

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 : Case No. 10-176-EL-ATA
The Toledo Edison Company :
for Approval of a New :
Rider and Revision of an :
Existing Rider. :

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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.

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PREHEARING CONFERENCE

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ARMSTRONG & OKEY, INC.
222 East Town Street, 2nd Floor
Columbus, Ohio 43215
(614) 224-9481 - (800) 223-9481
FAX - (614) 224-5724

- - -

APPEARANCES:

Jones Day
By Mr. David A. Kutik
And Mr. Grant W. Garber
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114

Mr. James W. Burk
Senior Attorney
and Ms. Carrie Dunn
FirstEnergy Service Company
76 South Main Street
Akron, Ohio 44308

On behalf of Ohio Edison Company,
The Cleveland Electric Illuminating
Company, and The Toledo Edison Company.

Janine L. Migden-Ostrander
Ohio Consumers' Counsel
By Mr. Jeffrey L. Small
and Ms. Maureen R. Grady
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

On behalf of the residential ratepayers
of Ohio Edison Company, The Cleveland
Electric Illuminating Company, and The
Toledo Edison Company.

McNees, Wallace & Nurick, LLC
By Mr. Samuel C. Randazzo
and Mr. Joseph Olikier
Fifth Third Center, Suite 1700
21 East State Street
Columbus, Ohio 43215-4288

On behalf of the Industry Energy
Users-Ohio.

Corcoran & Associates Co., LPA
By Mr. Kevin Corcoran
8501 Woodbridge Court
North Ridgeville, Ohio 44039

On behalf of Bob Schmitt Homes, CKAP,

1 APPEARANCES (continued):

2 Richard Cordray, Ohio Attorney General
 3 William Wright, Section Chief
 4 Public Utilities Section
 5 By Mr. John H. Jones
 6 Assistant Attorney General
 7 180 East Broad Street, 6th Floor
 8 Columbus, Ohio 43215-3793

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

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Friday Morning Session,
January 7, 2011.

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EXAMINER PRICE: Good morning. The Public Utilities Commission has set for a prehearing conference at this time and place case number 10-176-EL-ATA, being In the Matter of the Application of 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.

My name is Gregory Price. With me is Henry Phillips-Gary. We are the attorney examiners assigned to preside over today's hearing.

Let's begin by taking appearances of the parties starting with the company.

MR. KUTIK: Your Honor, my name is David Kutik, along with Grant Garber from the Jones Day firm. Also with me today are James Burk and Carrie Dunn of FirstEnergy Service Company.

EXAMINER PRICE: Staff.

MR. JONES: Good morning, your Honor. On behalf of the staff of the Public Utilities Commission of Ohio, Ohio Attorney General Richard Cordray, John Jones, Assistant Attorney General, 180

1 East Broad Street, Columbus, Ohio.

2 EXAMINER PRICE: Mr. Corcoran.

3 MR. CORCORAN: Kevin Corcoran on behalf
4 of Sue Steigerwald, Joan Heginbotham, Bob Schmitt
5 Homes, Inc., and CKAP.

6 EXAMINER PRICE: Thank you.

7 OCC.

8 MR. SMALL: Thank you, your Honor. On
9 behalf of the residential customers of the
10 FirstEnergy electric distribution utilities, Janine
11 Migden-Ostrander, Consumers' Counsel. I'm Jeffrey L.
12 Small, counsel of record, with me is Maureen Grady,
13 Assistant Consumers' Counsel, Office of the Ohio
14 Consumers' Counsel, 10 West Broad Street, Suite 1800,
15 Columbus, Ohio. Thank you.

16 EXAMINER PRICE: Thank you.

17 IEU-Ohio.

18 MR. RANDAZZO: Yes, your Honors. Thank
19 you. On behalf of the Industrial Energy Users of
20 Ohio I'd like to enter the appearance of the law firm
21 of McNees, Wallace & Nurick, 21 East State Street,
22 Columbus, Ohio, 43215, by Samuel C. Randazzo, that
23 would be me, and Joseph Oliker. Thank you.

24 EXAMINER PRICE: Thank you. There are
25 enough seats at the counsel table if you would be

1 more comfortable.

2 MR. RANDAZZO: Sure. Thank you.

3 EXAMINER PRICE: I know you have nothing
4 pending today, but if you would like to --

5 MR. RANDAZZO: Yes, your Honor, I was
6 going to indicate that one of the disabilities that
7 we have relative to the discovery fight is that we
8 have not been served with the responses to the
9 discovery, so we are encumbered relative to the
10 debate even if we had something to say.

11 EXAMINER PRICE: Have you not been served
12 responses by any of the parties?

13 MR. RANDAZZO: The documents, the
14 responses that have come from OCC have not been
15 served on us.

16 MR. JONES: Your Honor, I believe that's
17 the same case with the staff. I don't believe we've
18 gotten all the responses that OCC has provided the
19 company as well.

20 EXAMINER PRICE: OCC?

21 MR. SMALL: Well, your Honor, the rules
22 designate what a response to a production -- a
23 request for production entails and that entails a
24 response to the requesting party with documents. We
25 have been serving all parties, including staff, with

1 all of our responses to discovery, the
2 interrogatories, and also they received responses to
3 the request for production as far as the written
4 responses.

5 The actual documents themselves have not
6 been served on parties other than FirstEnergy, but
7 that is in compliance with the Commission's rules.

8 EXAMINER PRICE: Mr. Randazzo.

9 MR. RANDAZZO: It is, I think, a strained
10 interpretation of the rules and certainly
11 inconsistent with the practice that has been followed
12 at this Commission for decades. The documents,
13 production of documents, basically is part of the
14 discovery process. The parties are served with the
15 requests, parties should be served with the responses
16 would be my view of what the rules require. I think
17 that's the sensible thing to do in any event.

18 But the point that I wanted to make here
19 today is our ability to have any input into the
20 debate is constrained by the reality that we were not
21 served, whether it's a correct interpretation of the
22 rule or not. OCC has acknowledged that they did not
23 serve the documents, that was the point of my comment
24 earlier.

25 EXAMINER PRICE: Okay. Thank you.

1 MR. RANDAZZO: Yes.

2 MR. JONES: Your Honor, staff would echo
3 Sam's comments, as well as a courtesy and as a
4 practice. We'd like to have those document as well.

5 EXAMINER PRICE: It's my understanding
6 generally the Commission practice, especially
7 multiparty litigation, that we serve everything upon
8 all the parties, so I'd appreciate it if OCC would
9 from this point forward in this proceeding go ahead
10 and serve all the parties.

11 For our first motion I'd like to take up
12 I believe there's an outstanding motion for leave to
13 file by Mr. Corcoran -- how would you like me to
14 refer to your clients?

15 MR. CORCORAN: Let's just call them the
16 CKAP parties.

17 EXAMINER PRICE: The CKAP parties.

18 MR. CORCORAN: If you don't mind.

19 EXAMINER PRICE: I believe there's an
20 outstanding motion on behalf of the CKAP parties to
21 file their memorandum contra to FirstEnergy's motion
22 to compel, and we are going to go ahead and grant
23 that motion at this time.

24 MR. CORCORAN: Thank you.

25 EXAMINER PRICE: Next we will turn to the

1 motion to compel discovery filed by the Office of
2 Consumers' Counsel on December 23rd, 2010. Let's
3 begin by simply asking the question, is this, the
4 party's supplemental, are these issues still in
5 dispute?

6 MR. SMALL: Yes, your Honor.

7 EXAMINER PRICE: Okay. Mr. Small, then
8 you may commence.

9 MR. SMALL: The OCC seeks the
10 identification information on former FirstEnergy
11 employees, that would be telephone numbers and
12 addresses for the FirstEnergy employees who were
13 identified previously by the companies as having
14 information relevant for this -- to the OCC's
15 inquiries into marketing and sales practices of the
16 FirstEnergy companies.

17 As the attorney examiners know, the OCC
18 filed, previously filed a motion to compel; it was
19 filed on June 30th, 2010. The OCC replied to a
20 memo contra; our reply was on July 26th.

21 In addressing FirstEnergy's argument that
22 the information on the identity of marketing and
23 sales personnel was irrelevant, that was the memo
24 contra filed on July 15th, the Bench issued an
25 entry on November 8th stating that the information

1 sought is plainly related to the subject matter of
2 this proceeding and appears to reasonably calculate
3 to lead to the discovery of admissible evidence.
4 It's cited in Rule 4901-1-16(B).

5 Now, our inquiry of the matter of that
6 motion to compel asked for the identification of
7 individuals and asked for their business addresses.
8 Since several of the people were retired employees of
9 the company, we were given the former, you know,
10 FirstEnergy offices as the identification
11 information. Subsequent to that -- and there were
12 named individuals and they are mentioned in the OCC
13 motion to compel.

14 Subsequent to that I asked Mr. Burk for
15 the individuals' identification, that is telephone
16 numbers and addresses so that we could subpoena those
17 people if necessary; he refused. I sent a discovery
18 request to them, which is discovery request 80 and 81
19 which are the subject of the motion to compel, asking
20 for this identification information that would permit
21 the OCC to compel these individuals to depositions
22 and, if necessary, to the actual hearing.

23 To this date the companies have refused
24 to answer that discovery request. It was on the
25 ten-day expedited basis, but it's well past that.

1 The only objections stated to the OCC's
2 follow-up discovery request was basically on the
3 basis of irrelevance, which is the same objection
4 that we received during the summertime in which the
5 Bench addressed that objection.

6 So there have been other subsequent
7 communications having to do with who represents these
8 people and so forth, but the OCC seeks this
9 information so that they can compel these individuals
10 to attend depositions and, if necessary, attend the
11 hearing, and there's been no objection raised by the
12 company other than relevance.

13 EXAMINER PRICE: Companies?

14 MR. KUTIK: Yes, your Honor. I think
15 it's important to talk about who we're talking about.
16 We're talking about former employees, and there are
17 eight of them, and let me give you their names
18 because there are different issues with different
19 former employees.

20 Frank Dery, Don Smith, Ron Best, Al
21 Temple, Don Rearick, Judy Jergens, and Don Evans. I
22 think that's eight. With respect to Mr. Dery, he's
23 deceased. With respect to Mr. Temple, we basically
24 don't know where he is. We are more than willing to
25 provide OCC his last address, but his last address is

1 not a contact address.

2 With respect to the rest of the former
3 employees, they have retained my firm to represent
4 them and so under the rules guiding professional
5 conduct in Ohio, particularly Rule 4.2, OCC is
6 prohibited from contacting them and we pointed that
7 out to OCC.

8 We also said, with respect to these
9 witnesses, to the extent they're in Ohio, we would
10 make them available for deposition. As it turns out,
11 Mr. Smith and Mr. Best are not currently in the state
12 of Ohio and will not be in the state of Ohio for the
13 foreseeable future.

14 With respect to Mr. Hawley, we did
15 produce him for deposition. We produced him at a
16 date agreed to by OCC, and then OCC canceled that
17 deposition.

18 With respect to Mr. Rearick and
19 Ms. Jergens, we explained to OCC that at the time we
20 were talking about it, which was basically, you know,
21 the week or two before the holidays, that both of
22 these individuals were out of state for the holidays
23 and that they would be returning and that we fully
24 expected to be able to produce them for deposition,
25 and we will.

1 Both witnesses have agreed, and I'm here
 2 to represent that both witnesses will be produced for
 3 deposition. And we have dates we can discuss with
 4 OCC for those depositions, although I must say that
 5 Ms. Jergens only arrived last night and I probably
 6 will not be able to provide a date for OCC until, at
 7 the earliest, later today. She has to go back to
 8 work and figure out what her calendar looks like.

9 We also are ready to provide dates to OCC
 10 for Mr. Evans. So with respect to the people who are
 11 in the state of Ohio, that is that we know their
 12 whereabouts, that is Mr. Rearick, Ms. Jergens,
 13 Mr. Hawley, and Mr. Evans. We have or are prepared
 14 to produce all of those witnesses for deposition.

15 And we believe that it is far preferable,
 16 specifically for people who have not been employed by
 17 the company sometimes for over 20 years, to be able
 18 to accommodate their schedule rather than using the
 19 bludgeon of a subpoena as OCC suggests. I also have
 20 no reason to believe that any of these witnesses, if
 21 OCC wishes, will not be willing to come to a hearing.
 22 Obviously, we have to work out dates and things like
 23 that, but we do believe that we should be able to
 24 work that out.

25 So at this point we believe that there is

1 no reason why OCC needs to have these addresses with
2 respect to the witnesses for the purposes they seek,
3 which is for subpoenas, since we are willing to
4 produce these people in any event.

5 EXAMINER PRICE: Mr. Small.

6 MR. SMALL: Yes, your Honor.

7 EXAMINER PRICE: Let me ask first, what
8 is OCC's position vis-a-vis the deposition that
9 Mr. Kutik mentioned? At what point before the
10 deposition did you cancel that deposition?

11 MR. SMALL: Well, the circumstances of
12 the individual deposition that Mr. Kutik mentioned, I
13 had discussions with Mr. Burk, not very --
14 especially --

15 You have to have the context which was we
16 were deposing company witnesses and we took two days
17 of depositions of company witnesses up in Akron. I
18 had some difficulty scheduling those depositions with
19 Mr. Burk. Originally I asked him to consult with the
20 witnesses' schedules and come up with proposed dates
21 for those, and he started coming up with Monday,
22 Thursday, Friday.

23 You know, OCC is willing to accommodate
24 witnesses' schedules to a certain degree, but I don't
25 think it's -- there's a certain element of

1 inconvenience for the attorneys too, and it's a
2 two-and-a-half hour drive to Akron and, you know,
3 this is not a situation where the OCC felt like they
4 wanted to be driving up and down the freeway taking
5 individual depositions. So I asked him to group
6 those depositions. He accommodated that, and on the
7 15th and 16th we took four depositions, two on each
8 day.

9 But at the time when Mr. Hawley was
10 offered, that would have been the only deposition
11 that we would have had to have taken there and it was
12 my desire to have them, again, when we did the
13 non-company witnesses, to have them grouped so that
14 we didn't have to take one deposition, take a trip up
15 to Akron every time we had to take a deposition.

16 EXAMINER PRICE: This was a retired
17 employee and he made him available and you didn't
18 think that was good enough?

19 MR. SMALL: I was hoping --

20 EXAMINER PRICE: I mean, this wasn't a
21 company employee who they control. I mean, I
22 understand your point about bundling depositions when
23 it's company employees. He made the employee
24 available and that wasn't enough?

25 MR. SMALL: I've made my point which is

1 we were hoping to have some way of taking depositions
2 in combination with one another, not individual
3 depositions.

4 EXAMINER PRICE: I think vis-a-vis the
5 retirees you're going to have to be able to be a
6 little more flexible. They're going to be available
7 when they're available.

8 MR. SMALL: Well --

9 EXAMINER PRICE: Now, having said that,
10 what is the issue -- Mr. Kutik has said, has
11 obviously demonstrated they're willing to make these
12 former employees available. He has said a subpoena
13 is unnecessary. What is the purpose of your
14 interrogatory at this point?

15 MR. SMALL: Of the motion to compel?

16 EXAMINER PRICE: Motion to compel.

17 MR. SMALL: Well, to put this in context,
18 the offer made by the company, and Mr. Burk made this
19 offer to produce these individuals who he claimed
20 would be represented by FirstEnergy or Jones Day
21 counsel, that was agreeable to us because we wouldn't
22 have to go through the difficult -- more difficult
23 process of issuing subpoenas and so forth.

24 However, that was four weeks ago, and I
25 was hoping to have those depositions taken in

1 December, and upon arriving on the 15th for
2 depositions of the company witnesses I was told they
3 would try to arrange these depositions, but if they
4 failed to in their attempts to do that, they would
5 give me the addresses at a later date unspecified.

6 You know, the hearing is coming up.
7 We're under a certain amount of pressure to put
8 together our cases before that, and just waiting on
9 the company week after week and seeing whether they
10 would respond to a discovery request, we felt that we
11 had to move to compel.

12 And, you know, I would like to address
13 their legal argument too, which is Mr. Kutik made the
14 statement that there would be something unethical
15 about contacting them. There certainly would be
16 nothing unethical about serving a subpoena on a
17 witness; that is not making contact with the person.

18 So, you know, we would have been fine
19 with having the depositions scheduled, but we want to
20 have the identification information available to us
21 in case all of what we heard coming from
22 FirstEnergy's counsel doesn't come to fruition, which
23 is I have no recourse. They can say -- they can come
24 up to the hearing date and say, "Oh, well, we weren't
25 able to arrange those dates with those witnesses,

1 tough luck," because there's no ability for me to
2 compel those people.

3 And that would also be true if the
4 depositions took place and then they decided to be
5 uncooperative as far as turning up for the hearing.
6 I would have no ability to --

7 EXAMINER PRICE: But they haven't been
8 uncooperative yet.

9 MR. SMALL: But --

10 EXAMINER PRICE: They made one of the
11 witnesses available.

12 MR. SMALL: If you're going to say we are
13 going to put off the hearing if these people don't
14 cooperate with it, and then I can call them --

15 EXAMINER PRICE: The Bench is not
16 continuing its hearing on its own motion.

17 MR. SMALL: Well then, I think I should
18 have the information so I can compel their attendance
19 if I don't get the cooperation which FirstEnergy has
20 represented that I will get.

21 But I repeat, it's been four weeks since
22 I've been told that I would get that cooperation, and
23 I haven't -- I don't have any deposition schedules.
24 I don't have any suggestion of when these people
25 might be available. And the information I received

1 just -- that we received just now, that the person
2 just returned, I don't have that -- didn't have that
3 information either.

4 MR. KUTIK: Well, that's totally wrong.
5 Counsel was told that these witnesses were out of
6 state, so for him to claim that he just didn't know
7 what was going on is totally bogus. And as the Bench
8 has pointed out, we did make people available, and we
9 made other people available as well, of our own
10 employees. We've been more than accommodating to
11 accommodate his schedule.

12 Apparently, OCC hasn't heard of a
13 telephone or telephone deposition in terms of their
14 individual scheduling problems. But regardless of
15 that oversight, we've tried to help them out and get
16 a convenient schedule for them, but unfortunately,
17 with respect to this issue, it's not about them.
18 It's about former employees who really haven't been
19 involved in any of these issues for years.

20 EXAMINER PRICE: The Commission rules
21 require the parties work out discovery disputes
22 informally, and it certainly appears to me that
23 FirstEnergy has done a good-faith effort to
24 accommodate you. Nonetheless, we will grant your
25 motion to compel so that you have the contact

1 information that's necessary to the extent that the
2 witnesses are in the state of Ohio and are not
3 deceased and that FirstEnergy actually has the
4 contact information.

5 MR. SMALL: Thank you, your Honor.

6 MR. KUTIK: So, your Honor, just so I
7 know, I want to make sure I understood your ruling,
8 and that is it is granted for the witnesses in Ohio.

9 EXAMINER PRICE: No; I'm saying granted
10 for all of them. Witnesses outside of Ohio, they're
11 entitled to the addresses.

12 MR. KUTIK: Right.

13 EXAMINER PRICE: What they do with that
14 is their own business.

15 MR. KUTIK: I just want it stated again
16 on the record that if they attempt to contact
17 witnesses that have retained Jones Day, that is
18 unethical and I will take action to deal with that.

19 EXAMINER PRICE: Why don't you once
20 again, just so the record is clear, list for all the
21 parties and the Bench those witnesses who are
22 represented by Jones Day.

23 MR. KUTIK: Mr. Rearick, Mr. Smith,
24 Mr. Best, Mr. Hawley, Mr. Evans, and Ms. Jergens.

25 EXAMINER PRICE: Is that clear,

1 Mr. Small?

2 MR. SMALL: I'm sorry, Evans and Jergens.

3 Yes.

4 MR. KUTIK: And also, your Honor, I would
5 say that if a party connected to counsel attempts to
6 contact them, I will also take the same action.

7 MR. SMALL: Just so it's clear,
8 subpoenaing somebody, taking a subpoena to serve the
9 person, is not such a contact.

10 MR. KUTIK: I agree.

11 EXAMINER PRICE: Everybody agrees with
12 that.

13 MR. SMALL: I just wanted to make sure,
14 because the representation we got earlier was that
15 any contact --

16 MR. KUTIK: No, I don't believe a
17 subpoena is a contact. If you try to call them up,
18 that's a contact.

19 EXAMINER PRICE: I think we all
20 understand. We're all clear.

21 MR. SMALL: I think we all understand,
22 your Honor.

23 EXAMINER PRICE: Mr. Phillips-Gary.

24 EXAMINER PHILLIPS-GARY: All right.

25 We're going to take a short break and be back.

1 EXAMINER PRICE: Five minutes.

2 (Recess taken.)

3 EXAMINER PHILLIPS-GARY: We'll go ahead
4 and go back on the record. The next thing we're
5 going to consider is the motion to compel filed by
6 the companies on December 17th, 2010, seeking an
7 order compelling OCC to provide responses and also in
8 looking at OCC's memoranda contra of December 27th.

9 The first thing I want to get clear is it
10 looks like since the motion to compel has been filed,
11 that there has been some additional documents
12 supplied by OCC. I note that the motion to compel
13 seeks responses to the requests for production of
14 documents 5, 7, 9, 10, 11, 12, and 14, and also
15 responses to the third set of discovery. So my
16 question for the companies is is that still -- are
17 any of those off the list, or are we still looking at
18 all of those?

19 MR. KUTIK: They're all on the list. The
20 only development is that we did receive responses in
21 the form of complete objections, so we have had no
22 substantive response to our third set. That's the
23 only difference between the state of play now versus
24 what was in the papers.

25 EXAMINER PHILLIPS-GARY: Okay. So the

1 response to third set was in the form of objections.

2 MR. KUTIK: Correct.

3 EXAMINER PHILLIPS-GARY: Okay. And then
4 just as a, I'll ask it this way, because neither
5 party in their filing actually provided the full -- I
6 notice in the request for production OCC's response
7 says "See the response to request for production
8 No. 1," and I was not able to find in either party's
9 filing the actual content of OCC's response to
10 request for production No. 1.

11 MS. GRADY: Your Honor, that would be
12 contained on Attachment A in our memoranda contra.

13 EXAMINER PHILLIPS-GARY: I missed it.
14 Oh, there it is, okay. All right.

15 EXAMINER PRICE: Thank you.

16 EXAMINER PHILLIPS-GARY: And it's what I
17 thought it was, but I just wanted to make sure.

18 MS. GRADY: Excuse my interruption.

19 EXAMINER PHILLIPS-GARY: No; I appreciate
20 the clarification because I was looking for it and I
21 didn't find it.

22 All right. So at this point basically
23 everything is still, the motion to compel is still in
24 play so, Mr. Kutik, do you want to go ahead and we'll
25 hear what your position is.

1 MR. KUTIK: Sure. In essence, your
2 Honor, what we are seeking is to have OCC tell us the
3 basis, the documentary basis of several things. We
4 want them to tell us with respect to certain
5 statements that they've made in their pleadings what
6 the basis is for that.

7 We want them to tell us what evidence
8 they have of things like inducements or promises,
9 supposedly, to have people have electric heating in
10 their homes.

11 We want to know what their basis is to
12 claim that there were expenses incurred in response
13 to inducements, promises, or representations.

14 We want to know what documents they have
15 that they believe reflect the marketing practices
16 that are supposedly at issue in this case.

17 And we want to know, perhaps most
18 importantly, what communications they've had with
19 others on these subjects and the documents from that.
20 We want to know, for example, what contacts they've
21 had with not only other parties, what contacts
22 they've had with customers, what contacts they've had
23 with people that have testified in the public
24 hearings.

25 The response has been: Well, it's

1 everything in the docket and it's everything that's
2 been submitted as far as the public hearings are
3 concerned. That is not an acceptable response under
4 the case law regarding the rules of evidence -- rules
5 of procedure.

6 The Commission's rules, as the Bench is
7 aware, are patterned after and based on, and in some
8 ways identical to the Ohio rules of civil procedure
9 which, in turn, are based on and almost identical to
10 the Federal rules of civil procedure, and the rule of
11 procedure we're talking about is Rule 34.

12 There are a whole host of cases, and we
13 can present you with case authority today if you
14 wish, that it is improper to respond to discovery by
15 having the requesting party look for a needle in a
16 haystack, that you can't simply say "The documents
17 are over there."

18 What you have to do and what we require
19 or what we are requesting, rather, in our motion is
20 that they identify the specific documents. They
21 don't have to produce them, but they certainly should
22 have to identify them. We shouldn't have to wait
23 until we get their brief in this case to know what
24 we're supposed to be responding to. We shouldn't
25 have to respond to, quote, "everything," end quote,

1 and that's, I think, the crux and the error in their
2 argument.

3 The other argument they make is that --
4 or another argument they make is that there is some
5 type of privilege that applies here, and they
6 certainly haven't even come close to demonstrating
7 that other than to make a very broad and conclusory
8 statement that these things are either
9 attorney-client privilege, work product privilege, or
10 a joint defense privilege.

11 Again, case law is very clear on this,
12 that there must be a particularized showing with
13 respect to every document, and to be consistent with
14 that we had requested in our discovery that if there
15 was a claim of privilege, be it attorney-client
16 privilege or work product privilege or some other
17 privilege, that we would be provided what's called a
18 privilege log, a list of documents that are claimed
19 to be privileged and the basis for the privilege so
20 that we could make an assessment so that the Bench
21 potentially could make an assessment.

22 And certainly we've gotten none of those,
23 nothing even close to that. So they haven't even
24 come close to making the showing they have to make.
25 And indeed, your Honor, we believe that it's very

1 likely that there is a lot of material here that they
2 think are privileged that's not.

3 It seems at one point in time, your
4 Honor, and I'm not sure OCC still takes this
5 position, but their position was: Well, since we're
6 OCC and we're counsel for residential customers, any
7 contact we have with residential customers is
8 attorney-client privilege. And the Commission has
9 rejected that position on several occasions.

10 For example, OCC versus Dayton Power &
11 Light, case number 90-455-GE-CSS. In Re:
12 Application GTE North for Authority to Adjust its
13 Rates and Charges to Change its Tariff, case number
14 87-1307. Those are two cases where the Commission
15 has not agreed with that position. So if they have
16 had contact with customers about the issues in this
17 case, we believe we're entitled to know that.

18 Further, they claim that there is a joint
19 defense privilege. Now, for a joint defense
20 privilege there must be communications involving
21 lawyers. So if staff people, for example, are
22 dealing with parties, for example Ms. Steigerwald,
23 that's not part of the joint defense because
24 Ms. Steigerwald is not an attorney and the staff
25 person of OCC is not an attorney. So we believe that

1 it's likely, to us, that there may be lots of
2 material that they have that isn't part of the joint
3 defense privilege.

4 And the joint defense privilege requires
5 that there be some commonality of interest. Now, it
6 seems to me that OCC and CKAP want to have it both
7 ways. They intervened on the claim, CKAP did, that
8 their interests were diverse from OCC. Well, if
9 their interests are diverse from OCC, they can't have
10 a common interest which would be the basis for a
11 joint defense privilege.

12 So on these bases, your Honor, we believe
13 that the materials we seek are within the scope of
14 appropriate discovery, that they deal with the issues
15 that OCC and CKAP have put into play and the Bench
16 has agreed to and the Commission has agreed to, and
17 that we should not be put to the task of having to
18 discern with extrasensory perception what we might be
19 facing at a hearing or in a brief.

20 EXAMINER PHILLIPS-GARY: Let me get
21 clear, because your remarks seem to indicate -- seem
22 to reference the documents filed in the docket of
23 this case; is that the extent of what you're seeking
24 discovery on, or are there other documents that you
25 believe are out there that are not in the docket?

1 MR. KUTIK: Your Honor, the responses
2 that we received, I believe, were two-fold. First
3 was to say, "Go look. Go fish in the public record,"
4 either in the docket itself or specifically in the
5 public hearing part of the docket. And the second
6 response we got was "Well, all this stuff is
7 privileged or protected in some way."

8 So we believe that they should -- if they
9 are saying that the documents that are responsive to
10 our requests are in the public record, well, tell us
11 what documents there are. And if there are
12 additional documents, of course, we want these
13 additional documents as well.

14 EXAMINER PHILLIPS-GARY: Okay. And in
15 their memo OCC references discovery responses on
16 December 23rd and December 27th and I just want
17 to again be clear, you're saying that you did not
18 actually receive documents in response?

19 MR. KUTIK: No; we did receive documents,
20 I would say probably, what, 25 days after our
21 request. So, you know, the history of the parties,
22 by the way, in this case has been they have always
23 been late. But beyond that, the documents we
24 received, yes, are responsive, but we don't believe
25 they are complete.

1 EXAMINER PHILLIPS-GARY: Okay. I just
2 wanted to make sure you did receive something.

3 MR. KUTIK: Yes, we did. And my
4 understanding, by the way, is, to point out for
5 Mr. Randazzo and Mr. Jones, that we're the only party
6 that's received them.

7 EXAMINER PHILLIPS-GARY: Ms. Grady.

8 MS. GRADY: Thank you, your Honor. A
9 couple of points in response to counsel's remarks.
10 First with respect to the documents that were
11 received either contemporaneous with or subsequent to
12 the filing of OCC's memo contra. December 23rd we
13 served revised discovery responses to the second set,
14 and on December 29th we produced approximately
15 5,000 documents for the company to respond to this
16 particular set of discovery and which were responsive
17 to all of the discovery that's subject to this motion
18 to compel.

19 EXAMINER PRICE: Were they late?

20 MS. GRADY: Were they late? Your Honor,
21 they were beyond the ten-day period, yes, that's
22 correct.

23 EXAMINER PRICE: Have any of your
24 discovery responses been on time?

25 MS. GRADY: Pardon?

1 EXAMINER PRICE: Have any of your
2 discovery responses been on time?

3 MS. GRADY: Yes, your Honor. Second set,
4 plus today's fourth set. Exactly -- not on time,
5 actually early.

6 EXAMINER PRICE: Okay.

7 MS. GRADY: And hand served.

8 Secondly, your Honor, your Honor would
9 note that the motion to strike solely argued that the
10 responses were required under 4901-1-12(D), that the
11 response that OCC had that the documents were in the
12 public record and were available to the company as
13 well as OCC, that motion to compel did not contend
14 that OCC had not fulfilled any responsibilities it
15 had as to ascertaining or as to alleging privilege.
16 So those allegations this morning are new, they were
17 not part of the motion to compel.

18 OCC incorporated its statements about
19 privilege and about attorney-client and trial
20 preparation privilege in its memoranda contra because
21 that was the basis of OCC's objections to these
22 motions to compel.

23 EXAMINER PRICE: Let me be clear. Are
24 you claiming privilege or not?

25 MS. GRADY: Yes, your Honor, we are.

1 However, the motion to compel was not -- was not
2 subject or did not contend that OCC's objections
3 based on privilege were unreasonable, nor were they
4 contending in their motion to compel that that was
5 the reason why the motion to compel should be
6 granted.

7 EXAMINER PRICE: Did you prepare a
8 privilege log?

9 MS. GRADY: No, your Honor, we did not;
10 however, this morning we --

11 EXAMINER PRICE: One second. "No" is
12 good.

13 Isn't it true that Ohio Rule Civil
14 Procedure 26 says, (B)(6)(a), "When information
15 subject to discovery is withheld on a claim that it
16 is privileged or is subject to protection as trial
17 preparation materials, the claim shall be made
18 expressly and shall be supported by a description of
19 the nature of documents, communications, or things
20 not produced that is sufficient to enable the
21 demanding party to contest that claim"?

22 MS. GRADY: Your Honor, I would take it
23 that your reading of that is correct. I would note
24 that these rules -- the Federal Rule 26(B) are --

25 EXAMINER PRICE: Ohio rule.

1 MS. GRADY: Ohio as well as federal
2 rules, which the PUCO rules closely follow, does not
3 specifically require the Commission to require
4 parties to submit privilege logs. I do not
5 understand --

6 EXAMINER PRICE: But in your argument --
7 they didn't include this in their motion to compel.
8 Their argument is that you didn't follow the
9 requirements of the rules of civil procedure, so how
10 could they have responded to that?

11 MS. GRADY: I would have expected them to
12 raise it in their motion to compel, your Honor.

13 EXAMINER PRICE: Okay. So you're saying
14 you have not up until now prepared a privilege log.
15 Have you prepared one at this point?

16 MS. GRADY: No, your Honor, we have not.
17 We have conducted searches within the records that
18 OCC has to start looking at this information and to
19 start preparing that type of thing, but, your Honor,
20 we have not completed that.

21 Secondly, your Honor, Mr. Kutik mentioned
22 that there was case law this morning that would show
23 that the responses that we made in particular that --
24 what they claim are the go look and go fish is not
25 sufficient. That case law has not been provided to

1 OCC, nor was the case law cited in the motion to
2 compel, so we're somewhat at a loss to understand
3 what that case law is because I am not aware of that
4 and it has not been identified.

5 EXAMINER PRICE: Ms. Grady, you were the
6 party that wasn't responding to their discovery
7 request. Are they obligated to include in their
8 discovery request case law saying "In the event you
9 don't tell us everything, this is why you should"?

10 MS. GRADY: No, your Honor, I'm not
11 making that argument. My argument is I would have
12 expected that in a motion to compel. If that was a
13 basis for their motion to compel, I would have
14 expected it in the motion to compel. In fact, there
15 was no case law cited. OCC cited case law in
16 response, but there was no case law cited by the
17 company.

18 EXAMINER PRICE: You're under an
19 obligation to inform the Commission of both cases
20 that support and do not support your position.
21 You're not aware of any case law that does not
22 support your position in all your research --

23 MS. GRADY: With respect -- I'm sorry,
24 your Honor.

25 EXAMINER PRICE: -- with respect to

1 properly identifying or specifically identifying the
2 documents in question.

3 MS. GRADY: No. What we identified, your
4 Honor, is the case law that supports our position --

5 EXAMINER PRICE: No; I said are you aware
6 of any case law that does not support your position?

7 MS. GRADY: No, your Honor, I'm not.

8 EXAMINER PRICE: You're not aware.

9 MS. GRADY: No.

10 EXAMINER PRICE: In all your research on
11 this you didn't come across any cases that said "Oh,
12 boy, that's a problem."

13 MS. GRADY: No, your Honor, I did not.

14 EXAMINER PRICE: Okay.

15 MS. GRADY: In fact, we cite in our
16 memorandum contra footnote 16 the examiners' ruling
17 which would suggest the opposite, your Honor. So
18 yes, we are not aware, plus there are -- yes, that
19 would cite the opposite.

20 In terms of the company's attack on OCC's
21 go look/go fish approach, if we can call it that, we
22 indicated in our memoranda contra that we are still
23 in the analysis ourselves and, therefore, cannot
24 identify what specific documents there are. We are
25 still looking and poring through transcripts and

1 poring through records and poring through the
2 thousands of letters that are filed at the
3 Commission, so we ourselves are in the process, have
4 not completed that process.

5 EXAMINER PRICE: Have you begun it?

6 MS. GRADY: We have begun it, your Honor.

7 EXAMINER PRICE: Have you identified any
8 documents?

9 MS. GRADY: We have not at this point.

10 EXAMINER PRICE: You can't identify one
11 until you identify all of them that might be
12 responsive?

13 MS. GRADY: Well, we have brought
14 examples, if you're talking about the public
15 documents now versus the documents that --

16 EXAMINER PRICE: I'm talking about any
17 documents.

18 MS. GRADY: I mean, we have identified
19 there are documents that are privileged that we
20 believe are in response to the company's request. In
21 terms of the documents that are in the public domain,
22 we have not identified particular documents that are
23 responsive.

24 EXAMINER PRICE: Then why did you say
25 "Look in the docket" if you had not identified any

1 documents that are responsive? Why did you refer to
2 the docket at all?

3 MS. GRADY: Because we believe that there
4 may be documents that are responsive in addition to
5 the transcripts that respond to the company's broad
6 requests which we indicated were objectionable on a
7 broad basis as well.

8 EXAMINER PHILLIPS-GARY: Looking at your
9 footnote 16, the parenthetical that explains "The
10 Attorney Examiner denied a motion to compel the
11 utility to provide documents that did not exist and
12 would have to be created by the utility, which would
13 take considerable time." Is it your understanding of
14 the companies' request for production that they're
15 asking you to create documents that do not currently
16 exist?

17 MS. GRADY: Your Honor, we are -- by
18 analogy we are making the argument that asking us to
19 go into the public docket and look at the thousands
20 of letters and look through, pore through the
21 transcripts and identify documents which we have not
22 yet identified is akin to requiring us to create
23 documents that do not currently exist and that we are
24 not currently aware of.

25 These are actions, your Honor, that

1 entail trial preparation. We are not complete -- we
2 have not completed our efforts in trial preparation,
3 and we believe as trial preparation efforts they
4 would clearly be covered by the trial preparation
5 qualified privilege.

6 EXAMINER PRICE: Why is that?

7 MS. GRADY: Because under, your Honor,
8 the --

9 EXAMINER PRICE: You're not creating any
10 documents. Isn't the trial preparation privilege,
11 isn't that centered around documents that you as an
12 attorney create?

13 MS. GRADY: It is.

14 EXAMINER PRICE: Can you show me any
15 cases that show gathering documents falls under the
16 trial preparation privilege?

17 MS. GRADY: Your Honor, I believe that
18 the theory of the --

19 EXAMINER PRICE: I asked you do you have
20 any cases that show gathering, not creating, but
21 gathering documents falls under the trial preparation
22 privilege?

23 MS. GRADY: Your Honor, I think Hickman
24 versus Taylor, the holding in Hickman versus Taylor
25 would support that contention, yes, because it speaks

1 to the attorney assembling information and sifting
2 through what he considers to be relevant from
3 irrelevant facts.

4 EXAMINER PRICE: Doesn't Hickman say --

5 EXAMINER PHILLIPS-GARY: Mental
6 impressions.

7 EXAMINER PRICE: -- "For present purposes
8 it suffices to note that the protective cloak of this
9 privilege does not extend to information which an
10 attorney secures from a witness while acting for his
11 client in anticipation of litigation"? If Hickman
12 says that, how does it cover gathering documents?
13 And Hickman does say that.

14 MS. GRADY: Your Honor, and I appreciate
15 the fact that you are citing to Hickman which we
16 cited extensively in our memoranda contra.

17 EXAMINER PRICE: But you didn't note that
18 particular provision of Hickman which undermines your
19 provision.

20 MS. GRADY: Understood, your Honor. We
21 believe -- I'm sorry. I lost my train of thought.
22 What was your question?

23 EXAMINER PRICE: Can you point to a case
24 that shows that gathering documents falls within the
25 scope of trial preparation?

1 MS. GRADY: Your Honor, I don't think
2 that that's what our claim is based upon. Our claim
3 is based upon the fact that we are analyzing,
4 gathering and analyzing what among thousands of
5 letters --

6 EXAMINER PRICE: They haven't asked for
7 any documents you've created. They've asked for
8 documents in your possession.

9 MS. GRADY: And we have not identified
10 documents that are in our possession that are
11 responsive, that are in the public docket --

12 EXAMINER PRICE: No. You said you have
13 identified some that were privileged.

14 MS. GRADY: Yes, that's correct.

15 EXAMINER PRICE: And I said can you show
16 me where the privilege extends to documents which you
17 gathered, not created? So are there documents in
18 your possession, which you did not create, but you're
19 claiming the privilege?

20 MS. GRADY: Yes, your Honor, that would
21 be with respect to the public documents.

22 EXAMINER PRICE: But you can't point
23 to -- no; I'm talking about nonpublic documents. Can
24 you point to a case that shows that the trial
25 preparation, I'll ask you again, can you point to a

1 case that shows that trial preparation exception
2 applies to gathering of documents rather than
3 documents that you did not create?

4 MS. GRADY: I do not have that
5 information at this point, but I would certainly
6 if --

7 EXAMINER PRICE: No. No. It's today.
8 It's now. There's no coming back later and saying
9 "Here's cases to support what we allege."

10 MS. GRADY: I misunderstood, because I
11 thought that's what the company was doing today, but
12 I misunderstood that.

13 MR. KUTIK: I'm prepared to discuss
14 authority right now, your Honor.

15 EXAMINER PRICE: Let's let Ms. Grady
16 finish her response and then we'll let you respond.

17 MR. KUTIK: Yes, your Honor.

18 MS. GRADY: We believe that, again, that
19 4901-1-20, which is the sole basis of the company's
20 motion to compel, does not require us to identify and
21 produce documents which we ourselves have not
22 identified as supporting or responding to the
23 company's discovery requests.

24 We believe, your Honor, that to the
25 extent that there is information that is nonpublic

1 documents that are in our possession, custody, and
2 control that are responsive to the company's data
3 requests, that those are covered by either, and/or
4 the trial preparation, attorney work product, or
5 attorney-client privilege.

6 For instance, if we look at, in
7 particular as an example, if we look at the request
8 for production of document No. 7 which asked for
9 documents reflecting the analysis of options proposed
10 by the staff regarding the amount, recovery, and
11 duration of future all-electric rates, that those
12 type of documents are most certainly trial
13 preparation documents that should be covered and
14 should not be produced.

15 We also believe, your Honor, that the
16 company has not borne its burden of proof, and it
17 does bear the burden of proof in this case, to show
18 that it --

19 EXAMINER PRICE: One second. We're not
20 talking about the burden of proof in this case.

21 MS. GRADY: I'm sorry. Burden of proof
22 on the motion to compel.

23 EXAMINER PRICE: We're talking about the
24 burden of responding to discovery.

25 MS. GRADY: Yes.

1 EXAMINER PRICE: Isn't it the general
2 rule that the burden is on the party who is opposing
3 discovery to demonstrate why something should not be
4 discovered?

5 MS. GRADY: That is correct, your Honor.

6 EXAMINER PRICE: So it's not the
7 companies' burden of proof on this case at all.

8 MS. GRADY: Your Honor, I misspoke. When
9 I said "burden of proof," in determining or in
10 showing or overcoming a claim of trial preparation
11 privilege under Federal Rule 26 as well as Civil Rule
12 26(B) (3) the companies have the burden of proof to
13 show that good cause exists that should require us to
14 divulge information such as work product.

15 EXAMINER PRICE: That's if it is properly
16 privileged. It's not their burden to show that it's
17 properly privileged. If it's privileged, it's their
18 burden to show that good cause exists that it should
19 be disclosed absent the privilege -- even with the
20 privilege; am I correct?

21 MS. GRADY: Yes, your Honor, that is
22 correct.

23 EXAMINER PRICE: So the burden of proving
24 it is privileged is on you.

25 MS. GRADY: That is correct, your Honor.

1 Your Honor, the Supreme Court of Ohio has held as
2 well that good cause to require OCC to divulge --

3 EXAMINER PRICE: We haven't gotten to
4 whether or not this is privileged -- we're not to the
5 good cause state yet. We're still as to whether or
6 not this is or is not privileged.

7 MS. GRADY: Understood, your Honor.

8 EXAMINER PRICE: If the Bench rules it's
9 privileged, then the company is entitled to say,
10 "Okay, even if it's privileged, good cause exists
11 that it should be disclosed anyway." And I'm certain
12 that Mr. Kutik is not prepared to say it's privileged
13 at this point.

14 MR. KUTIK: Well, particularly work
15 product privilege, your Honor.

16 MS. GRADY: Your Honor, we did prepare a
17 sample of documents that we believe are responsive to
18 the discovery request proposed and are prepared to
19 share those with the Bench as an example of what we
20 believe the documents in OCC's possession entail, and
21 would show those to the Bench -- to the extent that
22 the Bench determines an in-camera inspection of
23 documents is needed, we are prepared to do that.

24 EXAMINER PHILLIPS-GARY: Before we get to
25 that I do want to -- I understand with request for

1 production 7 that you're making an argument with the
2 work product doctrine, but I'd like to know how it
3 applies to some of the others, like request for
4 production No. 5 which seeks documents and
5 communications received from. So if those are ones
6 that you've received from staff or any customer, how
7 does that fall under the work product privilege?

8 MS. GRADY: Your Honor, I don't believe
9 that that necessarily would be work product, covered
10 by the work product privilege, but I believe it would
11 be covered by potentially the attorney-client
12 privilege because if we receive information from
13 customers and the customers are discussing their
14 understanding or their beliefs about --

15 EXAMINER PRICE: So you're claiming
16 attorney-client privilege to any communication to a
17 residential customer in this state?

18 MS. GRADY: No, your Honor, we are not.

19 EXAMINER PRICE: Then what are you
20 claiming?

21 MS. GRADY: We are claiming that the
22 contacts that we may have made in the course of the
23 proceeding after the filing of the complaint, or
24 after the filing of the tariff filing in February of
25 2010 could potentially be attorney-client based upon

1 communications that were made.

2 EXAMINER PHILLIPS-GARY: Hold that for a
3 second. So you're saying after February 2010, after
4 that you're saying you would assert an
5 attorney-client potential.

6 MS. GRADY: Could potentially, yes, your
7 Honor.

8 EXAMINER PHILLIPS-GARY: All right, let's
9 hold that. So before that date then, anything that
10 was sent from a residential customer to you with
11 regard to this, there is not an attorney-client
12 relationship.

13 MS. GRADY: That is correct, your Honor.

14 EXAMINER PHILLIPS-GARY: Okay. And given
15 that request for production No. 11 and 12 goes back
16 to 2005 --

17 MS. GRADY: Yes, your Honor.

18 EXAMINER PHILLIPS-GARY: -- have you
19 identified documents in that January 1st, 2005, to
20 February 2010 period where you received information
21 with regard -- has that information been turned over
22 to the company?

23 MS. GRADY: Your Honor, for the most part
24 those documents do not exist. What we had, we turned
25 over to the company in the 5,000 documents that were

1 produced on December 29th. Those were contacts
2 with, primarily contacts, business records that were
3 held by OCC, contacts with Consumers Services
4 division representatives where customers would call
5 in and would inquire or have complaints about
6 all-electric. That information was all turned over
7 to the company.

8 That was not trial preparation efforts
9 because those were pretrial and it did not -- the
10 trial preparation, as I understand it, does not
11 attach at that particular point in time. So we are
12 not claiming that anything that occurred prior to the
13 filing in February of 2010 is covered by
14 attorney-client nor covered by trial preparation.

15 EXAMINER PRICE: So post-February 2010
16 what are you claiming is attorney-client privilege?
17 I don't want potential. I want to know what
18 documents are you claiming are attorney-client
19 privilege. Describe the documents that are
20 privileged.

21 MS. GRADY: Well, your Honor, we cannot
22 identify them at this time. We have prepared, as
23 I've indicated, samples of that.

24 EXAMINER PRICE: Describe one of those
25 samples for us. I understand you want the Bench to

1 review this in camera, but certainly FirstEnergy is
2 entitled to at least what the description is.

3 MS. GRADY: Understanding, your Honor,
4 that when I draw the distinction, the distinction
5 that I'm drawing, in addition to being drawn by the
6 date, it also is drawn by the fact that
7 communications that occurred with our Consumers
8 Services division as opposed to our attorneys and
9 trial preparation team are privileged -- are not
10 privileged, whereas those communications occurring
11 between attorneys and analytical staff within OCC
12 that are assigned to the case would be the group that
13 the attorney-client and that the trial preparation
14 privilege attaches to. So it would be
15 communications --

16 EXAMINER PRICE: You believe.

17 MS. GRADY: Yes, your Honor, that is my
18 belief, that the communications would be more close
19 and more really related to pursuing the allegations
20 and pursuing the issues in the company's tariff
21 filing.

22 EXAMINER PRICE: Could you describe the
23 documents that you're claiming are privileged?

24 MS. GRADY: In general, your Honor, it
25 would be to the extent that customers would call,

1 would have contact with OCC or that counsel for CKAP
2 would have contact with OCC with respect to
3 particular issues that customers have raised with
4 respect to promises in marketing that were --

5 EXAMINER PRICE: Let's talk about the
6 relationship between you and CKAP.

7 MS. GRADY: Yes, your Honor.

8 EXAMINER PRICE: Is Mr. Kutik correct
9 that a joint defense agreement requires a commonalty
10 of interest?

11 MS. GRADY: Your Honor, I think in
12 general that is the correct rule; however, the
13 commonalty of interest does not mean identical
14 interest.

15 EXAMINER PRICE: And where can you cite
16 to that?

17 MS. GRADY: Your Honor, if needed, we can
18 cite to case law.

19 EXAMINER PRICE: You just represented to
20 me it doesn't mean identical. Now tell me your basis
21 for saying that.

22 MS. GRADY: I'm sorry?

23 EXAMINER PRICE: You just told me --

24 MS. GRADY: That's my general --

25 EXAMINER PRICE: -- common doesn't mean

1 identical. Can you cite to a case that says common
2 is not identical?

3 MS. GRADY: Your Honor, that's my general
4 understanding. I would have that information back at
5 the office.

6 EXAMINER PRICE: But you don't have it
7 for me.

8 MS. GRADY: I do not have it today for
9 you because I did not expect the joint defense
10 agreement to be the subject of this motion to compel
11 because it was not an issue that was raised in the
12 motion to compel.

13 EXAMINER PRICE: But in CKAP's motion to
14 intervene they claimed that their interests were not
15 represented by OCC.

16 MS. GRADY: That is correct, your Honor.

17 EXAMINER PRICE: And FirstEnergy
18 claimed --

19 MS. GRADY: Your Honor.

20 EXAMINER PRICE: Yes.

21 MS. GRADY: I'm sorry. I don't mean to
22 interrupt.

23 EXAMINER PRICE: Just this one time.

24 MS. GRADY: I believe that, and certainly
25 CKAP can speak for itself, but I believe that in the

1 motion to intervene CKAP made the representation that
2 although our interests are similar, they may diverge
3 at a certain point in time.

4 EXAMINER PRICE: Did OCC at any time file
5 a memoranda in support or in reply to FirstEnergy
6 saying that, yes, these are different?

7 MS. GRADY: We filed -- yes, we did, your
8 Honor.

9 EXAMINER PRICE: So you don't need to
10 worry about what Mr. Corcoran would say. What did
11 you say to the Commission in terms of the differences
12 of interest between OCC and the CKAP parties?

13 MS. GRADY: I don't have that pleading in
14 front of me so I can't recall exactly what was said,
15 but we did support their motion to intervene and I
16 believe it was on grounds based on case law that the
17 Commission --

18 EXAMINER PRICE: Based upon the fact that
19 you were not representing the same interests that
20 they were representing.

21 MS. GRADY: Not necessarily. Now, again,
22 a difference being that, you know, and my
23 understanding being that the joint defense agreement
24 does not require interests to be identical, but there
25 was certainly common interest. The common interest

1 is in working on a solution to the all-electric rate
2 issue.

3 EXAMINER PRICE: Is there any case where
4 two parties at interest would be identical?

5 MR. SMALL: No.

6 MS. GRADY: I don't know.

7 EXAMINER PRICE: Mr. Small thinks not.

8 MR. SMALL: No. That's kind of the
9 definition of a party.

10 EXAMINER PRICE: Well, but she said the
11 joint defense agreement doesn't require they be
12 identical, and I'm saying, I am exploring that and
13 saying in any case would parties' interests be
14 identical?

15 MS. GRADY: Not necessarily, especially
16 in a complex public utilities case it would not be.

17 EXAMINER PRICE: So your argument that
18 they don't have to be identical, I guess that's where
19 you're losing me, and maybe I'm just confused.

20 MS. GRADY: Your Honor, unfortunately, I
21 would say that the joint defense -- the law on joint
22 defense agreements in Ohio is not very clear. My
23 research does indicate that, that there's been no
24 holdings really by the Ohio Supreme Court nor by the
25 Sixth Circuit.

1 EXAMINER PRICE: But you don't dispute
2 Mr. Kutik's assertion that the interests have to be
3 common.

4 MS. GRADY: No, your Honor --

5 EXAMINER PRICE: And you don't dispute --

6 MS. GRADY: -- I would not dispute that.

7 EXAMINER PRICE: -- the fact that the
8 record demonstrates that your own representations are
9 that you have different interests in this proceeding.

10 MS. GRADY: We may have different
11 interests. If it comes to the point where there is
12 necessarily an allegation, an issue of whether the
13 entire residential customer class, for instance,
14 should support the entire discount, that is certainly
15 an interest that may diverge from the CKAP interests.

16 EXAMINER PRICE: I have one more thing,
17 one more issue and then I'll let you continue.

18 MS. GRADY: Thank you.

19 EXAMINER PRICE: Mr. Kutik represented to
20 the Bench that conversations amongst parties that
21 properly have the joint defense agreement between the
22 attorneys are not privileged, or may be privileged
23 but --

24 MR. KUTIK: No.

25 EXAMINER PRICE: I'm sorry. That the

1 conversations between attorneys may be privileged,
2 but conversations between the attorney from one party
3 and the other parties are not privileged. Is that
4 your understanding?

5 MS. GRADY: No, your Honor, that is not.

6 EXAMINER PRICE: And can you cite to a
7 case that demonstrates that that's wrong?

8 MS. GRADY: Your Honor, I believe that
9 comes out from the Upjohn proceeding, the control
10 groups concept which suggests that members within the
11 control group do not -- who are not necessarily
12 attorneys would be covered by the attorney-client
13 privilege, and I can certainly get that cite to you.

14 EXAMINER PRICE: I'm sure Mr. Kutik would
15 be happy to respond to that. I'll stop interrupting
16 your argument, sorry.

17 MS. GRADY: Your Honor, I'm really
18 concluded with my argument I would say. I believe,
19 your Honor, that we fully responded to the arguments
20 that were made in the motion to compel in our
21 memoranda contra and I stand on that memoranda
22 contra.

23 EXAMINER PHILLIPS-GARY: Go ahead,
24 Mr. Kutik, do you want to respond?

25 MR. KUTIK: Thank you, your Honors. The

1 issue of privilege is certainly before the Bench, and
2 properly so. It was squarely raised in their memo
3 contra as a basis to deny our motion to compel. So
4 certainly it is ripe for consideration and is ripe to
5 determine whether that is a proper basis to deny the
6 discovery that we are entitled to.

7 With respect to the case law, let's talk
8 about the case law, about the go-fish issue. The
9 case law is that it is improper to attempt to, quote,
10 ". . . attempt to hide a needle in a haystack by
11 mingling responsive documents with large numbers of
12 nonresponsive documents"; Williams versus Taser
13 International, Inc., 2006 WL 1835437, at 7, Northern
14 District of Georgia, 2006. In Re: Sulfuric Acid
15 Antitrust Litigation, 231 FRD 351, 363, Northern
16 District of Illinois, 2005.

17 Under this rule it is improper for a
18 party to point to all documents in a case as being
19 responsive to a request; Unlimited Resources, Inc.
20 versus Deployed Resources, LLC, 2009 WL 1563489, at
21 2, Northern District of Florida in 2009.

22 The specific cases that are cited by OCC
23 are irrelevant, particularly there are two that they
24 cite; one is the Blank versus Parker case. That case
25 involved a production of an individual's medical

1 records. The party seeking the record was the
2 individual, and the other party said, "Well, you can
3 get your own medical record."

4 The other case, Ohio versus Antonio
5 Franklin, was about getting access to a 911 tape.
6 Again, one party said, "We want the 911 tape." The
7 other party said, "Well, you can go to the police and
8 get the 911 yourself." In both instances the
9 particular thing to be discovered was knowable and
10 discrete, unlike what we have here.

11 With respect to the issue of burden -- of
12 privilege, excuse me, the party claiming privilege
13 has the burden of proving it; In Re: Guardianship of
14 Marcia S. Clark, 2009 Ohio 6577, at 8, at paragraph
15 8.

16 The party asserting the privilege must
17 demonstrate each element of it; see State ex rel.
18 Dann versus Taft, 2006, 109 Ohio St.3d 364.

19 A blanket assertion of privilege is
20 insufficient to meet this burden; Hitachi Medical
21 Systems America, Inc. versus Branch, 2010 U.S.
22 District, Lexis 1597, at 7, Northern District of
23 Ohio, September 24, 2010.

24 The privilege must be proven document by
25 document, and this demonstration is typically made

1 with a privilege log; United States versus Rockwell,
2 897 F.2d 1255, 3d Circuit 1990.

3 And actually Ohio courts have also held
4 that the claim of privilege is waived where a
5 privilege log is not timely provided; McPherson
6 versus Goodyear Tire & Rubber Co., 146 Ohio App.3d
7 441 at 444, Ninth District 2001.

8 In terms of the claim that they can say
9 that, well, if we talk to a customer after February
10 of 2010, that's privileged, that issue has been, we
11 believe, addressed in the OCC versus DP&L case.
12 There's a difference of reporting past events and
13 seeking legal advice. The whole point of an
14 attorney-client privilege is to seek or to provide
15 legal advice.

16 If someone is coming to OCC and said in
17 2000-whatever, or in 1995 Ohio Edison told me X,
18 that's not necessarily something that falls under the
19 rubric of a privilege. That's reporting their
20 problem to help them with their case; it's not
21 necessarily for legal advice.

22 In terms of the issue of whether mere
23 gathering is sufficient or turns something into work
24 product, we will cite the case -- and I think we have
25 a copy here if the Bench wishes -- DeCuzzi,

1 D-e-C-u-z-z-i, versus City of Westlake,
2 2010-Ohio-6169, Eighth District, where the court
3 there rejected an argument that the work product
4 privilege prohibits a request for discovery of facts
5 or evidence that support a party's contentions, which
6 is what we've asked here.

7 You can't just say or you can't turn a
8 fact or a document into work product simply by
9 gathering it. If that was the case, then I guess
10 we're not -- we should not be forced to be in the
11 position of waiting till we see what they produce at
12 the hearing or what they produce or what they cite to
13 in their brief before we know, Oh, that's what they
14 were talking about. That's what was responsive to
15 our discovery. We should have that discovery now so
16 we have a fair opportunity to meet that sometime at
17 the hearing and certainly later on in our briefs.

18 The issue that they're still looking for
19 stuff. We made the request in November. We're in
20 January. We're weeks away from what is now scheduled
21 to be the hearing. When are we going to see that
22 stuff? They haven't shown that any of this stuff is
23 privileged, either attorney-client privilege, joint
24 defense privilege, or a work product protection.

25 They haven't shown that they are not

1 required to provide us with specific citations to the
2 documents that they believe are responsive that
3 they've pointed us to in the record, the public
4 record, in the docket or in the public hearing
5 testimony. We're entitled to what we've moved, your
6 Honor, and we believe you should grant our motion.

7 EXAMINER PRICE: I'd asked Ms. Grady
8 repeatedly for specific case citations, and I would
9 ask you that but you've already given them to the
10 Bench. Can you point to a case where the Commission
11 itself has stated that failure to provide a privilege
12 log would waive the attorney-client privilege?

13 MR. KUTIK: I do not know of such
14 authority at this time, your Honor --

15 MS. GRADY: Your Honor --

16 MR. KUTIK: -- but, if I may finish, your
17 Honor, as I indicated earlier, the rules of the
18 Commission are patterned after the rules of Ohio
19 civil procedure, and this Commission frequently
20 defers and cites case law under those rules in
21 determining parties' obligations under the
22 Commission's rules, and I would suggest that this
23 Bench can do so with respect to the authority that
24 we've cited.

25 EXAMINER PRICE: Can you respond to

1 the -- I asked Ms. Grady to respond to your assertion
2 that communications under a joint defense agreement
3 between the attorney for one party and communications
4 with another party are not necessarily privileged,
5 she raised an Upjohn case that she believes work
6 product privilege was supporting her position that
7 they are privileged; I was wondering if you could
8 respond to that.

9 MR. KUTIK: Yes, your Honor. Courts have
10 consistently held that where no party -- where no
11 attorney is present or included in the communication,
12 the joint defense privilege does not attach, and we
13 would cite as an example, your Honor, Schachar,
14 S-c-h-a-c-h-a-r, versus American Academy of
15 Ophthalmology, Inc., 106 FRD 187, 192 at 93, Northern
16 District of Illinois in 1985. And also United States
17 versus Lucas, 2009 U.S. District Lexis, 123884 at 15,
18 Northern District of Ohio 2009, where the court
19 agrees that the joint defense privilege requires
20 involvement of counsel.

21 MS. GRADY: Your Honor.

22 EXAMINER PRICE: We'll get to you,
23 Ms. Grady.

24 I think I was asking a question more
25 specific. Is it true that a communication between --

1 you keep pointing to areas where no attorney is
2 involved.

3 MR. KUTIK: Correct.

4 EXAMINER PRICE: And I'm saying are there
5 any cases that demonstrate that the communications
6 are strictly between attorneys and not from attorney
7 to joint defense agreement, not an attorney?

8 MR. KUTIK: I guess I'm not sure I
9 understand your question. Are you asking me if --

10 EXAMINER PRICE: Let's eliminate the
11 hypotheticals.

12 MR. KUTIK: Okay.

13 EXAMINER PRICE: Ms. Steigerwald is not
14 an attorney. She may or may not have communicated
15 with OCC; I gather that you'd like those
16 communications.

17 MR. KUTIK: Yes.

18 EXAMINER PRICE: Do you have any cases to
19 support the position that irrespective of the joint
20 defense privilege her communications with OCC are not
21 subject to the attorney-client privilege?

22 MR. KUTIK: If they were with
23 nonattorneys, I believe I've just cited you those
24 authorities.

25 EXAMINER PRICE: Those are the cases that

1 you're relying on that we can look at.

2 MR. KUTIK: Yes. And of course the
3 hypothetical assumes that there is a proper joint
4 defense privilege and, as we indicated earlier, we
5 don't think there is given the difference of interest
6 that has been alleged between these two parties which
7 was the reason for entrance of CKAP in this case.

8 EXAMINER PRICE: Ms. Grady argues that
9 the interests don't have to be identical for there to
10 be a joint defense privilege.

11 MR. KUTIK: Well, certainly, your Honor,
12 as you indicated, the test of identity is a difficult
13 one, as is the test of commonalty. Certainly, if
14 they are diverse enough to bring different voices to
15 the Commission, they are diverse enough to be
16 excluded from a joint defense agreement; that's our
17 opinion.

18 EXAMINER PRICE: Can you think of any
19 previous situation where the Commission has excluded
20 a joint defense agreement?

21 MR. KUTIK: Your Honor, I'm not aware of
22 any issue where this Commission has upheld a joint
23 defense agreement.

24 EXAMINER PRICE: Fair enough.

25 MS. GRADY: Your Honor.

1 EXAMINER PRICE: Ms. Grady, would you
2 like the floor?

3 MS. GRADY: Very quickly and briefly,
4 your Honor. I would note that the attorney-client
5 privilege as recognized under RC 2317.02 in Ohio's
6 common law is a privilege that is not lightly taken.
7 The court has held that there can be no waiver of
8 that attorney-client privilege except by means of the
9 specific conditions set forth in 2317.02(A) and that,
10 your Honor, was a holding in Jackson versus Greger,
11 the Ohio Supreme Court --

12 EXAMINER PRICE: But doesn't that assume
13 that the attorney, that there was an actual
14 attorney-client relationship, that the privilege
15 actually existed?

16 MS. GRADY: Yes, your Honor, I believe it
17 does.

18 EXAMINER PRICE: We're not talking
19 about -- we're not asking you to waive
20 attorney-client privilege documents. We are
21 inquiring as to whether documents are properly
22 considered to be attorney-client privilege, and that
23 makes that case irrelevant, doesn't it?

24 MS. GRADY: Well, your Honor, we would
25 assert that you are -- we are talking about waiving.

1 You're asking us to waive attorney -- or, you are
 2 going into the area in questioning the applicability
 3 of a joint defense agreement, and under the joint
 4 defense agreement we believe an attorney-client
 5 privilege exists and it is an adjunct to the
 6 attorney-client privilege that the joint defense
 7 agreement exists under and, therefore, we would
 8 believe, to the extent that the company is inquiring
 9 into communications between, for instance, Sue
 10 Steigerwald and OCC, that --

11 EXAMINER PRICE: I'd be happy to look at
 12 those in camera. Do you have those?

13 MS. GRADY: I have examples of those,
 14 your Honor, yes. This is actually examples of all
 15 the different types of -- do you want me to
 16 specifically, because there's a bunch in here.

17 EXAMINER PRICE: I'd like to see the ones
 18 that are --

19 MS. GRADY: Between us and Sue
 20 Steigerwald, yes.

21 MR. KUTIK: Your Honor, are we on the
 22 record or off the record?

23 EXAMINER PRICE: We're on the record.
 24 We're just gathering documents for our in-camera
 25 review.

1 MR. KUTIK: Thank you.

2 EXAMINER PRICE: I'm still troubled,
3 Ms. Grady, by the idea that you seem to be -- let's
4 go off the record, Maria, one minute.

5 (Discussion off the record.)

6 EXAMINER PRICE: Let's go back on the
7 record. I'm still troubled by the fact that you are
8 not specifically claiming, you're making a broad
9 claim, you've not identified documents and said these
10 e-mails A, B, C, and D are all privileged for this
11 reason. You're simply saying everything's
12 privileged. You're not making specific
13 document-by-document claims.

14 MS. GRADY: That is correct, your Honor.

15 EXAMINER PRICE: Can you address why you
16 didn't?

17 MS. GRADY: Why we did not?

18 EXAMINER PRICE: Yeah.

19 MS. GRADY: We did not believe that the
20 holding of the Commission and the Commission's rules
21 require a privilege log.

22 EXAMINER PRICE: Okay.

23 MS. GRADY: In addition to the quite
24 burdensome and lengthy task of going through --

25 EXAMINER PRICE: E-mails from a party?

1 MS. GRADY: A lot more than that, your
2 Honor.

3 EXAMINER PRICE: Okay.

4 MS. GRADY: And we did make the objection
5 that these were overly broad.

6 EXAMINER PRICE: Okay. Let's go to a
7 couple other questions to follow this up. Is Amy
8 Gomberg an attorney with OCC?

9 MS. GRADY: No, she's not. She's our
10 legislative liaison.

11 EXAMINER PRICE: She's not on your
12 analytical staff?

13 MS. GRADY: We would consider her to be
14 part of the control group and she is on the case team
15 working on the all-electric case.

16 EXAMINER PRICE: Irv Zaretsky, is he an
17 attorney?

18 MR. SMALL: I'm sorry, who is it?

19 EXAMINER PRICE: So you're claiming
20 privilege between communications between Sue
21 Steigerwald and Amy Gomberg, who's not an attorney
22 and not part of your analytical team, she's your
23 legislative liaison, based on the idea that she's on
24 your case team. Is she on all your case teams?

25 MS. GRADY: No, she is not. She's within

1 the control group, your Honor.

2 EXAMINER PRICE: The control group?

3 MS. GRADY: According to Upjohn and the
4 Upjohn cite, your Honor, and contained in our
5 memoranda contra --

6 EXAMINER PRICE: Who all was in your
7 control group?

8 MS. GRADY: It would be particularly, for
9 instance --

10 EXAMINER PRICE: I'm asking specifically,
11 not for instance. I want to know who all is in your
12 control group.

13 MS. GRADY: Particularly the case team,
14 your Honor?

15 EXAMINER PRICE: Who all?

16 MS. GRADY: Attorneys, analytical, there
17 are some consumer services representatives.

18 EXAMINER PRICE: Okay. So it's any
19 number of people.

20 MS. GRADY: Well, it is a --

21 EXAMINER PRICE: How many employees are
22 employed with OCC?

23 MS. GRADY: It is not the entire OCC,
24 your Honor, it is a case team which represents --

25 EXAMINER PRICE: How many people?

1 MS. GRADY: Half dozen, 9, 10, 11, 12.

2 EXAMINER PRICE: Is it identified in
3 formal, or are you making this up as you go along?

4 MS. GRADY: Yes, it is, your Honor.

5 EXAMINER PRICE: You said a half dozen,
6 9, 10. You either have a list of control group
7 people or you don't.

8 MS. GRADY: Yes, your Honor. I can
9 provide that. I don't know offhand right now as we
10 sit here today. OCC is involved in many cases with
11 many different case teams, and I have been involved
12 in numerous case teams.

13 EXAMINER PRICE: There's only one
14 discovery conference today.

15 MS. GRADY: Understood, your Honor.

16 MR. SMALL: I know she's arguing, but I
17 will point out as lead counsel to this that the OCC
18 as a matter of course on all of its work before the
19 Public Utilities Commission has case teams assigned,
20 has attorneys assigned, those people who show up on
21 the pleadings. We have analytical people assigned,
22 sometimes we have individuals from Consumers Services
23 or whoever it is, but it is always a formalized list
24 and I can tell you who those people are right now.

25 EXAMINER PRICE: I'd appreciate that. I

1 think the record would be clear.

2 MR. SMALL: They are myself, Ms. Grady,
3 Mr. Allwein, we are the three attorneys assigned to
4 the case. Ms. Hixon is assigned to the case. I
5 believe Gregory Slone, who is an analytical person,
6 is assigned to the case. Brian Vogt, who is an
7 analytical person in the Analytical department of the
8 OCC. Amy Gomberg, who is not a typical person who is
9 assigned to a case, but she is part of the formalized
10 case team.

11 And not only are these people, is this a
12 list of people who are assigned to this case, but we
13 actually have distribution lists where we send things
14 and we send it to the case team, and we have many
15 case teams. When you send it to this list, this case
16 team list, everybody on that case team receives that
17 communication, so that's how formalized it is. And
18 that's how we operate not only in this case, but in
19 all other cases before the Public Utilities
20 Commission.

21 So it is a known, defined group, and it's
22 not 70 employees. It's on the order of a half dozen.

23 EXAMINER PRICE: I was asking her to name
24 them. She was just struggling to name them. I
25 appreciate you making the record clear.

1 MR. SMALL: I just want to make it clear
2 that there's a small group of people --

3 EXAMINER PRICE: This was set ahead of
4 time.

5 MR. SMALL: I believe I've named all of
6 them, but plus or minus one person.

7 MS. GRADY: Set at the beginning of the
8 case.

9 EXAMINER PRICE: I have another follow-up
10 on the joint defense --

11 MR. KUTIK: Your Honor.

12 EXAMINER PRICE: We will let you respond.
13 I understand there's been new issues raised, and we
14 will let you respond to those.

15 What was the date of the joint defense
16 agreement?

17 MS. GRADY: The joint defense agreement
18 was formally signed, your Honor, on --

19 MR. KUTIK: Your Honor, if they have a
20 joint defense agreement, we've asked for that and we
21 have not received a copy. I'd like to get a copy
22 right now.

23 EXAMINER PRICE: We will address that
24 after I get my date.

25 MS. GRADY: I believe October 20th,

1 2010.

2 EXAMINER PRICE: Okay.

3 MS. GRADY: I understand, your Honor,
4 that --

5 EXAMINER PRICE: Can you explain -- would
6 you like to give a copy of that to Mr. Kutik.

7 MS. GRADY: I don't know that they have
8 asked for it. If he could identify what discovery
9 request. I'm unaware of that.

10 MR. KUTIK: We asked CKAP for a copy of
11 that by way of our e-mail of December 16th.

12 MS. GRADY: Did you ask OCC for that?

13 MR. KUTIK: Well, it's in this room. We
14 have asked for it. We're entitled to it. If you
15 want to play that game, then give it to Mr. Corcoran
16 and he can give it to us.

17 EXAMINER PRICE: Do you have any
18 objection to giving the joint defense agreement to
19 Mr. Kutik?

20 MS. GRADY: No.

21 EXAMINER PRICE: We'll get you a copy of
22 that.

23 MR. KUTIK: Thank you, your Honor.

24 EXAMINER PRICE: Is there anything wrong
25 with that particular copy you have that you can't

1 give it to --

2 MS. GRADY: This is the only copy that I
3 brought this morning.

4 EXAMINER PRICE: That's okay. There's
5 not handwritten notes on there?

6 MS. GRADY: I don't believe so.

7 EXAMINER PRICE: If you need it back,
8 he'll give it back. Trust me.

9 MS. GRADY: Well, if we're going to hear
10 arguments about this, I would prefer to have a copy
11 of it.

12 EXAMINER PRICE: I think he would like to
13 see it so he can make some arguments about it. He
14 has asked for it in discovery before now.

15 MS. GRADY: From CKAP.

16 MR. CORCORAN: Can I see that e-mail? I
17 don't remember coming across it.

18 MR. KUTIK: Can I see that?

19 EXAMINER PRICE: Now, with respect to the
20 date of the joint defense agreement, do you have any
21 case law to support the idea that communications
22 entered into prior to the establishment of a joint
23 defense agreement are now retroactively privileged?

24 MS. GRADY: Your Honor, we do not have
25 specific case law, however --

1 EXAMINER PRICE: So this --

2 MS. GRADY: Your Honor, if I may finish.

3 EXAMINER PRICE: You may.

4 MS. GRADY: However, your Honor, I
5 believe there is -- I would believe that a joint
6 defense agreement, whether it was formalized or
7 informalized, existed and was understood to exist
8 prior to October 20th, and that there is case law
9 that suggests that the joint defense agreement need
10 not be in writing and need merely be an understanding
11 between parties in order to exist.

12 EXAMINER PRICE: And when did this
13 alleged understanding come to pass?

14 MS. GRADY: Your Honor, I would have to
15 check the e-mails and the --

16 EXAMINER PRICE: Mr. Small probably being
17 lead counsel is aware of when this alleged
18 understanding came to pass. He's lead counsel.

19 Mr. Small.

20 MR. SMALL: Working jointly between the
21 OCC and the CKAP parties has a much longer history
22 than October, and I can't place a date on it. The
23 situation with the public awareness largely happened
24 in February of 2010. Sometime after that --

25 EXAMINER PRICE: Sometime between

1 February and October?

2 MR. SMALL: Well, I would place it in the
3 area of the time when the -- well, you have
4 documentary evidence of it to a certain extent. The
5 motion to intervene by the CKAP parties and our
6 support for that effort is a landmark part of our
7 cooperation with the CKAP parties, yes.

8 EXAMINER PRICE: So when you filed a
9 document with the Commission representing that you
10 represented different interests, you didn't think it
11 relevant to say "But we have a joint defense
12 agreement"?

13 MR. SMALL: I don't, obviously --

14 EXAMINER PRICE: Well, when did you file
15 your memorandum in support of CKAP's intervention?

16 MR. SMALL: I don't have the date right
17 now.

18 EXAMINER PRICE: But as of that time you
19 had already reached an informal understanding that
20 you were going to jointly defend this case, but you
21 didn't think that was relevant to include to the
22 Commission and saying "Oh, but we have diverse
23 interests"; is that right?

24 MR. SMALL: Much has been made of
25 identical, common, or diverse interests. The

1 situation is that we're both interested in
2 representing the interests of all-electric customers
3 and, in general, both parties support discounted
4 rates for -- continued discounted rates for
5 residential customers. You know, we're not talking
6 about residential --

7 EXAMINER PRICE: But here you're trying
8 to withhold documents, and so you're being very flip
9 because the burden is on you to not respond to
10 discovery. They have legitimately asked you
11 questions on discovery. You've responded that some
12 of those, and you've identified them here, are not
13 disclosable because they're part of a formal joint
14 defense agreement.

15 Now when it turns out that these
16 documents were dated before the formal joint defense
17 agreement was entered into, you're saying "But there
18 was an informal joint defense agreement." The
19 burden's on you to demonstrate why these documents
20 should not be disclosed to FirstEnergy.

21 MR. SMALL: Okay. Well, I thought the
22 question that was directed towards me was --

23 EXAMINER PRICE: Well, it was, but you
24 were going into much --

25 MR. SMALL: -- how and why we're working

1 with the CKAP parties, and I'm playing out that
2 while, as Ms. Grady has argued, we don't have
3 identical interests, and I don't think there's any
4 intention on our part -- there certainly isn't any
5 intention on our part to file a joint brief in this
6 case after the evidence is taken and so forth.

7 EXAMINER PRICE: Notwithstanding the fact
8 that you filed several joint pleadings thus far.

9 MR. SMALL: We have joined with them in
10 some instances and we have not joined with them in
11 other instances. As a --

12 EXAMINER PRICE: More often than not.

13 MR. SMALL: No, not more often than not.
14 There have been a couple of joint filings. And in
15 other instances we've been in the same -- we've been
16 supporting generally the same position but they've
17 been separate filings.

18 And we have separate witnesses, and we're
19 developing our cases along those lines on separate
20 grounds and you can, for instance, the Commission or
21 the Bench is well familiar with Mr. Yankel's work
22 who's been hired by the OCC. This is a very separate
23 effort from the CKAP parties, although we have common
24 interests and we have a common theme in the direction
25 that we're going. And it's not my intention to file

1 a joint brief in this case either.

2 EXAMINER PRICE: We won't hold you to
3 that, Mr. Small.

4 EXAMINER PHILLIPS-GARY: Go ahead,
5 Mr. Kutik.

6 MR. KUTIK: Your Honor, I just have one
7 point I'd like to make and that is the colloquy that
8 you had with counsel about who was in the so-called
9 control group shows you, I think, just the utter
10 bankruptcy of the argument. The control group in
11 Upjohn is defined as the individuals that exercised
12 direct -- had control over management or managerial
13 decisions; that's not anybody in a case team that
14 they can make up in response to your questions.

15 Just take the one example of Ms. Gomberg.
16 A legislative aide on a case before the Commission?
17 I mean, that is laughable for them to assert that
18 she's a member of the control group of OCC by any
19 shape or form. They haven't -- the bottom line is
20 they have the burden to show that the privilege or
21 whatever privilege applies; they have come woefully
22 short of that and our motion should be granted.

23 EXAMINER PHILLIPS-GARY: All right. At
24 this point in time we're going to take the motion
25 under advisement and we're going to turn to the

1 motion to compel with regard to the CKAP parties.

2 Again, I guess to start out in regard to
3 this motion, the motion to compel seeks, in the first
4 set, request for production of documents 5 and 7 and
5 interrogatories 3, 4, and 5, as well as responses to
6 the third set of discovery, and I just wanted to know
7 as an initial matter, is that still the issues at
8 hand with regard to your motion to compel to seek out
9 parties?

10 MR. KUTIK: Your Honor, we did receive
11 responses I believe, I don't know if these were
12 supplemental responses, to our third set. We only
13 really I think have issue with regard to one of the
14 witnesses that they have identified in response to
15 our interrogatory, and that is a woman by the name of
16 Marla Haughn who is identified as a former employee
17 of one of the companies.

18 We asked for the contact information for
19 all of the witnesses, and for some witnesses CKAP
20 told us -- some witnesses they said basically "You
21 have the record," and Ms. Haughn was one of those
22 people where they said "Well, you have the record,
23 you go find it."

24 MR. CORCORAN: That's not true.

25 EXAMINER PHILLIPS-GARY: You'll have a

1 chance to respond.

2 EXAMINER PRICE: You'll have a chance to
3 respond, Mr. Corcoran.

4 MR. KUTIK: You said "Objection. This
5 information is readily available to FirstEnergy."

6 MR. CORCORAN: To a different question.

7 EXAMINER PHILLIPS-GARY: Okay. All
8 right.

9 MR. KUTIK: No.

10 EXAMINER PHILLIPS-GARY: Hold on. Before
11 you get into that, I'm still trying to get clear
12 exactly what the agenda is here.

13 MR. KUTIK: So with respect to the third
14 set, we would like to get contact information with
15 respect to interrogatory 18, part D, which asks
16 "State" -- this is "For each person who you intend to
17 call as a nonexpert witness at the hearing in this
18 matter: B) State a contact address and phone number
19 for the witness." For Ms. Haughn we were told
20 "Objection. This information is readily available to
21 FirstEnergy." And then it says "Unknown at this
22 time."

23 So our view is if they have the contact
24 information, provide it. If not, let us know that.

25 EXAMINER PHILLIPS-GARY: Okay. So that's

1 with the third set of discovery.

2 MR. KUTIK: Right.

3 EXAMINER PHILLIPS-GARY: Just that one.

4 MR. KUTIK: And with respect to all the
5 other matters that we have in our motion, they are
6 still live issues.

7 EXAMINER PHILLIPS-GARY: Okay. Then with
8 the first set, request for production 5 and 7,
9 interrogatories 3, 4, and 5 --

10 MR. KUTIK: Well, Mr. Garber reminds me
11 that I guess there is one other issue with respect to
12 our request to have them name their members; CKAP.
13 We've asked for CKAP -- that's in the second set. So
14 that's an additional issue.

15 EXAMINER PHILLIPS-GARY: All right.

16 MR. KUTIK: That is not in our motion.

17 EXAMINER PHILLIPS-GARY: Okay. But
18 that's in the second set, but it's not included in
19 the motion.

20 MR. KUTIK: Yes.

21 EXAMINER PHILLIPS-GARY: Okay.

22 MR. KUTIK: And essentially, your Honor,
23 the merits of our motion with respect to CKAP at all
24 are the same as with respect to OCC. They made the
25 same objections, the same type of objections, number

1 one, the go-fish objection, and number two, it's
2 privileged. And for reasons that we said for OCC, we
3 don't believe that CKAP has met their obligations
4 under the rules.

5 EXAMINER PHILLIPS-GARY: Okay.
6 Mr. Corcoran, if you want to respond.

7 MR. CORCORAN: Sure. Specifically there
8 was a request for information to interrogatory No. 20
9 that was directed at Bob Schmitt Homes and asked for
10 names and addresses of potential witnesses, and the
11 information that we had we gave them.

12 In particular, with regard to
13 Mrs. Haughn, she was a name that I have heard from a
14 fellow employee that worked for FirstEnergy, but we
15 have not tracked her down, and so I don't know the
16 information. If I had it, as you can see from the
17 responses that I gave on the other questions, when I
18 had the information, I gave it. There are some
19 people that I only knew their phone number, I didn't
20 know their address, so I gave them their phone
21 number.

22 But in particular with Mrs. Haughn, I
23 don't really know anything about her. I don't even
24 know how long she worked for the company, or I'm
25 having trouble figuring out when she worked for the

1 company as it relates to the other people that I
2 mentioned. People can't remember whether she came
3 before or after a particular person.

4 EXAMINER PRICE: If you were able to
5 obtain her address, would you supplement your
6 discovery response?

7 MR. CORCORAN: Oh, absolutely.

8 EXAMINER PRICE: But you're saying today
9 you do not have any contact information for her.

10 MR. CORCORAN: I do not.

11 EXAMINER PRICE: But you included her on
12 the list because if you do obtain it, you intend to
13 call her.

14 MR. CORCORAN: Yes, your Honor. You have
15 to remember that the list was asked for pretty early
16 in the process, so I just threw down some names that
17 I thought I might be calling at some point in time
18 that I hadn't even contacted.

19 In particular, there is a gentleman who
20 was identified in response to CKAP's interrogatory
21 No. 18 that as of that particular day I was meeting
22 with him later in the afternoon. He said he had
23 something to show me, and I met with him and it
24 wasn't anything that was worthwhile. So I had him
25 listed, but I wrote in the response that I won't be

1 calling him. So I didn't know who I was going to be
2 calling at that moment. I gave the information that
3 I had at the time.

4 EXAMINER PHILLIPS-GARY: Did you have
5 any -- that relates to the third set. What about
6 with regard to the first set and the second set, the
7 motion to compel with regard to those sets of
8 discovery?

9 MR. CORCORAN: Well, first of all, I
10 think the argument that we've told them to go fish is
11 not entirely accurate. I have made it clear in an
12 e-mail to Mr. Garber, who included it in his motion
13 to compel, that I did not have the information and I
14 said -- I told him plain as day that I didn't have it
15 and he said, "Well, you got to give it to me." You
16 know, you can't force me to give him something that I
17 don't have.

18 EXAMINER PRICE: Well, let's --

19 MR. CORCORAN: My supplemental -- I'm
20 sorry.

21 EXAMINER PRICE: Let's start with
22 interrogatory No. 3.

23 MR. CORCORAN: All right.

24 EXAMINER PRICE: It asked you to identify
25 each and every document that you intend to introduce.

1 I mean, clearly at some point you intend to introduce
2 some documents.

3 MR. CORCORAN: Yes, sir.

4 EXAMINER PRICE: In there you say, "CKAP
5 will introduce documents previously submitted at the
6 public meetings." I have two questions about that
7 phrase. When you say "submitted," do you mean
8 documents that are currently in the -- let me take a
9 step back.

10 When you say "public meetings," are you
11 referring to the formal public hearings held by the
12 Commission, or are you referring to some of the town
13 hall and other meetings that went on that are not
14 called as a part of this proceeding?

15 MR. CORCORAN: In my supplements I did
16 use the word "meetings," but I was referring to the
17 hearings.

18 EXAMINER PHILLIPS-GARY: Okay.

19 EXAMINER PRICE: When you say
20 "submitted," there were two types of document at
21 those public hearings, there were documents that
22 customers, what I would say, submitted, gave in lieu
23 of testimony, gave with their testimony, and then
24 there's a much more limited number of documents,
25 maybe a couple dozen per hearing that OCC or yourself

1 separately asked to be marked and moved for
2 admission.

3 MR. CORCORAN: Correct.

4 EXAMINER PRICE: When you say
5 "submitted," did you mean only those documents that
6 were already marked and moved for admission, or were
7 you talking about potentially any document as a part
8 of the public hearing record?

9 MR. CORCORAN: At the time that I
10 supplemented my responses I was saying all those
11 documents, the ones that were submitted by
12 individuals outside of the formal testimony at the
13 public hearings or those that were specifically
14 identified by the counsel for parties at those
15 hearings. And I went further and said those that are
16 on file with the PUCO that have been submitted
17 directly to you, to the docket.

18 EXAMINER PRICE: But how is that, I mean,
19 in interrogatory No. 3 it does say "Identify each and
20 every document that you intend to introduce into
21 evidence." When you say "Go look at the case
22 docket," how is that not "go fish"?

23 MR. CORCORAN: Well, first of all, I have
24 not identified those documents other than that's
25 where I'm going to go to identify them. And counsel

1 for FirstEnergy was there at those same hearings and
2 was knowledgeable as to which of those documents were
3 being submitted.

4 EXAMINER PRICE: But he's not
5 knowledgeable to which documents you thought were
6 relevant; the ones that make your case.

7 MR. CORCORAN: At this point in time I'm
8 not sure either. I haven't gone through those
9 documents. I have been spending a tremendous amount
10 of my time responding to discovery requests which,
11 you know, have been voluminous in this case.

12 EXAMINER PRICE: What is your basis --
13 well, I don't want to belabor this, but did you
14 prepare a privilege log of actual documents that you
15 specifically believe are attorney-client privilege?

16 MR. CORCORAN: I did not.

17 EXAMINER PRICE: Can you generally
18 describe those documents that you think would be
19 attorney-client privilege?

20 MR. CORCORAN: Not without some context I
21 don't believe.

22 EXAMINER PHILLIPS-GARY: Well, how
23 about --

24 EXAMINER PRICE: The context is like in
25 the request for production No. 5, they asked for all

1 documents and communications received from or sent to
2 the Commission or any customer of one of the
3 companies, and then you say that though you claim --
4 you claim trial preparation privilege, work product
5 doctrine, attorney-client privilege.

6 MR. CORCORAN: Yeah. The question talks
7 about all documents and communications received from
8 or sent to any customer of one of the companies
9 regarding the all-electric tariffs or rates or
10 credits, and that's essentially every single document
11 in this case.

12 EXAMINER PRICE: How about the staff?
13 Are there any documents that are responsive to the
14 request that were sent to the staff that were not
15 docketed?

16 MR. CORCORAN: I'm not aware of any. If
17 they were sent to the staff of the Commission, I --

18 EXAMINER PRICE: From you or any of your
19 number of clients.

20 MR. CORCORAN: Not that I'm aware of.
21 But if they were sent to the staff, shouldn't they
22 have been docketed?

23 EXAMINER PRICE: Not necessarily. Not
24 all communications that go to the staff are docketed.
25 We get communications every day, all the time that

1 are not docketed.

2 MR. CORCORAN: I'm not aware of any.

3 EXAMINER PRICE: Can you inquire from
4 your clients?

5 MR. CORCORAN: I sent these requests to
6 them for them to look over.

7 EXAMINER PRICE: Do you have anything to
8 add that we've not gone over repeatedly with OCC with
9 respect to the joint defense agreement?

10 MR. CORCORAN: There's been a lot made
11 about that, a lot of discussion about it. I believe
12 that we have been -- the reason for our appearance in
13 this case is because our interests diverged from the
14 very beginning. I think we have found common
15 interest over time, but I believe our initial reason
16 for entering into this case was because we had
17 different interests based on public statements that
18 came out of the OCC before we even got involved.

19 They had a totally different view of the
20 all-electric rate discount until a lot of this
21 information came to their attention, and as they
22 learned more about it, I think they became more aware
23 of some of the common interests that we hold. But
24 there have been discussions between me and Mr. Small
25 where there are some areas where we're not exactly on

1 the same page and that's why we continue to be in
2 this case.

3 EXAMINER PHILLIPS-GARY: Do you have any
4 sort of informal time line when -- you've indicated
5 that you're not aware of some of these documents
6 because you're still in the process of going through
7 and preparing and all of that. Do you have sort of a
8 formal time line of when you -- it seems, based on
9 your response, that once you become aware of things,
10 that you have been willing to supplement your
11 answers, and I'm just wondering what the time line
12 that you think that process might be complete or if
13 you're able to at this point.

14 MR. CORCORAN: I wish I could tell you.
15 You know, a lot of it -- going through transcripts or
16 anything like that right now is beyond my
17 comprehension. Right now my schedule is to try to
18 get my expert testimony prepared so it can be filed
19 on the 10th and then move on to the slew of
20 depositions that we've got scheduled in this case.

21 I have pointed out to you on at least one
22 occasion that I am one person, and I've made that
23 clear to Mr. Burk as well. I can only work on, you
24 know, one thing at a time. And as I uncover
25 information, I have given it to them. While my

1 information has not always arrived on time, it has
2 arrived.

3 EXAMINER PRICE: Can you tell me who Irv
4 Zaretsky is? Is he a member of CKAP?

5 MR. CORCORAN: I believe he is. And I
6 also believe he is an attorney, but I'm not 100
7 percent sure.

8 EXAMINER PRICE: But he's not
9 representing CKAP.

10 MR. CORCORAN: What was that?

11 EXAMINER PRICE: He's not representing
12 CKAP.

13 MR. CORCORAN: No. No, he's not. I
14 believe -- he may have testified at a public hearing
15 once before, but there's a lot of, you know, people
16 that have come before the Commission in this case, I
17 can't remember everybody.

18 EXAMINER PRICE: Mr. Kutik.

19 MR. KUTIK: Yes. Your Honor, I think
20 that what you've seen here is that the companies'
21 requests, which no one really contends are
22 illegitimate, have been totally not answered. We're
23 not asking for exotic or, hardly, burdensome stuff.
24 We're asking for what's the basis of your claim that
25 the companies supposedly made misrepresentations,

1 improper inducements, and so forth. That apparently
2 is what CKAP, for example, is in the case about. And
3 they're saying, you know, three or four weeks before
4 the hearing "I don't know."

5 It seems to me there's been a total lack
6 of diligence here. We provided to you in our motion
7 an example of an e-mail that Ms. Steigerwald sent to
8 who knows how many people. We never heard whether
9 Mr. Corcoran asked Ms. Steigerwald, "Well, where's
10 the rest of your e-mails?" At the very least we
11 should get every e-mail that she has that she sent
12 out to anybody relating to this case, except her own
13 counsel. But there's been no indication that he did
14 that.

15 Oh, I sent it out to them and asked them
16 whether they had anything; that's not good enough,
17 especially when he gets the motion and specific
18 evidence that was not provided to us that should have
19 been provided to us. There's no claim here that that
20 e-mail was in any way, shape, or form privileged
21 under any construction of that term.

22 And so what we have here, your Honor,
23 from both parties, OCC and CKAP, et al., "We're still
24 looking. I don't know yet. I still have to go
25 through this stuff." The very basis of the case,

1 when are we going to find out? We have to produce
2 our witness, our prefiled testimony, next week. Next
3 Monday. When are we going to know that?

4 They're not ready to go, your Honor, and
5 certainly because they're not ready to go, we're not
6 ready to go. And so at this point, your Honor, we
7 move for a 60-day extension of all dates.

8 MR. CORCORAN: Your Honor, may I respond?

9 EXAMINER PRICE: Absolutely.

10 MR. CORCORAN: Thank you. If you
11 remember, this case was originally scheduled to go
12 forward on November 27th. Prior to that no
13 discovery had occurred whatsoever; none. Discovery
14 wasn't started until well after the fact. Once the
15 continuance to this January 27th date was granted,
16 that's when the discovery started in this case.

17 If they're so concerned about all this
18 stuff, you would have thought that they would have
19 been prepared to go on November 27th and had asked
20 for all their discovery responses then

21 EXAMINER PRICE: In all fairness,
22 Mr. Corcoran, the Commission did issue an entry on
23 rehearing in November which changed the scope of the
24 hearing, and I'm sure from FirstEnergy's perspective
25 a large scope of the hearing, and so I'm sure that

1 they were not feeling the need to do discovery
2 because until the entry on rehearing the scope of
3 this hearing was much narrower.

4 MR. CORCORAN: Except that I believe that
5 we're losing a little bit of focus in here, and even
6 with some of their discovery requests. The
7 information that is being requested is information
8 that comes from FirstEnergy and its companies. The
9 information that they're asking us if we have would
10 have been information that came from them. They
11 generated it. It's not --

12 EXAMINER PRICE: But they're entitled to
13 know what you have in your hand for -- this is not
14 blind poker. This is a civil matter. There should
15 be full and free discovery on both sides. We're
16 about trying to find out what the truth is here, not
17 about who can tactically manipulate the discovery
18 rules best. They're entitled to know what you have,
19 and you're entitled to know what they have.

20 MR. CORCORAN: You bring up an important
21 point about using discovery rules. One of the
22 questions that they asked is whether a witness has
23 ever taken service pursuant to any all-electric rate
24 from one or more of the companies, and that was asked
25 of the nonexpert witnesses that are going to be

1 appearing at the hearing. That's information that
2 they have. If they're a customer of FirstEnergy,
3 they have that information. Why are they asking me?
4 They're just doing this to fill up my time and, as
5 you can see --

6 EXAMINER PRICE: Is it part of the motion
7 to compel?

8 MR. CORCORAN: I'm sorry?

9 EXAMINER PRICE: Is that part of the
10 motion to compel?

11 MR. CORCORAN: I don't know. They
12 brought it up with Marla Haughn, for instance, when
13 he said --

14 EXAMINER PRICE: I'm just saying if it's
15 not part of the motion to compel, it's not before us
16 today.

17 MR. CORCORAN: It was brought up just a
18 few minutes ago when they started their presentation
19 when they were talking about Marla Haughn.

20 EXAMINER PHILLIPS-GARY: That
21 interrogatory, is that No. 20 they mentioned on the
22 third set, part D?

23 MR. CORCORAN: Yeah, interrogatory
24 No. 20, yes. Correct. I'm talking about C through F
25 is all asking questions about whether they've taken

1 service pursuant to all-electric rates. At what date
2 did they take service. Really? You've got to ask
3 me? Look it up in your own computer. You've got the
4 information. Why do I need to go through that. My
5 people, how would they know, if they've been living
6 in their house for 30, 40 years? How would they
7 know? And I don't even have --

8 MR. KUTIK: Are you contending that an
9 individual wouldn't know when they took service at
10 the house?

11 EXAMINER PRICE: Mr. Kutik.

12 MR. CORCORAN: A nonexpert witness who --

13 MR. KUTIK: Yes.

14 MR. CORCORAN: -- works for FirstEnergy?

15 MR. KUTIK: You don't know when you took
16 service.

17 MR. CORCORAN: You didn't ask me. I
18 know.

19 MR. KUTIK: All right.

20 MR. CORCORAN: But I'm the counsel.

21 EXAMINER PHILLIPS-GARY: Mr. Corcoran.

22 MR. CORCORAN: But you're asking about
23 Mr. Kaplan --

24 EXAMINER PRICE: Mr. Corcoran, everybody,
25 let's respond to the Bench directly.

1 MR. CORCORAN: I am. I'm mentioning that
2 they asked, you know, Mr. Kaplan, who is a former
3 employee of FirstEnergy. He's a nonexpert witness.
4 He worked for FirstEnergy. If he has service in the
5 state of Ohio, electric service, they would know
6 that. They could look that up.

7 EXAMINER PRICE: Not necessarily,
8 Mr. Corcoran. Actually, I'm not an expert on
9 FirstEnergy's billing system, but to the best of my
10 knowledge it's tied to addresses and account numbers,
11 not necessarily tied to individuals. Especially when
12 you're talking about records that go back numerous
13 years.

14 EXAMINER PHILLIPS-GARY: The other --

15 EXAMINER PRICE: People's names change.
16 People move.

17 MR. CORCORAN: I don't have addresses for
18 specifically Mr. Kaplan, so I wouldn't be able to
19 give him that information anyway.

20 EXAMINER PRICE: If you don't have it,
21 you don't need to give it to him.

22 EXAMINER PHILLIPS-GARY: And I would
23 point out that that interrogatory is not subject to
24 the motion to compel, nor have you filed for relief
25 from answering that from the Bench. I understand you

1 have some frustration, but we need to look at the
2 issues that have been brought specifically before us.

3 MR. CORCORAN: Okay. I would like to
4 make an oral motion to compel, then, right now if I
5 may.

6 EXAMINER PRICE: To compel what?

7 MR. CORCORAN: Responses to request for
8 production of documents that I sent out.

9 EXAMINER PRICE: We'll get to that at the
10 end. I mean, we will come back to this.

11 MR. CORCORAN: Okay.

12 EXAMINER PRICE: But we're dealing with
13 your request for production now and we'll deal with,
14 if you've got motions to compel, at the end of this.
15 I think Mr. Small reserved the right to bring up some
16 additional issues at the end of this. So we will get
17 to that.

18 MR. KUTIK: Your Honor, may I respond at
19 this point?

20 EXAMINER PRICE: You may.

21 MR. KUTIK: Your Honor, apparently the
22 argument is, well, if we have it, if we've ever had
23 it, if the companies have ever had it, you should
24 just have it, why should I give it to you.

25 We're talking about 30 or 40 years of

1 materials here. And if they're the ones that have
 2 made the allegations, are they contending at this
 3 point that they don't know what their allegations are
 4 based on? Apparently, that's their argument. That's
 5 not a basis for them to say, "Well, sorry. Little
 6 ole me, I can't respond." Either they know or they
 7 don't know. If they need more time, we should get
 8 more time, and that was the point of my motion.

9 EXAMINER PRICE: Would any of the parties
 10 like to speak to the motion for a continuance? Let
 11 me rephrase that. Mr. Small, what's your response to
 12 the motion for a continuance?

13 MR. SMALL: Could I ask the Bench for a
 14 short intermission before we go into that matter?

15 EXAMINER PRICE: What's the purpose of
 16 the intermission?

17 MR. SMALL: I have my legal director in
 18 the room with me and I would like to confer with him.

19 EXAMINER PRICE: Certainly. Let's take
 20 ten minutes. Let's go off the record.

21 (Recess taken.)

22 EXAMINER PRICE: Let's go back on the
 23 record. Mr. Small, you have the floor.

24 MR. SMALL: Your Honor, there has been
 25 previously some discussion about the procedural

1 schedule and it was the OCC's motion, in fact, to
2 proceed with the schedule and to push this case along
3 and the OCC, for the reasons stated then and for
4 other reasons, does not favor a 60-day extension.

5 EXAMINER PRICE: Mr. Corcoran?

6 MR. CORCORAN: Your Honor, one of the
7 issues in this case has been the uncertainty around
8 the rate for the homeowners that have to deal with
9 it, and in particular as it relates to the
10 marketability of their homes, and that is something
11 that we heard time and time again at the public
12 hearings in this matter. For that reason, I would
13 say let's stay on the schedule that we have because
14 any delay interferes with a resolution and just adds
15 uncertainty in the real estate market.

16 EXAMINER PRICE: As to both OCC and CKAP
17 parties, then, in the event that we were to rule in
18 favor of the motion to compel, what is a reasonable,
19 hard deadline for you responding to all of the
20 outstanding FirstEnergy discovery requests? Are you
21 willing to respond by Monday?

22 MS. GRADY: Your Honor, with respect, at
23 least with respect to the motion to compel that I
24 addressed this morning would be filed under memoranda
25 contra, are you ruling that there is no privilege or

1 is your ruling --

2 EXAMINER PRICE: I didn't make any
3 ruling. I simply said assuming for the sake of
4 argument that -- we're talking about the motion for
5 continuance, and both parties said we want to move
6 forward.

7 MS. GRADY: Correct.

8 EXAMINER PRICE: I said assuming for the
9 sake of argument FirstEnergy prevails on this motion
10 to compel, are you prepared to respond fully by
11 Monday?

12 MS. GRADY: Your Honor, to the extent
13 that the company prevails on its motion to compel on
14 privileged information, we would take an immediate
15 interlocutory appeal, which is permitted under
16 4901-1-15(A).

17 EXAMINER PRICE: So you have no intention
18 of responding prior to Wednesday under any
19 circumstances.

20 MS. GRADY: If the ruling is to compel
21 the production of privileged information, yes, your
22 Honor.

23 EXAMINER PRICE: Mr. Corcoran?

24 MR. CORCORAN: If you're specifically
25 referring to and pointing out the items that have

1 been submitted to the docket and submitted in public
2 hearings in this matter, I am not prepared to provide
3 that by Monday given the --

4 EXAMINER PRICE: Wednesday?

5 MR. CORCORAN: -- expert testimony. I
6 think Wednesday --

7 EXAMINER PRICE: I don't want to give
8 parties -- in the event that FirstEnergy prevails,
9 and we need to break, Mr. Phillips-Gary and I need to
10 break and discuss this, I'm just -- we have a motion
11 for a continuance, you've indicated you're not
12 willing to proceed with that, and so we need to go
13 back and say, okay, let's look at this and then if
14 they prevail, what is a reasonable deadline to give
15 you.

16 MR. CORCORAN: Given that the expert
17 testimony is due on Monday, Wednesday would be -- I
18 couldn't possibly look at all the public hearing
19 transcripts in two days and have a response.

20 MR. SMALL: Your Honor --

21 EXAMINER PRICE: The parties understand
22 FirstEnergy does actually have a right to prepare
23 their defense, don't you? I mean, you have asked
24 them to eat, what I understand, is something on the
25 order of 90 million dollars a year forever, and I

1 have to be mindful of their due process rights in the
2 event that you ultimately win this proceeding, and
3 I'm having trouble squaring how you think they're
4 going to prepare for hearing if you don't respond to
5 discovery requests.

6 MR. SMALL: Your Honor, earlier there was
7 an argument about knowable and discrete, and our
8 position has been that when you point to the public
9 docket, you are pointing to a knowable and
10 discrete --

11 EXAMINER PRICE: That is nonresponsive to
12 the point I was making.

13 MR. SMALL: No; the point I was making --

14 EXAMINER PRICE: What's a reasonable time
15 period between serving discovery responses and the
16 commencement of the hearing?

17 MR. SMALL: I'm trying to make the point
18 that the docket that we point to is tremendously
19 repetitive. In other words, we could point out
20 things that were in the public docket, but to go
21 through every single one of them when it's
22 tremendously repetitive, we could certainly give
23 examples, but --

24 EXAMINER PRICE: I think some of their
25 discovery, this goes back to the motion to compel,

1 was simply asking you to identify those documents you
2 intend to move the admission for at the hearing. And
3 they're certainly entitled to those documents.

4 MS. GRADY: We have not made that
5 determination yet, your Honor.

6 MR. SMALL: Well, we have to the extent
7 we've already moved a couple dozen documents.

8 EXAMINER PRICE: I understand that.

9 MR. SMALL: We intend on moving the
10 prefiled testimony of Mr. Yankel; that's clear. We
11 haven't taken a deposition yet of --

12 EXAMINER PRICE: But you've identified,
13 each of you have identified ten witnesses you intend
14 to call whose testimony will not be prefiled, and
15 surely you have an understanding of what documents
16 you intend to introduce through each of those 19, 20
17 witnesses.

18 MR. SMALL: I was prevented from -- I
19 have not had an opportunity to take the depositions
20 of those former employees, and it's clear that some
21 of --

22 EXAMINER PRICE: Except for one.

23 MR. SMALL: Okay. But I have not had a
24 chance to depose them, and I'm in the same situation
25 as Mr. Corcoran, without having, you know, without

1 having had a chance to even talk to these people I
2 certainly can't give the addresses and phone numbers
3 of these people. I simply put them down on the list
4 as a possibility. There's very little chance that I
5 will call most of those people, but, you know, the
6 entry came out that we had to have this early list
7 put out, so we put out people who would be
8 possibilities.

9 But, you know, it's not -- I wouldn't say
10 it's my expectation of calling those people. I'd
11 certainly have to talk to them first.

12 EXAMINER PRICE: Okay.

13 MR. SMALL: So we've already moved
14 documents. We intend on moving Mr. Yankel. After
15 we've had a chance to talk to these people we'll find
16 out whether there's anything else, but, you know, up
17 until then that's -- those are all the documents that
18 we intend right now that we know we would introduce
19 into the record.

20 EXAMINER PHILLIPS-GARY: So in
21 identifying these individuals there were no documents
22 that helped you identify these individuals that --

23 MR. SMALL: They were identified in the
24 discovery coming from FirstEnergy with the exception
25 of Elio Andreatta.

1 EXAMINER PHILLIPS-GARY: Right.

2 MR. SMALL: Who is the name on a document
3 that was presented at a local public hearing. Bill
4 Miese is a name that was mentioned by somebody in a
5 local public hearing. And the others were identified
6 by the company by name, but not by contact
7 information, and that's the reason why you notice in
8 my filing there's an asterisk next to all those
9 names, for that reason.

10 I've been asked during the week, I've
11 been asked by FirstEnergy during the week to provide
12 the contact information, the addresses of these
13 individuals in response to one of their discovery
14 requests. They haven't given me the addresses of
15 these individuals, and they asked me for their
16 addresses. That's the kind of discovery inquiries
17 we're getting from FirstEnergy right now.

18 MR. KUTIK: Well, let's be fair and let's
19 be accurate. What we asked you for were names and
20 addresses of your witnesses before we saw your
21 witness list. With respect to people who are not our
22 witnesses -- who are not our former employees, we're
23 certainly entitled to that information unless you're
24 claiming that you represent them and that you will
25 produce them for depositions; I haven't heard any of

1 that.

2 MR. SMALL: I'm sorry, I'm referring to
3 this e-mail. The one that the gentleman next to
4 you -- sitting next to you sent to us.

5 MR. KUTIK: Sure.

6 EXAMINER PRICE: Mr. Small, I asked
7 everybody earlier --

8 MR. SMALL: I'm sorry.

9 EXAMINER PRICE: -- very politely to
10 respond to the Bench.

11 MR. SMALL: I apologize.

12 EXAMINER PRICE: And the court reporter
13 certainly has no idea which e-mail you're holding up
14 in your hand, so you're just muddying up my record.

15 MR. SMALL: I'm just saying, your Honor,
16 I have an e-mail in front of me which was dated this
17 last week asking me for the contact information which
18 they refused to give to me. That's the quality of
19 the inquiries we're getting today.

20 MR. KUTIK: Well, you clearly
21 misconstrued our e-mail to you, for your own venal
22 purpose.

23 EXAMINER PRICE: Mr. Kutik, let's not
24 characterize these things.

25 MR. KUTIK: Well, this is the situation

1 that we face. We have asked throughout this
2 proceeding, once it had been expanded in our view,
3 for an orderly process to understand what the case
4 was going to be about. I mean, this has been a very,
5 kind of a moving target in our view, through no fault
6 of anyone's perhaps, but that's still the case.

7 We asked, our suggestion, our preference
8 was and still is that testimony be prefiled so that
9 everyone would know in advance of the testimony -- in
10 advance of the hearing what was going to be the
11 subject of the hearing. That was opposed, and the
12 Bench at least at this point has agreed with that
13 view. Okay.

14 Well, at least let's understand the
15 documents that underlie your case. We haven't gotten
16 any of that. And we hear today that even if it's not
17 privileged, they're still unable to provide it to us
18 and they can't even tell us when they might be able
19 to provide it to us. We're really in an untenable
20 situation and unfair situation for the companies.

21 MR. CORCORAN: Your Honor, may I?

22 EXAMINER PHILLIPS-GARY: Go ahead.

23 MR. CORCORAN: Some of our nonexpert
24 witnesses that were identified by Bob Schmitt Homes
25 were former FirstEnergy employees, and while there

1 has been one document that has been identified and
 2 provided to FirstEnergy, the other people on the list
 3 do not have documents associated with their names,
 4 and that is one of the items that I requested in my
 5 request for production. That would be the basis of
 6 my motion to compel. I would love to identify
 7 documents --

8 EXAMINER PRICE: Are you making a motion?

9 MR. CORCORAN: No, I'm not going there
 10 right now.

11 EXAMINER PRICE: Okay.

12 MR. CORCORAN: I'm saying that I would
 13 love to identify documents if they would be provided
 14 to me, but as of right now they haven't been
 15 provided. And the subject of this matter is or part
 16 of it is the market -- the questions relating to the
 17 marketing of the all-electric rate, and these
 18 documents speak directly to that issue and they've
 19 not been provided yet.

20 MR. RANDAZZO: Your Honor, may I?

21 EXAMINER PRICE: Mr. Randazzo.

22 MR. RANDAZZO: May be I heard? One of
 23 the things I think that struck me throughout this
 24 proceeding is that in part we're here as a result of
 25 rates that were produced by a settlement that was

1 adopted by the Commission that all the parties at
2 this table with the exception of one, Mr. Corcoran's
3 clients, signed onto. This case has been very much
4 tried in the press up to this point and there are a
5 lot of --

6 EXAMINER PRICE: Not by the Commission.

7 MR. RANDAZZO: Pardon?

8 EXAMINER PRICE: Not by the Commission.

9 MR. RANDAZZO: Not by the Commission,
10 your Honors, of course. And my concern is, at this
11 point, is to the extent that this case proceeds with
12 vague allegations or references to sources of the
13 claims that have been advanced in favor of the relief
14 that is being requested, it puts the Commission in a
15 continuing position of being subjected to trial in
16 the press.

17 So as much as anything I think it's
18 incumbent on all of us as officers of the court, in
19 this case the Commission, to go forward with clear
20 evidence to support the allegations and avoid the
21 continuing emotional ordeal that customers, who have
22 been used by everybody in this process for their own
23 particular advantage, to avoid any further creation
24 of expectations that are unwarranted based upon what
25 the facts and the law will support.

1 If we want to be fair to people who are
2 out there wondering about what their electric bills
3 are going to be, that issue cuts both ways. There
4 are customers who might be impacted by the
5 Commission's resolution of how to deal with the
6 shortfall in revenue associated with any discount as
7 well.

8 This case is more than about just the
9 all-electric customers. It's about all the customers
10 and how the Commission needs to balance the interests
11 of all those customers in view of the facts and the
12 law.

13 So to the extent -- and what I've heard
14 here today is that there still is a fairly loose
15 understanding of what is going to be produced to
16 support the allegations that have been made in this
17 case about misrepresentation, marketing practices,
18 and the like, and I think that is a disservice not
19 only to the Commission, but to the customers that are
20 sitting out there waiting for resolution to this
21 case, and with that I'll be quiet.

22 EXAMINER PRICE: And we will let you have
23 the last word, Mr. Randazzo.

24 At this point we will take a break of 30
25 minutes while Mr. Phillips-Gary and I review the

1 three outstanding motions made by FirstEnergy, two
2 motions to compel and a motion for continuance.

3 MR. KUTIK: Your Honor, do you intend to
4 deal with the motion to quash?

5 EXAMINER PRICE: We will deal with the
6 motion to quash when we return.

7 MR. KUTIK: Thank you.

8 EXAMINER PRICE: So let's go off the
9 record.

10 EXAMINER PHILLIPS-GARY: We're not
11 forgetting about --

12 EXAMINER PRICE: We understand that other
13 parties may have additional motions after we make our
14 rulings, but my understanding was from the parties
15 that they wanted to hear what the rulings were first
16 and, if they were adverse, I believe are going to
17 make some interlocutory appeals, and if we're in
18 their favor, I don't know what they're going to do.

19 MS. GRADY: We'll probably still take an
20 interlocutory appeal.

21 EXAMINER PRICE: Probably still take an
22 interlocutory appeal. With that, let's take a
23 30-minute break. Thank you.

24 (At 12:34 p.m. a lunch recess was taken
25 until 1:00 p.m.)

1 Friday Afternoon Session,
2 January 7, 2011.

3 - - -

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

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

11 Both motions to compel filed by
12 FirstEnergy will be granted. The Bench finds that
13 FirstEnergy has demonstrated that OCC and the CKAP
14 parties have failed to identify the specific
15 documents legitimately sought in discovery by the
16 companies, therefore, for each document that OCC and
17 the CKAP parties have identified referenced in
18 10-176-EL-ATA the parties will, which is responsive
19 to FirstEnergy's discovery requests, the parties will
20 identify the date of filing of the document and the
21 name, if applicable, of the person filing or
22 submitting the document.

23 The Bench notes that OCC and the CKAP
24 parties have failed to establish an attorney-client
25 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 MS. GRADY: Your Honor, we could take an
2 interlocutory appeal of that ruling.

3 EXAMINER PRICE: And that will not be
4 certified because that is well within the authority
5 of the attorney examiner. Please make your arguments
6 now, Ms. Grady.

7 MS. GRADY: Your Honor, we would believe
8 that the rules permit us filing an immediate
9 interlocutory appeal in writing under 4901-1-15 and
10 that that ruling is -- and that those rules provide
11 for a time period of five days from the
12 interlocutory -- from the ruling to make the
13 interlocutory appeal.

14 EXAMINER PRICE: You made your
15 interlocutory appeal. We're now talking about the
16 process for arguing your interlocutory appeal,
17 Ms. Grady. Please make your arguments in support of
18 your interlocutory appeal at this time so the
19 Commission can rule on them at the nearest possible
20 opportunity.

21 MS. GRADY: Your Honor, I'm somewhat
22 confused.

23 EXAMINER PRICE: You made a motion for --
24 you said you were going to take an interlocutory
25 appeal.

1 MS. GRADY: That is correct.

2 EXAMINER PRICE: I am saying please
3 explain why you believe the Bench's ruling was wrong
4 so that the Commission can review this transcript and
5 the Commission can then rule on whether or not your
6 interlocutory appeal is correct. We're not going to
7 have further memoranda. The Commission is going to
8 rule based upon the arguments made by the parties at
9 this time. Now do you understand?

10 MS. GRADY: I understand, your Honor, and
11 I would --

12 EXAMINER PRICE: And then you asked for
13 an interlocutory appeal on my decision --

14 MS. GRADY: That is correct.

15 EXAMINER PRICE: -- but this is a
16 procedural schedule and I just indicated that that
17 won't be certified, so you should proceed at this
18 time.

19 MS. GRADY: I would make an
20 intermediate -- or I would argue, your Honor, that
21 under 4901-1-15 certification is not required where
22 the order grants a motion to compel discovery or
23 denies a motion for protective order and that your
24 ruling does so, as well as falls under subsection (4)
25 which requires the production of documents or

1 testimony over an objection based on privilege.

2 EXAMINER PRICE: Nobody's disputing that
3 you have an immediate interlocutory appeal at the
4 Commission. I'm just saying do you have anything to
5 add to the record?

6 MS. GRADY: With respect to the immediate
7 interlocutory appeal under 4901-1-15(A)(4), no, your
8 Honor, we will make those arguments, per the rule, in
9 a written document.

10 EXAMINER PRICE: Let's go off the record.

11 (Discussion off the record.)

12 EXAMINER PRICE: Please go back on the
13 record and read out loud the section where she took
14 an interlocutory appeal.

15 (Record read.)

16 (Discussion off the record.)

17 EXAMINER PRICE: Let's go back on the
18 record. Ms. Grady.

19 MS. GRADY: Thank you, your Honor. Your
20 Honor, at this time OCC would alert the Bench that it
21 intends to take an interlocutory appeal of the ruling
22 which requires the production of documents over OCC's
23 objections based on privilege.

24 EXAMINER PRICE: According to my
25 understanding of the rule and what we've done so far

1 today you've made your interlocutory appeal earlier
 2 in this discussion, you indicated to the Bench that
 3 you'd like to take an immediate interlocutory appeal
 4 to the Commission and I set it for arguments. Is
 5 there a difficulty setting it for arguments?

6 MS. GRADY: Yes, your Honor. Your Honor,
 7 OCC would like to take advantage of its opportunities
 8 under 4901-1-15 to actually file in writing its
 9 interlocutory appeal.

10 EXAMINER PRICE: If that were the case,
 11 why did you ask for an immediate interlocutory appeal
 12 five minutes ago?

13 MS. GRADY: Your Honor, I misspoke. When
 14 I read the rules, I was referring to the fact that a
 15 request for certification is not needed, and that was
 16 my mistake, and I apologize if I misled the Bench.

17 EXAMINER PRICE: No, certification is not
 18 needed, you are exactly correct, if you get an
 19 immediate interlocutory appeal on this issue.

20 Mr. Kutik, do you have any response to
 21 this?

22 MR. KUTIK: Well, your Honor, I heard
 23 what you heard, and I was also under the impression
 24 they were taking not only one, but two interlocutory
 25 appeals, or trying to.

1 EXAMINER PRICE: That's what my
2 understanding was as well.

3 MR. KUTIK: And so I guess our view is
4 that, as I said, we are prepared to argue and we have
5 been arguing all morning on the issue and we would
6 basically be content to stand on the record as it now
7 is comprised.

8 If the Bench, however, is willing to
9 entertain the withdrawal of the motion, then we would
10 again renew our motion for continuance to accommodate
11 this delay in getting what we believe we're entitled
12 to.

13 EXAMINER PRICE: Well, the Bench is not
14 willing to entertain a withdrawal of the previous
15 interlocutory appeal. I would note that an
16 interlocutory appeal has been made. If OCC would
17 like to attempt to withdraw that, it will be up to
18 the Commission to decide whether that withdrawal was
19 properly done.

20 Ms. Grady, are you withdrawing your
21 previous request for interlocutory appeal?

22 MS. GRADY: Your Honor, I am simply
23 informing the Bench that I'm taking an interlocutory
24 appeal and that we are going to file an application
25 for review under 4901-1-15(C).

1 EXAMINER PRICE: Are you making a motion,
2 or are you withdrawing a motion, or are you just
3 providing some sort of advanced notice of what you
4 might file later?

5 MS. GRADY: I'm providing an advanced
6 notice of what will be filed later and alerting the
7 Bench that this is an issue.

8 EXAMINER PRICE: So you acknowledge you
9 already made your interlocutory appeal. You already
10 requested your interlocutory appeal notwithstanding
11 what the transcript says.

12 MS. GRADY: Your Honor, I'm not sure what
13 the transcript says at this point, but my indication
14 is that we will file an interlocutory appeal and we
15 will file an application for review under
16 4901-1-15(C).

17 EXAMINER PRICE: Okay. I understand.
18 Notwithstanding the interlocutory appeals, all
19 parties are still under a continuing obligation to
20 respond to any matters not privileged by the dates
21 set by the attorney examiner. As I understand it,
22 you're only applying for -- or, your interlocutory
23 appeal only applies to those documents which are
24 being required to be produced over your privilege
25 claim; is that correct? So all other documents will

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

1 reading from my notes to be very specific as to what
2 was being ruled. But the bottom line is the motion
3 to compel has been granted.

4 MS. GRADY: Understood.

5 EXAMINER PRICE: Okay. At this time we
6 will take up OCC's motion to quash FirstEnergy's
7 subpoena. Mr. Small.

8 MR. SMALL: Thank you, your Honor. The
9 motion's been submitted, I won't -- I'll repeat,
10 there are two bases, fundamental bases for the OCC's
11 motion to quash. The first section, which I won't
12 repeat, has to do with numerous procedural
13 requirements that were not followed by the
14 FirstEnergy companies and one of them, of course, was
15 the notice; proper notice wasn't given to the
16 parties. That's the purpose for having signed
17 subpoenas put into docketing and served on parties.
18 I didn't learn about it until after the long weekend
19 and on a Tuesday.

20 I will move on to the rest of the motion
21 to quash which is substantive and not procedural.
22 Tom Logan, the person to whom the -- and the subject
23 of the subpoena was a letter by Elio Andreatta
24 addressed to Mr. Tom Logan and dated June 18th,
25 1988. It was presented by Mr. Logan, the person to

whom the letter was addressed, when he testified at the Strongsville hearing and be presented the letter with a two-page attachment, that can be located in the Strongsville transcript on page 124 to 127.

FirstEnergy did not raise any questions regarding authenticity at the local public hearing. The objections should have been made as to authenticity; Mr. Logan was available. He was the person to whom the letter was addressed and gave personal authentication of the letter. According to Rule of Evidence 901(B)(1) it gives as an example of authentication and identification the testimony of a witness with knowledge, and that was Mr. Logan, the person who received the letter.

Rule 1003 provides for the admission of duplicates, I quote, "unless a genuine question is raised as to the authenticity of the original." FirstEnergy had an opportunity at the Strongsville local public hearing to do just that, they didn't raise any question about the genuineness of the letter.

EXAMINER PRICE: Mr. Small, are you really arguing to the Bench that FirstEnergy had an adequate opportunity to inquire as to the authenticity of the letter that was presented? Are

1 you arguing the five minutes reviewed by counsel for
2 FirstEnergy was sufficient?

3 MR. SMALL: Well, as you know, your
4 Honor, and I believe there are portions of the
5 transcript that support this, there was a question --

6 EXAMINER PRICE: Just portions. Go
7 ahead.

8 MR. SMALL: There was a concern about
9 whether persons who appeared and were invited by the
10 Commission to come forth with their evidence of
11 contracts or commitments by the company should come
12 forth with those documents, and there was a concern
13 about whether those individuals would then be further
14 burdened by coming -- being required to come to
15 Columbus after they'd already made the
16 representations about the origins of the documents
17 and so forth.

18 And the purpose of the local public
19 hearings was to gather those documents. We took some
20 pain at the local public hearings that I attended for
21 counsel to look over those documents.

22 On several occasions I asked witnesses
23 about their personal knowledge of, not Mr. Logan but
24 in other instances, about their personal knowledge in
25 connection with the documents; that was clearly an

1 attempt to use the witness when he was available to
2 give that testimony. Now, if FirstEnergy --

3 EXAMINER PRICE: But wasn't the ruling
4 that I made at the local public hearing that
5 FirstEnergy needed to ask any questions they had of
6 the witness, but that they could further raise
7 authenticity or any other relevance issues
8 subsequently?

9 MR. SMALL: It was my understanding that
10 the authenticity was being dealt with at the
11 particular time --

12 EXAMINER PRICE: Questions.
13 Cross-examination regarding authenticity was being
14 dealt with at the time. Certainly, FirstEnergy
15 legitimately has a right to go back and review their
16 files to determine if this document has somehow been
17 altered, if that document is even available in their
18 files, but that's neither here nor there. Isn't that
19 true?

20 MR. SMALL: Well, I believe that the
21 matter of admissibility of these documents was
22 bifurcated. The matters of admissibility would be
23 handled at the local public hearings, but that the
24 company had an opportunity, before the Bench ruled on
25 their actual admission into the record, could argue

1 things such as relevance and so forth, those things
2 that would not require the actual attendance of the
3 witness.

4 Now, let's take an instance where
5 FirstEnergy is given a second bite at the apple to
6 question the authenticity of it. We really need to
7 have Mr. Logan back in Columbus in order to respond
8 to --

9 EXAMINER PRICE: Am I incorrect? I
10 thought that the author of the document was on your
11 witness list.

12 MR. SMALL: Well, he was put there
13 because --

14 EXAMINER PRICE: So you're planning to
15 call the author of the document.

16 MR. SMALL: Well --

17 EXAMINER PRICE: Why would you not be
18 able to inquire any questions or respond to any
19 questions FirstEnergy is raising regarding the
20 authenticity of the document by inquiring from the
21 original author of the document?

22 MR. SMALL: First of all, as I mentioned
23 earlier, because we were asked to identify people
24 early, we put down anybody who might --

25 EXAMINER PRICE: I'd just like to make

1 one thing clear on the record. You were asked to
2 identify parties in lieu of prefiling testimony and,
3 if I recall correctly, you had actually offered to
4 identify parties in lieu of prefiling testimony. And
5 I think you're muddying the record by indicating this
6 was done early somehow.

7 The original ruling was that you prefile
8 all witnesses. You asked that that be reversed.
9 FirstEnergy objected to that reversal, but the Bench
10 did. And now you're objecting to what was in lieu of
11 prefiling, which was giving a witness list.

12 MR. SMALL: There's a time element that's
13 missing from your summary which is we never
14 contemplated that we were going to have a witness
15 list and have to identify in December.

16 EXAMINER PRICE: Well, that may be true,
17 but isn't it reasonable to give FirstEnergy more time
18 for discovery when you're not prefiling and you were
19 going to do these witnesses live? Is that not fair,
20 Mr. Small?

21 MR. SMALL: I'm sorry, what are you
22 asking me?

23 EXAMINER PRICE: Is it unreasonable for
24 FirstEnergy to be given more time for discovery on
25 witnesses that are being done live than witnesses

1 that prefiled? Isn't that unreasonable?

2 MR. SMALL: You're asking whether they
3 should be given more time to do discovery on their
4 former employees. They know a whole lot more about
5 it than I do. In fact, I spoke with Mr. Andreatta
6 yesterday and he told me that FirstEnergy contacted
7 him a long time ago. They faxed him the letter,
8 asked him, and he verified that this was -- he
9 verified the contents of the letter.

10 MR. KUTIK: Well, first, that's untrue;
11 let's put that on the record.

12 EXAMINER PRICE: Well, we will allow --
13 that issue will be raised at the hearing if we have a
14 witness.

15 MR. KUTIK: That's right.

16 MR. SMALL: The point was that we were
17 trying not to create burdens on people or punish
18 people, essentially, for coming to local public
19 hearings and, you know, it's an empty invitation to
20 the public to come out with your documents and so
21 forth if your reward for it is to be hauled down to
22 Columbus.

23 EXAMINER PRICE: I disagree. He's not
24 been called down to Columbus. He's been asked to
25 give it to, I believe a notary public located

1 somewhere in northeastern Ohio. Let's let
2 FirstEnergy argue their half of this before we make a
3 ruling.

4 MR. SMALL: I think I'm not quite done
5 with the argument. There is the first argument which
6 is I think FirstEnergy's had their opportunity and
7 they've missed it. The second argument that I have
8 with regard to that particular subpoena is that
9 FirstEnergy at no time has offered to protect and
10 return the personal property of Mr. Tom Logan and
11 that is, you know, even if the subpoena goes forward,
12 it is his personal property.

13 I think the Bench pointed out to me at
14 one point during a local public hearing that a
15 medallion shouldn't end up in the possession of the
16 PUCO. So, you know, this is Mr. Logan's property.

17 EXAMINER PRICE: And I am sure that that
18 particular issue we can work with FirstEnergy to
19 protect to ensure that Mr. Logan's letter is properly
20 returned to him after they have had an opportunity to
21 review it.

22 MR. SMALL: And in the rush of going
23 forward with this somehow that was missed, and I will
24 say that, you know, faced with this tight time frame
25 I responded, which is to say this was basically an

1 acquisition of his property. Anyway, there wasn't an
2 opportunity for a lot of discussion. I thought it
3 was important to protect not only Mr. Logan from
4 inconvenience, but also his personal property.

5 EXAMINER PRICE: Okay. FirstEnergy.

6 MR. KUTIK: Yes, your Honor. The
7 document that we're talking about is a document that
8 has been highlighted in the press, has been trumpeted
9 by the other side as being a promise that supposedly
10 we made. The only document that I know of that's
11 been so identified. It's, obviously, an important
12 part of their case. It speaks volumes that they are
13 fighting so hard to prevent us from seeing the
14 original of a single piece of paper.

15 We do not agree with the notion that
16 somehow we waived all rights to question the
17 authenticity of documents with respect to -- when we
18 only saw copies at the hearing and when we see them
19 potentially for the first time at a hearing. We
20 believe there are substantial questions about the
21 authenticity of the document.

22 So with respect to the rule that
23 Mr. Small cited, Rule 901, copies don't cut it if
24 there are substantial questions or genuine questions
25 about the authenticity of the document. We want to

1 see the original. We want to have someone who is
2 qualified to examine documents examine it. And we
3 certainly have no intention to do any type of
4 destructive testing or alteration of the document.
5 And we certainly have every intention, when we're
6 done, to provide that document back to Mr. Logan.

7 Mr. Small says, "Well, we really didn't
8 have much opportunity to talk about it." They didn't
9 talk about it. They didn't raise that issue to us at
10 all. They just filed their motion to quash. We
11 don't believe that this burdens Mr. Logan one whit.
12 Put it in the mail and send it; that was good enough.
13 And we advised Mr. Logan of that. So we believe that
14 this is a document that gives us -- that we have the
15 right --

16 EXAMINER PRICE: You're willing to accept
17 mail return of this document?

18 MR. KUTIK: Pardon?

19 EXAMINER PRICE: You're willing to accept
20 this document through the mail?

21 MR. KUTIK: I think with respect to
22 courier we were --

23 EXAMINER PRICE: But you're willing to
24 have it couriered over. You're not asking him to --

25 MR. KUTIK: No.

1 EXAMINER PRICE: -- personally deliver
2 this.

3 MR. KUTIK: Correct.

4 EXAMINER PRICE: Are you willing to pay
5 for the courier?

6 MR. KUTIK: Yes.

7 MR. SMALL: Protect and return?

8 EXAMINER PRICE: Pardon me?

9 MR. SMALL: Protect and return.

10 EXAMINER PRICE: And they will protect
11 and return.

12 MR. KUTIK: Yes.

13 EXAMINER PRICE: How long --

14 MR. KUTIK: Now, I do not know at this
15 time, depending upon the examination of the document,
16 whether the return of that would happen after the
17 review or after the hearing; I don't know that. But
18 certainly at some point Mr. Logan would get his
19 document back.

20 EXAMINER PRICE: Is it unreasonable for
21 the Bench to ask you to advise the Bench within three
22 days of the delivery of the document when you would
23 anticipate returning it?

24 MR. KUTIK: Assuming that the person who
25 is around to -- who we want to examine it is

1 available, I don't believe that is unreasonable. And
2 if there is a problem, I will advise the Bench.

3 EXAMINER PRICE: Okay. Thank you.

4 Given that FirstEnergy's willing to
5 protect the document, return the document to the
6 customer when it's done, and is willing to accept a
7 courier, pay for a courier to go to his residence,
8 pick it up --

9 MR. CORCORAN: Your Honor, may I
10 interrupt before you continue? We haven't had any
11 description of who this person is. When I Googled
12 the address, it's a residential house in the middle
13 of Independence. You know, I'd just like to hear a
14 little bit more about --

15 EXAMINER PRICE: It's irrelevant.
16 They're going to have a courier come to Mr. Logan and
17 pick it up.

18 MR. CORCORAN: His personal property is
19 leaving his possession and going to some residential
20 house, a nondescript residential house in
21 Independence.

22 EXAMINER PRICE: It's a notary public, is
23 it not, Mr. Kutik?

24 MR. KUTIK: No, your Honor, it's not a
25 notary public. It is the person that we want to

1 examine the document. We believe that, you know, I'm
2 hoping that we're not going to have issues about
3 chain of custody, so I wanted this person to get the
4 document directly from Mr. Logan. If the other side
5 is not going to object, obviously, to chain of
6 custody, to raise chain of custody issues with
7 respect to the courier, then certainly I'm more than
8 glad to agree to the courier.

9 EXAMINER PRICE: Do you understand what
10 he's saying?

11 MR. CORCORAN: I understand what he's
12 saying.

13 EXAMINER PRICE: So are you willing to
14 waive any chain of custody arguments and say the
15 courier will go to Jones Day's offices in Cleveland?

16 MR. CORCORAN: I'm sorry, going where?

17 EXAMINER PRICE: I'm sure the courier can
18 deliver -- it would be more convenient to Mr. Kutik
19 to deliver it to his office in Cleveland.

20 MR. KUTIK: Well, frankly, your Honor, I
21 prefer it to go to the individual so that she can
22 open up the package and do all that kind of stuff. I
23 don't want to be involved in it.

24 EXAMINER PRICE: But I was saying,
25 putting on the idea that they would waive chain of

1 custody arguments.

2 MR. KUTIK: Sure.

3 EXAMINER PRICE: I don't think we need to
4 worry about where this document is going to, that
5 will just raise a whole other can of worms by asking
6 you to waive chain of custody. So I appreciate your
7 concerns, but no.

8 EXAMINER PHILLIPS-GARY: Is your concern
9 that someone's going to go to the house and pick it
10 up? Is that --

11 MR. CORCORAN: The concern is where the
12 document's going to.

13 EXAMINER PHILLIPS-GARY: Okay.

14 EXAMINER PRICE: Apparently, it's going
15 to a handwriting or document preparation expert, so
16 we'll leave it at that. This in no way burdens
17 Mr. Logan. FirstEnergy will be responsible for the
18 proper and timely return of this document. They've
19 pledged not to do any destructive testing. I'll also
20 note that Mr. Logan hasn't filed a motion to quash.
21 So your motion to quash has been denied.

22 MR. SMALL: May I request that counsel be
23 kept informed of progress regarding this? Mr. Kutik
24 made certain representations that he would report to
25 the Bench. We'd like to be kept informed about the

1 process.

2 EXAMINER PRICE: I'm sure he would be
3 happy to include you in those conversations.

4 MR. KUTIK: I wouldn't say "happy."

5 EXAMINER PRICE: I'm sure Mr. Kutik will
6 keep you informed of those conversations.

7 Okay, Mr. Corcoran, you had a motion to
8 compel that you wanted to make.

9 MR. CORCORAN: Yes.

10 EXAMINER PRICE: Now, you're really
11 making this. You're not going to make it a few days
12 later.

13 MR. CORCORAN: I'm really making it right
14 now.

15 EXAMINER PRICE: Thank you.

16 MR. CORCORAN: I don't know about your
17 rules, and I frankly probably won't study them at
18 all, but in Bob Schmitt Homes' first request for
19 production of document there was a request,
20 specifically request for production No. 6, it asked
21 to produce any and all documents including, but not
22 limited to, any proposals, contracts, and agreements
23 between FirstEnergy and Bob Schmitt Homes, Ridgefield
24 Homes, and/or Bob Schmitt.

25 MR. KUTIK: I'm sorry, what was the last

1 one?

2 MR. CORCORAN: Bob Schmitt.

3 EXAMINER PRICE: Is this No. 6?

4 MR. CORCORAN: It is, yes.

5 Thus far I have not received any of those
6 documents.

7 EXAMINER PRICE: When were they served?

8 MR. CORCORAN: Excuse me?

9 EXAMINER PRICE: When was the request
10 served?

11 MR. CORCORAN: The 17th of November.

12 EXAMINER PRICE: Can you read into the
13 record the full interrogatory, please?

14 MR. CORCORAN: I'm sorry. I just did.

15 EXAMINER PRICE: Again, I'm sorry. I
16 wasn't sure if you were summarizing or if that was --

17 MR. CORCORAN: No; I can do it again.

18 MR. KUTIK: And, your Honor, may I
19 request that the response be read, because I don't
20 have it in front of me so I don't know what he's
21 talking about.

22 EXAMINER PRICE: Yes, please go ahead and
23 read the full interrogatory and response.

24 MR. CORCORAN: I don't have the response
25 with me. I just have the interrogatory. The request

1 says, "Request for Production No. 6: Produce any and
2 all documents including, but not limited to, any
3 proposals, contracts, and agreements between
4 FirstEnergy and Bob Schmitt Homes, Inc., Ridgefield
5 Homes, and/or Bob Schmitt." That was it. That's the
6 one that I'm particularly concerned about.

7 EXAMINER PRICE: The companies are
8 unaware of their response?

9 MR. KUTIK: Your Honor, again, I don't
10 have all the discovery in front of me. When we asked
11 Mr. Corcoran earlier today about what the issue was,
12 he told us it was about these contracts. I think, as
13 Mr. Garber now is telling me this, that Mr. Corcoran
14 had told him that he had gotten one contract. I then
15 checked --

16 MR. CORCORAN: I'll --

17 MR. KUTIK: Let me finish.

18 MR. CORCORAN: I will.

19 MR. KUTIK: I then checked with the folks
20 who were responsible for our response, and I was told
21 that with whatever we provided or haven't provided,
22 we looked and we've given them whatever we've got.

23 MR. CORCORAN: The document that he was
24 referring to is the document that I gave him. It's a
25 document that's signed by one FirstEnergy

1 representative, it's not signed by anybody else. And
2 there have been a history of these documents existing
3 going back decades.

4 MR. KUTIK: And that's the problem.

5 EXAMINER PRICE: What's the problem?

6 MR. KUTIK: That they go back decades. I
7 doubt FirstEnergy keeps contracts that have long
8 since terminated and terminated decades ago.

9 MR. CORCORAN: These documents were
10 signed periodically, every phase I believe they were,
11 so it was every couple years they were signed. Some
12 of them wouldn't be that old.

13 MR. KUTIK: For example, what's the date
14 of the document you have?

15 MR. CORCORAN: 2000, I believe.

16 MR. KUTIK: All right. So it's 11 years
17 ago.

18 MR. CORCORAN: That's pretty good, to do
19 math in his head.

20 EXAMINER PRICE: FirstEnergy will
21 forthwith review their files to see if there are any
22 other documents that are responsive to their request.
23 If there are no other documents, you'll inform
24 Mr. Corcoran that you have fully complied with his
25 motion to compel.

1 MR. KUTIK: We will be happy to do that,
2 your Honor.

3 EXAMINER PRICE: Your motion to compel is
4 being granted.

5 MR. CORCORAN: Thank you.

6 MR. KUTIK: Now can we raise a motion to
7 compel?

8 EXAMINER PRICE: You may.

9 MR. KUTIK: Your Honor, as I mentioned
10 earlier, there is an additional issue that we raised
11 with respect or we'd like to raise with respect to
12 our second set of discovery particularly directed to
13 CKAP parties, and CKAP particularly.

14 We asked for CKAP to provide us names of
15 their members and we also asked, with respect to
16 certain information about those members, this is with
17 respect to interrogatory No. 7 and, for example,
18 interrogatory No. 11 which, for example, asked for
19 information about the property values being
20 negatively impacted; we believe that that information
21 is relevant. We were told that there is no, quote,
22 "list maintained," end quote, and, therefore, we were
23 not provided any information on whatever CKAP has.

24 We do know that CKAP keeps a list of
25 e-mail addresses that Ms. Steigerwald sends e-mails

1 out to folks about and certainly we would expect at
2 the very least we would have received those, and we
3 have not. So for those reasons, your Honor, we move
4 to compel answers to interrogatory No. 7,
5 interrogatory No. 9, and interrogatory No. 11 with
6 respect to our second set of discovery. Ten and 11,
7 excuse me.

8 EXAMINER PRICE: Mr. Corcoran.

9 MR. CORCORAN: Your Honor, while that may
10 be accurate that there is a list of e-mails, those
11 people may or may not be identified other than by an
12 e-mail address. If they are identified at all, then
13 they would be part of the CKAP group and, therefore,
14 represented by counsel and there would be no reason
15 to have that information because you can't contact
16 those people because they're a party to the case and
17 represented by counsel.

18 EXAMINER PRICE: Fair enough. But in the
19 analogous situation earlier we granted OCC's motion
20 to compel parties -- the contact information for
21 parties that were represented by Jones Day.

22 MR. SMALL: I would distinguish it, if I
23 may, your Honor.

24 EXAMINER PRICE: I don't think I called
25 upon you, Mr. Small.

1 MR. SMALL: All right.

2 EXAMINER PRICE: We will let Mr. Small
3 distinguish it, however, at this time.

4 MR. SMALL: I was asking for the
5 information simply so I could subpoena the
6 individuals.

7 EXAMINER PRICE: I don't see why it's not
8 analogous just because they haven't decided what
9 they're going to do with it yet.

10 MR. SMALL: Well, the point -- when the
11 company said to me, and they did, that they wouldn't
12 give it to me because it would be unethical for me to
13 contact them, I responded to them by saying "I only
14 intend to use it for subpoena purposes, therefore,
15 you should give this to me because there's no other
16 objection." But the only --

17 EXAMINER PRICE: Mr. Kutik, do you intend
18 to contact these individuals?

19 MR. KUTIK: Well, your Honor, the first
20 thing I think is we want to know who CKAP is or what
21 it is and whether there is any CKAP other than
22 Ms. Steigerwald. So, I mean, just the fact that
23 there are other people I think is in itself relevant.
24 And with respect to the list, we haven't figured out
25 what we might do with the list since we don't know

1 what it is and what it comprises of and whatnot.

2 I'm not sure I agree with Mr. Corcoran
3 that because he represents CKAP he represents all
4 the, quote, members of CKAP as individuals.

5 But certainly if we were going to contact
6 them or wanted to contact them, I think it would be
7 proper, and I think it would be my intention or our
8 intention to advise Mr. Corcoran of that fact and
9 have it out with him if we disagree.

10 EXAMINER PRICE: That takes me out of the
11 loop. We're going to grant the motion to compel. At
12 a minimum CKAP is a -- let me step back.

13 What is CKAP, Mr. Corcoran? I'm going to
14 grant the motion to compel anyways, but let's see if
15 we can identify the question of what is CKAP. I view
16 it as a loose association of individuals who signed
17 up for an e-mail list. Is it anything else?

18 MR. CORCORAN: It's an association of
19 all-electric homeowners. I don't -- because I don't
20 know anything -- some of these people are not
21 identified other than an e-mail address, which
22 doesn't give them a whole lot of identification.

23 EXAMINER PRICE: Do these people know
24 that they're represented by you?

25 MR. CORCORAN: Yes.

1 EXAMINER PRICE: How do they know that?

2 MR. CORCORAN: Because we sent them an
3 e-mail.

4 EXAMINER PRICE: And anybody that didn't
5 want to be represented by you had a chance to remove
6 themselves from the list.

7 MR. CORCORAN: I believe that's the way
8 it was handled.

9 EXAMINER PRICE: Okay. I don't think the
10 contents of the e-mail list are privileged and so we
11 will go ahead and grant the motion to compel.
12 Whether FirstEnergy does or does not have an ethical
13 duty not to contact those, that's something we'll
14 deal with at a future point.

15 MR. KUTIK: Your Honor, just to be clear
16 though, I'm not just looking for the e-mail list. To
17 the extent that they know who these people are, I
18 think we're entitled to a list of those people.

19 EXAMINER PRICE: I'm sorry, I didn't mean
20 to -- I did not mean to be indicating that I was
21 reducing it just to the e-mail list.

22 MR. KUTIK: Thank you.

23 EXAMINER PRICE: Any contact information
24 CKAP has regarding its membership, to the extent that
25 they have it, is fair game and is discoverable. It's

1 not privileged. It should be disclosed to
 2 FirstEnergy. At a minimum, that includes your list
 3 of e-mail addresses. If you have more contact
 4 information for other individuals, I think it's fair
 5 game that FirstEnergy has it. Perhaps they'd like to
 6 subpoena some of these members.

7 MR. KUTIK: Your Honor, and by what date?

8 EXAMINER PRICE: January 14th, 10 a.m.

9 MR. KUTIK: Your Honor, I have --

10 EXAMINER PRICE: We have more motions?

11 MR. KUTIK: Two procedural motions,
 12 they're not discovery motions.

13 EXAMINER PRICE: Okay. Well, let's make
 14 sure. I think Mr. Small had earlier represented that
 15 he may or may not have further discovery issues.

16 MR. SMALL: What I had in mind, your
 17 Honor, I will not raise. At the time when I
 18 mentioned it, I won't raise that. There's been a
 19 broad swath of decisions about timing and so forth
 20 and it's just -- I wanted some consideration of that
 21 before I discussed things further, but thank you for
 22 the opportunity, your Honor.

23 EXAMINER PRICE: Fair enough. Okay.
 24 Let's move to the nondiscovery portions of today's
 25 prehearing conference.

1 MR. KUTIK: Yes, your Honor.

2 MR. CORCORAN: I'm sorry, your Honor, I
3 do have one discovery --

4 EXAMINER PRICE: Yes, Mr. Corcoran.

5 MR. CORCORAN: -- motion. At this point
6 I'd like to make a motion for protective order.
7 Given the decisions made today and the volume of
8 information that is to be prepared in a short time
9 frame, I would like to be protected from any future
10 discovery requests from this point forward.

11 EXAMINER PRICE: And what would your
12 grounds be?

13 MR. CORCORAN: It's a good question,
14 other than being overwhelmed.

15 EXAMINER PRICE: I don't think CKAP can
16 decline continuances and then say they shouldn't be
17 subject to further discovery.

18 MR. CORCORAN: I'm sorry? Say that
19 again.

20 EXAMINER PRICE: FirstEnergy's got a,
21 actually I believe they have a pending motion for a
22 continuance which they renewed, which had previously
23 been denied. I don't understand how CKAP can on the
24 one hand say further discovery would be too
25 burdensome for us to prepare for the hearing, but we

1 are unwilling to move the hearing. We're going
2 forward on the 27th because the parties are
3 unwilling to move the 27th.

4 MR. CORCORAN: Right.

5 EXAMINER PRICE: The party that you're
6 saying should be precluded from further discovery is
7 willing to move forward on the 27th. Your sole
8 reason for opposing further discovery is you won't
9 have time to respond to further discovery and prepare
10 for the case. Don't you see a conflict there,
11 Mr. Corcoran? No?

12 MR. CORCORAN: Honestly, I don't.

13 EXAMINER PRICE: Okay.

14 MR. CORCORAN: I don't see a problem with
15 that.

16 EXAMINER PRICE: Well, your motion for
17 protective order is denied.

18 MR. CORCORAN: Okay.

19 EXAMINER PRICE: But I'm certain
20 FirstEnergy will act in good faith and not attempt to
21 unduly burden you with further discovery.

22 MR. CORCORAN: That was the whole reason
23 for asking for the motion to protect.

24 MR. KUTIK: We don't believe we've done
25 so already, your Honor, to date.

1 EXAMINER PRICE: I understand.

2 EXAMINER PHILLIPS-GARY: All right. Any
3 other discovery motions?

4 (No response.)

5 EXAMINER PHILLIPS-GARY: Mr. Kutik, do
6 you want to proceed?

7 MR. KUTIK: Your Honor, at this point I
8 guess I'll put it in the form of a motion, we request
9 that the Bench order electronic service of all
10 pleadings, motions, and discovery.

11 EXAMINER PRICE: Does any party not have
12 the capability for electronic service of all
13 pleadings, motions, and discovery?

14 MR. CORCORAN: Yes.

15 EXAMINER PRICE: Mr. Corcoran?

16 MR. CORCORAN: I do not. As it relates
17 to discovery, I have already given hard copies of
18 discovery responses, and I am not capable of
19 providing discovery responses in most cases.

20 EXAMINER PRICE: Electronically.

21 MR. CORCORAN: Electronically, yes.

22 MR. KUTIK: Your Honor, you have already
23 ordered discovery to be electronic, now I'm expanding
24 it to motions and pleadings.

25 EXAMINER PRICE: I understand, but --

1 MR. CORCORAN: I don't have a scanner. I
2 can't scan all the responses.

3 EXAMINER PRICE: But what he's arguing,
4 and correctly so I believe, is that you already have
5 an obligation to electronically serve discovery.
6 He's saying motions and pleadings. Do you have an
7 e-mail system where you can --

8 MR. CORCORAN: Yeah.

9 EXAMINER PRICE: -- serve motions and
10 pleadings?

11 MR. CORCORAN: Yes.

12 EXAMINER PRICE: Do you have any
13 objections to motions and pleadings being served
14 electronically?

15 MR. CORCORAN: Motions and pleadings, no.

16 EXAMINER PRICE: Okay. Your motion is
17 granted. Whatever my prior ruling was, it was.

18 MR. KUTIK: Your Honor, at this point I
19 think the last motion that we have for you this
20 afternoon is we would like the Bench to revise the
21 dates for responding to motions. We suggest that
22 memoranda contra be filed five business days after
23 service of the motion and that reply briefs be filed
24 three days after the -- three business days after the
25 service of the memo contra.

1 EXAMINER PRICE: Mr. Small?

2 MR. SMALL: I haven't heard the basis for
3 the motion.

4 EXAMINER PRICE: Mr. Kutik.

5 MR. KUTIK: Well, it should be glaringly
6 obvious. The basis is the short amount of time we
7 have between now and January 27th.

8 EXAMINER PRICE: Mr. Kutik believes that
9 due to the fact that the hearing is soon upon us, a
10 more expedited pleading schedule would be
11 appropriate.

12 MR. SMALL: That happens in every case,
13 when you get close to the hearing date, you're close
14 to the hearing date, but I still haven't heard
15 argument for the exception to the Commission's rules.

16 EXAMINER PRICE: I do understand the
17 logic of his rationale. Do you have an objection?

18 MR. SMALL: Yes. We object to the
19 expedited treatment, and we don't believe good cause
20 has been even argued, let alone shown.

21 EXAMINER PRICE: Mr. Corcoran.

22 MR. CORCORAN: I object as well.

23 EXAMINER PRICE: Grounds?

24 MR. CORCORAN: The same reasons that I
25 just made on my motion for protective order.

1 Shortening the time frame is placing an undue burden
2 on me and my clients.

3 EXAMINER PRICE: This proceeding is
4 certainly not setting any records for harmony in
5 responding to reasonable requests, but in light of
6 the objections we will deny your request for an
7 expedited schedule for pleading practice. I will
8 note for the parties that anybody at any time can
9 request for an expedited ruling which will
10 automatically mean seven days for memo contra and no
11 replies.

12 Any further procedural issues?

13 (No response.)

14 EXAMINER PRICE: At this time we are
15 going to take --

16 MR. KUTIK: The only thing is, as you
17 pointed out, your Honor, we do have our renewed
18 motion for continuance.

19 EXAMINER PRICE: Right, and we're going
20 to take a six-minute adjournment and then
21 Mr. Phillips-Gary and I will come back and rule on
22 your motion for continuance. So we will return at
23 2 o'clock. We are off the record.

24 (Recess taken.)

25 EXAMINER PRICE: Let's go back on the

1 record. I'd like to talk for a moment about the
2 pre-hearing conference presently scheduled. It is
3 not traditional at Commission proceedings to bring a
4 court reporter to all prehearing conferences. Is
5 there a sense from the parties that we should bring
6 the court reporter again next time? We do not seem
7 to be working through issues very well without formal
8 rulings from the Bench.

9 MR. KUTIK: Well, your Honor, how long in
10 advance do you need to make that decision?

11 EXAMINER PRICE: That week.

12 EXAMINER PHILLIPS-GARY: It will have to
13 be --

14 EXAMINER PRICE: Forty-eight hours.

15 EXAMINER PHILLIPS-GARY: Yeah, that's on
16 a Tuesday, so it would have to be that previous
17 Friday.

18 EXAMINER PRICE: The previous Friday.

19 MR. KUTIK: So I think what I would
20 suggest is, you know, we advise -- any party that
21 thinks a court reporter is necessary would advise you
22 by noon on Friday.

23 EXAMINER PRICE: That will work. Thank
24 you.

25 (Discussion off the record.)

1 EXAMINER PRICE: Let's roll back. Let's
2 make it Thursday at noon, because Mr. Phillips-Gary
3 makes a good point that Monday will be a holiday.

4 Second. At the prehearing conference the
5 Bench would request that the intervenors who have a
6 joint defense agreement present to the Bench and
7 FirstEnergy a order of witnesses that you intend to
8 call your witnesses. We'll be dealing with these
9 witnesses live, as we're all aware. Parties should
10 be prepared at the conclusion of one witness to move
11 on to the next witness.

12 If you need to delete a witness, that is
13 fine, but once you establish your witness order, you
14 will only be permitted to reschedule witnesses at the
15 consent of the Bench. FirstEnergy needs to be
16 prepared from day to day as to which witness they
17 need to prepare for cross-examination, and I think
18 that's a courtesy that we'll extend to them.

19 MR. SMALL: Clarification.

20 EXAMINER PRICE: Mr. Small.

21 MR. SMALL: Does that mean, the order of
22 witnesses, is there some indication of the designated
23 day?

24 EXAMINER PRICE: We'll take intervenor
25 witnesses when we're concluded, I mean, FirstEnergy

1 has provided, I believe, Mr. Ridmann --

2 MR. KUTIK: Correct.

3 EXAMINER PRICE: -- as their sole
4 witness, so I expect that sometime Monday afternoon
5 or perhaps first thing Tuesday we will begin with
6 intervenor witnesses and we'll take them one by one.
7 And we have potentially 20 intervenor witnesses all
8 of whom will be called live, and Mr. Yankel, who is
9 being prefilled.

10 MR. KUTIK: Mr. Frawley as well.

11 EXAMINER PRICE: Two witnesses will be
12 prefilled, so it's difficult to judge how quickly or
13 not quickly we will move through these witnesses, and
14 I don't want to have half days. We reserved the
15 hearing room for two weeks, and we are going to go
16 forward until we are done.

17 Mr. Corcoran.

18 MR. CORCORAN: Two weeks? I'm sorry, you
19 said we're starting on the 27th --

20 EXAMINER PRICE: I consider nothing
21 beyond the realm of possibility.

22 MR. CORCORAN: You mentioned Monday or
23 Tuesday.

24 MR. KUTIK: The 27th's not a Monday.

25 MR. CORCORAN: Yeah, the 27th is a

1 Thursday.

2 EXAMINER PHILLIPS-GARY: It's a Thursday,
3 yes.

4 EXAMINER PRICE: Right.

5 MR. CORCORAN: And the experts are going
6 first?

7 EXAMINER PRICE: Well, FirstEnergy's
8 witness is going first, so the company. If the
9 parties would like to arrange -- that's why we're
10 asking you to come up with a witness order. However
11 it works for you guys to plug your experts in. If
12 you want Mr. Yankel and the other expert to go first,
13 that's fine with us.

14 MR. SMALL: My concern -- I haven't
15 talked to Mr. Yankel, and I don't think there's going
16 to be a problem with Mr. Yankel especially since he
17 lives in Cleveland. My concern is for the subpoenaed
18 witness and having them not know what day to testify.

19 EXAMINER PRICE: I share your concern,
20 but we also have regular lay witnesses that are
21 coming in that they won't know what day they'll
22 testify. Our interest is having an orderly
23 presentation of the witnesses and not have gaps in
24 the schedule. I don't want to go --

25 MR. SMALL: My idea, my concern here is

1 that to not really, at least they're not -- these are
2 not really our witnesses. I mean, they would be put
3 on, but they're not --

4 EXAMINER PRICE: Have them go first,
5 Mr. Small.

6 MR. SMALL: I don't know when first is,
7 though. If I could put them on the first day of
8 hearing, if I knew that, you know, I don't want to --

9 EXAMINER PRICE: I'm willing to --

10 MR. SMALL: -- burden somebody to tell
11 them come back a second day, especially when these
12 people are working and so forth.

13 EXAMINER PRICE: Let's go off the record
14 for one second.

15 (Discussion off the record.)

16 EXAMINER PRICE: Let's go back on the
17 record. Based upon our off-the-record agreement the
18 parties will present to the Bench at the prehearing
19 conference to be held on the Tuesday after the
20 holiday a proposed witness order that they will work
21 out informally amongst themselves in the interim.

22 At this point I think we have covered
23 everything except we were going to revisit one issue.
24 The Bench would like to -- the hearing date is very
25 close upon us, and the OCC intends to file an

1 interlocutory appeal on the matters related to
 2 privilege, which is their right, and that
 3 interlocutory appeal will have to be taken up by the
 4 Commission, but the OCC and CKAP should be aware that
 5 we will recommend to the Commissioners, in the event
 6 that we are upheld, that you respond immediately to
 7 the motion to compel. In other words, close of
 8 business day of the Commission order.

9 So I would be looking through your
 10 documents and be prepared to respond because that is
 11 what we will recommend to the Commissioners to do in
 12 order to not unduly prejudice FirstEnergy who has a
 13 due process right to at least defend themselves in
 14 this proceeding.

15 With that, I think we are adjourned.

16 MR. JONES: Your Honor, one other matter.
 17 Sorry.

18 MR. CORCORAN: So close.

19 MR. KUTIK: So you've denied our motion
 20 for continuance.

21 EXAMINER PRICE: You're motion for
 22 continuance, yes, Mr. Kutik. Your renewed motion for
 23 continuance. We will renew our denial of your motion
 24 for a continuance.

25 Mr. Jones.

1 MR. JONES: Thank you, your Honor. I
2 just want to get a time frame for when OCC will be
3 providing staff with a copy of the production of
4 documents that was provided to FirstEnergy. I don't
5 think we talked about a time frame as to when they
6 would copy us on those documents.

7 EXAMINER PRICE: Actually, I had said on
8 a going-forward basis.

9 MR. SMALL: Yes, you did, your Honor.

10 EXAMINER PRICE: But it certainly would
11 be reasonable for OCC to provide staff with --

12 EXAMINER PHILLIPS-GARY: And other
13 parties.

14 EXAMINER PRICE: -- and other parties --

15 MR. OLIKER: Thank you, your Honor.

16 EXAMINER PRICE: -- by next Wednesday the
17 documents they've already provided to FirstEnergy.
18 It's a simple matter of photocopying.

19 And I believe you said there were 25
20 documents.

21 MS. GRADY: Five thousand.

22 MR. SMALL: Five thousand.

23 EXAMINER PRICE: Five thousand. Well,
24 that's a little bit different matter.

25 MR. KUTIK: Provided by e-mail.

1 MR. SMALL: They were scanned.

2 EXAMINER PRICE: Okay. Well, is there
3 any reason why you can't provide those documents to
4 staff by Wednesday?

5 MR. SMALL: No, your Honor.

6 EXAMINER PRICE: Okay.

7 MR. JONES: Thank your Honor.

8 EXAMINER PHILLIPS-GARY: That's to staff
9 and other parties, correct?

10 EXAMINER PRICE: Yes.

11 EXAMINER PHILLIPS-GARY: Any further
12 matters?

13 (No response.)

14 EXAMINER PHILLIPS-GARY: Now we are
15 adjourned.

16 (The hearing concluded at 2:13 p.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Friday, January 7, 2011, and carefully compared with my original stenographic notes.

Maria DiPaolo Jones, Registered
Diplomate Reporter and CRR and
Notary Public in and for the
State of Ohio.

My commission expires June 19, 2011.

(MDJ-3773)

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Summary: Transcript Transcript of Ohio Edison Company hearing held on 01/07/11.
electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Jones,
Maria DiPaolo Mrs.