

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

For the reasons set forth in the attached Memorandum in Support, Dynegy Marketing & Trade, LLC (“Dynegy Marketing & Trade”) respectfully moves for leave to file the attached objections *instanter* to Staff’s February 21, 2023 Review and Recommendation regarding the renewal of NOPEC’s governmental aggregation certificate.

Respectfully submitted,

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### Willing to Accept Service by Email

***COUNSEL FOR DYNEGY MARKETING AND  
TRADE, LLC***

**BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**MEMORANDUM IN SUPPORT OF DYNEGY MARKETING & TRADE, LLC'S  
MOTION FOR LEAVE TO FILE OBJECTIONS *INSTANTER* TO THE FEBRUARY  
21, 2023, STAFF REVIEW AND RECOMMENDATION**

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Pursuant to Ohio Adm.Code 4901-1-28(E), Dynegy Marketing & Trade, LLC (“Dynegy Marketing & Trade”) respectfully moves for leave to file the objections *instanter* to the Staff Review and Recommendation filed on February 21, 2023 (“Staff Review”). Dynegy Marketing & Trade’s objections are attached as Exhibit 1 hereto. Leave should be granted for the filing of Dynegy Marketing & Trade’s objections for two independent reasons.

The Staff Review constitutes an investigative Staff report within the meaning of Ohio Adm.Code 4901-1-28(E). The Staff Review confirms that Staff investigated NOPEC’s conduct and reported on that investigation. *See* Staff Review at 3 (“Staff is required to evaluate an applicant based on its managerial, technical, and financial capabilities to provide the service it intends to offer and its ability to comply with commission rules or orders .... Staff has reviewed and evaluated [NOPEC’s] application, accompanying exhibits, and amendments. Based on this review....”) (emphasis added); *see also id.* at 2 (stating that Staff reviewed “data request responses provided to Staff as a result of Staff’s inquiry into the circumstances surrounding NOPEC’s movement of customers back to default service. ... Staff identified several concerns and met with NOPEC to discuss these concerns on multiple occasions from October 2022 to February 8, 2023.”) (emphasis added).

Ohio Adm.Code 4901-1-28(E) provides in relevant part, “Unless otherwise ordered by the commission, in all other [non rate] cases in which the commission orders an investigation to be performed by staff and the filing of a report, the report shall be deemed admitted into evidence at the time it is filed with the commission[.]” The rule goes on to state that, “If a staff report described in this paragraph is admitted into evidence, interested persons shall have some opportunity, to be determined by the commission, to submit testimony, file comments, or file objections to the report.” Ohio Adm.Code 4901-1-28(E) (emphasis added).

Accordingly, the Commission’s rules provide that “interested parties” such Dynegy Marketing & Trade must be given an “opportunity ... to submit testimony, file comments, or file objections” to the Staff Review in this case. Ohio Adm.Code 4901-1-28(E). It would have been Dynegy Marketing & Trade’s preference to address the Staff Review in its Comments filed on January 27, 2023, or its Reply Comments filed on February 3, 2023. However, Staff filed their Staff Review after those comment deadlines had passed, foreclosing that opportunity. Accordingly, Dynegy Marketing & Trade respectfully requests the opportunity to submit objections to the Staff Review, in the form attached hereto, as permitted by Ohio Adm.Code 4901-1-28(E).

In the alternative, even if the Staff Review is not a staff report within the meaning of Ohio Adm.Code 4901-1-28(E), the Commission has the discretion to grant Dynegy Marketing & Trade leave to file its objections to the Staff Review. That is because the Staff Review’s conclusions are based on a clearly erroneous finding made by Staff that was based on representations made to Staff by NOPEC. In particular, Staff writes on page 5 of its report that, “In discussions with Staff, NOPEC indicated that it was only partially hedged for the electric load requirements and with the increase in market costs, it was not in a position to complete the program term.” But as discussed

in detail in the attached proposed objections, this is patently untrue as shown by NOPEC's own records. Further, leave should be granted because in other ways discussed in detail in the objections, Staff's Review overlooks NOPEC's own admissions regarding the market impact of its customer-drop and does not address many of the facts developed and now in the record in this proceeding.

### **CONCLUSION**

For the foregoing reasons, the Commission should grant leave to Dynegy Marketing & Trade to file the attached objections to Staff's February 21, 2023 report.

February 24, 2023

Respectfully submitted,

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**Exhibit 1**

**DYNEGY MARKETING & TRADE, LLC'S OBJECTIONS TO THE  
FEBRUARY 21, 2023, STAFF REVIEW AND RECOMMENDATION CONCERNING  
NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S CERTIFICATE RENEWAL**

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 & TRADE, LLC'S OBJECTIONS TO THE FEBRUARY 21, 2023, STAFF REVIEW AND RECOMMENDATION CONCERNING NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S CERTIFICATE RENEWAL**

Dynegy Marketing & Trade, LLC, a party-in-interest in these proceedings, respectfully submits these objections to the Review and Recommendation of Commission Staff filed in this matter on February 21, 2023 (the "Staff Review") concerning the pending Order to Show Cause dated September 7, 2022, and NOPEC's CRES Certificate Renewal Application dated November 22, 2022. Dynegy Marketing & Trade offers these objections to correct the record on a key factual finding in the Staff Review that is clearly erroneous and appears to be based on false information provided by NOPEC, and to object to Staff's misplaced recommendation that NOPEC should have its governmental aggregation certification renewed.

**I. Staff's Finding That NOPEC "Was Not In A Position To Complete The Program Term" Is Clearly Erroneous And Not Supported By The Record.**

The *central* question the Commission raised in its Order to show cause was "whether the decision of NOPEC and NextEra to not match the SSO price, and thus follow through on their prior representation, [was] due to legal constraints or economic choices."<sup>1</sup> Partly addressing this question, the Staff Review concluded:

NOPEC customers were billed higher rates above the SSO rates for many months prior to the requested return of the customers back to the default service, including \$0.099/kWh in the summer month of July, and \$0.12/kWh during the summer months of August and into September. **In discussions with Staff, NOPEC indicated that it was only partially hedged for the electric load requirements**

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<sup>1</sup> Entry, Case No. 00-2317-EL-GAG, Sept. 7, 2022, at ¶ 10.

**and with the increase in market costs, it was not in a position to complete the program term.**

Staff Review at 5 (emphasis supplied).

But a key June 7, 2022 internal presentation belatedly produced by NOPEC in this case plainly shows that this factual finding is erroneous.<sup>2</sup> If, in fact, NOPEC represented to Staff that NOPEC “was not in a position to complete the program term,” NOPEC misled Staff. In that June 7, 2022 presentation, prepared for a meeting between NOPEC and NextEra, those entities were deliberating about the [REDACTED]

[REDACTED]. With unmistakable clarity, NOPEC and NextEra wrote as follows on page 13 of their presentation regarding [REDACTED]

[REDACTED]:

[REDACTED]

In other words, as of June 7, 2022, NOPEC and NextEra had [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>3</sup> [REDACTED]

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<sup>2</sup> This June 7, 2022 presentation is attached as **Exhibit A**, and was also filed as Exhibit 11 to Dynegy Marketing & Trade’s January 27, 2023 Comments in this matter. While filed under seal, Dynegy Marketing & Trade reserves the right to challenge the trade secret claims by NOPEC over some or all of this document.

<sup>3</sup> Indeed, pages 11 and 12 of the June 7, 2022 presentation confirm that [REDACTED]  
[REDACTED].

[REDACTED]

[REDACTED]

The importance of this information for answering the Commission’s key question in this proceeding bears emphasizing. As of June 2022, as confirmed by [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. [REDACTED]

[REDACTED].<sup>4</sup> Thus, Staff’s statement that NOPEC “was not in a position to complete the program term” is simply wrong. Not only could NOPEC have clearly “completed” the Standard Program Price term, it could have done so at or near SSO rates because [REDACTED]

[REDACTED]!

The obvious question is, if NOPEC had [REDACTED], why did NOPEC charge those customers [REDACTED] \$0.12/kWh for their electricity? The answer lies in the information contained in the balance of that critical June 7, 2022 presentation. As discussed previously in the comments filed in this case, NOPEC’s misguided energy hedging strategy [REDACTED]. Thus, as of June 2022, NOPEC and NextEra were looking at purchasing energy hedges [REDACTED]. Because energy prices were extremely high at that time, NOPEC and NextEra realized that [REDACTED]. Accordingly, NOPEC and NextEra [REDACTED]

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<sup>4</sup> Page 15 of the presentation cited [REDACTED].



[REDACTED]

[REDACTED]. That pricing strategy involved [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], as shown by these bullet points on page 8 of their presentation:

[REDACTED]

Stated differently, NOPEC and NextEra provided their customers no price relief in 2022 because

[REDACTED]

[REDACTED]. In fact, in no uncertain terms, the presentation plainly stated [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(emphasis in original). NOPEC and NextEra then list [REDACTED]

[REDACTED]

[REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Accordingly, NOPEC was *absolutely* able to “continue the [Standard Program Price] program” through its natural conclusion in December 2022, contrary to Staff’s finding. This is no small error, and NOPEC bears direct responsibility for it. That is because Staff’s conclusions expressly state that they are based on representations made by NOPEC to Staff. Staff was clearly concerned about the key question of whether NOPEC had the ability to complete the Standard Program Price term through December 2022, and why NOPEC could not match SSO rates. Again, that is *the* central question raised by the Commission in commencing these show cause proceedings.

NOPEC has refused to provide a direct or truthful answer to the Commission’s question, and the conclusion that can be drawn from Staff’s erroneous finding is that NOPEC misled Staff about whether NOPEC could complete the Standard Program Price term in 2022 and match SSO pricing. The only reason the Commission now knows the truth about these questions is because Dynegy Marketing & Trade has spent considerable resources seeking to uncover that truth in these proceedings, in the face of continuous opposition from NOPEC. In fact, this key June 7, 2022 NOPEC/NextEra presentation was not produced until January 23, 2023, mere days before the

January 27, 2023 comment deadline. That was because for *months* NOPEC *refused* to produce its communications with NextEra based on a specious joint defense privilege claim.

NOPEC almost succeeded in hiding the truth necessary to answer the Commission's questions. The truth is now here, in full display for the Commission, in that June 7, 2022 presentation between NOPEC and NextEra. NOPEC was [REDACTED]

[REDACTED]. [REDACTED]  
[REDACTED]. NOPEC and NextEra could set the Standard Program Price at whatever price level they wanted.<sup>5</sup> The "decision of NOPEC and NextEra to not match the SSO price, and thus follow through on their prior representation" was not due to legal constraints. It was not due to the Ukraine war. It was not due to inflation. It was not due to an increase in market costs. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

NOPEC will undoubtedly respond to this filing with vitriol and accusing Dynegy Marketing & Trade of cherry-picking snippets from its June 7, 2022 presentation. But the words, facts and statements in that presentation belong to NOPEC. NOPEC should have been truthful with the Commission and Staff from the very beginning of this case about why it chose not to match SSO rates in 2022 and why it chose to terminate the program early, a decision that cost NOPEC's customers and Ohio's electricity markets dearly.

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<sup>5</sup> In fact, page 15 of the June 7, 2022 presentation shows that [REDACTED]  
[REDACTED]

**II. Staff Failed to Give Weight to NOPEC’s Own Admission That Its Customer-Drop Would Detrimentially and Severely Impact Ohio’s SSO Market.**

The Commission, in its show-cause order, also rightly expressed concern about the impact of NOPEC’s customer-drop on the SSO wholesale markets. In that Order, the Commission reaffirmed its “commit[ment] to protecting the wholesale auctions which provide the generation for SSO service in all Ohio EDUs service territories.” Entry, Sept. 7, 2022, at ¶ 14.

In its Staff Review, Staff appears to credit NOPEC’s representation that “[Standard Program Price] customers were returning to the SSO on their own in large numbers” and on that basis, concluded that while “Staff is concerned with the negative impact NOPEC’s actions may have had on the SSO auctions and subsequent SSO customer prices, Staff believes that some degree of negative impacts would have occurred irrespective of when the return to the SSO occurred.” Staff Review at 6. In reaching this conclusion, however, Staff did not seem to consider NOPEC’s own presentation from July 6, 2022, where NOPEC *admitted* that a premature return to SSO would severely harm the markets and even computed that SSO suppliers would lose approximately \$173 million dollars as a result.<sup>6</sup> These admissions included specific admissions that, in NOPEC’s view, a premature return would result in October 2022 SSO auctions having “materially lower participation,” “materially higher prices,” and may even “fail to attract the minimum number of bidders necessary to proceed”—all of which came true.

It was erroneous for Staff to disregard such a clear admission by NOPEC while instead crediting speculation about what might have happened in SSO markets had NOPEC not terminated its aggregation program several months early. The Commission should accept NOPEC’s own admissions on the expected impacts to SSO load suppliers and future SSO load auctions.

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<sup>6</sup> See Dynegy Marketing & Trade Comments, Jan. 27, 2023, at Ex. 1-5, pp. 10, 12; Keiper Dep. 78:2–79:9.

**III. Staff's Recommendation is Inconsistent with the Record in this Case.**

At the end of the day, the record in this proceeding has established the following facts, which compel a different recommendation by PUCO Staff:

- NOPEC had [REDACTED]  
[REDACTED]  
[REDACTED] for its most recent aggregation program, and thus NOPEC could have (and should have) completed the program.
- NOPEC had both the discretion and [REDACTED] to match (or at least come close to) SSO rates for its Standard Program Price customers for the last six months of 2022 for its most recent aggregation program, and thus the spike in the rates paid by NOPEC's customers was not the result of the Ukraine war, inflation or the myriad of other excuses concocted by NOPEC, but rather entirely within NOPEC's control and decision-making.
- NOPEC chose to increase rates in June 2022 and forward anyway to (1) [REDACTED]  
[REDACTED]  
[REDACTED], and (2) [REDACTED]  
[REDACTED].
- By overcharging its Standard Program Price customers for their electricity, leading to a collective loss by those customers of at least \$150 million in the last year of the program, NOPEC's multiple representations to its customers that they were saving money by being a NOPEC customer were demonstrably false and misleading.

- When NOPEC's customers balked at the exorbitant rates they were being saddled with in the murky Standard Program Price program, and began leaving the program in increasing numbers, NOPEC made the anticompetitive, unfair, manipulative, irresponsible, and harmful decision to immediately drop 550,000 of its customers to SSO.
- NOPEC took this action *knowing* and indeed *admitting* in its own documents that this unprecedented massive drop of its customers to SSO would cause over \$173 million in direct damages to SSO load suppliers and destabilize Fall 2022 SSO auctions by decreasing participation in those auctions and leading to increased risk premiums, all of which came true.
- The disastrous results of the subsequent SSO auctions will continue to harm Ohio consumers for years to come, as non-shopping customers are dealt severe economic harm by overpaying for their electricity, all of which NOPEC *knew* and *predicted* before the drop.
- When asked by the Commission to account for its conduct, NOPEC lied in its show cause response, engaged in obstructionist discovery practices, and subsequently misled Commission Staff about whether NOPEC could complete its Standard Program Price program.
- NOPEC also misled the public by claiming it executed the drop for the sole benefit of its customers, when, in truth, NOPEC did so to protect its market share by making it harder for competing CRES providers to market to NOPEC communities and when, in truth, NOPEC and NextEra collectively made \$ [REDACTED] selling

the excess energy hedges that were meant to support the program, [REDACTED]

*See generally*, Dynegy Marketing & Trade Jan. 27, 2023, Comments.

This record has been painstakingly developed notwithstanding the concerted efforts by NOPEC to obstruct discovery and keep these truths and facts under seal and hidden from public view—hoping the Commission will sweep its conduct under the proverbial rug. The Staff Review overlooks this record almost entirely, failing to cite to it, discuss it, or reconcile Staff’s conclusions with it. Other competitive retail electric and/or natural gas suppliers—who lack NOPEC’s political clout—have faced substantial sanctions from this Commission for much less alleged conduct. *See, e.g.*, Order, PUCO Case No. 19-957-GE-COI (Jan. 29, 2020); Order, PUCO Case No. 20-1216-GE-COI (Feb. 24, 2021) Order, PUCO Case No. 21-0046-GE-UNC (Feb. 24, 2021); Order, PUCO Case No. 22-0128-EL-UNC (May 18, 2022). In fact, there is no single precedent in the Commission’s entire history of a single CRES causing so much harm, loss and destruction as NOPEC has to Ohio’s electricity market suppliers, competitors and consumers.

All of the major energy participants in the Ohio energy markets and on a national level are watching what the Commission will do in this case. Ohio’s energy markets depend on public confidence that this Commission will enforce its rules equally and protect energy markets from this kind of market manipulation and improper conduct. Either all CRES providers stand equal before this Commission, or they do not. If the rules apply differently to different market participants, and that some truly are too politically connected to be held accountable, public confidence in these proceedings will suffer and that will further harm the perception of Ohio’s energy market by its participants.

**CONCLUSION**

It is never too late to do the right thing. With the record now clarified with these objections, Staff should consider an updated review and recommendation. The Commission should also do the right thing by denying NOPEC's certificate renewal and opening an investigation to address appropriate remedies for NOPEC's unfair, anticompetitive, and deceptive conduct. NOPEC can re-apply to be certified as a governmental aggregator once appropriate penalties have been implemented and NOPEC submits an appropriate compliance plan approved by Staff.

Dated: February 24, 2023

Respectfully submitted,

/s/ David F. Proaño

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**EXHIBIT A**

**JUNE 7, 2022 NOPEC/NEXTERA PRESENTATION  
RE: PRICING AND HEDGING (NOPEC\_002444)**

***[FILED UNDER SEAL]***

## **CERTIFICATE OF SERVICE**

I certify that on February 24, 2023, the foregoing document was filed using the Commission's Docketing Information System and was served by electronic mail on:

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

**2/24/2023 4:13:40 PM**

**in**

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

Summary: Motion Motion for Leave to File Objections Instant to Staff's February  
21, 2023 Review and Recommendation [PUBLIC REDACTED VERSION]  
electronically filed by Mr. David F. Proano on behalf of Dynegy Marketing and  
Trade, LLC