**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

|  |  |  |
| --- | --- | --- |
| In the Matter of the Certification of Northeast Ohio Public Energy Council as Governmental Aggregator | ))) | Case No. 00-2317-EL-GAG |
| **MEMORANDUM CONTRA OF HARTREE PARTNERS, LPTO THE INTERLOCUTORY APPEAL OF THE OFFICE OF THE OHIO CONSUMERS’ COUNSEL** |

# INTRODUCTION

The Office of the Ohio Consumers’ Counsel’s (“OCC”) interlocutory appeal of the December 9, 2022 Entry[[1]](#footnote-1) in the instant proceeding suspending automatic authorization of the Northeast Ohio Public Energy Council’s (“NOPEC”) Competitive Retail Electric Service (“CRES”) governmental aggregator certification[[2]](#footnote-2) should not be certified to, nor granted by, the Public Utilities Commission of Ohio (“Commission”). The Ohio Administrative Code narrowly defines the circumstances in which an interlocutory appeal may be certified to the Commission. The Interlocutory Appeal does not satisfy these requirements.

The Interlocutory Appeal is premised on the OCC’s position that NOPEC has merely acted to protect ratepayers, and collaterally attacks the Commission’s Show Cause Order[[3]](#footnote-3) for the same reason. The OCC’s position could not be more short-sighted or misguided. NOPEC’s actions in returning its customers to their Standard Service Offer (“SSO”) – the “Customer Return” – is what has harmed ratepayers. NOPEC automatically assigned its aggregated customers to its Standard Price Program (“SPP”), which exposed its retail customers to the volatility of the wholesale market, and then failed to ensure that its wholesale supply was reasonably priced and adequately hedged against such volatility. NOPEC engaged in the Customer Return to protect its own, and its wholesale supplier NextEra Energy Services Ohio, LLC’s, interests – not its retail customers. In fact, the OCC’s position is premised on unsupported and specious allegations of potential future harm to Ohio retail electric customers but ignores demonstrable evidence of the harms that NOPEC’s Customer Return has already inflicted on these same customers, the utilities that serve them, the Ohio retail electricity market, and its suppliers. For these reasons, the Interlocutory Appeal should be denied.[[4]](#footnote-4)

# BACKGROUND

On August 24, 2022, NOPEC informed the Commission of its unilateral decision to return all of its approximately 550,000 SPP customers to their utilities’ SSO retail electric service.[[5]](#footnote-5) NOPEC sought, and the Commission granted, waivers to expedite the process of returning NOPEC’s SPP customers to their SSO services.[[6]](#footnote-6) The Customer Return precipitated a massive, unanticipated shift of risk in the Ohio retail electricity market. This volatility triggered cascading deleterious consequences for Ohio utilities, ratepayers, wholesale suppliers, and Ohio’s retail electricity markets generally. The outcomes of SSO auctions held in October 2022, after the Customer Return, show the concrete, dollars-and-cents impact of NOPEC’s abdication of its responsibilities as a CRES governmental aggregator:

|  |  |  |  |
| --- | --- | --- | --- |
|

|  |  |
| --- | --- |
|  |  |

 |  |

Fig. 1 (Source: [FirstEnergy Ohio SSO CBP Auction Results](https://www.firstenergycbp.com/Results.aspx))



Fig. 2 (Source: [AEP Ohio SSO CBP Auction Results](https://www.aepohiocbp.com/index.cfm?s=background&p=previousResults))

As the above figures illustrate, in the immediate aftermath of the Customer Return, *clearing prices in SSO auctions**nearly doubled, while the number of rounds and participants in each auction fell by nearly half*. Reduced participation resulted in less competitive auctions and prices skyrocketed. Put plainly, there is a direct link between the Customer Return on one hand, and increased prices and decreased supplier participation in SSO auctions on the other.

In a September 7, 2022 Entry in this proceeding, the Commission found that NOPEC’s “premature” implementation of the Customer Return and its potential adverse impact on Ohio retail ratepayers, utilities, SSO suppliers, and the Ohio retail electricity market “cast doubt upon whether NOPEC continues to demonstrate the managerial, technical, and financial capability to be certified as a CRES governmental aggregator.”[[7]](#footnote-7) Accordingly, the Commission directed NOPEC to show cause why its CRES certificate should not be suspended.”[[8]](#footnote-8) NOPEC submitted its response to the Commission’s Show Cause Order on September 28, 2022. The Commission has solicited initial and reply comments from the public, which are due on January 13, 2023 and January 20, 20223, respectively.

Against this tumultuous backdrop, NOPEC filed for renewal of its CRES government aggregator certification on November 22, 2022, and, incredibly, sought automatic approval of its application pursuant to Ohio R.C. § 4928.08(b). On December 9, 2022, an Entry was issued in this proceeding suspending automatic approval of NOPEC’s renewal application, finding “good cause to suspend the automatic approval” in light of “the unique circumstances of this case and to allow sufficient time for the Commission and Staff to further consider this matter.”[[9]](#footnote-9)

# ARGUMENT

## The Interlocutory Appeal Does Not Satisfy the Requirements for Certification

The Interlocutory Appeal does not satisfy the requirements of the Ohio Administrative Code governing interlocutory appeals and, as a consequence, should not be certified to the Commission. Ohio Adm.Code § 4901-1-15 prohibits the legal director, deputy legal director, attorney examiner, or presiding hearing officer from certifying an appeal **unless**:

[H]e or she finds that the appeal presents a new or novel question of interpretation, law, or policy, or is taken from a ruling which represents a departure from past precedent and an immediate determination by the commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the commission ultimately reverse the ruling in question.[[10]](#footnote-10)

The Interlocutory Appeal does not meet these requirements for certification to the Commission.

### The December 9 Entry is Not a Departure from Past Precedent

The Attorney Examiner’s decision to suspend the automatic authorization of NOPEC’s CRES governmental aggregator certificate does not present a departure from past precedent, as the OCC asserts. As a threshold issue, the Ohio Revised Code *expressly permits suspension of the automatic authorization provision for good cause shown*.[[11]](#footnote-11) It is difficult to see how using the authority expressly granted by the Ohio Revised Code to allow the Commission further time to consider NOPEC’s CRES governmental aggregator application represents a departure from past precedent or a novel question or interpretation of law.

OCC’s claim that the December 9 Entry marks “a departure from past precedent where PUCO has routinely and timely renewed NOPEC’s governmental aggregation certificate” is incorrect. The facts are clear – the only participant in this proceeding that has departed from “past precedent” is NOPEC. By implementing the Customer Return, NOPEC deviated from its 20-year history of serving customers as a CRES governmental aggregator when it simply decided to stop serving its customers and return them (and their load requirements) to their utilities’ SSO programs. As shown above, the resulting shift of risk in the Ohio retail electricity market has yielded markedly higher SSO clearing prices and markedly lower SSO auction participation. These market forces, driven by NOPEC’s Customer Return, have harmed and will continue to harm retail ratepayers. Automatic authorization in the face of these facts would not be consistent with past precedent – it would be an abdication of the Commission’s responsibility “to ensure financial integrity and service reliability in the Ohio utility industry.”[[12]](#footnote-12)

The Commission’s Show Cause Order and the decision to suspend the automatic authorization of NOPEC’s CRES certification, when viewed against NOPEC’s recent conduct, are not departures from past precedent. Rather, these actions reflect a reasonable regulatory response – one that is explicitly provided for in the Ohio Revised Code *–* to an unprecedented event in the history of the Ohio CRES program – the Customer Return. The actions of the Commission and Attorney Examiner Addison reflect pragmatic regulation that is clearly needed to protect ratepayers from NOPEC’s actions. Granting the Interlocutory Appeal would frustrate that critical purpose.

### The OCC’s Claims of Undue Prejudice and Expense Are Unsubstantiated

The OCC fails to substantiate claims of undue prejudice and expense in the event that the Interlocutory Appeal is not granted. As a result, the Interlocutory Appeal must fail. The OCC asserts that the decision to suspend automatic authorization of NOPEC’s CRES certification will result in market uncertainty that *could* produce higher future electricity prices for FirstEnergy retail customers.[[13]](#footnote-13) The OCC offers no factual support for its allegations of hypothetical future price increases, arguing only that the December 9 Entry constitutes such extreme regulatory overreach that it will produce market uncertainty and “potentially higher electricity prices” for retail customers.[[14]](#footnote-14) Unfortunately for the OCC, unsupported allegations do not warrant the extraordinary relief sought in the Interlocutory Appeal.[[15]](#footnote-15)

## Automatic Authorization Threatens Further Harm to Retail Consumers

The OCC asserts that the Interlocutory Appeal is necessary to prevent harm to retail customers (in the form of potentially higher prices) that *may* occur if NOPEC’s CRES certificate is not automatically authorized. The OCC is wrong. In fact, the OCC’s arguments utterly ignore – and ask the Attorney Examiner (and the Commission) to ignore – that NOPEC, through its implementation of the Customer Return, has already harmed retail customers. That harm is not theoretical.

The clearing price of the first SSO auction FirstEnergy Ohio conducted after the Customer Return was nearly 100% higher than the clearing price of the prior auction.[[16]](#footnote-16) The number of registered bidders fell by nearly half – from seven (7) to eleven (11).[[17]](#footnote-17) Similar results were also seen in AEP Ohio’s first post-Customer Return SSO auction.[[18]](#footnote-18) These results establish that there *is* a participant to this proceeding that has injected uncertainty into the Ohio electricity market. That uncertainty has chased SSO suppliers from the marketplace and resulted in increased SSO prices, which translates to higher retail prices – for the very SSO service that NOPEC has improperly used as its backstop. The participant responsible for this uncertainty, however, is not the Commissioner or the Attorney Examiner – it is NOPEC.

The precise theoretical harms that the OCC is concerned *may* result from the “regulatory overreach” of the December 9 Entry *have* resulted from the Customer Return. SSO auction prices increased dramatically, and auction participation plummeted. This happened because potential SSO suppliers were uncertain about how the Customer Return would impact their potential SSO load obligations. The market is still contending with this uncertainty. Returning NOPEC to the CRES landscape without allowing the Commission the time it is expressly permitted under the Ohio Revised Code to assess NOPEC’s fitness as a CRES governmental aggregator will not resolve this uncertainty. If anything, *automatically authorizing* NOPECto return to the CRES governmental aggregator obligations it unilaterally shed to the tune of over half-a-million customers less than four months ago is likely to trigger further uncertainty and dysfunction in a market that is only now beginning to understand, and mitigate, the impact of the Customer Return.

## “Industry-Wide Generic” Proceedings Will Not Mitigate the Impact of NOPEC’s Malfeasance

The OCC suggests that the appropriate venue to assess NOPEC’s fitness as a CRES governmental aggregator is the Commission’s “often-used generic review in industry-wide cases for consumer protection.”[[19]](#footnote-19) The OCC errs yet again.

Prior to the Customer Return, NOPEC had never unilaterally discharged its obligation to competitively source electricity for its SPP customers. In the Show Cause Order, the Commission recognized the unprecedented nature of the Customer Return and found that the way in which NOPEC carried out the Customer Return raised *prima facie* concerns about NOPEC’s continued fitness as a CRES governmental aggregator. This proceeding does not present the Commission with issues of general interpretation appropriate for industry-wide review. The issue before the Commission in this proceeding is the technical, commercial, and managerial fitness of one CRES governmental aggregator – NOPEC. Auction data demonstrates that the Customer Return had an adverse impact on SSO auction clearing prices. Further, information adduced in this proceeding suggests that NOPEC contemplated using the Customer Return to its own competitive advantage. NOPEC has an obligation to demonstrate that it should be a CRES governmental aggregator in light of this information and the Commission’s stated concerns. If it cannot, it has no business being a certified CRES governmental aggregator. The appropriate forum to make this determination is not a technical, industry-wide proceeding of general application – it is the current, NOPEC-specific certification proceeding.

# CONCLUSION

 For the foregoing reasons, Hartree respectfully requests that the legal director, deputy legal director, attorney examiner, or presiding hearing officer not certify the Interlocutory Appeal. If the Interlocutory Appeal is certified, Hartree respectfully requests that the Commission deny the Interlocutory Appeal and continue to suspend certification of NOPEC as a CRES governmental aggregator until NOPEC has demonstrated that it possesses the technical, commercial, and managerial capabilities to be certified as a CRES governmental aggregator.

Dated: December 19, 2022 Respectfully submitted,

|  |  |
| --- | --- |
|   | /s/ **\_\_Michael D. Dortch\_\_\_\_\_\_\_\_\_\_\_\_\_\_**Michael D. Dortch (0043897), Counsel of RecordJustin M. Dortch 0090048)Richard R. Parsons (0082270)Kravitz, Brown & Dortch, LLC65 East State StreetSuite 200Columbus, Ohio 43215Tel: 614.464.2000Fax: 614.464.20023Email: mdortch@kravitzllc.com  Jdortch@kravitzllc.com  rparsons@kravitzllc.com /s/**\_\_Michael A. Yuffee**  (by MDD, w/ permission)\_\_\_\_\_\_Michael A. Yuffee PHV# 26036-2022Ryan Norfolk PHV# 26248-2022Baker Botts, L.L.P.700 K Street, NWWashington DC 20001Tel: 202.639.1132Fax: 202.585.1013Email: michael.yuffee@bakerbotts.com  ryan.norfolk@bakerbotts.com |

**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 December 19, 2022, to the following:

|  |  |
| --- | --- |
| Dane StinsonDevin D. ParramBricker & Eckler, LLP100 S. Third StreetColumbus, Ohio 43215 dstinson@bricker.comdparram@bricker.com  | Steven T. NourseAEP Service Corporation1 Riverside PlazaColumbus, Ohio 43215stnourse@aep.com  |
| Brian KnipeFirstEnergy Corp.76 S. Main Street Akron, Ohio 44308bknipe@firstenergycorp.com  | Larry SauerOhio Consumer’s Counsel65 E. State StreetSuite 700Columbus, Ohio 43215larry.sauer@occ.ohio.gov  |
| Evan BettertonStacie CathcartIGS Energy6100 Emerald ParkwayDublin, Ohio 43016Tel: (614) 659-5000Fax: (614) 659-5073evan.betterton@igs.comstacie.cathart@igs.com  | Thomas LindgrenRhiannon PlantAssistant Ohio Attorneys GeneralPublic Utilities Section30 East Broad StreetColumbus, Ohio 43215Thomas.Lindgren@OhioAGO.govRhiannon.Plant@OhioAGO.gov |
| David ProañoJames H. RollinsonPatrick T. LewisKyle T. CuttsTaylor M. ThompsonAli I. HaqueBAKER & HOSTETLER, LLP127 Public Square, Suite 2000Cleveland, Ohio 44114dproano@bakerlaw.comjrollinson@bakerlaw.comkcutts@bakerlaw.com tathompson@bakerlaw.com ahaque@bakerlaw.com | John FinniganMaureen WillsLarry SauerOffice of the Ohio Consumers’ Counsel65 East State StreetSuite 700Columbus, Ohio 43215John.Finnigan@occ.ohio.gov Maureen.Willis@occ.ohio.gov Larry.Sauer@occ.ohio.gov  |
| Janessa GlennK&L Gates LLP2801 Via Fortuna, Suite 650Austin, Texas 78746-7568Tel: 512-482-6866Fax: 512-482-6859janessa.glenn@klgates.com  | Dona Seger-LawsonAEP Indiana Michigan110 E. Wayne St.Fort Wayne, IN 46802Dgseger-lawson@aep.com |
| Thomas M. BellishBuckeye Energy Brokers, Inc.65 East Mill StreetAkron, OH 44308tb@buckeyeenergybrokers.com  | Christine E. WatchornZachary E. WoltzFirstEnergy Service Company 100 E. Broad Street, Suite 2225 Columbus, Ohio 43215Tel: (614) 437-0183cwatchorn@firstenergycorp.com zwoltz@firstenergycorp.com  |
| Michael R. GladmanShalini B. GoyalMargaret M. DenglerJones Day325 John H. McConnell Blvd., Suite 600Columbus, Ohio 43215Tel: (614) 469-3939Fax: (614) 461-4198mrgladman@jonesday.com sgoyal@jonesday.com mdengler@jonesday.com  | Ryan A. DoringoJones DayNorth Point901 Lakeside AvenueCleveland, Ohio 44114Tel: (216) 586-3939Fax: (216) 579-0212radoringo@jonesday.com |
|  | Respectfully Submitted,/s/ Michael D.Dortch Michael D. Dortch  |

1. *See* Entry of December 9, 2022 at ¶ 23 (“December 9 Entry”). [↑](#footnote-ref-1)
2. Interlocutory Appeal, Request for Certification to the PUCO Commissioners and Application for Review by the Office of the Ohio Consumer’s Counsel (filed Dec. 14, 2022) (“Interlocutory Appeal”). [↑](#footnote-ref-2)
3. Entry of September 7, 2022 (“Show Cause Order”). [↑](#footnote-ref-3)
4. NOPEC submits this memorandum contra to the Interlocutory Appeal in accordance with OAC R. 4901-1-15(D). [↑](#footnote-ref-4)
5. *See* NOPEC Notice of Material Change at 1. [↑](#footnote-ref-5)
6. *See* December 9 Entry at ¶ 8. [↑](#footnote-ref-6)
7. Show Cause Order at ¶ 10. [↑](#footnote-ref-7)
8. *Id.* [↑](#footnote-ref-8)
9. December 9 Entry at ¶ 23. [↑](#footnote-ref-9)
10. Ohio Adm.Code 4901-1-15(B). [↑](#footnote-ref-10)
11. Ohio R.C. 4928.08(b). [↑](#footnote-ref-11)
12. [PUCO Mission and Commitments | Public Utilities Commission of Ohio](https://puco.ohio.gov/about-us/resources/mission-and-commitments). [↑](#footnote-ref-12)
13. Interlocutory Appeal, Memorandum in Support at 1. [↑](#footnote-ref-13)
14. Interlocutory Appeal at 4. [↑](#footnote-ref-14)
15. *See In the Matter of the Complaint of Ohio Power Co. v. Nationwide Energy Partners, LLC*, Entry at ¶ 54, Case No. 21-990-EL-CSS (July 27, 2022) (denying an interlocutory appeal filed by the OCC because the OCC’s alleged interests were only *potential* interests dependent on a determination that the Commission may never reach in the proceeding; thus, the Commission found that “the interests advocated by OCC in its … interlocutory appeal are, at best, premature.”). [↑](#footnote-ref-15)
16. *See supra*, Fig. 1. [↑](#footnote-ref-16)
17. *Id.* [↑](#footnote-ref-17)
18. *See supra*, Fig. 2. [↑](#footnote-ref-18)
19. Interlocutory Appeal at 5. [↑](#footnote-ref-19)