

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

- - -

PROCEEDINGS

before Gregory Price, Megan Addison and Jacky St.
John, Hearing Examiners, at the Public
Utilities Commission of Ohio, 180 East Broad Street,
Room 11-A, Columbus, Ohio, called at 10:00 a.m. on
Tuesday, November 8th, 2022.

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APPEARANCES:

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APPEARANCES: (Continued)

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On behalf of Dynegy Marketing
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On behalf of Ohio Edison and Cleveland
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On behalf of the Staff of the Public
Utilities Commission of Ohio

ALSO PRESENT: James Lang, Aundrea Williams,
and Dana Coulter, observing.

1 Tuesday Morning Session,
2 November 8, 2022.

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4 HEARING EXAMINER PRICE: Go on the
5 record. Good morning. The Public Utilities
6 Commission has set for this time and this place a
7 prehearing conference in Case No. 00-2317-EL-GAG,
8 being In the Matter of the Certification of Northeast
9 Ohio Public Energy Council as a Governmental
10 Aggregator.

11 My name is Gregory Price, with me is
12 Megan Addison, and we have been assigned to preside
13 over today's hearing.

14 Let's start by taking appearances of the
15 parties, since we're on the record today, starting
16 with NOPEC.

17 MR. GURBACH: I'm Matthew Gurbach on
18 behalf of NOPEC.

19 MR. STINSON: Dane Stinson, Bricker &
20 Eckler, on behalf of NOPEC.

21 MR. PARRAM: Devin Parram, law firm of
22 Bricker & Eckler on behalf of NOPEC.

23 MS. HERRNSTEIN: Kara Herrnstein,
24 Bricker & Eckler, on behalf of NOPEC.

25 EXAMINER PRICE: Mr. Dortch.

1 MR. DORTCH: Yes, your Honor, Michael
2 Dortch on behalf of Hartree Limited Partners.

3 EXAMINER PRICE: Mr. Proano.

4 MR. PROANO: Good morning, your Honor.
5 David Proano from Baker Hostetler on behalf of Dynegy
6 Marketing and Trade, and Enel Trading North America.

7 MR. HAGUE: Good morning, your Honor.
8 Ali Hague from Baker Hostetler on behalf of Dynegy
9 Marketing.

10 MR. BETTERTON: Good morning, your
11 Honors. Evan Betterton on behalf of IGS Energy.

12 MR. LINDGREN: Thomas Lindgren from the
13 Office of Ohio Attorney General Dave Yost on behalf
14 of Staff.

15 MS. PLANT: Good morning, your Honor.
16 Rhiannon Plant, OAG's office on behalf of Dave Yost.

17 MR. GLADMAN: Good morning, your Honor.
18 Michael Gladman from Jones-Day on behalf of Ohio
19 Edison and Cleveland Electric.

20 MS. DENGLER: Good morning. Molly
21 Dengler on behalf of Ohio Edison and Cleveland
22 Electric, also with the law firm Jones-Day.

23 MR. FINNIGAN: Good morning, your Honor.
24 John Finnigan, Office of the Ohio Consumers' Counsel.

25 HEARING EXAMINER PRICE: Mr. Lang, would

1 you care to note your presence in the room?

2 MR. LANG: Jim Lang on behalf of NextEra
3 here to take notes.

4 HEARING EXAMINER PRICE: Okay. Our main
5 order of business is the multiple motions to compel
6 and motions for protective order that were recently
7 filed in this case. We intend to take them in the
8 following order: First Northeast -- NOPEC's motion
9 for protective order regarding the depositions, then
10 NOPEC's -- a motion to compel on NOPEC's responses
11 and objections to Dynegy's first set of
12 interrogatories, and then Dynegy's responses to
13 NOPEC's regarding Dynegy's responses to NOPEC's first
14 set of interrogatory requests.

15 We have thoroughly reviewed all of the
16 pleadings that have been filed in this case. We may
17 have a few questions, we may take minimal argument on
18 a few topics, but we have dozens of rulings, and so I
19 think it's just best to get right after them. So if
20 there's any clarifications that need to be sought,
21 please feel free to ask.

22 Okay. I guess before we make any
23 rulings --

24 MR. PARRAM: Your Honor, I do have one
25 question. I would like to know if Dynegy brought the

1 privilege log today.

2 HEARING EXAMINER PRICE: I think NOPEC
3 indicated they were not going to bring a privilege
4 log today.

5 I'm hopeful that after we have today's
6 rulings it will narrow the scope of any necessary
7 privilege log, but we would expect -- I know that
8 NOPEC had asked for two weeks, I think that's a
9 little long, so we would ask for NOPEC to produce its
10 privilege log a week after today's -- I'm sorry, I'm
11 screwing this up.

12 We would ask Dynegy to produce their
13 privilege log seven days after this prehearing
14 conference, and hopefully after we have rulings on
15 the motion to compel by NOPEC it will limit the scope
16 of the necessary privilege log for Dynegy.

17 MR. PROANO: And your Honor, can I seek
18 one clarification? Are the orders coming out today?
19 Are the discovery orders being issued today as well?

20 HEARING EXAMINER PRICE: Today's
21 prehearing is transcribed, we're making the orders --

22 MR. PROANO: Okay. Just as long as we
23 have clear direction for the log.

24 HEARING EXAMINER PRICE: So before we
25 begin, are there any -- with respect to the motions

1 for protective order, are there any contested issues
2 that are contested in the motion of protective order
3 that have been resolved by the parties?

4 MR. GRUBACH: With regard to the
5 depositions, your Honor?

6 HEARING EXAMINER PRICE: Yes.

7 MR. GRUBACH: I believe so. I don't
8 think we put this on the record. If my understanding
9 is correct, Dynegy has withdrawn topics 29, 30 and 31
10 with regard to NOPEC 8.

11 MR. PROANO: Your Honor, we did put that
12 in our briefs. We sought assurances from NOPEC's
13 counsel that NOPEC, Inc., which is a wholly owned
14 subsidiary of NOPEC, had no role in hedges related to
15 the aggregation, had no role in the purchase of
16 electricity related to the Standard Program Pricing
17 customers, did not benefit financially from the drop,
18 or getting payments from NextEra.

19 NOPEC's counsel confirmed all of those
20 questions in the negative, and so we voluntarily
21 withdrew three topics directed to NOPEC, Inc. to
22 those issues.

23 HEARING EXAMINER PRICE: Thank you.
24 Okay. The first contested issue relates to Rates of
25 Standard Program Price, topic No. 1 identified at

page 7 in the motion for protective order. We'll deny the protective order at this time.

Item 2, we'll deny the protective order at this time. Items 10 and 11 and 12 will be denied to the extent that the question relates to the Standard Program Pricing only. Other pricing programs that are part of NOPEC's aggregation of the motion for protective order will be granted.

And that's going to be a consistent theme in our rulings today. We are likely to limit most discovery to Standard Program Pricing issues only.

Going down to the next topic, broadly characterized as Representations Regarding Standard Program Price Savings, issues 20, 21, 22, and 23, we'll deny the motion for protective order.

The next topic, item 4, we will grant the motion for protective order. The circumstances and negotiations between NOPEC and NextEra are not relevant at all to the particular issues in this proceeding.

Item 7, we will deny the motion for protective order as it relates to any document which addresses or covers Standard Pricing Program. If documents exclusively relate to other pricing

1 programs the motion of protective order will be
2 granted.

3 And then item 28, the motion for
4 protective order will be denied.

5 Item 4, Intraparty Payments, issues No.
6 8 and 26, we will deny the motion for protective
7 order to the extent that it relates to any payments
8 or other services after January 1st, 2020. Again,
9 that will be a recurring theme limiting the scope of
10 discovery to events after January 1st, 2020.

11 Item 5, motion for -- or item 13, topic
12 No. 5, item 13, the motion for protective order will
13 be granted.

14 MR. PROANO: I'm sorry, your Honor, is
15 that topic -- depo topic 5, or depo topic 13?

16 HEARING EXAMINER PRICE: Well, it's a
17 loose grouping No. 5, Offers Other than Standard
18 Program Price. So the question related to the
19 monthly variable price and the fixed term product,
20 and we will grant the motion for protective order
21 there.

22 We'll come back to the Joint Defense
23 Agreement presently. Let's move on at this time
24 to -- I'm working off of NOPEC's responses to
25 Dynegy's first set of interrogatories, we're dealing

1 with the motion to compel filed by Dynegy regarding
2 that document.

3 The first request -- set of requests for
4 protection of documents, we'll grant the motion to
5 compel at this time to the extent that the documents
6 relate to or cover the Standard Pricing Program,
7 consistent with our previous ruling.

8 The same will be true as to item 2, and
9 item 3. Item 4, which relates to agreements between
10 NOPEC and its member communities, we will deny the
11 motion to compel at this time. We don't believe the
12 relationship between NOPEC and its member communities
13 is germane to any of the issues in this proceeding.

14 Item 5, is this still up for dispute?

15 MR. PARRAM: We produced these
16 documents, your Honor.

17 HEARING EXAMINER PRICE: Okay. Item 6,
18 we'll grant the motion to compel. Item 7, we'll
19 grant the motion to compel to the extent that it
20 addresses agreements with NextEra. No. 8, is this
21 still in dispute? Looks like we have had at least
22 partial compliance.

23 MR. PARRAM: I'm sorry, your Honor, at
24 request for production of documents No. 8?

25 HEARING EXAMINER PRICE: Yeah.

1 MR. PARRAM: We have produced those
2 documents, your Honor.

3 HEARING EXAMINER PRICE: I was just
4 confirming, Mr. Proano.

5 MR. PROANO: I'm sorry, your Honor?

6 HEARING EXAMINER PRICE: I'm sorry. I
7 was just confirming with you that this is no longer
8 in dispute.

9 MR. PROANO: I believe that those
10 records were produced in document request No. 8.
11 Thank you, your Honor.

12 HEARING EXAMINER PRICE: Item 9, request
13 for production of documents No. 9, we'll grant the
14 motion to compel, although I'm not sure there's
15 anything that's not already been disclosed.
16 Mr. Parram?

17 MR. PARRAM: We produced No. 9, your
18 Honor.

19 HEARING EXAMINER PRICE: Okay. Item 10,
20 we'll grant the motion to compel subject to the
21 review of the privilege log, so if any documents --
22 we're not ruling upon any documents that are
23 referenced in the privilege log at this time,
24 otherwise we're granting the motion to compel.

25 MR. PROANO: And Judge Price, will there

1 be an opportunity to discuss this log this morning at
2 another point, or should we discuss it now?

3 HEARING EXAMINER PRICE: We'll have an
4 opportunity to discuss it at some point this morning.
5 I'd just like to see if we can get through the
6 relevance and the other objections before we come
7 back to this.

8 MR. PROANO: Understood.

9 HEARING EXAMINER PRICE: Item No. 11,
10 appears it's no longer in dispute, is that correct,
11 Mr. Proano?

12 MR. PROANO: That is a duplicate of No.
13 10 except it uses the parent company NextEra versus
14 NextEra Energy Services, so it's just a belt and
15 suspenders request, it is still an issue, your Honor.

16 HEARING EXAMINER PRICE: NOPEC
17 represents on 11 they don't have any documents.

18 MR. PROANO: Is that correct?

19 MR. PARRAM: Your Honor, 10 and 11
20 appear to be the same. I think we had a supplemental
21 response to our initial No. 11, so I believe the
22 privilege log would address Nos. 10 and 11.

23 HEARING EXAMINER PRICE: Okay. But
24 everything that is responsive to 10 and 11 is on the
25 privilege log?

1 MR. PARRAM: Yes.

2 HEARING EXAMINER PRICE: Item 12 --

3 MR. PROANO: And so just -- your Honor,
4 just so the record is clear, is the motion to compel
5 being granted on 11 and then subject to the privilege
6 dispute?

7 HEARING EXAMINER PRICE: Yes, consistent
8 with the ruling in 10, it's granted with respect to
9 any documents, which he represents there are none,
10 that are not otherwise covered on the privilege log.

11 MR. PROANO: Thank you, your Honor.

12 HEARING EXAMINER PRICE: Item 12, the
13 motion will be granted. There's no Joint Defense
14 Agreement with OCC, is that correct, Mr. Parram?

15 MR. PARRAM: There is not, your Honor.

16 HEARING EXAMINER PRICE: Thank you. 13,
17 appears the parties have worked this out.

18 MR. PROANO: Yeah, we're not pursuing
19 discovering on NOPEC, Inc., your Honor.

20 HEARING EXAMINER PRICE: 14, I assume
21 that you've complied with out of the protective
22 agreements?

23 MR. PARRAM: Yes, your Honor.

24 HEARING EXAMINER PRICE: And 15 as well?

25 MR. PARRAM: Yes, your Honor.

1 MR. PROANO: Could I just address one
2 thing, your Honor, on those two?

3 HEARING EXAMINER PRICE: Yes.

4 MR. PROANO: We just received a
5 supplemental production this morning that had some of
6 this information.

7 We're just a little concerned by the
8 delay in the production of these materials. They
9 were not marked confidential, subject to the
10 protective agreement, should have been produced like
11 a month ago, so like what we're going to hope to get
12 today is some clarity as to when the production is
13 going to be completed so we can actually take the
14 deposition once the productions are made.

15 We have sought assurances from NOPEC
16 multiple times is your production completed and not
17 received a response. I realize today's rulings will
18 expand the production, but I think just to assist us
19 in this process, I think we're going to request some
20 kind of date by which NOPEC will produce the
21 documents that should be produced.

22 HEARING EXAMINER PRICE: We'll get to
23 that before we leave.

24 MR. PARRAM: Your Honor, may I address
25 that?

1 HEARING EXAMINER PRICE: You can, but
2 there's really no need, but go ahead.

3 MR. PARRAM: I can tell by your response
4 I better just wait. Just keep going.

5 HEARING EXAMINER PRICE: We're going to
6 address this topic at the end, and we're clearly on
7 both sides we're going to have a series of denies,
8 motion to compels, everybody is going to have some
9 production obligation, and we'll get to that at the
10 end. And when we have an agreed date, I expect
11 everybody will comply with the agreed date.

12 MR. PARRAM: Thank you, your Honor.

13 HEARING EXAMINER PRICE: First set of
14 interrogatories, 1 appears to be addressed.
15 Mr. Parram, on item -- interrogatory 2, how many
16 employees does NOPEC have?

17 MR. PARRAM: I don't have the exact
18 number, but I believe it's no more than -- I would
19 say approximately 20, your Honor. But I would have
20 to confirm that.

21 But our objection goes not just to the
22 amount of employees, your Honor, it's more
23 specifically a concern with respect to harassment and
24 why is it necessary to attain the names of those
25 employees just for purposes of Dynegy filing comments

1 in this proceeding, your Honor.

2 So I understand that the number of
3 employees may not be significantly high, but our
4 concern and our objection goes beyond just the extent
5 that we haven't discovered who those employees are.

6 HEARING EXAMINER PRICE: Mr. Proano.

7 MR. PROANO: I think this goes to
8 managerial capacity. That's clearly an issue in this
9 case. It's relevant. We just wanted to know who are
10 their employees and what they are doing.

11 I think it's relevant also to some of
12 the questions I'll be asking at the deposition; who
13 is responsible for communicating with NextEra, who is
14 responsible for making decisions about the drop, who
15 is monitoring the price, who is setting the prices.

16 We're very much in the dark if we don't
17 have the information about NOPEC employees. NOPEC is
18 a public entity, so I don't think those are really
19 trade secrets here involved, and to the extent there
20 are confidentiality concerns there is a protective
21 agreement in place. This is pretty basic
22 information, your Honor.

23 HEARING EXAMINER PRICE: And easily gets
24 over the hurdle of reasonably calculated to lead to
25 admissible evidence. We will grant the motion to

1 compel.

2 Number 3 I believe has been resolved.
3 Number 4, we'll grant the motion to compel. Number 5
4 we will grant the motion to compel.

5 MR. PARRAM: Your Honor, I have a
6 question on No. 4. One of our objections is
7 specifically related to scope of time that we're
8 talking about. It doesn't identify when these
9 meetings have occurred. Again, our concern is also
10 that the request is overbroad.

11 HEARING EXAMINER PRICE: Well, as to the
12 scope of time, I assume that you are not planning on
13 returning customers prior to January 1st of 2020,
14 because you didn't have them at that point.

15 Is there another reasonable cutoff date
16 that you're looking for? I'm not necessarily saying
17 we need to go back to January 1st, 2020, but if you
18 can give me another date that is reasonable to limit
19 the scope.

20 MR. PARRAM: Well, I was thinking at
21 least July or June. I know some of the discovery
22 requests that Mr. Proano had propounded upon NOPEC
23 had a date of, I believe June 1st, so I think it's
24 more reasonable if we're going to have to determine
25 when these meetings occurred and who participated,

1 like June 1st date, which is -- I think that date was
2 actually in the request for production of documents.

3 HEARING EXAMINER PRICE: Mr. Proano.

4 MR. PROANO: Your Honor, now that I've
5 seen the log for the first time and it's 600 plus
6 documents, we may follow up and ask for
7 communications predating June, I'd be very surprised
8 by the extensiveness of this log.

9 So I think I would submit a fair date
10 for this one would be January 1st, 2020 on the
11 meetings. It seems like there's some meetings that
12 took place before June, so we'd like discovery back
13 to January 1st, 2020 on this specific issue, topic 4.

14 HEARING EXAMINER PRICE: We'll split the
15 difference and make it March 1st.

16 MR. PARRAM: Your Honor, to the extent
17 that just within the few days, the amount of time and
18 work that we had to go in and go through and get all
19 of these documents for just the time frame from June
20 1st until today, I think the amount of time and
21 effort that we will put in -- have to put into that
22 potentially could be extensive.

23 Who was involved in each meeting, when
24 each meeting occurred is incredibly overbroad again
25 with respect to what does Dynegy need to file

1 comments in this proceeding, and to prepare for their
2 deposition, which we have already agreed to produce
3 someone for the deposition, now we have to go back to
4 early 2020 to try to find every single one of those
5 meetings, your Honor, I think it's incredibly overly
6 broad and burdensome just for the purposes of filing
7 comments in this proceeding.

8 HEARING EXAMINER PRICE: There are
9 E-discover tools that are -- easily harvest this
10 information from whatever sort of calendaring
11 system --

12 MR. PARRAM: There are tools, your
13 Honor, and they are not easy, because you still have
14 to have human beings that go through and produce the
15 privilege logs like this, which we did, Dynegy did
16 not, but pursuant to your request, and it took a
17 significant amount of time each day since you last
18 sent that email, of a lot of people on our team to
19 come up with these, so now we're going to go all the
20 way back to March 2020 just for a fishing
21 expedition --

22 HEARING EXAMINER PRICE: I don't think
23 it's a fishing expedition at all, Mr. Parram. The
24 reality is that you put the March date in play
25 because that's the date you're saying you began

1 having a common interest with NextEra on returning
2 customers to the service.

3 So the truth is I didn't come up with
4 March 1st out of the air, you put that date in play.
5 They are not on a fishing expedition and you'll
6 comply with the order.

7 MR. PARRAM: Thank you, your Honor.

8 HEARING EXAMINER PRICE: Okay. Moving
9 along, we have item 6 which will be granted, as well
10 as item 7.

11 Item 8 will be denied, no relevance to
12 the issues in this proceeding. No. 9 will be denied,
13 no relevance to this proceeding.

14 Item 10 will be granted. Item 11 will
15 be granted, as well as 12 and 13, 14.

16 Item 15 will be denied, no relevance to
17 this proceeding.

18 No. 16 will be denied, why they picked
19 NOPEC -- or why they picked NextEra has no relevance
20 to this proceeding.

21 17 involves the monthly variable price
22 and that has no relevance to the proceeding, that
23 will be denied.

24 I think at this point we will turn to
25 the motion to compel filed by NOPEC with respect to

1 Dynegy's responses to NOPEC's first set of
2 interrogatories.

3 Again, I'll be working off Attachment A
4 to the motion. Interrogatory 1 will be granted in
5 part and denied in part. It will be granted with
6 respect to items A, C and D.

7 MR. STINSON: I'm sorry, your Honor, I
8 didn't hear.

9 HEARING EXAMINER PRICE: We're going to
10 grant the motion to compel with respect to item 1 as
11 to items A, as in apple, C as in cat, D as in dog.

12 MR. STINSON: Thank you.

13 HEARING EXAMINER PRICE: And that is
14 going to be true as to items 2, 3, 4, 5, 6, and 7,
15 and 8.

16 The motion to compel will be denied with
17 respect to items B as in Ben, E, F, G, H, for
18 interrogatories 1, 2, 3, 4, 5, 6, 7 and 8. I don't
19 believe -- I believe it's not relevant as to how
20 Dynegy formed its bid, and it's overly burdensome in
21 any event as to how they form their bids in these
22 auctions.

23 So item 9, the motion to compel will be
24 granted.

25 10, it will be granted.

1 11, 12, 13, all be granted.

2 14, 15, 16, motion shall be granted.

3 17, 18 and 19, the motion to compel will
4 be granted.

5 MR. PROANO: Your Honor, could we just
6 pause for a second on a couple of these?

7 HEARING EXAMINER PRICE: Yes.

8 MR. PROANO: On 10 and related
9 interrogatories, so what the discovery is going to
10 establish is the tranche size that Dynegy was
11 obligated to search in all these territories.

12 11 and similar requests for other
13 utility territories will establish what was paid by
14 FirstEnergy, the clearing price, and whatever was in
15 the master SSO agreement.

16 10, you're getting there into really
17 details of damages to Dynegy. And I would
18 respectfully submit that the extent of either profit
19 or harm Dynegy has made historically on these
20 auctions is just irrelevant to this case.

21 HEARING EXAMINER PRICE: I disagree.
22 You put in play that you are harmed by NOPEC's
23 actions. They are entitled to explore the extent to
24 which you were or were not harmed by -- allegedly
25 harmed by their actions. I think it's a very

1 relevant issue.

2 I understand 10 in particular is going
3 to be highly confidential. I suspect it's going to
4 be attorneys' eyes only, and you could protect your
5 interest through the protective agreement.

6 MR. PROANO: I realize that is your
7 ruling, I just want to put on the record, you know,
8 from our perspective, whether or not Dynegy is or is
9 not harmed is not relevant to whether or not NOPEC
10 complied with its aggregation, governing documents,
11 or Ohio law, or whether or not they mislead customers
12 with respect to the aggregation program, the Standard
13 Program Price.

14 So we will comply with your Honor's
15 orders, obviously, but this is one I think is going
16 to cause a lot of shock waves in the SSO supplier
17 community.

18 You know, we joined these proceedings in
19 order to raise these issues with the Commission, and
20 this is going to -- this is going to spill over into
21 a lot of other participants.

22 We have already had TransAlta drop out
23 of the case. I don't know what the other SSO
24 suppliers are going to do in this case, but all the
25 suppliers are following this litigation, and I'm

1 concerned if this will be a -- put a -- asking for
2 reconsideration, I think this will put a chilling
3 affect on a lot of the SSO suppliers. They will know
4 if they raise similar issues in the future there's
5 going to be this kind of discovery into their inner
6 workings of supplying these loads, which are
7 extremely highly confidential.

8 HEARING EXAMINER PRICE: Are you willing
9 to stipulate that you were not harmed by NOPEC's
10 actions?

11 MR. PROANO: This is what I could offer,
12 your Honor: I could offer an affidavit that -- for
13 the attorney's eyes only, documenting the extent of
14 harm to the dollar to date.

15 That's what I can offer with necessary
16 supporting documentation, as part of the meet and
17 confer talking process. That is something I need to
18 clear with my client obviously, but I think that
19 would be something that we could put in evidentiary
20 form through an affidavit, and if necessary, NOPEC
21 could depose our affiant on the issue.

22 Obviously I'm making this offer without
23 having consulted my client, but I think it's
24 preferable that they take that route versus this,
25 which is not easy discovery to comply with. These

1 are very complicated procurement situations for many,
2 many, many millions of dollars, and over a long time.

3 So if I could offer that we would work
4 with NOPEC on some kind of affidavit, but we actually
5 document, you know, what harm was caused by the NOPEC
6 drop, and then NOPEC is free to depose our affiant on
7 that affidavit, that's what I would offer.

8 HEARING EXAMINER PRICE: NOPEC.

9 MR. STINSON: Your Honor, if I could
10 respond. I appreciate your ruling. If the
11 information is relevant, the September 7 show cause
12 order placed at issue harms to SSO suppliers and the
13 market and SSO customers, on that basis is going to
14 be sufficient, we need the information to be able to
15 test the affidavit and to test the information Dynegy
16 provides.

17 HEARING EXAMINER PRICE: He's offering
18 up a deposition of the witness. Let's take a step
19 back. You're only talking about No. 10 right now?

20 MR. PROANO: I'm talking about No. 10
21 and similar --

22 HEARING EXAMINER PRICE: Don't say
23 similar, tell me which ones in particular you're
24 talking about.

25 MR. PROANO: We would have to go through

1 them here. So it would be 10, it would be 13 because
2 you're talking about forward forecasting of
3 procurement, which has a very complicated subject.

4 Dynegy has its own generation resources
5 in Ohio, it also procures in the open market, it also
6 procures -- and this is -- I'm just speculating at
7 this point because I have not dealt in this, actually
8 their procurement strategy for the forward market,
9 but I anticipate it will be multi pronged and very
10 complicated.

11 16 -- we can stop there. There might be
12 some that we discuss, depending on your rulings, that
13 could be put in an affidavit, but I'm happy to put
14 that down in an affidavit and make the witness
15 available on those issues, on the actual, you know,
16 economic impact to Dynegy if it resolves these
17 discovery issues.

18 HEARING EXAMINER PRICE: Well, I'd like
19 to think we won't be back having another discovery
20 conference, but I suspect we will, so that does
21 enable us -- I think what we're going to do is we
22 will defer on 10 -- ruling on 10, 13, and 16. The
23 parties need to get together and see if you can work
24 something out. If you can't, we'll come back.

25 MR. STINSON: I'll just reiterate, your

1 Honor, that Dynegy is a willing intervenor in this
2 proceeding, it subjected itself to discovery and we
3 shouldn't be limited in our discovery as to relevant
4 issues as to their harm pursuant to the September 7th
5 entry and their own allegations in their pleadings.

6 HEARING EXAMINER PRICE: I'm not asking
7 to limit your discovery, I'm asking to see if you can
8 work it out, as opposed to being subject to whatever
9 ruling the Examiners come up with.

10 MR. DORTCH: Your Honor, I'm going to
11 request on behalf of Hartree, and I suspect other SSO
12 providers may have the same request, that they be
13 permitted to participate in those discussions --

14 HEARING EXAMINER PRICE: Absolutely.

15 MR. DORTCH: -- as this develops.

16 HEARING EXAMINER PRICE: Absolutely.

17 MR. DORTCH: Thank you.

18 HEARING EXAMINER PRICE: I want to be
19 clear. We are sensitive to the marketers -- not the
20 marketers, the suppliers' interest, and that's why
21 we're excluding how you develop your bids for the
22 customers, but at the same time people plan for the
23 market and Mr. Stinson is right, they should have a
24 chance to defend themselves.

25 MR. PROANO: I understand, we'll work

1 with NOPEC to try to get it resolved.

2 HEARING EXAMINER PRICE: Did we -- just
3 say it to be clear. I'm not sure where we stopped,
4 but 17, 18, and 19 will be granted.

5 Then we move over generally to a topic
6 related to Dynegy's affiliate. For the most part
7 those will be denied, so 20, 21, 22, and 23, the
8 motion to compel will all be denied.

9 The actions of Dynegy's affiliate have
10 no relevance in this proceeding other than sort of
11 what about this guy, and that's not a relevant legal
12 theory.

13 Item 24 will be granted.

14 Is there a Joint Defense Agreement
15 between any of these parties?

16 MR. PROANO: No, your Honor.

17 HEARING EXAMINER PRICE: Item 24 will be
18 granted.

19 MR. PROANO: Could we seek a
20 clarification on 24, your Honor?

21 HEARING EXAMINER PRICE: Yes.

22 MR. PROANO: Obviously customer return
23 is a certain subject. I'm not sure, I just want some
24 clarification on the scope of that just so we can
25 comply appropriately.

1 There may be at times communications in
2 the course of this litigation between myself and Mike
3 Dortch, for example. Is this limited to
4 communications around that specific drop, or just any
5 communications related to litigation, because I think
6 that clarification would be important?

7 MR. STINSON: I believe it covers all
8 communications, your Honor, there's no in place --

9 HEARING EXAMINER PRICE: I think it
10 covers all those communications. If you're having
11 conversations with Mr. Dortch about a draft pleading,
12 we are inclined to cover those under common interest
13 if you're both going to sign the pleading.

14 So I don't think that is a danger, you
15 don't have a Joint Defense Agreement. We would
16 extend that courtesy to any party in any litigation.
17 If you're working on some sort of joint pleading,
18 we're not going to make communications be disclosed.
19 Beyond that, I think you need to disclose them.

20 MR. PROANO: Could we have a time limit
21 on this request?

22 HEARING EXAMINER PRICE: March 1st.

23 MR. PROANO: March 1st until what time?
24 I'm trying to get a forward limit. Is it today?
25 Last month?

1 HEARING EXAMINER PRICE: The day you
2 were served with this discovery.

3 MR. PROANO: Thank you, your Honor.

4 MR. STINSON: Your Honor, there will be
5 a privilege log still with respect to these
6 communications? We're talking about common interest
7 and I know we're going to get another communications
8 as well, but I would assume all these would be
9 included in Dynegy's privilege log?

10 HEARING EXAMINER PRICE: If they want to
11 try to exclude them they will be covered in a
12 privilege log, yes.

13 MR. PROANO: Just so the record is
14 clear, we're not going to seek any protection over
15 any communications between the parties that are the
16 subject of the topic No. 24.

17 HEARING EXAMINER PRICE: Okay. Item 25,
18 the motion to compel will be granted. Item 26, the
19 motion to compel will be granted.

20 On document -- request for production of
21 documents, item No. 1 is overly broad and will be
22 denied. Item No. 2 is overly broad, be denied. Item
23 No. 3 is overly broad and will be denied, as will
24 item No. 4 and No. 5. No. 6 overly broad, will be
25 denied. No. 7 is overly broad, will be denied.

No. 8 we denied in part and granted in part. It will be granted with respect to documents related to FirstEnergy's competitive bid process that took place on October 4th, 2022, otherwise it relates to auctions which all took place prior to the return of customers, and has no relevance to this proceeding.

Item No. 9, similar ruling, will be granted in part and denied in part. 9A will be granted to the extent that it relates to the October 4th, 2022 competitive bid process for FirstEnergy. It will be denied with respect to prior SSO auctions prior to the customer return. B and C will be denied. And D will be granted subject to attorney/client privilege, which to the extent there is anything responsive to this -- otherwise be responsive but for the privilege will need to be identified in a privilege log.

MR. PROANO: Your Honor, on 9D, that's obviously going to invoke a lot of privilege communications. I suppose I'm asking for a reconsideration on that one.

I don't know how internal deliberations on whether or not to bring a complaint against NOPEC is relevant to the issues in the case. I think

1 that's a legal strategy issue, risk management issue.

2 MR. STINSON: Your Honor, if Mr. Proano
3 could speak up, I'd appreciate it.

4 MR. PROANO: I'm sorry. Thank you,
5 Mr. Stinson. On 9D I suppose I'm going to ask for
6 just a reconsideration on that one. That's going to
7 be just mostly privileged documents.

8 I don't see how a strategy decision on
9 whether or not to file a complaint against an
10 aggregator is at all relevant to the issue in this
11 case. This case is about NOPEC's certification.

12 MR. STINSON: Well, your Honor, I would
13 say to put it in a privilege log which addresses
14 that.

15 MR. PROANO: And, your Honor, you're
16 just going to get a bunch of privileged documentation
17 unnecessarily. They are just not going to be
18 relevant to the issues in this case. It's about
19 strategy and issues related to Dynegy's legal
20 position, but it's not relevant to NOPEC's
21 certification.

22 HEARING EXAMINER PRICE: Why don't you
23 do the privilege log and then we'll make an
24 assessment whether we need to do an in camera review
25 or not?

1 MR. GRUBACH: But, your Honor, to be
2 clear, they would still be ordered to produce
3 non-privileged responsive documents to D, correct?

4 HEARING EXAMINER PRICE: Yes.

5 MR. GRUBACH: Thank you.

6 HEARING EXAMINER PRICE: Item 10 will be
7 granted. Item 11 will be granted.

8 MR. PROANO: Your Honor, 10 and 11 are
9 similar to the topics we deferred subject to
10 negotiation. If we could put those in that category,
11 that would be great.

12 HEARING EXAMINER PRICE: Sure, we'll
13 defer on 10 and 11 then.

14 MR. PROANO: Actually 11 is okay.

15 HEARING EXAMINER PRICE: We'll defer on
16 10.

17 MR. PROANO: 11 is just the amount of
18 energy. There's a percentage of the energy provided
19 and we can provide that. 10 would be great to --

20 HEARING EXAMINER PRICE: I'll try to
21 slow down. 12 appears to be one we should defer
22 ruling for the same reasons. You're objecting to the
23 ones where it's paid in dollars, is that correct, at
24 this time?

25 MR. PROANO: Yes.

1 HEARING EXAMINER PRICE: We'll defer 12
2 and 13. You're not asking that 14 be deferred; is
3 that right?

4 MR. PROANO: No.

5 HEARING EXAMINER PRICE: We'll grant the
6 motion to 14. And 15. We'll defer 16.

7 MR. PROANO: Could I just make one
8 comment on some of these, your Honor?

9 HEARING EXAMINER PRICE: Yes.

10 MR. PROANO: A lot of these document
11 requests overlap with the interrogatory requests, so
12 there's an interrogatory request that asks this same
13 exact question as 15, so please identify for the
14 period September 1st, 2022 through December 31st,
15 2022, the amount of capacity you anticipate procuring
16 to supply the tranches --

17 HEARING EXAMINER PRICE: It's not been
18 usual for an interrogatory to be followed by a
19 request for production of documents saying please
20 produce the documents.

21 MR. GRUBACH: Right, your Honor.

22 MR. PROANO: So it would be beneficial I
23 think just to address the rog first, get the data to
24 NOPEC. This for -- 15 might be opening a can of
25 worms internally and provide a lot of documents

1 related to procurement, and strategy -- you know,
2 strategies for procuring, so I'm just trying to --

3 HEARING EXAMINER PRICE: I understand
4 that, Mr. Proano, but you guys repeated all your
5 interrogatory responses almost verbatim now, and then
6 attorney/client now, and then not, and so now you're
7 saying well, this one might be really burdensome as
8 opposed to ones where we all said they are all
9 burdensome, but these are super burdensome. I mean,
10 it's kind of aggravating at this point to say well --

11 MR. PROANO: I'm just trying to chart a
12 most efficient path forward. We're taking the
13 rulings today and we're going to comply with them.
14 These are duplicative of interrogatories, so I'm just
15 trying to find a way to provide NOPEC the information
16 without adding more burden to the process.

17 HEARING EXAMINER PRICE: Which is what
18 meet and confer is supposed to have done.

19 MR. PROANO: And we tried, your Honor,
20 and they --

21 HEARING EXAMINER PRICE: I understand.
22 I'm not impressed with any of the parties' meet and
23 confer efforts. We're trying to save that lecture
24 for the end, but the Examiners are not impressed with
25 the meet and confer opportunities. It looked very

1 much like people got together for five minutes and
2 said let's agree to disagree and move on to the
3 Examiners.

4 MR. PROANO: That wasn't by our choice,
5 your Honor. We wanted to try to confer and reach
6 agreement.

7 HEARING EXAMINER PRICE: I understand it
8 takes two.

9 MR. STINSON: I think some emails speak
10 for themselves; I think there was a further
11 communication would have been futile.

12 Beyond that I want to say as to Dynegy's
13 attempt to shield from discovery, so we have entered
14 into a protective agreement for attorneys' eyes only,
15 we have spent our weekend putting together a
16 privilege log, over thousands of documents, and I
17 just don't see the burden to Dynegy to defer these
18 and not provide them to NOPEC.

19 HEARING EXAMINER PRICE: I understand.
20 I totally understand.

21 15 in particular, we will give them an
22 opportunity to demonstrate this one is particularly
23 burdensome. It is related to capacity, but for the
24 most part I don't think it's unusual at all to have
25 an interrogatory and a request for production of

1 documents, pretty much the way life works around
2 here.

3 Okay. I think that takes us back to 17,
4 which we will grant. 18 will be granted -- 18 we'll
5 defer. 19 we'll defer. 20 will be granted.

6 We will allow Dynegy the opportunity
7 to -- on 21 to demonstrate this is overly burdensome
8 or cannot be otherwise addressed in their
9 interrogatory. Same with 22.

10 MR. PROANO: 22 will be deferred based
11 on the discussion on the affidavit?

12 HEARING EXAMINER PRICE: Yes.

13 MR. PROANO: Just one clarification. We
14 had -- could we put 17 in the deferred category?
15 It's the other side of 15, so 15 is capacity and 17
16 is energy. That would be the category of let's see
17 if we can find a way to do it less burdensome, but if
18 not, we can meet that burden and produce the
19 documents. One is capacity and one is energy.

20 HEARING EXAMINER PRICE: We'll allow it.

21 MR. PROANO: Thank you, your Honor.

22 HEARING EXAMINER PRICE: That takes us
23 back to 23. Same boat, looks like, we'll defer that
24 one. 24 we'll defer. 25 we'll defer.

25 26 will be granted. 27 will be granted.

1 28 will be granted.

2 29 will be denied. 30 will be denied.

3 31 will be granted -- back up on 31.

4 Mr. Stinson, where are you going with 31? What is
5 the relevance? And why Vistra?

6 MR. STINSON: It goes to the impact of
7 the recurring, your Honor, to the harm, whether there
8 was any communication between Dynegy and its Vistra
9 subsidiaries, any communications about what the harm
10 is to the return.

11 MR. PROANO: Your Honor, may I address
12 that one?

13 HEARING EXAMINER PRICE: You may.

14 MR. PROANO: I think this is just
15 another way to get at Dynegy Energy Services
16 communications. I just don't think there's relevance
17 here.

18 We're going to be providing a lot of
19 information and documents and data on the harm issue.
20 Your Honor has ruled that's relevant to the
21 proceeding. I don't believe these internal
22 communications are relevant. So we would certainly
23 object to this 31.

24 MR. STINSON: Well, I think they are
25 precisely relevant on the issue of the harm in that

1 discussion between Dynegy and anyone, actually, what
2 its thoughts were during those communications with
3 customer return.

4 HEARING EXAMINER PRICE: I'm going to
5 deny the motion on 31, 32, 33. I just don't see the
6 relevance, the issues here between -- communications
7 between Dynegy and a nonparty regarding the issues in
8 this case.

9 I'll deny 34, 35, 36, 37, 38, 39, and
10 40. I'll deny 41. 42 does not appear to be in
11 dispute, counsel has represented subsequent
12 responses. 43 there does not appear to be any
13 dispute, as well as 44. 45 will be denied.

14 Any questions, clarification? At this
15 time we're going to go off the record while we
16 look -- take a first look at the privilege log. So
17 we'll be off the record for at least 10, 15 minutes.
18 Thank you.

19 (Recess taken.)

20 HEARING EXAMINER PRICE: We have
21 reviewed the extensive privilege log by NOPEC and we
22 do believe that there are a large number of documents
23 which should be subject to in camera review by the
24 Attorney-Examiner prior to them being disclosed.

25 Let's start with the documents that do

1 not need to be disclosed. The Joint Defense
2 Agreement was executed on June -- September 8, 2022.
3 We do not need any documents from that date forward.

4 We do not want any documents that relate
5 to the exchange of drafts of the Joint Defense
6 Agreement between counsel or the parties.

7 Other than that, we would like NOPEC
8 to -- we request NOPEC produce all the remaining
9 documents for in camera review by the 15th of
10 November. You can just bring them -- just let us
11 know and we'll pick them up downstairs in the lobby.

12 MR. PARRAM: Clarification question.
13 What about drafts of potential pleadings in this
14 case?

15 HEARING EXAMINER PRICE: Drafts of
16 potential pleadings?

17 MR. PARRAM: Pleadings or discovery.

18 HEARING EXAMINER PRICE: If you're
19 asking for exchange of drafts of the material change,
20 we would like to look at that. Are you talking about
21 some other draft pleading?

22 MR. PARRAM: No, your Honor, I was just
23 asking generally.

24 HEARING EXAMINER PRICE: We are
25 contemplating the material change ones. So we would

ask that NOPEC produce these documents to the Attorney-Examiners by November 15th.

We already previously asked that Dynegy produce its privilege log by November 15th to the Attorney-Examiners and the other parties.

We would expect Dynegy and NOPEC and the other parties to address the issues we deferred and report back to the Attorney-Examiners by November 15th.

And we expect all the parties to produce all the documents for which motions for protective order were denied or motions for protective order were granted, and other documents and the other discovery requests by November 15th.

We will set a new prehearing conference, not for November 15th, to resolve the remaining issues, to discuss the resolution of the in camera review. We may supplement our request to Dynegy for documents for in camera review after we look at your privilege log. We'll probably just do that by email.

MR. PROANO: Your Honor, could we address the schedule?

HEARING EXAMINER PRICE: Yes.

MR. PROANO: Our hope is to take the deposition and submit comments once these documents

1 are produced obviously.

2 We would like to request three more
3 weeks for the case schedule and the comments so we
4 can get through this intense time period we're
5 addressing these discovery issues, and then we will
6 work with NOPEC on a new deposition time so we can
7 have the documents -- if they are coming November
8 15th, comments are right now due November 21st, that
9 way we can actually have time to look at them.

10 You're going to need time to look at
11 probably three or four hundred documents and make a
12 determination. We'd obviously like those documents
13 as part of the deposition and the comments, so just
14 to build a little time to finish up these issues in
15 the case.

16 MR. PARRAM: Your Honor, I think it's
17 premature to try to get an extension of time with
18 respect to the comments and the schedule.

19 We have a deposition scheduled for this
20 week. I think we can, after we leave the prehearing
21 conference today, see what can be done prior to that
22 deposition, and then after the deposition, to the
23 extent there needs to be any further discussions with
24 respect to the ongoing discovery, I think we should
25 do that before we try to get an extension of the

1 procedural schedule, I think for us to try to take
2 what we heard today and try to address all the
3 outstanding discovery as opposed to pushing out the
4 schedule.

5 HEARING EXAMINER PRICE: I'm not in any
6 hurry to extend the schedule at this point -- I'm not
7 in any hurry to extend the schedule at this point.
8 What day is it?

9 MR. PROANO: November 21st is the
10 current initial comment deadline. We would like to
11 wrap up discovery first obviously before addressing
12 that. It would be helpful for the public and the
13 parties to know what the new comment deadline is
14 going to be.

15 So I'd submit given all these issues
16 today, if we're going to be spending a lot of time
17 over the next week producing logs and documents, it
18 would be helpful to get an extension.

19 HEARING EXAMINER PRICE: We'll take it
20 under advisement. When we issue the entry setting a
21 new preconference date we'll either deny the request
22 or set a new reply date.

23 MR. PROANO: Thank you.

24 HEARING EXAMINER PRICE: Anything else
25 from the Bench? Thank you all for your time and

1 patience.

2 Again, as I indicated earlier, please
3 work hard on meet and confers. You're much better
4 off working things out than subjecting yourselves to
5 the Attorney-Examiners' rulings. Thank you all.
6 We're adjourned. Thank you.

7 (Thereupon, the hearing was
8 adjourned at 11:28 a.m.)

9 - - -

CERTIFICATE

I do hereby certify that the foregoing
is a true and correct transcript of the proceedings
taken by me in this matter on Tuesday, November 8,
2022, and carefully compared with my original
stenographic notes.

Valerie J. Grubaugh,
Court Reporter and Notary
Public in and for the State
of Ohio.

My commission expires August 11, 2026.

**This foregoing document was electronically filed with the Public Utilities
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in

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

Summary: Transcript November 8th 2022 In the Matter of the Certification of
Northeast Ohio Public Energy Council as a Governmental Aggregator.
electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and
Grubaugh, Valerie