

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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PROCEEDINGS

before Mr. Gregory Price and Mr. Henry Phillips-Gary,
 Attorney Examiners, at the Public Utilities
 Commission of Ohio, 180 East Broad Street, Room 11-D,
 Columbus, Ohio, called at 10 a.m. on Tuesday,
 January 18, 2011.

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APPEARANCES:

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

and

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

On behalf of the Applicants 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.

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

On behalf of Bob Schmitt Homes, Inc.; Sue
Steigerwald; Joan Heginbotham; and CKAP.

APPEARANCES: (Continued)

Mike DeWine,
Ohio Attorney General
By Mr. John H. Jones
and Mr. Thomas Lindgren,
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180 East Broad Street, 6th Floor
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On behalf of the Staff of the PUCO.

McNees, Wallace & Nurick, LLC
By Mr. Samuel C. Randazzo,
Mr. Joseph Olikier,
and Mr. Scott E. Elisar
Fifth Third Center, Suite 1700
21 East State Street
Columbus, Ohio 43215-4228

On behalf of the Industrial Energy
Users-Ohio.

Vorys, Sater, Seymour & Pease, LLP
By Mr. Stephen Howard
and Ms. Lija Kaleps-Clark
52 East Gay Street
Columbus, Ohio 43216-1008

On behalf of the Constellation NewEnergy,
Inc.

Ohio Partners for Affordable Energy
By Mr. David C. Rinebolt
and Ms. Colleen L. Mooney
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P.O. Box 1793
Findlay, Ohio 45840-1793

On behalf of the Ohio Partners for
Affordable Energy.

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1 Tuesday Morning Session,
2 January 18, 2011.

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4 EXAMINER PRICE: Good morning. The
5 Public Utilities Commission has set for prehearing
6 conference at this time and this place Case No.
7 10-176-EL-ATA being in the Matter of the Application
8 of Ohio Edison Company, The Cleveland Electric
9 Illuminating Company, and The Toledo Edison Company
10 for Approval for a New Rider and Revision of an
11 Existing Rider.

12 My name is Gregory Price. With me is
13 Henry Phillips-Gary. We are the Attorney Examiners
14 assigned to preside over today's hearing.

15 We have augmented parties from our last
16 prehearing conference so let's go ahead and take
17 appearances again starting with the companies.

18 MR. BURK: On behalf of Ohio Edison, The
19 Cleveland Electric Company, and The Toledo Edison
20 Company, James W. Burk and Carry Dunn, 76 South Main
21 Street, Akron, Ohio 44308.

22 And also on behalf of the companies why
23 don't you go ahead.

24 MR. SAKS: Jeffrey Saks and Grant W.
25 Garber of Jones Day, North Point, 901 Lakeside

1 Avenue, Cleveland, Ohio 44114.

2 EXAMINER PRICE: Constellation.

3 MS. KALEPS-CLARK: Lija Kaleps-Clark from
4 Vorys, Sater, Seymour & Pease, 52 East Gay Street,
5 Columbus, Ohio 43216.

6 EXAMINER PRICE: IEU-O.

7 MR. RANDAZZO: Yes. On behalf of the
8 Industrial Energy Users of Ohio, I would like to
9 enter the appearance of McNees, Wallace & Nurick by
10 Joseph Olikier, Scott Elisar, and Samuel C. Randazzo,
11 21 East State Street, Columbus, Ohio 43215.

12 EXAMINER PRICE: Thank you.

13 MR. RANDAZZO: We filed an appearance for
14 Mr. Elisar in the proceeding this morning.

15 EXAMINER PRICE: Welcome to the
16 proceedings, Mr. Elisar.

17 Mr. Small.

18 Oh, I'm sorry. Mr. Corcoran.

19 MR. CORCORAN: On behalf of the --

20 EXAMINER PRICE: You have a joint defense
21 agreement so.

22 MR. CORCORAN: On behalf of the CKAP
23 parties, Kevin Corcoran, Corcoran & Associates, 8501
24 Woodbridge Court, North Ridgeville, Ohio 44309.

25 EXAMINER PRICE: Now, Mr. Small.

1 MR. SMALL: On behalf of the residential
2 customers of the FirstEnergy electric distribution
3 utilities, Office of the Ohio Consumers' Counsel,
4 Janine Migden-Ostrander, Jeffrey L. Small and Maureen
5 Grady, 10 West Broad Street, Suite 1800, Columbus,
6 Ohio.

7 EXAMINER PRICE: Mr. Rinebolt.

8 MR. RINEBOLT: On behalf of the Ohio
9 Partners for Affordable Energy, David C. Rinebolt and
10 Colleen L. Mooney, 231 West Lima Street, Findlay,
11 Ohio 45840.

12 EXAMINER PRICE: Mr. Jones.

13 MR. JONES: Thank you, your Honor. On
14 behalf of the staff of the Public Utilities
15 Commission of Ohio, Ohio Attorney General Michael
16 DeWine, Assistant Attorneys General Tom Lindgren and
17 John Jones, 180 East Broad Street, Columbus, Ohio
18 43215.

19 EXAMINER PRICE: Thank you.

20 We discussed a number of issues before we
21 went on the record this morning. We will take those
22 up one at a time. Let's begin with the issue of the
23 deposition notice for Mr. Yankel.

24 Mr. Saks, do we have a clarification on
25 that?

1 MR. SAKS: Yes. To the extent the
2 deposition notice that was sent out last week
3 indicated the deposition was going to be in
4 Cleveland, that is incorrect. As we had discussed
5 and agreed, the deposition of Mr. Yankel will be in
6 Columbus. He will be at the OCC's offices as I
7 understand, and we may -- we may take it
8 telephonically, but he will be present in Columbus.

9 MR. SMALL: Well, I confess to be a
10 little bit confused. The OCC's offices are perfectly
11 agreeable with the OCC. I believe the arrangement
12 was for the Jones Day offices, but maybe you could
13 clarify that.

14 MR. SAKS: Then I -- I thought we had
15 agreed --

16 MR. SMALL: We'll make our offices
17 available at the appointed time.

18 MR. SAKS: I thought the agreement -- if
19 you want Jones Day, we can do it there too.

20 MR. SMALL: The OCC offices are fine.
21 Thank you.

22 EXAMINER PRICE: Another issue we
23 discussed off the record OCC had asked that the
24 actual version of the letter of Mr. Logan that was
25 produced at the public hearing I believe in

1 Strongsville be produced at the hearing. Graciously
2 the staff has agreed to obtain that document, the
3 actual document from the Commission's Docket
4 Division, and produce that at the hearing.

5 Thank you, Mr. Jones.

6 MR. JONES: Yes, your Honor.

7 EXAMINER PRICE: There also is the issue
8 of documents that were marked and moved for admission
9 at the public hearing. There was some concern that
10 perhaps not all the documents OCC intended to be
11 marked and moved for admission were properly marked.

12 OCC is going to review the public hearing
13 transcripts and will notify all the parties by e-mail
14 in the event that any documents that were intended to
15 be marked and moved for admission were not so marked.

16 Other than that any documents from the
17 public hearings the parties intend to move for
18 admission need to be brought to the evidentiary
19 hearing and separately marked and moved for admission
20 at that time.

21 MR. BURK: Your Honor, when -- when does
22 OCC think they would send that out by e-mail?

23 EXAMINER PRICE: Mr. Small.

24 MR. SMALL: Because of the deposition
25 schedules which run through today it won't be today.

1 I would think Thursday would be possible.

2 EXAMINER PRICE: Thank you. But having
3 said that, Mr. Small, you are not aware of any
4 documents -- I know you looked very carefully at the
5 transcripts. You are just doing a double-check.

6 MR. SMALL: We looked through them. I
7 wasn't in attendance at all the public hearings.
8 Ms. Grady and I have consulted with one another, and
9 we noticed on a number of the documents there are
10 numbers which correspond with what we have recorded
11 for what we moved into evidence. We will check to
12 make sure that everything is clear and report as we
13 discussed off the record to the parties but, you
14 know --

15 EXAMINER PRICE: To the best of your
16 knowledge today, everything was properly marked.

17 MR. SMALL: There were marks on those
18 documents, yes, but we will check again.

19 EXAMINER PRICE: Okay. Excellent.

20 Finally, we discussed off the record the
21 issue of the witness list. And according to the
22 agreement of the parties, the witness order will be
23 as follows: Mr. Ridmann on behalf of FirstEnergy,
24 OCC witnesses Andreatta, Yankel, Jurgens, Holly, CKAP
25 witnesses in the order of their notice that was

1 provided to the parties in December, Ms. Harper on
2 behalf of OPAC, and staff witnesses.

3 I will note for the record that all the
4 parties have indicated the possibility that witnesses
5 may drop off that witness order. Otherwise we intend
6 to take these witnesses in the order that we have
7 agreed upon, and we'll only amend that order with the
8 agreement of the Bench.

9 Before we take up the issue of the in
10 camera review are there any issues we discussed or
11 need to discuss?

12 Okay. Let's begin with the questioning
13 of the in camera review. Ms. Grady has passed out to
14 all of the parties a privilege log. We did discuss
15 the possibility of perhaps bundling some of these
16 e-mails and other issues. However, Ms. Grady
17 indicated it was very difficult to bundle them, and
18 so maybe we'll just take them up one at a time and go
19 from there.

20 Start with e-mail -- No. 1, e-mail from
21 July 2, 2010, between Mr. Corcoran and Ms. Grady.
22 Ms. Grady, why don't you briefly summarize the basis
23 for your objection on this document.

24 MS. GRADY: Your Honor, we would object
25 and believe that the document is privileged under the

1 attorney-client trial preparation privilege. It is a
2 communication by -- between attorneys, the attorneys
3 being the agent of the client and, therefore, falling
4 within -- directly within the attorney-client
5 privilege.

6 There is also discussion of strategy
7 regarding whether the pleadings should be filed which
8 we believe that relates to the mental process or the
9 mental -- the opinions of the attorneys involved and
10 the solicitation of a legal advice, therefore,
11 falling within privilege, the attorney-client and
12 work product privilege.

13 EXAMINER PRICE: FirstEnergy.

14 MR. SAKS: We would note as was noted at
15 the January 7 hearing that -- at this very same time
16 that OCC and -- I'm sorry, the CKAP and the CKAP
17 other -- Bob Schmitt Homes and Ms. Heginbotham and
18 Ms. Steigerwald are moving to intervene. The
19 position they are taking and the basis for the
20 intervention is they have distinct interests from the
21 OCC.

22 And it appears frankly that OCC and the
23 CKAP parties are trying to have it both ways, and the
24 purpose is a joint defense claim, aligned interests,
25 particularly in light of a joint defense, time period

1 prior to the entry of a joint defense agreement, at
2 the same time they are arguing for intervention
3 purposes that they are not aligned.

4 MS. GRADY: Your Honor, if I may quickly
5 respond.

6 EXAMINER PRICE: Yes, Ms. Grady.

7 MS. GRADY: As I understand it, the issue
8 of whether or not there is a valid joint defense
9 agreement between OCC and CKAP beginning in June of
10 2010 is an issue that is presently before the
11 Commission, squarely put before the Commission in the
12 interlocutory appeal. So to the extent that issue is
13 directly before the Commission, we would believe it
14 would be inappropriate for the Attorney Examiners to
15 make a ruling while that issue is up at the
16 Commission for decision.

17 EXAMINER PRICE: I understand. We are
18 doing this in the event that you do not prevail on
19 your interlocutory appeal or at least inform the
20 Commission in their decision forthcoming on your
21 interlocutory appeal. If I could just ask briefly,
22 Ms. Grady, how did you determine June as the
23 effective date for I guess what we will characterize
24 as your informal joint defense agreement?

25 MS. GRADY: Your Honor, after discussion

1 with counsel for CKAP as well as a review of the
2 e-mails and the documents that we were able to
3 discern, it would appear that that is about the
4 starting point at which the informal joint defense
5 agreement took place. You will see, your Honor, that
6 prior to June, we did produce a number of documents
7 related to contacts primarily between Amy Gomberg and
8 CKAP and that there was a more divergent position
9 prior to that time which relates back to even OCC's
10 position in the prior case with respect to the
11 grandfathering of the all electric credit.

12 And so I would say that prior to that
13 point there was a much broader difference of opinion.
14 As the communications began and the relationship
15 developed, the interest became more closely aligned
16 to the extent that OCC then determined that based
17 upon the information given by CKAP and reviewed by
18 OCC, that it made sense for a joint defense to be
19 established.

20 EXAMINER PRICE: Thank you.

21 EXAMINER PHILLIPS-GARY: I notice on the
22 copy here it indicates there is an attachment just
23 for clarification because I notice on other ones on
24 your privilege log you indicate there are attachments
25 but this one does not say there's an attachment. Is

1 that --

2 MS. GRADY: Yes, your Honor, I do not
3 believe this one has an attachment.

4 EXAMINER PRICE: The heading indicates
5 attachments: MIME.822.

6 MS. GRADY: And, your Honor, I'm not sure
7 whether that refers to the document or that's just --

8 EXAMINER PRICE: The OCC logo?

9 MS. GRADY: No. As I understand it,
10 sometimes even when there is not an attachment, you
11 get an MIME message, but we certainly could check
12 into that.

13 EXAMINER PHILLIPS-GARY: I just was
14 asking just to make sure if there was --

15 EXAMINER PRICE: Consult with Mr. Weston.
16 He is quite the technology buff.

17 MS. GRADY: Unfortunately I am not savvy
18 in terms of the technology.

19 EXAMINER PHILLIPS-GARY: I noticed on --
20 and know we are not to it yet but document No. 4 also
21 indicates there is an attachment from the -- it says
22 attachments and indicates there is one there, but it
23 is not indicated in your log, and I just want to make
24 sure -- I guess kind of put you on notice
25 double-check these in case there are things that

1 aren't indicated in your privilege logs so we are
2 consistent in looking at comparing apples to apples,
3 I guess, and if there is something you need to make
4 us aware of, that you are --

5 MS. GRADY: And to a large extent, your
6 Honor, if there was an attachment, we did not include
7 that based upon the fact this describes the -- the
8 e-mails describe the purpose of the attachment and
9 what could be in it, and so I guess it was my -- my
10 opinion, my call that rather than produce the
11 attachment, that we at least just come forward with
12 the -- with the e-mail which describes what was
13 attached and the nature of the attachment and that
14 should your Honor require more, we can certainly
15 where there is an indication of attachment
16 double-check and provide copies of that attachment.

17 EXAMINER PHILLIPS-GARY: And I wasn't
18 necessarily saying you need to do that. I want to
19 make sure I just -- glancing through I had seen some
20 that didn't say attachment and that may -- what that
21 attachment is may factor into the analysis as to
22 whether it's protected or not. If it's an e-mail
23 that says happy birthday and then there is an
24 attachment, just looking at the e-mail may be --

25 MS. GRADY: Understood, your Honor.

1 There is no happy birthday e-mails here.

2 EXAMINER PRICE: There is a vacation one
3 on No. 5 that they waived privilege on.

4 MS. GRADY: That would be as I indicated
5 off the record, No. 5, where there is stars or
6 asterisks contained on the privilege log, those
7 documents have been produced. They were produced and
8 labeled the third supplemental responses. They were
9 e-mailed this morning prior to the prehearing
10 conference, and I did also as well bring hard copies
11 of those so these were weeded out, somehow they got
12 put in here, weeded out over the weekend. And I
13 provided those to the -- to the parties on the basis
14 that those were not privileged.

15 EXAMINER PRICE: And just one more thing
16 for the record, your written joint defense agreement
17 indicates an effective date of October 12, 2010; is
18 that correct?

19 MS. GRADY: That is my understanding,
20 your Honor. I will double-check. I now appear to
21 have a copy of that. It was produced for FirstEnergy
22 and --

23 EXAMINER PRICE: You can advise the Bench
24 at some point if that is not correct. We will go
25 with that date for now.

1 MS. GRADY: Just for the record it was
2 produced as PDF6 on Friday pursuant to the
3 supplemental responses.

4 EXAMINER PRICE: Okay. Moving along then
5 I assume that the same arguments apply for e-mails 2,
6 3, 4, 6, all of which involve correspondence between
7 Ms. Grady and Mr. Corcoran.

8 MS. GRADY: Yes, your Honor. I believe
9 those are attorney-client.

10 EXAMINER PRICE: We are looking at these,
11 and I am just checking them off as we are going
12 through them in my review.

13 EXAMINER PHILLIPS-GARY: And likewise 8
14 which is also between Ms. Grady and Mr. Corcoran.

15 MS. GRADY: Yes, yes, your Honor.

16 EXAMINER PRICE: That brings us to OCC
17 document Nos. 9, 10, and 11, correspondence between
18 Sue Steigerwald, Mr. Corcoran, and Amy Gomberg. Do
19 you have anything to supplement your previous
20 discussion?

21 MS. GRADY: Yes, your Honor. We would
22 note that attorney-client privilege does not require
23 the communication to contain purely legal advice to
24 be privileged. That instead if the communication is
25 between lawyer and client and would facilitate the

1 rendition of legal services or advice, that is
2 enough.

3 That authority is State, ex rel. Toledo
4 Blade v. Toledo Lucas 121 Ohio State 3rd 537.

5 Additionally, your Honor, the Supreme
6 Court of Ohio has held that the attorney-client
7 privilege includes communications through a person
8 acting as the attorney's agent. That would be State
9 of Ohio v. Post 32 Ohio State 3rd 380 which extended
10 the agent to a polygraph expert hired by the
11 attorney.

12 EXAMINER PRICE: Ms. Gomberg is a
13 polygraph expert?

14 MS. GRADY: No, your Honor. However --

15 EXAMINER PRICE: She's a lobbyist, is she
16 not?

17 MS. GRADY: She is, your Honor.

18 EXAMINER PRICE: Would you like to
19 respond to Mr. Garber's contention in his memorandum
20 contra which the courts have already determined
21 lobbyists are not attorneys for purposes of
22 privilege?

23 MS. GRADY: Yes, your Honor. Under
24 4911-12 the statute -- the statute which establishes
25 OCC, that statute indicates that the OCC may employ

1 officers, experts, lawyers, engineers, economists,
2 statisticians, accountants, investigators, and
3 employees in fiduciary, supervisory, and
4 policy-making positions as are necessary to carry out
5 Chapter 4911 and perform the Consumer's Counsel
6 duties.

7 Ms. Gomberg is an employee and is in a
8 fiduciary and supervisory role. She is a director of
9 the Office of Consumers' Counsel and, therefore, is
10 clearly an agent of the Consumers' Counsel regardless
11 of the fact she is not an attorney.

12 EXAMINER PRICE: Mr. Garber, would you
13 like to respond to that?

14 MR. GARBER: Yes, your Honor.

15 EXAMINER PRICE: I'm sorry. I'm not sure
16 who is arguing for FirstEnergy.

17 MR. SAKS: I am happy to respond.

18 EXAMINER PRICE: Whichever one you would
19 like to choose.

20 MR. SAKS: Our response would be several
21 fold. First of all, they need to make a showing how
22 this lobbyist facilitated legal advice first and
23 foremost. And, second of all, while there is a
24 number of communications here with Ms. Gomberg's name
25 on them, it's especially suspect. I mean, our

position would be anything involving Ms. Gomberg would be suspect and not privileged but especially suspect in the example of the e-mail we are discussing here, 9, 10, and 11, when there is not even an OCC lawyer involved. So it's not as though there is an OCC lawyer, and Ms. Gomberg is the alleged assistant somehow to the legal exchange, but you have a CKAP party in Ms. Steigerwald, you have CKAP's lawyer in Mr. Corcoran, and then you have Miss Gomberg. In those instances it's doubly problematic.

EXAMINER PRICE: Thank you.

Ms. Grady, attachment -- e-mail attachment No. 10 appears to be a letter from Cleveland Electric Illuminating Company. It does not appear attached to this e-mail. It appears to be a document gathered by OCC preparing for this hearing. Is there -- is this a document you are withholding based upon trial preparation material, based upon gathering documents?

MS. GRADY: Yes, your Honor, that is.

EXAMINER PRICE: Thank you.

MS. GRADY: Your Honor, if I may make a quick brief statement --

EXAMINER PRICE: No, thank you. We have 350 e-mails to go through.

1 EXAMINER PHILLIPS-GARY: Actually 11 then
2 is just an envelope.

3 EXAMINER PRICE: Yes.

4 EXAMINER PHILLIPS-GARY: Same applies to
5 11.

6 EXAMINER PRICE: E-mail 12 I believe is
7 the same situation, the communication between
8 Steigerwald and Ms. Gomberg and Mr. Corcoran. 13
9 waived, withdraw it.

10 MS. GRADY: Your Honor, I would rather it
11 be disclosed. We will not waive.

12 EXAMINER PRICE: Disclosed, 13 has
13 already been disclosed.

14 MS. GRADY: Thank you.

15 EXAMINER PRICE: E-mails 14, 15, 16 are
16 further e-mails between counsel for OCC, counsel for
17 CKAP. We've already discussed.

18 EXAMINER PHILLIPS-GARY: Turning to
19 e-mail 17, Ms. Grady, who is Beth Hixon?

20 MS. GRADY: Beth Hixon is part of the
21 analytical staff and also identified in the case
22 team. As a member of the case team, primarily
23 analytical in-house person.

24 EXAMINER PHILLIPS-GARY: She is on e-mail
25 17 and 18.

1 MR. SAKS: Your Honor, is Ms. Hixon an
2 attorney?

3 EXAMINER PRICE: No. I don't know, is
4 Ms. Hixon an attorney?

5 MS. GRADY: No, she is not.

6 EXAMINER PRICE: That is not my
7 understanding.

8 MS. GRADY: No. She falls within the --
9 under the statutory group that under 4911-12 that
10 assists the Consumers' Counsel in carrying out 4911
11 duties and responsibilities.

12 MR. SAKS: Can we be provided with her
13 title as to what she does to meet the definition you
14 just read?

15 EXAMINER PRICE: She is assistant
16 director of analytical services according to the
17 e-mail.

18 MR. SMALL: What was the last part?

19 EXAMINER PRICE: I assume that her title
20 is not privileged; I can disclose that.

21 MR. SMALL: That is her title.

22 EXAMINER PRICE: That leaves us with
23 e-mails 19 -- that's been disclosed, sorry. 19 --
24 18, 19, 20, 21, 22, 23, and 24 have all been
25 disclosed.

1 MR. JONES: Your Honor, if I may
2 interject on behalf of staff, that's what that
3 indicates, that has been disclosed, 18 through 24,
4 those communications?

5 EXAMINER PRICE: Yes.

6 MR. JONES: Okay. I have not had a
7 chance to see those, obviously involving
8 communications with staff and, you know, they involve
9 settlement discussions and we don't believe those --

10 MS. GRADY: Your Honor -- well, let me
11 strike that. I didn't mean to interrupt.

12 EXAMINER PRICE: Yeah. Let's let
13 Mr. Jones make his argument here.

14 MR. JONES: Yeah. Those were involving
15 settlement discussions with staff, and because that
16 was the nature of those discussions they should not
17 be disclosed.

18 EXAMINER PRICE: Well, unfortunately,
19 Mr. Jones, the cat is out of the bag because they
20 have already turned them over to FirstEnergy.
21 Whether or not a settlement privilege would have been
22 acceptable, that's not anything we discussed on
23 January 7. They have already been given to
24 FirstEnergy, and we cannot unring the bell.

25 MS. GRADY: Your Honor, if I might

1 assist, as I understand it, if documents have been
2 inadvertently disclosed or wrongly disclosed, that
3 does not waive the attorney-client privilege, and the
4 Bench could rule if it should -- should desire to do
5 so could rule those be returned to --

6 EXAMINER PRICE: They weren't
7 inadvertently disclosed. You certainly intentionally
8 did it. Might not be something the staff is very
9 happy about but I don't think we can rely on
10 inadvertent at this point. They are out to the
11 parties. It's not just FirstEnergy; I believe all
12 the parties got these documents this morning. What's
13 done is done.

14 MS. GRADY: I also would add the
15 communications do not disclose the nature -- as far
16 as I recall the nature of the settlement discussions
17 but merely to the fact that there were opportunities
18 or that there were -- there was scheduling of future
19 discussions.

20 EXAMINER PRICE: Okay. No. 25 and 26
21 regard correspondence between Ms. Gomberg,
22 Ms. Steigerwald, a named intervenor, and Pat Snyder.
23 Would you care to tell us who Mrs. or Mr. Snyder is?

24 MS. GRADY: Yes. Mr. and Mrs. Snyder are
25 residential customers of FirstEnergy who directly

1 contacted Ms. Gomberg and seeking -- trying to
2 apprise OCC their -- the issues that they believe are
3 relevant in this -- in this case related to the all
4 electric discount and the -- that's it.

5 EXAMINER PRICE: So your contention is a
6 residential customer who contacted Ms. Gomberg in
7 February and she -- her reply in November are
8 attorney-client privilege?

9 MS. GRADY: Your Honor, if I may have a
10 moment. Yes, your Honor, and we would note that
11 the -- the -- these customers were seeking to make
12 their concerns to OCC with respect to the specific
13 issues in this case and that it squarely falls as
14 a -- falls within attorney-client because it is a
15 customer, and the Consumers' Counsel is represent --
16 is the statutory representative of customers.

17 EXAMINER PRICE: Mr. Saks.

18 MR. SAKS: While there may be an argument
19 that the customer contacted the OCC as
20 attorney-client, by virtue of the OCC then turning
21 them over to Ms. Steigerwald who is not a lawyer,
22 with Ms. Gomberg who is not a lawyer, that would be
23 outside any attorney-client relationship, protected
24 relationship.

25 MS. GRADY: Your Honor, if I may quickly

1 respond, Ms. Gomberg is an agent of the attorney and
2 has -- and is part of the case team, is working with
3 the attorneys. In addition, the disclosure to a
4 third party with whom there were common interests
5 does not waive attorney-client privilege under the
6 Ohio law.

7 EXAMINER PRICE: Assuming for the sake of
8 argument the initial communication between the
9 Snyders and to whom it may concern are
10 attorney-client privilege.

11 MS. GRADY: That is correct, your Honor.
12 That is correct.

13 EXAMINER PRICE: Next, we have
14 communications in e-mail 27, 28, 29, 30 through 71
15 between Ms. Gomberg and Sue Steigerwald.

16 EXAMINER PHILLIPS-GARY: No. 27 is
17 between Beth Hixon and Sue Steigerwald, Ms. Gomberg,
18 Mr. Small, Ms. Grady. And then 28 through 71 are the
19 ones between Ms. Gomberg and Sue Steigerwald.

20 EXAMINER PRICE: Yes. A number of these
21 documents, 31, 32, are not broken out individually,
22 but a number of them are actually documents which OCC
23 has gathered in preparation of this litigation; is
24 that correct?

25 MS. GRADY: Your Honor, they were

1 gathered -- yes, your Honor, I would indicate they
2 were gathered and if you -- if I may have a moment,
3 your Honor. Your Honor, OCC would rely on the State,
4 ex rel. Toledo Blade Company versus Toledo --

5 EXAMINER PRICE: I am not taking
6 arguments right now. I was just seeking
7 clarification.

8 EXAMINER PHILLIPS-GARY: I do have a
9 question --

10 EXAMINER PRICE: I have got a question
11 first. I have the floor, Mr. Phillips-Gary. Just to
12 bundle this, 31 through 35, let's see, quite a few of
13 these documents appear to be documents -- were any of
14 these created by -- let's just say 31 through 71, did
15 OCC create any of these documents?

16 MS. GRADY: No, your Honor.

17 EXAMINER PRICE: Did CKAP create any of
18 these documents?

19 MS. GRADY: No, your Honor. I would
20 indicate they were documents that appear to be
21 created by the companies in this proceeding.

22 EXAMINER PRICE: Thank you.

23 EXAMINER PHILLIPS-GARY: Ms. Grady, have
24 any of these documents been moved for admission by
25 OCC in this proceeding by the virtue of them being

1 presented at a local public hearing?

2 MS. GRADY: Your Honor, that
3 determination has not been made.

4 EXAMINER PHILLIPS-GARY: Okay. To the
5 best of your knowledge, these are not documents that
6 have been presented at local public hearings.

7 MS. GRADY: Your Honor, I cannot say to
8 the best of my knowledge. I would have to take the
9 privilege log and sit the privilege log beside all
10 the exhibits that were moved in and make that
11 determination. I have not done that yet.

12 EXAMINER PHILLIPS-GARY: Okay.

13 EXAMINER PRICE: Okay. Item 72, I'm
14 concerned how the statement, "okay, thanks. Should I
15 put pressure on Jen Lynch" is in furtherance of an
16 attorney-client privilege? That doesn't seem to me
17 to be anything with respect to this lawsuit or this
18 proceeding. It appears to be strictly a political
19 organization activity. Can you explain as to why
20 that would be privileged?

21 MS. GRADY: Well, your Honor, I guess
22 it's not privileged now that it's on the record
23 because it's been disclosed.

24 EXAMINER PRICE: Inadvertent.

25 MS. GRADY: Truly inadvertent.

1 EXAMINER PRICE: But the point still is
2 this is political organizing. This isn't --
3 that's -- Jen Lynch is not a party to this
4 proceeding. The governor was not a party to this --
5 is not a party to this proceeding. And this appears
6 to me strictly lobbying. I mean, you have -- you
7 have got a discussion between an OCC lobbyist and
8 Ms. Steigerwald regarding lobbying activities. How
9 is that privileged?

10 MS. GRADY: Your Honor, it is part of the
11 trial preparation strategy, relates to how -- how --
12 what -- what avenues are available and it does relate
13 to trial strategy. Trial strategy can at times
14 involve politics, and certainly this case has been
15 quite political.

16 EXAMINER PRICE: I think you're making
17 FirstEnergy's point, this is lobbying. That's not
18 privileged but I'll let Mr. Saks speak to that.

19 MR. SAKS: Thanks, your Honor, and that
20 is precisely our position. The privilege is for
21 legal advice and this is not the dispensation of
22 legal advice, and similar to one of the arguments or
23 points I made earlier this morning there is no
24 attorney -- when you have communications like No. 72,
25 73, 74, and others where it's just Ms. Gomberg who is

1 not a lawyer, she is a staff member, and
2 Ms. Steigerwald who is not a lawyer, they are even
3 doubly suspect that there is any attorney-client
4 privilege that could possibly be attached.

5 MS. GRADY: If I may respond, your Honor.

6 EXAMINER PRICE: No. I believe we have
7 heard enough on that issue.

8 MR. CORCORAN: Your Honor.

9 EXAMINER PRICE: Yes.

10 MR. CORCORAN: When you are referencing
11 72 in the item that you inadvertently disclosed,
12 that -- just for your information that is just one
13 portion of that entire e-mail.

14 EXAMINER PRICE: Well, I understand that,
15 but it just -- I don't see any of that e-mail that
16 otherwise relates to actual trial work as opposed to
17 political organizing. There's a statement from
18 Ms. Gomberg related to that statement. There's
19 discussions with vis-a-vis Senator Grendell and this
20 just seems to me to be strictly lobbying.

21 I mean, how do you draw -- are you saying
22 that any lobbying activity, any contacting political
23 figures done by OCC and CKAP is privileged as part of
24 your trial preparation here?

25 MS. GRADY: Your Honor, I might add

1 Senator Grendell was a witness at the -- at one of
2 the public hearings. I believe it was the Kirtland
3 public hearing, so he is a witness.

4 EXAMINER PRICE: I am not sure how that
5 advances the ball.

6 MS. GRADY: Well, he certainly presented
7 testimony in this case, so it is testimony related
8 and part of trial preparation and strategy, not
9 merely political -- political efforts.

10 EXAMINER PRICE: Well, but on 9-10, 2010,
11 they certainly did not know he was a witness at
12 Kirtland. Kirtland was not held yet.

13 MS. GRADY: Your Honor, I am not certain
14 of that. Senator Grendell --

15 EXAMINER PRICE: I am certain Kirtland
16 was not held as of 9-10.

17 MS. GRADY: This could have been related
18 to preparation efforts of Senator Grendell.

19 EXAMINER PRICE: Senator Grendell is not
20 on the e-mail.

21 MS. GRADY: Correct.

22 EXAMINER PRICE: Is Senator Grendell a
23 member of CKAP?

24 MR. CORCORAN: I believe he is.

25 EXAMINER PRICE: He is? Okay. We still

1 have 75. We continue through 76, 77, 78, 79, 80, 81,
2 82, 83, 84, 85, 86, 87, 88, and 89 all relate to
3 communication between Ms. Steigerwald and
4 Ms. Gomberg.

5 EXAMINER PHILLIPS-GARY: The only
6 difference on those is that Mr. Corcoran is cced on
7 75. The other ones are between Ms. Gomberg and
8 Ms. Steigerwald.

9 EXAMINER PRICE: Thank you. And 90
10 appears to have been disclosed. Why was 90
11 disclosed?

12 MS. GRADY: Your Honor, because 90
13 contained a letter from Ms. Migden-Ostrander to
14 Senator Patton and Grendell.

15 EXAMINER PRICE: Which was lobbying
16 activity?

17 MS. GRADY: Your Honor, I am not familiar
18 with the letter. I have not reviewed the letter in
19 detail. I indicated it was disclosed outside.
20 Senator Patton, I believe, is not a member of CKAP,
21 and it was disclosed as part of --

22 EXAMINER PRICE: Is Governor Strickland a
23 part of CKAP? What I am saying is you seem to be
24 inconsistent. Sometimes you will disclose
25 communications with public office holders, and

1 sometimes you're not, saying, well, that's not
2 lobbying; that's trial preparation. And so I'm
3 looking for where you draw the line between lobbying
4 and trial preparation.

5 MS. GRADY: In addition, your Honor --

6 EXAMINER PRICE: I have a question I am
7 asking you, Ms. Grady. Where do you draw the line
8 between this document dated August 5 which was sent
9 to office holders and other documents sent to other
10 office holders or other political individuals?

11 MS. GRADY: Your Honor, I think you have
12 to look at each document on a document-by-document
13 basis and this letter was disclosed to people outside
14 OCC, outside of CKAP and, therefore, can no longer be
15 covered by the attorney-client privilege. I think
16 it's a very fact-specific determination.

17 EXAMINER PRICE: So legislators that are
18 members of CKAP are privileged and legislators that
19 are not members of CKAP are not?

20 MS. GRADY: May I have that reread?

21 EXAMINER PRICE: Legislators who are
22 members of CKAP are privileged, legislators who are
23 not members of CKAP are not; is that what you are
24 saying?

25 MS. GRADY: I think that would be a good

1 general rule.

2 EXAMINER PRICE: Thank you. Go ahead.

3 EXAMINER PHILLIPS-GARY: 93, 94, 95, and
4 96 are e-mails between Ms. Steigerwald and
5 Ms. Gomberg. 97 has been disclosed. 98, 99 are
6 another set of e-mails between Ms. Steigerwald and
7 Ms. Gomberg. 100 through 106 have been disclosed.
8 107 is also an e-mail from Ms. Gomberg to
9 Ms. Steigerwald.

10 MS. GRADY: And, your Honor, if I might
11 add with respect to that document, it does discuss
12 settlement so there would be some basis for
13 withholding on the basis of settlement privilege.

14 EXAMINER PRICE: What document is that?

15 EXAMINER PHILLIPS-GARY: 107?

16 MS. GRADY: That would be 107.

17 EXAMINER PRICE: You didn't list
18 settlement in your log.

19 MS. GRADY: In the drop down menu it was
20 not available to me. I did not create this
21 spreadsheet; it was created for me. It was not part
22 of the menu generally because settlement came up so
23 seldom in these documents.

24 EXAMINER PRICE: Okay.

25 EXAMINER PHILLIPS-GARY: 108 is -- 108

1 through 110 are e-mails from Ms. Gomberg to John
2 Gresock.

3 MS. GRADY: Yes, your Honor.

4 EXAMINER PRICE: Who is Mr. Gresock?

5 EXAMINER PHILLIPS-GARY: Could you
6 identify him, please.

7 MS. GRADY: Mr. Gresock is a residential
8 customer.

9 EXAMINER PRICE: That's it? That's your
10 sole basis?

11 MS. GRADY: He is seeking legal advice,
12 and as the representative of residential ratepayers,
13 it is OCC's client, a direct customer contact with
14 our office for the purpose of seeking legal advice.

15 EXAMINER PHILLIPS-GARY: And so
16 looking --

17 EXAMINER PRICE: One second, please.
18 The -- at 110 you are going to stand on the argument
19 that he is a residential customer or do you want to
20 amend that?

21 MS. GRADY: Your Honor, he is a
22 residential customer as well as a representative of
23 Western Reserve Property Management, so in both, he
24 was inquiring as in both capacities.

25 EXAMINER PRICE: Well, he identifies

1 Western Reserve Property Management. Do you know he
2 is a residential customer in the state?

3 MS. GRADY: Your Honor, that is my
4 understanding.

5 EXAMINER PRICE: Based upon what?

6 MS. GRADY: Based upon the fact that he
7 was discussing the issues related to residential
8 customers.

9 EXAMINER PRICE: He was discussing those
10 as property manager. I am just asking do you know he
11 is a residential customer?

12 MS. GRADY: I am surmising he is a
13 residential customer as well as a property manager.

14 EXAMINER PRICE: What is your basis for
15 believing he is a FirstEnergy customer at all?

16 MS. GRADY: He is inquiring about
17 FirstEnergy. He is not going to inquire about --

18 EXAMINER PRICE: He is a property
19 manager. He has got property. He is a businessman.
20 He contacted you on behalf of his business.

21 Certainly a property owner might have an interest in
22 FirstEnergy's rates but that has nothing -- there is
23 no plausible attorney-client relationship between a
24 property manager and OCC.

25 MS. GRADY: I understand you are drawing

1 a distinction, your Honor. I might not necessarily
2 agree with that, but I understand your distinction.

3 EXAMINER PRICE: If you don't agree with
4 my distinction that he is a property manager, can you
5 explain how communications between a property manager
6 and OCC are privileged?

7 MS. GRADY: Your Honor, again, I am not
8 clear from this e-mail whether or not he is inquiring
9 as a residential customer on issues that could be
10 related to residential customers as well as a
11 business customer. The information given by
12 Ms. Gomberg went through the entire water heating
13 schedules with respect to residential generation
14 credit and was given to him -- information was given
15 to him as to what the -- what the tariffs provided
16 and what the discounts for residential generation
17 credit were to a particular group of customers. I do
18 not think it is quite as clear as your Honor believes
19 it is.

20 MR. SAKS: Your Honor, if I may, based
21 upon that description, I don't have the benefit of
22 seeing the document, I would submit that reading
23 tariffs and explaining what rates apply is not the
24 rendering of any sort of legal advice that would be
25 privileged irrespective of the party's relationship.

1 MS. GRADY: Your Honor, if I might
2 address that --

3 EXAMINER PRICE: No, that's okay. Are
4 you working with any other groups of individuals
5 besides CKAP that you are claiming privilege for?
6 Who is Sunrise Cove Condominium Association?

7 MS. GRADY: Your Honor, that is a group
8 of condominium owners. I believe the member is a --
9 member who is with the condominium association is a
10 member of CKAP.

11 EXAMINER PRICE: Okay. Document 111,
12 112, we have included Sue Dougherty of Serving Our
13 Seniors as one of the e-mails.

14 MS. GRADY: Yes, your Honor.

15 EXAMINER PRICE: Is Sue Dougherty of
16 Serving Our Seniors an employee of OCC?

17 MS. GRADY: No, your Honor. She is a
18 member of CKAP.

19 EXAMINER PRICE: Mr. Corcoran, is that
20 correct?

21 MR. CORCORAN: That is correct, has been
22 for a long time.

23 EXAMINER PRICE: Is she an all electric
24 customer? Is she a residential customer of The
25 Toledo Edison?

1 MS. GRADY: I do not know that, your
2 Honor.

3 EXAMINER PRICE: I am asking
4 Mr. Corcoran.

5 MR. CORCORAN: I believe she is a
6 resident of Toledo Edison.

7 MR. RINEBOLT: She is.

8 EXAMINER PRICE: Mr. Rinebolt confirms
9 that she is a Toledo Edison customer.

10 MR. CORCORAN: I don't know all the CKAP
11 members personally.

12 EXAMINER PRICE: I'm struggling here with
13 people who identify themselves working for a business
14 or organization in their communications with OCC but
15 also happen to be one of the 3 million or so
16 residential customers served by FirstEnergy, that
17 that creates an attorney-client privilege vis-a-vis
18 OCC.

19 I mean, it seems to me that that is a
20 rather broad claim at that point because you could
21 claim that your communications with Mr. Rinebolt
22 irrespective of any common interest in this case are
23 privileged because Mr. Rinebolt is an -- is a
24 resident of FirstEnergy service territory.

25 Do you see my point? If people contact

1 you in the capacity as an organization, how is it
2 that their communications with you are privileged?

3 MS. GRADY: As a matter of CKAP. To the
4 extent they are not residential customers, I would
5 believe -- and it's clearly not --

6 EXAMINER PRICE: But there is no
7 attorneys -- I understand what you are saying but
8 there's no attorneys from CKAP involved in this
9 e-mail exchange.

10 MS. GRADY: This would be an agent under
11 the CKAP and under the prevailing --

12 EXAMINER PRICE: Sue Dougherty is not an
13 agent of CKAP, that's my point. I understand you
14 want to make the argument that under Upjohn
15 Steigerwald's communication with OCC attorneys are a
16 member of a control group to an attorney and are
17 privileged. And I can almost understand that because
18 Sue Steigerwald is one of the leaders of CKAP. But
19 Sue Dougherty isn't a named intervenor in this case,
20 doesn't appear to have any semi-formal position or
21 formal position with CKAP. She just happens to be a
22 member of CKAP. And I don't understand how you can
23 say that every communication between Amy Gomberg and
24 every member of CKAP is privileged.

25 MR. CORCORAN: Your Honor.

1 EXAMINER PRICE: Yes.

2 MR. CORCORAN: Ms. Dougherty is
3 essentially like a lieutenant in the group. She --

4 EXAMINER PRICE: Do you have a defined
5 control group?

6 MR. CORCORAN: A defined control group?

7 EXAMINER PRICE: OCC has a defined
8 control group for this case.

9 MR. CORCORAN: I don't know that I have
10 ever defined the group.

11 EXAMINER PRICE: You see the difficulty
12 you are putting the Commission in because you are
13 just -- every time this comes up you can say she is a
14 lieutenant.

15 MR. CORCORAN: She was in charge of the
16 Sandusky area, The Toledo Edison area. She had led
17 that -- that area --

18 MR. RANDAZZO: Sandusky is Ohio Edison.

19 MR. CORCORAN: Whatever. I don't know
20 the territories. And whenever there was a meeting in
21 Sandusky, Sue was -- Sue Dougherty was the contact
22 for the CKAP members for the most part.

23 EXAMINER PRICE: FirstEnergy.

24 MR. SAKS: Just to renew and echo what
25 your Honor just noted, we have the same problems,

1 particularly as I said in the instance of not having
2 the e-mail in front of me when you have Amy Gomberg
3 who is merely a staff aide, not a lawyer;
4 Ms. Steigerwald is not a lawyer; Ms. Dougherty is not
5 a lawyer. It would make any claim of attorney-client
6 privilege suspect, and particularly as your Honor
7 identified the fact that Ms. Dougherty is part of
8 some morbus undefined control group that could be
9 however expansive.

10 EXAMINER PRICE: Not that I think this
11 case is going to turn on this question but I will
12 note that there is a -- document 112 there is a
13 May 25, 2010, document that you probably ought to
14 disclose to FirstEnergy because that document
15 dates -- if you have not otherwise done so, that
16 document dates even before your June -- is it June
17 1st that your informal agreement came into being?

18 MS. GRADY: I believe, your Honor, that's
19 what we identified, in the beginning of June. I
20 would look at the interlocutory appeal.

21 EXAMINER PHILLIPS-GARY: So your informal
22 agreement predates the filing of OCC's filing in
23 response to CKAP's motion to intervene?

24 MS. GRADY: I do not believe so, your
25 Honor.

1 MR. CORCORAN: I'm sorry. Say that
2 again.

3 EXAMINER PHILLIPS-GARY: I am just trying
4 to get straight on the dating of this --

5 MR. CORCORAN: I believe, your Honor, the
6 motion to intervene was in March.

7 EXAMINER PHILLIPS-GARY: Right. No.

8 EXAMINER PRICE: There is substantial
9 motion practice involved.

10 MS. GRADY: Correct.

11 EXAMINER PHILLIPS-GARY: And more
12 importantly what I am trying to get at is that -- let
13 me find the -- my understanding is that on June 2 was
14 when the motion to intervene was filed by the CKAP
15 parties. And OCC filed a reply to FirstEnergy's
16 memorandum contra, the motion to intervene, on
17 June 24, 2010. That's why I am wondering about the
18 June 1 because --

19 EXAMINER PRICE: At that point you are
20 representing your interests don't converge.

21 MS. GRADY: Your Honor, if you would look
22 at the OCC memorandum contra, we did not focus on
23 that particular issue. Instead we made other claims
24 that the statute -- the statute that that -- whether
25 or not parties' interests are diverse is not the

1 grounds or basis for excluding intervention, so we
2 did not even address that issue. That was CKAP that
3 addressed the issue of whether the interests were
4 divergent or not.

5 EXAMINER PRICE: Certainly hadn't
6 abandoned that claim. The Commission is going -- I
7 mean that issue is squarely before the Commission,
8 and they are going to rule how they are going to
9 rule.

10 Okay. 113 at the bottom of page 2
11 Ms. Gomberg, Steigerwald, as is 114. That takes us
12 to 115, 118.

13 MS. GRADY: Your Honor, it's my
14 understanding of 115 that the majority of that was
15 disclosed with the exception of the -- the area that
16 looks like handwriting out. That is my
17 understanding.

18 EXAMINER PRICE: Whose handwriting is
19 that?

20 MS. GRADY: That is my -- that is my
21 handwriting. Understand we went through thousands
22 and thousands of documents.

23 EXAMINER PRICE: Whose Joyce Leimbach?

24 MS. GRADY: She apparently is a
25 residential customer and a member of CKAP.

1 EXAMINER PRICE: I am concerned about
2 "apparently." You know she is or you don't know.
3 The burden -- again, this is one of those fundamental
4 questions. The burden is on you to show the
5 privilege applies. And you keep saying "I assume she
6 is a residential customer, apparently she is a
7 residential customer." I don't know how you can draw
8 "apparently" from dex.net. You know that she is or
9 you know she is a member of CKAP and she is part of
10 CKAP's control group or it should come in.

11 MS. GRADY: Your Honor, she is a member
12 of CKAP.

13 EXAMINER PRICE: I said control group.
14 Is she a member of CKAP's control group?

15 MS. GRADY: I will let Mr. Corcoran
16 address that.

17 EXAMINER PHILLIPS-GARY: I want to direct
18 your attention to 112, document 112, and just looking
19 at the to lines -- I am not going to disclose the
20 names or anything like that but looking at the text
21 of that e-mail and the to line on it, would you say
22 that that lists the control group for CKAP?

23 MR. CORCORAN: There are a few others
24 that are not mentioned in that to line but those
25 people have been all leaders on CKAP --

1 EXAMINER PHILLIPS-GARY: Okay.

2 MR. CORCORAN: -- in this issue.

3 EXAMINER PRICE: Mr. Saks, at the
4 January 7 prehearing conference Mr. Kutik pointed to
5 the Upjohn test who is in a control test -- control
6 group. Can you fresh the Bench's recollection of the
7 definition of control group, please?

8 MR. SAKS: If I could defer to Mr. Kutik
9 who has walked in.

10 EXAMINER PRICE: Slow times at the Duke
11 ESP?

12 MR. KUTIK: We are on a break, your
13 Honor, so I am more than glad to refresh your
14 recollection. Basically the test is basically
15 managerial discretion to control the decisions of the
16 entity.

17 MS. GRADY: Your Honor, if I might add.

18 EXAMINER PRICE: Certainly.

19 MS. GRADY: And Ohio State versus Leslie
20 and State versus Post are controlling.

21 EXAMINER PRICE: And there is a different
22 test there?

23 MS. GRADY: Your Honor, State versus Post
24 held that the attorney-client privilege extends to
25 agents. It did not necessarily define who the agents

1 were but said that the attorney-client extends to
2 agents. In that case it was a polygraph expert
3 retained by the attorney.

4 EXAMINER PRICE: But that's not -- that's
5 not a remotely close analogy here.

6 MS. GRADY: I'm just providing you --

7 EXAMINER PRICE: Clearly a polygraph
8 expert is retained to perform a specific task on
9 behalf of the attorney. In no case here is it with
10 possibly the exception of Ms. Gomberg who is
11 apparently retained to lobby on behalf of OCC, not
12 that there is anything wrong with lobbying, but
13 there's -- there are no people you are talking about
14 here who have been retained to perform a specific
15 task on behalf of the attorney.

16 We are not talking about your secretary
17 or people taking messages and giving them to you.
18 We're talking about what is the definition of the
19 control group for CKAP. And, you know, I would like
20 to be flexible and give them a little bit of leeway,
21 but it seems fairly undefined as opposed to OCC that
22 had a clearly defined trial team. People may
23 disagree as to whether people are appropriately on
24 it. You represented to us last week you had a
25 defined formal group, and honestly the burden is on

1 Mr. Corcoran to demonstrate that he has a defined
2 formal group of leaders.

3 Mr. Corcoran, care to step up to that?

4 MR. CORCORAN: I would love to. I am
5 trying to pull that information up and see if I can
6 help you out a little bit. Yeah. There is no
7 defined place where you can go to find out who the
8 control group is in CKAP.

9 EXAMINER PRICE: Isn't there a section on
10 your website that lists the leaders of CKAP?

11 MR. CORCORAN: There is.

12 EXAMINER PRICE: Who are the four
13 individuals?

14 MR. CORCORAN: That would be three
15 others. That's what I was pulling up. One is Connie
16 Kline, Rich Jordan, and Sue Steigerwald.

17 EXAMINER PRICE: Are you willing to
18 stipulate for purposes of today's prehearing that
19 that is your control group?

20 MR. CORCORAN: I would not limit it to
21 those people, no.

22 EXAMINER PRICE: Could you tell me who
23 else before we keep going through these?

24 MR. CORCORAN: Certainly. I think you
25 are looking at -- I can't remember everybody, you

1 know. Different people came in and played roles at
2 different times for different purposes. So you're
3 talking about somebody like a Sue Dougherty who has
4 been there and active in the Sandusky area the whole
5 time, people like John Carney and Mike Carney.

6 EXAMINER PRICE: The Carneys, they are
7 property owners. They are developers, right? They
8 testified at the prehearing conference in
9 Strongsville, I believe.

10 MR. CORCORAN: I believe Mike Carney
11 lives in one of those units.

12 EXAMINER PRICE: Right. The other one is
13 a developer.

14 MR. CORCORAN: Also an attorney along
15 with his partner.

16 EXAMINER PRICE: Well, he may be -- there
17 are lots of attorneys who are not acting in terms of
18 providing legal advice. Okay. So you're claiming
19 Mr. Carney who is a real estate developer is also
20 potentially a member of your control group?

21 MR. CORCORAN: We had discussed strategy
22 with him, CKAP strategy, quite a bit.

23 EXAMINER PRICE: Okay.

24 MR. CORCORAN: And, you know, again, I
25 can't remember everybody. This has been going on for

1 a long time and there was a lot of people involved.

2 EXAMINER PRICE: Uh-huh. Okay. We left
3 off with the question of Joyce Leimbach who is not a
4 homeowner.

5 MS. GRADY: I'm sorry. What number
6 document are we on, your Honor?

7 EXAMINER PRICE: I am looking at 116, 115
8 through 118. Okay. That takes us up to 119, 120,
9 communication between Sue Steigerwald and Amy Gomberg
10 or Amy Gomberg and Mr. Corcoran, 121, 122. 123, 124
11 have been disclosed. 125 all attorneys apparently
12 seemingly. Is there anybody who is not an attorney
13 on 125?

14 MS. GRADY: No, your Honor.

15 EXAMINER PRICE: Okay.

16 MR. SMALL: Your Honor, if I may.

17 EXAMINER PRICE: Yes, Mr. Small.

18 MR. SMALL: Would there be a moment we
19 could take a break off the record?

20 EXAMINER PRICE: No. Is there
21 something -- let's go off the record.

22 (Discussion off the record.)

23 EXAMINER PRICE: Let's go back on the
24 record. We left off at 125. 126 and 127, we've
25 discussed those issues thoroughly. 128 involves

1 communication between Amy Gomberg and Mike and Marie
2 Pollock and pollock@windstream.net. Is there -- are
3 you claiming anything more than residential customer
4 here?

5 MS. GRADY: Residential customer seeking
6 legal advice. That is what we are claiming
7 associated with the all electric rate discount and
8 all of the issues that this proceeding brings to
9 bear. Your Honor, I might note --

10 EXAMINER PRICE: One second please. 129
11 I notice that it's Ms. Gomberg who made the
12 connection to the Pollocks. You -- this is not a
13 contact of a residential customer with OCC seeking
14 legal advice. This was an instance of OCC seeking
15 out the customers. Does that change your position
16 any?

17 MR. CORCORAN: Actually I believe the
18 residential customer was looking for advice and had
19 contacted Representative Lundy who then passed the
20 information along to the OCC.

21 EXAMINER PRICE: I understand that that's
22 what happened but that seems to be kind of a stretch.
23 It certainly wasn't -- the customer did not reach out
24 to OCC. They reached out to their legislature, not
25 OCC that reached out to them but let's not belabor

1 this point.

2 MR. SAKS: Your Honor, the point I would
3 make in line with that the communication from the
4 customer to the representative obviously is not
5 privileged, so then when it goes through that route,
6 that would I think you are indicating make any kind
7 of privilege even all the more suspect.

8 EXAMINER PRICE: Then we have 130 -- oh,
9 that's been disclosed.

10 MS. GRADY: Your Honor, I might add that
11 it would appear the disclosure 130 to 132 was on the
12 basis that your Honor discussed it being a
13 nonresidential customer, and so to the extent that we
14 were willing to produce that the other documents
15 related to the Sunrise Cove Condominium Association
16 would be able to be disclosed as well.

17 EXAMINER PRICE: So you'll supplement
18 anything else from Mr. Gresock.

19 MS. GRADY: Well, your Honor, I will look
20 at Mr. Gresock's e-mails and make that determination,
21 but it would appear that as a general rule, we would
22 be willing to produce those.

23 EXAMINER PHILLIPS-GARY: Great because
24 108 through 110 appear to be identical to 131 and
25 132.

1 MS. GRADY: So there would be no need to
2 supplement because it's already been produced then.

3 EXAMINER PHILLIPS-GARY: With the
4 exception of at the top of 108 the Amy Gomberg's
5 comment.

6 MS. GRADY: And that certainly -- the
7 comment is -- you are talking about the comment, "ha,
8 thanks"?

9 EXAMINER PHILLIPS-GARY: Actually it
10 refers to the holiday that is soon to be coming up.

11 MS. GRADY: And that would not be
12 privileged.

13 EXAMINER PHILLIPS-GARY: Yeah.

14 EXAMINER PRICE: Okay. 134 I'm just
15 going to note for the record once again appears to
16 strictly be political organizing. It's discussion
17 regarding a committee hearing and whether or not
18 e-mails should be forwarded to a legislator. It's
19 nothing to do with trial preparation. It has
20 everything to do with lobbying.

21 MS. GRADY: Your Honor, again my
22 response --

23 EXAMINER PRICE: I don't need a further
24 response. I was just making a note for the record,
25 Ms. Grady. 136 through 15 -- no, 136 is

1 Ms. Steigerwald and Ms. Gomberg. 137 was disclosed.
2 138 through 154. We have a letter to the governor.
3 Would you care to explain how a three-page letter to
4 the governor has any plausible trial preparation?

5 MS. GRADY: Your Honor, we would be able
6 to disclose that.

7 EXAMINER PRICE: Thank you. How far does
8 your disclosure go? All the way to 154?

9 MS. GRADY: No, 139 to 141, because I
10 don't believe the other documents were disclosed to
11 anyone outside CKAP and OCC, Amy Gomberg.

12 EXAMINER PHILLIPS-GARY: Did 142 -- if
13 you look at this, is this part of what was included
14 in the letter to the governor?

15 MS. GRADY: I do not -- I do not -- well,
16 your Honor, I stand corrected. It looks like this
17 may have been, so to the extent that this was
18 disclosed, we would --

19 EXAMINER PRICE: You will disclose it
20 probably.

21 MS. GRADY: We will disclose it. It was
22 disclosed to the governor, and it appears to be an
23 attachment, so we would provide copies of that.

24 EXAMINER PHILLIPS-GARY: That goes
25 through 154, I believe.

1 MS. GRADY: I think that's correct, your
2 Honor.

3 EXAMINER PRICE: Okay. 155, Gomberg,
4 Steigerwald. 156, Gale Larson, Gale Larson would be?

5 MS. GRADY: Your Honor, I believe she is
6 a residential customer. She was inquiring as to
7 whether or not customers that participate in
8 aggregation would receive all electric credits. So I
9 believe that that is --

10 EXAMINER PRICE: On the basis she is a
11 residential customer of the state.

12 MS. GRADY: Correct. And I am not sure
13 if she is a member of CKAP or not.

14 MR. CORCORAN: I'm not sure.

15 EXAMINER PRICE: Okay. 157 through 160,
16 Strategy Discussion Re: Meetings with -- Re:
17 Testimony; Other Meeting with Government Officials,
18 Discussion Re: Meeting with OCC. Clearly here we
19 had discussions with, meeting with, lobbying with
20 office holders which is some sort of lobbying
21 activity. Do you have a case that demonstrates that
22 lobbying activity combined with litigation equals
23 attorney-client privilege?

24 MS. GRADY: Your Honor, I don't think
25 there is a specific case.

1 EXAMINER PRICE: But there is a specific
2 case saying lobbying activity is not privileged. Do
3 you agree on that?

4 MS. GRADY: No, your Honor. I am not
5 aware.

6 EXAMINER PRICE: Did you read
7 Mr. Garber's little message? He certainly makes that
8 point. I believe that's in section 4 of his
9 memorandum contra to your interlocutory appeal he
10 cites to several cases that lobbying activity is not
11 privileged.

12 MS. GRADY: I did not review that
13 memoranda contra.

14 MR. SAKS: Your Honor, if I may.

15 EXAMINER PRICE: You may.

16 MR. SAKS: On emails 157 through 160,
17 May 21, before June 1.

18 EXAMINER PRICE: Excellent point.

19 MR. SAKS: The same would be true for
20 several more as you turn to page 4.

21 EXAMINER PRICE: I knew there were some
22 on page 4.

23 MS. GRADY: Yes, there are.

24 EXAMINER PRICE: So you will disclose
25 those promptly.

1 MS. GRADY: Your Honor, as promptly as I
2 can.

3 EXAMINER PRICE: Well, you've got copies
4 here, Ms. Grady. You just have to tear out the pages
5 and give them to the gentlemen over there.

6 OCC is not seeking privilege on those.
7 157 through 160.

8 Okay. 161 through 162, okay, those have
9 been disclosed. 163, 164, 166, takes us to documents
10 166 through 168 dated March 21, 2010, prior to the
11 informal joint defense agreement. Is there any
12 reason you shouldn't be disclosing those?

13 Hearing none we will move on to the next.
14 169 predates the joint defense agreement. 170
15 predates the joint defense agreement. It takes us to
16 171 through 173. Mr. Corcoran, this was sent out to
17 all the people in the CKAP mailing list.

18 MR. CORCORAN: It looks like it was,
19 internal party communication.

20 EXAMINER PRICE: What steps do you take
21 to ensure that only CKAP members join the CKAP
22 mailing list? Is this a list serve that anybody can
23 sign up for? Can Mr. Randazzo sign up for it?

24 MR. CORCORAN: As I mentioned the last
25 prehearing, pretrial hearing, I believe that there

1 was a message that went out and mentioned they had an
2 opportunity to be represented by counsel as a CKAP
3 member.

4 EXAMINER PRICE: I understand that. I
5 understand. I am just saying have you taken any
6 steps to safeguard that the list is CKAP members and
7 solely CKAP members? Is there a code that you give
8 people that you are now on the list, or is it simply
9 anybody that wants to receive our communications can
10 receive our communications? Because I don't see the
11 privilege there.

12 MR. CORCORAN: Well --

13 EXAMINER PRICE: I know you are kind of a
14 loose association. I am trying to respect that.

15 MR. CORCORAN: Right. The people that
16 ask --

17 EXAMINER PRICE: Do they pay a fee or a
18 fine? Do they pay a registration fee? Do they
19 register? Do they provide their name and address?

20 MR. CORCORAN: They paid a lot of money
21 during the winter heating season when their discount
22 was taken away. These people asked to be on the list
23 because they are all electric homeowners.

24 EXAMINER PRICE: But you don't know if
25 everybody on that list is all electric homeowners.

1 Maybe there is somebody who is not an all electric
2 homeowner who could put their e-mail address on
3 there, couldn't they?

4 MR. CORCORAN: They had to make some
5 formal contact with the group to ask to be put on the
6 list. The people that asked to be put on the list
7 are all electric homeowners as far as I'm aware.

8 MR. SAKS: Your Honor, we would just
9 follow up and submit that there has not been a
10 showing that the attorney-client privilege has been
11 protected in this instance, particularly with this
12 e-mail. Mr. Corcoran earlier today, I don't believe
13 it was on the record when we asked for names and
14 addresses of CKAP members, told us that he does not
15 have such a list. The only list he has is a list of
16 e-mail addresses.

17 For all he knows I could take my personal
18 e-mail account not identified as a lawyer and try
19 getting on the CKAP list. There is not the necessary
20 precautions being taken to preserve the
21 attorney-client privilege, particularly in the
22 context of 171 through 173 with a blast e-mail to all
23 CKAP members.

24 EXAMINER PRICE: The other thing I am
25 going to note for the record is this is in OCC's

1 disclosure but there is no record of where OCC came
2 across this particular document. There's no
3 indication that it was given to OCC attorneys.
4 There's no indication it was given to --

5 EXAMINER PHILLIPS-GARY: No indication it
6 was given to OCC.

7 EXAMINER PRICE: No indication it was
8 given to OCC directly.

9 EXAMINER PHILLIPS-GARY: How does OCC --

10 MS. GRADY: Your Honor, it would appear
11 that there are -- this -- at the bottom corner of the
12 document that says 3 of 5. Perhaps the 1 and 2 would
13 explain that, and I don't have that 1 and 2 before
14 me, but I could certainly provide that if your Honors
15 want a context for this.

16 EXAMINER PRICE: Well, I think the point
17 of the in camera review you bring what you have, and
18 if you don't bring it, then we assume you don't have
19 it. After all, you asked for an interlocutory appeal
20 for an in camera review.

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

22 EXAMINER PRICE: Okay. 174 is
23 Ms. Steigerwald or Ms. Gomberg, part of their
24 communications. 175 involves Nick Colby.

25 MS. GRADY: Your Honor, Mr. Colby as

1 evident in the -- in the e-mail is a total electric
2 homeowner, has been since 1977.

3 EXAMINER PRICE: So you're relying upon
4 the fact he is a residential customer.

5 MS. GRADY: That is correct.

6 EXAMINER PRICE: Thank you.

7 MR. SAKS: I'm sorry. Was that No. 175?

8 EXAMINER PRICE: Yes, it was.

9 MR. SAKS: That would also be April 10,
10 2010.

11 EXAMINER PRICE: Good point. Their
12 argument is all residential customers soliciting
13 legal advice with them is also privileged.

14 MR. SAKS: But then it goes to
15 Ms. Steigerwald -- but then it goes to
16 Ms. Steigerwald who is assigned to the group prior to
17 the joint defense privileged time period as
18 articulated as June 1.

19 EXAMINER PRICE: Fair enough. Thank you.
20 OCC, this falls outside the timeframe from your joint
21 defense agreement. It ought to be disclosed.

22 I wish I had highlighted those. Okay.
23 That takes us to 176, communication between Sue
24 Dougherty, Amy Gomberg, and Sue Steigerwald. 177.

25 EXAMINER PHILLIPS-GARY: 177.

1 EXAMINER PRICE: 177, your handwritten
2 notes here, I am not sure if I -- have you disclosed
3 the bottom half of this, Ms. Grady?

4 MS. GRADY: That's my understanding, your
5 Honor.

6 EXAMINER PRICE: Thank you. Otherwise
7 it's just a communication between Ms. Steigerwald and
8 Ms. Gomberg.

9 MS. GRADY: That is correct.

10 EXAMINER PHILLIPS-GARY: 178 and 179 have
11 been disclosed.

12 EXAMINER PRICE: 180, Mike Payne. E-mail
13 from Sue Seigerwald to Mike Payne. Who is Mike
14 Payne?

15 MR. CORCORAN: Mike Payne is a member of
16 CKAP.

17 EXAMINER PRICE: But not a member of the
18 control group?

19 MR. CORCORAN: I believe that you could
20 say that because of his position as a residential
21 builder. He's in a similar situation as the Bob
22 Schmitt Homes so, therefore, I would --

23 EXAMINER PRICE: Okay. So what is Mike
24 Payne's capacity? Is he a home builder, or is he a
25 residential customer? Because I am not going -- you

1 cannot claim another home builder's communications
2 with you are privileged. There's no privilege in the
3 role between CKAP and home builders other than Bob
4 Schmitt. Certainly the documents that have been
5 attached appear to be documents between FirstEnergy
6 and a home builder.

7 And just let me point out, Mr. Corcoran,
8 this is actually Ms. Grady's argument because these
9 are her documents. The burden is not on you to
10 demonstrate privilege; the burden is on her.

11 EXAMINER PHILLIPS-GARY: And with regard
12 to Mr. Price's comments about these particular type
13 of documents, just so we can consolidate the
14 discussion also 186. Starting 187 through 219 appear
15 to be also -- well, up through many of these, up
16 through 206 at least and maybe even further appear to
17 be -- fall in the same category as their documents
18 cre -- which appear to be created by FirstEnergy.

19 And I would note that continues on into
20 the 244. There is also another -- there is a whole
21 other big stack of them there and then starting with
22 2 -- well, really it looks like through 289 that
23 the -- I am assuming there are cover e-mails and then
24 there are documents which look like they were -- have
25 been created by FirstEnergy or a predecessor or an

1 operating company.

2 EXAMINER PRICE: Ms. Grady, what's the
3 basis of your privilege claim here?

4 MS. GRADY: I'm sorry, your Honor. You
5 are asking with respect to all these materials?

6 EXAMINER PRICE: I think we are talking
7 about as Mr. Phillips-Gary said 180 through 185, 186
8 through 219, 220 through 244, 245 through 265, 266
9 through 289. All of these appear to be
10 communications between a home builder, Mr. Payne, and
11 Ms. Steigerwald with a copy to Ms. Gomberg.

12 MS. GRADY: Your Honor, the basis would
13 be that it would be trial preparation. It's fact
14 work product which is recognized --

15 EXAMINER PRICE: These are all --

16 EXAMINER PHILLIPS-GARY: Work product.

17 MS. GRADY: Work product.

18 EXAMINER PRICE: Did you create any
19 documents?

20 MS. GRADY: It was gathered and is the
21 basis --

22 EXAMINER PRICE: This is your gathering
23 argument.

24 MS. GRADY: Yes, your Honor.

25 EXAMINER PRICE: And sole, that's fine.

1 The documents that are at issue here you are hanging
2 your hat on the gathering argument.

3 MS. GRADY: Yes, your Honor.

4 MR. SAKS: Your Honor, we would just note
5 and our position would be that Mr. Payne being
6 involved would be outside of any recognized
7 privilege. He is a builder. He is not a member of
8 CKAP. He testified to my knowledge at one of the
9 public hearings and parties including CKAP members
10 are not supposed to testify at these public hearings
11 is my understanding. And we would submit that
12 anything involving Mr. Payne is beyond any
13 conceivable argument.

14 EXAMINER PRICE: Their argument is any
15 documents that were gathered by Ms. Gomberg on behalf
16 of their attorneys are privileged under a broad
17 interpretation of the trial preparation privilege.

18 Something you might keep in mind in your
19 next rate case, just have your attorneys gather all
20 the documents and then they won't be discoverable.

21 MR. SAKS: And I guess our response would
22 be even that looking at the broadest application of
23 that doctrine, if I as an attorney sit in my office
24 and I choose to pick these 10 documents but not 10
25 others, that might be my work product, but when

1 Mr. Payne is involved in the process and I involve
2 someone outside of the attorney-client privilege, so
3 to speak, then that waives it.

4 EXAMINER PRICE: I think the gathering
5 question has been thoroughly addressed in the
6 previous prehearing conference and thoroughly briefed
7 by the parties and squarely before the Commission,
8 and the Commission will either uphold the privilege
9 or they won't.

10 MR. SAKS: Duly noted.

11 MS. GRADY: Your Honor, I might indicate
12 that Mr. -- I'm sorry, counsel for FirstEnergy
13 indicated that CKAP members were not supposed to
14 testify at the public hearings. I believe that's a
15 misstatement.

16 EXAMINER PRICE: Well, it gets to the
17 difficulty of the named intervenors versus the
18 resident -- it gets again back to trying to get a
19 little bit of leeway to the loose association that is
20 known as CKAP. It's certainly the case, it is a
21 general rule parties are not supposed to testify at
22 public hearings. Mr. Corcoran was kind enough to not
23 put on his named intervenors because of that general
24 rule.

25 But we did hear from a number of other

1 people, I'm sure many of them were CKAP members, and
2 so we are trying to give a little leeway to the CKAP
3 members, but I will say when you start stretching it
4 and say a home builder is a part of CKAP, that makes
5 it, I think, a little bit more difficult but,
6 again --

7 MR. CORCORAN: Your Honor, may I clarify
8 Mr. Payne's status?

9 EXAMINER PRICE: Sure.

10 MR. CORCORAN: He lives in an all
11 electric home, and he is a CKAP member.

12 EXAMINER PRICE: I understand but he is
13 presenting these documents as a former home builder
14 or current home builder and these are clearly
15 documents that were obtained in the course of his
16 construction business. I mean, that's certainly why
17 he has got some extensive flexibility and then
18 forwarded it on to OCC.

19 Again, the issue of gathering these
20 documents is squarely before the Commission. We
21 don't need to belabor this point. The mere fact that
22 he turned them over to OCC is not necessarily going
23 to make them privileged, but the Commission will
24 decide that.

25 MR. CORCORAN: I would like to note some

1 of these documents start out with "dear customers" so
2 they are -- they are not necessarily builder
3 documents.

4 EXAMINER PRICE: Would you like to
5 identify which ones?

6 MR. CORCORAN: 222 starts off with "dear
7 customer."

8 EXAMINER PRICE: Okay. But having said
9 that were these documents that were given to
10 customers, or were they given to the builder? Were
11 they given to the -- first of all, again, this is --
12 Ms. Grady's the one claiming privilege, but I have
13 been trying to give some leeway on this question. Do
14 you know if these documents were given to the builder
15 to give on to customers as part of the marketing of
16 all electric homes, or were these documents sent
17 directly by FirstEnergy to these customers?

18 MS. GRADY: Your Honor, with all due
19 respect this would probably be a question to ask
20 FirstEnergy.

21 EXAMINER PRICE: I am asking you. You
22 are asserting the privilege, and the burden is upon
23 you to demonstrate privilege. It's not upon them to
24 respond to any questions that occur to you.

25 MS. GRADY: Your Honor, it would appear

1 that the brochures are not directed at builders.

2 EXAMINER PRICE: That's not what I said.
3 I said the question is are these brochures that were
4 given to builders to pass on to customers as we all
5 know documents like that exist, or were they
6 documents that were sent directly by FirstEnergy?

7 MS. GRADY: We do not know the response
8 to that.

9 EXAMINER PRICE: Exactly.

10 MS. GRADY: But the documents do appear
11 to be directed to customers and not builders.

12 EXAMINER PRICE: Okay. That takes us to
13 document 290, an e-mail from Ms. Steigerwald to
14 usconstruction@aol.com, somebody that lives in
15 Florida and is not an OCC --

16 EXAMINER PHILLIPS-GARY: Actually that's
17 291. 290 is an e-mail between Sue Steigerwald and
18 Bill Pruton.

19 EXAMINER PRICE: Let's go back to that
20 one first.

21 MS. GRADY: Yes, your Honor. It would be
22 with respect to a bill so this was a customer who was
23 receiving a bill and was questioning the effect of
24 the RGC and why it was higher or lower.

25 EXAMINER PHILLIPS-GARY: And the -- how

1 is -- what I am confused about is there doesn't seem
2 to be any OCC action indicated in this.

3 MS. GRADY: Other than the -- the bill
4 would be forwarded to OCC for confirmation and help
5 with figuring out why the RGC was at the rate it was
6 at. And the RGC credit and the rate of the RGC is
7 certainly an issue in this proceeding. It's a
8 customer --

9 EXAMINER PHILLIPS-GARY: He is asking
10 something to Sue Steigerwald.

11 EXAMINER PRICE: And copying --

12 EXAMINER PHILLIPS-GARY: Copying a
13 nonattorney --

14 MS. GRADY: An agent of OCC seeking --

15 EXAMINER PHILLIPS-GARY: -- who is not
16 involved in the discussion.

17 MS. GRADY: In the discussion between Sue
18 and the customer?

19 EXAMINER PHILLIPS-GARY: Right.

20 MS. GRADY: That is correct, yes, the
21 customer contacted Sue. Sue then turned around and
22 contacted OCC for information and analysis.

23 EXAMINER PHILLIPS-GARY: That is not
24 indicated on this though. This indicates the
25 customer contacted Sue. Sue answered the customer's

1 inquiry and cced Amy Gomberg.

2 MS. GRADY: I'm sorry. That is correct.

3 EXAMINER PHILLIPS-GARY: I guess that's
4 my --

5 MS. GRADY: That is correct.

6 EXAMINER PHILLIPS-GARY: It would make
7 more sense if there was an e-mail trail that showed
8 OCC responding to the customer's question in some
9 way. That is a little different but this is just you
10 are cced on.

11 MS. GRADY: Correct.

12 EXAMINER PRICE: Yes, sir.

13 MR. GARBER: Your Honor, if I may briefly
14 add something, there was a discussion on this
15 particular issue in the last hearing and I fear the
16 record of this hearing may not have captured this.
17 OCC has tried this argument, this argument being any
18 communications from customers to us are privileged
19 because we are the statutory representative of
20 customers. They have tried this argument before, and
21 they have lost repeatedly.

22 And I think it was pointed out on the
23 record of the January 7 proceeding one of the
24 authorities for that is OCC against DP&L, Case No.
25 90-455, entry dated July 17, 1990. So I wanted to be

1 sure your Honors have a chance to review that.

2 EXAMINER PRICE: Oh, we will. And that's
3 why we don't need a response though. That's why I
4 have been asking her from time to time are you solely
5 saying your sole argument here is communication of
6 residential customers so we can properly respond to
7 that, the Commission can properly respond, where they
8 are arguing joint defense versus where they are
9 simply saying this is a communication with one of our
10 residential customers.

11 MS. GRADY: And I can quickly note for
12 the record --

13 EXAMINER PRICE: No, no, Ms. Grady. We
14 are not taking further arguments on this topic at
15 this time. Thank you.

16 MS. GRADY: Thank you, your Honor.

17 EXAMINER PRICE: Okay. Now, it takes us
18 to 291 to 303.

19 EXAMINER PHILLIPS-GARY: Disclosed, is
20 that correct, 291 to 303?

21 MS. GRADY: That's correct, your Honor.
22 That's what the asterisks indicated.

23 EXAMINER PRICE: Excellent. You'll make
24 your 1 o'clock deposition with no trouble.

25 Okay. 304 and 305 are communications

1 between Ms. Gomberg and Ms. Steigerwald.

2 EXAMINER PHILLIPS-GARY: However, 305 is
3 dated May 11, 2010, and as is 306 which I believe
4 predates the June 1 informal agreement.

5 MR. RANDAZZO: There's several more below
6 that.

7 EXAMINER PRICE: We'll come around to
8 those.

9 EXAMINER PHILLIPS-GARY: Yeah, so we have
10 305, 306.

11 EXAMINER PRICE: Those are properly
12 disclosable. 307.

13 EXAMINER PHILLIPS-GARY: June 22.

14 MS. GRADY: Your Honor, I might add 307,
15 that the bottom half of that where Sue was
16 communicating with Beth Trumble was disclosed.

17 EXAMINER PRICE: Thank you. Okay.

18 MS. GRADY: As well as on 308, the
19 communication with Ms. Trumble was disclosed.

20 EXAMINER PRICE: Right, so that takes us
21 to the April 7 documents. Mr. Randazzo noted those
22 are all predating your June 1 informal agreement.

23 MS. GRADY: That's correct, your Honor.

24 EXAMINER PRICE: So those are not subject
25 to the interlocutory appeal. The same thing is true

1 of the March 20 -- the March 22 one appears to be a
2 term sheet labeled "confidential, for settlement
3 purposes only." I don't know anybody who is not on
4 this, though we are going to recognize the settlement
5 privilege, and although first -- although OCC has not
6 claimed it, they haven't claimed anything in here.

7 EXAMINER PHILLIPS-GARY: Drop down menu.

8 EXAMINER PRICE: The drop down menu
9 doesn't allow it.

10 EXAMINER PHILLIPS-GARY: Is that blank
11 because of the drop down menu you referenced earlier?

12 MS. GRADY: In addition to the fact we
13 had communications with FirstEnergy and early on they
14 disclosed it and we said, okay, we'll disclose it and
15 then the conversation was no, no, don't disclose it,
16 we wanted to certainly be responsive to the discovery
17 requests, and we believe it was responsive.

18 EXAMINER PRICE: Fair enough. That would
19 also apply to --

20 MS. GRADY: 328 through 334 and 335
21 through 338.

22 EXAMINER PRICE: All those appear to be
23 settlement discussions and don't need to be disclosed
24 unless somebody wants to argue there is no settlement
25 privilege.

1 EXAMINER PHILLIPS-GARY: I think you and
2 I are the only ones who don't have original copies.
3 Maybe Mr. Corcoran.

4 EXAMINER PRICE: Mr. Corcoran has it now.

5 EXAMINER PHILLIPS-GARY: Looking at the
6 list it looks like everybody else --

7 EXAMINER PRICE: Was on those anyway.

8 EXAMINER PHILLIPS-GARY: Maybe not
9 Constellation, I suppose.

10 EXAMINER PRICE: No. Constellation would
11 have been privy to those. They were on the ESP.

12 Mr. Randazzo.

13 MR. RANDAZZO: Point of maybe interest to
14 me only, the settlement issues would have only
15 affected the all electric stuff on a going forward
16 basis. So it wouldn't necessarily deal with the
17 historical situation.

18 MS. GRADY: Discovery request was broad
19 enough to include all electric issues with no
20 timeframe.

21 MR. RANDAZZO: I understand.

22 EXAMINER PHILLIPS-GARY: Ms. Grady, I
23 just wanted to -- you referenced the Leslie case
24 again.

25 MS. GRADY: Yes, your Honor.

1 EXAMINER PHILLIPS-GARY: And can you
2 explain to me -- and I know you have gone through it
3 in your brief. I just -- to me this case deals with
4 whether the attorney-client privilege applies to
5 communication between state agencies and in-house
6 counsel. So to me Leslie requires that in-house
7 counsel be involved in the communication, and it's
8 only limited to staff and in-house counsel. And you
9 made a reference as we went through these to the
10 communications between Ms. Steigerwald and
11 Ms. Gomberg in reference to the Leslie case, so I
12 just want to explore that because I wasn't sure. My
13 reading of the case is a little different.

14 MS. GRADY: Your Honor, I believe that in
15 general the Leslie case is cited as to show that
16 communications between counsel for government
17 agencies is no less privileged than communications
18 between an attorney and an outside client.

19 EXAMINER PHILLIPS-GARY: Okay.

20 MS. GRADY: And that's generally -- and I
21 think that the Leslie case was really cited in terms
22 of discussing waiver and under what conditions a
23 waiver can occur.

24 EXAMINER PHILLIPS-GARY: Okay. But
25 you -- again, forgive me if I'm wrong in this, but I

1 thought you had referenced it with discussions. So
 2 you don't see Leslie as supporting your position in
 3 terms of Ms. Gomberg as an agent of OCC because
 4 Leslie specifically talks about in-house counsel and
 5 staff, not nonattorneys and outside parties.

6 MS. GRADY: Yes, your Honor, Leslie is
 7 the closest you can find based upon the research
 8 about what happens within an agency and whether a
 9 particular agent -- whether particular people are
 10 within the control group or not.

11 Now, generally State versus Post was the
 12 Ohio Supreme Court that said agents of attorneys are
 13 covered by the attorney-client privilege.

14 EXAMINER PRICE: Did that case involve a
 15 joint defense agreement?

16 MS. GRADY: No, your Honor, it did not.
 17 There is no authority in the -- that I am aware of in
 18 the state of Ohio from the Supreme Court of Ohio that
 19 has interpreted a joint defense agreement.

20 EXAMINER PRICE: Is there any authority
 21 in the state of Ohio from the Court of Appeals that
 22 has upheld the joint defense agreement privilege?

23 MS. GRADY: Your Honor, I did not
 24 research that issue.

25 EXAMINER PRICE: Is there any authority

1 from a Common Pleas Court that's upheld a joint
2 defense privilege? Can you point to any Ohio case
3 upholding a joint defense privilege?

4 MS. GRADY: Your Honor, I believe we
5 cited cases within the interlocutory appeal and,
6 again, this issue is before the Commission.

7 EXAMINER PRICE: Were they Ohio State law
8 cases?

9 MS. GRADY: Your Honor, I would have to
10 look. I don't recall.

11 EXAMINER PRICE: Thank you.

12 Okay. Well, I would like to thank
13 everybody for bearing with us as we laboriously go
14 through this list. I'm sure that the in camera
15 review will be most helpful to the Commission in
16 rendering a decision on the interlocutory appeal.

17 I would like to note in a number of cases
18 documents that predate June 1 were not subject to the
19 interlocutory appeal, therefore, they should have
20 been disclosed last Friday, and we do expect OCC to
21 disclose those documents to FirstEnergy within 24
22 hours. That would be noon tomorrow. Copies to all
23 the other parties as we previously discussed.

24 MS. GRADY: Be happy to do that, your
25 Honor.

1 EXAMINER PRICE: Thank you. Otherwise
2 the Commission will take up OCC's interlocutory
3 appeal at their convenience.

4 Anything else -- let's go off the record.

5 (Discussion off the record.)

6 EXAMINER PRICE: Let's go back on the
7 record. We've addressed all the issues before
8 today's prehearing conference. We are going to
9 adjourn the prehearing conference, and the
10 evidentiary hearing will commence on,
11 Mr. Phillips-Gary?

12 EXAMINER PHILLIPS-GARY: January 27.

13 EXAMINER PRICE: Thank you very much.
14 Thank you all.

15 We are off the record.

16 (Thereupon, the hearing was adjourned at
17 12:19 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 Tuesday, January 18,
2011, and carefully compared with my original
stenographic notes.

Karen Sue Gibson, Registered
Merit Reporter.

(KSG-5307)

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Summary: Transcript Transcript of Ohio Edison Company hearing held on 01/18/11.
electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Gibson,
Karen Sue Mrs.