Services in the State of Ohio.	))))	Case No. 20-103-EL-AGG

NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S
REPLY TO FIRSTENERGY ADVISORS' MEMORANDUM CONTRA
NOPEC'S MOTION TO COMPEL

I. INTRODUCTION

In its memorandum contra NOPEC's[1] motion to compel, FirstEnergy Advisors[2] misrepresents the focus of the discovery dispute in this proceeding. FirstEnergy Advisors claims that NOPEC is attempting to expand the scope of this proceeding[3] and that it is engaged in a "fishing expedition"[4] to further its own competitive interests. Nothing could be further from the truth.

Importantly, FirstEnergy Advisors has not provided any discovery whatsoever requested by the intervenors in this case, including NOPEC and OCC. In fact, it has filed for a protective order to specifically shut down any discovery in this case. This is an unprecedented attempt to shield FirstEnergy Advisors and the First Energy EDU'S from any public scrutiny in this case.

FirstEnergy Advisors audaciously claims that NOPEC is attempting to expand the scope of this proceeding to obtain information to use in a "separate corporate separation" dispute.[5] That's

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[1] "NOPEC" is the Northeast Ohio Public Energy Council, an unopposed intervenor in this case.

[2] "FirstEnergy Advisors" is the trade name of the applicant, Suvon, LLC.

[3] FirstEnergy Advisors memo contra at 1.

[4] FirstEnergy Advisors memo contra at 5.

[5] FirstEnergy Advisors memo contra at 1.

nonsense. If there is one thing that NOPEC and FirstEnergy Advisors agree upon, it's that the issues in this proceeding already are set by R.C. 4928.08(B). The issues are whether the applicant has the managerial, technical and financial ability to provide service. By proposing a management team that is nearly identical to that of the FirstEnergy Ohio electric distribution utilities ("EDUs") – housed in the same offices as the EDUs' – FirstEnergy Advisors has injected corporate separation issues front and center into this application. It is a ***per se*** violation of R.C. 4928.17(A) for FirstEnergy Advisors to share a management team with its regulated EDUs housed in the same offices, because they will not be "fully separated" affiliates. Because it is unlawful for FirstEnergy Advisors to install the EDUs' management team as its own, FirstEnergy Advisors has yet to identify management that is capable of providing CRES. Its application should be denied until new, capable, and lawful management is proposed that is to comply with R.C. 4928.17(A).

Moreover, it is disingenuous if not a bold faced lie for FirstEnergy Advisors to claim that corporate separation issues are not involved in this proceeding. It supplemented Exhibit B-2 of its application on April, 1, 2020, to attempt to explain how it, and its affiliated EDUs, would comply with the PUCO's corporate separation rules. It is First Energy Advisors that injected corporate separation issues into this proceeding by stacking its officer and manager positions in FirstEnergy Advisors with the same individuals who hold senior positions with the EDUs. It is proper that FirstEnergy Advisors must address those issues fully if its application is to be approved. It has not done so yet.

NOPEC is not engaged in a "fishing expedition" to serve its own competitive interests. However, this proceeding does affect NOPEC's competitive interests in the broader sense, considering that FirstEnergy Advisors' shared management will harm Ohio's competitive electric industry. The PUCO has recognized that competitors may intervene in a CRES proceeding to protect the competitive market, and thus their competitive interests, from potential abuses. See,

e.g., I*n Re Star Energy Partners*, Case No. 17-2398-EL-WVR, Entry (July 1, 2019) at 3 (Interstate Gas Supply's intervention in a CRES application). The very reason Ohio's legislature enacted corporate separation rules when it passed SB 3 was to prevent powerful, monopoly EDUs from exerting their considerable market power to the detriment of their affiliates' competitors and the market in general. See, R.C. 4928.17(A)(2) (a corporate separation plan must prevent the abuse of market power); *see, also*, R.C. 4928.02(I)). The corporate separation issues FirstEnergy Advisors' application has raised in this proceeding go hand-in-hand with potential abuses to the competitive market if the corporate separate rules are not enforced. NOPEC has every right to discover how information may be passed between FirstEnergy's regulated EDUs and its non-regulated affiliates. Transparency, so far lacking in this case, will protect Ohio's CRES market from illegal and potential competitive abuses by the FirstEnergy EDUs' management of essentially a fully controlled affiliate. As a result of protecting Ohio's competitive market, NOPEC will protect its interests as well, and those its approximately 500,000 customers. FirstEnergy Advisors makes the unsupported argument that NOPEC is "afraid of competition, NOPEC is not afraid of competition. However, NOPEC is concerned about a sham utility affiliate managed and controlled by the EDUs' officers who can engage in anti-competitive behavior contrary to Ohio law, without any transparency that results from a fulsome discovery and hearing process in this case.

I. ARGUMENT

A. Discovery is not premature

On March 11, 2020, NOPEC emailed FirstEnergy Advisors in an attempt to resolve this discovery impasse.[8] By letter of March 16, 2020, FirstEnergy Advisors refused to provide any discovery whatsoever. It cited cases in which it attempted to show that discovery in this

[8] See NOPEC Motion to Compel, Attachment C, Exhibit 1.

proceeding is premature.[9] Accordingly, in its Motion to Compel, NOPEC cited established precedent that shows that an intervenor may request discovery once a proceeding is commenced.[10] Now, FirstEnergy Advisors has declined to address NOPEC's legal arguments in its memorandum contra NOPEC's Motion to Compel. Instead, it stated that it would address the issue in its reply to NOPEC's memorandum contra FirstEnergy Advisors' motion for protective order, which was filed April 8, 2020.[11] Because FirstEnergy Advisors should have replied to NOPEC's legal arguments in its memorandum contra to the Motion to Compel, but deferred its response to the April 8 reply, NOPEC will address FirstEnergy's arguments contained in its April 8 reply.[12]

In its April 8 Reply, FirstEnergy Advisors clings to its interpretation of *In re Chapters 4901-1, 4901-3 and 4901-9 of the Ohio Administrative Code*, Case No. 06-685-AU-ORD, Finding and Order (December 6, 2006) at ¶ 9. As explained in NOPEC's Motion to Compel, at 12, the issue in that rulemaking was whether universal participation in PUCO proceedings should be allowed, including the right to intervene, conduct discovery and present evidence at hearing. Here, NOPEC's intervention is not opposed by the applicant and the issues are identified. Consistent with the PUCO's recent precedent, discovery should be permitted upon NOPEC's intervention to permit it to prepare for hearing.

The most recent precedent on when intervenors may commence discovery is *In the Matter of the Application of Verde Energy USA Ohio, LLC for Certification as a Competitive Retail*

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[9] See NOPEC Motion to Compel, Attachment C, Exhibit 2.

[10] NOPEC Motion to Compel at 10-13.

[11] FirstEnergy Advisors' Memorandum Contra, at 3.

[12] FirstEnergy Advisors stated it would address NOPEC's legal arguments in its April 8 reply, instead of its April 6, memorandum contra, so that the PUCO could avoid the need to review duplicate briefings. It should have addressed the legal arguments in its memorandum contra NOPEC's Motion to Compel. It would appear that FirstEnergy Advisors is attempting to engage in further gamesmanship of the PUCO's rules, by deferring comment to its reply in an attempt to prevent NOPEC from responding to FirstEnergy Advisors' arguments.

Electric Services Supplier, et al., Case Nos. 11-5886-EL-CRS and 13-2164-GA-CRS, Attorney Examiner Entry (March 3, 2020) ("*Verde*"). Similar to FirstEnergy Advisors' arguments, the applicant in *Verde* asserted that efficiency required that discovery not commence until after intervention is granted and a procedural schedule established.[13] The Attorney Examiner rejected Verde's argument and found that an intervenor can commence discovery as soon as a motion to intervene is filed, and prior to the PUCO setting a procedural schedule or hearing.[14]

FirstEnergy Advisors misrepresents Verde's holding, by claiming that the entry did not permit discovery until a procedural schedule was issued. That's incorrect. While true that the *Verde* entry established a procedural schedule, the schedule set a ***final date to serve discovery***, not commence it. The entry also permitted discovery even though the ***PUCO had not made a determination to conduct a hearing***. Indeed, *Verde* recognized the legitimacy of discovery requests made prior to the procedural entry's issuance, by requiring that the applicant respond to the pre-entry discovery on an expedited basis.[15] Finally, the procedural entry did not define the scope of permissible discovery, which FirstEnergy Advisors claims is a prerequisite to commencing discovery. Rather, it permitted intervenors to conduct unrestricted discovery on the same issues at play in this case: whether the applicant had the managerial, technical and financial ability to provide service. The proper procedure is to challenge individual discovery requests by objection, not bar discovery altogether, and provide transparency to PUCO proceedings. The PUCO should reject FirstEnergy Advisors' incorrect analysis and mischaracterization of the *Verde* entry.

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[13] *Id.*, Verde's memorandum contra OCC's motion to compel (January 10, 2020).

[14] *Id.*, ¶ 13.

[15] *Id.*

On reply, FirstEnergy Advisors for the first time cites a 2005 case, *In the Matter of the Joint Application of Cinergy Corp., et al. for Consent and Approval of a Change of Ownership*, Case No. 07-532-EL-MER ("*Cinergy*"). While *Verde* addressed intervenors' immediate discovery rights in a CRES ***certification*** case (where the issues are identified by R.C. 4928.08(B)), *Cinergy* involved a ***merger*** proceeding (where the issues are not defined). The issues for review in merger proceedings are nebulous and require a finding that "the acquisition will promote public convenience and result in the provision of adequate service for a reasonable rate, rental, toll, or charge." R.C. 4905.402. Considering the nebulous standard, the PUCO ordered that discovery be stayed. In *Verde*, and in the instant proceeding, no stay has been ordered. Discovery is permitted upon intervention, consistent with contemporary discovery entries that NOPEC provided in its earlier pleadings. See *In re Columbia Gas of Ohio*, Case No. 11-5351-GA-UNC, Entry (January 27, 2012) (denied a motion to stay discovery; discovery was permitted before a determination was made to hold a hearing in an application not for an increase in rates, pursuant to R.C. 4909.18) ("*Columbia*"); *In re Cleveland Elec. Illum. Co. et al.*, Case No. 07-385-EL-PWC, Entry (April 17,2007) at 2 ("Although the Commission must still determine if reasonable grounds for complaint have been stated, the parties are reminded that, pursuant to Rule 4901-1-17, O.A.C., discovery may begin immediately after a proceeding is commenced and should be completed as expeditiously as possible."); accord *In re Cincinnati Gas & Elec. Co. v. City of Lebanon*, Case No. 05-103-EL-PWC, Entry (February 8, 2005) at 2.

FirstEnergy Advisors attempts to distinguish *Columbia* on the bases that it is an attorney examiner entry and that Columbia already had answered one set of discovery. The fact that *Columbia* and other entries cited by NOPEC are attorney examiner entries merely evidences that the attorney examiners are routinely enforcing the PUCO's precedent, policies and practices. The fact that Columbia had answered one set of interrogatories was not a reason given for rejecting the

motion to stay discovery. It was merely the argument of an opposing party. Indeed, discovery was expressly permitted prior to hearing to develop positions and aid the Commission in making its determination. Significantly, the motion to stay in *Columbia* was sought on the same grounds as the stay granted in *Cinergy*, *e.g.*, that neither a procedural schedule had been set nor the scope of the proceeding identified.[16] The motion's denial represents a departure from Cinergy, decided nearly 15 years ago, and renders *Cinergy* an outlier of discovery decisions. Because the issues in this proceeding, as in Verde, are defined, the blanket prohibition on discovery that FirstEnergy Advisors seeks is inappropriate. FirstEnergy Advisors' proper remedy is to object to the individual discovery requests and have the PUCO rule on them, as NOPEC seeks by its Motion to Compel. Indeed, FirstEnergy Advisors has made objections to individual interrogatories. As discussed below, none have merit.

B. NOPEC's discovery is relevant and reasonably likely to lead to the discovery of admissible evidence.

FirstEnergy Advisors futilely attempts to persuade the PUCO that the EDUs and FirstEnergy Advisors can share the same management teams as long as their time is properly recorded in the cost allocation manual.[17] It relies on O.A.C. 4901:1-37-04(A)(5), which provides that "[a]n electric utility shall ensure that all shared employees appropriately record and charge their time based on fully allocated costs." However, even if the shared executives properly record their time (assuming they are required to do so), it doesn't resolve the central issue in this case, which is: How can the same executives who control the regulated EDUs and their non-regulated affiliate separate their knowledge of the EDUs' business plans from the business needs of the affiliate they control? The issue has nothing to do with allocation of time. It has everything to do

[16] *Columbia*, at 2-3.

[17] FirstEnergy Advisors' Memorandum Contra at 4. FirstEnergy Advisors makes the same misplaced arguments in supplemented Exhibit B-2 to the application filed April 1, 2020.

with the allocation of knowledge and control of the affiliate. The knowledge the executives have of each affiliate's business plans cannot be allocated and the control that the EDU executives have over the affiliate cannot be allocated. Thus, the EDUs and FirstEnergy Advisors cannot function as "fully separated" affiliate. Shared management is a ***per se*** violation of R.C. 4928.17(A).

FirstEnergy Advisors fails to address each of NOPEC's interrogatory questions individually, but lumps the requests into groups to confuse NOPEC's requests. NOPEC directs the PUCO to its Motion to Compel, which states the reason for each individual request. To the extent NOPEC needs to address comments made by FirstEnergy Advisors, it offers the following, based upon FirstEnergy Advisors' categorical groupings.

1. Requests that seek the identity of employees and background information are reasonably likely to lead to the discovery of admissible evidence.

Exhibits B-2 and B-3 to the application, even as supplemented, provide scant information as to the employees FirstEnergy Advisors will employ. INT-01. NOPEC has the right to discover who these employees are to assess FirstEnergy Advisors' managerial and technical ability to provide service. Similarly, NOPEC has the right to obtain the identity and background information of such employees who formerly were FirstEnergy Solutions employees. INT-02. NOPEC has the right to discover what positions the employees held, what competitive information they have acquired, and if they will use that information in similar positions with FirstEnergy Advisors. Again, the issue is whether that information makes its way to the regulated EDUs via the unlawful shared management and control relationship. The issue does not involve simple cost allocation among shared employees as FirstEnergy Advisors would have the PUCO believe. It is a much more serious issue involving the unlawful shared management and control arrangement.

2. Requests which seek charter documents, meeting minutes, and written actions of FirstEnergy Advisors [INT-05 and INT-06] and information concerning past, present and future positions held by officers, directors and partners identified in FirstEnergy Advisors' Application [INT-7 through 17] are reasonably likely to lead to the discovery of admissible evidence.

FirstEnergy Advisors admits that these interrogatories go directly to the corporate separation issues raised in this case. It just erroneously believes that those issues should not be a part of this proceeding – even though it is responsible for raising the issues, and even addressed them in supplemented Exhibit B-2 to the application. As explained time and again, FirstEnergy Advisors' management structure violates the corporate separation rules and cannot be allowed. It is reasonably likely that information contained in FirstEnergy Advisors' corporate documents will lead to admissible evidence related to its affiliate relationship with the EDUs. To the extent that FirstEnergy Advisors believes some of that information is confidential, NOPEC is amenable to entering into a protective agreement.

Similarly, FirstEnergy Advisors erroneously claims that information concerning the positions held by the executives identified in its application [INT-07 through 17] is beyond the scope of this proceeding, because it is related to corporate separation issues. The information is reasonably likely to lead to admissible evidence that the information retained by the individuals will be shared with executive management members, who will gain knowledge of the business operations of the EDUs as well as FirstEnergy Advisors. If the EDUs' and FirstEnergy Advisors' business operations are controlled by the same management, the affiliates cannot be structurally separated and management this case cannot be approved.

3. Requests seeking information concerning employees and their experience with prior employers [INT-18 and INT-19] is reasonably likely to lead to the discovery of admissible evidence.

The requests under this category of interrogatories relate to unnamed employees in Exhibits B-2 and B-3 to the application. FirstEnergy Advisors still has not named these individuals in the supplemented exhibits. The identity and background of these employees is likely to lead to admissible evidence concerning whether FirstEnergy Advisors is managerially and technically capable of providing service. It is not unusual, and is preferred, in PUCO application proceedings that the applicant provide the biographies or even resumes of the persons who hold these key managerial and technical positions. NOPEC has the right to test the background of these employees (and to discover what FirstEnergy Advisors is seeking to hide about these individuals).

As to the documents NOPEC seeks in INT-18(g) and INT-19(g), NOPEC was correct in its Motion to Compel that this information is relevant to determine the information these employees will provide to FirstEnergy Advisors. As employees of FES/Energy Harbor, they obtained highly proprietary information about the Ohio competitive retail electric market. This competitive information, which should not be shared with regulated utilities, will necessarily be shared with the management team of FirstEnergy Advisors, who are senior officers of the FirstEnergy EDUs. NOPEC's request is reasonably likely to lead to the discovery of admissible evidence that, through shared management, the EDUs will learn of competitive business operations, which violate corporate separation rules and could lead to the abuse of market power.

C. NOPEC's discovery requests are not vague, overbroad or unduly burdensome.

FirstEnergy Advisors does not seriously develop its argument that NOPEC's discovery requests are vague, overbroad or unduly burdensome. Instead, it relies on its tired, catch-all

argument that discovery in this proceeding is premature. NOPEC has shown that it was entitled to discovery when it intervened in this case.

D. FirstEnergy Advisors' objections based upon privilege do not exempt it from providing a privilege log.

FirstEnergy Advisors' objected to providing the communications requested in RPD-13 through RPD-16 based upon privilege. NOPEC offered to accept, and the PUCO should order, NOPEC to provide a privilege log. Apparently recognizing the weakness of it position, FirstEnergy Advisors now claims that its objection was based upon the fact that discovery is premature. NOPEC has refuted that failed argument as well.

III. CONCLUSION

For the foregoing reasons, NOPEC respectfully renews its request that the PUCO grant its Motion to Compel.

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 served on the persons stated below via electronic transmission this 13th day of April 2020.

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