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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company and The Toledo) Case No. 10-176-EL-ATA
Edison Company for Approval of a New)
Rider and Revision of an Existing Rider.)

**INTERLOCUTORY APPEAL
AND
APPLICATION FOR REVIEW
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
AND THE CITIZENS FOR KEEPING THE ALL-ELECTRIC PROMISE**

The Office of the Ohio Consumers' Counsel ("OCC") and Citizens for Keeping the All-Electric promise ("CKAP") (jointly "Appellants") hereby submit this Interlocutory Appeal¹ to the Public Utilities Commission of Ohio ("PUCO" or "Commission") and respectfully request the Commission to reverse the Attorney Examiner's oral ruling made January 7, 2011 at a pre-hearing conference in this case. That ruling can be interpreted to require OCC and CKAP to provide in discovery documents that are privileged from disclosure under attorney-client and/or the trial preparation privilege. Appellants have attached transcripts that convey the ruling, in accordance with the provisions of Ohio Admin. Code 4901-1-15(C). (Attachment A).

Reversal of the ruling will prevent severe prejudice to Appellants that will result from requiring them to turn over documents that may contain not only opinion work product revealing the mental impressions, legal theories, and conclusions of Appellants'

¹ The appeal is filed pursuant to Ohio Adm. Code 4901-1-15.

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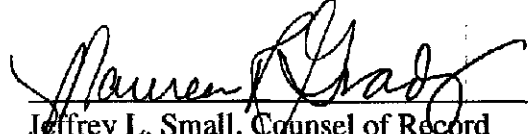
lawyers, but also legal advice given by Appellants, where the client has not waived the attorney client privilege. The disclosure ordered will have a chilling effect on complete and candid communication between and among CKAP and OCC and its clients and the ability of parties to work effectively in joint efforts on issues of common interest. Thus, the Attorney Examiner's ruling creates far reaching implications for OCC and the way OCC fulfills its statutory duties with respect to the representation of residential customers in Ohio. In turn the ruling will impact a whole host of other parties who practice before the Commission and work jointly in coalitions to represent common and joint interests.

Those coalitions work effectively to speak with one voice in one pleading, thereby significantly reducing the administrative burden on the Commission by having multiple individual pleadings to read and consider in what are sometimes short timeframes. The ability of parties to work together and submit joint filings contributes to narrowing the issues before the Commission and to judicial economy. This ruling can have a chilling and adverse impact on the ability of parties to work together towards joint resolution – a time-honored practice that has been one of the hallmarks of PUCO administrative proceedings for more than three decades.

The reasons for this Interlocutory Appeal are explained in the attached Memorandum in Support.

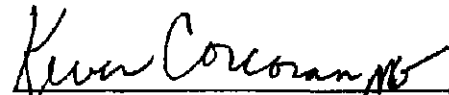
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MEMORANDUM IN SUPPORT

I. BACKGROUND

On November 4, 2010, the Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company ("FirstEnergy" or the "Companies") served their First Set of Interrogatories and Requests for Production of Documents upon OCC and upon CKAP. On November 17, 2010, FirstEnergy served its Second Set of Interrogatories and Requests for Production of Documents on OCC and CKAP. On November 23, 2010, the Attorney Examiner issued an Entry that addressed, among other issues, the response time for discovery, ordering that it be shortened from twenty days to ten days and ordering electronic service of requests and responses.² On November 30, 2010, FirstEnergy served its Third Set of Interrogatories and Requests for Production on OCC and CKAP.

On December 8, 2010, CKAP responded to FirstEnergy's First Set of Discovery, and included objections to the discovery based on attorney client privilege and work-product. On December 9, 2010, Counsel for the Companies communicated with CKAP,

² Discovery responses are due within twenty days after service or within such shorter or longer time as the Commission may allow. Ohio Adm. Code 4901-1-19(A).

indicating that it found the responses “deficient in several ways and require[ing] immediate supplementation.”³ Company Counsel in its communication did not raise a concern with CKAP’s objections based on privilege, but appeared to be focused on the public, not private documents implicated in CKAP’s responses to discovery.⁴

On December 10, 2010, OCC electronically served a copy of its Responses and Objections to FirstEnergy Companies’ First and Second Sets of Interrogatories and Requests for Production of Documents. While the responses to the First Set were late, Responses to the Second set were on time, by agreement with the Company, considering the shortened discovery time frame was not considered as applicable.⁵

On December 14, 2010, Counsel for the Company communicated with CKAP, as conveyed in Attorney Garber’s Affidavit of Counsel attached to FirstEnergy’s Motion to compel. Additionally, on that date, Counsel for FirstEnergy, by e-mail, advised OCC that it considered OCC’s responses also “deficient in several ways and require immediate supplementation.”⁶ Counsel for FirstEnergy demanded responses from OCC by the end of the day, one day later, December 15, 2010.⁷ Otherwise Counsel indicated FirstEnergy was moving to compel. Additionally, FirstEnergy’s Counsel advised that the Third Set of Interrogatories and Requests for Production to OCC were overdue and indicated that FirstEnergy desired responses at the end of the day on December 15, or it would also

³ See Exhibit GWG-2, FirstEnergy Motion to Compel (Dec. 15, 2010).

⁴ Id.

⁵ FirstEnergy, through e-mail, communicated an agreement that “we will treat the discovery requests that were sent out on November 17th [(Second Set)] as having a response date of December 10th ***.”

⁶ See Ex. GWG-2, e-mail of December 14, 2010.

⁷ The OCC counsel with whom communications were conducted concerning discovery responses was engaged in depositions of four witnesses in Akron on December 15 and 16, 2010, as agreed to by counsel for FirstEnergy.

move to compel such responses.⁸ OCC responded to Companies' Counsel's communications, further explained its reasons for objecting, and voiced a concern that the Companies' counsel had not exhausted all reasonable efforts to resolve the discovery dispute.⁹

On December 15, 2010, FirstEnergy filed a motion to compel against CKAP and sought an expedited ruling.¹⁰ In its Motion to compel against CKAP, the Company requested responses to RFP 5 and 7 and Interrogatories 3, 4, and 5. It asked the Attorney Examiner to order CKAP to "i) specifically identify the date, filing party and docket title of all documents responsive to Request for Production No. 5 that appear in the docket of this case; and (ii) provide a description of any responsive document submitted at any public hearing, including the name of the individual who submitted it and the date and the location of the public hearing at which it was submitted."¹¹ FirstEnergy's motion was directed at the publicly available documents, not the private documents retained by

⁸ On December 22, 2010, OCC provided responses to the Companies' Third Set of Interrogatories and Requests for Production upon OCC. Hence the motion to compel as it relates to the Third Set of Discovery is moot. The Companies undertook virtually no communication regarding the Third Set, which partly explains why it was not identified as having been transmitted until December 16, 2010. For instance, the Companies' counsel has not been transmitting Word versions of its discovery to OCC to facilitate responses (except in response to a request by OCC for such a version to the Second Set), a common courtesy that has been observed between OCC and FirstEnergy counsel and other utility counsel in numerous previous cases and which has been observed by OCC in the present proceeding to help expedite the matters.

⁹ Under Ohio Adm. Code 4901-1-23(C), no motion to compel shall be filed until the party seeking discovery has exhausted all other reasonable means of resolving the differences with the party or person from whom discovery is sought. OCC submits that the Company has failed to engage in that process in any meaningful way. In contrast, OCC counsel in attempting to resolve discovery disputes in this case over deficient discovery responses provided by FirstEnergy, initiated and engaged in lengthy and prolonged efforts to resolve discovery disputes. See for example efforts detailed in OCC's Motion to Compel, filed June 30, 2010.

¹⁰ FirstEnergy provided little detail in its motion to compel (or the attached affidavit of counsel) to show that it had complied with its duty under 4901-1-23(C) to exhaust all reasonable means of resolving its discovery differences with CKAP. Appellants submit that its efforts in this regard fall woefully short of its obligations under Ohio Admin. Code 4901-1-23(C).

¹¹ Motion to compel at 4 (Dec. 15, 2010).

CKAP that CKAP objected to producing on grounds of attorney-client and work product privilege. Additionally, FirstEnergy based its motion to compel solely on the argument that CKAP had an obligation under Ohio Admin. Code 4901-1-20(D) to give it enough information to “let the requesting party know what the responsive document is and where specifically it may be found.”¹²

On December 17, 2010, FirstEnergy filed a motion to compel against OCC and requested an expedited ruling on its motion.¹³ In its Motion to Compel it requested “complete responses” to Requests for Production 5, 7, 9, 10, 11, 12, and 14. Specifically the relief requested was that the Attorney Examiner order “OCC to (i) specifically identify the date, filing party and docket title of all documents responsive to the requests listed above that appear in the docket of this case; and (ii) provide a description of any responsive document submitted at any public hearing, including the name of the individual who submitted it and the date and the location of the public hearing at which it was submitted.”¹⁴ Like FirstEnergy’s motion to compel against CKAP, its motion against OCC was solely based upon its argument that OCC had an obligation under Ohio Admin. Code 4901-1-20(D) to give it enough information to “let the requesting party know what the responsive document is and where specifically it may be found.”¹⁵ Similarly, like the motion to compel against CKAP, there was no discussion in this motion seeking to compel private documents held by OCC that OCC had not produced

¹² Id.

¹³ OCC advised Company Counsel that it objected to an expedited ruling, and thus, files this response in accordance with Ohio Adm. Code 4901-1-12(C).

¹⁴ Motion to Compel at 5.

¹⁵ Id.

subject to claims of attorney-client and trial preparation privilege. Nor was there a request for relief pertaining to such private documents.

On December 23, 2010, OCC submitted Supplemental Responses and Objections to FirstEnergy's Second Set of Requests for Production, where OCC supplemented its response to RFP 5, indicating that it had identified documents that were not privileged and responsive to the Company's request. OCC indicated that those documents would be available for inspection or would be provided. The documents transmitted were public materials distributed to customers at local public hearings.

On December 27, 2010, consistent with Ohio Admin Code 4901-1-12 (C), OCC filed its Memorandum Contra FirstEnergy's Motion to Compel. OCC's filing was made within the shortened response time period of seven days given that FirstEnergy had sought an expedited ruling on its motion to compel. Under the Commission's rules, since FirstEnergy requested an expedited ruling on its motion, and the Commission did not specifically request a reply memorandum from FirstEnergy, no reply memorandum was permitted to be filed. FirstEnergy in fact did not file a reply.

On December 30, 2010 OCC provided FirstEnergy with the additional documents referenced in the Supplemental Response to RFP 5, which included non-privileged documents totaling over 5,000 pages. These documents, which were provided to FirstEnergy on December 30, 2010, contained communications between OCC and customers concerning all-electric rates that were not otherwise available to FirstEnergy through the public docket in this proceeding. Primarily that information pertained to the business records of OCC maintained by its Consumer Services Division.

On January 3, 2011, CKAP filed its Memorandum Contra FirstEnergy's Motion to compel. On January 7, 2011, a pre-hearing discovery conference was held and transcribed by a court reporter. At the pre-hearing conference, the Attorney Examiners permitted FirstEnergy to make new arguments for its Motions to Compel, including arguments regarding the Appellants' claim of privilege that FirstEnergy had not included in its Motions to Compel. Moreover, FirstEnergy made arguments in reply to OCC's Memorandum Contra even though FirstEnergy, by requesting an expedited ruling, had foregone the right to reply. At the prehearing, FirstEnergy for the first time argued to the Commission that OCC's and CKAP's objections based on attorney-client privilege and/or trial preparation were insufficient to preclude discovery on such matters. And for the first time the Company provided citations to case authority—authority which was conspicuously absent from its Motions to Compel. Moreover, the Company expanded its filed Motions to Compel, seeking not only publicly filed documents, but also "private" documents not publicly docketed that are in OCC's and CKAP's possession that are responsive to the documents requests.¹⁶ Because these new arguments were never presented in its original Motion to Compel and included case citations, OCC was at a significant disadvantage to respond. When FE asked for an expedited ruling it waived its right to a reply and was on notice that the totality of its arguments needed to be made in its Motion to Compel. FE's failure to do so and the Attorney Examiners' willingness to allow FirstEnergy to supplement its Motion through oral argument, was prejudicial and unjust and unreasonable and placed OCC and CKAP at a disadvantage.

¹⁶ See Tr. 22-28.

In response to an earlier request by the Attorney Examiner, OCC presented for *in camera* review a few samples of the types of documents potentially covered by the discovery requests. (Tr. 44). The Attorney Examiners asked one or two questions on the documents, before returning them back to OCC. (Tr.66-67). After returning from a brief recess where the Attorney Examiners “caucus[ed]” on the argument (Tr. 112), the Attorney Examiners took up ruling on the Motions. The Attorney Examiner announced the ruling on FirstEnergy’s Motions to Compel against OCC and CKAP, which included ruling on the Motions to Compel that FirstEnergy filed and ruling on the claims that FirstEnergy raised for the first time at the prehearing. That ruling begins on page 112 of the transcript and concludes on page 113.¹⁷

The ruling granted FirstEnergy’s motions to compel, including the claims that FirstEnergy raised for the first time at the pre-hearing conference. The Attorney Examiner indicated that “the Bench *finds* that FirstEnergy has demonstrated that OCC and CKAP have failed to identify the specific documents legitimately sought in discovery by the companies.” It ordered “[t]herefore for each document that OCC and the CKAP Parties have identified referenced in 10-176-EL-ATA the parties will, which is responsive to FirstEnergy’s discovery request, the parties will identify the date of filing of the document and the name if applicable, of the person filing or submitting the document.” (Tr. 112). The Bench also indicated that it “*finds* the trial preparation privilege does not apply to documents gathered rather than created by the attorney in reasonable anticipation of litigation.”

¹⁷ The Attorney Examiner’s expeditious ruling on the Companies’ Motion to compel stands in stark contrast to its dilatory ruling on OCC’s motion to compel. OCC filed a motion to compel on June 30, 2010, and a ruling was not issued until November 10, 2010, four and a half months later.

The Bench further conveyed that it “*finds* that the parties have not established that privilege applies to documents regarding past conduct by FirstEnergy rather than documents relating to customers seeking legal advice from OCC.” (Tr. 113). The Attorney Examiner in response to questions by OCC counsel indicated that the motion to compel was granted with respect to both “private and public documents.” (Tr. 114). The Attorney Examiner, in response to later inquiry by OCC’s counsel, subsequently explained that his ruling was not intended to require OCC to turn over communications made between and among OCC and its case team that did not go anywhere outside of OCC. Rather, the Attorney Examiner indicated that communications between OCC and Ms. Steigerwald, prior to the execution of the joint defense agreement, are fair game and should be disclosed. (Tr. 121-122).

In addition to the above *findings* of the Bench, the Attorney Examiner conveyed the following statements:

- “The Bench *notes* that OCC and CKAP did not preserve any claims of privilege by creating a privilege log or otherwise specifically identifying the document and the basis for the privilege claim as required by the rules of civil procedure.” (Tr. 113)
- “The Bench notes that the parties did not establish that the joint defense agreement privilege applies to any communications prior to its [the joint defense agreement] execution on October 12, 2010” (Tr. 113)

OCC and CKAP, in accordance with their right to file a written application¹⁸ for review related to any “ruling” issued under Ohio Admin. Code 4901-1-15(C), hereby file this pleading. This appeal focuses that portion of Attorney Examiner ruling pertaining to the disclosure of “private documents.” In this regard, OCC and CKAP are required by the ruling to reveal to FirstEnergy documents not in the public domain that are related to communications between OCC and CKAP. Those documents will reveal attorney-client communications and communications protected by the trial preparation privilege. The appeal also relates to the “notes” of the Bench that appear to be a basis behind the “findings” made in the Attorney Examiner’s ruling.

II. APPLICATION FOR REVIEW

A. The Appeal Can Be Taken to the Commission Without the Need for It to be Certified.

Under Ohio Admin. Code 4901-1-15(A), there are certain circumstances adversely affecting a party that allow the party to take an interlocutory appeal to the Commission without the need for the appeal to be certified to the Commission by the Attorney Examiner. Appeals can be taken without certification when an Attorney Examiner has granted a motion to compel discovery and/or required documents to be produced “over an objection based on privilege.”¹⁹ Both of these circumstances are present and thus the Appellants have the right to take this direct interlocutory appeal to the Commission.²⁰

¹⁸The Attorney Examiner recognized this right. (Tr. 157-158).

¹⁹ Ohio Admin. Code 4901-1-15(A)(4).

²⁰ See Tr. 116-117, where the Attorney Examiner acknowledged OCC’s right to a direct appeal of the ruling to the Commission without the need for certification.

B. Summary

The ruling of the Attorney Examiner requires OCC and CKAP to reveal documents related to communications between OCC and CKAP, where those documents will reveal attorney-client communications and privileged trial preparation materials. That result is unreasonable, unlawful, and an abuse of discretion in two respects. First and foremost, the Attorney Examiner's ruling imposes a severe sanction—the ordering of production of privileged information—without making the necessary determination *on a document-by-document basis* what privilege applies and whether the documents seeking to be discovered qualify under that privilege. This amounts to an abuse of discretion because the Supreme Court has ruled in *Peyko v. Frederick*²¹ that once a party asserts the attorney-client privilege with regard to discovery, the trial court must determine by *in camera* inspection, which if any documents are privileged.

Thus, the ruling here which blanketly requires all documents related to OCC's and CKAP's communications with each other to be disclosed without determining on a document-by-document basis if there is a valid privilege that applies is an abuse of discretion. Second, in finding that communications between OCC and CKAP are subject to discovery when there was no formalized joint defense agreement, the Attorney Examiner unreasonably and without authority expanded the circumstances under which attorney-client communications in Ohio can be waived.²²

²¹ *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167.

²² See *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 2005-Ohio-1508, 105 Ohio St.3d 261; *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975).

The matters “noted”²³ by the Attorney Examiners are inconsistent with PUCO rules (Ohio Admin. Code 4901-1-20), PUCO precedent (*S.G. Foods*²⁴ and others) and the standard practice before the PUCO which does not require the responding party to produce a privilege log each time privilege is claimed as a ground for objecting to discovery. Indeed, FirstEnergy did not claim in its Motions to Compel, filed on December 15 and 17, 2010, that OCC and CKAP were required to produce a privilege log. Nor did FirstEnergy claim that OCC and CKAP had failed to adequately describe the nature of the documents not produced in order to enable it to contest OCC and CKAP’s claims of privilege.

The Attorney Examiner’s reliance upon Ohio Civil Rule 26(B)(6)(a) to support a requirement of a privilege log is misplaced as well because that rule does not require such. In “noting” that Appellants failed to preserve their claim of attorney-client privilege by not creating a privilege log, or otherwise specifically identifying the document and the basis for the privilege claim, the Attorney Examiner misconstrues the discrete and defined circumstances under which statutory and common law attorney-client privilege in Ohio can be waived. In its “notes” the Bench fails to recognize a joint defense effort existed between OCC and CKAP prior to execution of a formal document memorializing that agreement. Thus, the Attorney Examiner misconstrued the doctrine of common interest/joint defense and will force OCC and CKAP to reveal documents reflecting communications that should be protected from disclosure under attorney-client privilege and/or work product. These arguments are addressed in detail below.

²³ Tr. at 112-113.

²⁴ *In the Matter of the Complaints of S.G. Foods Inc. et al v. The Cleveland Electric Illuminating Company, Toledo Edison Company, and American Transmission Systems, Inc.*, Case No. 04-28-EL-CSS, Entry at 9-10 (Apr. 30, 2007).

The ruling is an abuse of discretion because it is unreasonable, arbitrary, and unconscionable.²⁵ Taken as a whole, the Attorney Examiner's ruling (including what the Examiner noted) will severely prejudice Appellants by requiring them to produce documents that may contain not only opinion work product revealing the mental impressions, legal theories and conclusions of OCC's and CKAP's lawyers in this case, but also legal advice given by Appellants, where the client has not waived the attorney-client privilege. Such disclosure will have a chilling effect on complete and candid communication between and among OCC and its clients and the ability of OCC to work effectively with third parties in joint efforts on issues of common interest. Thus, the Attorney Examiner ruling and notes create far reaching implications for OCC and other parties who practice before the commission and work jointly in coalitions to represent common and joint interests of parties.

The Commission on this basis should reverse the Attorney Examiner's ruling that grants the motion to compel as it relates to non-public²⁶ documents that Appellants claim are privileged, based on the arguments presented in Appellants' Memorandum Contra FirstEnergy's Motion to compel and those presented during the pre-hearing conference. It should find that the documents already produced by both CKAP and OCC are sufficient and responsive to the discovery requests. If what the Bench "noted" in

²⁵ See e.g. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, defining abuse of discretion.

²⁶ OCC and CKAP are not appealing the portion of the Attorney Examiner ruling that relates to the documents they have gathered that are publicly filed or docketed in this proceeding by third parties. OCC and CKAP will be producing such documents by January 14, 2011, as ordered by the Attorney Examiner. OCC and CKAP believe however that this ruling is inconsistent with the Ohio Supreme Court ruling in *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Authority* (2009), 121 Ohio St. 3d 537, 542-43 (citing *Dunn v. State Farm Fire & Cas. Co.* (C.A.5, 1991), 927 F.2d 869, 875)(where the Ohio Supreme Court held that the attorney-client privilege even includes an attorney's factual investigations if the client for whom the investigation was made shows "that other legal advice or assistance was sought and that the investigation conducted was integral to that assistance." Additionally, the Court held that "if a communication between a lawyer and client would facilitate the rendition of legal services or advice, the communication is privileged.")

connection with its findings are considered part of the Attorney Examiner's ruling, then the Commission should reverse these portions of the ruling as well.

C. The "Findings" of the Attorney Examiner

- 1. When the Attorney Examiner ruled that Appellants must turn over all documents related to privileged communications between OCC and CKAP without conducting an *in camera* review of each document claimed to be privileged, the Attorney Examiner abused his discretion.**

The Supreme Court of Ohio has held that if a party asserts the attorney-client privilege with regard to the contents of a file sought to be discovered, the trial court, before ordering disclosure of the contents, "shall" determine by *in camera* inspection which portions of the file, if any, are so privileged.²⁷ That holding was contained in *Peyko v. Frederick*.²⁸ In *Peyko v. Frederick*, at the appellate court level, the plaintiff had issued a subpoena duces tecum to the defendant's insurer directing him to produce the defendant's entire claims file related to the evidentiary hearing.²⁹ The insurer moved to quash the subpoena on grounds that the material in the claims file was, among other things, privileged. The insurer's motion relied upon the blanket assertion that the file contained privileged communications.³⁰ The appellate court granted the motion to quash, holding that while some of the material in the file may be privileged, the party claiming the privilege has the burden of showing, *during an in camera inspection of the file by the court*, which materials in particular are so privileged.³¹

²⁷ See *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167.

²⁸ *Id.*

²⁹ *Id.* at 164..

³⁰ *Id.* at 166.

³¹ *Id.* at 164.

On appeal the Ohio Supreme Court found that although the insurer had not initially satisfied its burden of showing the file was privileged, the trial court is required to determine by *in camera* inspection which portions of the file are privileged.³² On remand the court of appeals was directed to conduct an *in camera* inspection of the claims file in order to determine which portions of the file were privileged.³³ The Supreme Court's holding in *Peyko v. Frederick* controls here.

Here OCC and CKAP objected to the production of privileged materials on a timely basis, by expressly stating the privilege. Appellants further provided information to FirstEnergy and the Commission in their respective Memoranda Contra FirstEnergy's motion to compel. There Appellants described the nature of the documents falling under the privilege so that FirstEnergy would have an opportunity to contest them. And indeed, FirstEnergy was able to contest the privilege claims at the pre-hearing conference. (Tr.22-28; 78-81).

The Attorney Examiner, however, was obligated to conduct an *in camera* review of each of the documents prior to ordering their disclosure. It failed to do so, only reviewing a sample of documents that OCC provided to it and reviewing no CKAP produced documents. Its approach is inconsistent with the Supreme Court's holding in *Peyko*, which requires an *in camera* review of each document before ordering the disclosure of documents claimed to be privileged, even when the resisting party has not borne the initial burden of proving the privilege.

Lower Courts in Ohio have determined that a blanket grant compelling discovery of documents claimed to be privileged without holding an evidentiary hearing to

³² Id. at 167.

³³ Id.

determine the nature of the privilege is an abuse of discretion.³⁴ In *Grace v. Mastruserio*, the Court of Appeals of Ohio's First Appellate District recognized the court has a duty to regulate discovery just as it has a duty to control the trial and impose reasonable limits and conditions, consistent with its rules, to expedite the administration of justice.³⁵ Nonetheless the court determined that granting a motion to compel the entirety of an attorney's case file without first hearing evidence or conducting an *in camera* inspection is beyond the discretion of the trial court.³⁶ The court found it must conduct an evidentiary hearing or perform an *in camera* inspection of the materials to reach a reasonable, informed, and conscionable decision on whether evidence is discoverable or protected under attorney-client privilege.³⁷

Here, the Attorney Examiner made a blanket ruling that all documents reflecting communications between OCC and CKAP should be turned over in discovery despite objections based on both work product and attorney-client-privilege. The ruling was made with a brief inspection of a few examples of privileged materials that OCC provided to the Bench. The Bench did not examine any documents claimed by CKAP to be privileged. The Attorney Examiner's ruling came without an evidentiary hearing on the documents and without an *in camera* inspection on a document-by-document basis. This ruling conflicts with the Ohio Supreme Court standard requiring *in camera*

³⁴ *Cargile v. Barrow and Aetna Health Inc.*, 182 Ohio App.3d 55, 2009 Ohio 371, ¶ 12 (First Appellate District)(overturning the release of all medical records claimed to be privileged before conducting an *in camera* inspection of the records based on *Peyko* and cases from other appellate districts and guidance from other states); *Grace v. Mastruserio*, 182 Ohio App.3d 243, 2007 Ohio 3942 (First Appellate District); *Miller v. Basset*, 2006 Ohio 3590 (Eight Appellate District) (holding that the possibility of two differing forms of protection under the attorney-client privilege (opinion work product and fact work product) necessitate an evidentiary hearing).

³⁵ *Grace v. Mastruserio*, 182 Ohio App.3d at ¶36.

³⁶ *Id.*

³⁷ *Id.* at ¶38.

inspection of documents before requiring disclosure over a privilege objection. It amounts to an abuse of discretion as determined by a number of lower courts in Ohio.

The Attorney Examiner's ruling should be reversed and CKAP and OCC should not be required to turn over any further documents to FirstEnergy, beyond those already produced. If however the Commission determines that there are additional documents that should be turned over in discovery, it should modify the ruling and schedule an *in camera* inspection regarding the applicable documents to determine, on a document-by-document basis, if each document is privileged. Doing so would comport with the law of Ohio, as recognized by the Ohio Supreme Court. And it would begin the process of correcting the unlawful ruling.

2. When the Attorney Examiner ruled that communications and work product/trial preparation shared between OCC and CKAP are subject to discovery when there is no formalized joint defense agreement, the Attorney Examiner unreasonably expanded the circumstances under which the attorney-client privilege can be waived in Ohio.

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications."³⁸ An attorney-client privilege is created where: (1) legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.³⁹ Except under certain circumstances,

³⁸ *Swidler & Berlin v. United States* (1998), 524 U.S. 399, 403; see also *Upjohn v. United States* (1981), 449 U.S. 383, 389.

³⁹ *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 2005-Ohio-1508, 105 Ohio St.3d 261, ¶ 21 (citation omitted).

only the client can waive the attorney-client privilege.⁴⁰ In Ohio, the attorney-client privilege is governed by statute, R.C. 2317.02(A), and in cases that are not addressed in R.C. 2317.02(A), by common law.⁴¹ Notably the common law attorney-client privilege reaches far beyond the proscription of testimonial speech, by protecting against any dissemination of information obtained in the confidential relationship.⁴²

The Ohio Revised Code provides a statutory testimonial privilege for attorney-client communications preventing an attorney from testifying to communications made “to the attorney by a client or the attorney’s advice to a client.”⁴³ Under R.C. 2317.02(A), an attorney may not testify as to privileged communications with a client unless the client has waived the statutory attorney-client privilege by either express consent or by voluntarily testifying to the communications, at which point the attorney may be compelled to testify on the same subject. The Ohio Supreme Court has held that the testimonial privilege of R.C. 2317.02(A) applies not only to prohibit testimony at trial, but also to protect the sought-after communications during the discovery process.⁴⁴

Where R.C. 2317.02(A) applies, the statute provides the only means by which the privilege may be waived.⁴⁵ In *Jackson v. Greger*, the Ohio Supreme Court explicitly held that R.C. 2317.02(A) provides the exclusive means by which a client may waive the statutory attorney-client privilege.⁴⁶ In *Jackson*, the Court emphasized its consistent

⁴⁰ *Id.* (citing *Allen Cty. Bar Assn. v. Williams* (2002), 95 Ohio St.3d 160, ¶9-14).

⁴¹ *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 2005-Ohio-1508, 105 Ohio St.3d 261, ¶ 17-18.

⁴² *Id.* at ¶26, citing *Am. Motors Corp. v. Huffstutler* (1991), 61 Ohio St.3d 343, 348.

⁴³ *Jackson v. Greger*, 2006-Ohio-4968, 110 Ohio St.3d 488 at FN 1.

⁴⁴ *Jackson* at FN 1; see also *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 2010-Ohio-4469, reconsideration denied, 2010-Ohio-5762.

⁴⁵ *Jackson v. Greger*, 2006-Ohio-4968, 110 Ohio St. 3d 488, syllabus.

⁴⁶ *Jackson* at ¶13.

rejection of judicially created “waivers, exceptions, and limitations for testimonial privilege statutes.”⁴⁷ Thus, where the attorney-client privilege is governed by R.C. 2317.02(A), the statute provides the only means by which the privilege may be waived. Under the statutory attorney-client privilege, a client’s disclosure to a third party of communications made pursuant to the attorney-client privilege, does not constitute a waiver.⁴⁸

This statutory attorney-client privilege is implicated in communications directly made between OCC attorneys and Sue Steigerwald and/or Kevin Corcoran. Thus, any communications made between and among these individuals, if they meet the standards of attorney-client privilege discussed above, qualify as privileged information and the privilege is not waived through third party disclosure. Nor is the privilege waived by failing to produce a discovery log, as this condition is not explicitly recognized under R.C. 2317.02(A) as either an express waiver or a waiver where the client voluntarily testifies on the same subject.⁴⁹

Where the statutory privilege for attorney-client communications is not applicable, for instance where the communication is made between a client and an agent of the attorney, the common-law controls the creation and waiver of the attorney-client privilege. The common law attorney-client privilege would apply to communications made between OCC’s attorneys’ agents and Sue Steigerwald and/or her counsel, provided they meet the standards of attorney-client privilege discussed above.

⁴⁷ *Id.* at ¶ 13 (citing numerous cases).

⁴⁸ See *State v. McDermott*, 72 Ohio St.3d 570, 1995 Ohio 80 (modifying the waiver proposition of the *State v. Post* syllabus, (1987), 32 Ohio St.3d 380).

⁴⁹ See *State v. McDermott* (1995), 72 Ohio St.3d 570, 572 (relying on *Swetland v. Miles* (1920), 101 Ohio St. 501, 504, for the proposition that the Ohio statute on privileged communications evinces the sole criteria for waiving privilege as (1) the client expressly consents, or (2) the client voluntarily testifies).

The Ohio Supreme Court has also held that the common law or judicially created attorney-client privilege applies to communications between attorneys and their state-government clients pertaining to the attorney's legal advice.⁵⁰ The Court held that the common-law attorney-client privilege applies to government entities and "reaches far-beyond a proscription against testimonial speech" and "protects against any dissemination of information obtained in the confidential relationship."⁵¹ "The privilege applies when legal advice of any kind is sought from the legal advisor in that capacity and the client's confidential communication relates to that purpose."⁵²

In *Leslie* the Court ultimately found that the communications by attorney-employees of the state departments were subject to the attorney-client privilege and should have been sealed. The communications that should have been sealed on the basis of attorney-client privilege included: a memorandum from Leslie (an attorney) to the lead counsel of ODOD, which provided legal advice; a memorandum from Leslie providing legal advice to the lead counsel of ODOD and key OHFA staff; correspondence from Leslie to OHFA Special Counsel, which raised legal issues for discussion; and additional emails and draft letters providing legal opinions and advice.⁵³

The judicially created attorney-client privilege is subject to waiver according to the common-law as determined by the courts of Ohio. The Ohio appellate courts continue to apply the common-law waiver exception pronounced in *Hearn v. Rhay*.⁵⁴

⁵⁰ *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 2005-Ohio-1508, 105 Ohio St.3d 261, ¶ 24.

⁵¹ *Id.* at ¶ 26 (citing *Am. Motors Corp. v. Huffstutler* (1991), 61 Ohio St. 3d 343, 348).

⁵² *Id.* at ¶29.

⁵³ See *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 2003-Ohio-6560, ¶ 86, *aff'd in part, rev'd in part*, 2005-Ohio-1508, 105 Ohio St. 3d 261.

⁵⁴ See for example *Grace v. Mastruserio*, 2007-Ohio 3492, citing *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975).

Under the *Hearn v. Rhay* three-prong test, a client impliedly waives the attorney-client privilege when all three of the following conditions are met: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.⁵⁵

While the Court has recognized that under the common law attorney-client privilege, disclosure to a third party may waive attorney client privilege,⁵⁶ the Court's holding is inapplicable here given the distinguishing circumstances presented. Here those circumstances include that there was discrete disclosure of attorney-client communications to a third party but only under a joint defense/common interest agreement, where there were intentions of and desires for confidentiality.

In *State v. Post*, where the Court stated that the attorney-client privilege is lost by voluntary disclosure of the content of an attorney-client statement to others, the disclosure was made to a fellow inmate.⁵⁷ The court reasoned that the attorney-client privilege assumes that "the communications are made with the intention of confidentiality" and that the reason for prohibiting disclosure ceases when "the client does not appear to have been desirous of secrecy."⁵⁸ The Court noted that other courts have "held that '[c]ommunications divulged to strangers or outsiders can scarcely be considered confidential communication between attorney and client,' and are not

⁵⁵ *Id.* at 252.

⁵⁶ *State v. Post* (1987), 32 Ohio St.3d 380.

⁵⁷ *Id.* (citing *Travelers Indem. Co. v. Cochrane* (1951), 155 Ohio St. 305, 316).

⁵⁸ *Id.* (citing 8 Wigmore, *Evidence*, 599, Section 2311).

protected by the attorney-client privilege.”⁵⁹ The *Post* Court ultimately held that while the client’s communications to the attorney’s agent (a polygraph examiner retained by counsel for the client) were privileged,⁶⁰ the client waived the privilege by subsequently disclosing the communication to a fellow inmate.

Here, both OCC (agents and attorneys) and CKAP, including an agent of CKAP, Sue Steigerwald, and its attorney, Kevin Corcoran, communicated in furtherance of their common but not identical legal representation of residential electric consumers. The communications between OCC and CKAP were communications between attorney and client. They were made pursuant to the need for legal advice. The advice was sought from OCC in its capacity as a statutory representative of FirstEnergy’s residential customers. The communications directly related to the purpose of representing a subgroup of residential customers’ interests in the case--the residential all-electric customers. The communications were made in confidence, by the client or authorized by the client. The communications made between OCC and CKAP were made with the intention that they were confidential.

Moreover, both OCC and CKAP were desirous of secrecy on these matters because the communications involved developing a joint case strategy. Both CKAP and OCC shared a common interest in resolving the all-electric rates which are the subject of this case and agreed to exchange information in confidence. These are just the type of communications that the attorney-client privilege was intended to protect, unlike the communications made in *State v. Post* where there was no intent that the communications were confidential and no indication that the parties involved in the communication were

⁵⁹ *Id.*

⁶⁰ *State v. Post* at 385 (citing 8 Wigmore, *Evidence*, 618-619, Section 2317).

desirous of secrecy. Thus, *State v. Post* is not applicable here, where distinguishable facts exist.

Furthermore, it should be noted that “even if a document is not entitled to attorney-client privilege status, that it is not subject to disclosure if it is independently entitled to work product protection.”⁶¹ In Ohio, discovery of trial preparation/work product is governed by Civil Rule 26(B)(3).⁶² The Court embraces the purpose of this privilege to “preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and to prevent an attorney from taking undue advantage of his adversary's industry or efforts.”⁶³ This policy is recognized in the stringent manner in which the trial preparation doctrine/work product privilege can be waived.

Like other qualified privileges, the work product doctrine is not absolute and may be waived.⁶⁴ Despite this similarity, waiver of the work product privilege must be separate and distinct.⁶⁵ And it is well established by federal courts that the work product doctrine is not automatically waived through disclosure to a third party absent a showing that the disclosure is inconsistent with maintaining the confidentiality of the protected

⁶¹ *In re Pfizer Inc. Securities Litigation*, (December 22, 1993) U.S. District Court for the Southern District of New York, 1993 U.S. Dist. LEXIS 18215 at footnote 6.

⁶² See *Jackson v. Greger* (2006), 110 Ohio St. 3d 488 at 491, 854 N.E.2d 487.

⁶³ *Id.* at 491-492; citing Civ. R. 26(A).

⁶⁴ *State v. Fairchild* (Ohio Ct. App., Darke County Aug. 27, 1999), 1999 Ohio App. LEXIS 4012 at Page 10.

⁶⁵ *In re Grand Jury* (Ohio Ct. App., Washington County June 1, 1995), 1995 Ohio App. LEXIS 2567 at Page 41; citing *In re Election of November 6, 1990 for the Office of Attorney General of Ohio* (1991), 57 Ohio St.3d 614 at 615, 567 N.E.2d 243, stating a waiver of the attorney-client privilege does not necessarily constitute a waiver under the work product doctrine.

materials.⁶⁶ As such, disclosure to a third party does not act as a mandatory waiver of the work product privilege. And the disclosure of work product to a party sharing common interests—such as in this case—has been found to be not inconsistent with the policy of privacy protection underlying the doctrine.⁶⁷

Finally, the Companies have failed to shown that “good cause” exists to require OCC and CKAP to divulge its trial preparation/work product, which is a requirement of Ohio R.26 (B)(3). The Supreme Court of Ohio has held that “good cause” under Civ. R. 26(B)(3) requires demonstration of a need for the materials—i.e., a showing that the materials, or information they contain are relevant *and otherwise unavailable*.⁶⁸ Civ. R. 26 (B)(3) places a burden on the party seeking discovery to demonstrate good cause for the sought-after materials. But here, the Companies solely focus on their alleged right to know what documents are in OCC’s and CKAP’s possession and on an assertion that the information is relevant.⁶⁹ The Companies have made no argument that the information is otherwise unavailable.

Therefore, the Attorney Examiner erred when he ordered the OCC and CKAP to produce documents that are protected by the trial preparation/work product privilege. Accordingly, the Commission should deny the Companies’ motion to compel materials that are protected by the attorney-client privilege and/or the trial preparation/work product doctrine.

⁶⁶ See *Vacco v. Harrah's Operating Co.* (N.D.N.Y Oct. 29, 2008), 2008 U.S. Dist. LEXIS 88158 at Page 21; stating “work product privilege is not automatically waived through disclosure to a third person absent a basis to conclude that disclosure is inconsistent with maintaining secrecy from possible adversaries,” quoting *United States v. American Tel. & Tel. Co.* (D.C. Cir. 1980), 642 F.2d 1285 at 1299.

⁶⁷ See *In re Pfizer Inc. Securities Litigation*, (December 22, 1993) U.S. District Court for the Southern District of New York, 1993 U.S. Dist. LEXIS 18215 at *21.

⁶⁸ See *Jackson v. Greger*, 2006 Ohio 4968 at ¶16. (Emphasis added.)

⁶⁹ Motion to Compel at 4.

D. The “Notes” of the Bench

- 1. The Attorney Examiner’s conclusion requiring OCC and CKAP to create privilege logs to preserve their claim of privilege is unreasonable, and unsupported by Commission rule, Commission practice, or Commission precedent.**

The discovery process at the PUCO is governed by the Ohio Administrative Code. Specifically, Rule 4901-1-20 relates to the production of documents when requested in discovery. Under Rule 4901-1-20, the party upon whom the request is served must serve a written response usually within a twenty-day time frame, unless otherwise ordered by the Commission. The response is to state that the inspection is to be permitted when requested, “unless the request is objected to, in which case the reason for the objection shall be stated.”⁷⁰ Absent from the Commission’s rule is any requirement that a party claiming privilege must produce a privilege log if privilege is claimed. Indeed, the Commission itself has recognized that its rules do not require a privilege log to be produced in response to a claim for privilege, as it did in *S.G. Foods Inc. v. CEI, et al.*⁷¹ In this case OCC and CKAP did not provide a privilege log but objected to the discovery in question and stated the reason for their objections as required by the Commission rules. OCC and CKAP clearly complied with the Commission’s discovery rules.

Moreover, contrary to the Attorney Examiner’s note, the Ohio Rules of Civil procedure 26(B)(6)(a) do not require a privilege log to be produced either. Rather this rule requires the claim of privilege to be “made expressly and supported by a description

⁷⁰ *Id.*

⁷¹ *In the Matter of the Complaints of S.G. Foods Inc. et al v. The Cleveland Electric Illuminating Company, Toledo Edison Company, and American Transmission Systems, Inc.*, Case No. 04-28-EL-CSS, Entry at 9-10 (Apr. 30, 2007).

of the nature of the documents sufficient to enable the demanding party to contest the claim.” OCC and CKAP expressly made their claim of privilege and provided further explanation of the grounds for claiming privilege in their respective Memorandum Contra FirstEnergy’s motion to compel. Additionally both CKAP and OCC addressed these grounds at the pre-hearing conference. The Companies thus were able to contest the privilege claim, as they did at the pre-hearing conference.

Furthermore, FirstEnergy did not argue in its Motions to Compel that OCC and CKAP should have provided a privilege log along with their objections to discovery. Nor did FirstEnergy argue in its motion to compel that OCC and CKAP failed to adequately describe what was not produced, or that the Company was unable to contest CKAP’s and OCC’s claims based on the responses to discovery and their Memoranda Contra.

While it may be appropriate to order a privilege log to be produced to assist the Commission in determining whether documents are protected from discovery by privilege, as the Commission noted in *S.G. Food Inc.*, the standard practice of the Commission is to require a log to be produced in response to a motion to compel, followed by an *in camera* inspection of each document identified as privileged.⁷² Such a practice is in line with what the Ohio Supreme Court dictated in *Peyko*. But the Attorney Examiner failed to follow this practice. Such a practice assures the Commission is able to make a reasonable, informed, and conscionable decision on whether evidence is discoverable or protected under attorney-client or some other privilege.

Finally, OCC is unaware of any standard practice in discovery related to PUCO proceedings where parties as a matter of course produce privilege logs when making

⁷² See for e.g. *In the Matter of the Complaint of AT&T v. Global NAPs Ohio, Inc.*, Case No. 08-960-TP-CSS, Entry at 4 (Mar. 17, 2008).

objections to discovery based on privilege. *FirstEnergy itself, in the present case, did not produce a privilege log when it objected to discovery on the basis of privilege.*

Rather it, like OCC and CKAP, claimed privilege without identifying each document the privilege applied to.⁷³ Moreover, FirstEnergy has not provided privilege logs in other past cases where it has objected to discovery from OCC on the basis of privilege.⁷⁴ In fact, Counsel for OCC has, very rarely if ever, seen parties produce a privilege log at the time of making an objection based on privilege.⁷⁵ Generally privilege logs are only produced when ordered or when the parties agree to do so to settle a discovery dispute. Thus, using the absence of a privilege log as a basis of the Attorney Examiner's ruling was unjust, unreasonable, discriminatory and prejudicial in that the Attorney Examiner imposed a standard on one party that was not equally applied to all others.

2. The Attorney Examiner's conclusion that OCC and CKAP must create a privilege log to preserve privilege, creates an impermissible waiver of attorney-client privilege which is not recognized under statutory or common law attorney-client privilege.

As explained supra, the attorney-client privilege in Ohio is governed either by statute or common law.⁷⁶ Under the statutory attorney-client privilege in Ohio there are only two ways the privilege can be waived: if the client expressly consents, or if the

⁷³ See FirstEnergy Response to OCC RFP 2-10 (Attachment B); FirstEnergy Response to BSH RPD 1-8 (Attachment C); FirstEnergy Response to BSH 1-4 (Attachment D).

⁷⁴ See for example, FirstEnergy Response to OCC RFP 2-15, in Case No. 09-906-EL-SSO (Attachment E).

⁷⁵ Other utilities tend to follow suit and like FirstEnergy make blanket privilege claims and do not provide a privilege log or a description of the nature of the documents not produced. See for example, Ohio Power and CSP Responses to OCC RPD 35, Case No. 10-1261-EL-UNC (Attachment F); AEP Ohio Response to OCC Interrogatory 8, 9, Case No. 08-917-EL-SSO (Attachment G, H); Dominion Retail Inc. Response to Duke Energy of Ohio I-13, RFP 13, 14, 18. (Attachment I).

⁷⁶ *State ex rel Leslie v. Ohio Hous. Fin. Agency*, 2003-Ohio at ¶17.

client voluntarily testifies on the subject.⁷⁷ Failure to create a privilege log is not a condition that creates a waiver of the statutory attorney-client privilege in Ohio.

Under the common law attorney-client privilege, the lower Ohio courts have recognized an implied waiver of the attorney-client privilege is permissible. However, the waiver must meet the three conditions espoused in *Hearns*.⁷⁸ One of the conditions is that the waiver must be an “affirmative act.” Failure to create a privilege log is not an affirmative act and thus, does not meet the conditions of *Hearns*. Additionally, application of the privilege cannot be said to deny FirstEnergy access to information vital to its defense, another prong of *Hearns* that must be met to effectuate a waiver of privilege.

The failure to create a privilege log, especially where one is not required by the rules of the PUCO, does not amount to a waiver of attorney-client privilege in Ohio. The Examiner’s ruling to the contrary is inconsistent with the Ohio Supreme Court’s 2003 ruling in *State v. Leslie*.

Additionally, while a lower court such as the 9th District court of appeals⁷⁹ has held that a claim of privilege is waived where a privilege log is not timely provided, such a decision does not square with the later pronouncements of the Ohio Supreme Court in *State v. Leslie*. Moreover, in that 9th District court opinion, *McPherson v. Goodyear Tire & Rubber Co.*, there are factual distinctions that make the ruling inapplicable here. First, the appellant in *McPherson* failed to prove the privileged nature of the documents *in a*

⁷⁷ *State v. McDermott*, 72 Ohio St.3d at 572.

⁷⁸ See for example, *Grace v. Mastruserio*, 2007-Ohio-3942 (holding that the common law implied waiver exception to the attorney client privilege survives R.C. 2317.02 but remanding for an evidentiary hearing or an *in camera* review of the requested attorney file to decide which materials were protected).

⁷⁹ FirstEnergy cites to a 2001 holding of a Summit County Ohio court of appeals, *McPherson v. Goodyear Tire & Rubber Co.*, 146 Ohio App. 3d. 441, as precedent for waiver.

timely fashion, with the court noting that the appellant's efforts were made in an "effort to circumvent the trial court's order." Appellant there had moved for a protective order in response to a request for production, which the court subsequently denied and instructed appellant to produce the documents. The Appellant then withheld the documents and only in response to a motion to compel, did appellant elaborate on the privileged nature of the documents withheld.

In contrast to *McPherson v. Goodyear Tire & Rubber Co.*, in the case before the PUCO there has been no untimely proof here, nor is there any suggestion that OCC or CKAP is trying to circumvent any order of the PUCO. Second, in the *McPherson* case the appellant did not provide any corroborative evidence to support its assertion of privilege when it sought to preclude discovery in its motion for protection. Here, Appellants provided explanation and corroboration in their respective Memoranda Contra FirstEnergy's motions to compel and at the pre-hearing conference. Additionally, to impose such a harsh waiver sanction, when the rules and practice of the PUCO were followed by OCC and CKAP in this proceeding, would be unreasonable.

3. The Attorney Examiner erred when it noted that there was no joint defense agreement privilege applicable before October 12, 2010.

The attorney-client privilege has long been one of the law's basic protections against the discovery of certain communications between attorneys and their clients.⁸⁰ Discovery of these communications jeopardizes the attorney-client relationship by discouraging complete and honest communications between an attorney and his client.

⁸⁰ *Boone v. Vanliner Ins. Co.* (2001), 91 Ohio St. 3d 209 at 210, 744 N.E.2d 154; stating, "its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" citing *Upjohn Co. v. United States* (1981), 449 U.S. 383 at 389, 101 S. Ct. 677.

This concept acts as the foundation of the common interest or joint defense doctrine, which serves to protect attorney-client communications and work-product materials shared among cooperating parties on the same side of a legal dispute who share this information for their mutual benefit in that dispute. The common interest doctrine furthers the twin aims of the attorney-client privilege: the free flow of information between clients and their attorneys and an enhanced quality of legal representation.⁸¹

Often, in order to attempt to utilize the common interest doctrine, parties enter into confidentiality agreements before exchanging attorney-client privileged information.⁸² These agreements typically manifest the parties' intent that the information exchanged remains confidential as to any outside parties.⁸³ "The parties may name such an agreement a 'confidentiality agreement,' a 'joint defense agreement,' a 'joint prosecution agreement,' or a 'common interest agreement,' and will typically include a statement that the purpose of the exchange is to further a joint defense strategy, a joint prosecution strategy, or some other legal interest common to the parties."⁸⁴

A joint defense or common interest agreement is, at its base, a contract between such cooperating parties. And just like a standard contract,⁸⁵ a joint defense agreement

⁸¹ See *Libbey Glass, Inc. v. Oneida Ltd.* (N.D. Ohio 1999), 197 F.R.D. 342 at 347-348, 1999 U.S. Dist. LEXIS 4558; stating that the doctrine "protects attorney-client privileged matters when they are shared with co-parties, even though those parties are represented by separate counsel" and it "encourages parties working with a common purpose to benefit from the guidance of counsel, and thus avoid pitfalls that otherwise might impair their progress toward their shared objective."

⁸² Katharine Traylor Schaffzin, *An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It*, 15 B.U. Pub. Int. L.J. 49, 54 (2005), note 17, at 81.

⁸³ See *id.*

⁸⁴ *Id.*

⁸⁵ Ohio recognizes that "an oral contract is certainly a contract" just not in writing. *First Nat'l Sec. Corp. v. Hot* (1953), 162 Ohio St. 258, 122 N.E.2d 777. See also, R.C. 2305.07 states that "an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued."

may be entered into both in writing and orally among parties. The federal courts have recognized such, in discussing oral joint defense agreements on several occasions without raising the issue as to their legitimacy.⁸⁶ Indeed, the United States Court of Appeals for the Third Circuit stated that “[w]hile written agreements *** might be preferable, nothing requires this so long as the parties understand the limitations.”

Most aptly put, a joint defense agreement’s only limitation is that which the original privilege places upon it—that the agreement cannot go above and beyond the protections granted it by the privilege upon which the agreement is based. The United States District Court for the Northern District of California put it best when stating that a “joint defense agreement can be written or oral, but joint defense agreements are not contracts which create whatever rights the signatories chose, but are notice of defendants’ invocation of privileges set forth in law. Joint defense agreements therefore cannot extend greater protections than the legal privileges on which they rest.”⁸⁷

Moreover, at the heart of the issue, a joint defense agreement serves judicial economy by allowing two or more parties who share a common legal interest to share legal advice under the shield of the attorney-client privilege. It is not necessary that a formal written agreement be entered into in order to invoke the protections of the attorney-client privilege, but rather, it is enough that there be an “oral understanding between the parties toward mutual cooperation.”⁸⁸ Therefore, joint defense agreements—

⁸⁶ See *In re Grand Jury Subpoena* (1st Cir. Mass. 2001), 274 F.3d 563; *Under Seal v. United States* (4th Cir. Va. 2005), 415 F.3d 333; and *Teleglobe Commun. Corp. v. BCE, Inc.* (3d Cir. Del. 2007), 493 F.3d 345.

⁸⁷ *United States v. Paiz* (N.D. Cal. Dec. 23, 2010), 2010 U.S. Dist. LEXIS 138503; citing *United States v. Stepney* (2003), 246 F. Supp. 2d 1069 at 1079.

⁸⁸ *Vacco v. Harrah's Operating Co.* (N.D.N.Y Oct. 29, 2008), 2008 U.S. Dist. LEXIS 88158; citing *In re Rivastigmine Patent Litig.*, 2005 U.S. Dist. LEXIS 20851.

whether written or oral—have strong ties to both to the attorney-client privilege as well as the foundations of contract law.

The Attorney Examiner's notation that "the parties have not established that the joint defense agreement privilege applies to any communications prior to its execution on October 12th, 2010" is flawed.⁸⁹ As discussed above, any "oral understanding between the parties toward mutual cooperation"⁹⁰ will protect attorney-client communications and trial preparation materials. Such an oral understanding existed shortly after CKAP filed its Motion to Intervene, at or around June 1, 2010. It was then that CKAP and OCC began to work jointly in the common interest of developing a solution to the all-electric rate discount issue. Accordingly, the Commission should find that the informal oral common interest agreement between OCC and CKAP existed from June 1, 2010 forward, despite the fact that a formal document was not drawn up until October of 2010. Thus any documents that present attorney-client communications and work-product materials shared between CKAP and OCC, cooperating parties on the same side of a legal dispute, should be protected from disclosure to third parties, including FirstEnergy.

III. CONCLUSION

This Application for Review meets the terms of Ohio Adm. Code 4901-1-15(C), because the Application meets the timing requirement set out in the Commission's rules⁹¹ and the application "set[s] forth the basis of the appeal and citations of any authorities relied upon." The Attorney Examiner's ruling should be reversed and CKAP

⁸⁹ See Tr. 5.

⁹⁰ *Vacco v. Harrah's Operating Co.* (N.D.N.Y Oct. 29, 2008), 2008 U.S. Dist. LEXIS 88158; citing *In re Rivastigmine Patent Litig.*, 2005 U.S. Dist. LEXIS 20851.

⁹¹ Ohio Adm. Code 4901-1-15(C) provides "five days after the ruling is issued," and Ohio Adm. Code 4901-1-7(A) provides a due date on Monday if the fifth day falls on a Sunday.

and OCC should not be required to turn over any further documents to FirstEnergy, beyond those already produced. If however the Commission determines that there are additional documents that should be turned over in discovery, it should modify the ruling and schedule an *in camera* inspection regarding the applicable documents, to determine on a document-by-document basis if each document is privileged. Doing so would comport with the law of Ohio, as recognized by the Ohio Supreme Court. And it would begin the process of correcting the unlawful ruling.

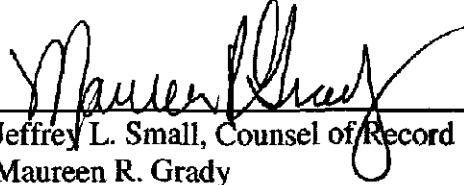
Joint Appellants will be severely prejudiced if they are required to turn over numerous documents that contain attorney-client privileged information and attorney work product/trial preparation materials. Allowing the Attorney Examiner's ruling to stand will create a new precedent that will fundamentally change how parties practice and participate in before the Commission. The Attorney Examiner's ruling could have adverse and far reaching implications on numerous other parties practicing before the PUCO. The Attorney Examiner's ruling threatens to have a chilling effect on joint representation of common interests, contrary to the choice parties should be free to make for joint advocacy and the administrative efficiencies that joint advocacy brings to PUCO proceedings.

Parties typically engaged in common interest representation at the PUCO have been historically working with the reasonable expectation that attorney-client communications made in confidence and in pursuit of that common interest are protected from disclosure. Much of the representation is undertaken without a formalized document. The Attorney Examiner's ruling in this case jeopardizes the viability of such

joint representation by requiring disclosure of such communications, where there is no formalized joint defense agreement in place.

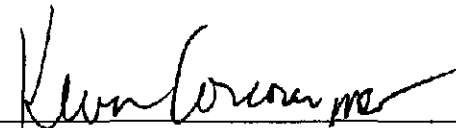
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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Joint Interlocutory Appeal was served by regular U.S. Mail, prepaid, to the counsel identified below this 12th day of January 2011.


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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the :
Application of Ohio :
Edison Company, The :
Cleveland Electric :
Illuminating Company, and : Case No. 10-176-EL-ATA
The Toledo Edison Company :
for Approval of a New :
Rider and Revision of an :
Existing Rider. :

- - -

PROCEEDINGS

before Mr. Gregory A. Price and Mr. Henry
Phillips-Gary, Hearing Examiners, at the Public
Utilities Commission of Ohio, 180 East Broad Street,
Room 11-D, Columbus, Ohio, called at 10:00 a.m. on
Friday, January 7, 2011.

- - -

PREHEARING CONFERENCE

- - -

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- - -

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On behalf of Bob Schmitt Homes, CKAP,

APPEARANCES (continued):

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On behalf of the staff of the Public
 Utilities Commission of Ohio.

- - -

Friday Afternoon Session,
January 7, 2011.

- - -

EXAMINER PRICE: Let's go back on the record. Thank you for allowing us time to caucus amongst ourselves. We are going to take these motions a little out of order.

The motion for continuance will be denied. We will proceed on January 27th as currently scheduled.

Both motions to compel filed by FirstEnergy will be granted. The Bench finds that FirstEnergy has demonstrated that OCC and the CKAP parties have failed to identify the specific documents legitimately sought in discovery by the companies, therefore, for each document that OCC and the CKAP parties have identified referenced in 10-176-EL-ATA the parties will, which is responsive to FirstEnergy's discovery requests, the parties will identify the date of filing of the document and the name, if applicable, of the person filing or submitting the document.

The Bench notes that OCC and the CKAP parties have failed to establish an attorney-client privilege or trial preparation privilege as applies

1 to the documents in question. The Bench finds the
2 trial preparation privilege does not apply to
3 documents gathered rather than created by the
4 attorney in reasonable anticipation of litigation.

5 The Bench notes that OCC and CKAP did not
6 preserve any claims of privilege by creating a
7 privilege log or otherwise specifically identifying
8 the document and the basis for the privilege claim as
9 required by rules of civil procedure.

10 The Bench notes that the parties have not
11 established that the joint defense agreement
12 privilege applies to any communications prior to its
13 execution on October 12th, 2010.

14 The Bench further finds the parties have
15 not established that privilege applies to documents
16 regarding past conduct by FirstEnergy rather than
17 documents relating to customers seeking legal advice
18 from OCC.

19 Accordingly, discovery responses will be
20 served pursuant to the motion to compel by January
21 14th, 2011, at 10 a.m.

22 Ms. Grady.

23 MS. GRADY: Your Honor, just for
24 clarification purposes. At one point in your ruling
25 you referred to public documents and that the request

1 to or motion to compel on the public documents was
2 granted. Is it your ruling that the motion to compel
3 with respect to documents held by OCC --

4 EXAMINER PRICE: The motion to compel was
5 granted with respect to both private and public
6 documents. I was simply stating that in lieu of
7 providing the actual public documents, you could
8 provide an identification of the date the document
9 was filed in the docket and the name, if applicable,
10 of the person who is filing or submitting that
11 document.

12 MS. GRADY: Thank you, your Honor. Your
13 Honor, at this time OCC would take an immediate
14 interlocutory appeal --

15 EXAMINER PRICE: Thank you.

16 MS. GRADY: -- pursuant to 4901-1-15(A)
17 which permits any party adversely affected to take an
18 immediate interlocutory appeal where the appeal
19 requires the production of documents or testimony
20 over an objection based upon --

21 EXAMINER PRICE: It does indeed. Make
22 your arguments in support of your interlocutory
23 appeal. The Commission will rule based upon the
24 arguments made today, there will be no further filing
25 of memoranda.

1 be properly identified by January 14th, 2011, at
2 10 a.m. Is that clear?

3 MS. GRADY: I believe that is correct.

4 MR. KUTIK: Your Honor, may I ask for a
5 clarification on that.

6 EXAMINER PRICE: You may.

7 MR. KUTIK: With respect to the
8 identification, could we request at least some
9 identification of what the document is, like a
10 letter, a memorandum, a brochure, a something.

11 EXAMINER PRICE: I think that's perfectly
12 reasonable. I will amend my previous ruling to
13 indicate that in addition to identifying the date,
14 the name of the person who presented it, some summary
15 indication of whether it's an e-mail, memo, brochure,
16 something that allows the companies to understand
17 which of the many documents that might be filed that
18 day are being relied upon.

19 MR. SMALL: Your Honor, may I ask a
20 clarifying question?

21 EXAMINER PRICE: Yes.

22 MR. SMALL: I think it will simplify
23 rather than complicate things. I wanted to make sure
24 that we understood what the matters were that we're
25 supposed to identify. For instance, I hope that we

1 don't have a ruling that internal communications
2 between case team members and, for instance, the
3 Consumers' Counsel herself didn't go anywhere outside
4 of the OCC, simply our case work, that that's not --

5 EXAMINER PRICE: That was never intended
6 to be part of any of the rulings that we made today.

7 MR. SMALL: I just wanted to --

8 EXAMINER PRICE: OCC's internal
9 communications weren't subject to disclosure.

10 MR. SMALL: Okay. Thank you.

11 EXAMINER PRICE: Communications between
12 OCC and Ms. Steigerwald, however, prior to the joint
13 defense agreement's execution are fair game and
14 should be disclosed.

15 MS. GRADY: Is that the extent of the
16 ruling on the privileged information?

17 EXAMINER PRICE: No. I gave you the
18 lengthy colloquy at the beginning of this after our
19 break.

20 MS. GRADY: Well, I think that was what
21 Mr. Small's question went to.

22 EXAMINER PRICE: If you review the
23 transcript, you'll see the breadth of the ruling.

24 MS. GRADY: Thank you, your Honor.

25 EXAMINER PRICE: I try to be very careful

OCC Set 2

Case No. 10-176-EL-ATA
Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider

REQUEST FOR PRODUCTION OF DOCUMENTS

OCC
Set 2
RPD 10

Please provide a copy of all documents you (FirstEnergy and EDUs) have discussed with, shown to, or provided to persons not affiliated with FirstEnergy that pertain to FirstEnergy's residential all-electric rates. This is a continuing request to be updated when you discuss additional documents or show to or provide. such additional documents to persons not affiliated with FirstEnergy.

Response:

Objection. This request is overly broad and unduly burdensome, and would require the disclosure of proprietary customer information and confidential settlement negotiations.

**Revised
Question**

Please provide a copy of all documents you (FirstEnergy and EDUs) have discussed with, shown to, or provided, in the past 5 years, to persons not affiliated with FirstEnergy that pertain to FirstEnergy's continuation of all-electric rates, funding of all-electric rates, the setting of all electric rates, the benefits of all electric rates, and cost savings of all-electric rates. This is a continuing request to be updated when you discuss additional documents or show to or provide. such additional documents to persons not affiliated with FirstEnergy.

**Revised
Response**

Objection. This request is overly broad and unduly burdensome, and would require the disclosure of proprietary customer information and confidential settlement negotiations. Subject to and without waiving the objections, to the best of the Company's knowledge the following are currently responsive to the above question. The following are in addition to any documents previously provided in response to OCC interrogatories and document requests in this proceeding:

Please refer to the following documents from Case No. 05-1125-EL-ATA:

- Application
- Testimony of Gregory F. Hussing

OCC Set 2 RPD 10 Attachment 1.PDF, which includes samples of:

- Feb. 2006 customer bill message and bill insert
- 2/15/2006 form letters to; architects and engineers, builders and developers, national C&I customers, customers that applied for grandfathered rates, local electrical inspectors
- October 2006 bill message
- June and July 2009 bill insert

Please refer to the following documents from Case No. 07-551-EL-AIR

BSH Set 1

Case No. 10-176-EL-ATA
Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo
Edison Company for Approval of a New Rider and Revision of an Existing Rider

REQUEST FOR PRODUCTION OF DOCUMENTS

BSH RPD Produce all documents that you intend to rely upon or that may be introduced at trial.
Set 1-8

Response: Objection to the extent the request calls for the disclosure of **privileged documents or attorney work product**. Subject to the objection, please refer to response to BSH Set 1 - 4.

BSH Set 1

Case No. 10-176-EL-ATA
Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider

RESPONSES TO REQUEST

**BSH
Set 1-4**

Identify all exhibits including, but not limited to, contracts, documents and correspondence which you intend to introduce at the hearing in this matter.

Response:

Objection to the extent the request calls for the disclosure of privileged documents or attorney work product. Subject to the objection, the Companies have not determined what exhibits will be introduced at the hearing in this matter.

OCC MRO Set 2
Witness: Warvell

Case No. 09-906-EL-SSO
Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated With Reconciliation Mechanism, and Tariffs for Generation Service

RESPONSES TO REQUEST

OCC Set 2 - 15 Regarding the proposed time periods between the auction dates and the dates for delivery:

- a) Who was consulted and/or relied upon to establish these time periods (i.e. identify the persons)?
- b) What did each person consulted and/or relied upon to establish the time periods recommend regarding the time periods?

Response:

Objection. This interrogatory calls for the disclosure of **privileged attorney-client communications** and attorney work product. The recommendations were universally to stagger the auctions, and include significantly more time between the auction dates and the delivery date as compared to the timeline utilized in the May 2009 competitive bidding process.

**OHIO POWER COMPANY'S AND COLUMBUS
POWER COMPANY'S RESPONSE TO
OHIO CONSUMERS' COUNSEL
DATA REQUEST
CASE NO.10-1261-EL-UNC
FIFTH SET**

REQUEST FOR PRODUCTION OF DOCUMENTS

RPD-035. Please provide a copy of all exhibits AEP Ohio intends to introduce at the hearing on the Stipulation in this case.

RESPONSE

The Companies object to this request as seeking information that is **confidential and privileged** trial preparation material. The Companies also object to this request seeking information that has not been finally determined and the Companies reserve their right to present any evidence or information at trial that is deemed appropriate. Without waiving these objections, the Companies intend to present the testimony of Companies witness Nelson.

**AEP OHIO'S RESPONSE TO
THE OFFICE OF THE OHIO CONSUMER COUNSEL
INTERROGATORY REQUESTS
FIRST SET
CASE NO. 08-917-EL-SSO & CASE NO. 08-918-EL-SSO**

INTERROGATORY REQUEST NO. INT-8.

For Globe and Solsil, the following language is included in both contracts: "Under no circumstances will the customer be allowed to participate in PJM demand response programs unless it is at the direction of AEP Ohio." For each contract state (if the answers are different for each contract, please identify the difference):

- a. Whether agreeing to the contract language was a requirement of providing Globe a special contract before the current contract was executed.
 - i. If so, why?
 - ii. If not, why?
- b. The relevance of this language to whether a special contract was offered.
- c. Whether this language was explained or discussed with the customer before it signed the contract?
- d. What explanation was provided the customer for including such language?
- e. Whether, and if so, what information was provided to the customer about the economic benefit to the customer of participating in such PJM DR programs?
- f. Whether the customers were informed that the PJM DR programs were available for their participation?
- g. Why participation in the PJM DR programs is determined by a company that is not a signatory to the contract?
- h. Whether AEP had any conversations with the customer regarding such language?
- i. Whether a shared employee of AEP and/or the contracting utility had any conversations with the customer regarding such language?

RESPONSE:

- a. The contract language represents all the terms and agreements made by the parties. The Companies believe this provision is consistent with the nature of the service to be provided under the agreement.
 - i. See the response to 8-a above.
 - ii. See the response to 8-a above.
- b. See the response to 8-a above.
- c., d. e, f, and h. The Companies object as the requests seek information that would reveal **privileged settlement discussions** and are not reasonably calculated to lead to discovery of admissible evidence.
- g. Assuming the contract would be between the customer and a Curtailment Service Provider, such a contract would have financial and operational implications for the Companies and their other customers.
- i. This request seeks the content of confidential contract negotiations which is not subject to discovery. Without waiving that objection, no shared employee of AEP and/or the contracting utility had any conversations with the customer regarding such language. See also response to Int-10.

Prepared by: D. M. Roush, J. C. Baker and Counsel

**AEP OHIO'S RESPONSE TO
THE OFFICE OF THE OHIO CONSUMER COUNSEL
INTERROGATORY REQUESTS
FIRST SET
CASE NO. 08-917-EL-SSO & CASE NO. 08-918-EL-SSO**

INTERROGATORY REQUEST NO. INT-9.

Identify whose ultimate decision it was to require customers to agree not to participate in PJM's DR programs except at the direction of AEP by:

- a. name,
- b. company,
- c. title,
- d. whether the person is a shared employee of an affiliate, and
- e. the name of the affiliate?

RESPONSE:

The Companies object to the use of the term "require" since this question refers to a voluntary contract. The Companies object as the requests seek information regarding privileged settlement discussions and are not reasonably calculated to lead to discovery of admissible evidence.

Prepared by: J. C. Baker and Counsel

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Duke	:	
Energy Ohio for Approval of a Market	:	
Rate Offer to Conduct a Competitive	:	
Bidding Process for Standard Service	:	Case No. 10-2586-EL-SSO
Offer Electric Generation Supply,	:	
Accounting Modifications, and Tariffs	:	
for Generation Service.	:	

RESPONSES OF DOMINION RETAIL, INC.
TO
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS
OF
DUKE ENERGY OHIO

(First Set Dated December 3, 2010)

Pursuant to Rules 4901-1-19 and 4901-1-20, Ohio Administrative Code, Dominion Retail, Inc. ("Dominion Retail") hereby provides the following responses to the First Set of Interrogatories and Requests for Production of Documents of the Duke Energy Ohio ("Duke") dated December 3, 2010.

INTERROGATORIES

1. Identify each person who answered or furnished information or documents, or assisted in answering or in furnishing any information or documents, used in answering any of these Interrogatories and/or Requests for Production of Documents, and identify each Interrogatory and/or Document Request for which such person participated in the response.

RESPONSE:

Undersigned counsel.

2. Identify each person whom Dominion intends to call to testify at the hearings in the above captioned matters. To the extent Dominion claims that it has not made a final

determination which witnesses it intends to testify on its behalf, please supplement this response as soon as such a determination is made.

RESPONSE:

At this juncture, Dominion Retail does not anticipate calling any witnesses to testify in this proceeding. If Dominion Retail subsequently determines to call a witness or witnesses, it will supplement this response when such determination is made.

3. For each person identified in response to Interrogatory No. 2 above, please state (1) the subject matter upon which the witness is expected to testify, (2) the facts to which each witness is expected to testify, (3) the opinions to be rendered by each witness, (4) a summary of the witness's qualifications to provide the testimony, and (5) a summary of each witness's testimony. To the extent Dominion claims that it has not made a final determination with regard to witnesses it intends to call to testify on its behalf, please supplement this response as soon as such a determination is made.

RESPONSE:

Not applicable.

4. Please identify each expert whom Dominion has retained or is in the process of retaining to testify on its behalf in the above-captioned proceeding. If the response indicates that a decision has not been made, please supplement the response as soon as the decision is made.

RESPONSE:

None.

5. For each expert identified in response to Interrogatory No. 4 above, please state (1) the subject matter on which the witness is expected to testify, (2) the facts to which each expert is expected to testify, (3) the opinions to be rendered by each expert is *[sic]* expected to testify, (4) a summary of the expert's qualifications to provide the testimony, and (5) a summary of each expert's testimony.

RESPONSE:

Not applicable.

6. For each expert witness identified above, please identify all proceedings all *[sic]*

jurisdictions in which the expert has offered evidence, including but not limited to, prefiled testimony, sworn statements, or any analysis. For each response, please provide the following:

- (a) the jurisdiction in which the testimony or statement was pre-filed, offered, given, or admitted into the record;
- (b) the administrative agency and/or court in which the testimony or statement was pre-filed, offered, admitted, or given;
- (c) the date(s) the testimony or statement was pre-filed, offered, admitted, or given;
- (d) the identifying number for the case or proceeding in which the testimony or statement was pre-filed, offered, admitted, or given;
- (e) whether the witness was cross-examined; and
- (f) the custodian of the transcripts and pre-filed testimony or statements for each proceeding.

RESPONSE:

Not applicable.

7. Please identify any and all experts whom Dominion has consulted with or asked to prepare any analysis, of any kind from July 30, 2008 to the present, related to any of the following topics, regardless of whether Dominion intends to call such expert to testify in the above captioned proceedings.
 - (a) any and all of the above-captioned proceedings;
 - (b) the present or future state of development of wholesale electric markets;
 - (c) the present or future state of development of retail electric markets;
 - (d) the present or future state of deregulation of retail generation service;
 - (e) the present or future state of retail generation prices;
 - (f) the present or future state of the different models or methods for regulating electricity; or
 - (g) market rate offers by Ohio utilities.

RESPONSE:

Objection. To the extent this interrogatory seeks the identity of experts that Dominion does not intend to call as witnesses, this interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. Further, this interrogatory is overbroad, unduly burdensome, and would require the disclosure of attorney work product. Finally, the interrogatory is vague and ambiguous in that it refers to "the above captioned proceedings" when, in fact, there is only one proceeding designated in the caption.

8. For each expert(s) identified in Interrogatory Nos. 4 and 7, above, please identify all documents provided by Dominion to each expert(s).

RESPONSE:

Objection. To the extent this interrogatory seeks the identity of documents provided to experts that Dominion does not intend to call as witnesses, this interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. Further, this interrogatory is overbroad, unduly burdensome, would require the disclosure of attorney work product and proprietary information.

9. Please state whether any of the experts identified above in Interrogatory Nos. 4 and/or 7 presented any speeches or written *[sic]* any articles, papers, treatises, books, memoranda or white papers relating to the restructuring of the electric industry; the pricing of electric services; independent transmission entities; economics; retail competition in the electric, gas, or telecommunications industries; the marketing of products or services; electric restructuring stranded cost recovery methodologies; or the ending of any market development period, or similar period during which price adjustments were (or are) not permitted, in any state (hereinafter referred to as Article).

RESPONSE:

Not applicable.

10. If the response to Interrogatory No. 9 above is in the affirmative, please state for each expert:

- (a) the title of each such Article;
- (b) the date of each such Article;
- (c) the publication of each such Article; and

(d) the name, volume, and number of the journal or other compendium where the Article appears.

RESPONSE:

Not applicable.

11. For each expert or expert witness identified in response to Interrogatory Nos. 4 and/or 7 above, please identify all documents relating to the anticipated expert testimony, including, without limitation, all expert reports, statements, and/or notes or other documents, and any correspondence, communications, or other documents exchanged between Dominion and the expert.

RESPONSE:

Not applicable.

12. Identify all documents or other evidence that Dominion may seek to introduce as exhibits or otherwise use in witness examination in any proceeding related to the above-captioned matter.

RESPONSE:

Dominion Retail has not yet determined what exhibits, if any, it may seek to introduce as exhibits or otherwise use in witness examination in this proceeding.

13. Please state whether Dominion prepared any documents relating to any of the following topics and, if so, identify the specific topics about which documents were prepared:
- (a) any and all of the above-captioned proceedings;
 - (b) the present or future state of development of wholesale electric markets;
 - (c) the present or future state of development of retail electric markets;
 - (d) the present or future state of deregulation of retail generation service;
 - (e) the present or future state of retail generation prices;
 - (f) the present or future state of the different models or methods for regulating electricity;
 - (g) Ohio utility market rate offers; and

(h) retail and/or wholesale auctions.

RESPONSE:

Objection. This interrogatory this interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. Further, this interrogatory is overbroad, unduly burdensome, and would require the disclosure of attorney work product and documents covered by the attorney-client privilege. Finally, the interrogatory is vague and ambiguous in that it refers to "any and all of the above captioned proceedings" when, in fact, there is only one proceeding designated in the caption.

14. Please state whether Dominion participated in any seminars in the last three (3) years that addressed any of the following topics, and, if so, identify the specific topics addressed in any seminar:

- (a) any and all of the above-captioned proceedings;
- (b) the present or future state of development of wholesale electric markets;
- (c) the present or future state of development of retail electric markets;
- (d) the present or future state of deregulation of retail generation service;
- (e) the present or future state of retail generation prices;
- (f) the present or future state of the different models or methods for regulating electricity;
- (g) Ohio utility market rate offers; and
- (h) retail and/or wholesale auctions.

RESPONSE:

Objection. This interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. Further, this interrogatory is overbroad and unduly burdensome. Finally, the interrogatory is vague and ambiguous in that it refers to "any and all of the above captioned proceedings" when, in fact, there is only one proceeding designated in the caption.

15. Please state whether Dominion attended any meetings, within the last three (3) years, with other consumer advocate groups, similar to the [sic] Dominion, from other states where any of the following topics were addressed, and, if so, identify the specific topics addressed in any such meeting:

- (a) any and all of the above-captioned proceedings;
- (b) the present or future state of development of wholesale electric markets;
- (c) the present or future state of development of retail electric markets;
- (d) the present or future state of deregulation of retail generation service;
- (e) the present or future state of retail generation prices;
- (f) the present or future state of the different models or methods for regulating electricity;
- (g) Ohio utility market rate offers; and
- (h) retail and/or wholesale auctions.

RESPONSE:

Objection. This interrogatory is vague and ambiguous because it is based on the inaccurate predicate that Dominion Retail is a consumer group and because it refers to "any and all of the above captioned proceedings" when, in fact, there is only one proceeding. Further, this interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

16. Please list all publication to which Dominion maintained subscriptions from January 1, 2009 to the present.

RESPONSE:

Objection. This interrogatory is not reasonably calculated to lead to the discovery of admissible evidence and is unduly burdensome.

17. For each publication identified above, have an of these publications had any articles that addressed any of the following topics:

- (a) any and all of the above-captioned proceedings;
- (b) the present or future state of development of wholesale electric markets;
- (c) the present or future state of development of retail electric markets;
- (d) the present or future state of deregulation of retail generation service;
- (e) the present or future state of retail generation prices;

(f) the present or future state of the different models or methods for regulating electricity;

(g) Ohio utility market rate offers; and

(h) retail and/or wholesale auctions.

Is so, please identify the specific topic identified in such publication, the article, and the citation.

RESPONSE:

Not applicable.

18. Has Dominion made any presentations or prepared any summary, analysis, or evaluation in the past three (3) years regarding any of the following topics:

(a) any and all of the above-captioned proceedings;

(b) the present or future state of development of wholesale electric markets;

(c) the present or future state of development of retail electric markets;

(d) the present or future state of deregulation of retail generation service;

(e) the present or future state of retail generation prices;

(f) the present or future state of the different models or methods for regulating electricity;

(g) Ohio utility market rate offers; and

(h) retail and/or wholesale auctions.

If so, please identify the specific topics on which such presentations were made or such summaries, analyses, and evaluations prepared.

RESPONSE:

Objection. This interrogatory is not reasonably calculated to lead to the discovery of admissible evidence. Further, this interrogatory is overbroad, unduly burdensome, and would require the disclosure of attorney work product and the identity of documents covered by the attorney-client privilege. Finally, the interrogatory is vague and ambiguous in that it refers to

“any and all of the above captioned proceedings” when, in fact, there is only one proceeding designated in the caption.

19. Please provide a list of each meeting, teleconference, or communication (written or oral) between Dominion and any Party, or member of any Party, regarding the above-referenced matter.

RESPONSE:

Objection. This interrogatory is overbroad and ambiguous, and is not reasonably calculated to lead to the discovery of admissible evidenced. Without waiving this objection, Dominion Retail states that its undersigned counsel participated in a conference call on December 9, 2010 regarding PUCO Case No. 09-1026-EL-ATA with counsel for Duke and certain other intervenors in this proceeding during which the above-referenced matter was discussed.

20. Please provide a list of each meeting, teleconference, or communication between the [sic] Dominion and PUCO Commissioners regarding the above-captioned proceeding.

RESPONSE:

There were no such meetings, teleconferences, or communications.

21. Provide and describe all agreements between Dominion and any Party to the above proceeding or any member or affiliate of a Party to the proceeding that concern said proceeding. Agreements include written or oral terms agreed upon by the participants, and include, but are not limited to, protective agreements, confidentiality agreements, agreements to support or oppose any item or position and any other commitments made among the Parties.

RESPONSE:

There are no such agreements.

22. Please state whether you agree to supplement your responses to these Interrogatories and Document Requests.

RESPONSE:

Dominion Retail will comply with the Commission's discovery rules in this regard.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Any and all documents identified or referenced in response to any of the foregoing Interrogatories.

RESPONSE:

Dominion Retail has no documents responsive to this request.

2. Any and all documents that contain any information used, reviewed, or referenced in preparing Dominion's responses to any of the foregoing Interrogatories.

RESPONSE:

Dominion Retail has no documents responsive to this request.

3. Any and all documents that Dominion may introduce as exhibits or use for purposes of witness examination at any hearing related to the above-captioned matter.

RESPONSE:

Please see Dominion Retail's Response to Interrogatory No. 12.

4. For each and every expert identified in Interrogatory No. 7, please provide a copy of any analysis or opinion rendered by said expert, on behalf of Dominion, related to the topics listed in Interrogatory No. 7.

RESPONSE:

Not applicable.

5. Any and all documents relating to the testimony of any of CHC's witnesses and/or expert witnesses including, but not limited to, any and all *curricula vitae*, reports, papers, statements, notes, other documents, and any correspondence, communications, or other documents exchanged between Dominion and the expert.

RESPONSE:

Not applicable.

6. Any and all contacts for services between Dominion and any expert retained or consulted to provide opinions, testimony, evidence, or analysis in relation to the above-captioned proceedings.

RESPONSE:

Please see Dominion Retail's Response to Interrogatory No. 7. Objecting further, this request is vague and ambiguous in that it asks for the production of "contacts," which are not documents. Without waiving these objections, and assuming that the requests seeks "contracts" and not "contacts," Dominion Retail states that it has no documents responsive to this request.

7. Please provide legible copies of any documents identified in Interrogatory No. 13.

RESPONSE:

Not applicable.

8. Please provide copies of any and all materials or presentations received or created by Dominion related to seminars identified in Interrogatory No. 14.

RESPONSE:

Not applicable.

9. Please provide copies of any and all materials from meetings identified in Interrogatory No. 15.

RESPONSE:

Not applicable.

10. Please provide copies of all presentations, summaries, analyses, or evaluations identified in Interrogatory No. 18.

RESPONSE:

Not applicable.

11. Any and all documents prepared by, for, or on behalf of Dominion relating to the current or projected future state of the competitive retail electric market in Ohio.

RESPONSE:

Objection. This request is overbroad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Further, the request seeks documents which are attorney work product or subject to the attorney-client privilege.

12. Any and all documents prepared by, for, or on behalf of Dominion relating to Duke Energy Ohio's Market Rate Offer.

RESPONSE:

Other than its Motion to Intervene in this proceeding, a copy of which was served upon counsel for Duke on December 1, 2010, Dominion Retail has no documents responsive to this request.

13. Please provide any and all summaries, documents, or other material received or prepared by the *[sic]* Dominion since January 1, 2007, regarding the present state of deregulation in Ohio and/or nationwide.

RESPONSE:

Objection. This request is overbroad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Further, the request seeks documents which are attorney work product or subject to the attorney-client privilege.

14. Please provide any and all summaries, documents, or other material received or prepared by the *[sic]* Dominion since July 30, 2008, regarding the future of deregulation in Ohio and/or nationwide.

RESPONSE:

Objection. This request is overbroad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Further, the request seeks documents which are attorney work product or subject to the attorney-client privilege.

15. Please provide any and all summaries, documents, or other material received or prepared by the *[sic]* Dominion since July 30, 2008, regarding deregulation or re-regulation in the state of Ohio or nationwide. Please provide copies of any and all documents and correspondence (including, but not limited to, letters, emails, telephone transcripts, etc.) between Dominion and residential electric and/or gas customers of Duke Energy the *[sic]* January 1, 2009.

RESPONSE:

Objection. This request is overbroad, unduly burdensome, and is not reasonably calculated to lead to the discovery of admissible evidence. Further, the first part of the request seeks documents which are attorney work product or subject to the attorney-client privilege.

16. Please provide copies of any and all documents and correspondence (including, but not limited to letters, emails, telephone transcripts, etc.) between Dominion and any of the Parties, including the Commission Staff, between August 1, 2010 and the present date regarding the above-captioned proceeding.

RESPONSE:

Dominion Retail has no documents responsive to this request.

17. Please provide copies of any and all documents and correspondence (including, but not limited to letters, emails, telephone transcripts, etc.) between Dominion and PUCO Commissioners, between August 1, 2010 and the present date regarding the above-captioned proceeding.

RESPONSE:

Dominion Retail has no documents responsive to this request.

18. Please provide copies of any agreements identified in Interrogatory No. 20.

RESPONSE:

Objection. The factual predicate is inaccurate because Interrogatory No. 20 contains no reference to "agreements."

19. Please provide copies of any agreements identified in Interrogatory No. 21.

RESPONSE:

Not applicable.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served upon the following parties by first class mail, postage prepaid, or by electronic mail this 13th day of December 2010.

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