PUBLIC REDACTED VERSION

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

DYNEGY MARKETING AND TRADE, LLC'S COMMENTS OPPOSING THE RENEWAL OF NOPEC'S GOVERNMENTAL AGGREGATION CERTIFICATE AND ADDRESSING NOPEC'S RESPONSE TO THE COMMISSION'S SEPTEMBER 7, 2022 SHOW-CAUSE ORDER

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TABLE OF EXHIBITS

Exhibit Number	Description	Filed Under Seal?
1	Keiper Deposition Transcript	Partial
1-1	Notice of Keiper Deposition	No
1-2	NOPEC's Responses to First Set of Interrogatories	No
1-3	NOPEC Financial Statements	No
1-4	NOPEC 2022 Balance Sheet	No
1-5	NOPEC July 1, 2022 Presentation	No
1-6	NOPEC Aug. 24, 2022 Presentation	No
1-7	NOPEC Standard Program Rates	No
1-8	Master Services Agreement ("MSA")	No
1-9	MSA Annex	Yes
1-10	First Amendment to MSA	Partial
1-11	Second Amendment to MSA	Partial
1-12	Third Amendment to MSA	Partial
1-13	Fourth Amendment to MSA	Partial
1-14	08.03.22 Letter to Keiper and Krassen	Yes
1-15	08.03.22 Letter to Keiper and Krassen	Yes
1-16	04.01.22 Letter to Keiper and Krassen	Yes
1-17	06.29.22 Letter to Keiper and Krassen	Yes
1-18	NOPEC Operations and Governance Plan	No
1-19	Fifth Amendment to MSA	Partial
1-20	08.24.22 Keiper Email to NOPEC Community Member	No
1-21	NOPEC Response to Show-Cause Order	No
1-22	04.08.22 Opt-Out Notice	No
1-23	NOPEC Ads	No
2	Price Comparison Chart	No
3	NOPEC's Responses to Second Set of Interrogatories	Yes
4	Voluntary Drop Data	Yes
5	07.05.22 Email re PUCO Mtg Tomorrow	Yes
6	06.08.22 Email re NOPEC Pricing & Hedging	Yes
7	June 17 Draft Presentation	Yes
8	07.15.22 Email – Back to SSO, or Not	Yes
9	08.12.22 Email re Action Items	Yes
10	Talking Points for Aug. 24 Mtg	Yes
11	06.07.22 NOPEC Pricing and Hedging Update	Yes
12	07.05.22 Email re Aggregation Non-Renewals	Yes

I. INTRODUCTION

These comments discuss in detail, supported with over 800 pages of sworn testimony and documents from NOPEC uncovered through months of discovery, why the Commission should deny NOPEC's application to renew its PUCO Certificate as a Governmental Aggregator. NOPEC violated multiple Commission rules and its own governing documents, deceived its customers about NOPEC's Standard Program Price aggregation program, engaged in an anti-competitive campaign that devasted Ohio's standard service offer ("SSO") market, knowingly caused hundreds of millions of dollars in damages to SSO load suppliers, and then profiteered from this unscrupulous plan by secretly selling energy hedges together with NOPEC's supplier for a profit of [redacted].[1] Then, after Dynegy Marketing & Trade intervened in this case to discover the truth of these market-harming events, NOPEC lied about its motivations and what it knew about the destructive ramifications of its scheme to unilaterally drop 550,000 customers to SSO.

Under O.A.C. 4901:1-24-10(A)(2), no hearing is required to deny NOPEC's renewal application. That denial should be issued promptly to let the public and market participants know that such anticompetitive and destructive conduct will not be tolerated or brushed aside. No entity regulated by the Commission is above the law, not even the largest aggregator in the State of Ohio. In addition to denying NOPEC's renewal application, the Commission should initiate a compliance proceeding against NOPEC under O.A.C. 4901:1-23-05(A) to address NOPEC's severe misconduct and consider appropriate corrective remedies, including a potential forfeiture, restitution to NOPEC's Standard Program Price customers, and any other corrective action that the Commission finds is warranted. Appropriate remedies will demonstrate the Commission's

[1] Dynegy Marketing & Trade believes this monetary figure should be public, and has notified NOPEC accordingly. NOPEC has opposed any public disclosure of this monetary figure, arguing that it is a "trade secret" that should be sealed and thus kept hidden from its former customers and the public. *See NOPEC's Motion for Protective Order*, Filed Jan. 26, 2023, Case No. 00-2317-EL-GAG.

commitment to compliance by regulated entities, and restitution may bring some financial relief to NOPEC customers harmed by NOPEC's aggregation program.

II. SUMMARY OF COMMENTS

NOPEC's half-hearted defense of its misconduct fails to match the gravity of the moment. On August 24, 2022, NOPEC announced its plan to unilaterally drop 550,000 NOPEC consumers to SSO. NOPEC did so without their consent and in violation of its own operations and governance plan, and it did so to protect its market share after failing repeatedly to deliver on its representations of savings to its customers. Further, NOPEC proceeded with its scheme after having calculated in detail the enormous harm that its unprecedented customer drop would have on the wholesale providers who supply electricity for the SSO service, and indeed on the entire Ohio energy market.

The Commission responded to NOPEC's maneuver with understandable concern, openly questioning whether NOPEC's decision to abandon customers, rather than "match the SSO price, and thus follow through on their prior representations … [wa]s due to legal constraints or economic choices."[2] The Commission was equally troubled by "evidence of a potential violation of NOPEC's communities' operations and governance plans," which do not countenance NOPEC's unilateral conduct.[3] The Commission therefore concluded that NOPEC's "premature return of customers to SSO service and the potential failure to comply with the operations and governance plans cast doubt upon" NOPEC's continued viability as a CRES provider.[4]

These serious concerns by the Commission demanded a serious response. Yet, in its response to the Commission's Show-Cause Order, NOPEC offered virtually no evidence to justify its extraordinary decision to upend Ohio's energy markets. As its response plainly shows, NOPEC

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[2] Entry, Case No. 00-2317-EL-GAG, ¶ 10 (Sept. 7, 2022) ("Show-Cause Order").

[3] *Id.*

[4] *Id.*

hoped to skirt any meaningful review by making vague allusions to the "Russian invasion of Ukraine," "supply chain challenges," and the "other market supply and demand factors" that supposedly explained away the unprecedented customer drop.[5] And rather than supplying affidavits from its executives or officers attesting to the decision-making behind the drop, or any evidence it actually considered when making this critically important decision, NOPEC seeks to mollify the Commission through the repeated claim that the drop was just "the right thing to do" to protect consumers.[6] NOPEC was equally vague in its communications to customers, telling them that the drop would "protect your interests in the energy marketplace."[7] Indeed, just last month NOPEC CEO Chuck Keiper told a reporter at Cleveland.com that the customer drop "was the right choice" for customers, without disclosing the truth of NOPEC's plan.[8]

Dynegy Marketing & Trade has uncovered documents from NOPEC proving that protecting customers or making the "right choice" for them were not NOPEC's priorities or concerns. Rather, NOPEC was plainly motivated by self-interest and self-enrichment at the expense of other market participants. In the months leading up to its customer drop, NOPEC realized that member communities and individual customers had learned that NOPEC's prices were far above the SSO rate and were voluntarily leaving NOPEC for better rates elsewhere.[9]

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[5] Ex. 1, Deposition of Charles Keiper, Keiper Dep. Ex. 21 (NOPEC's *Response to the Show-Cause Order*, Case No. 00-2317-EL-GAG, p. 3 (Sept. 28, 2022) ("Response")). Dynegy Marketing & Trade is providing the Commission with the entirety of Mr. Keiper's deposition, and all exhibits used in that deposition, so that the Commission may evaluate the transcript and testimony on a complete record.

[6] *See id.* at 5, 10, 12, 13, 14, 19.

[7] *See* NOPEC's *Motion for One-Time, Limited Waiver*, Case No. 22-806-EL-WVR ("Waiver Motion"), Ex. 1 (proposed letter to customers describing the drop); *see also* Material Change Notice, Case No. 00-2317-EL-GAG, ¶ 10 (Aug. 24, 2022) ("Notice of Material Change").

[8] *See* What is NOPEC doing with our electric bills and how did we get here?, CLEVELAND.com (Dec. 4, 2022), *available at*, https://www.cleveland.com/business/2022/12/what-is-nopec-doing-with-our-electric-bills-and-how-did-we-get-here html (last visited Jan. 11, 2023).

[9] *See* Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), at 4-5, 9.

Stymied by this legitimate (and understandable) competition in the marketplace, NOPEC did not move to reduce its rates, as it could have done, or re-work its energy hedging plan. As a result, in the last year of the Standard Program Price aggregation program, NOPEC's customers paid ***$150 million more*** than they would have paid had NOPEC matched SSO rates. It was no wonder that NOPEC's Standard Program Price customers were leaving the aggregation program in droves.

Instead of providing rate relief for its customers, again as NOPEC had the ability to do, NOPEC and its supplier, NextEra Energy Services Ohio, LLC ("NextEra"), devised a plan to manipulate the market and eliminate customer choice by prematurely dropping NOPEC's Standard Program Price customers to SSO.[10] As NOPEC reasoned at the time, "***if evidence mounts*** that such 3rd parties' efforts are proving successful in convincing/inducing NOPEC member communities to leave NOPEC for SSO for a later return to another aggregation program, NOPEC may need to consider the possibility of acting itself to return its customers to SSO, in pre-emptive fashion."[11] NOPEC determined that if it could not compete with rates being offered to departing customers and communities, it would prevent such departures by preemptively dropping customers to the SSO, only to re-enroll them later when NOPEC could compete with the market. Incredibly, NOPEC described this behavior in a presentation from July 2022 as "unscrupulous," but then threatened to engage in it anyway to protect its market share.[12]

NOPEC fully appreciated the disastrous consequences that its unprecedented customer drop would have on Ohio's energy market. In the month before the customer drop, NOPEC deliberately calculated that its proposed drop would have a net-negative impact of $173,000,000 on Ohio's SSO load suppliers, as shown by this chart prepared by NOPEC for the July 2022

[10] *Id.* at 9-10.

[11] *Id.* (emphasis in original).

[12] *Id.* at 8.

presentation:[13]

Supplier	PTC Share	Estimated P&L Impact
Dynegy	32%	($55,000,000)
Energy Harbor	17%	($29,000,000)
Hartree	11%	($19,000,000)
DTE	10%	($17,000,000)
NextEra	8%	($14,000,000)
Transalta	7%	($12,000,000)
Vitol	5%	($9,000,000)
ConocoPhillips	4%	($7,000,000)
Enel	4%	($7,000,000)
AEP	2%	($4,000,000)
Total	100%	($173,000,000)

Figure A (NOPEC Harm Forecast)

As NOPEC explained in the narrative for the presentation accompanying this chart, "[e]ach additional 10% of load return starting in September would add an incremental aggregate loss of ~$170 Million to the SSO wholesale supplier group," including Dynegy Marketing & Trade.[14] And NOPEC also correctly predicted in its presentation that its maneuver would negatively impact the upcoming SSO load auctions, forecasting that the auctions "[c]ould have materially lower participation," "[m]aterially higher prices," and "[m]ay fail to attract the minimum number of bidders necessary to proceed," most of which came true after the NOPEC drop.[15]

But instead of refraining from a scheme expected to cause such widespread financial devastation, and expected to severely destabilize Ohio's SSO auctions, NOPEC and NextEra built themselves a profitable lifeboat. Specifically, on the very date NOPEC announced the drop

[13] *Id.* at 10.

[14] *Id.* at 11.

[15] *Id.* at 12.

(August 24, 2022), NextEra and NOPEC entered into a Limited-Term Fifth Amendment to their Master Supply Endorsement Services Agreement (the "Fifth Amendment").[16] As the Fifth Amendment makes plain, its purpose was [redacted][17] To achieve this, NOPEC and NextEra agreed that as part of the customer drop to SSO NextEra's wholesale market affiliate would liquidate energy hedges NOPEC had put in place [redacted].[18] Then, in the Fifth Amendment NOPEC and NextEra agreed to a [redacted][19] [redacted][20] [redacted]

[16] *See* Ex. 1, Keiper Dep. Ex. 19 (5th Amend. to Master Services Agreement), p. 2.

[17] *Id.*

[18] *Id.* at 4-7. [redacted] *Id.* at Appx. A.

[19] *Id.* at 6-7.

[20] *Id.*

[21]

Where did NOPEC's customers fit into this hedge liquidation scheme?

[22]

Of course, NOPEC did not disclose the details of this shameful arrangement to the public or tell the Commission these facts when ordered to explain the reasons behind NOPEC's decision to drop 550,000 customers to SSO. Further, NOPEC has never notified its former customers of

. Dynegy Marketing & Trade has sought to make these details of the hedge liquidation plan public, including the items redacted above in the public version of these comments, by challenging NOPEC's claim that the plan should be kept secret and shielded from the public. But NOPEC has opposed any public disclosure of its Fifth Amendment with NextEra, claiming that the information in that

[21] *Id.*

[22] *Id.*

agreement is a "trade secret" that should be kept hidden from its customers and the public.[23]

In responding to the Commission's Show Cause Order, NOPEC also failed to disclose its dire (and accurate) prediction that its customer drop would wreck Ohio's SSO auction market and severely damage SSO load suppliers. Instead, NOPEC actively misled the Commission. First, NOPEC claimed in its response that its "actions will not be responsible for what likely will be an increase in FirstEnergy's SSO prices for Delivery Year 2023/2024."[24] NOPEC's internal documents produced in discovery flatly contradict this statement, confirming that NOPEC knew the customer drop would both negatively impact the auctions and lead to price increases. Second, NOPEC's internal documents flatly contradict the oft-repeated claim that NOPEC was only acting in its customers' best interest.[25] In truth, NOPEC engaged in its customer drop scheme to preserve its market share, all the while ensuring that [redacted] NOPEC's internal documents and actions show repeatedly that customers were in fact NOPEC's *lowest* priority, [redacted] after collectively losing more than $150 million compared to SSO rates in the last year of the Standard Program Price aggregation program despite NOPEC's repeated assurances of savings.

Considering how NOPEC engineered the drop and its knowledge of the destruction it would cause, NOPEC cannot plausibly claim that it was merely a victim of global events. Every other governmental aggregator in Ohio had the same global dynamics to contend with as NOPEC did. Unlike NOPEC, they managed to carry out their obligations without prematurely abandoning

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[23] *See* NOPEC's Motion for Protective Order filed Dec. 9, 2022; Dynegy's Memorandum Contra Filed Dec. 27, 2022; and NOPEC's Reply In Support of its Motion for Protective Order filed Jan. 3, 2023, Case No. 00-2317-EL-GAG.

[24] *NOPEC's Response to the September 7, 2022 Show Cause Order* at p. 14, Filed Sept. 28, 2022, Case No. 00-2317-EL-GAG.

[25] *Id.* at pp. 14-15

their customers or disrupting Ohio's energy markets. NOPEC is responsible for its actions and deserves no special treatment. It is a wayward market participant that deliberately and knowingly caused severe harm to the SSO markets and future SSO auctions and stifled legitimate competition for retail customers in Ohio, [redacted].

Accordingly, the Commission should not renew NOPEC's certificate as a governmental aggregation. After all, NOPEC is not entitled to renewal of its certificate merely because it submits the required paperwork on the timeframe established by Commission rules, or merely because it has been certified for many years. Rather, discovery in this case has demonstrated that NOPEC is not "managerially, financially, and technically fit and capable of performing the service" as a CRES provider and is not "capable of complying with all applicable commission rules and orders." O.A.C. 4901:1-24-10(C)(1)-(2).

In addition to denying the renewal of NOPEC's certificate, the Commission should also initiate a compliance proceeding under O.A.C. 4901:1-23-05(A) to determine additional appropriate remedies against NOPEC. NOPEC is sitting on approximately $52 million or more in liquid and unrestricted assets, as shown by its financial statements as of December 31, 2021.[26] NOPEC can both afford to and should return all of those funds to its Standard Program Price customers through restitution ordered by the Commission to defray the excessive energy costs those customers needlessly bore when they were a part of NOPEC's now defunct program. Even NOPEC admits that such a distribution is possible.[27] That would be "the right thing to do" to protect the interests of NOPEC's customers and Ohio's ratepayers.

[26] Ex. 1, Keiper Dep. Ex. 3 (NOPEC Financial Statements as of 12-31-21).
[27] *Id.*

III. LEGAL STANDARD

The Commission is the entity which determines whether a governmental aggregator is entitled to the privilege of providing competitive retail electric service ("CRES") to Ohio customers. The Commission accomplishes this through a certification process that requires the entity seeking CRES certification to establish that it has the "managerial, technical, and financial" capability to serve in this role and can furnish a financial guarantee sufficient to protect customers and electric distribution utilities from default. *See* R.C. 4928.08(B), (D). Under the Commission's rules, the Commission cannot approve a CRES renewal application unless the Commission finds that all of the following are true:

> (1) The applicant is managerially, financially, and technically fit and capable of performing the service it intends to provide.
>
> (2) The applicant is managerially, financially, and technically fit and capable of complying with all applicable commission rules and orders.
>
> (3) The applicant is able to provide reasonable financial assurances sufficient to protect electric distribution utility companies and the customers from default.

O.A.C. 4901:1-24-10(C).

Normally, a governmental aggregator's certification renewal application is deemed automatically approved thirty-one days after its filing if the Commission has not issued a decision. O.A.C. 4901:1-24-10(A). However, in this case, on December 9, 2022, the Attorney Examiner suspended that automatic approval process for NOPEC's renewal application per the authority granted under O.A.C. 4901:1-24-10(A)(1).[28]

Because the automatic approval of NOPEC's renewal application was suspended, the Commission must "[a]ct to approve or deny the application within ninety calendar days from the date that the application was suspended." O.A.C. 4901:1-24-10(A)(2)(b). Unlike an order

[28] *See December 9, 2022 Entry*, Case No. 00-2317-EL-GAG.

suspending or rescinding a CRES provider's certificate, the Commission need not hold a hearing before declining to renew NOPEC's certificate. *Compare* O.A.C. 4901:1-24-13(A) ("After notice and the opportunity for a hearing, the commission may, upon its own motion or upon complaint, suspend, rescind, or conditionally rescind a competitive retail electric service (CRES) provider's certificate, in whole or in part, for good cause shown."). Instead, a hearing is purely discretionary before denying a renewal application. O.A.C. 4901:1-24-10(A)(2)(c).

Further, under O.A.C. 4901:1-24-16 and 4901:1-23-05(E), the Commission has the authority to level additional penalties against NOPEC. Specifically, among other remedies, the Commission may order that NOPEC make a forfeiture payment, provide restitution to its customers, and take other corrective actions. O.A.C. 4901:1-1-24-16(A) & (C) and 4901:1-23-05(E). Accordingly, the Commission should initiate a compliance proceeding against NOPEC under O.A.C. 4901:1-23-05(A) to consider appropriate penalties for NOPEC's rule violations and anticompetitive conduct. As part of that compliance proceeding, the Commission will have the ability to implement a broad array of appropriate remedies against NOPEC following a hearing. *See* O.A.C. 4901:1-23-05(E) (listing available remedies, including corrective actions, forfeitures, attorney general enforcement and "other appropriate remedies to protect the public safety, reliability, and customer service").

Because NOPEC's most recent governmental aggregation certificate expired as of December 29, 2022, the Commission does not need to schedule a hearing on the suspension or rescission of that certificate.[29] Instead, the Commission has the authority to deny NOPEC's governmental aggregation renewal application filed in this case on November 22, 2022, without a hearing, and order NOPEC to cease providing governmental aggregation services under its expired

[29] *See* NOPEC's Governmental Aggregation Certificate No. 01-044E, Case No. 00-2317-EL-GAG, Filed Jan. 15, 2021.

certificate. O.A.C. 4901:1-24-10(A)(2). As discussed below, the record compels the conclusion that NOPEC's certificate should not be renewed, and that a compliance proceeding should be initiated to determine whether NOPEC should be ordered to undertake corrective remedies, pay a forfeiture, pay restitution to its customers, or be subject to other appropriate relief.

IV. FACTUAL AND PROCEDURAL HISTORY

A. NOPEC and NextEra Pledge to Operate Their Electricity Aggregation Program in Accordance with Ohio Law and Commission Rules.

NOPEC is a regional council of governments organized under Chapter 167 of the Ohio Revised Code. On January 5, 2001, NOPEC received its initial certificate as a CRES governmental aggregator in Ohio, with an effective date of December 29, 2000. NOPEC then filed renewal applications in this docket every two years, the most recent of which was filed on November 22, 2022.[30] NOPEC's operative CRES certificate was issued on January 15, 2021, with an effective date of December 29, 2020.

Until recently, NOPEC operated in the service territories of several Ohio electric distribution utilities ("EDUs"), including the Cleveland Electric Illuminating Company ("CEI"), Ohio Edison Company ("Ohio Edison"), and the Ohio Power Company ("AEP Ohio"), serving customers in over 200 communities in Ohio through competitive electric supply agreements with NextEra.

In September 2017, NOPEC and NextEra Energy Services, Ohio, LLC entered into a master supply endorsement services agreement ("Master Services Agreement").[31] This Master Services Agreement governs the supply of energy-related services by NextEra to NOPEC's

[30] *See generally* Case No. 00-2317-EL-GAG ("Certificate Case").

[31] Ex. 1, Keiper Tr., at 82:19-83:11; Ex. 1, Keiper Dep. Ex. 8 (Master Services Agreement).

aggregation customers.[32] Among other provisions, the Master Services Agreement requires that NOPEC and NextEra "administer" their provision of services pursuant to the agreement "in material accordance with the Commission's Rules and Orders."[33]

NOPEC and NextEra amended the Master Services Agreement multiple times over the last several years, and extended the termination deadline to January 2027.[34] The fourth amendment to the Master Services Agreement, effective November 1, 2020, [redacted]"[35]

The Master Services Agreement and amendments establish NOPEC's and NextEra's energy procurement strategies, including [redacted].[36] [redacted][37] [redacted][38] [redacted][39]

The Master Services Agreement and amendments also provided for [redacted].[40]

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[32] Ex. 1, Keiper Dep. Ex. 8 (Master Services Agreement).

[33] *Id.* at § 2.1(b).

[34] Ex. 1, Keiper Tr., at 87:6-89:20.

[35] Ex. 1, Keiper Dep. Ex. 13 (4th Amend. to Master Services Agreement), § 4.1(b).

[36] *Id.* at § 1, Schedule A, at 39.

[37] *Id.*; Ex. 1, Keiper Tr., at 93:5-97:16.

[38] *Id.*

[39] Ex. 1, Keiper Tr., at 166:23-167:9.

[40] *Id.* at 97:21-99:17.

[41]

The November 2020 amendment to the Master Services Agreement provides

B. NOPEC Fails to Maintain Rates Competitive With the SSO, Causing Customers to Collectively Pay $150 Million Over Prevailing SSO Rates in the Last Year of the Standard Program Price program.

In late 2021, NOPEC's prices began to meaningfully deviate from the SSO price. Specifically, by December 2021, the standard program price (or "SSP") rate was 6.965 cents per

[41] *Id.*; *see also* Ex. 1, Keiper Dep. Ex. 13 (4th Amend. to Master Services Agreement), § 2.

kilowatt hour for all three NOPEC service territories.[42] From that point on, until the NOPEC customer drop, NOPEC's prices remained above the SSO rates.[43] Between December 2021 and July 2022, the standard program price rates nearly doubled, reaching up to 12 cents per kilowatt hour.[44]

NOPEC's failure to match or compete with other rates in the market—particularly the SSO rate—meant that NOPEC's customers bore the brunt of extremely high prices for most of 2022. Indeed, an analysis of NOPEC's rates, when compared with the Price to Compare rates ("PTC") show that NOPEC's residential customers in FirstEnergy territory collectively paid *$150 million more* for their electricity than they would have if they had returned to SSO in October 2021.[45]

Although its public logo markets to customers that "No one does more to lower your utility bills,"[46] NOPEC concedes that [redacted][47] [redacted][48]

[42] Ex. 1, Keiper Dep. Ex. 7 (NOPEC Standard Price Program Rates).

[43] Ex. 1, Keiper Tr., at 63:3-16.

[44] *Id.*; Ex. 1, Keiper Dep. Ex. 7 (NOPEC Standard Price Program Rates).

[45] *See* Ex. 2, Price Comparison Chart. The Price Comparison Summary estimates the amount by which NOPEC Standard Program Price residential customers overpaid relative to SSO or the "price-to-compare" pricing since October 2021. The underlying data sources consist of publicly available price-to-compare charts maintained by the PUCO at https://energychoice.ohio.gov/ApplestoApples.aspx.

[46] *See* NOPEC Home Page, *available at* https://www.nopec.org/.

[47] Ex. 1, Keiper Tr., at 104:6-105:4.

[48] *Id.*

[redacted][49] [redacted][50]

C. Stymied by Legitimate Competition, NOPEC Explores Ways to Manipulate the Market to Retain Its Member Communities and Customers.

Given NOPEC's high prices in early 2022, customers began to exercise their choice in the market and look for electric services elsewhere. NOPEC estimated that by August 2022, approximately 100,000 customers made the deliberate choice to drop NOPEC as their energy provider.[51] In fact, NOPEC and NextEra [redacted]"[52]

Fearful of potentially losing customers for years to come, NOPEC knew it had to act and plotted with NextEra to disrupt the natural market. Unable or unwilling to compete with other prices in the market, and resistant to lowering customer rates, NOPEC and NextEra began to explore other options to protect their market share. NOPEC and NextEra met in Florida for three

[49] Ex. 1, Keiper Tr., at 100:11-102:13.

[50] *Id.*

[51] *Id.* at 170:12-24.

[52] Ex. 4, Voluntary Drop Data, NOPEC_001375, at 8.

days in June 2022 to begin developing a plan to drop more than half a million customers from NOPEC's standard program and then surreptitiously bring them back aboard when NOPEC was in a better position to compete in the market.[53] Even then, NOPEC and NextEra knew that [redacted][54] As NextEra put it at the time, [redacted]"[55]

NOPEC and NextEra then met with PUCO Staff on July 6, 2022. At the meeting, NOPEC explained that NOPEC's inability to compete with SSO prices was causing significant numbers of customers to drop NOPEC's services and return to the default service.[56] In NOPEC's view, customers were being encouraged by "3rd party brokers, consultants, and advisors" to drop NOPEC's services "*en masse*" and then return to a retail aggregation program when conditions improved.[57] In NOPEC's view, the *en masse* return "[w]ould be certain to ca[u]se economic harm to current SSO suppliers."[58] And NOPEC predicted that the "planned return" of those same customers to retail aggregation service at some point in the future could "again cause economic

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[53] Ex. 1, Keiper Tr., at 45:4-16.

[54] Ex. 5, 07.05.22 Email re PUCO Mtg. Tomorrow, p. 2.

[55] Ex. 6, 06.08.22 Email re NOPEC Pricing & Hedging, p. 3.

[56] [redacted] Ex. 5, 07.05.22 Email re PUCO Mtg. Tomorrow, p. 3. [redacted] *Id.* at 2.

[57] Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), p. 8.

[58] *Id.*

harm to then current SSO suppliers."[59] In other words, NOPEC predicted that both the mass return of customers to the SSO *and* the eventual return of those same customers to retail aggregations could significantly harm SSO suppliers.

NOPEC told PUCO Staff that the opportunistic return of customers to the SSO was "unscrupulous."[60] Yet remarkably, NOPEC and NextEra told those in attendance that it was considering engaging in the *same* "unscrupulous" behavior—dropping customers *en masse* and then returning them at a more favorable time in the future—as a means to protect NOPEC's market share.[61] Specifically, NOPEC was considering a "pre-emptive" return to the SSO to disrupt further loss of its customer base.[62] After all, if NOPEC can drop a customer before he or she leaves for a third-party program, it becomes much easier for NOPEC to recapture that customer—and retain its market share—once NOPEC feels like it can once again compete in the market.

NOPEC and NextEra knew that such a gambit would have disastrous consequences on suppliers serving the SSO load, including Dynegy Marketing & Trade.[63] In a slide specifically prepared by NextEra, NOPEC wrote that "[i]f NOPEC returned its retail electric customers to SSO in September 2022, we estimate that [FirstEnergy] Ohio EDCs' SSO suppliers would together suffer a loss of ~$173,000,000."[64] NOPEC and NextEra specifically estimated that Dynegy Marketing & Trade alone would lose ***$55,000,000*** if NOPEC proceeded with the drop.[65]

Not only that, NOPEC knew that the customer drop would profoundly impact SSO auctions

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[59] *Id.*

[60] *Id.*

[61] *Id.* at 8-9.

[62] *Id.* at 9.

[63] *Id.* at 10.

[64] *Id.*

[65] *Id.*

going forward, including the October 2022 FirstEnergy and Duke auctions.[66] Specifically, NOPEC predicted that the October 2022 SSO auction would have "materially lower participation"; "[m]aterially higher prices"; and "[m]ay fail to attract the minimum number of bidders necessary to proceed."[67]

NOPEC's and NextEra's initial draft of their July 6 presentation was [redacted] Among other things, NOPEC and NextEra conceded that [redacted]"[68] [redacted]"[69]

D. Before Flooding the SSO Market with Dropped Customers, NOPEC and NextEra Built a Lifeboat to Protect and Enrich Themselves.

Given the catastrophic harm that would befall SSO suppliers if NOPEC proceeded with the customer drop, NOPEC and NextEra [redacted][70] [redacted]

[66] *Id.* at 12.

[67] *Id.* (emphasis in original).

[68] Ex. 7, June 17 Draft Presentation, pp. 5-6 (emphasis added).

[69] *Id.* at 6.

[70] Ex. 8, 07.15.22 Email re Back to SSO, or Not, pp. 2-4.

[71]

"[72]

In early August 2022, NOPEC and NextEra entered into a Limited-Term Fifth Amendment to the Master Supply Endorsement Services Agreement between NOPEC and NextEra, which became effective August 24, 2022, the same day as the customer drop ("Fifth Amendment").[73] As the Fifth Amendment makes plain, its purpose was [74] To achieve this, NextEra and NOPEC agreed that NextEra's wholesale affiliate would liquidate the energy hedges in place [75] [76] .[77]

To allocate the millions generated by the hedge liquidation, NextEra and NOPEC agreed to a waterfall payment structure. First priority for NOPEC and NextEra was ensuring that NextEra's affiliate—NextEra Energy Marketing—would avoid the losses awaiting other SSO load

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[71] *Id.*

[72] *Id.* at 2.

[73] *See* Ex. 1, Keiper Dep. Ex. 19 (5th Amend. to Master Services Agreement), p. 2.

[74] *Id.*

[75] *Id.* at 4-7. *Id.* at Appx. 1.

[76] Ex. 1, Keiper Tr., at 129:11-25.

[77] Ex. 3, NOPEC's Resp. to Dynegy Marketing & Trade's Second Set of Interrogatories, No. 22.

[78]

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[83]

[78] Ex. 1, Keiper Dep. Ex. 19 (5th Amend. to Master Services Agreement), p. 7.

[79] *Id.*

[80] Ex. 9, 08.12.22 Email re Action Items, p. 1.

[81] *Id.*

[82] Ex. 1, Keiper Dep. Ex. 19 (5th Amend. to Master Services Agreement), p. 7.

[83] *Id.*

Again, NOPEC hid behind the attorney-client privilege to avoid testifying about [redacted] Specifically, Mr. Keiper testified as follows:

Q. [redacted]

A. [redacted]

Q. [redacted]

NOPEC's counsel. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

NOPEC's counsel. [redacted]

A. [redacted][84]

E. NOPEC Drops Over Half a Million Customers to SSO.

Of course, NOPEC did not warn (let alone build in financial protections) for any other SSO supplier that would inevitably be harmed by the customer drop. Instead, on August 24, 2022,

[84] Ex. 1, Keiper Tr., at 139:3-140:16.

NOPEC met again with PUCO Staff to inform them that "[m]arket trends discussed with PUCO on July 6, 2022 have continued and have not abated."[85] As NOPEC's presentation for that August 24th meeting disclosed, "[i]f daily rate [of customer switching] continues or further accelerates, NOPEC would expect to lose *50+%* of customers by year-End 2022."[86] [redacted][87] [redacted]"[88]

At his deposition, NOPEC's corporate representative [redacted]"[89] Sure enough, just hours later NOPEC filed a notice of material change ("Material Change Notice") in this case announcing that it would be dropping approximately 550,000 SPP customers onto the applicable EDUs' SSO. NOPEC justified this extraordinary conduct by claiming that:

> [E]lectric prices have spiked in 2022 for reasons beyond NOPEC's, NextEra's, and the PUCO's control. Prices are likely to remain at current levels throughout the aggregation program's current term, and could move even higher in 2023. The spike in market prices will significantly increase NOPEC's Standard Program Price customers' electricity costs *for the remainder of the aggregation program*. Consistent with its mission to protect customers' interests in the electricity marketplace, and to prevent harm from experiencing drastic electricity price

[85] Ex. 1, Keiper Dep. Ex. 6 (Aug. 24, 2022 Presentation), p. 3.

[86] *Id.*

[87] Ex. 10, Talking Points for Aug. 24 Meeting, p. 1.

[88] *Id.* at 1-2.

[89] Ex. 1, Keiper Tr., at 54:22-55:3.

> increases in these inflationary times, NOPEC will immediately be returning its Standard Program Price customers to the EDUs' standard service offers ("SSO").
>
> NOPEC plans to *resume its aggregation program* when NOPEC's costs are expected to align considerably more closely with then-effective SSO prices.[90]

In the Material Change Notice, NOPEC touted that it operates "with the goal to provide the *best available electric prices*," and that "NOPEC's return of SPP customers to the SSO is being done *solely for the benefit of its customers*–to protect them from significant price increases in the current volatile energy markets and provide them access to lower cost electricity."[91] As Dynegy Marketing & Trade would uncover after significant discovery efforts, these representations were false.

While the rest of the industry processed the news that NOPEC's 550,000 standard program customers would be returned to the SSO, NOPEC and NextEra began to liquidate its hedges, creating [redacted][92]

Then, on August 26, 2022, NOPEC filed a request for a limited, one-time waiver of O.A.C. 4901:1-10-29(H)(2), which requires an EDU to provide a notice to customers when its CRES provider has notified the EDU that customers will be returned to SSO service (the "Waiver Request").[93] NOPEC represented that CEI and Ohio Edison were unable to process sufficient numbers of customer notices to facilitate NOPEC's sudden drop of over half a million customers, therefore warranting a "one-time, limited" waiver of O.A.C. 4901:1-10-29(H)(2). In this Waiver

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[90] Notice of Material Change, Case No. 00-2317-EL-GAG, ¶ 10 (Aug. 24, 2022), p. 2 (emphases added).

[91] *Id.* at 2-3 (emphases added).

[92] Ex. 3, NOPEC's Resp. to Dynegy Marketing & Trade's Second Set of Interrogatories, No. 22.

[93] *See* Waiver Request, Case No. 22-806-EL-WVR (Aug. 26, 2022).

Request, NOPEC repeated the false claims that the customer drop was done "solely for the benefit of its customers" and that NOPEC's objective was to "provide the best available electric prices."[94]

F. The Customer Drop Creates Considerable Uncertainty in the Market, as Reflected in Recent Auctions.

As NOPEC predicted in its July 6, 2022, presentation to PUCO Staff, but did not disclose in its publicly filed Material Change Notice and Waiver Request, NOPEC's announcement had far-reaching negative impact on the SSO auctions. Specifically, the customer drop shifted some 550,000 new customers to the SSO load all at once, and announced to the market that those customers would be shifted back to NOPEC's government aggregation at an undefined point in the future (now revealed to be June 1, 2023). Those moves created considerable uncertainty among load suppliers and other market participants, which led to the consequences NOPEC predicted: "materially lower participation" and "[m]aterially higher prices" at the SSO auctions following the implementation of NOPEC's customer drop.[95]

1. Duke's SSO Auction of September 20, 2022.

Evidence of the dramatic impact of NOPEC's conduct was seen in the first SSO auction following NOPEC's announcement—Duke's September 20, 2022, auction for 40 tranches of SSO load for the delivery period of June 1, 2023 to May 31, 2024.[96] Duke's auction saw *half* as many participants as the previous one, so much so that during the auction, "the tranche target was reduced from 40 tranches to 20 tranches in accordance with established auction protocols due to lower than anticipated participation," leaving 20 tranches unsold.[97] A total of six bidders entered bids, with

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[94] *Id.* at 1-2.

[95] Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), p. 12 (emphasis omitted).

[96] *See* Finding and Order, Case No. 18-6000-EL-UNC, ¶ 22 (Sept. 21, 2022).

[97] *Id.*

four prevailing bidders, yielding a clearing price of $115.75 per MWh.[98] CRA, the auction manager, noted that "concerns related to community aggregation triggered by recent PUCO activity around NOPEC" constituted a "factor[] . . . that materially affected the auction in unanticipated ways."[99]

2. FirstEnergy's SSO Auction of October 4, 2022.

FirstEnergy's SSO auction on October 4, 2022, provides even more dramatic evidence of the impact of NOPEC's customer drop. That auction was for 33 tranches of SSO load for the delivery period of June 1, 2023 to May 31, 2024.[100] The 7 bidders represented a reduction of 36% from the 11 bidders at the prior auction. While all tranches sold, 75.7% of them—25 of 33—sold to a single bidder: NextEra Energy Marketing, NextEra's affiliate. The tranches sold at a weighted average price of $122.30 per MWh.[101]

Table 2. Winning Bidders and Tranches Won

Winning Bidder	Number of Winning Tranches	Tranche-Weighted Average Price to be Paid ($/MWh)
AEP Energy Partners, Inc	3	$122.30
ConocoPhillips Company	2	$122.30
Constellation Energy Generation, LLC	2	$122.30
Interstate Gas Supply, Inc.	1	$122.30
NextEra Energy Marketing, LLC	25	$122.30
	33	**$122.30**

Unsurprisingly, CRA reported that "there were concerns related to community aggregation triggered by recent PUCO activity around NOPEC" and that "[c]oncerns may have increased the

[98] Notification of CBP Auction Results, Case No. 18-6000-EL-UNC, p. 3 (Oct. 12, 2022).

[99] *Id.* at 8.

[100] *See* Finding and Order, Case No. 16-776-EL-UNC, ¶ 7 (Oct. 5, 2022).

[101] *See* Notification of CBP Auction Results, Case No. 16-0776-EL-UNC (Oct. 26, 2022), p. 4.

risk premium realized in the auction."[102]

3. AEP's SSO Auction of November 1, 2022.

AEP's November 1st auction played out in similar fashion. AEP attempted to auction 50 tranches of SSO load for the same June 1, 2023 to May 31, 2024 delivery period as the others.[103] Its auction obtained only 7 bidders, a reduction of 36% from the 11 bidders in the prior auction.[104] Only 45 of the 50 tranches sold.[105] And like the FirstEnergy auction, the affiliate of NOPEC's partner, NextEra, won an outsized number of tranches: 22 of 45.[106]

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Table 2. Winning Bidders, Tranches Won, and Clearing Price

	Delivery Period June 1, 2023 to May 31, 2024
Clearing Price ($/MWh)	119.98
Winning Bidder	Tranches Won
AEP Energy Partners, Inc.	3
ConocoPhillips Company	3
Constellation Energy Generation, LLC	7
Energy Harbor LLC	5
Interstate Gas Supply, Inc.	5
NextEra Energy Marketing, LLC	22
Total	45

NERA, the auction manager, reported that "uncertainty" surrounding NOPEC may have "materially affected the auction in unanticipated ways[.]"[107]

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[102] *See* Notification of CBP Auction Results, Case No. 16-0776-EL-UNC (Oct. 26, 2022), p. 6.

[103] *See* Finding and Order, Case No. 17-2391-EL-UNC, ¶ 7 (Nov. 2, 2022).

[104] *See* Notification of CBP Auction Results, Case No. 17-2391-EL-UNC, p. 4 (March 9, 2022).

[105] Notification of CBP Auction Results, Case No. 17-2391-EL-UNC, p. 4 (Nov. 23, 2022).

[106] *Id.* at 5.

[107] *Id.* at 8.

4. Dayton Power & Light Company's ("AES Ohio") Auction of November 29, 2022.

AES Ohio's November 29, 2022 SSO auction continued this trend.[108] Only 35 tranches were offered for bidding in the auction, whereas 50 tranches were offered in the prior auction.[109] And again, NextEra won a significant number of tranches, and again, the tranche-weighted average price was $113.42:[110]

Table 2. Winning Bidders and Tranches Won

Winning Bidder	Number of Winning Tranches	Tranche-Weighted Average Price to be Paid ($/MWh)
AEP Energy Partners, Inc.	3	$113.42
ConocoPhillips Company	4	$113.42
Energy Harbor LLC	13	$113.42
Interstate Gas Supply, Inc.	5	$113.42
NextEra Energy Marketing, LLC	10	$113.42
TOTAL	**35**	**$113.42**

5. FirstEnergy's January 10, 2023 Auction.

Six bidders participated in FirstEnergy's January 10, 2023 auction for the delivery period of June 1, 2023 to May 31, 2024.[111] Thirty-three tranches were sold with a tranche-weighted average price of $97.70 per MWh.[112]

* * * * *

In the wake of NOPEC's misconduct, on December 8, 2022, AES Ohio, Duke, FirstEnergy, and AEP Ohio, all filed applications to amend their respective supplier tariffs to provide for a "minimum stay" intended to "prevent governmental aggregators from prematurely returning

[108] *See* Notification of CBP Auction Results, Case No. 17-0957 (Dec. 21, 2022), p. 3.

[109] *Id.*; *compare* Notification of CBP Auction Results, Case No. 17-0957 (May 11, 2022), p. 3.

[110] Notification of CBP Auction Results, Case No. 17-0957 (Dec. 21, 2022), p. 4.

[111] *See* Notification of CBP Auction Results, Case No. 16-0776-EL-UNC, at 3 (Jan. 11, 2023).

[112] *Id.*

customers to default service and then, within an unreasonably short time, reenrolling such customers in a new aggregation program."[113] The proposed amendments provide for a minimum stay period that prohibits governmental aggregators that return more than 5,000 customers (or in FirstEnergy's case, 25,000 customers) from an opt-out aggregation program to the SSO before the aggregation term ends "from offering any opt-out aggregation program for at least twelve months following that return."[114] The proposed amendments also request that the Commission order all governmental aggregators to provide sufficient notice before prematurely returning such customers to the SSO before the aggregation term ends, including "the reason for the return."[115]

These proposed amendments are intended to ensure that a governmental aggregator that makes the strategic or self-serving decision to abandon a significant number of customers to the SSO—as NOPEC did here—cannot offer an opt-out program for the next 12 months. As AEP Ohio explained, this provision "uses the statutory stay concept and helps avoid the questionable practice of gaming of dropping and re-enrolling customers back and forth from the SSO to the aggregation program based on the aggregator's financial position[.]"[116] Stronger disapproval of NOPEC's behavior from these suppliers is hard to imagine. And Dynegy Marketing & Trade supports these tariff amendments consistent with its comments filed in those matters.[117]

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[113] *See In the Matter of the Application of AES Ohio*, Case No. 22-1138-EL-ATA (Dec. 8, 2022); Duke Energy Ohio, Inc.'s *Application for Tariff Amendment not for an Increase in Rates*, Case No. 22-1129-EL-ATA (Dec. 8, 2022) (similar); AEP Ohio's *Application Not for an Increase in Rates*, Case No. 22-1140-EL-ATA (Dec. 8, 2022) (similar); FirstEnergy Ohio's *Application Not for an Increase in Rates*, Case No. 22-1127-EL-ATA (Dec. 8, 2022) (similar).

[114] *Id.*

[115] *Id.*

[116] AEP Ohio's *Application Not for an Increase in Rates*, Case No. 22-1140-EL-ATA, p. 2 (Dec. 8, 2022).

[117] *See* Dynegy Marketing & Trade, LLC's Comments in Support of Proposed Governmental Aggregation Minimum Stay Tariff Amendments with Proposed Modifications, Case Nos. 22-1127-EL-ATA, 22-1129-EL-ATA, 22-1138-EL-ATA, 22-1140-EL-ATA (Jan. 6, 2023).

G. The Commission Demands that NOPEC Account for Its Conduct and Show Cause as to Why Its Certificate Should Not Be Suspended.

In response to these unprecedented actions, on August 31, 2022, Dynegy Marketing & Trade filed a motion to intervene in the Certificate Case and the Waiver Case. It also filed an emergency motion in both cases intended to draw the Commission's attention to the ways in which NOPEC's actions harmed other market participants, undermined state policy, and violated various provisions of Ohio law, Commission rules, and NOPEC's own operations and governance plan ("O&G Plan").[118] That emergency motion was also filed in a complaint proceeding initiated by Dynegy Marketing & Trade against NOPEC.[119] Among other things, Dynegy Marketing & Trade's emergency motion recommended that the Commission investigate NOPEC's conduct and consider suspending NOPEC's certificate as a CRES governmental aggregator.

On September 7, 2022, the Commission issued the Show-Cause Order in the Certificate Case and Waiver Case that did two things. First, the Commission granted NOPEC's requested one-time waiver of O.A.C. 4901:1-10-29(H)(2), thereby permitting NOPEC's customer drop to go forward.[120] It did so for the limited purpose of providing "an opportunity for customers currently in NOPEC's aggregation program to take advantage of energy savings provided by the SSO service."[121]

Second, the Commission found that NOPEC's actions, and the circumstances surrounding its customer drop and rule waiver request, "cast doubt upon whether NOPEC continues to demonstrate the managerial, technical and financial capability to be certified as a CRES

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[118] *See* Dynegy Marketing & Trade's *Expedited Motion for Emergency Interim Order*, Case No. 00-2317-EL-GAG (Aug. 31, 2022).

[119] *See* Complaint, Case No. 22-817-EL-CSS (Aug. 31, 2022) (Complaint Case).

[120] *See* Show-Cause Order, Case No. 00-2317-EL-GAG, ¶¶ 9-10 (Sept. 7, 2022).

[121] *Id.* at ¶ 10.

governmental aggregator in this state."[122] The Commission identified at least three potential reasons for NOPEC's potential suspension as a CRES governmental aggregator:

> (1) The lack of explanation for NOPEC's decision to seek a "premature return" of customers to the SSO and for "the decision of NOPEC and NextEra to not match the SSO price, and thus follow through on their prior representations [of energy savings]";
>
> (2) Record evidence of a "potential violation of NOPEC's communities' operations and governance plans, which do not appear to allow for the return to customers under these circumstances and require a 90-day notice to customers prior to being returned to SSO service"; and
>
> (3) The potentially adverse effects to wholesale generation providers and SSO customers caused by the combination of NOPEC's premature drop of customers *and* its proposal to re-enroll "these same customers at some undefined point in the future when NOPEC deems that economic conditions are favorable[.]"[123]

Given these serious concerns, the Commission ruled "that NOPEC should be directed to show cause by September 28, 2022, demonstrating why its CRES certificate should not be suspended pursuant to O.A.C. 4901:1-24-13."[124] The Commission further ruled that "interested parties" could comment on NOPEC's Response.[125]

While these proceedings were ongoing, NOPEC sought to rush the Commission to judgment on its renewal application, making the superficial claim that "[d]elays in re-certifying NOPEC could sow doubt in the market."[126] Yet NOPEC did virtually nothing to aid the Commission's evaluation of NOPEC's fitness to continue to serve as a CRES provider in this State. After all, NOPEC has the burden to demonstrate its managerial, technical, and financial capabilities to serve as a CRES provider and to adhere to all applicable Commission rules and

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[122] *Id.*

[123] *Id.* at ¶¶ 10-11.

[124] *Id.* at ¶ 12.

[125] *Id.* at ¶ 13.

[126] Renewal Application of Northeast Ohio Public Energy Council, Case No. 00-2317-EL-GAG (Nov. 22, 2022).

guidelines. *See* O.A.C. 4901:1-24-10(C)(1)-(2).[127] Despite the legitimate scrutiny engendered by these proceedings, NOPEC did not submit any affidavits attesting to its capabilities or its compliance with this Commission's rules and procedures. It did not offer any factual evidence regarding the necessity or defensibility of the customer drop or, just as importantly, what steps NOPEC was prepared to take to ensure that its prices more closely matched SSO prices or what steps it would take to avoid a future customer drop. NOPEC did not [redacted] NOPEC did not explain whether or how it intended to use its considerable war chest, accumulated from its customers paying high prices, to alleviate the burden its customers bore for the past year. And NOPEC did not explain any other changes it was prepared to make should it move forward with the mass customer return it has planned for Spring 2023. Instead, NOPEC simply did the bare minimum, submitting the required forms and a two-page letter from its counsel, rehashing many of the same superficial arguments it raised in its Response to the Show-Cause Order.[128]

Rather than accept NOPEC's invitation to hastily renew its certificate on such a miniscule record, the Attorney Examiner suspended the automatic renewal process and found it "appropriate to broaden the scope of the comments" in these proceedings to "include consideration of NOPEC's renewal application."[129] As the Attorney Examiner reasoned, whether to suspend NOPEC's certificate, and whether to renew its application, involved overlapping considerations.[130]

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[127] *See id.*

[128] *See id.* NOPEC also used the renewal application process to debut a new justification of the customer drop. In a cover letter to the renewal application, NOPEC's counsel argues that "NOPEC returned SPP customers to the SSO this year due to spiking prices in the electricity market." *Id.* (cover letter). While NOPEC was certainly not equipped to handle "spiking prices in the electricity market," and failed to take the managerial and technically responsible steps to hedge against such eventualities, the factual record belies counsel's latest argument.

[129] Attorney Examiners' Entry, Case No. 00-2317-EL-GAG, ¶ 23 (Dec. 9, 2022).

[130] *Id.*

Specifically, "the Commission's ultimate objective in this certification proceeding is to determine whether NOPEC possesses the managerial, technical, and financial capability to continue to provide CRES in Ohio."[131]

H. NOPEC Misrepresents Its Motivations for the Customer Drop to the Commission.

In its Response filed on September 28, 2022, NOPEC argued, albeit superficially, that it had complied with its Operations and Governance Plan ("O&G Plan"), did not violate any Commission rule with its premature return of customers to the SSO load, and was not the cause of elevated SSO prices.[132] NOPEC submitted no affidavits, declarations, or other direct testimony in support of its comments or the sweeping conclusions it reached. Instead, NOPEC blamed Russia's invasion of Ukraine and generalized "supply chain" issues, and alluded vaguely to "supply and demand."[133]

NOPEC's Response also repeats the falsehood that the customer drop was "only taken to benefit all Standard Price customers by moving them to the lower-priced SSO. NOPEC had no anti-competitive intent or ability."[134] No fewer than seven times did NOPEC repeat the platitude that the customer drop was simply "the right thing to do."[135]

Remarkably, NOPEC's Response makes *no mention* of the fact that months before the customer drop, it began plotting to return customers to the SSO—not because it was the "right thing to do"—but because NOPEC was losing market share because it would not or could not compete with the SSO pricing. Instead, NOPEC pays lip service to the idea that "[t]he potential

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[131] *Id.*

[132] Ex. 1, Keiper Dep. Ex. 21 (Response), pp. 1-2.

[133] *Id.* at 3.

[134] *Id.* at 19-20.

[135] *Id.* at 5, 10, 12, 13, 14, 19.

for customers to return to the SSO is an inherent and known risk of the current market design, which allows customers to return freely to the SSO."[136] While NOPEC is correct that some degree of migration to the SSO is a natural and appropriate component of the current market design, what NOPEC did not disclose in its Response is that NOPEC's customer drop is an active and deliberate attempt to *disrupt* the "inherent and known risk" of customer departure. Having lost thousands of customers to the SSO who very well may later sign up with other suppliers, NOPEC dropped 550,000 customers to the SSO so that NOPEC could later recapture those customers when conditions were more favorable to *NOPEC's* ability to compete in the market.

Nor does NOPEC disclose in its Response that, although it viewed as "unscrupulous" the conduct of returning customers to the SSO only to resign them under more favorable conditions, NOPEC decided to do just that: discourage customers from leaving by involuntarily dropping them to the SSO and recapturing them later when NOPEC was in a better position to legitimately compete in the marketplace. NOPEC said nothing about the hundreds of millions of dollars of harm it would inflict upon those suppliers—including Dynegy Marketing & Trade—required to service NOPEC's customers. And of course, NOPEC said nothing about [redacted]

In short, when the Commission asked NOPEC for an honest accounting of why NOPEC returned more than a half million customers to default service, NOPEC gave the Commission misrepresentations and platitudes. An honest accounting is nowhere to be found in its Response.

[136] *Id.* at 20.

I. NOPEC Obstructs Legitimate Discovery Efforts While Serving Abusive Discovery on Intervenors.

Given its failure of candor, NOPEC has fought to ensure that the Commission—and more importantly, the public—remain in the dark about its true motivations for the customer drop. Consequently, at every turn NOPEC has opposed Dynegy Marketing & Trade's—and other intervenors'—legitimate discovery efforts. All the while, NOPEC has served overbroad and punitive discovery on Dynegy Marketing & Trade and other proposed interveners who sounded the alarm about NOPEC's conduct, which tactics regrettably drove some from this litigation.

Both before and after NOPEC's Response, Dynegy Marketing & Trade sought discovery from NOPEC in order to test its claims. By Entry dated September 29, 2022, the Commission directed the parties to continue fact discovery until otherwise ordered, and shortened the deadline for all discovery responses to ten days.[137] In a prehearing conference on October 4, 2022, the Commission granted pending *pro hac vice* motions and addressed other procedural issues.[138] By subsequent Entry, the Commission also extended the comment deadlines by two weeks, allowing initial comments by October 27, 2022, and NOPEC's reply comments by November 3, 2022.

In a prehearing conference held on October 18, 2022, the attorney examiners and counsel for the parties addressed a set of discovery-related issues, including the appropriate scope of discovery in this case, a protective agreement between Dynegy Marketing & Trade and NOPEC, and the topics for a corporate deposition of NOPEC. Dynegy Marketing & Trade has repeatedly met and conferred in good faith with NOPEC regarding all discovery disputes and has tried—in vain—to minimize the need for Commission intervention with the discovery process.

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[137] Entry, Case No. 00-2317-EL-GAG (Certificate Case), ¶¶ 16, 17 (Sept. 29, 2022).

[138] Entry, Case No. 00-2317-EL-GAG (Certificate Case), ¶ 13 (Oct. 11, 2022).

At every turn since filing its Material Change Notice on August 24, NOPEC has resisted any attempt at discovery into its conduct underlying the Show-Cause Order. First, NOPEC attempted to avoid discovery altogether, requesting that the Commission stay "[a]ny and all discovery matters in this case" pending the resolution of the show-cause process.[139] Given the senselessness of postponing discovery on relevant issues until *after* those issues are resolved, Attorney Examiner Addison rejected NOPEC's request and ordered that "discovery should continue unimpeded until otherwise ordered[.]"[140]

Yet NOPEC persisted in its obstructionist discovery tactics, forcing Dynegy Marketing & Trade to seek and receive Commission intervention. In an in-person hearing on various outstanding discovery disputes, Attorney Examiner Price ordered NOPEC to produce responsive documents no later than November 15, 2022. Meanwhile, NOPEC simultaneously launched a punitive discovery campaign against Dynegy Marketing & Trade, serving a battery of 71 irrelevant, onerous, and prejudicial discovery requests, the vast majority of which have nothing to do with the sole issue of this show-cause (and now) certificate-renewal proceeding. Indeed, as NOPEC correctly identified (prior to serving its discovery requests, of course), "the issue [in this show cause proceeding is] limited to whether NOPEC continues to have the ability to provide service as a result of the change in its operations[.]"[141] But instead of providing information that could help shed light on that issue, NOPEC devoted its purportedly sparse resources to stonewalling Dynegy Marketing & Trade's legitimate discovery requests, and unsuccessfully attempting to force Dynegy Marketing & Trade to produce huge swaths of irrelevant information.

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[139] NOPEC's *Motion to Stay*, Case No. 00-2317-EL-GAG, p. 1 (Sept. 27, 2022).

[140] Entry, Case No. 00-2317-EL-GAG, ¶ 14 (Sept. 29, 2022).

[141] *See, e.g.*, NOPEC's *Memo. Contra Enel Trading North America, LLC's Motion to Intervene*, Case No. 00-2317-EL-GAG, p. 5 (Sept. 14, 2022).

NOPEC alone was in the position to validate its Response with evidence. Corroborating the truth is not onerous; hiding it is. That NOPEC made the strategic decision to vehemently oppose any discovery into its conduct should further raise alarms as to whether it should be permitted to serve Ohio customers.

These obstructionist tactics were in full force during the deposition of NOPEC's designated corporate representative, Charles Keiper. During the deposition, NOPEC's attorney instructed Mr. Keiper not to answer many of Dynegy Marketing & Trade's questions on the basis of the attorney-client privilege, oftentimes where there is no conceivable basis for such an instruction. Here is just sampling of the improper and unfounded instructions counsel for NOPEC gave to Mr. Keiper:

Q. [redacted]

NOPEC's counsel: [redacted][142]

* * * * *

Q. [redacted]

A. [redacted]

Q. [redacted]

NOPEC's counsel: [redacted]

Q. [redacted]

A. [redacted]

Q. [redacted]

[142] *Id.* at 50:8-17 (cleaned up).

NOPEC's counsel. [redacted][143]

* * * * *

Q. [redacted]

A. [redacted]

Q. [redacted]

NOPEC's counsel: [redacted]

A. [redacted][144]

* * * * *

Q. [redacted]

NOPEC's counsel. [redacted]

A. [redacted][145]

* * * * *

Q. [redacted]

NOPEC's counsel. [redacted]

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[143] *Id.* at 63:13-64:11.

[144] *Id.* at 104:22-105:4.

[145] *Id.* at 123:10-18.

A. [redacted][146]

* * * * *

Notwithstanding NOPEC's obstructionist tactics during discovery in this proceeding, Dynegy Marketing & Trade is prepared to offer comments on NOPEC's fitness to continue serving as a CRES governmental aggregator in Ohio.

V. LAW AND ARGUMENT

A. NOPEC's Certificate Should Not Be Renewed Because It Misled the Commission About the Customer Drop.

Although NOPEC's misrepresentations to the Commission are sweeping and plenary, two specific ones warrant special consideration and justify denial of NOPEC's renewal application. *First*, NOPEC was not truthful about its *motivation* for the customer drop, claiming that its "sole" reason for the drop was to benefit customers when in fact the drop was motivated by its desire to protect its market share and, in the process, disrupt legitimate competition. *Second*, NOPEC flatly misrepresented the *impact* of the customer drop to the Commission, claiming in pleadings that the drop would not impact SSO prices while internally estimating $173 million losses to SSO load suppliers and significant impacts on the SSO auctions where prices are set.

Either of these falsehoods—made in multiple signed pleadings to the Commission, including NOPEC's Response and Material Change Notice—justify denying NOPEC its certificate. *See* O.A.C. 4901:1-24-10(C)(1), (2) (CRES provider must be "managerially, financially, and technically fit and capable of" servicing its customers and "complying with all applicable commission rules and orders"); *see also* O.A.C. 4901:1-24-13(E)(5), (11) (suspension of CRES certification warranted if the provider "deliberately omitted information or knowingly

[146] *Id.* at 140:7-16.

provided false information on a … certification renewal application, including supporting attachments" or has "engaged in any fraudulent [or] misleading … practice); *accord* O.A.C.4901:1-24-13(E)(11) (suspension appropriate where CRES provider has "engaged in any fraudulent, misleading, or unfair practice"). Together, they demonstrate that NOPEC lacks the managerial competence to operate as a governmental aggregator in Ohio and highlight the need for enhanced oversight should NOPEC be allowed to continue to operate on a go-forward basis.

1. NOPEC Falsely Stated in Multiple Pleadings to the Commission that NOPEC Prematurely Dropped Customers for Their Sole Benefit.

NOPEC told the Commission in its Material Change Notice that "NOPEC's return of [SPP] customers to the SSO is being done **solely** for the benefit of its customers—to protect them from a significant price increase in the current volatile energy markets and provide them access to lower cost electricity."[147] NOPEC repeated this falsehood in its Waiver Request, repeating the claim that the drop is "**solely** for [their customers'] financial benefit."[148] And NOPEC again misrepresented its motivation for the drop in its Response to the Commission's show-cause order, claiming that its "actions were **only** taken to benefit all Standard Price customers by moving them to the lower-priced SSO."[149]

These representations are demonstrably false. Fact discovery—which NOPEC opposed at every opportunity—proves that NOPEC did not drop customers solely for their benefit, but rather took this unprecedented move to preserve its market share and slow the hemorrhaging of customers to more competitive, better qualified alternatives. The drop was self-motivated and self-serving.

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[147] Notice of Material Change, Case No. 00-2317-EL-GAG, ¶ 10 (Aug. 24, 2022), p. 3 (emphasis added).

[148] NOPEC's *Motion for One-Time, Limited Waiver*, Case No. 22-806-EL-WVR, p. 2 (emphasis added).

[149] Ex. 1, Keiper Dep. Ex. 21 (Response), pp. 19-20 (emphasis revised).

As documents produced in discovery by NOPEC show, it first began exploring a customer drop not due to "immediate and dramatic price increases," as NOPEC claims in its Response,[150] but because it could no longer legitimately compete against other market participants and customers voluntarily abandoning NOPEC for SSO prices. As NOPEC saw it, competitors were engaging in the "unscrupulous" behavior of encouraging customers to drop NOPEC with the intention of signing those customers themselves when conditions improved.[151] In fact, as they planned the customer drop NOPEC and NextEra [redacted]"[152] And slides prepared for NOPEC's August 24, 2022, meeting with PUCO Staff disclosed that "[i]f daily rate [of customer switching] continues or further accelerates, NOPEC would expect to lose *50+%* of customers by year-End 2022."[153]

Of course, NOPEC has the flexibility to adjust its prices and could have sought to compete with SSO prices and prices within the wider market. But either lacking the technical and managerial know-how to legitimately compete, or merely lacking the interest to ease the burden on its customers, NOPEC opted for the "unscrupulous" practice of an "en masse" customer drop, not out of motivation to benefit its customers, but to protect its market share.[154] After all, dropping customers to the SSO made it more difficult for competitors to market to those customers with better rates or for those customers to decide for themselves that NOPEC was no longer operating

[150] *Id.* at 3.

[151] Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), p. 8.

[152] Ex. 4, Voluntary Drop Data, p. 8.

[153] Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), p. 8.

[154] *Id.* at 8, 10.

in their best interest.[155] And NOPEC admitted in its July 2022 presentation that the "*en masse*" return of customers to the SSO would undoubtedly "ca[u]se economic harm to current SSO suppliers," just like resigning those customers to retail aggregation at some point in the future would.[156] But unwilling or unable to compete on price, NOPEC viewed a "pre-emptive" customer drop—not one done solely for the benefit of its customers—as its only option to protect its market share.[157]

The deal NOPEC struck with NextEra confirms that the customer drop was an act of self-preservation and self-enrichment, not altruism. Knowing that the customer drop would flood the SSO market, burdening SSO load servicers and creating price increases, NOPEC and NextEra constructed a lifeboat and contracted to liquidate NOPEC's energy hedges and [redacted].[158] Specifically, NOPEC and NextEra agreed to [redacted]

Just one day after announcing the customer drop, NOPEC and NextEra [redacted][159] [redacted]

[155] *Id.*

[156] *Id.* at 8.

[157] *Id.* at 9.

[158] Ex. 1, Keiper Dep. Ex. 19 (5th Amend. to Master Services Agreement).

[159] Ex. 3, NOPEC's Resp. to Dynegy Marketing & Trade's Second Set of Interrogatories, No. 22.

[redacted][160] [redacted]

[redacted]"[161] [redacted]

[redacted][162] In other words, [redacted]

[redacted][163]

2. NOPEC Falsely Represented to the Commission that the Customer Drop Would Not Impact the SSO.

NOPEC lied about the impact the customer drop would have on SSO prices and the Northeast Ohio energy market. In NOPEC's own words, it "has explained in several pleadings that its return of Standard Price customers will not affect current SSO prices."[164] According to NOPEC, its "return and/or re-enrollment of Standard Price customers is not the driver of expected SSO price increases and will not affect the SSO price."[165] And as for claims by Dynegy Marketing & Trade and other SSO suppliers that intervened to decry NOPEC's opportunistic and harmful conduct, NOPEC told the Commission that it "had no anti-competitive intent or ability."[166]

NOPEC believes none of this, and its statements are readily disproven by its own internal

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[160] *Id.*

[161] *Id.* at No. 35.

[162] *Id.*

[163] *Id.*

[164] Ex. 1, Keiper Dep. Ex. 21 (Response), p. 20.

[165] *Id.* at 1.

[166] *Id.* at 20.

documents showing that NOPEC and NextEra predicted that a mass customer drop "[w]ould be certain to cause economic harm to current SSO suppliers[.]"[167] After all, NOPEC and NextEra went so far to quantify that economic harm, estimating that "[i]f NOPEC returned its retail electric customers to SSO in September 2022, … [FirstEnergy] Ohio EDCs' SSO suppliers would together suffer a loss of $173,000,000[.]"[168]

NOPEC also accurately predicted that the customer drop would disrupt upcoming auctions—including those in October and November 2022. Even before it instituted the customer drop, NOPEC correctly forecasted that these auctions "[c]ould have materially lower participation," "***materially higher prices***," and "[m]ay fail to attract the minimum number of bidders necessary to proceed."[169] These predictions proved prescient. Auctions have seen significantly less market participation overall and have struggled to attract the minimum number of participants to proceed. In some cases, far fewer tranches have been sold than expected. And as NOPEC knew full well would happen, the auctions have resulted in "materially higher prices." In sum, NOPEC lied to the Commission when it said that it would not be responsible for higher SSO prices. It knew the customer drop would cause tens of millions of dollars of losses to SSO suppliers—losses that would inevitably lead to higher prices. [redacted] And it knew that as a direct result of the customer drop, auctions would produce "materially higher prices." It told the Commission none of this, but instead falsely represented the customer drop would have no impact on SSO prices. These misrepresentations provide an additional,

[167] Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), p. 8; *see also* Ex. 1, Keiper Tr., at 78:2-80:13 [redacted].

[168] Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), p. 10.

[169] *Id.* at 12 (emphasis added).

independent basis to deny NOPEC's request for a certificate renewal.

B. NOPEC Lacks the Managerial and Technical Competence to Continue to Serve as a CRES Provider Without Meaningful Change and Oversight.

The Commission has already expressed well-founded skepticism that NOPEC lacks "the managerial, technical and financial capability to be certified as a CRES governmental aggregator in this state."[170] Subsequent events have only confirmed this.

NOPEC claims that its mission—and the sole purpose behind the customer drop—is to benefit customers with the best prices available.[171] Dynegy Marketing & Trade has already shown that those statements are false. But even if NOPEC were truly trying to operate in the best interest of customers, the record leaves no doubt that they lack the "managerial, technical and financial capability" to do so.

First, NOPEC demonstrated its technical and managerial incompetence by implementing a hedging strategy whereby NOPEC [redacted].[172] [redacted]

Internal documentation just recently produced by NOPEC shows that both it and NextEra

[170] *See* Show-Cause Order, Case No. 00-2317-EL-GAG, ¶ 10 (Sept. 7, 2022).

[171] *See, e.g.*,Notice of Material Change, Case No. 00-2317-EL-GAG, ¶ 10 (Aug. 24, 2022), p. 1 ("NOPEC was formed to protect the interests of its member communities' [sic] and their residents' [sic] in the competitive electric marketplace, with the goal to provide the best available electric prices."); Ex. 1, Keiper Tr., at 105:23-106:1.

[172] Ex. 1, Keiper Tr., at 166:14-167:25.

were well aware that NOPEC's hedging strategy was not equipped to handle present market conditions. [redacted]"[173] [redacted]"[174] [redacted][175] [redacted]"[176] [redacted]"[177]

The practical effect of this completely misguided hedging strategy is that NOPEC's customers bore *all* the risk and burden for any increase or volatility in energy prices, like what

[173] Ex. 11, 06.07.22 NOPEC Pricing & Hedging Update, p. 7.

[174] *Id.* at 8.

[175] *Id.*

[176] *Id.* at 10.

[177] *Id.*

occurred in 2022. And it was this mismanaged strategy together with NOPEC's unwillingness to abide by its promises of savings that allowed NOPEC's prices to reach double the SSO price—causing NOPEC customers to collectively pay more than $150 million over the last year than they would have at standard market rates.[178] [redacted] After all, [redacted] And tellingly, [redacted]

Likewise, when asked whether [redacted] Mr. Keiper responded, [redacted][179] Thus, to the extent that NOPEC has a justification for [redacted] that reasoning is hidden behind NOPEC's claim of privilege, and cannot be used to justify its poor economic decisions here.

The uncontroverted evidence shows that NOPEC's [redacted] left it woefully unprepared to compete in a market with rising prices, like occurred in Ohio in 2022, and thus further confirms its lack of technical or managerial competency sufficient to warrant a continuance of its certificate. *See In the Matter of the Application of One Source Energy, LLC for Authority to Operate as an Ohio Natural Gas Company*, Case No. 16-1181-GA-ACE, at ¶ 38

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[178] *See* Ex. 2, Price Comparison Chart.

[179] Ex. 1, Keiper Tr., at 167:14-20 ("[redacted]").

(Entry, Aug. 22, 2019) (denying application to provide natural gas service because, among other reasons, supplier's rates "may not reflect the true cost of providing natural gas service and may not result in just and reasonable rates," which "is a limiting constraint on the Company's financial performance and its capability of operating a financially healthy public utility in Ohio"). And because NOPEC has made the tactical decision to [redacted], NOPEC cannot carry its burden to affirmatively demonstrate that it possesses the competencies necessary to operate as a governmental aggregator in Ohio. *See In the Matter of the Application of One Source Energy, LLC for Authority to Operate as an Ohio Natural Gas Company*, Case No. 16-1181-GA-ACE, at ¶ 33 (Entry, July 31, 2019) (supplier's inability to demonstrate "that it has reasonable financial assurances in place to protect consumers" compelled conclusion that supplier lacked technical and managerial competency sufficient to warrant issuance of a certificate).

Second, once NOPEC's prices exceeded the SSO in December 2021, NOPEC should have taken proactive steps to lower its prices and do what they claim to have done all along: "provide the best available electric prices."[180] In fact, NOPEC's O&G Plan *pledges* NOPEC to do just that: "NOPEC seeks to aggregate consumers *to negotiate the best rates available* for the supply and distribution of electricity and to advance consumer protection for all eligible residents[.]"[181]

[redacted]

Q. [redacted]

A. [redacted][182]

[redacted]

[180] Notice of Material Change, Case No. 00-2317-EL-GAG, ¶ 10 (Aug. 24, 2022), p. 1.

[181] Ex. 1, Keiper Dep. Ex. 18 (NOPEC's Operations and Governance Plan), p. 1.

[182] Ex. 1, Keiper Tr., at 104:22-24.

Q.

NOPEC's counsel:

A. [183]

NOPEC's decision to shield the answer to these questions behind a dubious claim of privilege aside,[184] there are only two possible conclusions to draw from this exchange: either NOPEC was *unable* to match or compete with SSO prices, or NOPEC was *unwilling* to do so. Neither answer bespeaks confidence in NOPEC's "managerial, technical and financial capability" to serve as a CRES provider.

Instead, customers were left paying rates higher than the SSO for eight months through the auspices of a company that holds itself as a non-profit, customer-focused enterprise—and competes based on those representations.[185] But at no point in time did NOPEC use its significant resources—including tens of millions in liquid funds NOPEC has available—to take steps to defray customers costs or otherwise provide relief for prices that, at times, doubled the SSO. Nor did NOPEC explain these failures in its Response to the Commission's Show-Cause Order. This omission is striking given the Commission's overriding concern that it could not determine "whether the decision of NOPEC and NextEra to not match the SSO price, and thus follow through on their prior representations, is due to legal constraints or economic choices."[186] Either NOPEC

[183] *Id*. at 104:25-105:4.

[184] The attorney-client privilege "applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice." *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 294 (6th Cir.2002) (citation omitted). "Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected." *Jacobs v. Equity Trust Co.*, Lorain No. 20CA011621, 2020-Ohio-6882, ¶ 14 (citation omitted).

[185] Ex. 1, Keiper Tr., at 38:13-25; 63:3-16; 158:2-17; 164:9-17.

[186] Show-Cause Order, Case No. 00-2317-EL-GAG, ¶ 10 (Sept. 7, 2022).

was unable to reduce rates for their customers—which would show that it lacks the "managerial, technical and financial capability" to continue to serve as an aggregator—or it chose not to, in which case its representations about acting in the best interest of the customers are false. In either scenario, denial of NOPEC's application to renew its certificate is warranted.

At bottom, NOPEC has not offered any *legal* constraint on its ability or willingness to match the SSO price, including in the deposition of its corporate representative. Rather, it appears to have been an economic choice—shrouded behind a dubious claim of privilege.

C. NOPEC's Certificate Should Not Be Renewed Because It Failed to Comply with Its O&G Plan.

NOPEC breached the termination and notice provisions in its O&G Plan and, in the process, violated O.A.C. 4901:1-21-16(D), which requires notice to customers about material changes to the aggregation program in accordance with the terms of the O&G Plan. This violation deprived the 550,000 customers of the protections afforded by the O&G Plan—particularly the 90-day notice provision applicable to events of termination like NOPEC's unilateral customer drop—and compels the denial of NOPEC's certification renewal application.[187]

1. NOPEC's O&G Plan permits program termination in only two limited scenarios—neither of which occurred here.

O.A.C. 4901:1-21-16 requires NOPEC and other governmental aggregators to adopt an operation and governance plan for the benefit of customers that explains customers' rights and obligations under the aggregation program in plain, accessible language. The plan must "be sufficiently detailed to allow customers to readily understand the services that the governmental aggregator is to provide and to compare those services to similar services provided by competitive

[187] *See also* Show-Cause Order, Case No. 00-2317-EL-GAG, ¶ 11 (Sept. 7, 2022) ("protecting 'retail electric service' consumers against unreasonable sales practices, market deficiencies and market power" are all valid bases for suspending a CRES governmental aggregator's certification).

suppliers." O.A.C. 4901:1-21-16(B).[188]

Chapter 4901-1 further provides that a governmental aggregator:

> shall not 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.

O.A.C. 4901:1-21-16(D) (emphasis added). The notice required under this section must disclose "changes to the plan, inform the customer of its right to opt out of the aggregation without penalty, and identify the method and time frame for the customer to opt out." *Id.*

Here, NOPEC's O&G Plan provides that the aggregation program "may be terminated for participating customers in two ways" and *only two ways*: (1) the "termination or expiration of the power Supply Contract(s) for all member communities without any extension, renewal, or subsequent Supply Contract(s) being negotiated"; or (2) an individual member community's cancellation of its membership in NOPEC.[189] Otherwise, NOPEC's O&G Plan does not allow it to unilaterally terminate the aggregation program for any other reason.[190] The plan further provides that "*each individual customer* receiving power supply services under the Aggregation Program will receive notification of termination of the program ninety (90) days prior to such termination."[191]

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[188] *See also* Show-Cause Order, Case No. 00-2317-EL-GAG, ¶ 10 (Sept. 7, 2022).

[189] *See* Ex. 1, Keiper Dep. Ex. 18 (NOPEC's Operations and Governance Plan), p. 51.

[190] *See id.*

[191] *Id.* (emphasis added).

The O&G Plan is clear and unambiguous on this point:[192]

> Termination of the NOPEC member Aggregation Program
>
> The NOPEC Aggregation Program may be terminated for participating customers in two ways:
>
> (1) Upon the termination or expiration of the power Supply Contract(s) for all member communities without any extension, renewal, or subsequent Supply Contract(s) being negotiated; or
>
> (2) At the decision of an individual member community to cancel its membership in NOPEC.
>
> In any event of termination, each individual customer receiving power supply services under the Aggregation Program will receive notification of termination of the program ninety (90) days prior to such termination. Customers who are terminated from the Aggregation Program shall receive power supply from the local distribution company unless they choose an alternative supplier.

2. NOPEC's customer drop breached its O&G Plan because it deprived customers of rights afforded by the Plan.

NOPEC violated the provisions of its O&G Plan in two respects. *First*, as the Commission already observed, NOPEC's O&G Plan does not allow NOPEC to unilaterally return customers to the SSO in the manner it did.[193] Indeed, *nothing* in the O&G Plan contemplates termination of the aggregation program in any other way. Because the plans only identify two "event[s] of termination" that would allow NOPEC to terminate services for a customer—and the wholesale customer drop was not one of them—NOPEC violated its O&G Plan and jeopardized its certificate.

Second, after it committed the first breach by dropping over a half million customers, NOPEC compounded that breach without providing the 90-day notice required by its O&G Plan.[194] NOPEC does not dispute that it failed to provide the required 90-day notice. Rather, it argues that it did not technically "terminate" the aggregation program and thus the two allowable

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[192] *Id.*

[193] *See* Show-Cause Order, Case No. 00-2317-EL-GAG, ¶ 10 (Sept. 7, 2022) ("[T]he record in the *Certification Case* provides evidence of a potential violation of NOPEC's communities' operations and governance plans, which do not appear to allow for the return to customers under these circumstances and require a 90-day notice to customers prior to being returned to SSO service.").

[194] *Id.*; *see also* NOPEC Renewal App., Case No. 00-2317-EL-GAG, p. 51 (Nov. 23, 2020).

instances in which it can terminate the aggregation program—the expiration of the agreement or a member community's cancellation—do not apply. According to NOPEC, it can effectively stop the aggregation program for 550,000 customers for *any* reason, no matter the circumstance and no matter the impact on those same customers or the public at large.[195] And under NOPEC's reading, those customers also do not enjoy the protection afforded by the 90-day notice provision or any other provision applicable to what this maneuver clearly is: a termination of the aggregation program with a promise to start it back up when conditions are more favorable to NOPEC.[196]

This interpretation, of course, is neither consistent with the language of NOPEC's O&G Plan or with the protection of customers that operations and governance plans are intended to achieve. The O&G Plan does not grant NOPEC license to terminate customers at will and without notice except in the two circumstances specifically identified in the O&G Plan. Under NOPEC's untenable interpretation, it would be allowed to drop customers *without* cause and *without* notice, all at NOPEC's sole discretion. Such an interpretation of the O&G Plan is incompatible with the purpose of such a plan in the first place: to protect customers' interests and advise them of their rights and obligations. *See Dominion Liquid Techs., LLC v. GT Bev. Co., LLC*, 2014 WL 1045913, *5 (S.D. Ohio Mar. 14, 2014) (Ohio contract law "embraces the general notion that if parties intended that the general terms were to apply unrestricted, they would not have included the specific terms or classes in the first instance").

In its Response to the Commission's Show-Cause Order, NOPEC also argues that Section 5 of the Agreement Establishing the Northeast Ohio Public Energy Council gives it plenary power to "take any other necessary and incidental actions to effect and carry out the purposes of the

[195] *See* Ex. 1, Keiper Dep. Ex. 21 (Response), pp. 14-16.

[196] *See id.*

Aggregation Program for the benefit of the Members and their respective electricity consumers."[197] But this provision is far too general, and non-specific, to constitute a grant of authority to NOPEC to return more than a half million customers to the SSO based on nothing more than NOPEC's unilateral decision to do so. That is because NOPEC's formation document cannot give it power contrary to, or inconsistent with, its limited authority provided in the O&G Plan, or Commission rules mandating NOPEC to operate consistent with that plan and in the interest of customers. Again, NOPEC's reading of its formation document allows unchecked power to trump accountability to member communities and customers. It should be rejected.

At bottom, NOPEC argues that regardless of what the O&G Plan dictates or the obligations it had to customers under that plan, it had no choice but to drop over half a million customers to the SSO.[198] Not true. If NOPEC truly believed that the customer drop was in the best interest of customers, it should have sought a waiver from the Commission allowing it to (1) waive the requirements of O.A.C. 4901:1-21-16, and (2) waive the "event of termination" and 90-day notice requirements in its O&G Plan. In fact, NOPEC has sought waivers of O&G Plan requirements in the past in this certification case.[199] And NOPEC sought and received a waiver of the confirmation letter requirement of O.A.C. 4901:1-10-29(H)(2), contemporaneous with its announcement of the customer drop.

A prospective application from NOPEC to the Commission regarding the scope of its obligations under O.A.C. 4901:1-21-16 and the limitations of the O&G Plan could have both prevented NOPEC's violations in the first place and allowed the Commission to evaluate

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[197] Ex. 1, Keiper Dep. Ex. 21 (Response), pp. 16-18 (*quoting* Response Ex. A, § 5).

[198] *Id.* at 14-17.

[199] *See* Finding and Order, Case No. 00-2317-EL-GAG, p. 1 (Mar. 31, 2010) (granting "a waiver from any provision of the NOPEC plan of operation and governance in connection with the opt-out mailing for the calendar year 2010 aggregation program for Residential EDR Customers").

NOPEC's planned customer drop *before* NOPEC proceeded with such dramatic action. But NOPEC made the strategic decision not to seek Commission approval for its extracontractual maneuvers, or seek assurance that its gambit would not violate its obligations to its customers. Essentially, NOPEC begs forgiveness when it had every opportunity to ask permission. After all, NOPEC attributes the need for the customer drop to the Ukraine-Russia conflict and supply chain and market factors. But the war in Europe and the global supply chain issues had been occurring months before NOPEC sprung the customer drop in late August. NOPEC had more than enough time to seek Commission approval of the customer drop before unilaterally unleashing it upon the Northeast Ohio energy market. It must now face the consequences of that decision—including denial of its renewal request.

3. NOPEC breached its O&G Plan by moving forward with the customer drop and an amendment to its NextEra agreement without its Board approval.

NOPEC's O&G Plan provides that any material changes to its operations must first be approved by NOPEC's Board of Directors.[200] There is good reason for this rule; it increases accountability for NOPEC's conduct and ensures that material changes to the O&G Plan are brought to and approved by NOPEC's full Board, not just individual officers or directors.

NOPEC admitted that the customer drop was a "material" change to its O&G Plan.[201] And Mr. Keiper told reporters at Cleveland.com that "before NOPEC could temporarily drop the customers, it needed to get approval from its board of directors[.]"[202] While Mr. Keiper is quite

[200] *See* Ex. 1, Keiper Dep. Ex. 18 (NOPEC's Operations and Governance Plan), p. 16 ("All material modifications to the NOPEC Plan shall be approved by majority vote of the NOPEC Board of Directors and ratified by a majority vote of the NOPEC General Assembly.").

[201] Ex. 1, Keiper Tr., at 170:3-11.

[202] *See* Sean McDonnell, *What is NOPEC doing with our electric bills and how did we get here?*, CLEVELAND.com (Dec. 4, 2022), , https://www.cleveland.com/business/2022/12/what-is-nopec-doing-with-our-electric-bills-and-how-did-we-get-here html (last visited Jan. 11, 2023).

correct that it *needed* approval from its Board, Mr. Keiper admitted at his deposition that [redacted][203]

Q. [redacted]

A [redacted]

* * * * *

Q. [redacted]

A. [redacted]

Q. [redacted]

A. [redacted][204]

In other words, NOPEC went forward and committed itself to the provisions of the Fifth Amendment—including the hedge liquidation and the resulting amounts that [redacted], as required by its own O&G Plan. This is an independent breach of NOPEC's O&G Plan and warrants denial of its certificate renewal application.

4. NOPEC's customer drop is nothing like the voluntary and orderly transfer of customers to the SSO.

Finally, NOPEC argues that its wholesale customer drop is "little different" from an individual customer choosing to opt out of a CRES's aggregation program.[205] This argument reveals how little NOPEC values the role customers play in the selection of their energy providers. After all, an opt-out structure *empowers* customers with a meaningful choice in *who* is providing their electricity and *how much* they are paying for it. That choice is particularly important here

[203] Ex. 1, Keiper Tr., at 177:17-178:5.

[204] *Id.*

[205] Ex. 1, Keiper Dep. Ex. 21 (Response), p. 19.

because the customers NOPEC dropped without their consent were the same customers "automatically enrolled in NOPEC's [aggregation] program[.]"[206] And of course, NOPEC dropped those customers *en masse* (before those customers made the independent decision to drop NOPEC) to protect its market share and with the intention of readily recapturing as many of those customers as possible when NOPEC so chooses.

That is not how a system driven by customer choice should operate. By both "automatically" *enrolling* consumers and then *cancelling* their enrollment without their consent, NOPEC effectively eliminated meaningful customer choice from the equation—an outcome wholly inconsistent with Ohio law and governing regulations. *See, e.g.*, O.A.C. 4901:1-21-17(A)-(B) (establishing disclosure requirements for customer opt-out options); R.C. 4928.02(E) (state policy ensuring customer access to information "to promote [] effective customer choice of retail electric service"). Depriving consumers of any practical choice in this fashion leaves them subject to the whims of NOPEC—no matter how self-interested or misguided those whims may be. Thus, there is a world of difference between empowering more than a half of million consumers with the ability to walk away from a governmental aggregation program and NOPEC's unilateral decision to make that decision for them.

[206] NOPEC Renewal App., Case No. 00-2317-EL-GAG, p. 60 (Nov. 23, 2020).

[redacted]"[207] [redacted]

[redacted]"[208]

Further confusing the matter, the form letter used by many local mayors, township trustees, and other elected officials to support NOPEC, asks the Commission "not interfere with our voters' decision to aggregate and participate in the numerous benefits offered by NOPEC."[209] Of course, declining to renew NOPEC's certificate—and requiring NOPEC submit to additional oversight and accounting—in no way "interfere[s] with [] voters' decisions" about the electric service provider. After all, customers make the decision to participate in NOPEC's aggregation program not at the ballot box, but when they either choose to stay on with the program after receiving proper notice or when they affirmatively opt out. And as many of the letters make clear, voters only voted to authorize *community* aggregation, not choose the specific provider.[210] The selection of NOPEC as the community aggregation program provider in particular, as opposed to some other aggregation provider, was made by the "legislative authority" for the community—not the voters.

D. By Gaming the Market and Abusing the Aggregation Model, NOPEC Engaged in Anticompetitive Conduct that Undermines the Structure of the SSO Load Auction Process and the Ohio Electricity Market.

O.A.C. 4901:1-24-13(E)(9) lists "anticompetitive act" as a basis for the Commission to suspend, rescind, or conditionally rescind a CRES provider's certificate. Although undefined, the term "anticompetitive act" undoubtedly encompasses acts that serve no legitimate business purpose and harm competition, the competitive process, or competitors. NOPEC acted in an

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[207] Ex. 12, 07.05.22 Email re Aggregation Non-Renewals, p. 1.

[208] *Id.*

[209] *See, e.g.*, Letter of Mayor Richard Patrick, Mayor of Village of Garrettsville, Case No. 00-2317-EL-GAG, Public Comments (Nov. 21, 2022); *see also* Letter of Mayor Leonard A. Spremulli, Mayor of Village of Bentleyville, Case No. 00-2317-EL-GAG, Public Comments (Nov. 21, 2022) (identical).

[210] *See id.*

anticompetitive manner when it decided to drop approximately 550,000 variable rate customers back to SSO service.

NOPEC was not losing money by continuing to aggregate those customer loads and serving them with supplies it had already secured from NextEra. The decision to drop them was therefore not made based on supply and demand principles because NOPEC had all the supplies it needed to meet the associated demand. Yet by dropping its customers, NOPEC has caused, and will continue to cause, substantial harm to competition, the competitive process, and competitors, all of which will inure to the long-term detriment of SSO customers or EDU ratepayers generally.

1. NOPEC has failed to offer a legitimate justification for its actions.

NOPEC's sudden drop of its variable rate aggregation customers served no *legitimate* business purpose. NOPEC has not alleged that it was unable to supply the dropped customer loads through its NextEra supply arrangement, nor has it claimed that it was losing money by doing so. Although NOPEC may have had malign motives for its action [redacted], such motives are not a legitimate business purpose.

Rather than disclose the true motives for its action, NOPEC offers prevarications. According to NOPEC, the decision to drop the vast majority of its customers was a philanthropic one designed to do no more than save its variable rate customers money. However, NOPEC promised its customers to deliver lower rates under its aggregation program than they would receive under SSO service. Moreover, NOPEC's claimed justification is belied by the notice it had previously provided to its aggregation customers, in accordance with OAC 4901:1-21-17(A)(6) and (7), that:

(6) . . . customers that choose to opt out of the governmental aggregation program prior to

> the commencement of the governmental aggregation program ... will be served by the standard service offer established pursuant to section 4928.14 of the Revised Code or until the customer chooses an alternative supplier of electric service.
>
> (7) . . . customers that ... switch back to [their electric utility] . . . may not be served under the same rates, terms, and conditions that apply to other customers served by the electric utility.

In other words, NOPEC misled its aggregation customers when it told them they would save money through its aggregation program, and then misled its customers again when it assured them that they would enjoy substantial savings by switching back to SSO service. The Commission should reject NOPEC's purportedly philanthropic motive, buttressed by deception, as little more than a guise to obscure its failure to live up to its promises. Unable or unwilling to live up to its promise of delivering lower prices to approximately 550,000 variable rate aggregation customers, and with customers leaving NOPEC's aggregation of their own accord,[211] NOPEC simply decided to stick SSO suppliers with serving that load at prices far below current market conditions. In doing so, it held open the option of a so-called "planned return," in which it would unfreeze the program and regain all of its customers at a later date of NOPEC's own choosing.[212] NOPEC's decision to drop its variable rate customers served no *legitimate* business purpose.

2. NOPEC's actions are harming competition, the competitive bid procurement processes, and competitors.

NOPEC's actions and the resulting uncertainty are already leading to a reduction in the number of companies willing to bid in EDU competitive bid procurement ("CBP") process to serve SSO load. Full-requirements contracts are common across the energy industry, including the use of such contracts to serve tranches of load remaining with the electric utility after a state's transition to retail choice. However, potential market participants will be unwilling to enter into a

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[211] *See* Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), p. 8.

[212] *Id.*

full-requirements contract that locks them into selling at a fixed price but allows the size of the market they will be servicing to be vastly expanded during the term of the agreement by the addition of substantial numbers of new customers looking to reap windfall savings whenever market prices rise above the contract's fixed price. This unwillingness will be even more acute if those new customers could subsequently opt-out as soon as market prices drop back down, and the fixed price, full-requirements agreement is no longer advantageous to them. No seller could hedge for the risk of such tremendous load variability which turns not on actual energy usage, but on large market participants seeking to game (or in this case, caused by NOPEC's gaming) the seller's fixed-price contract.

At the same time, SSO suppliers are receiving margin calls from EDUs associated with the mark-to-market exposure of serving the NOPEC-dropped load at fixed SSO supply agreement prices that are well below today's market prices. SSO suppliers were already contractually committed to sell energy to meet EDU SSO requirements at fixed prices that are far below market. Now they are being told that EDU SSO requirements have been drastically increased by the addition of approximately 550,000 customers and that they must absorb the losses associated with serving that demand at below-market prices as well. And they are required to post cash or other collateral for the privilege of having this additional load-service obligation.

As NOPEC predicted, the customer drop harmed the competitive auction process by raising prices; reducing the number of participants and winning bidders; reducing the number of overall tranches sold; and consolidating load responsibility with NextEra Energy Marketing—the NextEra affiliate [redacted]. As shown below, these trends have impacted every load auction for which there is data since NOPEC announced the customer drop. And without NextEra Energy Marketing propping up these auctions by buying an oversized

share of the load, these auctions almost certainly would have failed. Indeed, as shown below, NextEra Energy Marketing now owns around *half* of the entire load auctioned since the announcement of the customer drop.

a. September 20, 2022 Duke Auction

Duke's September 2021 auction included four winning bidders: Dynegy Marketing & Trade, Hartree Partners, LP, NextEra Energy Marketing, and TransAlta Energy Marketing (USA), Inc.[213] The auction sold 50 tranches at an average price of $47.99 after 16 rounds of bidding.[214] But one year later, only one of the 2021 winners managed to win a tranche in 2022: NextEra Energy Marketing.[215] As NOPEC had predicted, there were not only fewer participants, but also far fewer tranches were sold; 20 of the 40 available tranches went unsold during only 6 rounds of bidding.[216] The average price was up to $115.75:[217]

Table 2. Winning Bidders and Tranches Won

Winning Bidder	Number of Winning Tranches	Tranche-Weighted Average Price to be Paid ($/MWh)
ConocoPhillips Company	4	$115.50
Boston Energy Trading and Marketing LLC	4	$115.50
Constellation Energy Generation, LLC	7	$115.50
NextEra Energy Marketing, LLC	5	$116.50
TOTAL	**20**	**$115.75**

[213] *See* Notification of CBP Auction Results, Case No. 18-6000-EL-UNC, pp. 3-4 (Sept. 23, 2021).

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

b. October 4, 2022 FirstEnergy Auction

FirstEnergy's October 4, 2021 auction saw 33 tranches sold at an average price of $50.21.[218] There were 11 rounds of bidding, with five winning participants, including Dynegy Marketing & Trade and NextEra Energy Marketing.[219]

But one year later, only one of the participants from the October 2021 auction was willing to participate in FirstEnergy's October 2022 auction for the same number of tranches—NextEra Energy Marketing.[220] Winning bidders DTE Energy Trading, Inc., Hartree Partners, LP, TransAlta Energy Marketing (USA), Inc., and Dynegy Marketing & Trade did not win any tranches in the October 2022 FirstEnergy auction.[221] There were seven rounds of bidding in the October 2022 auction, and NextEra Energy Marketing won over 76% of the load at an average price of $122.30 (*see* Table 2):[222]

Table 2. Winning Bidders and Tranches Won

Winning Bidder	Number of Winning Tranches	Tranche-Weighted Average Price to be Paid ($/MWh)
AEP Energy Partners, Inc	3	$122.30
ConocoPhillips Company	2	$122.30
Constellation Energy Generation, LLC	2	$122.30
Interstate Gas Supply, Inc.	1	$122.30
NextEra Energy Marketing, LLC	25	$122.30
	33	**$122.30**

[218] *See* Notification of CBP Auction Results, Case No. 16-776-EL-UNC, pp. 3-4 (Oct. 6, 2021).

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

c. November 1, 2022 AEP Ohio Auction

AEP's November 1st auction played out in similar fashion to the Duke and FirstEnergy auctions. AEP attempted to auction 50 tranches of SSO load for the same June 1, 2023, to May 31, 2024, delivery period as the others.[223] Its auction obtained only seven bidders, a reduction of 36% from the 11 bidders in the prior auction. Only 45 of the 50 tranches sold.[224] And like the FirstEnergy auction, the affiliate of NOPEC's partner, NextEra Energy Marketing, won an outsized number of tranches: 22 of 45.[225]

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Table 2. Winning Bidders, Tranches Won, and Clearing Price

	Delivery Period
	June 1, 2023 to May 31, 2024
Clearing Price ($/MWh)	119.98
Winning Bidder	Tranches Won
AEP Energy Partners, Inc.	3
ConocoPhillips Company	3
Constellation Energy Generation, LLC	7
Energy Harbor LLC	5
Interstate Gas Supply, Inc.	5
NextEra Energy Marketing, LLC	22
Total	45

[223] *See* Finding and Order, Case No. 17-2391-EL-UNC, ¶ 7 (Nov. 2, 2022).

[224] *Id.*

[225] Notification of CBP Auction Results, Case No. 17-2391-EL-UNC, p. 5 (Nov. 23, 2022).

d. AES Ohio's November 29, 2022 Auction

AES Ohio's November 29, 2022, SSO auction continued this negative trend.[226] Only 35 tranches were offered for bidding in the auction, down from 50 offered in the prior auction.[227] Trances sold at weighted average price of $113.42:[228]

Table 2. Winning Bidders and Tranches Won

Winning Bidder	Number of Winning Tranches	Tranche-Weighted Average Price to be Paid ($/MWh)
AEP Energy Partners, Inc.	3	$113.42
ConocoPhillips Company	4	$113.42
Energy Harbor LLC	13	$113.42
Interstate Gas Supply, Inc.	5	$113.42
NextEra Energy Marketing, LLC	10	$113.42
TOTAL	**35**	**$113.42**

e. FirstEnergy's January 2023 Auction

Six bidders participated in FirstEnergy's January 10, 2023 auction for the delivery period of June 1, 2023 to May 31, 2024.[229] Thirty-three tranches were sold with a tranche-weighted average price of $97.70 per MWh.[230]

3. NOPEC's actions are anticompetitive because they disrupt the level playing field of Ohio's CBP bidding process, increase uncertainty, and are not based on fundamentals of supply and demand.

NOPEC's orchestrated customer-drop transformed Ohio's CBP process into a game of Three-Card Monte. SSO load-suppliers were the unwitting "marks" for the 2022-23 delivery period, and will lose hundreds of millions of dollars. The SSO suppliers reacted as NOPEC

[226] *See* Notification of CBP Auction Results, Case No. 17-0957 (Dec. 21, 2022), p. 3.

[227] *Id.*; *compare* Notification of CBP Auction Results, Case No. 17-0957 (May 11, 2022), p. 3.

[228] Notification of CBP Auction Results, Case No. 17-0957 (Dec. 21, 2022), p. 4.

[229] *See* Notification of CBP Auction Results, Case No. 16-0776-EL-UNC, at 3 (Jan. 11, 2023).

[230] *Id.*

predicted, destabilizing the SSO auctions. The biggest losers, however, will be Ohio's energy consumers, who will suffer dramatically higher retail prices in 2023 and 2024.

First, NOPEC's scheme tilted the playing field, affording itself and NextEra an unfair advantage over other market participants. Before NOPEC dropped its customers back to SSO, it calculated, for each SSO load supplier, the likely loss the SSO supplier would incur from having to serve NOPEC's customers.[231] NOPEC reported those calculations in its presentation to PUCO Staff on July 6, 2022. Then, in the Fifth Amendment NOPEC and NextEra signed on August 24, 2022 NOPEC agreed to [redacted].[232] [redacted][233]

Second, NOPEC rigged the SSO market by taking unfair advantage of market rules to opportunistically shift load from its aggregation program to SSO—a classic example of unlawful "gaming the system" in a way that is inconsistent with market fundamentals. *See, e.g.*, *FERC v. Coaltrain Energy, L.P.*, 501 F. Supp. 3d 503 (S.D. Ohio 2020) (holding that conduct intended to impair, obstruct, or defeat a well-functioning market by gaming the market's rules would be

[231] Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), p. 10.

[232] Ex. 1, Keiper Dep. Ex. 19 (5th Amend. to Master Services Agreement), pp. 4-5, 7.

[233] Ex. 9, 08.12.22 Email re Action Items, p. 1.

considered fraudulent); *In Re Make-Whole Payments and Related Bidding Strategies*, 144 FERC ¶ 61,068 at p. 76 (2013) (approving settlement imposing $285 million civil penalty, plus disgorgement of $125 million in wrongful profits in connection with JP Morgan's market behavior that allegedly was not grounded in normal forces of supply and demand but to reap profits by operation of the market rules that were far in excess of the loss of money incurred by the otherwise irrational behavior); *Houlian Chen*, 151 FERC ¶ 61,179, p. 58 (2015) (approving settlement imposing civil penalties of approximately $300 million plus profits disgorgement due to alleged strategy of engaging in trading activity for no purpose other than to profit from market rules, without regard to the relationship between supply and demand fundamentals); *Barclays Bank PLC*, 144 FERC ¶ 61,041, p. 7 (2013) (imposing civil penalties of over $435 million, plus profits disgorgement, based on finding that Barclays traded fixed-price products not to attempt to profit from supply-and-demand, but instead for the fraudulent purpose of moving the Index price to a particular point so that Barclays' financial swap positions at that same trading point would benefit).

NOPEC's scheme exploited the fact that SSO supply contracts were full requirements contracts which, by their terms, required SSO suppliers to supply any load level at a fixed price determined a year in advance.[234] NOPEC opportunistically took advantage of those market rules, shifting all of its Standard Program Price customers to SSO supply when the SSO price was less than NOPEC's Standard Program Price, while reserving the right to then move all the customers

[234] The increase in SSO load caused by NOPEC's customer-drop is so grossly disproportionate to the variability in load shown in the historical figures that it may be held to be outside the SSO suppliers' obligations if challenged in court. *See, e.g.*, *Waste Stream Envtl., Inc. v. Lynn Water & Sewer Comm'n*, 15 Mass. L. Rep. 723 (2003) (finding that full-requirements supplier was not obligated to satisfy unreasonably disproportionate variation in demand); *Energy Tactics v. Niagara Mohawk Power Corp.*, 219 A.D.2d 577, 631 N.Y.S.2d 697 (App. Div. 1995) (finding that purchaser of "full output" of facility was not obligated because where an agreement "is silent as to output approximations or figures, the parties' respective obligations are limited to normal or otherwise comparable prior output or requirements and no quantities unreasonably disproportionate to such amounts may be tendered or demanded"); *Phila. Corp. v. Niagara Mohawk Power Corp.*, 207 A.D.2d 176, 621 N.Y.S.2d 237 (App. Div. 1995) (when dealing with full-output contracts *with* estimates, the output must remain within "the normal range commercially consistent with the … estimates used in the contracts").

from SSO service back onto NOPEC's aggregation program at a time of NOPEC's choosing. In this environment, SSO providers will *always* lose money, as government aggregators will be incentivized to shift load to SSO providers when SSO pricing is less than market pricing, only to shift the load back to themselves (and away from SSO providers) when NOPEC so chooses.

Markets cannot function this way. SSO suppliers depend on a relatively stable level of SSO load when bidding on SSO load tranches. The Commission has made clear the importance of CBP processes minimizing uncertainty and rate volatility for SSO customers to provide predictability for all interested parties. For example, in accepting but ordering modifications to AEP Ohio's initial CBP process for SSO customers, the Commission stated, "The CBP process, including the products offered and the timing of the auctions, should be designed to minimize uncertainty and potential rate volatility for SSO customers." *In the Matter of the Application of Ohio Power Co. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO, p. 31 (Feb. 25, 2015). The Commission found that AEP's initial proposal relied too heavily on 12-month products in later auctions, which "may have the adverse effect of higher prices and greater rate volatility." *Id.* Furthermore, as part of their CBP processes, each EDU published its historical monthly SSO load so bidders would have reasonable expectations as to their approximate load obligations and the degree of variability that should be anticipated. Through these vehicles, this Commission and the EDUs developed a CBP auction process with reasonably predictable loads, which has allowed bidders to rationally price their bids and adequately hedge for volumetric risk.

NOPEC's market-gaming completely defeats these principles and leaves SSO providers unable to predict future loads. If electric suppliers see the market in a given state as unfair, unpredictable, and subject to risks that cannot be effectively hedged, many suppliers will simply

choose not to supply electricity in that state and those suppliers that do participate will demand a steep premium for assuming the risk that their participation will be impaired by unexpected and unfair conduct by other market participants, such as by procuring insurance to account for unexpected dropdowns and passing the added cost of that insurance through to customers. The results of the recent SSO auctions—the first three since the NOPEC drop was announced—have borne this out and are just the tip of the iceberg. If massive switching into and out of SSO service in response to changing market prices is allowed to become commonplace, and SSO suppliers are expected to assume the risk of the tremendous resultant load variability, the Commission will soon find little, if any competition, to serve SSO load, and SSO prices will be unattractive to all customers, leaving them with no viable default service option. A complete failure of the SSO load auction process, and the need for emergency proceedings to ensure SSO service, are real possibilities triggered by NOPEC's anticompetitive and destabilizing acts.

Finally, NOPEC's conduct is anticompetitive because, by its own admission, it orchestrated the customer-drop to SSO not out of an altruistic motive of saving customers money, but to protect its market-share against competition by other CRES providers. A prominent aspect of NOPEC's July 2022 presentation to PUCO Staff featured NOPEC's complaints about what NOPEC described as "unscrupulous" behavior by unidentified "3rd party brokers, consultants, and advisors" who allegedly were encouraging NOPEC member communities to leave NOPEC's aggregation program during 2022, allowing other aggregation programs to compete for those communities' business in 2023.[235] NOPEC believed it could prevent its member communities from leaving the NOPEC aggregation for competitors by "acting itself to return its customers to

[235] Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), p. 8.

SSO, in pre-emptive fashion."[236] That is to say, if NOPEC returned *all* of its standard program price customers to SSO service "in pre-emptive fashion," it appears NOPEC believed doing so would make it a lot harder for those "brokers, consultants, and advisors" to convince NOPEC communities to switch to a different provider. Forcing SSO providers to shoulder hundreds of millions of dollars in losses to allow NOPEC to maintain market-share is not only wrong but is anticompetitive and unfair market conduct.

4. NOPEC profiteered off of its anticompetitive misconduct.

While much of the rest of the market has been destabilized by NOPEC's anticompetitive conduct, NOPEC took preemptive actions to protect and enrich itself *before* announcing and following through with the customer drop. Specifically, NOPEC's and NextEra's Fifth Amendment—written to go into effect the day of the customer drop—was specifically crafted to [redacted][237] To achieve this, NextEra and NOPEC agreed that [redacted][238] [redacted][239] Quantifying the liquidation value of the energy hedges provided for in the Fifth Amendment reveals that they were valued at nearly [redacted].[240] In light of this, it is unsurprising that [redacted]

[236] *Id.* at 9.

[237] *Id.*

[238] *Id.* at 7.

[239] *Id.* at Appx. A.

[240] Ex. 3, NOPEC's Resp. to Dynegy Marketing & Trade's Second Set of Interrogatories, No. 22.

[241]

Specifically, NextEra and NOPEC agreed to [242] [243] [244] [245]

E. With Its Pattern of Unfair and Deceptive Marketing, NOPEC Has Long Failed to Comply With State Laws and Rules Designed to Protect Customers.

1. NOPEC's prices were regularly higher than the SSO.

NOPEC's inability to match or offer prices lower than the SSO is nothing new. Over a significant period of time, NOPEC has not offered competitive prices in comparison to the SSO, well before the war in Ukraine or other extraneous market or supply factors. Indeed, Mr. Keiper testified on behalf of NOPEC that its prices were over SSO starting in December 2021—months before NOPEC announced the customer drop.[246]

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[241] Ex. 1, Keiper Tr., at 166:2-13.

[242] Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), p. 7.

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] Ex. 1, Keiper Tr., at 63:3-16.

Dynegy Marketing & Trade has uncovered through discovery that NOPEC's representations about operating in the best interests of customers and communities is just a marketing ploy, not any sort of actual practice by NOPEC. As the Commission explained in its Show-Cause Order, it was especially concerned about the treatment of "NOPEC's customers, who in good faith enrolled in the aggregation based upon representations of energy savings."[247] After all, NOPEC told the Commission in its announcement of the customer drop in August 2022 that it "was formed to protect the interests of its member communities and their residents in the competitive electric marketplace, with the goal to provide the best available electric prices."[248] Yet when asked this exact question in his deposition, *i.e.* whether NOPEC actually operated with the goal to provide the "best available electric prices" to customers, Mr. Keiper from NOPEC's testified that "No," that was not NOPEC's objective.[249] Mr. Keiper even went further and disavowed that NOPEC had any obligation to provide savings or costs in line with SSO pricing.[250] And Mr. Keiper admitted in his deposition that [redacted].[251]

Misrepresentations about cost savings and working in the customers' best interest are only the beginning of NOPEC's deceptive conduct towards customers. Among other things, NOPEC's enrollment website touts "No Tricky Contracts."[252] Yet approximately 97.5 percent of NOPEC's aggregation customers are on the murky "Standard Price Program" that offers a short-term fixed

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[247] Show-Cause Order, Case No. 00-2317-EL-GAG, ¶ 10 (Sept. 7, 2022).

[248] *See* Notice of Material Change, Case No. 00-2317-EL-GAG, ¶ 10 (Aug. 24, 2022), p. 1.

[249] Ex. 1, Keiper Tr., at 28:13-15.

[250] *Id.*

[251] *Id.* at 59:18-60:17.

[252] *See* https://www.nopec.org/enrollment (last visited Jan 11, 2023).

introductory rate followed by an immediate rollover into an ill-defined and opaque monthly variable rate that is supposedly "determine[d]" monthly by NOPEC and NextEra based on "many different factors."[253]

Not only is this generic and vague description inconsistent with NOPEC's slick "No Tricky Contracts" marketing, it does not comply with Commission rules because it does not allow a customer—or the Commission—to understand how NOPEC's (and NextEra's) pricing is determined. After all, O.A.C. 4901:1-28-04(C) provides that "[n]o governmental aggregator … shall impose any terms, conditions, *fees, or charges* on any customer served by a governmental aggregation unless the particular term, condition, fee, or charge was clearly disclosed to the customer at the time the customer chose not to opt out of the aggregation." *Id.* (emphasis added). Yet NOPEC's Terms and Conditions merely disclose that "[NextEra] and NOPEC will determine … price based on many different factors, which will include, without limitation, competitors' prices, applicable industry charges, wholesale market conditions and electricity supply sources."[254] This in no way satisfies NOPEC's duty to adequately apprise customers of the fees and charges they can expect to incur under NOPEC's program.

NOPEC's public representations also raise unanswered questions about NOPEC's dealings with NextEra. Why is the price determined by "Supplier and NOPEC" as opposed to just "Supplier"? Does that mean that there are other processes or negotiations going on that affect the rates? If so, what are they? Why have they not been disclosed, as is required by Rule 4901:1-28-04(C)? Answers to these questions would no doubt aid the Commission in determining whether NOPEC has complied with its legal obligations and whether its certificate renewal application

[253] *See, e.g.*, Ex. 1, Keiper Dep. Ex. 22 (Opt-Out Notice (CEI)), p. 3.

[254] *See id.*; *see also* NOPEC Terms and Conditions (CEI and OEC), § 3, *at*, https://www.nopec.org/media/1808/cei-and-oe-january-2020-term-tos.pdf.

should be denied. Yet answers are nowhere to be had in NOPEC's Response to the Commission's show-cause order.

The fact is that since at least *December 2021*, all of NOPEC's new aggregation customers on the SPP have paid *more* than the utility default rate on its short fixed-term introductory rate, after which those unsuspecting customers were rolled over into a variable rate that is now nearly double the utility default rate.[255] All of these customers would have been much better off staying on utility default service for the past nine months—during an extremely challenging inflationary period for Ohio residents—and NOPEC knows it.

NOPEC's high prices throughout 2022 are hardly an aberration. Comparing NOPEC's data[256] regarding its introductory SPP rates to the EDUs' Price to Compare historical chart makes clear that NOPEC has often failed to beat the SSO during the current aggregation plan period. For example, in 2021, CEI's SSO rates were lower than NOPEC's rates in January through May, and September through December.[257]

NOPEC's Response does not meaningfully engage with these issues. Instead, it attempts to deflect scrutiny of its operations by pointing to its relatively long history of being regulated by the Commission.[258] But the fact that NOPEC is a longstanding market participant does not excuse it from scrutiny, let alone justify its failure to actually save its customers money, as it pledged to do in both communications to the public and in its filings with the Commission.

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[255] Ex. 1, Keiper Tr., at 63:3-16.

[256] *See* Ex. 1, Keiper Dep. Ex. 7 (NOPEC Standard Price Program Rates).

[257] Pub. Util. Comm., *Illuminating Company's Price to Compare Historical Chart,* https://puco.ohio.gov/utilities/electricity/resources/historical-ptc-chart-illuminating-company (last visited Jan. 11, 2023).

[258] *See* Ex. 1, Keiper Dep. Ex. 21 (Response), pp. 2, 6, 17.

In reality, NOPEC is an outlier in Ohio's competitive market. In theory, its large size should have given it significant bargaining power and permitted it to obtain competitive rates for its customers. But NOPEC's track record demonstrates that it has failed to do so—long before the current energy price spikes. Instead of achieving superior bargaining power, NOPEC has instead abused the governmental aggregation model, failed to maintain rates that are competitive with the SSO (much less other providers), and, worse, has become so large that it can threaten the very structure of the SSO load process. This shows that NOPEC's model has failed.

2. NOPEC made false and misleading statements to customers about its electricity rates and savings.

NOPEC's higher-than-SSO pricing, which long predates the war in Ukraine, is not only reflective of an uncompetitive business model but also demonstrates that NOPEC has consistently misled Ohio customers in violation of Commission rules. *See* O.A.C. 4901:1-24-13(E)(11) (authorizing suspension upon "[a] finding by the commission that a CRES provider has failed to comply with state laws or rules designed to protect consumers in this state or has otherwise engaged in any fraudulent, misleading, or unfair practice"). Despite the Commission having advised NOPEC of its obligation to comply with O.A.C. 4901:1-24-13(D),[259] NOPEC chose not to address this issue in its Response but rather seemingly blames the Commission for failing to provide it with proper notice of alleged rules violations and opportunity for hearing.[260] Not only has NOPEC charged its member communities prices above the SSO pricing well before price spikes attributable to the war in Ukraine and other events over the course of 2022, NOPEC has long made unrealistic and untrue claims that it saves its customers money.

[259] *See* Show-Cause Order, Case No. 00-2317-EL-GAG, ¶¶ 10, 12 (Sept. 7, 2022).

[260] *See* Ex. 1, Keiper Dep. Ex. 21 (Response), p. 7, n.4.

This pattern of deceptive conduct violates Commission rules about sales and marketing, *e.g.*, O.A.C. 4901:1-21-05(C) (banning "unfair, misleading, deceptive, or unconscionable" acts in the sale and marketing of a CRES product) as well as NOPEC's O&G Plan.[261] For instance, NOPEC has made (and continues to make) material representations regarding its pricing on its website[262] to the public and more specifically to consumers residing in its member communities. As depicted in Figure C below, NOPEC describes its pricing on its website as being achieved through a "Preferred Pricing Program" through which member communities can buy electricity "at cost" which "means your government gets the absolute best pricing available from NOPEC."

Preferred Pricing Program

Member communities can buy electricity and natural gas for their municipal loads at cost. That means your government gets the absolute best pricing available from NOPEC. Contact our relationship management team at 440-248-1992 to find out if your community is eligible.

READ MORE

Figure C
(excerpt from http://www.nopec.org/communities/member-benefits)

[261] *See* NOPEC Renewal App., Case No. 00-2317-EL-GAG, p. 52 (Nov. 23, 2020) (promising, *inter alia*, "NOPEC will ensure that customers are provided with adequate, accurate and understandable pricing and terms and conditions of service").

[262] *See* www.nopec.org (last visited Dec. 7, 2022).

This statement is highly misleading, if not outright false. NOPEC has consistently failed to deliver the "absolute best pricing" to its member communities. And although NOPEC may claim to the Commission that, strictly speaking, it has secured the "best pricing available" to it (*i.e.,* it has obtained the best pricing it could through its contractual arrangement with NextEra), that is certainly not how, in NOPEC-speak, the "more vulnerable" (*i.e.*, the "least sophisticated") customers would read this statement.[263]

For the customers in NOPEC's member communities who go to NOPEC's website to explore whether to opt-out of the "Preferred Pricing Program," NOPEC engages in further misrepresentations to dissuade them from doing so. NOPEC tells its customers that once they receive an enrollment letter from NOPEC, they "have two options: do nothing and let NOPEC negotiate lower electric rates . . . exclusively for NOPEC customers, or, opt out." *See Figure D*.

What should you do with this letter?

You have two options: do nothing and let NOPEC negotiate lower electric rates and gas rates exclusively for NOPEC customers, or, opt-out. If you live in a NOPEC community, you have the option to choose not to participate, however, our bulk buying strategies, member benefits, residential energy-saving programs, and small business initiatives have kept our NOPEC communities satisfied and growing.

Figure D[264]

This statement is, at best, misleading and, at worst, false. NOPEC's reference to "lower electric rates" must have some context. A customer in a member community would likely read this language to mean that NOPEC is able to negotiate "lower" electric rates than those offered by the

[263] *See* Ex. 1, Keiper Dep. Ex. 21 (Response), p. 10.

[264] www nopec.org/info/opt-out-letter (last visited Jan. 11, 2023).

default service providers. And as discussed above, NOPEC has consistently failed to achieve such pricing. Indeed, given the contractual arrangement between NOPEC and NextEra (through which pricing is fixed for a period of time and then converts to variable rate), NOPEC member communities will likely be paying higher rates if there are pricing spikes in the electricity market.

Moreover, to further prevent residents of its member communities from moving to new electricity suppliers, NOPEC encourages the residents to sign up for its "Do Not Knock Program" to prevent what it describes as "Unwanted Door-to-Door Solicitors."[265] When one clicks on the "Do Not Knock Program" on the webpage, one is navigated to a further webpage[266] wherein NOPEC warns, "**BEWARE: DOOR-TO-DOOR ENERGY SOLICITORS WILL COST YOU**." NOPEC represents that it is "different" from "[m]any for-profit door-to-door energy companies [who] will offer you a low intro-rate (and maybe a free gift) for signing up, only to raise your rates a few months later after you're locked into a long-term contract. Now that great deal you thought you were getting is <u>costing you big time</u>." Clicking on the underlined portion, one is directed to a page of NOPEC's website which purports to feature an article written by Rachel Duthie entitled "Why Door-to Door Energy Sales Will Cost You."

[265] www nopec.org/enrollment (last visited Jan. 11, 2023).

[266] www nopec.org/residents/do-not-knock (last visited Jan. 11, 2023).

Figure E[267]

Unbeknownst to the unwary, Rachel Duthie was a "content marketing specialist" for NOPEC between August 2018 and August 2022, and was apparently pursuing an undergraduate degree in journalism from Kent State University in January 2017 when the article purportedly attributed to her was written.[268] In the article, the author writes that "NOPEC takes a long-term approach to energy rates and doesn't offer a low intro-rate for signing up only to raise the rates a few months later when the intro period ends."[269] Of course, this statement is untrue – this is exactly the type of pricing arrangement that NOPEC currently has with NextEra.

This deceptive marketplace conduct does not simply affect consumers—it affects the marketplace as a whole. A competitive market cannot function if it is based on deception. *See* O.A.C. § 4901-1-21-03(A) (the Commission has authority to prevent electric service providers

[267] www nopec.org/blognewsroom/blog/why-door-to-door-energy-sales-will-cost-you (last visited Jan. 11, 2023).

[268] *See* LinkedIn Profile of Rachel Duthie, *at* https://www.linkedin.com/in/rachel-duthie-6a5352b7 (last visited Jan. 11, 2023).

[269] Rachel Duthie, *What Door-to-Door Energy Sales Will Cost You*, NOPEC, https://www.nopec.org/blognewsroom/blog/why-door-to-door-energy-sales-will-cost-you (last visited Jan. 11, 2023).

like NOPEC from engaging in "unfair, misleading, deceptive, or unconscionable acts or practices related to" the "administration of contracts for CRES" and the "provision of CRES"). NOPEC may argue that these concerns are beyond the scope of this proceeding. Not so. The Commission's show-cause order made clear that NOPEC's representations regarding customer savings are an important issue in this case. And this issue ties directly into the load drop that gave rise to these proceedings in the first place. NOPEC claims it is acting in customers' best interests by returning customers to the SSO.[270] But NOPEC has long claimed to be looking out for customers in the past, and those claims do not stand up to scrutiny. The Commission should not credit NOPEC's contention that all it is doing is looking out for consumers now, particularly when NOPEC opted against supporting that position with testable evidence.

VI. RECOMMENDATIONS

A. NOPEC Is Not Fit to Serve as a Governmental Aggregator at Present.

Ever since August 24, 2022—the day it announced the customer drop—NOPEC has sought to deflect any meaningful oversight of its conduct with the empty assurance that the customer drop was simply "the right thing to do" for its customers. As NOPEC tells it, the customer drop was an act of benevolence which provided customers some relief from "immediate and dramatic price increases." Any adverse impact on the market, according to NOPEC, is merely a result of these unprecedented times, not the massive and unprecedented shift of a half million customers to the SSO. It seeks renewal of its certificate on the same superficial showing, adding nothing more to the documents required by rule for renewal applications other than a self-serving cover letter that does not disclose the truth about NOPEC's hedge liquidation plan or its internal calculations of massive harm to the SSO auction process and SSO load suppliers.

[270] *See* Ex. 1, Keiper Dep. Ex. 21 (Response), pp. 9-10.

Revealing the truth—as Dynegy Marketing & Trade has done here through months of discovery—shows that preservation of NOPEC's market share, not altruism or concern for customers' electric bills, was what led NOPEC to partner with its supplier NextEra to plan and execute the customer drop. After all, NOPEC faced the same global phenomena as every other governmental aggregator operating in Ohio. Yet through managerial incompetence and sharp, self-serving practices, NOPEC appears to be the only governmental aggregator in Ohio that prematurely dropped its customers back to the SSO rather than use its considerable war chest to provide meaningful financial relief for those customers.[271] And NOPEC is the only governmental aggregator whose irresponsible and self-serving conduct inflated SSO prices on a go-forward basis, meaning that *non-NOPEC customers* on the SSO will pay higher prices as a direct consequence of NOPEC's mismanagement.

NOPEC lied about why it designed and implemented the customer drop. Competitive challenges began to arise for NOPEC in December 2021, when its prices surpassed the SSO rate. Those prices never recovered. As 2022 wore on, NOPEC customers eventually paid *double* the SSO rate. Although NOPEC had both the mandate to lower prices (by virtue of its promise to customers to deliver the best rates available), and the contractual flexibility to implement that mandate, NOPEC never tried to match those lower prices. NOPEC refuses to explain why seven months passed without any action on its part to provide relief for its customer, dubiously claiming that any explanation is protected by the attorney-client privilege. But there is no great mystery why NOPEC failed to act—indeed, here are only two plausible explanations.

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[271] It is instructive that NOPEC has previously taken the position before this Commission that premature termination of customers' services and inadequate notification are grounds for revocation of a CRES certificate. *See Ne. Ohio Pub. Energy Council v. Green Mountain Energy Co.*, 2006 WL 2285713, at *1 (Aug. 9, 2006) (NOPEC moved for "immediate revoc[ation]" of Green Mountain's CRES certificate because it allegedly "failed to notify the Commission of material changes to its business operations … and improperly terminated customers for non-payment in October 2005 and failed to return the same customers to GMEC's supply").

The first is that NOPEC lacks the technical and managerial competence to respond to changing market dynamics and fulfill its promise to customers to deliver them the best available rates. This explanation is all the more plausible considering that NOPEC's only hedging strategy [redacted] it is little surprise that NOPEC has proven itself ill-equipped to navigate the current market and provide any meaningful relief for its customers.

The second, and equally plausible, explanation is that NOPEC made the strategic business decision not to lower customer prices, disregarding the promises it made to customers to ensure that they received the best rates available. After all, NOPEC customers collectively paid $150 million more over the last year to NextEra than they would have paid had NOPEC matched prevailing market rates. It is therefore unsurprising that NOPEC has managed to amass approximately $52 million in liquid assets.[272] What *is* surprising is that despite its supposed mandate as a customer-focused nonprofit, NOPEC has not used any of those accumulated assets to relieve the financial burden on its customers in the many months leading up to the customer drop.

Whatever the explanation for NOPEC's inaction, customers understandably began to tire of NOPEC's markedly higher prices. And competitors began to see legitimate opportunities to win customers stretched thin by months of paying NOPEC's prices. Whether on their own, or working with third parties, customers therefore began returning to the SSO, eroding NOPEC's market-share.

[272] Ex. 1, Keiper Dep. Ex. 3 (NOPEC Financial Statements as of 12-31-21).

NOPEC viewed this situation as "unscrupulous" but still would not budge from its pricing strategy or find ways to compete for customers. Instead, NOPEC devised its own "unscrupulous" plot; if customers were going to the SSO with the intent to join some other aggregation program, NOPEC would take the "pre-emptive"[273] step to disrupt this behavior by dropping *all* of its Standard Program Price customers to the SSO. That way, when conditions improved to the point NOPEC could compete in the market again, NOPEC would re-sign those same customers, thereby preventing them from signing up with one of NOPEC's competitors.

In short, the *overriding* motivation for the customer drop was preservation of NOPEC's market share. If NOPEC were really interested in doing the "right thing" for its customers, it had seven months to affirmatively lower its prices or reach into its deep pockets and lighten the real burden its customers bore for far too long. In fact, there is *still* time for NOPEC to make things right. As discussed below, the Commission should order NOPEC to reimburse customers for the high prices they paid and defray some of the costs that customers bore under NOPEC's program. Hopefully all parties can agree that such recompense, at a minimum, is the right thing to do.

NOPEC lied about the disastrous impact the customer drop had on the market. NOPEC also lied about the impact of the customer drop on SSO prices and the market. More than a month before it announced the customer drop, NOPEC and NextEra predicted $173 million in losses to the SSO load suppliers—including $55 million of losses suffered by Dynegy Marketing & Trade in particular. NOPEC and NextEra also correctly described the negative impact the customer drop would have on SSO load auctions, including reduced participation by suppliers, difficulty in selling all available tranches, and critically, "materially higher prices."

[273] *See* Ex. 1, Keiper Dep. Ex. 5 (July 1, 2022 Presentation), at 9.

All of this came to pass, to no surprise to NOPEC. Unlike the rest of the market, however, NOPEC and its partner NextEra had both the knowledge and time necessary to plan for the monumental load shift and protect themselves accordingly. Weeks before announcing the customer drop publicly, NOPEC and NextEra negotiated the [redacted] SSO load suppliers were left exposed to the harm that NOPEC knew would occur once it instituted the customer drop. Sure enough, the auctions following the announcement of the customer drop experienced exactly what NOPEC predicted: minimal participation, difficulty selling all available tranches, and "materially higher prices"—in NOPEC's own words. These harms are a direct and obvious consequence of NOPEC's anticompetitive behavior, and have damaged SSO suppliers in the entirety of Ohio's energy market, including Dynegy Marketing & Trade.

NOPEC created these circumstances through their short-sighted, incompetent management and failure to account for the possibility of changing market trends. It exacerbated these flaws through the self-serving customer drop, profiting while customers and SSO suppliers literally paid the price for NOPEC's machinations. NOPEC cannot now be heard to decry its situation, or the

Commission's necessary evaluation of its fitness going forward. NOPEC's shocking misconduct has shown that it is not fit to serve as a governmental aggregator in Ohio, and its certificate should not be renewed.

B. The Commission Should Decline to Renew NOPEC's Certificate and Should Initiate a Compliance Proceeding to Consider Additional Remedies.

In light of this evidence, NOPEC has failed to carry its burden to demonstrate that it possesses the managerial, technical, and financial capability to serve as a CRES governmental aggregator in Ohio. Accordingly, the Commission should deny NOPEC's application to renew its governmental aggregator certificate, which the Commission can do without a hearing under O.A.C. 4901:1-24-10(A)(2). In addition, in its order the Commission should direct NOPEC to cease providing governmental aggregation services under its expired governmental aggregation certificate, which expired on December 29, 2022.

In addition, the Commission should initiate a compliance proceeding against NOPEC under O.A.C. 4901:1-23-05(A) in order to determine what additional remedies the Commission should impose on NOPEC given its extraordinary misconduct. As part of that compliance proceeding, the Commission will have the ability to implement a broad array of appropriate remedies against NOPEC following a hearing. *See* O.A.C. 4901:1-23-05(E) (listing available remedies, including corrective actions, forfeitures, attorney general enforcement and "other appropriate remedies to protect the public safety, reliability, and customer service"); O.A.C. 4901:1-23-05(E) (other available remedies include customer restitution).

Dynegy Marketing & Trade respectfully submits that the denial of NOPEC's certification renewal application is simply not sufficient in light of NOPEC's harmful and anticompetitive misconduct. Dynegy Marketing & Trade submits that the following would be appropriate remedies to implement under these circumstances as part of compliance proceeding initiated by

the Commission under O.A.C. 4901:1-23-05(A):

Require That NOPEC Pay Customer Restitution to Former Standard Program Price Customers from NOPEC's $52 Million of Liquid Assets. The Commission, as the regulatory body overseeing NOPEC and its certificate, should order NOPEC to use the approximately $52 million in liquid assets it has accumulated over the years and re-rate customers' bills to the then-prevailing SSO rates going back to December 2021. Indeed, multiple customers in NOPEC-served communities have written to the Commission expressly requesting refunds for the amounts they overpaid due to NOPEC's technical mismanagement:

- "The total extra costs for electric for these ten months [December 2021 through October 2022] is $295.92 and that is the amount of refund I have requested from NOPEC. … If NOPEC does not refund me, I need help from PUCO."[274]
- "So, again, my question (that NOPEC refuses to answer) is why did it take NOPEC over 8 months to make the decision to do what's best for the customer? … NOPEC has stated they will no longer respond to my inquiries, so I, as a customer, am left without an understanding of why I paid over $335.14 (since January 2022) for my electric services."[275]
- "NOPEC charges were outrageous. I feel NOPEC should refund at least a portion of their charges from 2022 which was over $1600."[276]

Require That NOPEC Pay an Appropriate Forfeiture from Its $52 Million of Liquid Assets. The Commission should also order NOPEC to pay an appropriate forfeiture to the State

[274] Comment of Rich DiTommaso, Case No. 22-0806-EL-WVR (Dec. 20, 2022).

[275] Comment of Steven Pastor, Case No. 22-0806-EL-WVR (Oct. 17, 2022) (cleaned up).

[276] Comment of Trudy K. German, Case No. 00-2317-EL-GAG (Oct. 27, 2022).

of Ohio based on its violation of the Commission's rules, if any money is left over after restitution payments to former Standard Program Price customers.

Require That NOPEC Submit a Detailed Compliance Plan for Future Operations. The Commission should order NOPEC to submit a comprehensive and detailed compliance plan to PUCO Staff and intervening parties in this case describing how NOPEC plans to remain compliant with Ohio law and the Commission's rules should the Commission decide to grant NOPEC a governmental aggregation certificate in the future. Further, the Commission should order that NOPEC may only re-apply to be a governmental aggregator after PUCO Staff has approved NOPEC's compliance plan, and the compliance plan should be included in any future renewal application by NOPEC and made public given the public nature of these proceedings.

Submit to Oversight of An Independent Monitor. Should the Commission reissue NOPEC a governmental aggregation certificate in the future following the submission of a Staff-approved compliance plan, NOPEC should be ordered to submit to the oversight of an independent monitor appointed by the Commission at NOPEC's cost for two years, to oversee NOPEC's operations on a go-forward basis and provide regular reports to the Commission regarding, among other things, NOPEC's operations, management, and capabilities as a certified governmental aggregator.

Notification of Outcomes. Finally, NOPEC should be ordered to notify its member communities and former customers about any decision issued by the Commission in these proceedings, through a communication that is first approved by PUCO Staff.

* * * * *

NOPEC made the deliberate decision to disregard the law and put its competitive position and its revenue ahead of its Standard Program Price customers, to disastrous results for them and for Ohio's SSO market participants and future SSO auctions. Having failed to "do the right thing" in the numerous ways documented in detail in these comments, NOPEC should now be held publicly accountable by Commission. Accordingly, the Commission should deny NOPEC's November 22, 2022 governmental aggregation renewal application, which it may do so without a hearing under O.A.C. 4901:1-24-10(A)(2), and also initiate a compliance proceeding under O.A.C. 4901:1-23-05(A) to consider additional appropriate remedies against NOPEC.

Dated: January 27, 2023

Respectfully submitted,

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Summary: Comments PUBLIC REDACTED VERSION - DYNEGY MARKETING AND TRADE, LLC'S COMMENTS OPPOSING THE RENEWAL OF NOPEC'S GOVERNMENTAL AGGREGATION CERTIFICATE AND ADDRESSING NOPEC'S RESPONSE TO THE COMMISSION'S SEPTEMBER 7, 2022 SHOW-CAUSE ORDER electronically filed by Mr. David F. Proano on behalf of Dynegy Marketing and Trade, LLC