

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Certification of)	
Northeast Ohio Public Energy Council as)	Case No. 00-2317-EL-GAG
Governmental Aggregator.)	
)	

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

I. INTRODUCTION

Pursuant to Ohio Administrative Code (O.A.C.) 4901-1-12(B)(1), Northeast Ohio Public Energy Council (“NOPEC”) requests that the Public Utilities Commission of Ohio (“PUCO” or “Commission”) deny the Motion to Intervene by Dynegy Marketing and Trade, LLC (“Dynegy”) in the above-captioned certification case.

Dynegy seeks intervention solely to “address matters described in the Notice of Material Change to Business Operations that NOPEC filed in this docket on August 24, 2022.”¹ Dynegy seeks to prevent the return of certain NOPEC governmental aggregation customers to their electric distribution utilities’ standard service offer (“SSO”), as noticed in NOPEC’s filing. Dynegy also requests that the PUCO open an investigation into NOPEC. Dynegy claims, without legal or factual support, that it is unlawful for governmental aggregation customers to return to the SSO in order to benefit from the SSO’s lower-priced electricity, even though Dynegy’s sister company encourages its customer to return for that very reason.²

¹ Dynegy Motion to Intervene at 1.

² Dynegy is part of the same Vistra Corp. family of companies as NOPEC’s direct competitor—Dynegy Energy Services (East), LLC f/k/a Duke Energy Retail Sales, LLC See Exhibit 21.1 to Vistra Corp.’s Form 10-K for fiscal year ending December 31, 2021, and including both Competitor and Dynegy Energy Services (East), LLC as “Significant Subsidiaries of Vistra Corp.” See <https://app.quotemedia.com/data/downloadFiling?webmasterId=101533&ref=116492043&type=PDF&symbol=VST&companyName=Vistra+Corp.&formType=10-K&dateFiled=2022-02-25&CK=1692819>.

Dynegy's sister company is NOPEC's direct competitor in the governmental aggregation space, and provides competitive retail electric supply to nearly 120 communities in Ohio participating in governmental aggregations.³ In the opt-out material provided to its customers, Dynegy's sister company includes the following response to a frequently asked question:⁴

What if my local utility company's rate decreases?

If at any time during the term of your Agreement the local utility company's rates fall lower than the Dynegy price, you will have the option to return to the utility, your local electric company, without penalty.

Dynegy has absolutely no qualms about its sister company returning an estimated 35,000 customers to the SSO so far this year from about 13 different governmental aggregations. It only has qualms if its sister company's direct competitor lawfully seeks to return some of its customers.

In its Motion to Intervene, Dynegy describes itself as an "energy trading and wholesale energy supplier" that is a "regular participant in the SSO load auctions for all of the EDUs in Ohio" and "routinely responsible for supplying a substantial portion of the SSO load in Ohio."⁵ Dynegy admits that it currently supplies 32% of the SSO load in FirstEnergy's service territories.⁶ Dynegy's sole concern is protecting its financial interest as an SSO supplier in FirstEnergy's service territories – namely that it might lose money if NOPEC returns customers to the SSO as planned. Dynegy admits this, stating it "will be responsible for ensuring that these customers are

³ <https://www.dynegy.com/municipal-aggregation/communities-we-serve/Ohio>

⁴ <https://butlertownship.com/wp-content/uploads/2021/06/Butler-Township-Montgomery-County-Dynegy-Opt-out-Package-AES-Ohio.pdf>

⁵ Dynegy Motion to Intervene at pg. 3.

⁶ *Id.* at pgs. 3-4.

adequately supplied with electricity, at far higher cost than Dynegy Marketing & Trade could have reasonably anticipated.”⁷

Interestingly, Dynegy fails to mention that as an SSO supplier, it: (i) is contractually obligated to supply a certain percentage (32% exactly) of FirstEnergy’s SSO load on a firm basis;⁸ (ii) knows FirstEnergy’s SSO load can and will fluctuate during the relevant delivery period depending on the number of shopping customers; and (iii) contractually acknowledged that the quantity of SSO supply that Dynegy is obligated to deliver is determined by FirstEnergy’s SSO load, “which may be different from the amount indicated in the Solicitation.”⁹ Emphasis added. In other words, Dynegy accepted the business risk of serving more SSO customers than expected when it bid into the SSO auction and signed FirstEnergy’s SSO Supply Agreement. Dynegy is now attempting to shirk its contractual responsibilities as an SSO supplier by attempting to prevent NOPEC from returning customers to the SSO. This anti-consumer gamesmanship by Dynegy, if successful, would undeniably result in as many as 550,000 Ohio electric consumers paying higher prices for electric generation service solely to pad Dynegy’s profit margin.

Dynegy’s scheme in filing its Complaint case and this motion to intervene is two-fold: (1) to shirk its binding obligation to provide electric supply at auction prices to NOPEC’s customers returning to the SSO,¹⁰ and (2) to gain a competitive advantage for its sister corporation in the governmental aggregation marketplace in Ohio, by getting NOPEC out of the picture. Dynegy’s attempt to achieve its goals by attempting to intervene in the Notice of Change is inept, at best.

⁷ *Id.* at 4.

⁸ FirstEnergy Master SSO Supply Agreement (“SSO Supply Agreement”), ¶ 2.1(a). See https://www.firstenergycbp.com/Portals/0/SupplierDocuments/Master_SSO_Supply_Agreement_20160810.pdf

⁹ SSO Supply Agreement, ¶ 2.1(b). The SSO Supply Agreement defined “Solicitation” as “the competitive bidding process by which the counterparty, quantity, pricing and other terms of this Agreement are established.” (emphasis added).

¹⁰ SSO Supply Agreement”, ¶ 2.1(a).

NOPEC's mere filing of a Notice of Material Change in this docket does not convey intervention rights upon Dynegy because the filing does not trigger a "quasi-judicial proceeding." *Ohio Domestic Violence Network v. Pub. Utilities Comm.*, 1994-Ohio-165, 70 Ohio St. 3d 311, 315, 638 N.E.2d 1012, 1016. Therefore, Dynegy has no right of intervention under R.C. 4903.221.

To the extent that PUCO wishes to entertain Dynegy's baseless allegations, (which it should not do), they should be considered in Dynegy's complaint case (Case No. 22-0817-EL-CSS) in the unlikely event reasonable grounds for that complaint are found under R.C. 4905.26.

II. LAW AND ARGUMENT

As set forth below, Dynegy fails to satisfy the PUCO's long-standing criteria for intervention as set forth in O.A.C. 4901-1-11.

A. Dynegy does not demonstrated a real and substantial interest to intervene in this certification case.

R.C. 4903.221 provides individuals and entities who "may be adversely affected by a [PUCO] proceeding" the right to "intervene in such proceeding." (Emphasis added) The Ohio Supreme Court has held that R.C. 4903.221 "clearly contemplates intervention in quasi-judicial proceedings, characterized by notice, hearing, and the making of an evidentiary record." *Ohio Domestic Violence Network v. Pub. Utilities Comm.*, 1994-Ohio-165, 70 Ohio St. 3d 311, 315, 638 N.E.2d 1012, 1016.

The impetus behind Dynegy's Motion to Intervene was NOPEC's filing of its Notice of Material Change regarding NOPEC's return of Standard Program Price customers to the SSO. NOPEC filed this notice pursuant to O.A.C. 4901:1-24-11(A)(1), which required NOPEC to file the notice in its initial certification case. The mere filing a notice of material change in this case does not trigger a "quasi-judicial proceeding" that creates a right to intervention. A right to intervene due to filing a notice of material change would attach only if the PUCO provides notice

and an opportunity for a hearing under O.A.C. 4901:1-24-11(A)(2). Even then, the issue would be limited to whether NOPEC continues to have the ability to provide service as a result of the change in its operations, which it clearly does. The issue would not be whether customers can return to the SSO. The PUCO's rules do not prevent the return, the SSO agreements that bind Dynegy require it to serve its share of all returning SSO load, and even Dynegy's sister company recognizes Dynegy's service obligation. NOPEC's Notice of Material Change is just that—a notice. It does not trigger a quasi-judicial proceeding or a right to intervene.

The PUCO has denied motions to intervene in dockets where no hearing was held or required because the dockets did not constitute “quasi-judicial proceedings”. *In the Matter of the Commission's Promulgation of Rules for Competitive Retail Natural Gas Service and its Providers Pursuant to Chapter 4929, Revised Code*, Case No. 01-1371-GA-ORD, et al., Second Finding and Order at pp. 3-4 (May 14, 2003). In addition, the PUCO previously refused to expand the definition of “proceeding” to include “any filing, hearing, investigation, inquiry, or rulemaking which the Commission is required or permitted to make, hold, or rule upon”. *In Re Rev. of Chapters 4901-1, 4901-3, & 4901-9 of Ohio Adm. Code*, Case No.06-685-AU-ORD, Finding and Order at ¶ 7 (Dec. 6, 2006). The PUCO rejected this proposed definition of “proceeding” because it would mean “any interested person would have the right to intervene, conduct discovery, and present evidence in any Commission case” *Id.* at ¶ 9. There is not right to intervene in “any filing,” and Dynegy certainly does not have that right in a purely ministerial filing.

PUCO and Ohio Supreme Court precedent demonstrate that NOPEC's filing a notice of material change does not create a right of intervention. As such, Dynegy's Motion to Intervene should be denied.

B. The legal positions Dynegy intends to advance are not related to the merits of a proceeding, because there are not merits to be considered in a notice filing.

Dynegy's Motion to Intervene demonstrates that it plans to use this docket to:

- accuse NOPEC (without evidence) of “anti-competitive” behavior and “manipulating the aggregation load market”;
- request a PUCO-ordered investigation into the PUCO's rules regarding governmental aggregators and CRES suppliers;
- request that the PUCO investigate NOPEC's certification as a CRES governmental aggregator;
- raise issues regarding whether NOPEC's decision to return customers to the SSO infringes on Federal Energy Regulatory Commission's (“FERC”) jurisdiction; and
- Request a broad investigation regarding the current structure of the Ohio SSO auction system.¹¹

As its Motion to Intervene clearly shows, Dynegy intends to inappropriately use the simple Notice of Material Change as a platform for litigating a wide range of issues. These issues do not go the merits of a case, because there are no justiciable issues for the Commission to determine on a purely ministerial notice filing. The PUCO should not allow Dynegy to grossly misuse the intervention process to meet Dynegy's self-serving financial goals as an SSO supplier. Nor should the PUCO allow Dynegy to use this proceeding to attack NOPEC for the purpose of benefiting Dynegy's sister company, Dynegy Energy Services, a direct competitor of NOPEC.

C. Dynegy's intervention would unduly delay NOPEC's customers' return to SSO service.

Dynegy's primary goal in seeking intervention is delaying (or completely preventing) NOPEC's return of customers to the SSO. This is undeniable. If Dynegy achieves its goal, customers will be harmed. This too is undeniable, which makes Dynegy's action all the more

¹¹ Dynegy's Motion to Intervene at pgs. 5-6.

contemptible. Yet, Dynegy aggressively seeks intervention in this to cause delay without a care about the numerous Standard Program Price customers who will be negatively impacted by the delay.

Although Dynegy claims a delay is justified, Dynegy's sole concern in this case is protecting its profits as an SSO supplier, and promoting those of its sister company that competes directly with NOPEC. Intervention should not be granted to permit Dynegy a forum to attempt to achieve its self-serving goals and, in the process, delay meaningful benefits to 550,000 Ohio electric consumers.

D. Dynegy will not contribute to an equitable resolution of factual issues.

Dynegy does not have a real and direct interest in this docket. As discussed above, there are no factual issues to resolve in this ministerial notice filing. The broad issues Dynegy intends to raise are simply irrelevant and intervention should be denied.

E. Dynegy's purported interests cannot be protected in this docket.

Dynegy claims it has an interest in NOPEC's plan to return Standard Program Price customers to the SSO. NOPEC's Notice of Material Change filed in this docket on August 26, 2022, was a ministerial notice filing. It presents no justiciable issue or interests and Dynegy has nothing to protect. It is apparent from Dynegy's various pleadings that Dynegy intends to call into question the SSO supply structure in Ohio. In addition, it is clear that Dynegy intends to engage in frivolous litigation against NOPEC in order to benefit Dynegy Energy Services—a direct competitor of NOPEC. The PUCO should not allow Dynegy to misuse the intervention process in this case and advance its scheme to advance its self-serving interests while preventing 550,000 Ohio consumers from benefitting from lower electricity prices.

To the extent that PUCO wishes to entertain Dynegy's baseless allegations, (which it should not do), they should be considered in Dynegy's complaint case (Case No. 22-0817-EL-CSS) in the unlikely event reasonable grounds are found under R.C. 4905.26.

III. CONCLUSION

For the foregoing reasons, the PUCO should deny Dynegy's Motion to Intervene in this docket. The ministerial Notice has no justiciable issues and does not trigger a quasi-judicial proceeding in which intervention is permissible.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Memorandum Contra Dynegey's Motion to Intervene was served upon the persons listed below by electronic transmission this 7th day of September 2022.



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Summary: Memorandum in Opposition to Motion to Intervene by Dynegy Marketing and Trade, LLC electronically filed by Teresa Orahood on behalf of Dane Stinson