**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

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| In the Matter of the Certification of Northeast Ohio Public Energy Council as Governmental Aggregator | )  )  ) | Case No. 00-2317-EL-GAG |
| **MEMORANDUM CONTRA NORTHEAST OHIO PUBLIC ENERGY COUNCIL’S**  **MOTION TO COMPEL** | | |

Pursuant to Ohio Administrative Code (Ohio Adm.Code) 4901-1-12(B)(1), Hartree Partners, LP (“Hartree”) files this Memorandum Contra Northeast Ohio Public Energy Council’s (“NOPEC”) Motion to Compel (“Motion”). Hartree files this Memorandum Contra to respectfully request that the Commission deny NOPEC’s Motion for the following reasons: (1) NOPEC does not have the right to seek discovery in this proceeding, which solely concerns NOPEC’s continued viability as a Competitive Retail Electric Service (“CRES”) provider; (2) NOPEC has not satisfied its obligation under Ohio Adm.Code 4901-1-23(C)(1)-(3) to exhaust reasonable means of resolving differences before filing a motion to compel; and (3) NOPEC’s discovery requests are outside the scope of this proceeding.

1. **INTRODUCTION**
   1. **Factual Background**

NOPEC is a governmental aggregator that arranges for electricity supply to residents in 242 member communities, covering 19 Ohio counties. NOPEC prematurely returned all of its Standard Program Price (“SPP”) customers, over half a million accounts, to the standard service offer (“SSO”) in the FirstEnergy Corp. (“FirstEnergy”) service territory beginning August 1, 2022.[[1]](#footnote-1) NOPEC removed its SPP customers from its then-currently effective three-year aggregation program, which was intended to conclude January 2023, because “electric prices have spiked in 2022 for reasons beyond NOPEC’s, NextEra’s[,] and the PUCO’s control.”[[2]](#footnote-2) NOPEC intends to “resume its aggregation program when NOPEC’s costs are expected to align considerably more closely with then-effective SSO prices” but has provided limited guidance as to the conditions that must prevail before it will resume providing the service it unilaterally discontinued.[[3]](#footnote-3)

NOPEC represents that its unilateral return of 550,000 electricity customers to the SSO in the FirstEnergy service territory is a minor material change to benefit its customers. This is incorrect. NOPEC’s shift of its SSO program customers will have significant negative effects on its customers and the Ohio electricity market generally, including suppliers like Hartree. However, NOPEC ignores the cascading effects that its massive load shift will have on the Ohio electricity market and its customers, both in the long-term and presently.

The Commission spent considerable time developing the competitive bid procurement process to produce SSO load supply to transition SSO load pricing to stable and transparent market-based rates. In doing so, the Commission recognized that ensuring rate predictability, stability, and certainty in the markets would benefit Ohio consumers as ratepayers. NOPEC’s unilateral termination of the program upends the Ohio electricity markets, creating uncertainty for customers and suppliers alike. It is on this basis that the Commission determined it was necessary and appropriate to investigate NOPEC’s fitness as a governmental aggregator.

* 1. **Procedural History**

On August 24, 2022, NOPEC filed a notice of material change in this proceeding, announcing that it intended to drop approximately 550,000 SPP customers into the customers’ applicable electric distribution utility SSO.[[4]](#footnote-4) On August 26, 2022, NOPEC filed a request for a limited, one-time waiver of Ohio Adm.Code 4901:1-10-29(H)(2), to return its customers to the SSO without providing the requisite notice.[[5]](#footnote-5) On September 7, 2022, the Commission issued an Entry granting NOPEC’s requested waiver and directing NOPEC to show cause by September 28, 2022 “demonstrating why its CRES certificate should not be suspended pursuant to Ohio Adm.Code 4901:1-24-13.”[[6]](#footnote-6) Also on September 7, 2022, Hartree filed a Motion to Intervene and Memorandum in Support of Motion to Intervene in the proceeding. On October 12, 2022, NOPEC served Hartree with its First Set of Discovery. On October 24, 2022, Hartree responded to NOPEC’s First Set of Discovery. On November 4, 2022, NOPEC served Hartree and filed with the Commission its Motion to Compel.

For the reasons discussed in detail below, Hartree respectfully requests that the Commission deny NOPEC’s Motion to Compel.

1. **LAW AND ARGUMENT**

The Commission should deny NOPEC’s Motion to Compel because NOPEC: (i) does not have the right to seek discovery in this proceeding; (ii) has failed to satisfy its obligation under Ohio Adm.Code 4901-1-23(C)(1)-(3) to exhaust reasonable means of resolving differences before filing a motion to compel; and (iii) seeks information and documents through its discovery requests that are outside the scope of this proceeding.

* 1. **NOPEC Has No Right to Seek Discovery of Hartree**

This Commission has previously determined that when a party’s “activities have no bearing on the subject of” the proceeding, the Commission will prohibit discovery of such party.[[7]](#footnote-7) In its September 7, 2022 Entry, the Commission identified numerous reasons as to why NOPEC’s CRES certificate may be suspended, notably:

1. The potentially adverse effects to wholesale generation providers and SSO customers caused by NOPEC’s premature drop of customers and NOPEC’s proposal to re-enroll those same customers “at some undefined point in the future when NOPEC deems that economic conditions are favorable[;]”
2. The lack of explanation for NOPEC’s decision to prematurely return customers to the SSO and for “the decision of NOPEC and NextEra to not match the SSO price, and thus follow through on their prior representations” of energy savings to customers; and
3. Evidence of a “potential violation of NOPEC’s communities’ operations and governance plans, which do not appear to allow for the return of customers under these circumstances and require a 90-day notice to customers prior to being returned to SSO service.”[[8]](#footnote-8)

In addition to directing NOPEC to show cause to demonstrate why its CRES certificate should not be suspended, the Commission provided that “interested parties” could comment on NOPEC’s response.[[9]](#footnote-9)

The Commission’s Show Cause Order did not create a right for NOPEC to seek discovery of those parties interested in NOPEC’s response to the Show Cause Order. NOPEC’s discovery requests are the platonic ideal of the proverbial discovery “fishing expedition,” covering everything from interrogatories concerning Hartree’s “communications with Dynegy Marketing and Trade, LLC, Interstate Gas Supply, Inc., TransAlta Energy Marketing (U.S.) Inc. and/or Enel Trading North America, LLC regarding the Customer Return” to all documents concerning Hartree’s executive officers’ “decision to participate or not participate” in certain SSO auctions. [[10]](#footnote-10) Setting aside momentarily NOPEC’s presumptiveness in issuing data requests to an entity whose party status NOPEC is actively trying to thwart, NOPEC’s data requests to Hartree are fundamentally, fatally flawed because they have no bearing on the scope of the issues established in this proceeding by the Commission’s Show Cause Order. In light of these critical deficiencies, the Commission should reject NOPEC’s motion to compel.

Rejection of NOPEC’s motion to compel is consistent with Commission precedent. The facts and circumstances presented here are similar to those the Commission faced in the *Matter of the Complaint of The River Gas Company v. Halwell Limited Partnership and Geological Consultants, Inc.* (*The River Gas Company*).[[11]](#footnote-11) In that case, The River Gas Company (“River Gas”) filed a complaint with the Commission, alleging that Halwell Limited Partnership and Geological Consultants, Inc. (together, “Respondents”) were unlawfully operating as public utilities but not submitting to the Commission’s jurisdiction. In the course of that proceeding, Respondents served River Gas with a notice of deposition and request for production of documents. River Gas filed a motion with the Commission requesting that it not be required to produce the documents Respondents requested because the central issue in the proceeding was whether Respondent’s activities were subject to Commission regulation, to which River Gas’ activities were irrelevant. The Commission agreed with River Gas, finding River Gas’ “customer accounts, rate base, return on equity, balance sheet, and income or expense statements are not relevant to the inquiry of whether or not River [Gas] suffered economic harm by [R]espondents’ specific activities.”[[12]](#footnote-12) The Commission in *The River Gas Company* found that evidence concerning River Gas’ actions were not the subject of the case and that “what River [Gas] could or should have done is speculative and would not assist the trier of fact in making a determination on whether [R]espondents’ activities were lawful.”[[13]](#footnote-13) Consistent with *The River Gas Company*, the Commission should find that Hartree’s participation in Ohio’s SSO load procurement auctions is of no consequence to a determination of NOPEC’s capabilities as a CRES provider.

* 1. **NOPEC Fails to Satisfy its Burden Under Ohio Adm.Code 4901-1-23(C)**

A party may file a motion to compel discovery only after “the party seeking discovery has exhausted all other reasonable means of resolving any differences with the party or person from whom discovery is sought.”[[14]](#footnote-14) The purpose of this rule is to “minimize commission intervention in the discovery process.”[[15]](#footnote-15) This rule requires that a party seeking discovery make a good-faith effort to resolve discovery disputes before requesting Commission intervention.[[16]](#footnote-16) As support for this requirement, the Commission also requires that a “motion to compel discovery be accompanied by [a]n affidavit of counsel…setting forth the efforts which have been made to resolve any differences with the party or person from whom discovery is sought.”[[17]](#footnote-17) The party filing a motion to compel must also file a memorandum in support of the motion which states “how the information sought is relevant to the pending proceeding” and the movant’s response to objections raised by the party opposing discovery.[[18]](#footnote-18)

NOPEC has failed to satisfy the requirements of Ohio Adm.Code 4901-1-23(C) in every respect. First, NOPEC did not make a good faith effort to resolve its discovery disputes before involving the Commission. As demonstrated in Attachment B to its Motion, NOPEC gave Hartree less than 24 hours to both decide whether Hartree would execute the protective order and whether Hartree would provide “substantive responses to all of the Discovery.”[[19]](#footnote-19) Of note, in an e-mail sent at 12:13 AM on October 28, 2022, NOPEC demanded a response from Hartree on both inquiries by 6 PM that same day.[[20]](#footnote-20) As discussed in those e-mail communications with NOPEC’s counsel, Hartree was reluctant to sign a protective order that resulted from negotiations to which it was not party to, despite multiple requests to be included in those negotiations. However, after a final e-mail, in which Hartree’s counsel agreed to execute the protective order and which ended with “[w]e are happy to discuss our position further if that would be helpful[,]” NOPEC’s counsel abruptly responded: “It appears that we are at an impasse. We will file a motion to compel.”[[21]](#footnote-21)

As demonstrated in the affidavit to its own Motion, NOPEC rejected the invitation to further discussion with Hartree to attempt to resolve their discovery disputes and filed its Motion with the Commission prematurely. NOPEC’s counsel’s contumacious e-mail traffic does not constitute a good faith effort to resolve discovery disputes that arise solely due to NOPEC’s overly broad and unreasonable discovery requests. For these reasons, NOPEC’s “failure to comply with Ohio Adm.Code 4901-1-23…compel[s] a complete dismissal of [its] motion.”[[22]](#footnote-22)

* 1. **NOPEC’s Discovery Requests are Outside the Scope of this Proceeding**

Even were the Commission to find that NOPEC has the right to seek discovery of Hartree pursuant to the Commission’s Show Cause Order, the Commission should find that NOPEC’s discovery requests are well outside of the scope of this proceeding. NOPEC, through its discovery request, seeks extensive information and documentation from Hartree, including Hartree’s “every communication” with “Dynegy Marketing and Trade, LLC, Interstate Gas Supply, Inc., TransAlta Energy Marketing (U.S.) Inc. and/or Enel Trading North America, LLC regarding the Customer Return[,]” “minutes of any Hartree risk department or committee meetings” regarding certain SSO auctions, and “documents to or from Hartree’s executive officers relating to Hartree’s decision to participate or not participate in each of the SSO auctions[,]” past and future business operations, commercial decisions, internal communications regarding those decisions, and Hartree’s role in the Ohio energy market as a whole.[[23]](#footnote-23) None of these requests have any bearing on whether NOPEC’s CRES certificate should be suspended.

This Commission has denied motions to compel that seek discovery of information and materials which are beyond the scope of the proceeding and are “not imperative in a final determination of [the] matter” and “would be of no consequence to a determination of [the proceeding.]”[[24]](#footnote-24) In determining whether to grant a motion to compel discovery, “the Commission, or the attorney examiner, must determine that the information sought to be discovered is neither privileged nor irrelevant.”[[25]](#footnote-25) The Commission’s relevancy standard “has been found to be not so liberal as to allow a party to…explore matter which does not presently appear germane on the theory that it might conceivably become so.”[[26]](#footnote-26)

NOPEC’s motion to compel should be denied on the merits because it seeks to compel discovery of sweeping subjects and categories of documents which do not pertain to the Commission’s directive that NOPEC show cause to “demonstrate the managerial, technical, and financial capability to be certified as a CRES governmental aggregator.”[[27]](#footnote-27) NOPEC seeks discovery of, among other things, “[a]ll public record requests sent to any governmental entity or agency regarding NOPEC[,]” documents showing “Hartree’s decision to file a motion to intervene in the above-captioned case[,]” Hartree’s decision to participate or not participate in each SSO auction, and Hartree’s “every communication between Hartree and representatives of the PUCO, including members of its staff, regarding the Customer Return.”[[28]](#footnote-28) These interrogatories and requests for documentation are expansive inquisitions, requesting information on Hartree’s every action inside and outside of Ohio’s SSO auctions.

Nothing from the exhaustive list of information and documents that NOPEC seeks from Hartree is of consequence to the Commission’s determination as to whether NOPEC remains fit to be a certified governmental aggregator. Substantive responses to all of NOPEC’s discovery, as NOPEC’s counsel demanded Hartree produce within approximately 18 hours of its October 28, 2022 e-mail, would not provide NOPEC or the Commission with information that would allow the Commission to assess NOPEC’s technical, managerial, or financial fitness as a certified governmental aggregator. NOPEC’s discovery requests are targeted at, among other things, presumptively privileged communications between Hartree and its legal counsel (both internal and external), sensitive commercial and financial information with no bearing on activity in the Ohio electricity markets, and communications that, if they existed, would already be a matter of public record. To be clear, none of Hartree’s responses would be imperative to the Commission’s final determination of the matter. Indeed, the expansive scope of NOPEC’s requests suggests that the ultimate objective is not to adduce relevant information, but rather to disincentivize participation in this proceeding by raising the gauntlet of unduly burdensome discovery at a preliminary stage. Regardless of the intent, the facts are immovable – NOPEC’s discovery requests to Hartree have no bearing upon the scope of this proceeding. As such, this Commission should find that NOPEC’s Motion is both premature and insufficient on the merits.

1. **CONCLUSION**

For the foregoing reasons, Hartree respectfully requests that the Commission deny NOPEC’s Motion to Compel.

Dated: November 7, 2022 Respectfully submitted,

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**Willing to Accept Service by Email**

***COUNSEL FOR HARTREE PARTNERS, LP***

**CERTIFICATE OF SERVICE**

I certify that the foregoing document was filed using the Commission’s Docketing Information System and was served by electronic mail, on November 7, 2022, to the following:

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1. *See* Entry at ¶ 9, *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 (Sept. 7, 2022);Notice of Material Change, *In the Matter of the Certification of Northeast Ohio Public Energy Council as Governmental Aggregator*, Case No. 00-2317-EL-GAG (Aug. 24, 2022) (Notice); Motion for a One-Time, Limited Waiver and Request for Expedited Ruling, *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 (Aug. 26, 2022) (Motion for Waiver). [↑](#footnote-ref-1)
2. Notice at 2; Motion for Waiver at 5. [↑](#footnote-ref-2)
3. Motion for Waiver at 5 n.6. [↑](#footnote-ref-3)
4. Notice at 2-3. [↑](#footnote-ref-4)
5. Motion for Waiver. [↑](#footnote-ref-5)
6. Entry at ¶ 9, *In the Matter of the Certification of Northeast Ohio Public Energy Council as a Governmental Aggregator*, Case No. 00-2317-EL-GAG (Sept. 7, 2022) (Show Cause Order). [↑](#footnote-ref-6)
7. *In the Matter of the Complaint of The River Gas Company v. Halwell Limited Partnership and Geological Consultants, Inc.*, 1989 WL 1733878, at \*1 (Sept. 13, 1989). [↑](#footnote-ref-7)
8. Show Cause Order at ¶ 10, 11. [↑](#footnote-ref-8)
9. *Id.* at ¶ 13. [↑](#footnote-ref-9)
10. NOPEC’s First Set of Discovery at 14, 16. [↑](#footnote-ref-10)
11. 1989 WL 1733878 (Sept. 13, 1989). [↑](#footnote-ref-11)
12. *Id.* at \*1. [↑](#footnote-ref-12)
13. *Id.* [↑](#footnote-ref-13)
14. Ohio Adm.Code 4901-1-23(C). [↑](#footnote-ref-14)
15. Ohio Adm.Code 4901-1-16(A). [↑](#footnote-ref-15)
16. *See In the Matter of the Rev. of the Political and Charitable Spending by Ohio Edison Co., the Cleveland Elec. Illuminating Co., and the Toledo Edison Co.*, 2020 WL 7353459, at \*2 (Dec. 10, 2020) (finding that a single conversation “does not meet the prerequisite good faith effort needed prior to the filing of a motion to compel and prematurely requests the Commission’s intervention in [the] discovery dispute.”); *Cleveland Metropolitan School District v. The Cleveland Elec. Illuminating Co.*, 2020 WL 5845796, at \*5 (Sept. 28, 2020) (finding that the motion to compel was “not ripe for a decision” at the time because one party was willing to continue to negotiate, and ordering the parties to “expeditiously engage in further negotiations”). [↑](#footnote-ref-16)
17. Ohio Adm.Code 4901-1-23(C)(3). [↑](#footnote-ref-17)
18. *Id.* at 4901-1-23(C)(1)(b)-(c). [↑](#footnote-ref-18)
19. Motion, Attach. B at 6 (emphasis in original). [↑](#footnote-ref-19)
20. *Id.* at 4-6. [↑](#footnote-ref-20)
21. *Id.* at 1-6. [↑](#footnote-ref-21)
22. Entry at ¶ 9, *In the Matter of the Compl. of Matt and Allison Kubitza*, Case No. 17-1435-EL-CSS (Nov. 19, 2018). [↑](#footnote-ref-22)
23. NOPEC’s First Set of Discovery at 6-14, 16. [↑](#footnote-ref-23)
24. *In the Matter of the Complaint of Ruth L. Wellman v. Ameritech Ohio*, 2002 Ohio PUC LEXIS 554, at \*2-15 (June 21, 2002); *In the Matter of the Compl. Of Allnet Comm. Services, Inc.*, 1989 WL 1735299, at \*2 (Nov. 16, 1989). [↑](#footnote-ref-24)
25. Entry at ¶ 33-35, *In re Matter of the Continuation of the Rate Freeze and Extension of the Market Development Period for the Dayton Power and Light Co., et al.*, 2003 Ohio PUC LEXIS 392 (Sept. 2, 2003). [↑](#footnote-ref-25)
26. *In the Matter of the Application of the Cleveland Elec. Illuminating Co. for Auth. To Amend and to Increase Certain of its Filed Schedules Fixing Rates and Charges for Elec. Serv.*, 1981 WL 703866, at \*1 (Jan. 14, 1981). [↑](#footnote-ref-26)
27. Show Cause Order at ¶ 10. [↑](#footnote-ref-27)
28. NOPEC’s First Set of Discovery at 14, 16, 18. [↑](#footnote-ref-28)