

 **FILE**

**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 :

**PUCO**

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**BUCKEYE ENERGY BROKERS, INC.'S COMMENTS REGARDING  
NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S RESPONSE TO THE  
PUCO'S SEPTEMBER 7, 2022 SHOW CAUSE ORDER**

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**I. PROCEDURAL HISTORY**

The Ohio General Assembly opened Ohio's electricity market to competition in 1999 pursuant to Senate Bill 3. In response, the Northeast Ohio Public Energy Council ("NOPEC") sought authorization in the year 2000 to operate as a government aggregator under Ohio law. The Public Utilities Commission of Ohio ("PUCO" and/or the "Commission") approved NOPEC's initial application to operate as a government aggregator, on January 5, 2001, and required that NOPEC's certification be renewed every two (2) years. NOPEC applied for its most recent renewal application on November 23, 2020. The PUCO approved NOPEC's 2020 application on January 15, 2021.

On August 24, 2022, NOPEC filed a notice of material change in this proceeding ("Material Change Notice"). NOPEC's Material Change Notice sought to immediately return its roughly 550,000 Standard Program Price customers to the customers' respective electric distribution utility's ("EDU's")<sup>1</sup> standard service offer ("SSO") service. The Material Change

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<sup>1</sup> NOPEC's customers' EDUs are: (a) the Cleveland Electric Illuminating Company ("CEI") and (b) the Ohio Edison Company ("OEC" and collectively with CEI known as "FirstEnergy").

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Notice created a tidal wave of concern from the regulated community because it proposes fundamental and illegal changes in how open energy markets operate.

In response to NOPEC's Material Change Notice, the PUCO issued a Show Cause Order on September 7, 2022 that demanded that NOPEC justify why its certificate as a government aggregator should not be suspended ("September Order"). The September Order also stated that any "interested parties may file comments regarding NOPEC's response." Pursuant to the September Order, Buckeye Energy Brokers, Inc. ("Buckeye Energy") respectfully submits the following comments to NOPEC's September 28, 2022 Response to the September Order ("NOPEC'S Response"). In addition, Buckeye Energy wishes to provide additional comments regarding NOPEC's other practices that make it unfit to continue operating as a government aggregator in the State of Ohio.

## **II. BUCKEYE ENEGRY'S COMMENTS TO NOPEC'S RESPONSE.**

### **A. THE PUCO'S PROCESS TO BECOME A GOVERNMENTAL AGGREGATOR.**

Under R.C. § 4928.08, a party must file an application to be certified as a government aggregator. That application must be approved by the PUCO. In order to be approved the application must demonstrate to the PUCO that the entity: (a) has the managerial, technical, and financial capability to operate as a government aggregator; (b) is able to provide the necessary financing required; and (c) has a plan to administer its government aggregation in a manner in which the PUCO approves. If the PUCO determines that an entity's application meets these standards, then the PUCO issues an Order granting a certificate to operate as a government aggregator in Ohio.

Once the PUCO grants a certificate to operate as a governmental aggregator, that aggregator is legally required to operate pursuant to the terms of the PUCO's approval Order and the terms approved in its application pursuant to Ohio Administrative Code ("O.A.C.") § 4901:1-21-15. R.C. § 4928.08(D) also ensures that the PUCO can suspend and/or revoke an entity's certificate if the entity: (a) fails to comply with the applicable certification standards; and/or (b) engages in anticompetitive, unfair, deceptive, or unconscionable acts or practices. NOPEC's recent actions violate both.

**B. NOPEC'S ACTIONS HAVE VIOLATED OHIO LAW AND THE PUCO'S RULES.**

NOPEC's claim that "no statute, rule or order prevents the return of customers to [First Energy's] SSOs prior to the end of an aggregation program" demonstrates that NOPEC is either: (a) so mismanaged that it does not understand the authority to operate as a government aggregator (granted to it by the PUCO); or (b) willing to being dishonest in order to provide a short term benefit to its members, regardless of the impact on the utility market. In either case, this is just another example of NOPEC demonstrating that it is unfit to remain a certified government aggregator here in Ohio.

**1. THE PLAN OF OPERATION AND GOVERNANCE DICTATES THE PROPER PROCESS IN WHICH TERMINATION OF NOPEC'S GOVERNMENT AGGREGATION PROGRAM CAN OCCUR.**

As stated earlier, the PUCO granted NOPEC the authority to operate as a government aggregator on January 15, 2021. As a condition of its certification, NOPEC was required to seek recertification every two years. The PUCO approved NOPEC's 2020 Application for recertification on January 15, 2021 ("2020 Application"). As a result, NOPEC is legally required to operate pursuant to the terms of its 2020 Application, which included NOPEC's Plan of Operation & Governance for Member Communities ("POG").

Under Section 2.4.7 of NOPEC's POG, NOPEC is permitted to terminate its aggregation program under only two situations. Those two situations are: (a) NOPEC's power supplier terminates its contract; and/or (b) at the decision of an **individual member or community** to cancel its membership in NOPEC. (Emphasis Added.) Incredibly, NOPEC **EXPRESSLY STATES** that neither of these events have occurred in its Response.<sup>2</sup> Nonetheless, it is important to discuss how the process would have worked in each instance before discussing just how grievous NOPEC's actual actions were.

a. **TERMINATION OF AGGREGATION PLAN DUE TO THE POWER SUPPLY CONTRACT BEING TERMINATED.**

NOPEC'S POG provides very little information regarding how a power supplier could terminate service with NOPEC. This is likely governed by NOPEC's contract(s) with its power supplier, NextEra Energy, Inc. ("NextEra"). It is Buckeye Energy's understanding that NOPEC has refused all discovery attempts to disclose anything regarding the NOPEC and NextEra relationship other than to: (a) state that it exists; and (b) admit that NextEra has not terminated its power supply agreement with NOPEC. The PUCO should order NOPEC to disclose this public document so that further public scrutiny and comment can be made.

b. **TERMINATION OF AGGREGATION PLAN BY INDIVIDUAL CUSTOMERS.**

The process in which an individual customer can terminate their participation is found in Section 2.4.5 of the POG. Specifically, Section 2.4.5 of the POG states that customers are permitted to withdraw from the aggregation program at the following times: (a) at the opt-out time prior to the start-up of service, (b) every two (2) years after the startup of service (without

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<sup>2</sup> See NOPEC Response at P. 15.

any penalty); and/or (c) at any other time (however the customer may be required to pay an exit fee).

First, the start-up of service began in January, 2021 under the 2020 Application. Therefore, it is clear that any individual customer that sought to leave the aggregation plan in 2022 is not using the opt-out time prior to the start-up of service.

The only two other methods of termination require individual customers to make an affirmative decision to withdraw from NOPEC's government aggregation plan under NOPEC's POG. In both, the **individual customer** must provide the necessary notice under the POG. In addition, the individual customer then may have to pay a termination and/or transfer fee based upon the timing of the termination notice under the POG.<sup>3</sup>

c. TERMINATION OF AGGREGATION PLAN BY AN ENTIRE  
GOVERNMENTAL ENTITY.

A governmental entity, such as a municipality, can also withdraw from NOPEC's government aggregation plan through any of the options provided to an individual customer. However, in order to initiate a termination, governmental entities are subject to legal requirements of their own. Specifically, a government entity takes action through a formal declaration, such as a declaration or ordinance (voted on by the governing body). Therefore, a government entity must go through its own legal processes to make its formal declaration to withdraw from NOPEC's government aggregation plan. This is the same process that the governmental entity used to enter the aggregation plan.

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<sup>3</sup> Note: NOPEC also has the authority to waive any termination and/or transfer fee under the terms and conditions of the POG.

2. NOPEC’S MATERIAL CHANGE NOTICE VIOLATES THE PLAN OF OPERATION AND GOVERNANCE THAT NOPEC FILED WITH THE PUCO AND THEREFORE VIOLATES OHIO LAW.

NOPEC filed its Material Change Notice unilaterally – a clear violation of its POG and Ohio law. In fact, not a single step under the POG was taken. Neither individual customers and/or governmental entities enrolled in the aggregation plan took the action necessary to “opt-out” of the aggregation program. Moreover, NOPEC’s Board of Directors did not even vote to take this action. Instead, NOPEC’s management asserts in its Material Change Notice solely (and incorrectly) its own belief that this action will provide NOPEC’s customers a benefit by providing cheaper energy prices. Even if true, NOPEC’s decision directly contradicts the POG. Moreover, NOPEC’s actions demonstrate that NOPEC’s management is entirely unqualified to operate a government aggregation program.

C. NOPEC IS TAKING THESE ILLEGAL ACTIONS IN ORDER TO RETAIN CUSTOMERS AS PART OF ITS 2023 AGGREGATION PLAN.

NOPEC actions were illegal and therefore should not have been taken. Yet, NOPEC took those actions anyway to “slam” its customers. NOPEC’s flawed rationale centers around either: (a) the PUCO’s legally approved method of termination was not working; and/or (b) NOPEC’s customers’ dissatisfaction would harm NOPEC’s reputation because the customers would seek more competitive governmental aggregation plans. Neither rationale is a valid justification to break Ohio’s laws.

First, NOPEC’s legally approved withdraw system was working. In fact, NOPEC’s Response indicates that the process described within its POG (described above) was being utilized by those customers more sensitive to higher rates. Specifically, NOPEC stated **individual customers and government entities** were voluntarily terminating their involvement in NOPEC’s aggregation plan. NOPEC expressly acknowledged that “a large number of

NOPEC's Standard price customers voluntarily chose to return to utility default service upon learning of the SSO's much lower price[.]" beginning in July of 2022. NOPEC even goes so far to state that over 100,000 of its customers terminated involvement in the NOPEC's aggregation program and returned to FirstEnergy's SSOs in a manner entirely consistent with the POG.

In fact, the effective rate at which customers were leaving NOPEC's aggregation plan is exactly why NOPEC engaged in its illegal activity. NOPEC originally attracted cities and townships into its aggregation program by promising "no-risk terms" and inferring that their lower prices are permanent with statements like, "For-profit energy suppliers offer low rates at first. But it never lasts." Well, neither did NOPEC's low rate offers, and at least 100,000 of its customers became so displeased when they discovered that NOPEC's promises were false that they left NOPEC's service. A customer that finds you dishonest and therefore leaves your service is not likely to return as a customer later. This is evidenced by the fact that not a single one of the 100,000 self-elected, former NOPEC customers have risen in support of NOPEC's actions in this proceeding.

NOPEC's is actually concerned that its remaining customers would follow what 100,000 customers had already discovered – NOPEC does not possess a "secret sauce" and is just as subject to the market as all other suppliers. As a result, NOPEC no doubt felt it needed to look like "it was doing something" for its customers or risk these customers participation in future aggregation plans.

A responsible and honest governmental aggregator would have sent notices to its customers encouraging them to (legally) leave its aggregation program for the SSO months ago. NOPEC could even have informed its customers that it would waive all penalties and fees if the customer decided to leave. NOPEC's Response points out that many responsible CRES

providers and/or government aggregators – competitors to NOPEC – did exactly this, in this market and other markets. NOPEC, of course, did none of these things. Thereby, mismanaging yet another situation in which NOPEC could have continued to operate legally under Ohio's laws.

**D. NOPEC'S FAILURE TO UNDERSTAND OHIO'S ENERGY MARKET SHOULD DISQUALIFY IT FROM OPERATING AS A GOVERNMENT AGGREGATOR.**

Not only is NOPEC's position illegal and self-serving, but the position is also: (1) inaccurate; and (2) is contrary to the reasons that Ohio's General Assembly created an open energy market.

**1. NOPEC'S ILLEGAL ACTIONS ONLY PROVIDED ITS CUSTOMERS SHORT TERM SAVINGS WHILE COSTING THEM, AND EVERY OTHER ENERGY USER, MORE MONEY IN THE LONG TERM.**

NOPEC took its extraordinary (and illegal) step of dumping its aggregation plan with no legal justification to provide its clients short term savings (that will likely only last 4-6 months) without any regard what that action might do to the energy market at large. NOPEC either failed to understand long term energy market or disregarded those effects if it did understand them. Either reflects NOPEC's severe mismanagement.

An open market only operates properly if everyone operates within the rules of that market. When an individual party operates outside the scope of the marketplace's rules then it: (a) creates uncertainty in the market; and (b) encourages other parties to operate in the same manner. In this case, NOPEC's abandonment of its termination rules, for a short-term savings creates fear within the market that other aggregators (and CRES providers) will later do the same. That uncertainty has a cost, and as a result, overall prices rise for every party entered into the market.



To be clear, this relatively simple market depiction is not merely hypothetical. In our real world, the mere threat of NOPEC being permitted to act outside the rules of the market has led to increased prices for the whole market. For example, FirstEnergy's next SSO auction result of 12.23 cent/kWh had an estimated 3-cent KWH premium that was expressly caused by the threat that the PUCO will permit NOPEC's behavior. In their October 4, 2022 report, CRA International stated that "[t]here were concerns related to community aggregation triggered by recent PUCO activity around NOPEC. Concerns may have increased the risk premium realized in the auction." This increase was exasperated after the PUCO granted NOPEC its waiver in Case No. 22-806-EL-WVR, which saw AEP Ohio's most recent SSO auction see an increase to \$11.998 cents/kWh and the AES Ohio auction resulted in 11.342 cents/kWh.

## 2. NOPEC'S ACTIONS ARE COUNTER-PRODUCTIVE TO THE GOALS OF SENATE BILL 3.

NOPEC's Response correctly points out that the General Assembly enacted Senate Bill 3 to open the energy market in Ohio and provide choice to Ohio's energy users. NOPEC's Material Change Notice took that choice away from NOPEC's customers. NOPEC's customers received service through NOPEC via governmental entities, such as municipalities, through an opt-out governmental aggregation. Therefore, most of its customers receive NOPEC's service because their local government made the complicated and conscious choice to join the aggregation plan.

NOPEC's mismanagement of the energy market created a situation where NOPEC's customers were paying more than customers of NOPEC's competitors. This led to customer dissatisfaction with NOPEC. Again, NOPEC admitted that over 100,000 customers voluntarily left its aggregation program. NOPEC no doubt thinks that it is exploitative for competitors to utilize NOPEC's higher prices against it in the pursuit of customers, but NOPEC also recognized

that once it lost customers then those customers would likely not return. NOPEC therefore manipulated the mass termination of the current aggregation program in order to appear to be fixing the situation for its former customers, so that it might then reclaim those customers as its own at a later date.

In general, the local governments of Ohio are not uninformed purchasers. In fact, it is a statutory requirement that a municipality must pass an ordinance to enter into a governmental aggregation program, such as NOPEC's aggregation plan. Passing an ordinance through a local government demonstrates that deliberate thought (and possibly public debate) went into joining an aggregation program.

### **III. NOPEC HAS ALWAYS FAILED TO OPERATE ITS GOVERNMENT AGGREGATION PROGRAM UNDER OHIO LAW.**

Unfortunately, Buckeye Energy is not surprised by NOPEC's most recent illegal actions because NOPEC has always failed to comply with Ohio's laws. It was NOPEC's frequent failures to comply with Ohio's laws that permitted it to grow to its most recent size. It was almost inevitable that NOPEC's electric aggregation without sufficient managerial, technical and financial capability would lead to calamitous shockwaves through the energy market. Here are just some examples of NOPEC's failures to comply with Ohio law:

- 1) **Violation of O.A.C. § 4901:1-24-13(E)(5):** Deliberately omitted information or knowingly provided false information to the PUCO. Specifically, NOPEC claims to only be a government aggregator but also claims to buy energy like a marketer on its website and other forms of media.
- 2) **Violation of O.A.C. § 4901:1-24-13(E)(6):** Providing service to a customer without being certified by the PUCO to provide such service. Specifically, NOPEC is registered as a government aggregator, yet it provides broker services to commercial customers.

- 3) **Violation of R.C. § 167.03:** Providing service to a customer without being certified by the PUCO to provide such service. Specifically, NOPEC is registered as a government aggregator, yet receives money via sales commissions from energy suppliers.
- 4) **Violation of O.A.C. § 4901:1-24-13(E)(9):** Engaged in the anticompetitive act that requires member communities to commit to an “indefinite” term to be a member of NOPEC. NOPEC also appears to have an anticompetitive exclusive arrangement with NextEra because they do not serve any other municipal aggregation in Ohio and have not responded to requests for proposals.
- 5) **Violation of O.A.C. § 4901:1-24-13(E)(11):** Engaged in fraudulent, misleading, and/or unfair practices. Specifically, NOPEC’s runs misleading ads and its website makes statements like, “We buy electricity and natural gas in bulk.” These statements are fraudulent, misleading and/or unfair practices because under R.C. § 4928.20(F) makes it clear that a government aggregator does not engage in the purchase and resale of electricity.
- 6) **Violation of O.A.C. § 4901:1-24-13(E)(11):** Engaged in fraudulent, misleading, and/or unfair practices. Specifically, NOPEC does not conduct two (2) public meetings in each municipality as required by Ohio law before implementing its governmental aggregation plan in that city.
- 7) **Violation of O.A.C. § 4901:1-24-13(E)(11):** Engaged in fraudulent, misleading, and/or unfair practices. Specifically, NOPEC does not properly announce the time and/or dates of the two (2) public meetings required to be held by Ohio law before implementing a governmental aggregation plan in a municipality.
- 8) **Violation of O.A.C. § 4901:1-24-13(E)(11):** Engaged in fraudulent, misleading, and/or unfair practices. Specifically, NOPEC does not prominently state the rates and charges of its aggregation program in its opt-out disclosures as required by R.C. § 4928.20.
- 9) **Violation of O.A.C. § 4901:1-24-13(E)(11):** Engaged in fraudulent, misleading, and/or unfair practices. Specifically, NOPEC is illegally signing service agreements on behalf local government council(s) or board(s) instead of having the governmental entity sign.
- 10) **Violation of R.C. § 167.02(E):** NOPEC’s contracts do not allow its members to leave its aggregations services with via a sixty (60) day notice.
- 11) **Violation of R.C. § 705.11:** NOPEC’s contract with NextEra was a violation of this statute because NOPEC does not allow the law director of each member municipality to review and approve the energy service agreement(s) between the municipality and NextEra.

- 12) **Violation of R.C. § 4928.01(13):** NOPEC has never qualified as a “governmental aggregator” under the terms of this statute. Specifically, NOPEC is not a “legislative authority of a municipal corporation, a board of township trustees, or a board of county commissioners.”

#### **IV. CONCLUSION**

Throughout the last twenty (20) years, NOPEC was fortunate to operate in an energy market that was favorable to virtually every market participant. During this time, NOPEC actively flaunted Ohio’s laws to unscrupulously grow as rapidly as possible. Like most entities acting outside the law, NOPEC’s shortcuts and end-arounds eventually caught up to it. NOPEC then doubled down and committed its most far-reaching illegal activity to an attempt to stay in the market. NOPEC’s actions are unforgivable. As a result, NOPEC’s authorization to operate as a governmental aggregator should be revoked by the PUCO in order to prevent this (or another) catastrophe from occurring again. The PUCO should deny a certificate to any organization that rises out of the ashes of NOPEC, because the leadership would likely remain the same. Furthermore, the PUCO should formulate new rules that would ensure that innocent customers and governmental aggregators are not penalized by such actions in the future.

Respectfully Submitted,

/s/ Thomas Bellish  
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