

**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

---

**COMMENTS OF HARTREE PARTNERS, LP ON  
NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S RESPONSE  
TO THE SEPTEMBER 7, 2022 SHOW CAUSE ORDER**

---

**January 27, 2023**

Michael D. Dortch (0043897)  
Justin M. Dortch 0090048)  
Richard R. Parsons (0082270)  
Kravitz, Brown & Dortch, LLC  
65 East State Street  
Suite 200  
Columbus, Ohio 43215  
Tel: 614.464.2000  
Fax: 614.464.20023  
Email: [mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)  
[jdortch@kravitzllc.com](mailto:jdortch@kravitzllc.com)  
[rparsons@kravitzllc.com](mailto:rparsons@kravitzllc.com)

Michael A. Yuffee  
PHV# 26036-2022  
Ryan Norfolk  
PHV# 26248-2022  
Baker Botts, L.L.P.  
700 K Street, NW  
Washington DC 20001  
Tel: 202.639.1132  
F: 202.585.1013  
Email: [michael.yuffee@bakerbotts.com](mailto:michael.yuffee@bakerbotts.com)  
[ryan.norfolk@bakerbotts.com](mailto:ryan.norfolk@bakerbotts.com)

***COUNSEL FOR HARTREE PARTNERS, LP***

## TABLE OF CONTENTS

	<b>Page</b>
I. INTRODUCTION .....	1
II. BACKGROUND .....	2
A. NOPEC .....	2
B. The Customer Return .....	3
C. Hartree.....	5
III. COMMENTS OF HARTREE PARTNERS, LP .....	5
A. NOPEC Lacks the Managerial, Technical and Financial Capability to be a CRES Governmental Aggregator .....	5
1. In the Face of Dynamic Market Conditions, NOPEC Took No Action Except for the Customer Return .....	5
2. NOPEC Did Not Consider Alternative Suppliers of SPP Load Because NOPEC's Agreement with NESO Prohibits It .....	7
3. The Customer Return is Designed to Protect NOPEC, Not its Customers.	9
4. NOPEC Knew the Customer Return Would Generate Risk and Uncertainty.....	10
5. NOPEC Violated a Provision of its Own Plan of Operation and Governance .....	12
B. NOPEC's Response to the Show Cause Order is Deficient .....	13
1. NOPEC Fails to Support Its Claim of Consumer Protection and Approval .....	14
2. NOPEC Does Not Explain Why It Did Not Match The SSO Price and Follow Through on Its Representation Of Energy Savings to Customers	16
3. NOPEC Has Not Shown that the Customer Return was a Reasonable or Appropriate Response to Changing Market Conditions .....	16
C. The Customer Return Has Harmed And Will Continue to Harm Hartree .....	17
IV. RECOMMENDATIONS .....	20
V. CONCLUSION.....	21

## I. INTRODUCTION

The Northeast Ohio Public Energy Council (“NOPEC”) is unfit to be certified as a Competitive Retail Electric Service (“CRES”) governmental aggregator in this state. In August of last year, NOPEC informed the Public Utility Commission of Ohio (“Commission”) that it had unilaterally decided to return its 550,000 Standard Program Price (“SPP”) customers to their electric distribution utilities’ (“EDUs”) standard service offer (“SSO”).<sup>1</sup> NOPEC claims that this “Customer Return” was the consequence of unforeseeable geopolitical forces beyond the control of both NOPEC and NOPEC’s chosen electric supplier, NextEra Energy Services Ohio, LLC (“NESO”).<sup>2</sup> NOPEC further claims that the Customer Return was necessary to prevent NOPEC’s SPP customers from “experiencing drastic electricity price increases in these inflationary times.”<sup>3</sup> NOPEC’s claims belie a far less laudable truth.

While NOPEC has asserted – in this proceeding and to its customers – that the Customer Return was necessary to protect the interests and finances of its SPP customers, in reality it was the most commercially attractive option for NOPEC in the face of changing market conditions for which NOPEC had not planned and, ultimately, the only option that NOPEC pursued. In the face of rising energy costs, NOPEC waited. NOPEC did not act to mitigate the impact of foreseeable price fluctuations by pursuing additional risk mitigating hedges. NOPEC did not attempt to find alternative suppliers for its SPP customers’ load.<sup>4</sup> NOPEC did not give its SPP customers the option to remain on SPP service. NOPEC did not offer to transition SPP customers to Monthly Variable Price (“MVP”) service or a fixed-rate service program. After

---

<sup>1</sup> Notice of Material Change to Business Operations (filed Aug. 24, 2022) (“Notice”).

<sup>2</sup> *Id.* at 2.

<sup>3</sup> *Id.*

<sup>4</sup> *See* NOPEC000802 (“No. NOPEC did not “shop” the load to find a different supplier....”).

months of internal deliberation,<sup>5</sup> NOPEC simply sent its SPP customers packing. The Customer Return was unprecedented and injected additional risk and uncertainty in the Ohio electricity markets; results that NOPEC *anticipated*. Given the foregoing, NOPEC’s decision to undertake the Customer Return is *prima facie* evidence of its lack of fitness to be a CRES government aggregator.

Pursuant to the Commission’s Entry of September 7, 2022 in the above-referenced proceeding (“Show Cause Order”),<sup>6</sup> Hartree Partners, LP (“Hartree”) hereby submits these comments to highlight why NOPEC’s CRES certificate was properly suspended pursuant to Ohio Adm. Code 4901:1-24-13 and why NOPEC’s recertification should be denied. Nothing in NOPEC’s Response to the September 7, 2022 Show Cause Order (“Response”) changes these truths.

## II. BACKGROUND

### A. NOPEC

NOPEC is a governmental aggregator that provided retail electric service in 242 member communities across 19 Ohio counties. NOPEC was first certified as a governmental aggregator and CRES provider on January 5, 2001. NOPEC offers retail electricity service to customers under three rate structures: (1) Fixed-Term, (2) MVP, and SPP.<sup>7</sup> Both SPP and MVP are variable priced products. The MVP is calculated as “a set percentage off of the electric utility’s price to compare” that changes on a monthly basis.<sup>8</sup> The SPP is a “competitive” variable rate that “is based on favorable wholesale purchase prices available to the market.”<sup>9</sup> While NOPEC

---

<sup>5</sup> See NOPEC000804-810.

<sup>6</sup> See Entry of September 7, 2022 at ¶ 7.

<sup>7</sup> See Notice at, 2, n.3.

<sup>8</sup> *Id.*

<sup>9</sup> See [NOPEC Residential Electric Pricing | NOPEC](#) (last accessed Dec 7, 2022).

offers all three pricing options for residential electric services, NOPEC structured its aggregation program to automatically enroll eligible customers in the SPP. The SPP program had over 550,000 customers until the Customer Return. [REDACTED]

[REDACTED].<sup>10</sup>

## **B. The Customer Return**

On August 24, 2022, NOPEC filed the Notice, informing the Commission that it would immediately be returning all of its SPP customers – over 550,000 accounts across the service territories of the Cleveland Electric Illuminating Company, Ohio Edison Company, and Ohio Power Company – to their respective EDUs’ SSO. NOPEC asserted that the Customer Return was necessary because “electricity prices have spiked in 2022 for reasons beyond NOPEC’s, NextEra’s and the PUCO’s control...and could move even higher in 2023.”<sup>11</sup> NOPEC subsequently sought waiver of Ohio Adm.Code 4901:1-10-29(H)(2), which requires EDUs to notify their customers of an impending return to SSO service, to expedite the Customer Return.<sup>12</sup> In support of the waiver, NOPEC represented that it intends to “resume its aggregation program when NOPEC’s costs are expected to align considerably more closely with then-effective SSO prices.”<sup>13</sup>

On September 7, 2022, the Commission granted NOPEC’s requested waiver to effectuate the Customer Return. In doing so, however, the Commission found that NOPEC’s “premature return of customers to SSO service and potential failure to comply with the operations and governance plans cast doubt upon whether NOPEC continues to demonstrate the managerial,

---

<sup>10</sup> NOPEC000866 (Response of NOPEC to PUCO Data Request No. 3, Question 5).

<sup>11</sup> Notice at 2.

<sup>12</sup> Show Cause Order ¶ 7.

<sup>13</sup> Motion for a One-Time, Limited Waiver and Request for Expedited Ruling, *In the Matter of the Motion of Northeast Ohio Public Energy Council for a Limited Waiver of Rule 4901:1-10-29(H), Ohio Administrative Code*, Case No. 22-0806-EL-WVR (Aug. 26, 2022) (“Motion for Waiver”).

technical and financial capability to be certified as a CRES governmental aggregator in this state.”<sup>14</sup> Accordingly, the Commission directed NOPEC to “show cause ... demonstrating why its CRES certificate should not be suspended pursuant to Ohio Adm.Code 4901:1-24-13.”<sup>15</sup> In its Show Cause Order, the Commission identified numerous reasons why NOPEC’s CRES certificate may be suspended, notably:

- a) The potentially adverse effects to wholesale generation providers and SSO customers caused by NOPEC’s premature drop of customers;
- b) The potentially adverse effects of NOPEC’s proposal to re-enroll those same customers “at some undefined point in the future when NOPEC deems that economic conditions are favorable[;]”
- c) The lack of explanation for NOPEC’s decision to prematurely return 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 to customers; and
- d) Evidence of a “potential violation of NOPEC’s communities’ operations and governance plans, which do not appear to allow for the return of customers under these circumstances and require a 90-day notice to customers prior to being returned to SSO service.”<sup>16</sup>

NOPEC has offered nothing in its Response that would assuage these concerns. Indeed, internal NOPEC documentation relating to the Customer Return establishes that the Commission’s concerns about NOPEC’s malfeasance and its impact on SSO customers, wholesale suppliers, and NOPEC’s own member communities is well founded.<sup>17</sup> On December 22, 2022, the Commission notified NOPEC that its certificate was cancelled by operation of law and that NOPEC was required to cease providing services.

---

<sup>14</sup> Show Cause Order at ¶ 10.

<sup>15</sup> *Id.* at ¶ 12.

<sup>16</sup> *Id.* at ¶ 10, 11.

<sup>17</sup> *See e.g.*, NOPEC0000846-849; NOPEC000850-861.

### C. Hartree

Hartree is an energy marketer and wholesale energy supplier that participates in SSO load auctions for Ohio EDUs, including FirstEnergy Ohio, Duke Energy Ohio, AES Ohio, and AEP Ohio.<sup>18</sup> Hartree is responsible for approximately 11 percent of the SSO load obligation for the planning year June 1, 2022 through May 31, 2023 in the FirstEnergy Ohio service territory, approximately 4 percent of the SSO load obligation in the AES Ohio service territory.<sup>19</sup>

### III. COMMENTS OF HARTREE PARTNERS, LP

NOPEC utterly fails to address the Commission’s concerns noted in the Show Cause Order, or explain its actions that led to the Customer Return. In short, NOPEC has not, and cannot allay the concerns the Commission has voiced about NOPEC’s fitness as a CRES governmental aggregator. NOPEC’s actions have proven that it is not fit to be a governmental aggregator. The Commission should not certify NOPEC as a CRES governmental aggregator.

#### A. NOPEC Lacks the Managerial, Technical and Financial Capability to be a CRES Governmental Aggregator

##### 1. *In the Face of Dynamic Market Conditions, NOPEC Took No Action Except for the Customer Return*

NOPEC represents that its decision to implement the Customer Return was a necessary evil to protect its customers from price shocks stemming from “unprecedented inflation due to international tension and hotter than normal weather this summer.”<sup>20</sup> NOPEC would have the Commission – and its customers – believe that NOPEC did everything possible to maintain an economically viable SPP service for its customers but was overwhelmed in the face of “unprecedented” conditions. But this is not the case. This was not NOPEC’s first experience

---

<sup>18</sup> See Response of Hartree to NOPEC First Discovery Requests, Interrogatory Nos. 1 through 8.

<sup>19</sup> See *id.*

<sup>20</sup> NOPEC000190.

with market volatility. Indeed, NOPEC saw the current market environment developing many months before it informed the Commission of the Customer Return – and did nothing to prepare for it.

In its Response, NOPEC relies heavily on its experience to try to convince the Commission that it should be permitted to maintain its certification as an aggregator. Specifically, NOPEC notes that “[i]t has had an outstanding track record on behalf of its member’s residents, and under the PUCO’s supervision for over 20 years.”<sup>21</sup> However, NOPEC’s decision to implement the Customer Return demonstrates that NOPEC applied none of its claimed experience to addressing or mitigating the effects of the market volatility that occurred in 2022. In fact, NOPEC expressly ignored past experiences that should have informed NOPEC to take steps to mitigate market risks that arose in 2022.

For example, the volatile geopolitical conditions that NOPEC cites as the reason for the Customer Return are not unprecedented, even in NOPEC’s existence. Indeed, NOPEC first year of operations – 2001 – saw the United States suffer the unprecedented terror attacks of September 11, 2001 and the ensuing U.S. invasion of Afghanistan, which set off sustained volatility in the global energy markets. NOPEC also blames the need for its Customer Return on the fact that 2022 was an unusually hot summer. However, the summer of 2022, while marked by extreme weather and temperatures, was by no means a significant outlier relative to the last twenty years during which NOPEC has been a certified CRES provider. The simple fact is that a CRES provider with 20 years’ experience should have recognized developing volatility in the markets and developed a plan to provide service to its customers despite that volatility. And

---

<sup>21</sup> Response at 6.



while internal NOPEC/NESO documents establish NOPEC's awareness of the coming volatility months before the Customer Return, NOPEC did nothing.

In the six months prior to implementing the Customer Return, NOPEC representatives were involved in nearly three dozen phone calls, virtual meetings, and in-person meetings where the Customer Return may have been discussed.<sup>22</sup> Presentation materials from at least two of these meetings detail the developing volatility in the electricity markets and the potential for increased risk and uncertainty.<sup>23</sup> And yet, despite observing this market volatility for months, NOPEC decided that the only remedy available to it was to use the framework of Ohio's SSO program to shift the risk that it was either unwilling or incapable of managing onto the SSO suppliers; a circumstance that the SSO program was not designed to cover. NOPEC did nothing to prevent, mitigate or, ultimately, assume any responsibility for these risks. Indeed, NOPEC was aware that the Customer Return would *increase* risk and uncertainty for SSO customers, SSO suppliers, and EDUs.<sup>24</sup> And yet NOPEC *still* proceeded with the Customer Return. These actions are demonstrative of an organization bereft of the technical, managerial, or financial capabilities required to be a CRES provider.

## ***2. NOPEC Did Not Consider Alternative Suppliers of SPP Load Because NOPEC's Agreement with NESO Prohibits It***

NOPEC's decision not to look at other options for sourcing its SPP load requirements also raises significant questions about NOPEC's fitness as a CRES provider. In a data request from Commission Staff to NOPEC and NESO, NOPEC was asked whether it tried "to 'shop' the load around/find a different supplier **at a beneficial rate for customers.**"<sup>25</sup> NOPEC responded that it

---

<sup>22</sup> See NOPEC000805-808.

<sup>23</sup> See NOPEC000850-861 (Ohio Retail Electric Aggregation/Market Conditions Discussion (July 1, 2022)).

<sup>24</sup> See NOPEC000859-861.

<sup>25</sup> NOPEC000802 (Response of NOPEC to PUCO Data Request No. 2, Question 4).

did not because it believed that finding such an alternate supply would be “impossible” and “...The contract with NextEra makes no allowance for such an action.”<sup>26</sup> In other words, NOPEC did not attempt to find alternative, more economic means to serve its customer obligations because the wholesale supply contract it had executed with its sole supplier – NESO – did not permit NOPEC to take such action.

NOPEC and NESO are parties to a Master Supply Endorsement Agreement (“MSA”), which obligates NESO to purchase “100% of NOPEC’s expected energy supply needs and Renewable Energy Credits in the forwards markets.”<sup>27</sup> As market volatility persisted into the summer of 2022 and NOPEC trained its attention on the Customer Return, NOPEC undertook efforts to ensure that its contractual relationship with NESO would weather the storm, even if its SPP customers did not.

On August 3, 2022, NESO and NOPEC entered into a Temporary Hedge Strategy Adjustment to address the impact of the forthcoming Customer Return. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>28</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

---

<sup>26</sup> *Id.*

<sup>27</sup> NOPEC000801 (Response of NOPEC to PUCO Data Request No. 2, Question 1). NESO represents that the largest (approximately 60-70% of total power supply costs) and most volatile cost component of this full requirements power supply contract is energy cost.

<sup>28</sup> NOPEC000834.

[REDACTED].<sup>29</sup> These documents reflect a far different image of NOPEC from the one it has painted for itself as a benevolent protector of its customers. In reality, as NOPEC watched the electricity markets become increasingly volatile, it took decisive legal and commercial action (*i.e.*, the Temporary Hedge Strategy) to protect itself and its sole electric supplier for its SPP customers. At the same time, NOPEC left its SPP customers to fend for themselves. The Customer Return is a function of NOPEC's failure to explore options to source electricity at competitive prices from suppliers other than NESO because of the potential for commercial and legal fallout vis-à-vis NESO. This too is demonstrative of NOPEC's lack of fitness to be certified as a CRES governmental aggregator.

### 3. *The Customer Return is Designed to Protect NOPEC, Not its Customers*

NOPEC repeatedly claims in this proceeding and to its customers that the Customer Return is designed to protect customers. Indeed, the Commission granted NOPEC's waiver request "to provide NOPEC customers with an opportunity [to] save money on their electric bills...."<sup>30</sup> This is a fallacy knowingly perpetuated by NOPEC.

In presentation materials for its July 1, 2022 Ohio Retail Electric Aggregation/Market Conditions Discussion, NOPEC identified [REDACTED]

[REDACTED] [REDACTED].<sup>31</sup> While accusing

these parties of unscrupulous behavior in soliciting its customers, NOPEC raises the specter of a nuclear option if mass defections from NOPEC are expected. [REDACTED]

---

<sup>29</sup> NOPEC000837.

<sup>30</sup> Show Cause Order at ¶ 9.

<sup>31</sup> NOPEC000857-861.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>32</sup> NOPEC even admits it has [REDACTED]

[REDACTED]

[REDACTED]<sup>33</sup> Thus, NOPEC admits that it had prepared a plan to prevent competitors from encroaching on its aggregation business. That plan, by another name, was the Customer Return.

While NOPEC would like to convince the Commission that the Customer Return was motivated by its concern for its customers, the evidence demonstrates that this simply is not true. In fact, the evidence demonstrates that the Customer Return was motivated by: (1) NOPEC's desire to dissuade competition; and (2) the fact that the NOPEC-NESO wholesale supply contract, and NESO as NOPEC's exclusive wholesale supplier, would not permit NOPEC to seek any alternative sources of supply. This warrants not only suspension of NOPEC's CRES certificate, but potentially investigation of NOPEC and NESO for anticompetitive behavior.

#### ***4. NOPEC Knew the Customer Return Would Generate Risk and Uncertainty***

NOPEC's decision to implement the Customer Return is all the more contemptable and demonstrative of NOPEC's lack of fitness as a CRES provider when one realizes that NOPEC was fully aware of the deleterious economic implications of the Customer Return on SSO customers, SSO suppliers, and the Ohio electricity markets *before* it implemented the Customer Return.

---

<sup>32</sup> NOPEC000858 (emphasis in original).

<sup>33</sup> *Id.* (emphasis in original).

In presentation materials for its July 1, 2022 Ohio Retail Electric Aggregation/Market Conditions discussion, NOPEC stated that [REDACTED] (i.e., the Customer Return) would result in significant losses for SSO wholesale suppliers. Specifically, NOPEC represented that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>34</sup> NOPEC further stated that [REDACTED]

[REDACTED].<sup>35</sup> Reproduced below are NOPEC's own projections of the potential adverse consequences of the Customer Return to the Ohio electricity markets as set forth in the document NOPEC produced bearing Bates No. NOPEC\_002102:

[REDACTED]

---

<sup>34</sup> NOPEC\_002101 (emphasis in original).

<sup>35</sup> NOPEC\_002102 (emphasis in original).

In sum, NOPEC's own internal documentation demonstrates that NOPEC recognized that the Customer Return presented a viable option to prevent competitors from taking customers from NOPEC but that implementing the Customer Return would result in significant harm to SSO suppliers, other CRES providers, and the integrity of upcoming SSO auctions. Balancing these harms, NOPEC nevertheless implemented the Customer Return to protect the commercial interests of it and NESO. This renders NOPEC fundamentally unfit to be certified as a CRES community aggregator.

#### ***5. NOPEC Violated a Provision of its Own Plan of Operation and Governance***

Further evidence of NOPEC's lack of fitness to be a CRES provider can be seen in NOPEC's violation of its own Plan of Operation and Governance to effectuate the Customer Exchange.

The termination provision of NOPEC's Plan of Operation and Governance allows for termination of the NOPEC Aggregation Program 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.<sup>36</sup>

---

<sup>36</sup> Renewal Application of Northeast Ohio Public Energy Council for continued Certification as an Electric Governmental Aggregator, Exhibit A-3 (Operation and Governance Plan), § 2.4, *In the Matter of the Certification of Northeast Ohio Public Energy Council as a Governmental Aggregator*, Case No. 00-2317-EL-GAG (Nov. 23, 2020).

These are the only acceptable reasons and means by which NOPEC may terminate the Aggregation Program. NOPEC's implementation of the Customer Return does not fall within these two "options" and yet the practical effect of the Customer Return is that SPP service has been terminated for the remainder of NOPEC's current three-year aggregation program, which ends in January 2023.<sup>37</sup>

In a blistering display of double speak, NOPEC tries to have its cake and eat it too by claiming: (1) that the termination provision it violated is merely a "notice" provision; but also (2) that it did not violate the termination provision because the Customer Return is not an event triggering termination under the above language of NOPEC's Plan of Operation and Governance.<sup>38</sup> The Commission should not be fooled by NOPEC's mischaracterization. NOPEC violated its Plan of Operation and Governance by returning all of its SPP customers to the SSO for reasons not provided for in the termination provision of its Plan of Operation and Governance. NOPEC's inability to comply with its own rules of conduct and governance renders it unfit to be CRES provider.

#### **B. NOPEC's Response to the Show Cause Order is Deficient**

NOPEC's Response to the Commission's Show Cause Order is deficient because NOPEC does not address the Commission's concerns outlined in the Show Cause Order, notably: (1) NOPEC claims its actions are for the benefit of customers but fails to support such claim; (2) NOPEC does not explain why it did not match the SSO price and follow through on its representation of energy savings to customers; (3) NOPEC did not adequately explain why it prematurely, unilaterally dropped all of its SPP customers; and (4) NOPEC did not explain its

---

<sup>37</sup> See Notice.

<sup>38</sup> See Response at 14-15.

plan to re-enroll customers when economic conditions become more favorable, except to provide that it plans to re-enroll customers in June 2023.<sup>39</sup>

***1. NOPEC Fails to Support Its Claim of Consumer Protection and Approval***

The overwhelming themes of NOPEC’s Response are that NOPEC does not hold its customers hostage to its three-year program, and, as such, NOPEC did the right thing by its customers by unilaterally returning them to the SSO. NOPEC attempts to portray of its unilateral, premature return of its SPP customers to the SSO as being within the same category as customers electing to go back to the SSO themselves. Throughout its Response, NOPEC asserts that customers retain the option to “leave at any time.”<sup>40</sup> In particular, NOPEC states that “the concept of a rigid three-year program to which all customers are captive in the Aggregation Program was never NOPEC’s intent...[NOPEC’s] opt-out notices make clear that customers are free to leave NOPEC’s aggregation program at any time without penalty.”<sup>41</sup> Notably, NOPEC acknowledges that it’s “full three-year aggregation term is *merely a means to protect customers’ interests, by requiring the governmental aggregator to honor its pricing commitment over time* when its prices are below the SSO.”<sup>42</sup> By its own admission, NOPEC contracts to provide its SPP service for a three-year term to protect customers’ interests and to honor its pricing commitment over time. NOPEC cannot simply decide to honor its commitment to whatever point in time it finds to be convenient or economic to it. Such a condition negates the effect of a term for service altogether.

NOPEC attempts to put its actions in the same bucket as that of a customer leaving upon its own initiative. These two actions are not the same. In an effort to justify its actions to the

---

<sup>39</sup> Response at 4.

<sup>40</sup> *Id.* at 10.

<sup>41</sup> *Id.* at 18.

<sup>42</sup> *Id.* at 18 (emphasis added).



Commission, NOPEC states that customers were already migrating back to their respective SSO providers at an increasing rate. The difference between the natural migration of customers back to their SSOs and NOPEC's unilateral dump of customers back to the SSOs is that, were the choice left to the customers, the migration would have been a gradual filtering in of customers and the impact of the sudden increase, an approximate 150% increase, would have been far less drastic and, therefore, far less harmful to SSO providers like Hartree.

Despite (or perhaps in recognition of) the firestorm of controversy its conduct has wrought in the Ohio electricity market, NOPEC defends its actions on the grounds that energy advisors recommended that shopping customers return to their SSO.<sup>43</sup> In addition, NOPEC states that the Office of Ohio Consumers' Counsel supports NOPEC's return of customers to the SSO. These claims are irrelevant as they ignore all of the actual facts underlying NOPEC's actions, and should be disregarded.

NOPEC provides no support for its claims that the market in general supports its actions. Indeed, Dynegy's originally-filed complaint and NOPEC's full throated opposition to any efforts to intervene in this proceeding would suggest that opposition to NOPEC is material. Most importantly, broad, unsupported claims of consumer protection do not suddenly render lawful an action that is otherwise unlawful. Yet that is all that NOPEC offers here. The substantive legal and factual disputes raised by Dynegy and others in the above-captioned proceeding render suspension of NOPEC's CRES certificate necessary.

---

<sup>43</sup> *Id.* at 10.

**2. *NOPEC Does Not Explain Why It Did Not Match The SSO Price and Follow Through on Its Representation Of Energy Savings to Customers***

In its Response, NOPEC argues that it never made a commitment to match the SSO price, as described in the Commission’s Show Cause Order.<sup>44</sup> Yet, in the proceeding paragraphs of its Response, NOPEC describes the commitments it has made to customers, namely: “to acquire the best market rate available for electricity supply[;]” the “acquisition of competitive prices and terms for power supply[;]” and that NOPEC’s “pricing is expected to be lower than the utility’s standard offer generation charge[.]”

NOPEC, focused on countering the precise language the Commission uses in its Show Cause Order, misses the point and fails to provide reasoning as to why it did not live up to its promises by unilaterally expelling its customers from its SPP service. NOPEC only insists that it “never” committed to match the SSO price in any of its opt-out notices to customers.<sup>45</sup> Instead of addressing the Commission’s concerns, NOPEC again redirects to its reluctance to “hold hostage” its customers, framing such as the opposite reality of NOPEC unilaterally ejecting its customers from its aggregate program.<sup>46</sup> Accordingly, NOPEC fails to adequately respond to the Commission’s concern that NOPEC did not follow through on its promise to customers.

**3. *NOPEC Has Not Shown that the Customer Return was a Reasonable or Appropriate Response to Changing Market Conditions***

NOPEC holds tight to the theme of taking action that it believes is in the best interest of the customers. In doing so, NOPEC fails to adequately respond to the Commission’s Show Cause Order. In particular, NOPEC does not explain why it prematurely, unilaterally dropped all of its SPP customers. Instead, NOPEC describes vague, global events that it points to as the

---

<sup>44</sup> *Id.* at 17.

<sup>45</sup> Response at 18.

<sup>46</sup> *See id.* at 18 (“Moreover, the concept of a rigid three-year program to which all customers are captive in the Aggregation Program was never NOPEC’s intent.”).

cause of “these unprecedented price spikes[.]”<sup>47</sup> For example, NOPEC describes the increased price of electricity in the United States and how such increase has caused the price per kWh in electricity to rise substantially in every state. NOPEC states that “the Russian invasion of Ukraine, combined with supply chain challenges and other market supply and demand factors outside the control of Ohio’s EDUs, NOPEC, and most importantly, Ohio consumers[.]” are the cause of the sudden price spikes.<sup>48</sup>

NOPEC’s explanation is another attempt to escape accountability for its actions. NOPEC may describe global events to explain the cause of electricity price increases, but NOPEC cannot refer broadly to global events as its reason for terminating its SPP program and returning customers to their SSO providers. NOPEC may believe that such explanation is sufficient, but the Commission was surely well aware of the external factors that resulted in global energy price spikes. Clearly, the Commission was seeking a response from NOPEC that described NOPEC’s specific reasoning for prematurely terminating its program, reasons specific to NOPEC’s inability to match the SSO providers lower price offerings. Nowhere in its Response does NOPEC provide to the Commission it’s reasoning for unilaterally, prematurely dropping all of its SPP customers. Such response is insufficient and warrants suspension of NOPEC’s CRES certificate.

### **C. The Customer Return Has Harmed And Will Continue to Harm Hartree**

As NOPEC anticipated, the Customer Return has triggered cascading deleterious effects on the Ohio electricity markets, including ratepayers, EDUs, and SSO suppliers. Hartree has been substantially and irrevocably harmed by the Customer Return.

---

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.*

Hartree forecasts that the Customer Return will result in a 150% increase in the FirstEnergy SSO load that Hartree serves. In the near term, as a result of NOPEC's unilateral shedding of its customers, Hartree forecasts that it will be required to procure approximately 70% more MWh of electricity to supply its tranches for its SSO load for the months of September through December 2022 than it was required to procure for the months of May through August 2022.<sup>49</sup> Specifically, Hartree forecasts that it will be required to procure approximately [REDACTED] of electricity to supply load associated with the Customer Return for the months of September through December 2022 and another [REDACTED] to supply load through the remainder of the June 2022 – May 2023 planning year. Hartree forecasts that it will pay approximately [REDACTED] to procure electricity needed to supply load associated with the Customer Return for the period September 2022 through December 2022 and approximately [REDACTED] for the remainder of the June 2022-2023 planning year.

The outcomes of SSO auctions held in October 2022, after the Customer Return, show the concrete, dollars-and-cents impact of NOPEC's abdication of its responsibilities as a CRES governmental aggregator:

---

<sup>49</sup> [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

## Summary of Results for March 7, 2022 ESP-IV SSO

Number of Registered Bidders	11
Number of Winning Bidders	7
Number of Rounds in the Auction	15

## Delivery Period

June 1, 2022 to  
May 31, 2023

Tranche Target	34
Number of Tranches Procured	34
Range of Starting Price (\$/MWh)	\$75.00 - \$95.00
Clearing Price (\$/MWh)	\$68.11

## Summary of Results for October 4, 2022 ESP-IV SSO

Number of Registered Bidders	7
Number of Winning Bidders	5
Number of Rounds in the Auction	8

## Delivery Period

June 1, 2023 to  
May 31, 2024

Tranche Target	33
Number of Tranches Procured	33
Range of Starting Price (\$/MWh)	\$100.00 - \$130.00
Clearing Price (\$/MWh)	\$122.30

Fig. 1 (Source: [FirstEnergy Ohio SSO CBP Auction Results](#))

## AEP Ohio CBP

## Summary of Results: Auction held on March 8, 2022

# of:	
Registered Bidders	11
Rounds in the Auction	11
<b>Product Detail</b>	<b>Delivery Period</b>
	<b>June 1, 2022 to May 31, 2023</b>
Tranche Target	50
# of Tranches Procured	50
# of Winning Bidders	9
Range of Starting Price (\$/MWh)	80.00 - 105.00
Clearing Price (\$/MWh)	69.27

## AEP Ohio CBP

## Summary of Results: Auction held on November 1, 2022

# of:	
Registered Bidders	7
Rounds in the Auction	4
<b>Product Detail</b>	<b>Delivery Period</b>
	<b>June 1, 2023 to May 31, 2024</b>
Tranche Target	50
# of Tranches Procured	45
# of Winning Bidders	6
Range of Starting Price (\$/MWh)	100.00 - 130.00
Clearing Price (\$/MWh)	119.98

Fig. 2 (Source: [AEP Ohio SSO CBP Auction Results](#))

As the above figures illustrate, in the immediate aftermath of the Customer Return, *clearing prices in SSO auctions nearly doubled, while the number of rounds and participants in each auction fell by nearly half*. Reduced participation resulted in less competitive auctions and prices skyrocketed. Similar results were also seen in AEP Ohio's first post-Customer Return SSO auction.<sup>50</sup> Put plainly, there is a direct link between the Customer Return on one hand, and increased prices and decreased supplier participation in SSO auctions on the other.

That uncertainty and risk that NOPEC has injected into the power market in Ohio has chased SSO suppliers from the marketplace and resulted in increased SSO prices, which translates to higher retail prices – for the very SSO service that NOPEC has improperly used as its backstop. Returning NOPEC to the CRES landscape will send a message to the market that CRES providers are free to use SSO as a backstop to serve the CRES providers' economic interests, rather than the backstop available to retail customers to allow them to shop for retail electricity services that best suit their needs. Such a result will permanently undermine the very retail market that Ohio and the Commission have worked to develop.

#### **IV. RECOMMENDATIONS**

Based on the foregoing, this Commission should find that NOPEC it not fit to be a governmental aggregator in Ohio and that NOPEC failed to adequately respond to the Commission's Show Cause Order. As such, this Commission should suspend NOPEC's CRES certificate unless and until NOPEC demonstrate that it has the managerial, technical, and financial capabilities to be a CRES governmental aggregator in Ohio.

---

<sup>50</sup> See *supra*, Fig. 2.

**V. CONCLUSION**

For the foregoing reasons, Hartree respectfully requests that the Commission find that NOPEC is not fit to serve as a governmental aggregator in the state of Ohio and, accordingly, deny NOPEC's Renewal Application.

Respectfully submitted,

/s/

Michael D. Dortch (0043897), Counsel of  
Record

Justin M. Dortch 0090048)

Richard R. Parsons (0082270)

Kravitz, Brown & Dortch, LLC

65 East State Street

Suite 200

Columbus, Ohio 43215

Tel: 614.464.2000

Fax: 614.464.20023

Email: [mdortch@kravitzllc.com](mailto:mdortch@kravitzllc.com)

[Jdortch@kravitzllc.com](mailto:Jdortch@kravitzllc.com)

[rparsons@kravitzllc.com](mailto:rparsons@kravitzllc.com)

/s/ Michael Yuffee

Michael A. Yuffee

PHV# 26036-2022

Ryan Norfolk

PHV# 26248-2022

Baker Botts, L.L.P.

700 K Street, NW

Washington DC 20001

Tel: 202.639.1132

F: 202.585.1013

Email: [michael.yuffee@bakerbotts.com](mailto:michael.yuffee@bakerbotts.com)

[ryan.norfolk@bakerbotts.com](mailto:ryan.norfolk@bakerbotts.com)

**Willing to Accept Service by Email**

***COUNSEL FOR HARTREE PARTNERS, LP***

Dated: January 27, 2023

**CERTIFICATE OF SERVICE**

I certify that the foregoing document was filed using the Commission's Docketing Information System and was served by electronic mail, on January 27, 2023, to the following:

Dane Stinson  
Devin D. Parram  
Bricker & Eckler, LLP  
100 S. Third Street  
Columbus, Ohio 43215  
[dstinson@bricker.com](mailto:dstinson@bricker.com)  
[dparram@bricker.com](mailto:dparram@bricker.com)

Brian Knipe  
FirstEnergy Corp.  
76 S. Main Street  
Akron, Ohio 44308  
[bknipe@firstenergycorp.com](mailto:bknipe@firstenergycorp.com)

Evan Betterton  
Stacie Cathcart  
IGS Energy  
6100 Emerald Parkway  
Dublin, Ohio 43016  
Tel: (614) 659-5000  
Fax: (614) 659-5073  
[evan.betterton@igs.com](mailto:evan.betterton@igs.com)  
[stacie.cathart@igs.com](mailto:stacie.cathart@igs.com)

David Proaño  
James H. Rollinson  
Patrick T. Lewis  
Kyle T. Cutts  
Taylor M. Thompson  
Ali I. Haque  
BAKER & HOSTETLER, LLP  
127 Public Square, Suite 2000  
Cleveland, Ohio 44114  
[dproano@bakerlaw.com](mailto:dproano@bakerlaw.com)  
[jrollinson@bakerlaw.com](mailto:jrollinson@bakerlaw.com)  
[kcutts@bakerlaw.com](mailto:kcutts@bakerlaw.com)  
[tathompson@bakerlaw.com](mailto:tathompson@bakerlaw.com)  
[ahaque@bakerlaw.com](mailto:ahaque@bakerlaw.com)

Steven T. Nourse  
AEP Service Corporation  
1 Riverside Plaza  
Columbus, Ohio 43215  
[stnourse@aep.com](mailto:stnourse@aep.com)

Larry Sauer  
Ohio Consumer's Counsel  
65 E. State Street  
Suite 700  
Columbus, Ohio 43215  
[larry.sauer@occ.ohio.gov](mailto:larry.sauer@occ.ohio.gov)

Thomas Lindgren  
Rhiannon Plant  
Assistant Ohio Attorneys General  
Public Utilities Section  
30 East Broad Street  
Columbus, Ohio 43215  
[Thomas.Lindgren@OhioAGO.gov](mailto:Thomas.Lindgren@OhioAGO.gov)  
[Rhiannon.Plant@OhioAGO.gov](mailto:Rhiannon.Plant@OhioAGO.gov)

John Finnigan  
Maureen Wills  
Larry Sauer  
Office of the Ohio Consumers' Counsel  
65 East State Street  
Suite 700  
Columbus, Ohio 43215  
[John.Finnigan@occ.ohio.gov](mailto:John.Finnigan@occ.ohio.gov)  
[Maureen.Willis@occ.ohio.gov](mailto:Maureen.Willis@occ.ohio.gov)  
[Larry.Sauer@occ.ohio.gov](mailto:Larry.Sauer@occ.ohio.gov)



Janessa Glenn  
K&L Gates LLP  
2801 Via Fortuna, Suite 650  
Austin, Texas 78746-7568  
Tel: 512-482-6866  
Fax: 512-482-6859  
[janessa.glenn@klgates.com](mailto:janessa.glenn@klgates.com)

Thomas M. Bellish  
Buckeye Energy Brokers, Inc.  
65 East Mill Street  
Akron, OH 44308  
[tb@buckeyeenergybrokers.com](mailto:tb@buckeyeenergybrokers.com)

Michael R. Gladman  
Shalini B. Goyal  
Margaret M. Dengler  
Jones Day  
325 John H. McConnell Blvd.,  
Suite 600  
Columbus, Ohio 43215  
Tel: (614) 469-3939  
Fax: (614) 461-4198  
[mrgladman@jonesday.com](mailto:mrgladman@jonesday.com)  
[sgoyal@jonesday.com](mailto:sgoyal@jonesday.com)  
[mdengler@jonesday.com](mailto:mdengler@jonesday.com)

Dona Seger-Lawson  
AEP Indiana Michigan  
110 E. Wayne St.  
Fort Wayne, IN 46802  
[Dgseger-lawson@aep.com](mailto:Dgseger-lawson@aep.com)

Christine E. Watchorn  
Zachary E. Woltz  
FirstEnergy Service Company  
100 E. Broad Street, Suite 2225  
Columbus, Ohio 43215  
Tel: (614) 437-0183  
[cwatchorn@firstenergycorp.com](mailto:cwatchorn@firstenergycorp.com)  
[zwoltz@firstenergycorp.com](mailto:zwoltz@firstenergycorp.com)

Ryan A. Doringo  
Jones Day  
North Point  
901 Lakeside Avenue  
Cleveland, Ohio 44114  
Tel: (216) 586-3939  
Fax: (216) 579-0212  
[radoringo@jonesday.com](mailto:radoringo@jonesday.com)

Respectfully Submitted,

/s/ \_\_\_\_\_  
Justin M. Dortch (0090048)

Respectfully Submitted,

/s/ *Michael Yuffee* \_\_\_\_\_  
Michael A. Yuffee (PHV# 26036-2022)

**This foregoing document was electronically filed with the Public Utilities  
Commission of Ohio Docketing Information System on**

**1/27/2023 4:37:59 PM**

**in**

**Case No(s). 00-2317-EL-GAG**

Summary: Comments PUBLIC VERSION OF CONFIDENTIAL FILING  
electronically filed by Mr. Michael D. Dortch on behalf of Hartree Partners, LP