BEFORE THE

PUBLIC UTILITIES COMMISSION OF OHIO

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| In the Matter of the Complaint and Request for Emergency Interim Relief by Dynegy Marketing and Trade, LLC Against the Northeast Ohio Public Energy Council | )  )  )  )  ) | Case No. 22-0817-EL-CSS |

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MOTION FOR LEAVE TO FILE REPLY MEMORANDUM IN SUPPORT OF TRANSALTA ENERGY MARKETING (U.S.) INC.’S MOTION TO INTERVENE

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Pursuant to Ohio Admin. Code 4901-1-12, TransAlta Energy Marketing (U.S.) Inc. (“TransAlta”), hereby moves for leave to file a Reply Memorandum to the Northeast Ohio Public Energy Council’s (“NOPEC’s”) Memorandum Contra TransAlta’s Motion to Intervene filed in the above captioned-proceeding on October 4, 2022.[[1]](#footnote-1) TransAlta moves to address the allegations NOPEC makes in its Memorandum Contra and demonstrates that: (1) TransAlta meets the Public Utilities Commission of Ohio’s (“Commission’s”) liberal standard for intervention; (2) NOPEC provides no basis for denying TransAlta’s intervention; and (3) NOPEC’s arguments are based on conclusory and unsubstantiated allegations. Accordingly, TransAlta requests leave to file a reply memorandum in support of its intervention in the above-captioned proceeding.

A memorandum in support of this motion is attached.

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| Dated: October 11, 2022 | Respectfully submitted,  */s/ Kimberly Frank*  Kimberly B. Frank, Counsel of Record  PHV-26301-2022  K&L Gates LLP  1601 K Street, NW  Washington, DC 20006  Tel: 202-778-9064  Fax: 202-778-9100  Email: [kimberly.frank@klgates.com](mailto:kimberly.frank@klgates.com)  Janessa Glenn (0100782)  K&L Gates LLP  2801 Via Fortuna, Suite 650  Austin, Texas  78746-7568  Tel: 512-482-6866  Fax: 512-482-6859  Email: [janessa.glenn@klgates.com](mailto:janessa.glenn@klgates.com)  **Willing to Accept Service by Email**  ***COUNSEL FOR TRANSALTA ENERGY MARKETING (U.S.) INC.*** |

BEFORE THE

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| In the Matter of the Complaint and Request for Emergency Interim Relief by Dynegy Marketing and Trade, LLC Against the Northeast Ohio Public Energy Council | )  )  )  )  ) | Case No. 22-0817-EL-CSS |

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MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE

TO FILE REPLY MEMORANDUM IN SUPPORT OF

TRANSALTA ENERGY MARKETING (U.S.) INC.’S MOTION TO INTERVENE

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On September 27, 2022, TransAlta Energy Marketing (U.S.) Inc. (“TransAlta”) moved to intervene in the above-captioned proceeding arising from the Northeast Ohio Public Energy Council’s (“NOPEC’s”) plan to prematurely and immediately return its Standard Program Price customers to the default standard service offer supply programs of three electric distribution utilities, as described in the Complaint and Request for Emergency Relief filed by Dynegy Marketing and Trade, LLC on August 31, 2022.[[2]](#footnote-2)

On October 4, 2022, NOPEC filed a Memorandum Contra TransAlta’s Motion to Intervene.[[3]](#footnote-3) TransAlta moves for leave to file a Reply Memorandum to NOPEC’s Memorandum Contra to correct the record, as NOPEC’s Memorandum Contra relies primarily on conclusory and unsubstantiated allegations. Although reply briefs are not normally permitted in the case of expedited motions, TransAlta should be granted leave to file a reply to correct NOPEC’s mischaracterizations of TransAlta’s Motion to Intervene and to ensure that the Public Utilities Commission of Ohio (“Commission”) is properly informed of TransAlta’s substantial interest in the outcome of this proceeding. Moreover, the Commission has not yet established a procedural schedule in this proceeding, and thus, no party will be prejudiced by having the Commission consider the attached reply brief.

Accordingly, for the foregoing reasons, the Commission should grant TransAlta’s motion for leave to file a reply memorandum and should consider the arguments set forth therein.

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| Dated: October 11, 2022 | Respectfully submitted,  */s/ Kimberly Frank*  Kimberly B. Frank, Counsel of Record  PHV-26301-2022  K&L Gates LLP  1601 K Street, NW  Washington, DC 20006  Tel: 202-778-9064  Fax: 202-778-9100  Email: [kimberly.frank@klgates.com](mailto:kimberly.frank@klgates.com)  Janessa Glenn (0100782)  K&L Gates LLP  2801 Via Fortuna, Suite 650  Austin, Texas  78746-7568  Tel: 512-482-6866  Fax: 512-482-6859  Email: [janessa.glenn@klgates.com](mailto:janessa.glenn@klgates.com)  **Willing to Accept Service by Email**  ***COUNSEL FOR TRANSALTA ENERGY MARKETING (U.S.) INC.*** |

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**REPLY MEMORANDUM IN SUPPORT OF**

**TRANSALTA ENERGY MARKETING (U.S.) INC.’S MOTION TO INTERVENE**

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1. **introduction**

On September 27, 2022, pursuant to R.C. 4903.221 and Ohio Admin. Code 4901-1-11, TransAlta Energy Marketing (U.S.) Inc. (“TransAlta”) moved to intervene in the above-captioned proceeding to address allegations raised in the Complaint and Request for Emergency Relief filed by Dynegy Marketing and Trade, LLC (“Dynegy”) on August 31, 2022,[[4]](#footnote-4) asking the Public Utilities Commission of Ohio (“Commission”) to: (1) investigate whether the Northeast Ohio Public Energy Council’s (“NOPEC’s”) dropping of over half a million of its Standard Program Price customers from its current three-year aggregation program and returning them prematurely to the standard service offer (“SSO”) programs of Cleveland Electric Illuminating Company and Ohio Edison Company (together, “FirstEnergy”) and Ohio Power Company (“AEP Ohio”) is consistent with Ohio law and the Commission’s rules; (2) enforce all relevant provisions of NOPEC’s governance and operation plan; and (3) suspend NOPEC’s certification. NOPEC’s load shift will have significant impacts on TransAlta and Ohio’s competitive electric service market, and TransAlta seeks intervention without limitation in this proceeding.

On October 4, 2022, NOPEC filed a Memorandum Contra TransAlta’s Motion to Intervene,[[5]](#footnote-5) which mischaracterizes the Commission’s liberal intervention standard, provides no basis for denying TransAlta’s intervention, and relies primarily on broad and unsupported allegations that have no basis in fact, law, or prior Commission precedent. Accordingly, the Commission should reject NOPEC’s arguments and grant TransAlta’s motion to intervene.

1. **law and argument**

The Commission has a long-standing policy of encouraging broad participation in its proceedings.[[6]](#footnote-6) Indeed, intervention rules should “generally [be] liberally construed in favor of intervention,”[[7]](#footnote-7) and this liberal construction applies “whether or not a hearing is held.”[[8]](#footnote-8) Moreover, a party should be granted intervention when it meets the five factors articulated in the rules, absent “evidence in the record calling those claims into doubt” or establishing that intervention would cause undue delay.[[9]](#footnote-9)

TransAlta has demonstrated that it meets the five factors the Commission uses in evaluating whether to permit intervention. Specifically, TransAlta has been directly impacted by NOPEC’s unprecedented actions because TransAlta is currently responsible for serving 7% and 4% of the SSO load in the FirstEnergy and AEP Ohio service territories, respectively. Accordingly, TransAlta has a real and substantial interest in this proceeding. No other party can represent TransAlta’s business interests with respect to its own SSO load obligations and the impact of NOPEC’s actions on TransAlta. Moreover, TransAlta’s intervention will not cause undue delay, as the Commission has not yet established a procedural schedule in this proceeding. Last, TransAlta’s supporting memorandum demonstrates that its intervention is in the public interest, and that its legal position is consistent with the Commission’s initial findings in Case No. 00-2317-EL-GAG (the “Certification Proceeding”).[[10]](#footnote-10) Thus, TransAlta meets the Commission’s liberal standard for intervention and its motion to intervene should be granted.

Rather than respond to TransAlta’s arguments or provide any particularized basis to deny TransAlta’s intervention, NOPEC spends most of its time arguing that TransAlta does not have a right to intervene in a proceeding concerning its “mere filing” of a Notice of Material Change.[[11]](#footnote-11) But NOPEC misses the point. First, even if there is no right to intervene here, intervention is nevertheless *permissive*. Second, so much more is at stake here than a “mere filing.” In fact, NOPEC’s characterization of its unilateral decision to return prematurely over 500,000 customers to SSO service—and its apparent ignorance of the significant impact that its actions will have on SSO load suppliers, SSO auctions, and the wider Ohio electric market—underscores why granting TransAlta party status is essential to ensure its interests in this proceeding are adequately protected.

NOPEC claims TransAlta’s intervention should be denied here because its interests can be protected by the submission of comments as sought by the Commission in the Certification Proceeding.[[12]](#footnote-12) But, the Commission has made clear on multiple occasions that it has not consolidated this proceeding with the Certification Proceeding.[[13]](#footnote-13) Thus, any comments that TransAlta may file with respect to NOPEC’s response to the Show Cause Entry will not preserve TransAlta’s rights as a party in this proceeding.[[14]](#footnote-14)

NOPEC further argues that TransAlta has no right to interject itself into Dynegy’s complaint proceeding, that TransAlta’s intervention is “an obvious attempt . . . to duplicate the efforts of Dynegy,”[[15]](#footnote-15) and that, essentially, TransAlta’s only interest in this proceeding is the underlying legal issue or the precedent to be set. Again, NOPEC misses the mark. TransAlta seeks intervention here to address the lawfulness of NOPEC’s actions, which Dynegy urges the Commission to investigate in the Complaint. There is no other party, including Dynegy, that can understand how NOPEC’s load-shifting will impact TransAlta’s business operations, and how that specific impact could more broadly adversely affect “wholesale auctions which provide the generation for SSO service in all Ohio EDUs service territories.”[[16]](#footnote-16) Accordingly, TransAlta’s interest in this proceeding is not duplicative or merely based on precedential interest. To the contrary, TransAlta has a direct and substantial business interest that cannot be represented by any other party, and should therefore be allowed to contribute to the development of the record and actively participate as a party in these proceedings. Further, NOPEC cites no precedent to support its assertion that intervention is unwarranted in a complaint proceeding, but rather cites precedent that would support TransAlta’s intervention.[[17]](#footnote-17)

Indeed, NOPEC’s Memorandum Contra largely relies on broad conclusory statements that are unsupported by any evidence, facts, case law, or precedent, and should thereby be rejected. For example, in asserting that TransAlta’s intervention will unduly delay the proceeding, NOPEC merely concludes “TransAlta seeks intervention to engage in a campaign against NOPEC,”[[18]](#footnote-18) and that its intervention “will ultimately result in overbroad and unwarranted discovery requests that go well beyond the narrow scope of this proceeding.”[[19]](#footnote-19) However, NOPEC provides no evidence or facts to support its assertions. NOPEC also claims, without any basis, that TransAlta “intends to make general and vague allegations,”[[20]](#footnote-20) is “blaming NOPEC for its own failures in assessing the risk of being an SSO supplier,”[[21]](#footnote-21) and that TransAlta intends to “misuse the intervention process . . . to advance its self-serving interests of avoiding its contractual commitments.”[[22]](#footnote-22) But again, NOPEC provides no evidence to support these assertions. Its conclusory and unsupported allegations must fail.

1. **Conclusion**

WHEREFORE, for the foregoing reasons, TransAlta respectfully requests that the Commission grant its motion to intervene in this proceeding. Because TransAlta may be bound by any Commission order or activity in this proceeding and may be adversely affected thereby, and because TransAlta’s interests in this proceeding cannot be represented by any other party, TransAlta respectfully requests its motion to intervene be granted without limitation.

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| Dated: October 11, 2022 | Respectfully submitted,  */s/ Kimberly Frank*  Kimberly B. Frank, Counsel of Record  PHV-26301-2022  K&L Gates LLP  1601 K Street, NW  Washington, DC 20006  Tel: 202-778-9064  Fax: 202-778-9100  Email: [kimberly.frank@klgates.com](mailto:kimberly.frank@klgates.com)  Janessa Glenn (0100782)  K&L Gates LLP  2801 Via Fortuna, Suite 650  Austin, Texas  78746-7568  Tel: 512-482-6866  Fax: 512-482-6859  Email: [janessa.glenn@klgates.com](mailto:janessa.glenn@klgates.com)  **Willing to Accept Service by Email**  ***COUNSEL FOR TRANSALTA ENERGY MARKETING (U.S.) INC.*** |

**CERTIFICATE OF SERVICE**

I certify on this 11th day of October, 2022, that the foregoing document was filed using the Commission’s Docketing Information System and was served by electronic mail on the following:

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Respectfully submitted,

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1. Memorandum Contra Motion to Intervene by TransAlta Marketing and Trade, LLC, *Dynegy Mktg. & Trade, LLC v. Ne. Ohio Pub. Energy Council*, Case No. 22-0817-EL-CSS (filed Oct. 4, 2022) (“Memorandum Contra”). Notably, NOPEC’s Memorandum Contra incorrectly identifies TransAlta as “TransAlta Marketing and Trade, LLC.” The movant’s correct business name is TransAlta Energy Marketing (U.S.) Inc. [↑](#footnote-ref-1)
2. Complaint and Request for Emergency Relief, *Dynegy Mktg. & Trade, LLC v. Ne. Ohio Pub. Energy Council*, Case No. 22-0817-EL-CSS (filed Aug. 31, 2022). [↑](#footnote-ref-2)
3. Memorandum Contra Motion to Intervene by TransAlta Marketing and Trade, LLC, *Dynegy Mktg. & Trade, LLC v. Ne. Ohio Pub. Energy Council*, Case No. 22-0817-EL-CSS (filed Oct. 4, 2022) (“Memorandum Contra”). Notably, NOPEC’s Memorandum Contra incorrectly identifies TransAlta as “TransAlta Marketing and Trade, LLC.” The movant’s correct business name is TransAlta Energy Marketing (U.S.) Inc. [↑](#footnote-ref-3)
4. Complaint and Request for Emergency Relief, *Dynegy Mktg. & Trade, LLC v. Ne. Ohio Pub. Energy Council*, Case No. 22-0817-EL-CSS (filed Aug. 31, 2022) (“Complaint”). [↑](#footnote-ref-4)
5. Memorandum Contra Motion to Intervene by TransAlta Marketing and Trade, LLC, *Dynegy Mktg. & Trade, LLC v. Ne. Ohio Pub. Energy Council*, Case No. 22-0817-EL-CSS (filed Oct. 4, 2022) (“Memorandum Contra”). Notably, NOPEC’s Memorandum Contra incorrectly identifies TransAlta as “TransAlta Marketing and Trade, LLC.” The movant’s correct business name is TransAlta Energy Marketing (U.S.) Inc. [↑](#footnote-ref-5)
6. *In re Cleveland Elec. Illum. Co.*, Case No. 85-675-EL-AIR, 1986 WL 1262093, Entry at ¶ 6 (issued Jan. 14, 1986) (“The Commission’s policy is to encourage the broadest possible participation in its proceedings.”). [↑](#footnote-ref-6)
7. *Ohio Consumers’ Counsel v. Pub. Utils. Comm’n*, 111 Ohio St.3d 384, 388, 2006-Ohio-5853, 856 N.E.2d 940, ¶ 16 (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 656 N.E.2d 1277 (1995)). [↑](#footnote-ref-7)
8. *Id.* at ¶ 20. [↑](#footnote-ref-8)
9. *Id*. [↑](#footnote-ref-9)
10. *In re Certification of Ne. Ohio Pub. Energy Council as Governmental Aggregator*, Case No. 00-2317-EL-GAG (issued Sept. 7, 2022) and *In re Motion of Ne. Ohio Pub. Energy Council for a Limited Waiver*, Case No. 22-806-EL-WVR (issued Sept. 7, 2022) (“Show Cause Entry”). [↑](#footnote-ref-10)
11. Memorandum Contra at pp. 2-3. [↑](#footnote-ref-11)
12. *Id*. at pp. 5-6. [↑](#footnote-ref-12)
13. Show Cause Entry at ¶ 15 (“[T]he Commission cautions the parties that these cases have not been consolidated at this time.”); *In re Certification of Ne. Ohio Pub. Energy Council as Governmental Aggregator*, Case No. 00-2317-EL-GAG, Entry at ¶ 12 (issued Sept. 23, 2022) (noting that this proceeding and the Certification Proceeding have not been consolidated and instructing parties to refrain from multi-captioning future filings). In fact, NOPEC previously complained that parties were filing a single motion to intervene in this and the Certification Proceeding, asserting that such “blanket” motions to intervene were unlawful and highly prejudicial to NOPEC. *See, e.g.*, Memorandum Contra Enel Trading North America, LLC’s Motion to Intervene, *Dynegy Mktg. & Trade, LLC v. Ne. Ohio Pub. Energy Council*, Case No. 22-0817-EL-CSS, at p. 1 (filed Sept. 14, 2022). [↑](#footnote-ref-13)
14. *See* *Ohio Domestic Violence Network, v. Pub. Utils. Comm’n*, 1994-Ohio-165, 70 Ohio St. 3d 311, 315-16, 638 N.E.2d 1012 (1994) (finding that appellants had no standing to appeal the Commission’s ruling in a proceeding for which they were denied intervention, and only had standing with respect to proceedings in which their intervention was granted). [↑](#footnote-ref-14)
15. Memorandum Contra at p. 5. [↑](#footnote-ref-15)
16. Show Cause Entry at ¶ 14. [↑](#footnote-ref-16)
17. *See, e.g.*, *In re Complaint of the City of Cleveland & WPS Energy Serv., Inc. v. The Cleveland Elec. Illum. Co. & FirstEnergy, Corp.*, Case No. 01-174-EL-CSS, Entry at ¶ 3 (issued Mar. 29, 2001) (granting intervention in complaint proceeding for party with “a real and substantial interest” that was not adequately represented by existing parties). [↑](#footnote-ref-17)
18. Memorandum Contra at p. 5. [↑](#footnote-ref-18)
19. *Id*. [↑](#footnote-ref-19)
20. *Id*. at p. 4. [↑](#footnote-ref-20)
21. *Id*. at p. 1. [↑](#footnote-ref-21)
22. *Id*. at p. 6. [↑](#footnote-ref-22)