

**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Certification of	)	Case No. 00-2317-EL-GAG
Northeast Ohio Public Energy Council as	)	
Governmental Aggregator	)	<b><u>Expedited Treatment</u></b>
	)	<b><u>Requested</u></b>

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**MOTION TO INTERVENE BY DYNEGY MARKETING AND TRADE, LLC**

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Pursuant to R.C. 4903.221 and Ohio Adm.Code 4901-1-11, Dynegy Marketing and Trade, LLC (“Dynegy Marketing & Trade”), moves to intervene in the above-referenced proceeding to address matters described in the Notice of Material Change to Business Operations (the “Notice”) filed by the Northeast Ohio Public Energy Council (“NOPEC”) on August 24, 2022.<sup>1</sup> Dynegy Marketing & Trade respectfully submits that it has a real and substantial interest in these issues raised by NOPEC in its Notice, and that Dynegy Marketing & Trade is so situated that the disposition of the proceeding without its participation may, as a practical matter, impair or impede its ability to protect that interest. Dynegy Marketing & Trade further submits that its participation in the proceeding will not cause undue delay, will not unjustly prejudice any existing party, and will meaningfully contribute to the development of the record. Dynegy Marketing & Trade’s interests will not be adequately represented by other parties to the proceeding, and therefore, Dynegy Marketing & Trade should be entitled to intervene.

There is a limited window of time—a matter of days—until NOPEC begins to carry out the steps outlined in the Notice. In light of the deleterious effects NOPEC’s intended plan will have on Dynegy Marketing & Trade and the entire Ohio electricity market, Dynegy Marketing & Trade respectfully requests that this motion to intervene be considered on an expedited basis.

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<sup>1</sup> 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).

A memorandum in support of this motion is attached.

Dated: August 31, 2022

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE BY DYNEGY  
MARKETING AND TRADE, LLC**

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**I. INTRODUCTION**

The Northeast Ohio Public Energy Council (“NOPEC”) currently serves well over half a million accounts in Ohio through competitive electric supply agreements with NextEra Energy Services Ohio, LLC (“NextEra”).<sup>2</sup> NOPEC now intends to return its Standard Price Program customers—approximately 550,000 in total—to the standard service offer (“SSO”) in the service territories of several Ohio electric distribution utilities (“EDUs”): the Cleveland Electric Illuminating Company (“CEI”), Ohio Edison Company (“Ohio Edison”), and Ohio Power Company (“AEP Ohio”). This change is scheduled to occur as NOPEC customers’ next meter-read date in the month of September.

This planned load shift will have significant and deleterious effects on Dynegy Marketing and Trade, LLC (“Dynegy Marketing & Trade”) and on the wider Ohio electricity market. The planned load shift is also unlawful. Dynegy Marketing & Trade seeks to intervene in this proceeding to defend its substantial interest in preventing the destabilization of the competitive electricity market and to counter NOPEC’s abuse of the aggregation load rules in Ohio—NOPEC seeks to benefit from the drop of most of its customers to default service while

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<sup>2</sup> See NOPEC 2021 Annual Report, 2, [https://www.nopec.org/media/g45jcv4i/21nop46\\_2021annualrpt\\_85x85\\_r8\\_web.pdf](https://www.nopec.org/media/g45jcv4i/21nop46_2021annualrpt_85x85_r8_web.pdf).

disregarding its own aggregation rules and Ohio law. In order to ensure that the Commission is fully and promptly briefed on these important issues, Dynegy Marketing & Trade respectfully requests that its motion to intervene be considered and granted on an expedited basis.

## II. 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 Adm.Code 4901-1-11(A). The 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 the full development and equitable resolution of the factual issues.
- 5) The extent to which the person's interest is represented by existing parties.

Ohio Adm.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, 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 Adm.Code 4901-1-12(C). If moving party does not certify that the other parties in the case consent to expedited consideration, other parties may file a memorandum in opposition to the motion within seven days. *See id.*

### **III. LAW AND ARGUMENT**

All of the relevant factors support Dynegy Marketing & Trade’s motion to intervene here. The motion should also be granted on an expedited basis given that NOPEC intends to begin dropping customers back to the EDUs’ SSO within the next month. Unless Dynegy Marketing & Trade is permitted to intervene in a timely fashion, Dynegy Marketing & Trade will be unable to protect its substantial interests or to provide the Commission with the benefit of meaningful briefing and argument on the weighty issues raised by NOPEC’s planned course of action before NOPEC begins taking steps that will cause significant harm to the functioning of the Ohio electricity market.

#### **1. The Nature and Extent of Dynegy Marketing & Trade’s Interest.**

Dynegy Marketing & Trade is an energy trading and wholesale energy supplier. Dynegy Marketing & Trade is a regular participant in the SSO load auctions for all of the EDUs in Ohio, including the EDUs—CEI, Ohio Edison, and AEP Ohio—whose service territories contain NOPEC Standard Price Program customers. As a result, Dynegy Marketing & Trade is routinely responsible for supplying a substantial portion of the SSO load in Ohio. Therefore, NOPEC’s plan to shift upwards of half a million customers from competitive supply through NextEra to the EDUs’ SSO will have a material impact on Dynegy Marketing & Trade, which submitted winning

bids for 32 out of 100 tranches of SSO load supply for FirstEnergy, and 21 out of 100 tranches for AEP Ohio, for the delivery period running from June 1, 2022 to May 31, 2023.

In this case, NOPEC’s proposed course of action will result in enormous numbers of Ohio consumers reverting to their EDUs’ SSO. Dynegy Marketing & Trade will be responsible for ensuring that these customers are adequately supplied with electricity, at far higher cost than Dynegy Marketing & Trade could have reasonably anticipated. Thus, the manner in which NOPEC intends to move its customers, or a substantial portion of them, to the SSO will have a material impact on Dynegy Marketing & Trade and threatens chaos in the electricity market in Ohio. These market realities demonstrate that Dynegy Marketing & Trade unquestionably has a “real and direct interest” in this proceeding and in NOPEC’s future activities as a CRES governmental aggregator. *See Entry, In the Matter of the Complaint of Ohio Power Company v. Nationwide Energy Partners, LLC*, Case No. 21-990-EL-CSS, ¶ 54 (Jul. 27, 2022).

## **2. Dynegy Marketing & Trade’s Legal Position and Its Relation to the Merits.**

The repercussions of NOPEC’s plans are immense. That is because, among other things, this massive—and arguably anti-competitive and unlawful—load shift will create significant ripple effects in the wholesale market which surely will threaten future SSO load supply auctions, undermine the competitive supply model by treating binding supply contracts as optional, and create a dangerous precedent for other Ohio aggregators. Fundamentally, NOPEC is improperly manipulating the aggregation load market in Ohio by profiting from the drop of a majority of its customers to default service, while not complying with its own aggregation rules and Ohio law.

Accordingly, Dynegy Marketing & Trade intends to seek a stay of thirty (30) days of NOPEC’s planned drop of customers to the EDUs’ SSO so that the Commission will have the ability to examine NOPEC’s compliance with the rules governing CRES governmental

aggregators and CRES suppliers, the state policies in R.C. 4928.02 that govern and inform Ohio's competitive market, and any other relevant source of law. In particular, Dynegy Marketing & Trade intends to ask the Commission to investigate NOPEC's certification as a CRES governmental aggregator, given that NOPEC is under an obligation not to alter its "operation and governance plan in any way that materially affects the customers of the aggregation without first providing notice to all affected customers and providing these customers the opportunity to opt out of the aggregation according to the procedures established for the initial opt-out disclosure notice set forth in rule 4901:1-21-17 of the Administrative Code." Ohio Adm.Code 4901:1-21-16(D).

Dynegy Marketing & Trade's filings in this case will also address numerous other issues created by NOPEC's planned load shift. Specifically, Dynegy Marketing & Trade contends that the SSO load auction system will be significantly disrupted by NOPEC's actions by disincentivizing bidders to participate in an electricity market being manipulated by NOPEC's abusive behavior, which will harm all Ohio customers in the long run. Dynegy Marketing & Trade will also highlight issues pertaining to the Federal Energy Regulatory Commission ("FERC")—namely, that this type of mass migration to the EDUs' SSO may infringe on FERC's exclusive jurisdiction over the rates, terms, and conditions of wholesale sales, and that the rates Dynegy Marketing & Trade and other SSO suppliers would be compelled to supply new customers at is not a "market based" rate as to such new customers and therefore is not a rate that has been authorized by FERC. Finally, Dynegy Marketing & Trade will draw upon decisions by public utility commission decisions in other states, where applicable, to inform the Commission on the best path forward. All of these issues are directly relevant to the permissibility of NOPEC's intended actions, and NOPEC's current and future fitness to provide residential electric service.

Dynegy Marketing & Trade respectfully submits that the Commission should allow it the opportunity to present them.

**3. Dynegy Marketing & Trade’s Participation Will Not Cause Undue Delay.**

Dynegy Marketing & Trade’s participation will not unduly prolong or delay these proceedings. While NOPEC has asserted that no hearing is necessary on the ground that this material change “will not adversely affect its customers or its fitness to provide service,”<sup>3</sup> Dynegy Marketing & Trade respectfully submits that full Commission consideration of this matter is required, and that although a 30-day stay paired with an expedited hearing schedule will cause some delay, such delay is not undue. Far from it. In fact, Dynegy Marketing & Trade’s participation in and of itself will not prolong or delay this proceeding at all because there is no procedural schedule in place here, and the Commission is free to adopt whatever schedule it deems best to permit Dynegy Marketing & Trade and any other interested parties to address the issues raised by NOPEC in its Notice. Dynegy Marketing & Trade submits that an accelerated schedule is in order to adequately address the situation that NOPEC seems bent to creating before it is too late.

**4. Dynegy Marketing & Trade’s Participation Is in the Public Interest.**

Dynegy Marketing & Trade’s participation is in the public interest, as Dynegy Marketing & Trade has extensive experience and industry knowledge that can assist in the development of a full and complete record in this proceeding. Dynegy Marketing & Trade is a longstanding participant in the Ohio wholesale and retail electricity market and has a clear stake in the issues

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<sup>3</sup> 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, 2 (Aug. 24, 2022) (“NOPEC Notice”). NOPEC cited “O.A.C. 4901:1-21-11(A)(2)” in apparent reference to Ohio Adm.Code 4901:1-24-11(A)(2).



raised by NOPEC in its Notice. If Dynegy Marketing & Trade is not allowed to participate, the Commission will not benefit from Dynegy Marketing & Trade's briefing and argument on issues that will affect the entire Ohio electricity market and that will inevitably create problems in future SSO load auctions. It is no exaggeration to say that every Ohio consumer will be affected by NOPEC's decision.

**5. Dynegy Marketing & Trade's Interest Cannot Be Represented by Existing Parties.**

Dynegy Marketing & Trade's direct interest in the outcome of this proceeding cannot be represented by other parties. Currently, no other companies in Dynegy Marketing & Trade's position are parties in this proceeding, and NOPEC's proposed course of action is possibly unprecedented in this state. Accordingly, Dynegy Marketing & Trade should be permitted to intervene to ensure that NOPEC cannot unlawfully manipulate and significantly change the Ohio electricity market for the foreseeable future.

**6. Dynegy Marketing & Trade's Motion to Intervene Should Be Considered on an Expedited Basis.**

Given the immediate nature of the potential impact to Dynegy Marketing & Trade and to the functioning of the wider Ohio electricity market, Dynegy Marketing & Trade should be allowed to intervene in this proceeding on an expedited basis. Per its August 24 Notice, NOPEC intends to begin dropping customers—more than half a million of them—from competitive supply to the SSO within the next month. Thus, the normal briefing schedule that would attach to this motion under Ohio Adm.Code 4901-1-12(B) is not viable. By the time that reply memoranda would be submitted in response to this motion under the normal briefing schedule, NOPEC would likely already be in the process of dropping customers to the SSO. At a minimum, notice of NOPEC's drops would likely have gone out to customers. Thus, it is imperative that the

Commission allow Dynegy Marketing & Trade and any other interested parties to intervene in this proceeding on an expedited basis.

Moreover, given the massive scale of the load shift that NOPEC is planning, it is likely that other parties will seek to intervene in this proceeding and/or open parallel proceedings before the Commission. Dynegy Marketing & Trade submits that the Commission should consider all such requests in conjunction with one another, and that a consolidated—and accelerated—procedural schedule will best allow the Commission to protect the interests of all Ohio stakeholders. At a minimum, Dynegy Marketing & Trade’s motion to intervene should be considered as soon as is practicable after the submission of any memorandum in opposition.

#### IV. CONCLUSION

For the foregoing reasons, Dynegy Marketing & Trade respectfully requests that the Commission grant this motion and permit Dynegy Marketing & Trade to intervene in this proceeding on an expedited basis.

Dated: August 31, 2022

Respectfully submitted,

*/s/ David F. Proaño*

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## CERTIFICATE OF SERVICE

I certify on this 31st day of August, 2022, that the foregoing document was filed using the Commission's Docketing Information System and was served by electronic mail and U.S. mail on the following:

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Summary: Motion to Intervene electronically filed by Mr. David F. Proano on behalf  
of Dynegy Marketing and Trade, LLC