BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MOTION FOR LEAVE TO FILE MEMORANDUM CONTRA TO DYNEGY'S OBJECTIONS TO PUCO STAFF REVIEW AND RECOMMENDATION BY OFFICE OF THE OHIO CONSUMERS' COUNSEL

Dynegy Marketing & Trade ("Dynegy") is an energy supplier that would benefit (and whose affiliates could benefit) from its efforts over more than half a year to have state government (PUCO) oust NOPEC from the market. Now, Dynegy has sought leave to file objections to the PUCO Staff's recent recommendation for NOPEC to be granted a renewed certificate.[1] Presently, no additional pleading cycle has been scheduled for Dynegy's objections and motion to file them.

If the PUCO grants Dynegy's Motion for leave to file objections,[2] the PUCO should allow OCC the opportunity to respond, per O.A.C. 4901-1-12 and due process. It would be unfair to OCC and the consumers it represents for OCC to be denied an opportunity to file if the PUCO grants Dynegy such an opportunity.

Indeed, there is good cause for the filing as part of due process. With Vistra/Dynegy's dramatic announcement about absorbing a major competitor (Energy

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[1] Dynegy Motion for Leave to File Objections (Feb. 24, 2023).

[2] OCC is not taking a position on Dynegy's motion for leave to file objections.

Harbor) in the governmental aggregation market,[3] the PUCO has all the more reason to preserve NOPEC as a competitive alternative for consumers. The PUCO should not allow itself to become an unintended part of the Vistra/Dynegy plan to concentrate its market power for electricity sales, including in the Ohio market for competitive governmental aggregation.

The PUCO has statutory authority for market-monitoring per R.C. 4928.06 (and has other authority). The PUCO should open an investigation and require Vistra/Dynegy to *show cause* why its acquisition of Energy Harbor will not adversely affect the Ohio retail electric market, especially including the governmental aggregation market and the consumers served by it.

OCC's Motion is more fully explained in the following Memorandum in Support. Further, OCC has attached its Memorandum Contra, for which OCC seeks leave to be heard.

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[3] J. Pelzer, *Energy Harbor, owner of plants at heart of HB 6 scandal, sold for $3.4 billion to Texas-based Vistra Corp.,* Cleveland.com (Mar. 6, 2023), available at: https://www.cleveland.com/news/2023/03/energy-harbor-owner-of-nuclear-plants-at-heart-of-hb6-scandal-sold-for-34-billion-to-texas-based-vistra-corp.htmlhttps://www.cleveland.com/news/2023/03/energy-harbor-owner-of-nuclear-plants-at-heart-of-hb6-scandal-sold-for-34-billion-to-texas-based-vistra-corp.html.

Respectfully submitted,

Bruce Weston (0016973)
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/s/ John Finnigan
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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM IN SUPPORT

I. INTRODUCTION

With the issuance of the PUCO Staff's recommendation, the PUCO should rule. Dynegy should focus on competing for consumers in the market and not on complaining to the state regulator about NOPEC. With the news about Vistra's market-concentrating acquisition of Energy Harbor, the PUCO should be all the more skeptical of Dynegy's efforts to oust NOPEC from serving consumers in the market.

II. ARGUMENT

The PUCO Staff's Review and Recommendation is that the PUCO Commissioners should accept NOPEC's response to the Show-Cause Entry and that the PUCO should renew NOPEC's certificate.[4] Dynegy raised several objections to the PUCO Staff's Review and Recommendation, which it seeks leave for the PUCO to allow as a filing.[5]

R.C. 4928.02(C) requires that consumers have access to reasonably priced electricity service. Dynegy's objections, if unrebutted, create additional uncertainty over NOPEC's status and could lead to unreasonably priced (higher) electricity prices. The

[4] Staff Review and Recommendation (Feb. 21, 2023).

[5] Dynegy Objections (Feb. 24, 2023).

PUCO should grant OCC leave to file a Memorandum Contra to respond to Dynegy's objections. Per O.A.C. 4901-1-12 and due process protections that have been confirmed by the Supreme Court of Ohio,[6] the PUCO should grant this Motion.

Indeed, there is good cause for allowing OCC's filing as part of due process. With Vistra/Dynegy's dramatic announcement about absorbing a major competitor (Energy Harbor) in the governmental aggregation market,[7] the PUCO has all the more reason to preserve NOPEC as a competitive alternative for consumers. The PUCO should not allow itself to become an unintended part of the Vistra/Dynegy plan to concentrate its market power for electricity sales, including in the Ohio market for competitive governmental aggregation.

As we explain in the Memorandum Contra, the PUCO has statutory authority for market-monitoring per R.C. 4928.06 (and has other authority). The PUCO should open an investigation and require Vistra/Dynegy to *show cause* why its acquisition of Energy Harbor will not adversely affect the Ohio retail electric market, especially including the government aggregation market and the consumers served by it.

OCC, an interested party in this proceeding, seeks leave to file a Memorandum Contra Dynegy's objections. Under O.A.C. 4901-1-12, the PUCO rules provide for filing of motions. There is good cause to allow OCC to file a Memorandum Contra Dynegy's Objections.

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[6] *In re Suvon, LLC*, 2021-Ohio-3630.

[7] J. Pelzer, *Energy Harbor, owner of plants at heart of HB 6 scandal, sold for $3.4 billion to Texas-based Vistra Corp.,* Cleveland.com (Mar. 6, 2023), available at: https://www.cleveland.com/news/2023/03/energy-harbor-owner-of-nuclear-plants-at-heart-of-hb6-scandal-sold-for-34-billion-to-texas-based-vistra-corp.htmlhttps://www.cleveland.com/news/2023/03/energy-harbor-owner-of-nuclear-plants-at-heart-of-hb6-scandal-sold-for-34-billion-to-texas-based-vistra-corp.html.

OCC's Memorandum Contra is timely as it is being made within fifteen days of Dynegy's Motion and Objections. [8] OCC's reply to Dynegy's objections should be allowed so that the PUCO has a complete record that will assist it in reaching its decision in this important matter. Dynegy will not be prejudiced by OCC's filing, as Dynegy is the one that sought a new pleading cycle. Dynegy's objections to the PUCO Staff's Recommendation should be overruled, for the protection of the public.

III. CONCLUSION

The PUCO should grant OCC leave to file a Memorandum Contra to Dynegy's objections for the reasons discussed above, including due process. OCC's Memorandum Contra is attached hereto, and OCC respectfully requests that the PUCO accept it for filing in the docket of this case.

Respectfully submitted,

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[8] *See* O.A.C. 4901-1-12(B)(1).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to File Memorandum Contra to Dynegy's Objections to PUCO Staff Review and Recommendation was served via electronic transmission upon the parties this 7th day of March 2023.

/s/ John Finnigan
John Finnigan
Assistant Consumers' Counsel

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM CONTRA DYNEGY'S OBJECTIONS TO THE PUCO STAFF'S REVIEW AND RECOMMENDATION THAT NOPEC'S CERTIFICATE SHOULD BE RENEWED
BY
OFFICE OF THE OHIO CONSUMERS' COUNSEL

I. INTRODUCTION

Vistra Corp., the owner of Dynegy Marketing & Trade ("Dynegy") and its competitive retail affiliates, has announced that it is buying Energy Harbor.[1] Energy Harbor is the successor to FirstEnergy Solutions, the owner of the two nuclear power plants at the center of the House Bill 6 scandal. The Vistra/Dynegy acquisition of their competitor, Energy Harbor, reduces the already limited number of competing suppliers to aggregations in northern Ohio (if not in the entire state of Ohio).

What a coincidence that Dynegy would be part of concentrating market power in the local governmental aggregation market through its owner's purchase of Energy Harbor. After all, Dynegy is the company that just spent more than half a year trying to use state government (instead of competing in the market) to rid itself of competition from NOPEC – and to thereby deny northeast Ohioans a choice of NOPEC for electricity.

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[1] J. Pelzer, *Energy Harbor, owner of plants at heart of HB 6 scandal, sold for $3.4 billion to Texas-based Vistra Corp.,* Cleveland.com (Mar. 6, 2023), available at: https://www.cleveland.com/news/2023/03/energy-harbor-owner-of-nuclear-plants-at-heart-of-hb6-scandal-sold-for-34-billion-to-texas-based-vistra-corp.htmlhttps://www.cleveland.com/news/2023/03/energy-harbor-owner-of-nuclear-plants-at-heart-of-hb6-scandal-sold-for-34-billion-to-texas-based-vistra-corp.html.

With Vistra/Dynegy's dramatic announcement about absorbing a major competitor (Energy Harbor) in the governmental aggregation market, the PUCO has all the more reason to preserve NOPEC as a competitive alternative for consumers. The PUCO should not allow itself to become part of the Vistra/Dynegy plan to concentrate its market power in the Ohio market for competitive governmental aggregation. And similarly the PUCO should not allow a retroactive application of the proposed minimum-stay tariffs to unlawfully remove NOPEC from serving electric consumers this year.

In another matter, recall that FERC's Office of Enforcement Staff recently concluded, after a lengthy investigation, that Dynegy "knowingly engaged in manipulative behavior to set the Zone 4 price in the 2015/16 [MISO]Auction."[2] That was an investigation involving charges by the Illinois Attorney General that Dynegy had improperly manipulated the 2015/16 MISO capacity auction.[3]

The PUCO has statutory authority for market-monitoring per R.C. 4928.06 (and has other authority). The PUCO should open an investigation and require Vistra/Dynegy to *show cause* why its acquisition of Energy Harbor will not adversely affect the Ohio retail electric market, especially including the governmental aggregation market and the consumers served by it. The PUCO's investigatory efforts should be directed toward scrutinizing the transaction. That regulatory scrutiny is needed to protect Ohio consumers from Vistra/Dynegy's concentration of market power in what should be a competitive governmental aggregation market and retail market generally.

[2] Office of Enforcement Staff Remand Report at 1 (filed Sept. 14, 2022); *see also* Remand Order, 179 FERC ¶ 61,185 at 16-18.

[3] E. Howland, *Dynegy manipulated MISO's 2015/16 capacity auction, driving up Illinois prices: FERC enforcement office,* Utility Dive (Nov. 22, 2022).

This week's Vistra/Dynegy news was preceded, on February 21, 2023, by the PUCO Staff's recommendation to approve NOPEC's request to renew its certificate to serve Ohioans with electricity.[4] The PUCO Staff also found that NOPEC's actions to protect consumers from rising electricity prices did not merit suspending its certificate.[5] Renewal of NOPEC's certificate will allow it to continue its role for contributing to the diversity of electricity supplies and suppliers and give consumers effective choices per R.C. 4928.02(C).

This Memorandum Contra is prompted by Dynegy (a NOPEC competitor that would benefit from the regulatory restrictions it seeks against NOPEC) -- asking leave to file objections to the PUCO Staff's recommendation.[6] *If the PUCO grants Dynegy's Motion for leave to file objections*,[7] the PUCO should overrule the objections and expeditiously renew NOPEC's certificate. Doing so is warranted by Ohio law and will serve the public interest.

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[4] Staff Review and Recommendation at 8 (Feb. 21, 2023)

[5] Staff Report and Recommendation at 8 (Feb. 21, 2023).

[6] Dynegy Motion for Leave to File Objections (Feb. 24, 2023).

[7] OCC is not taking a position on Dynegy's motion for leave to file objections.

II. RECOMMENDATIONS

A. With Vistra/Dynegy's dramatic announcement about absorbing a major competitor (Energy Harbor) in the governmental aggregation market, the PUCO has all the more reason to preserve NOPEC as a competitive alternative for consumers. The PUCO should not allow itself to become part of the Vistra/Dynegy effort to concentrate its market power in, among other things, the Ohio market for competitive governmental aggregation.

On March 6, 2023, Vistra announced that it would acquire Energy Harbor.[8] Vistra is the parent company of Dynegy.[9] At present, Vistra has 3.5 million retail customers in 20 states and the District of Columbia.[10] After the merger is completed, Vistra will operate one of the largest retail businesses in the country with about five million retail customers.[11]

The PUCO is required, on a continuing basis, to perform market monitoring to determine whether there is effective competition in the provision of competitive retail electric service.[12] The PUCO should open an investigation, per its market-monitoring authority under R.C. 4928.06 and other authority. The PUCO should require Vistra/Dynegy to *show cause* why its acquisition of Energy Harbor will not adversely affect the Ohio retail electric market, especially including the governmental aggregation market and the consumers served by it.

Note that FERC Enforcement Staff released a report on September 14, 2022, related to Dynegy. It stated the following in the report: "OE [Office of Enforcement] staff

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[8] P. Ring, *Vistra to acquire Energy Harbor,* Energy Choice Matters (Mar. 6, 2023).

[9] Vistra Corp. Form 10-K (Mar 1, 2023).

[10] *Id.* at 1.

[11] Vistra Corp. News Release, *Vistra to create 'Vistra Vision,' a leading zero-carbon generation and retail platform, through the acquisition of Energy Harbor* (Mar. 6, 2023).

[12] R.C. 4928.06; O.A.C. 4901:1-25-02.

found during its investigation that Dynegy knowingly engaged in manipulative behavior to set the Zone 4 price in the 2015/16 [MISO] Auction."[13]

Based on the forgoing, the PUCO should promptly approve the renewal of NOPEC's certificate. And the PUCO should open an investigation of Vistra/Dynegy's announced acquisition of Energy Harbor.

B. The PUCO Commissioners should adopt the PUCO Staff's Review and Recommendation because it furthers Ohio state energy policies of providing reasonably priced electricity service and diverse energy supplies.

R.C. 4928.02(A) requires that consumers have access to reasonably priced electricity service. R.C. 4928.02(C) requires that consumers have access to a "diversity of electricity supplies and suppliers." Additional uncertainty over NOPEC's status could lead to unreasonably priced (higher) electricity prices and a lack of diverse electricity suppliers.

With the issuance of the PUCO Staff's recommendation, the PUCO should rule. Dynegy should focus on competing for consumers in the market and not on complaining to the state regulator about NOPEC.

With the news about Vistra's market-concentrating acquisition of Energy Harbor, the PUCO should be all the more skeptical of Dynegy's efforts to use state government (PUCO) to oust NOPEC from serving consumers in the market. The PUCO should renew NOPEC's certificate, in the public interest.

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[13] Office of Enforcement Staff Remand Report at 1 (filed Sept. 14, 2022); *see also* Remand Order, 179 FERC ¶ 61,185 at 16-18.

C. NOPEC's Renewal Application should be approved, despite Dynegy's objections.

On February 21, 2023, the PUCO Staff recommended that NOPEC's request to renew its certificate to serve Ohioans with electricity be approved.[14] OCC agrees.

Dynegy believes that whether the PUCO should grant NOPEC's certificate renewal turns upon the rationale for NOPEC's decision --was the decision of NOPEC and NextEra to not match the SSO price due to legal constraints or economic choices?[15] Dynegy argues that the PUCO should reject the PUCO Staff's Review and Recommendation because it was based on Staff's "clearly erroneous and unsupported finding" that NOPEC "'was not in a position to complete the program term.'"[16] This argument is without merit and should be rejected. NOPEC is not like a Verde Energy that has been accused by the PUCO Staff of mis-marketing energy to Ohioans – and NOPEC should not be treated like that at the PUCO.

NOPEC's application to renew its certificate to serve Ohioans as an aggregator does not turn upon what motivated NOPEC to return consumers to the standard service offer. Rather, the application is to be judged by the standards found in O.A.C. 4901:1-24-10(C).

Those standards focus on whether the applicant is managerially, financially, and technically fit to provide service, comply with PUCO rules and orders and is able to provide financial assurances sufficient to protect the electric distribution utilities and customers from default. In this regard, the PUCO Staff found that NOPEC's application,

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[14] Staff Review and Recommendation at 8 (Feb. 21, 2023).

[15] Dynegy Objections at 1, citing to the PUCO's Sept. 7 Entry at ¶10.

[16] Dynegy Objections at 1-6 (Feb. 24, 2023).

supplemented on February 13, 2023, meets the requirements of O.A.C. 4901:1-24-10(C) to be certified as a governmental aggregator of electric service.

The PUCO Staff recommended that the NOPEC's certificate renewal application be approved.[17] OCC agrees.

D. The PUCO should not suspend NOPEC's certificate, despite Dynegy's objections.

The PUCO Staff also found that NOPEC's conduct did not rise to the level which would merit suspending its certificate.[18] OCC agrees.

As noted by the PUCO Staff, suspension of a certificate could be based on a finding that a marketer had violated a PUCO rule or Order adopted under Chapter 4928 of the Revised Code; a marketer has engaged in anticompetitive act; or a marketer has failed to comply with state laws or rules designed to protect consumers or otherwise engaged in fraudulent, misleading or unfair practice.[19] And while the Staff did express concerns over the timing of NOPEC's return of customers,[20] the Staff nonetheless recommended that NOPEC's application be renewed.

The PUCO Staff reviewed NOPEC's renewal application.[21] The PUCO Staff reviewed data request responses into the circumstances surrounding NOPEC's movement of customers back to default service.[22] The PUCO Staff also reviewed NOPEC's supplier contracts, documentation between NOPEC and member communities, NOPEC board

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[17] Staff Review and Recommendation at 8.

[18] Staff Report and Recommendation at 8 (Feb. 21, 2023).

[19] *Id*. at 4.

[20] *Id*. at 6.

[21] Staff Review and Recommendation at 2 (Feb. 21, 2023).

[22] *Id*.

meeting minutes, NOPEC advertisements, NOPEC's criteria for selecting a supplier, and NOPEC's audited financial statements, among other things.[23]

Additionally, NOPEC supplemented its renewal application with more detailed information on the managerial and technical expertise of its staff and consultants.[24] And NOPEC has proposed to change the way the aggregation program will be handled as NOPEC hired an independent energy consultant to assist in managing and hedging energy portfolios.[25]

Dynegy once again focuses on the wrong question. Dynegy believes that the central question in deciding on whether to deny NOPEC's certificate is: did NOPEC have the ability to complete the standard program price term and why NOPEC could not match SSO rates.[26] Its objections should be overruled.

Dynegy also argues that "Staff failed to give weight to NOPEC's own admission that its customer-drop would detrimentally and severely impact Ohio's SSO market."[27] Dynegy then purports to list several instances where "Staff's Recommendation is inconsistent with the record in this case."[28]

Dynegy misconstrues the reason NOPEC returned consumers to the standard service offer. Whether NOPEC was fully hedged or partially hedged is beside the point. Whether NOPEC was able to continue serving consumers at higher prices is beside the point. The point is that NOPEC's governmental aggregation price was increasing above

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[23] *Id*.

[24] Staff Review and Recommendation at 3.

[25] *Id*.

[26] Dynegy Comments at 5.

[27] *Id.* at 7.

[28] *Id.* at 8-10.

the standard service offer price, and NOPEC acted in consumers' interests when it returned consumers to the standard service offer.

When NOPEC filed its Notice of Material Change to notify the PUCO that it was returning Standard Program Price consumers to the standard service offer, NOPEC explained that its return of consumers to the utility's standard service offer was done for the benefit of those consumers:

> Unfortunately, electric 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 them from experiencing drastic electricity price increases in these inflationary times, NOPEC will immediately be returning its Standard Program Price customers to the EDUs' standard service offers ("SSO").*[29]

The PUCO Staff's Review and Recommendation correctly noted that NOPEC's reason for returning consumers to the standard service offer was driven by spiking electricity prices.[30] Dynegy claims that NOPEC falsely represented it was returning consumers to the standard service offer because it did not fully hedge its program.[31] But the PUCO Staff reached the correct conclusion. And this PUCO Staff finding was not "clearly erroneous and not supported by the record" as Dynegy wrongly claims.[32] Dynegy's objections should be overruled.

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[29] Notice of Material Change to Business Operations at 2 (Aug. 24, 2022) (Emphasis added.)

[30] Staff Review and Recommendation at 4 (Feb. 21, 2023).

[31] Dynegy Objections at 1-6 (Feb. 24, 2023).

[32] *Id.* at 1.

Dynegy's remaining objections are also irrelevant. Dynegy argues that "Staff failed to give weight to NOPEC's own admission that its customer-drop would detrimentally and severely impact Ohio's SSO market."[33] Dynegy then purports to list several instances where "Staff's Recommendation is inconsistent with the record in this case."[34]

The PUCO Staff's Review conflicts with Dynegy's supposition. The PUCO Staff found that "some degree of negative impacts would have occurred irrespective of when the return to the SSO occurred."[35] The PUCO Staff also concluded that it is "unclear if the magnitude of the impact would have been significantly different if NOPEC has waited until its aggregation program ended in January 2023 to move over 500,000 SPP customers to SSO service."[36]

III. CONCLUSION

The PUCO should overrule Dynegy's objections for the reasons discussed above. It should expeditiously renew NOPEC's certificate. Vistra/Dynegy's announcement is all the more reason for the PUCO to ensure that the public has NOPEC as an alternative in the electricity market.

The PUCO should also investigate Vistra/Dynegy's announced acquisition of Energy Harbor. The PUCO should require Vistra/Dynegy to *show cause* why its acquisition of Energy Harbor will not adversely affect the Ohio retail electric market,

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[33] *Id.* at 7.

[34] *Id.* at 8-10.

[35] Staff Review and Recommendation at 6.

[36] *Id*.

especially including the governmental aggregation market and the consumers served by it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum Contra to Dynegy's Objections to the PUCO Staff's Review and Recommendation was served via electronic transmission upon the parties this 7th day of March 2023.

/s/ John Finnigan
John Finnigan
Assistant Consumers' Counsel

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

Summary: Motion Motion for Leave to File Memorandum Contra to Dynegy's Objections to PUCO Staff Review and Recommendation by Office of the Ohio Consumers' Counsel electronically filed by Mrs. Tracy J. Greene on behalf of Finnigan, John