

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**MEMORANDUM CONTRA DYNEGY MARKETING AND TRADE, LLC’S  
MOTION FOR LEAVE TO FILE REPLY MEMORANDUM INSTANTER  
IN SUPPORT OF MOTION TO ACCELERATE DISCOVERY AND  
SCHEDULING OF EVIDENTIARY HEARING**

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**I. INTRODUCTION**

Dynegy Marketing and Trade, LLC’s (“Dynegy”) Motion for Leave is yet another attempt by a vexatious litigator to harass the Northeast Ohio Public Energy Council (“NOPEC”) and misuse the Public Utilities Commission of Ohio’s (“PUCO” or “Commission”) discovery process to harm a competitor. Each pleading Dynegy files in this case is more evidence that Dynegy is doing the bidding of its sister company—Dynegy Energy Services (East), LLC (“DESE”)—a direct competitor of NOPEC. DESE provides electric supply to nearly 120 communities in Ohio participating in governmental aggregations, and has a pecuniary interest in eliminating its major competitor, NOPEC, in Ohio.

Dynegy knew the rules when it sought expedited treatment for its Motion to Accelerate<sup>1</sup> and understood that it was relinquishing its right to file a reply brief. Dynegy’s decision to seek expedited treatment forced NOPEC to file its Memorandum Contra within seven (7) days rather than the fifteen (15) days normally afforded to parties. The PUCO’s rules explicitly forbid the

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<sup>1</sup> Memorandum in Support of Motion By Dynegy Marketing and Trade, LLC to Accelerate Discovery and Scheduling of Hearing (“Motion to Accelerate”), filed August 21, 2022.

filing of a reply when the movant seeks expedited treatment “unless specifically requested by the commission, the legal director, the deputy legal director, or the attorney examiner.” Ohio Administrative Code (“O.A.C.”) 4901-1-12(C). After forcing NOPEC to submit its Memorandum Contra on a shortened timeframe, Dynegy is now attempting to ignore the Commission’s rules and submit a duplicative and unnecessary reply. Dynegy, once again, is trying to game the PUCO’s well-established rules to continue its anti-competitive campaign against NOPEC for the sole purpose of padding the profits of its sister Ohio CRES aggregator company.<sup>2</sup>

Dynegy’s motion for leave to file its reply motion instanter should be denied and its reply memorandum stricken. The PUCO should not allow Dynegy (acting as a shill for DESE) to ignore the PUCO’S rules for the purpose of harassing NOPEC and using the discovery process to harm competitors. More importantly, none of the arguments contained in Dynegy’s proposed reply are useful in the Commission’s determination of Dynegy’s Motion to Accelerate.

## **II. ARGUMENT**

Dynegy has no right to file a reply in support of any motion for which it requested an expedited ruling under O.A.C. 4901-1-12(C). See, *e.g.*, *In re Investigation into Long-Term Sols. Concerning Disconnection of Service*, Case No. 04-1503-GE-UNC, Entry (November 23, 2004), at 9-10. See, also, *In the Matter of the Application of Black Fork Wind LLC*, Case No. 09-546-EL-BGN, Entry (July 1, 2010), at 2 (“[I]n a situation where, as here, an expedited ruling is sought, the last sentence of Rule 4906-7-12(C), O.A.C., [similar to O.A.C. 4901-1-12(C)] permits the filing of a reply memorandum only upon the request of the Board or of the ALJ.”); *Communications*

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<sup>2</sup> 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 Dynegy and DESE 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>

*Options, Inc. v. ValTech Communications*, Case No. 04-656-TP-CSS, Entry (March 25, 2005), at 2. (When the PUCO’s “rules do not provide for a reply to a memo contra” a reply memorandum filed instanter will not considered); *In re Joint Application of Northern Ohio Cellular Tel. Co., et al.*, Case No. 89-1861-RC-ATC, 1991 WL 11811217, Finding and Order (March 28, 1991), at ¶ 6 (denied motion to file a reply instanter to a reply memorandum under O.A.C. 4901-1-12); *In re Cols. Southern Power Co.*, Case No. 11-346-EL-SSO, Entry on Rehearing (January 30, 2013), at 5-6 (withdrawal of reply to memorandum contra application for rehearing because rules do not recognize the filing of replies).

To be fair, the PUCO has permitted the filing of replies under O.A.C. 4901-1-12(C) in unique circumstances to prevent prejudice and so that the PUCO is fully informed as to the merits of the issues before it. See, *e.g.*, *In re DP&L*, Case No. 16-395-EL-SSO, Entry (July 11, 2016). Dynegy’s motion satisfies neither criterion.

**A. Dynegy’s true goal in seeking discovery is to harm NOPEC and benefit NOPEC’s competitor – DESE.**

In its Motion to Accelerate, Dynegy initially claimed it needed accelerated discovery due to NOPEC’s plan to return Stand Price customers to the SSO. Dynegy claimed that time was of the essence because of the potential impact returning Standard Price customers would have on the Ohio energy markets. Despite Dynegy’s unsupported claims regarding the potential impact of returning Standard Price customers to the SSO, the PUCO granted NOPEC’s waiver in Case No. 22-806-EL-WVR, and all NOPEC Standard Price customers were dropped to their respective EDUs by September 22, 2022. These customers will be enjoying the lower SSO pricing due to NOPEC’s actions, despite the stringent and unreasonable opposition of Dynegy.

Because Standard Price customers have already been returned to their EDUs for generation service, Dynegy can no longer feign concern for Ohio energy markets or customers. Furthermore,

any purported right Dynegey's had to discovery in this case is now moot because the PUCO granted the waiver in this case. However, Dynegey has concocted new reasons why it so desperately needs to obtain discovery, which are discussed below. No matter what reason Dynegey uses for seeking discovery in this proceeding, it is apparent that Dynegey has two primary goals in this case: (1) cause as much harm to NOPEC (DESE's competitor) as possible by engaging in unwarranted and vexatious litigation and (2) misuse the PUCO discovery process to obtain highly confidential trade secret information from NOPEC and NOPEC's chosen supplier. The PUCO should see Dynegey's Motion for Leave for what it really is—another unjustified attempt to use this proceeding to eliminate NOPEC as its sister company's Ohio competitor.

**B. Dynegey will not be prejudiced if its motion to file a reply instanter is denied because Dynegey will have an opportunity to file a memorandum contra NOPEC's Motion to Stay.**

Dynegey claims that it needs to file its reply to address NOPEC's request for a stay of discovery contained within NOPEC's memorandum contra the Motion to Accelerate. Dynegey also insinuates that NOPEC was precluded from requesting a stay in its memorandum contra. Dynegey fails to cite any rule or PUCO case to support its claim. Nothing in the PUCO's rules precludes NOPEC from requesting stay while opposing a motion seeking to accelerate discovery. NOPEC's request was entirely appropriate and logical considering that: (1) the PUCO has not approved Dynegey's motion to intervene; (2) the PUCO has not issued a procedural schedule providing parties the right to discovery<sup>3</sup>; and (3) the PUCO has not established a hearing in this case.

At this premature stage in the proceeding, it is appropriate for the PUCO to stay the proceedings, and such a stay is supported by PUCO precedent. *In the Matter of the Complaint of*

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<sup>3</sup> When NOPEC filed its Memorandum Contra the Motion to Accelerate, the PUCO had yet to issue any entry regarding discovery. On September 30, 2022, in PUCO Case No. 002317-EL-GAG, the Commission issued an entry that ordering the continuation of discovery and reducing the response time to 10 calendar days until the Commission

*the Office of the Consumers' Counsel*, Case No. 84-259-EL-CSS, Entry (April 24, 1984) 1984 WL 991887, \*3 (“The Commission further finds that until such time as we have considered and acted on the respondents’ motions to dismiss and any replies submitted by OCC thereto, it is proper and reasonable to stay discovery in this proceeding.”). Furthermore, NOPEC formally filed a Motion to Stay on September 27, 2022. To the extent Dynegy opposes NOPEC’s Motion to Stay, this should be addressed in Dynegy’s memorandum contra the Motion to Stay, and not through Dynegy’s unwarranted reply which is precluded under O.A.C. 4901-1-12(C).

**B. Dynegy’s proposed reply will not provide the PUCO with information to assist in the merit determination of Dynegy’s Motion to Accelerate.**

In its Motion for Leave, Dynegy claims it is automatically entitled to expedited discovery because it filed a motion to intervene in this case. Dynegy is wrong. Although O.A.C. 4901-1-17(A) states that discovery can begin after the proceeding commences, the Commission is vested with broad discretion to manage its dockets. *Weiss v. Pub. Util. Comm.* (2000), 90 Ohio St.3d 15, 19, 734 N.E.2d 775, 780; citing *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St.2d 559, 560, 433 N.E.2d 212, 214. The Commission regularly exercises this discretion to stay discovery in proceedings until the Commission determines the appropriate scope of the proceeding. *In the Matter of the Joint Application of SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, and Ameritech Ohio for Consent and Approval of a Change of Control.*, PUCO Case No. 98-1082-TP-AMT, Entry on Rehearing, (Oct. 8, 1998). *In the Matter of the Joint Application of Cinergy Corp. on Behalf of the Cincinnati Gas & Electric Co. & Duke Energy Holding Corp. For Consent And Approval of a Change of Control of the Cincinnati Gas & Electric Company*, Case No. 05-732 et al, December 7, 2005 Order. It is completely within the

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orders otherwise. The Entry did not explicitly grant Dynegy’s Motion to Accelerate. Furthermore, the Entry did not address Dynegy’s request for rehearing, which NOPEC opposes.

Commission's discretion to resolve this proceeding without any hearing and without any discovery.

Discovery is inappropriate in this case because the PUCO has granted NOPEC's request for a waiver and Standard Price customers have been dropped to their respective EDUs. Furthermore, to the extent the PUCO consolidates these cases, discovery is entirely premature at this stage. The PUCO established a process whereby NOPEC would file a response to the show cause order. NOPEC has filed this response on September 28, 2022, and now interested parties have the opportunity to file comments and reply comments. Unless and until the PUCO determines that a hearing is necessary, the PUCO should stay all discovery. Such action is fully within the PUCO's discretion and consistent with PUCO precedent.

### **III. CONCLUSION**

Based on the foregoing, the Commission should deny Dynegy's motion to file a reply instanter and to strike its improper reply.

Respectfully submitted,



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## **CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing pleading was served upon the persons listed below by electronic transmission this 3<sup>rd</sup> day of October 2022.



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Summary: Memorandum Contra Dynegy Marketing and Trade, LLC's Motion for Leave to File Reply Memorandum Instantly in Support of Motion to Accelerate Discovery and Scheduling of Evidentiary Hearing by Northeast Ohio Public Energy Council electronically filed by Teresa Orahood on behalf of Dane Stinson