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**EXPEDITED TREATMENT REQUESTED** |

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

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Pursuant to R.C. 4903.221 and Ohio Admin. Code 4901-1-11, Transalta Energy Marketing (U.S.) Inc. (“Transalta”), moves to intervene in this proceeding concerning 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 (“SSO”) supply programs of three electric distribution utilities, as described in the Complaint and Request for Emergency Relief filed by Dynegy Marketing and Trade, LLC (“Dynegy”) on August 31, 2022,[[1]](#footnote-1) asking the Public Utilities Commission of Ohio (“Commission”) to investigate whether NOPEC’s actions are consistent with Ohio law and the Commission’s rules, and to suspend NOPEC’s certification.

As explained in the accompanying memorandum in support, Transalta has a real and substantial interest in this case, and Transalta is situated so that the disposition of this proceeding without its participation would impede its ability to protect that interest. Transalta further submits that its participation in this proceeding will meaningfully contribute to the development of a full record and the just and expeditious resolution of the issues in this proceeding, and will not cause undue delay or unreasonably prejudice any existing party. Because Transalta will be affected by the Commission’s orders in this proceeding and may be adversely affected by those rulings, 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.

Moreover, because NOPEC has likely already begun returning its customers to default SSO service, and Dynegy has filed expedited motions for an emergency interim order and to accelerate discovery and schedule an evidentiary hearing in this proceeding, Transalta respectfully requests that its motion to intervene be considered on an expedited basis.

A memorandum in support of this motion is attached.

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| Dated: September 27, 2022 | Respectfully submitted,*/s/ Janessa Glenn*Janessa Glenn (0100782)K&L Gates LLP2801 Via Fortuna, Suite 650Austin, Texas  78746-7568Tel: 512-482-6866Fax: 512-482-6859Email: janessa.glenn@klgates.com**Willing to Accept Service by Email*****COUNSEL FOR TRANSALTA ENERGY MARKETING (US) INC.*** |

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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**EXPEDITED TREATMENT REQUESTED** |

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MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE BY

TRANSALTA ENERGY MARKETING (U.S.) INC.

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1. introduction

Transalta Energy Marketing (U.S.) Inc. (“Transalta”) seeks to intervene in the above-captioned proceeding to defend its interest in maintaining a robust and competitive market for electric service, including the default standard service offer (“SSO”) auctions in which Transalta participates.

On August 24, 2022, the Northeast Ohio Public Energy Council (“NOPEC”) filed a Notice of Material Change to Business Operations (“Material Change Notice”)[[2]](#footnote-2) informing the Public Utilities Commission of Ohio (“Commission”) of its plan to end its competitive electric supply agreements with NextEra Energy Services Ohio, LLC and its unilateral decision to return, prematurely before the scheduled end of its current aggregation program, its Standard Program Price customers in the territories of three Ohio electric distribution utilities (“EDUs”)—the Cleveland Electric Illuminating Company (“CEI”), Ohio Edison Company (“Ohio Edison,” and together with CEI, “FirstEnergy”), and Ohio Power Company (“AEP Ohio”)—to those utilities’ default SSO service programs.

On August 26, 2022, NOPEC filed a request for a limited, one-timer waiver of Ohio Admin Code 4901:1-10-29(H)(2), which requires EDUs to notify their customers when their competitive retail electric service (“CRES”) provider has notified the EDU that the customer will be returned to SSO service.[[3]](#footnote-3) In that filing, NOPEC explained that operational limitations prevented FirstEnergy from notifying more than 10,000 customers a day, and sought waiver of that notice requirement to carry out its plan without administrative delay.[[4]](#footnote-4)

On August 31, 2022, Dynegy Marketing and Trade LLC (“Dynegy”) filed a Complaint and Request for Emergency Relief (“Complaint”),[[5]](#footnote-5) asking the Commission to investigate whether NOPEC’s actions are consistent with Ohio law and the Commission’s rules, enforce all relevant provisions of NOPEC’s governance and operation plan, including any customer notice provisions that NOPEC may have failed to abide by, and suspend NOPEC’s CRES certification. Count 1 of the Complaint alleges that NOPEC has violated the law by failing to disclose its pricing and contract terms.[[6]](#footnote-6) Count 2 alleges that NOPEC has engaged in unlawful practices in attempting to game and manipulate the SSO market.[[7]](#footnote-7) Dynegy also requested emergency relief of a thirty (30) day stay of NOPEC’s unilateral decision to drop its Standard Program Price customers onto SSO service.[[8]](#footnote-8)

On September 7, 2022, in related Case No. 00-2317-EL-GAG andCase No. 22-806-EL-WVR, the Commission ordered NOPEC to show cause, by September 28, 2022, why its CRES certification should not be suspended.[[9]](#footnote-9)

NOPEC’s unprecedented actions will substantially and immediately impair Transalta’s business operations in Ohio and will substantially and immediately disrupt Ohio’s competitive retail electric service market, warranting Transalta’s intervention. To ensure the Commission is fully and timely informed of these important issues as necessary to timely address NOPEC’s unprecedented actions, Transalta respectfully requests its motion to intervene be considered and granted on an expedited basis.

1. legal standard

The Commission’s rules provide that a person “shall” be permitted to intervene in a proceeding upon a showing that:

1. A statute of this state or the United States confers a right to intervene.
2. The person has a real and substantial interest in the proceeding, and the person is so situated that the disposition of the proceeding may, as a practical matter, impair or impede his or her ability to protect that interest, unless the person’s interest is adequately represented by existing parties.

Ohio Admin. Code 4901-1-11(A). The five factors for evaluating whether to permit intervention are as follows:

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.
5. The extent to which the person’s interest is represented by existing parties.

Ohio Admin. Code 4901-1-11(B).

The Supreme Court of Ohio has held that intervention should “generally [be] liberally construed in favor of intervention.” *Ohio Consumers’ Counsel v. Pub. Util. Comm*., 111 Ohio St.3d 384, 388, 2006-Ohio-5853, 856 NE.2d 940, ¶ 16 (quoting *State ex rel. Polo v. Cuyahoga Cty. Bd. of Elections*, 74 Ohio St.3d 143, 144, 656 NE.2d 1277 (1995)). This liberal construction applies “whether or not a hearing is held,” and a party should be granted intervention when it meets the factors articulated in the rules, absent “evidence in the record calling those claims into doubt” or establishing that intervention would cause undue delay. *Id.* at ¶ 20.

The Commission’s rules further provide that a party making any motion “may include a specific request for an expedited ruling” and that “[t]he grounds for such a request shall be set forth in the memorandum in support.” Ohio Admin. Code 4901-1-12(C).

1. law and argument

Transalta meets the Commission’s requirements for intervention. For the reasons described below, the Commission should find that Transalta has a real and substantial interest in this proceeding, that no other party would adequately represent Transalta’s interest, and that the Commission’s disposition of the proceeding may impair Transalta’s ability to protect its interest. Moreover, because NOPEC has likely already started to return Standard Program Price customers to the EDUs’ default SSO programs, Transalta requests that the Commission grant intervention on an expedited basis.

1. The Nature and Extent of Transalta’s Interest.

Transalta is a power marketer and wholesale generation supplier of SSO service to Ohio customers. Transalta is a regular participant in “the wholesale auctions which provide the generation for SSO service in all Ohio EDUs service territories,”[[10]](#footnote-10) including the auctions of FirstEnergy and AEP Ohio, whose service territories contain NOPEC Standard Price Program customers. Transalta currently serves 7% of FirstEnergy’s SSO load and 4% of AEP Ohio’s SSO load.[[11]](#footnote-11)

NOPEC’s course of action to revert over 550,000 Ohio customers to their EDUs’ default SSO programs, the lawfulness of which Dynegy urges the Commission to investigate in the Complaint, would cause a sudden and significant increase in load served by Transalta. Thus, Transalta has a real and substantial interest in this proceeding concerning the lawfulness of NOPEC’s plan.

NOPEC claims that intervention by other parties should be denied in this proceeding because the movants “cannot piggyback on Dynegy’s complaint to assert a purely legal/policy argument,”[[12]](#footnote-12) and that they raise only “general concern about the precedential effect of permitting NOPEC to return customers to the SSO.”[[13]](#footnote-13) But Transalta’s interest in this proceeding is neither based on purely legal or policy arguments nor merely a general concern about the precedent set by NOPEC’s decision to return its customers to the ISO. Indeed, the Commission has expressed concerns that SSO suppliers and SSO customers could be harmed by NOPEC’s plan. Specifically, the Commission has made the preliminary finding “that both NOPEC’s *actions*, prematurely returning customers to SSO service prior to the scheduled end of the aggregation program, and *proposed actions*, reenrolling these same customers at some undefined point in the future when NOPEC deems that economic conditions are favorable, will adversely affect the wholesale generation providers who supply generation for the SSO service, resulting in higher prices for SSO customers.”[[14]](#footnote-14) The Commission also found that “the premature return of customers to SSO service and the potential failure to comply with the operations and governance plans cast doubt upon whether NOPEC continues to demonstrate the managerial, technical and financial capability to be certified as a CRES governmental aggregator in this state,”[[15]](#footnote-15) and directed NOPEC to show cause, by September 28, 2022, why its CRES certification should not be suspended.[[16]](#footnote-16)

Transalta has a real and direct interest in this proceeding because it is a wholesale generation provider that participates in SSO load auctions, is currently an SSO supplier, and is thereby affected as the Commission’s order describes. Indeed, as an SSO supplier, Transalta stands to be materially harmed by NOPEC’s unilateral decision to return its customers prematurely to SSO service. Moreover, Transalta has a substantial interest in assuring that NOPEC’s plan is lawful, in accordance with Ohio laws, rules, and orders, and is not fraudulent, deceptive, or anti-competitive.

The case law upon which NOPEC has relied in opposing intervention in this proceeding is either distinguishable or misleading. For instance, in *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 (Mar. 29, 2001), the Commission granted intervention for a party who asserted that the conduct at issue in the complaint could potentially harm its business.[[17]](#footnote-17) In granting the motion to intervene, the Commission found the intervenor showed “a real and substantial interest” in the complaint proceeding, and that “its interest in keeping its current [ ] allocation [was] not adequately represented by existing parties.”[[18]](#footnote-18) Analogously, Transalta has a “real and substantial” interest in this proceeding because it will be adversely affected by NOPEC’s plan, and Transalta’s interest in keeping the three-year aggregation program as set forth in NOPEC’s most recent CRES renewal certificate application is not adequately represented by existing parties.[[19]](#footnote-19)

1. Transalta’s Legal Position and Its Relation to the Merits.

The adverse impacts of NOPEC’s unilateral decision to return over 550,000 customers back to default SSO service prematurely before the scheduled end of its current aggregation program are immense. Among other things, the adverse impacts of this deliberate and unanticipated load shift are likely to reverberate across the wider Ohio electricity market, could have a destabilizing effect on future “wholesale auctions which provide the generation for SSO service in all Ohio EDUs service territories,”[[20]](#footnote-20) and “will adversely affect the wholesale generation providers who supply generation for the SSO service, resulting in higher prices for SSO customers.”[[21]](#footnote-21) Moreover, NOPEC’s unilateral decision to shed its obligation to provide Standard Program Price service to customers for an economic reason—*i.e.*, changed market conditions that NOPEC and/or its supplier apparently has failed to anticipate or adequately hedge against—appears to allow it to shirk its obligations as a governmental aggregator and appears intended to position NOPEC to unjustly benefit from its actions.

The issues raised in the Complaint are consistent with the Commission’s initial findings in the Show Cause Order that “both the premature return of customers to SSO service and the potential failure to comply with the operations and governance plans cast doubt upon whether NOPEC continues to demonstrate the managerial, technical and financial capability to be certified as a CRES governmental aggregator in this state.”[[22]](#footnote-22) Allowing Transalta to intervene in these proceedings would foster the development of a full and complete record and aid the Commission in its decision-making process.

Transalta’s legal positions in this proceeding are neither merely duplicative of Dynegy’s nor based solely on potential future impacts of precedent established in this proceeding.[[23]](#footnote-23) As an SSO load supplier, Transalta stands to be materially harmed by NOPEC’s plan, and Transalta has its own perspective on how that plan will adversely impact its business operations with respect to its own obligation to serve its own SSO load.

1. Transalta’s Participation Will Not Cause Undue Delay.

Transalta’s intervention and participation will not cause undue delay, disrupt, or otherwise unnecessarily prolong this proceeding. The Commission has not yet established a procedural schedule in this proceeding. Transalta accepts the record as it stands to date, and thus, granting intervention will not prejudice the interests of, or impose burdens on, any entities that are already parties to this proceeding.

1. Transalta’s Participation Is in the Public Interest.

Transalta’s participation is in the public interest. Transalta has extensive experience and industry knowledge and, as a party to the proceeding, can contribute to the development of a full and complete record in this proceeding. Specifically, Transalta is a participant in the Ohio wholesale electricity market and is a “wholesale generation provider[] who suppl[ies] generation for the SSO service.”[[24]](#footnote-24) As such, Transalta has a clear stake in the issues raised by Dynegy in the Complaint concerning the lawfulness of NOPEC’s unprecedented actions. If Transalta is not permitted party-status in this proceeding, Transalta will be harmed. Further, the record upon which the Commission’s decision is made would exclude Transalta’s perspective on issues that will materially impact Transalta and the entire Ohio electricity market, including future “wholesale auctions which provide the generation for SSO service.”[[25]](#footnote-25) Indeed, Transalta’s intervention and participation in this proceeding will bring valuable insight to the Commission on how NOPEC’s unprecedented plan impacts the Ohio electricity market.

Accordingly, Transalta’s participation is in the public interest.

1. Transalta’s Interest Cannot Be Represented by Existing Parties.

Transalta’s interest in the outcome of this proceeding cannot be represented by any other party. Transalta has its own SSO load obligations, and NOPEC’s unprecedented course of action presumes that SSO suppliers will serve the customers NOPEC sheds for an indeterminate period of time. As described above, Transalta is currently responsible for procuring supply for 7% of the SSO load obligation in FirstEnergy’s service territories, and 4% of the SSO load obligation in AEP Ohio’s service territory through May 31, 2023. Intervention is necessary to allow Transalta to defend its own concrete financial interests that cannot be represented by any party. In fact, because others participating in these proceedings cannot adequately protect Transalta’s interest with respect to its own SSO load obligations, Transalta’s substantial interests will be prejudiced if it is not allowed to participate here.

1. Transalta’s Motion to Intervene Should Be Considered on an Expedited Basis.

Given the immediate nature of the impact that NOPEC’s unprecedented actions will have on Transalta, as well as on the Ohio electricity market, Transalta respectfully requests that the Commission grant intervention on an expedited basis. Indeed, NOPEC has likely already started to return its customers to the EDUs’ default SSO service.[[26]](#footnote-26)

Moreover, Dynegy has filed an expedited motion to accelerate discovery and schedule an evidentiary hearing in this proceeding, and it has already served NOPEC with its first set of document requests and interrogatories. Accordingly, Transalta requests that the Commission issue an order granting intervention in this proceeding on an expedited basis.

Transalta further submits that a consolidated—and accelerated—procedural schedule will best allow the Commission to protect the interests of all parties, including Transalta. For these reasons, Transalta requests that its motion to intervene be considered on an expedited basis.

1. Conclusion

WHEREFORE, for the foregoing reasons, Transalta respectfully requests that the Commission grant this motion to intervene in this proceeding on an expedited basis. 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: September 27, 2022 | Respectfully Submitted,*/s/ Janessa Glenn*Janessa Glenn (0100782)K&L Gates LLP2801 Via Fortuna, Suite 650Austin, Texas  78746-7568Tel: 512-482-6866Fax: 512-482-6859Email: janessa.glenn@klgates.com**Willing to Accept Service by Email*****COUNSEL FOR TRANSALTA ENERGY MARKETING (US) INC.*** |

CERTIFICATE OF SERVICE

I certify on this 27th day of September, 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,

*/s/ Janessa Glenn*

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1. Complaint and Request for Emergency Relief, *Dynegy Marketing & Trade, LLC v. Northeast Ohio Pub. Energy Council*, Case No. 22-0817-EL-CSS (filed Aug. 31, 2022). [↑](#footnote-ref-1)
2. Notice of Material Change, *In re Certification of Northeast Ohio Pub. Energy Council as Governmental Aggregator*, Case No. 00-2317-EL-GAG (filed Aug. 24, 2022). [↑](#footnote-ref-2)
3. Motion for a One-Time, Limited Waiver, *In the Matter of the Motion of Northeast Ohio Pub. Energy Council for a Limited Waiver of Rule 4902:1-10-29(H)*, *Ohio Admin. Code*, Case No. 22-806-EL-WVR (filed Aug. 29, 2022) (“Waiver Request”). [↑](#footnote-ref-3)
4. *Id*. at p.2. [↑](#footnote-ref-4)
5. Complaint and Request for Emergency Relief, *Dynegy Marketing and Trade, LLC v. Northeast Ohio Pub. Energy Council*, Case No. 22-0817-EL-CSS (filed Aug. 31, 2022). [↑](#footnote-ref-5)
6. *Id*. at pp 12-15. [↑](#footnote-ref-6)
7. *Id*. at pp 15-18. [↑](#footnote-ref-7)
8. *Id*. at pp. 19-20. [↑](#footnote-ref-8)
9. *In re Certification of Northeast Ohio Pub. Energy Council for Certification as a Governmental Aggregator*, Case No. 00-2317-EL-GAG (Sept. 7, 2022) and *In re Motion of Northeast Ohio Pub. Energy Council for a Limited Waiver*, Case No. 22-806-EL-WVR (Sept. 7, 2022) (“Show Cause Order”). The Commission authorized interested parties to file comments and reply comments with respect to NOPEC’s response to the Show Cause Order by October 13, 2022 and October 20, 2022, respectively. *Id*. at ¶ 13. [↑](#footnote-ref-9)
10. *Id*. at ¶ 14. [↑](#footnote-ref-10)
11. Transalta submitted winning bids for seven out of 100 tranches of SSO load supply for FirstEnergy, four out of 100 tranches of SSO load supply for AEP Ohio, and six out of 100 tranches of SSO load supply for Duke Energy, for the delivery period running from June 1, 2022 to May 31, 2023. [↑](#footnote-ref-11)
12. Northeast Public Energy Council’s Memorandum Contra Interstate Gas Supply, Inc.’s Motion to Intervene, *In the Matter of the Complaint and Request for Emergency Interim Relief by Dynegy Marketing & Trade, LLC Against the Northeast Ohio Pub. Energy Council*, Case No. 22-0817-EL-CSS, at p. 7 (filed Sept. 14, 2022) (“Opposition to IGS”). [↑](#footnote-ref-12)
13. *Id*.; *see also* Memorandum Contra Enel Trading North America, LLC’s Motion to Intervene, *In the Matter of the Complaint and Request for Emergency Interim Relief by Dynegy Marketing & Trade, LLC Against the Northeast Ohio Pub. Energy Council*, Case No. 22-0817-EL-CSS, at p. 6 (filed Sept. 14, 2022) (“Opposition to Enel”). [↑](#footnote-ref-13)
14. Show Cause Order at ¶ 11 (emphasis in original). [↑](#footnote-ref-14)
15. *Id*. at ¶ 10. [↑](#footnote-ref-15)
16. *Id*. at ¶ 12. [↑](#footnote-ref-16)
17. *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). [↑](#footnote-ref-17)
18. *Id*. Moreover, the Commission did not deny fully the other motions to intervene, but rather granted limited intervention for the legal issues in that case. *Id*. at ¶ 4. [↑](#footnote-ref-18)
19. The additional case law upon which NOPEC relies is also distinguishable. *See*, *e.g.*, *Ohio Schs. Counsel et. al. v. FirstEnergy Solutions Corp.*, Case No. 14-1182-EL-CSS, at ¶ 8 (Sept. 4, 2014) (denying intervention in complaint proceeding involving a specific billing dispute where movants failed to show they were parties to contracts invoking similar contractual issues); *Mark A. Whitt v. Nationwide Energy Partners, LLC*, Case No. 15-697-EL-CSS, at ¶ 9 (Nov. 18, 2015) (denying intervention to the Ohio Consumers’ Counsel, Ohio Partners for Affordable Energy, and Industrial Energy Users – Ohio, agencies with no real and direct interest in the factual allegations in the complaint and were only interested in broad policy and precedent, and granting intervention for party with direct interest). [↑](#footnote-ref-19)
20. Show Cause Order at ¶ 14. [↑](#footnote-ref-20)
21. *Id*. at ¶ 11. [↑](#footnote-ref-21)
22. *Id*. at ¶ 10. [↑](#footnote-ref-22)
23. *See* Opposition to Enel at p. 8 (asserting that intervention is not warranted in complaint proceeding that raises duplicative legal arguments and which would merely address general policy concerns); Opposition to IGS at pp. 8-9 (same). [↑](#footnote-ref-23)
24. Show Cause Order at ¶ 11. [↑](#footnote-ref-24)
25. *Id*. at ¶ 14. [↑](#footnote-ref-25)
26. *See* Material Change Notice at p. 3 (“NOPEC intends to return Standard Program Price customers to the EDUs on customers’ next meter read dates during the month of September ….”). [↑](#footnote-ref-26)