

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the :  
 Application of The :  
 Dayton Power and Light : Case No. 12-426-EL-SSO  
 Company for Approval of :  
 its Market Rate Offer. :

In the Matter of the :  
 Application of The :  
 Dayton Power and Light : Case No. 12-427-EL-ATA  
 Company for Approval of :  
 Revised Tariffs. :

In the Matter of the :  
 Application of The :  
 Dayton Power and Light : Case No. 12-428-EL-AAM  
 Company for Approval of :  
 Certain Accounting :  
 Authority. :

In the Matter of the :  
 Application of The :  
 Dayton Power and Light : Case No. 12-429-EL-WVR  
 Company for Waiver of :  
 Certain Commission Rules. :

In the Matter of the :  
 Application of The :  
 Dayton Power and Light : Case No. 12-672-EL-RDR  
 Company to Establish :  
 Tariff Riders. :

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PROCEEDINGS

before Mr. Gregory Price and Mr. Bryce McKenney,  
 Attorney Examiners, at the Public Utilities  
 Commission of Ohio, 180 East Broad Street, Room 11-A,  
 Columbus, Ohio, called at 5:00 p.m. on Thursday,  
 February 14, 2013.

1 APPEARANCES:

2 Faruki, Ireland & Cox, PLL  
3 By Mr. Charles J. Faruki and  
4 Mr. Jeffrey S. Sharkey  
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6 10 North Ludlow Street  
7 Dayton, Ohio 45402

8 On behalf of the Company.

9 Bruce J. Weston, Consumers' Counsel  
10 Office the Ohio Consumers' Counsel  
11 By Ms. Maureen R. Grady and  
12 Ms. Melissa R. Yost  
13 10 West Broad Street, Suite 1800  
14 Columbus, Ohio 43215

15 On behalf of the residential customers  
16 of The Dayton Power and Light Company.

17 McNees Wallace & Nurick, LLC  
18 By Mr. Matthew R. Pritchard,  
19 Mr. Frank P. Darr, and  
20 Mr. Joseph E. Olier  
21 21 East State Street Suite 1700  
22 Columbus Ohio 43215

23 On behalf of IEU-Ohio.

24 Calfee, Halter & Griswold, LLP  
25 By Mr. Trevor N. Alexander  
26 21 E. State Street, Suite 1100  
27 Columbus, Ohio 43215

28 On behalf of FES.

29 Thompson Hine, LLC  
30 By Mr. Philip B. Sineneng  
31 41 South High Street, Suite 1700  
32 Columbus, Ohio 43215

33 On behalf of Duke Energy Retail Sales  
34 and Duke Energy Commercial Asset  
35 Management.

1 APPEARANCES (Continued):

2 Carpenter Lipps & Leland, LLP  
3 By Ms. Kimberly W. Bojko  
4 280 North High Street, Suite 1300  
5 Columbus, Ohio 43215

6 On behalf of SolarVision.

7 Mike DeWine, Ohio Attorney General  
8 By Mr. Devin Parram  
9 Assistant Attorney General  
10 Public Utilities  
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12 Columbus, Ohio 43215

13 On behalf of the Staff of the Public  
14 Utilities Commission of Ohio

15 Honda of America Manufacturing, Inc.  
16 By Mr. M. Anthony Long  
17 24000 Honda Parkway  
18 Marysville OH 43040

19 On behalf of Honda.

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Thursday Evening Session,  
February 14, 2013.

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EXAMINER McKENNEY: Let's go ahead and go on the record at this time. Good afternoon. The Public Utilities Commission of Ohio calls for at this time and place Case No. 12-246-EL-SSO to establish a standard service offer in the form of electric security plan.

My name is Bryce McKenney, with me is Gregory Price, and we are the Attorney Examiners assigned to hear this case.

At this time we'll go ahead and take appearances of the parties. Go ahead and start with Dayton Power and Light Company.

MR. SHARKEY: Thank you, your Honor. Jeff Sharkey and Charles Faruki from Faruki, Ireland & Cox on behalf of the Dayton Power and Light Company.

EXAMINER McKENNEY: Thank you.

MR. PRITCHARD: Matt Pritchard, Frank Darr, Joe Olikier, from the law firm of McNees, Wallace & Nurik on behalf of IEU-Ohio.

MR. ALEXANDER: Trevor Alexander, Calfee Halter, on behalf of FES.

1 MR. SINENENG: Good evening, your Honor.  
2 Philip Sineneng from Thompson Hine on behalf of the  
3 Duke Energy Retail Sales and Duke Energy Commercial  
4 Asset Management.

5 EXAMINER MCKENNEY: Thank you.

6 MR. PARRAM: Good evening, your Honor.  
7 On behalf of the staff of the Public Utilities  
8 Commission of Ohio, Devin Parram from the Ohio  
9 Attorney General's Office.

10 MS. BOJKO: Thank you, your Honors. On  
11 behalf of SolarVision, LLC, Kim Bojko with Carpenter  
12 Lipps & Leland.

13 MS. YOST: Thank you, your Honor. On  
14 behalf of the Office of Consumers' Counsel, Maureen  
15 R. Grady and Melissa Yost.

16 EXAMINER MCKENNEY: Thank you.

17 MR. LONG: Thank you, your Honor.  
18 Anthony Long for Honda of America.

19 EXAMINER MCKENNEY: Thank you.

20 At this time let's go ahead and move  
21 forward with the dispute. Dayton Power and Light,  
22 you filed the motion, would you like to go ahead and  
23 get started?

24 MR. SHARKEY: Absolutely, thank you, your  
25 Honors.

1           As background, your Honors, we have two  
2 alternative arguments relating to these documents  
3 that were inadvertently produced. Our first argument  
4 is that they should be returned in their entirety;  
5 our second argument is that if they're not going to  
6 be returned in their entirety, then certain  
7 information should be redacted from them.

8           The question before you is would you like  
9 to hear both arguments now or do you want to argue  
10 the first issue and then if necessary argue the  
11 second issue?

12           EXAMINER PRICE: Go ahead and start with  
13 the first one and we'll see how things go.

14           MR. SHARKEY: Okay. The documents at  
15 issue, I have copies, your Honor, if I may approach.

16           EXAMINER PRICE: You may. Mr. Sharkey is  
17 bringing them to you.

18           MR. SHARKEY: There's three documents in  
19 total. They are all DPL, Inc. memoranda, were all  
20 certified DPL, Inc. employees. DPL, Inc. operates in  
21 the ordinary course of its business and, for example,  
22 to make SEC filings and accounting determinations.  
23 So those documents, if you look on the Re line of  
24 them, for each of them it identifies them as DPL,  
25 Inc. documents.

1           These documents were requested by OCC in  
2           its 24th request to Dayton Power and Light Company,  
3           and we, as you know, had objected to, and in fact  
4           dealt with whether DPL documents were subject to  
5           discovery at the prior discovery conference on  
6           January 30th, and you ruled that it is not. We  
7           inadvertently produced those; it was a mistake.

8           We produced them, in fact, to Border  
9           Energy, FirstEnergy Solutions, Interstate Gas,  
10          Wal-Mart, Federal Executive Agency, Kroger, IEU, and  
11          OCC

12                  EXAMINER PRICE: Mr. Sharkey, when you  
13           say "we produced them," I thought DPL documents were  
14           not in the possession of DP&L. So when you say "we  
15           produced them inadvertently," do you mean DP&L  
16           produced them or DPL produced them?

17                  MR. SHARKEY: Yes, your Honor. As I said  
18           to you in the prior conference, there is an  
19           allocation manual and the Commission's rules permit  
20           employees to be both, to have their time allocated to  
21           both DPL and to DP&L. And when the request came in,  
22           one of the employees who would allocate their time to  
23           both saw the request for the documents, retrieved  
24           them and provided them to all parties.

25                  EXAMINER PRICE: Aren't the documents

1 kept separately? Don't you have a section of DPL  
2 documents and a separate section of DP&L documents?

3 MR. SHARKEY: Your Honor, I can't speak  
4 as to the filing systems but there's electronic  
5 versions. There's not separate -- a person doesn't  
6 have a separate email address, for example, whether  
7 DPL documents or DP&L documents. Documents were kept  
8 in electronic places.

9 EXAMINER PRICE: They're on a server and  
10 there's no differentiation on the server between DP&L  
11 and DPL.

12 MR. SHARKEY: I can't speak to how it's  
13 kept on the server, but how documents come in, they  
14 don't come in as DP&L or DPL. So if you have  
15 electronic copies of those, that's how you have them.

16 We discovered that the documents were  
17 inadvertently produced when OCC served its 28th set  
18 of discovery requests. That set was served on  
19 February 4th. We were preparing objections for it  
20 late in the night of February 5 and discovered that  
21 these documents that OCC was asking about had been  
22 inadvertently produced, and we promptly sent notices  
23 to all of the parties and asked that the documents be  
24 returned to Dayton Power and Light, as I mentioned  
25 earlier.

1 All of the recipients other than OCC and  
2 IEU have agreed to destroy the documents.

3 It is our position -- step back.

4 There are stipulated protective  
5 agreements that the Dayton Power and Light Company  
6 has with both IEU and with OCC.

7 As to IEU, your Honor, it's attached to  
8 my declaration with the motion that you filed.  
9 Paragraph 17 clearly states that if there's an  
10 inadvertent production of privileged documents of  
11 documents that are work product or other protected  
12 documents, that that does not constitute any form of  
13 waiver or otherwise as to the production of the  
14 documents.

15 We believe that these documents here as  
16 DPL, Inc. documents would clearly fall within the  
17 scope of the other protected documents.

18 EXAMINER PRICE: Why? If they're not  
19 protected, they're not documents that are subject to  
20 the discovery. Why do you think they fall within the  
21 meaning of "other protected documents"?

22 MR. SHARKEY: Let me pull out the exact  
23 language, your Honor. Well, it refers in the clause  
24 to other protected documents shall not be deemed a  
25 waiver of privilege, work product, or other

1 protection or immunity from discovery.

2 So even if they didn't fall within the  
3 "other protective" clause, your Honor, I would submit  
4 they fall within the "or immunity from discovery"  
5 clause because the documents DPL, Inc. documents  
6 subject to your earlier ruling, those documents were  
7 not subject to discovery.

8 EXAMINER PRICE: I think that's right. I  
9 think we ruled they were subject to discovery, I  
10 don't think we said they were immune from discovery.  
11 We simply said they were not discoverable, they were  
12 in the possession of the affiliate. Do you see the  
13 distinction I'm making?

14 MR. SHARKEY: No, sorry, I don't  
15 understand the distinction you're making, your Honor.

16 EXAMINER PRICE: I'm not making myself  
17 clear.

18 You had these documents, you gave them to  
19 them but they're not privileged or at least not the  
20 documents -- you're not asserting that the documents  
21 in their entirety are privileged right?

22 MR. SHARKEY: That's correct, your Honor.

23 EXAMINER PRICE: You're not saying the  
24 documents are work product, you're saying they are  
25 protected or immunity from discovery. I think that's

1 a higher bar than just something where it's not  
2 something discoverable because it was served upon  
3 somebody who was not a party to this proceeding.

4 MR. SHARKEY: I understand your point,  
5 your Honor. It would be our point that the language  
6 in the stipulated protective agreement with OCC --  
7 sorry, it's with IEU, the purpose of that was to  
8 identify when there was some type of documents that  
9 were inadvertently produced or reasons other than  
10 being privileged or work product.

11 I have a difficult time identifying what  
12 other documents would fall within the other protected  
13 or immune clauses there that --

14 EXAMINER PRICE: One assumes the attorney  
15 or the physician/patient wouldn't apply.

16 MR. SHARKEY: I think DP&L has very  
17 few --

18 EXAMINER PRICE: That's a question we'll  
19 have for Mr. Pritchard.

20 MR. SHARKEY: Thank you, your Honor.

21 As to the stipulated protective  
22 agreement -- sorry, anything further on the  
23 stipulated protective agreement between DP&L and IEU?

24 EXAMINER PRICE: Actually I do have a  
25 question. I will come back. Again, this gets back

1 to respecting corporate separation. The protective  
2 agreement is between Dayton Power and Light and IEU,  
3 correct? It's not between DPL and IEU.

4 MR. SHARKEY: That is true.

5 EXAMINER PRICE: These documents are  
6 DPL's property. Why would the protective agreement  
7 apply to something that is not -- the ownership or  
8 the property of third parties?

9 MR. SHARKEY: Well, it would apply, your  
10 Honor, because it was not DPL that produced them, it  
11 was Dayton Power and Light that produced them and it  
12 applies simply to documents that the Dayton Power and  
13 Light Company produces.

14 EXAMINER MCKENNEY: Well, if Dayton Power  
15 and Light produced them, we held that they were not  
16 discoverable because they were held by an affiliate.  
17 If you produced them, then you hold them; is that  
18 correct?

19 MR. SHARKEY: Your Honor, there are a --  
20 Mr. Jackson is an example, is a person who some of  
21 his work is done on behalf of DPL, Inc. and some of  
22 his work is done on behalf of DP&L. And, yes,  
23 Mr. Jackson wears separate hats, he can access  
24 different documents, but the Commission's corporate  
25 separation rules permit that and part of his time is

1 appropriately allocated --

2 EXAMINER PRICE: We understand that, we  
3 just want to be consistent in our ruling. We just  
4 want to be -- we don't want to be in a situation  
5 where the ruling is, well, there are times when  
6 there's no separation between DP&L and DPL but when  
7 it comes to discovery-producing documents there's  
8 absolute separation.

9 MR. SHARKEY: I agree that there should  
10 be separation and they should be separated, and but,  
11 your Honor, Commission rules permitting people to  
12 wear multiple hats in these limited instances, a  
13 mistake may happen and that's what happened here.

14 You know, it was a simple mistake borne  
15 from the fact that we have in this process ten days  
16 to respond to discovery requests, a lot of work has  
17 to happen very rapidly.

18 Is that all for --

19 EXAMINER PRICE: Yes.

20 MR. SHARKEY: Then as to OCC, your Honor,  
21 there's also a stipulated protective agreement  
22 between Dayton Power and Light Company and OCC but it  
23 does not contain a similar clause, it's frankly,  
24 silent on this specific issue.

25 We -- I have assigned one of our

1 associates to search Ohio law, federal law  
2 diligently, could not identify a case in Ohio that  
3 dealt with the inadvertent production and parties  
4 seeking return of an inadvertent production of a  
5 document that was not a privileged or work product  
6 document.

7 So I was trying to find something that  
8 was analogous; we couldn't find any law in Ohio for  
9 us or against us in that situation.

10 What we submit, the Commission would have  
11 discretion -- the Commission has jurisdiction to  
12 regulate practice and procedure for it, so we submit  
13 the Commission could decide this issue as  
14 appropriate.

15 As we discussed in our memo, the doctrine  
16 of inadvertent production as applied in courts  
17 throughout the country is an acknowledgment of the  
18 fact that mistakes, in fact, will happen and there  
19 were tremendous amounts of documents exchanged in  
20 discovery and sometimes some person who had the  
21 responsibility of reviewing the documents will have  
22 missed a point in the documents that they should not  
23 have produced.

24 EXAMINER PRICE: That's correct. But  
25 again the cases you cite to relate to a case where

1 the document was privileged. Do you have a case to  
2 point to where, say, it was inadvertently produced  
3 but for reasons other than privilege relevance? Not  
4 reasonably calculated to lead to admissible  
5 discovery?

6 MR. SHARKEY: I represent to you, your  
7 Honor, that I said to the associate to find those  
8 cases and they didn't find a case for us or against  
9 us. That's what they reported to me. I didn't do  
10 the research myself, but he spent a fair amount of  
11 time doing it, and so that's my understanding, your  
12 Honor. If there is, I'd be surprised.

13 But, your Honor, the doctrine of  
14 inadvertent production originally sprang from the  
15 notion that the parties would -- litigants in court  
16 were overwhelmed and that they would sometimes make  
17 mistakes. And I'd submit that here in front of the  
18 Commission, parties are significantly more  
19 overwhelmed with the discovery process portion, we  
20 had a ten-day deadline to respond to discovery  
21 requests, your Honor, and the numbers are in the  
22 brief that we filed. But we responded to 54 sets --

23 EXAMINER PRICE: Excuse me, let's go off  
24 the record.

25 (Off the record.)

1 EXAMINER PRICE: Let's go back on the  
2 record.

3 MR. SHARKEY: DP&L has responded in the  
4 case to 54 sets of discovery requests; 800  
5 interrogatories; 210 requests for production of  
6 documents; 53,000 pages, about half of those requests  
7 came from OCC, roughly.

8 And, you know, Dayton Power and Light  
9 Company made a mistake in responding to those  
10 requests, your Honor. I think it would be unfair and  
11 inappropriate if OCC was allowed to use documents  
12 that the Dayton Power and Light Company made a  
13 mistake in producing.

14 I have the arguments, as I mentioned, as  
15 to redactions, but if I understand you correctly --

16 EXAMINER PRICE: Let's hold off on  
17 redactions until we need to get to that point.

18 MR. SHARKEY: That's all I had, your  
19 Honor.

20 EXAMINER PRICE: Mr. Pritchard?

21 MR. PRITCHARD: Yes, your Honor, thank  
22 you.

23 First, DP&L has categorized this as a  
24 case of inadvertent disclosure. I don't believe  
25 there was anything inadvertent about this, and that

1 the cases that applied inadvertent disclosure are  
2 inapplicable to the facts here.

3 The case DP&L cited for inadvertent  
4 disclosure involved an attorney who sent a number of  
5 blank medical releases to be signed and the assistant  
6 decided to attach and send in the production of  
7 documents a completely unrelated document. It was  
8 inadvertent to the lawyer, it was unbeknownst to them  
9 that they were producing it.

10 OCC's discovery request asked to provide  
11 a copy of the memo with the reference 12-Q3-GU-29, a  
12 second copy of a memo titled 12-Q3-GU-07, and a third  
13 labeled 12-Q3-GU-28.

14 Those three documents were identified and  
15 are the subject here. This isn't inadvertent, we  
16 didn't know these documents were being sent. These  
17 were the specific documents that were requested.  
18 They were reviewed, labeled confidential, sent to the  
19 parties, and DP&L even clarified that the original  
20 memo was -- had referenced a wrong document and  
21 provided the correction.

22 These documents were reviewed, clarifying  
23 remarks were included in the discovery responses, and  
24 they were sent out to the parties.

25 It's IEU's position this was a voluntary,

1 knowing disclosure, therefore, the stipulated  
2 protective agreement and the law of doctrine of  
3 inadvertent disclosure are inapplicable to the facts.

4 Secondly, we don't believe that this will  
5 fall into the category of other protected material.

6 EXAMINER PRICE: What does "other  
7 protected materials" mean to you, Mr. Pritchard?

8 MR. PRITCHARD: We interpreted it as  
9 being along the lines of privilege or work product --

10 EXAMINER PRICE: You already said  
11 "privilege" and "work product." It says three things  
12 have to be returned: Privileged, work product, and  
13 other protected materials. So you can't say  
14 privileged, work product, or fit into other protected  
15 materials.

16 What was your intent as to what "other  
17 protected materials" were if it's not this?

18 MR. PRITCHARD: Confidential material,  
19 Ohio has I believe --

20 EXAMINER PRICE: Confidential materials,  
21 you already had a confidentiality agreement with  
22 them. This was a confidentiality agreement so it  
23 wouldn't be confidential materials. That would have  
24 been no basis to return that.

25 MR. PRITCHARD: There are I believe

1 something like 15 different privileges in Ohio  
2 outside of the attorney/client privilege.

3 EXAMINER PRICE: And I'm just asking you  
4 to name one that would apply in this case.

5 MR. PRITCHARD: I cannot off the top of  
6 my head. But I'm sure that there are, well, there  
7 are medical records inside DP&L. There's a  
8 patient/client privilege.

9 It's our interpretation that other  
10 protected material would apply to the same category  
11 as privilege or work product; principle of contract  
12 interpretation is when there's specific items  
13 followed by more general terms. The general terms  
14 has to be read in light and conformance with the  
15 specifics.

16 If we're talking about privilege and work  
17 product, I would assume that the other protected  
18 material would have to be protected either by  
19 statute, sunshine laws, some sort of protected  
20 material.

21 DP&L has claimed these are protected on  
22 the grounds they're someone else's document. There's  
23 case law that -- about the relationship between a  
24 subsidiary and their parent and about when the  
25 subsidiary has access to and control of the financial

1 document they're deemed in possession of the  
2 subsidiary.

3           Additionally, courts have allowed  
4 discovery where the party has implicitly admitted  
5 that has control, possession, or access to documents.

6           So it's our position that these documents  
7 are not protected and so the stipulation agreement  
8 wouldn't apply because these are within the proper  
9 scope of discovery.

10           And then about the -- I'll wait to  
11 address the specifics to the attorney/client  
12 privilege if we have to --

13           EXAMINER PRICE: If we need to.

14           MR. PRITCHARD: Correct, your Honor.

15           EXAMINER PRICE: Thank you.

16           EXAMINER McKENNEY: OCC.

17           MS. GRADY: Thank you, your Honor. As I  
18 understand DP&L's argument, they argue that the  
19 documents were inadvertently produced and they belong  
20 to DP&L's parent DPL, Inc. and thus are not subject  
21 to discovery in this matter.

22           As your Honors noted, your ruling at the  
23 prehearing conference was not that DPL's documents  
24 are not subject to discovery in this case, that's a  
25 misstatement of the ruling. The ruling was that the

1 documents that were not in DP&L's possession were not  
2 discoverable. And these were clearly in DP&L's  
3 possession. So that ruling is not controlling.

4 The second ruling that I understand, and  
5 I can defer these arguments, if you will, is that  
6 related to DP&L's claim that the materials were  
7 privileged and work product. I can go ahead and  
8 address those now on a general basis.

9 EXAMINER PRICE: Wait till we get to  
10 individual redactions, if necessary.

11 MS. GRADY: But I do have one correction  
12 or at least one fact that I'd like to bring to the  
13 attention of the Attorney Examiners. These documents  
14 were two of the three documents were, the author was  
15 Jared Hoying and I believe Mr. Sharkey made a  
16 representation earlier that Mr. Hoying was an -- is  
17 an employee of DP&L, Inc.

18 That is inconsistent with DP&L's response  
19 to OCC discovery interrogatory 428 when asked to  
20 identify it's -- 428E, when asked: Please identify  
21 Jared Hoying and Yanina Giancristofano, the company  
22 stated: Subject to all general objections, DP&L  
23 states that Jared Hoying is the manager of accounting  
24 policy and external reporting at DP&L. The witness  
25 responsible was Mr. Jackson.

1 EXAMINER PRICE: But that doesn't exclude  
2 the possibility that he's a shared service employee.  
3 That just indicates that at a minimum he does work  
4 for DP&L but he also may be working for DPL.

5 MS. GRADY: I think Mr. Sharkey made the  
6 representation he is a DP&L, Inc. employee and I was  
7 just trying to correct the record there.

8 EXAMINER PRICE: He says they're employed  
9 by DP&L -- DP --

10 MS. GRADY: And L.

11 EXAMINER PRICE: No, he says they're  
12 employed by DPL, Inc. He doesn't say exclusively  
13 employed by DPL, Inc.

14 MS. GRADY: I think it's inconsistent  
15 with what they've told us in discovery, your Honor.

16 EXAMINER PRICE: Fair enough. Anything  
17 else?

18 MS. GRADY: No, your Honor.

19 MS. YOST: Your Honor, I have one issue  
20 if I could just briefly address it.

21 I've discussed with Mr. Sharkey the issue  
22 regarding this document or these documents being  
23 produced to OCC now being records under Ohio's  
24 records law which is under Revised Code 149.011  
25 titled Documents, Records, and Record Definitions.

1           When we were notified by DP&L that we had  
2 received these documents and DP&L indicated this was  
3 an inadvertent disclosure, I want the record to  
4 reflect that immediately we took measures to isolate  
5 the document, have electronic copies removed in a  
6 file that was accessible to those who had signed the  
7 protective agreement, and sent an email to the case  
8 team and asked that they delete any electronic  
9 version.

10           So we isolated these copies and then  
11 later it was -- later I was notified that these  
12 documents were used in producing or in drafting  
13 discovery that ultimately is what was served upon  
14 DP&L and they notified us of the documents that had  
15 been inadvertently disclosed. But in essence I'm  
16 hopeful that we can work with the company to come to  
17 a resolution.

18           To the extent these documents were  
19 received by OCC, relied on by OCC, used to generate  
20 other documents at OCC, and used to develop a  
21 settlement position, they are records in accordance  
22 with Revised Code 149.011.

23           Therefore, under Ohio law, specifically  
24 Revised Code 149.351, there are rules about  
25 destruction or damage of records. In essence, we

1 have to comply with our records retention for that  
2 specific record.

3 I notified Mr. Sharkey that I do have a  
4 copy of the three documents, I've not read the  
5 documents, I've put them in a sealed envelope,  
6 they're locked in a file case marked "confidential."

7 But to the extent a ruling goes against  
8 OCC that we have to return, destroy, or redact, we do  
9 have a records issue and I hope that we can come to  
10 an agreement with the company in regards to the one  
11 copy that I currently have that that can be retained  
12 in the manner that is consistent with treatment of  
13 the current protective agreement we have with DP&L.

14 EXAMINER PRICE: Mr. Sharkey, you care to  
15 respond to the arguments made?

16 MR. SHARKEY: Yes, your Honor, briefly,  
17 because I think my initial comments addressed some of  
18 the points that were made by other counsel.

19 I'll start with the comments Ms. Yost  
20 made, and essentially she's accurately represented a  
21 conversation which she and I had earlier today. The  
22 agreement essentially that we reached if you were to  
23 award that the documents at issue could not be used  
24 in discovery, there is still an outstanding issue  
25 that OCC has as to records in compliance with that

1 statute.

2 And Melissa and I worked separately to  
3 attempt to resolve that issue. We don't need that  
4 issue to be resolved today and we would take a ruling  
5 by your Honors that the documents had to be destroyed  
6 or returned as excluding the one document to keep the  
7 records retention. We will deal with that as a  
8 separate issue.

9 I didn't agree that she could keep it;  
10 she didn't agree that she had to get rid of it.

11 EXAMINER PRICE: We'll deal with it at a  
12 later date.

13 MR. SHARKEY: Hopefully by agreement,  
14 your Honors.

15 Briefly, your Honors, I have little to  
16 say, I think your questions hit the heart of it, but  
17 as to IEU, I think the inability to identify any  
18 specific other documents that would fall within that  
19 other protected document or otherwise immune from  
20 discovery clauses, they're in paragraph 17 of the  
21 SPA, demonstrate that these documents should be  
22 returned in their entirety from IEU.

23 Relating to the OCC, the one point I will  
24 say is I understand that Mr. Hoying, Jared Hoying,  
25 the author of the pieces at issue, is an employee, he

1 gets his check, his paycheck from DPL, Inc. the  
2 parent company. He may perform services for other  
3 companies but in this instance he was an employee  
4 acting on behalf of his employer.

5 That's all I have, your Honor.

6 EXAMINER PRICE: Thank you.

7 Mr. Alexander?

8 MR. ALEXANDER: Your Honor, I'd like to  
9 hear something on the hybrid issue, if I could.  
10 Earlier during the scope of the Court's previous  
11 order, FES is not subject to this motion to compel.  
12 When asked to delete the documents, FES did so. And  
13 FES has attempted to work with DP&L's counsel to  
14 resolve the issue in a mutually acceptable way going  
15 forward.

16 The issue that I want to bring to your  
17 attention is the scope of the Court's last order.  
18 Mr. Jackson testifies as to the financials in this  
19 case, he's a key witness, particularly with regard to  
20 zone M capital expense forecast, and FES intends to  
21 question Mr. Jackson about those forecasts which he's  
22 a sponsored witness.

23 It is not as important to FES to have a  
24 full and complete copy of this document because,  
25 quite frankly, we hadn't reviewed it in any real

1 level of detail before and we've since deleted it.

2 What I attempted to work out in this case  
3 was mutually acceptable redaction or at minimum, an  
4 agreement that we could explore Mr. Jackson's full  
5 knowledge, not only his knowledge while he had his  
6 "DP&L hat" on. Because Mr. Jackson is testifying as  
7 to these forecasts and we need to inquire into these  
8 forecasts. We were unable to reach an agreement on  
9 that point.

10 So when the Court issues its decision  
11 today, FES would appreciate some clarity as to, one,  
12 the level of separation that Mr. Jackson can rely on  
13 in his testimony, both written and in deposition, and  
14 two, what we're going to do going forward with regard  
15 to documents with shared employees that are relied on  
16 by those employees to create their testimony.

17 EXAMINER PRICE: Well, I think we can  
18 clarify our ruling and we'll do that now and try to  
19 get this out of the way.

20 Our ruling in the last discovery  
21 conference pertained to documents. DP&L had raised  
22 the issue of these were work product. In order to be  
23 work product it has to be a tangible thing, it was a  
24 document. They can't claim work product as to the  
25 witness' knowledge. So the documents were protected

1 but he can't segment off his knowledge. However, you  
2 can't inquire into things that are attorney/client  
3 privilege.

4 MR. ALEXANDER: Thank you, your Honor.

5 EXAMINER PRICE: That's as much clarity  
6 as I can give you. I hope that makes it clear.

7 MR. ALEXANDER: Thank you, your Honor.

8 EXAMINER MCKENNEY: Mr. Sharkey?

9 MR. SHARKEY: Yes, your Honor, I'd like  
10 to respond briefly to your point about you can't  
11 segment off knowledge relating to work product.

12 EXAMINER PRICE: Sure.

13 MR. SHARKEY: First of all, I submit that  
14 that's inconsistent with how the Supreme Court of  
15 Ohio has defined "work product." "Work product" has  
16 been defined to be mental impressions. That's the  
17 key point that is being protected by the work product  
18 doctrine is that it should not be able to get into  
19 the mental impressions of the attorney.

20 EXAMINER PRICE: The attorney.

21 MR. SHARKEY: Well, also of the attorney  
22 but also, your Honor, the rules describe work product  
23 not just of the attorney, but of the party. So if  
24 the party prepares work product, my analysis of  
25 projected decisions is ABC, the work product doctrine

1 protects their mental impressions and their paper  
2 just as it protects the attorney's mental impressions  
3 sprang out of protective attorney's work product but  
4 it's been extended to any work product prepared in  
5 anticipation of litigation. For example, your Honor,  
6 not only the document's protected but also the  
7 knowledge.

8 EXAMINER PRICE: Again, that's what I  
9 said, he can't inquire into things that are  
10 attorney/client privilege. If, for example, he is  
11 asking do you have a revenue projection based upon  
12 your expected outcome of this case, that's going to  
13 be privileged because it's based upon his attorney's  
14 advice. Right?

15 MR. SHARKEY: Yes, your Honor.

16 EXAMINER PRICE: I think we all agree  
17 with that.

18 Mr. Alexander?

19 MR. ALEXANDER: Yes, your Honor, I  
20 certainly do agree with that, but the next question  
21 would be have you considered possible expense  
22 reductions that DP&L could make to improve its return  
23 on equity.

24 Mr. Sharkey, would you agree that  
25 question would be appropriate?

1 MR. SHARKEY: Your Honors, you had  
2 previously addressed the privilege question relating  
3 to cost reductions and that's quoted in our piece.  
4 So we would --

5 EXAMINER PRICE: If the only cost  
6 reductions plan that you embark upon were based upon  
7 the advice of your counsel, then that's going to be  
8 protected.

9 MR. SHARKEY: Thank you, your Honor. I  
10 have nothing further, your Honor.

11 EXAMINER McKENNEY: Thank you,  
12 Mr. Sharkey.

13 Anything further?

14 MR. PRITCHARD: Just one clarifying  
15 question.

16 EXAMINER PRICE: I'm supposed to be  
17 asking the questions.

18 (Laughter.)

19 EXAMINER PRICE: Go ahead.

20 MR. PRITCHARD: I'm sorry, your Honor.

21 After the last discovery conference we  
22 said work product applied because it was a tangible  
23 document. We followed up with a series of questions  
24 that were asking what cost savings measure could DP&L  
25 implement in various ways and what revenue

1 enhancement such as filing a base distribution case  
2 they could comply with. And the response to every  
3 question was it's privileged and it's work product in  
4 accordance with your ruling.

5 I would say that could cause -- should  
6 exist on this if everything, if every single piece of  
7 information about their ability to cut costs is  
8 covered by the only one document that they claim  
9 exists, IEU-Ohio has no way of approving or  
10 challenging their ability on their financial  
11 integrity on the cost expense side.

12 If every single piece of information on  
13 that is privileged, we would have no idea to project  
14 how and to what extent they could cut their costs,  
15 and I would waiver that there's good cause exists for  
16 the information. Not necessarily the document that  
17 existed before, but to the extent over the next seven  
18 years how much money could you reduce?

19 We've been told that that's all the  
20 subject of that previous document so the numbers  
21 can't be even extracted. Not that whole information  
22 of the document and how the numbers were come to, but  
23 just the number X millions of dollars is a completely  
24 privileged number that we can't have access to to  
25 challenge their case.

1 MS. GRADY: Briefly, your Honor, I agree  
2 with the points that were made by counsel. Your  
3 Honor, as you well know, we had quite a discussion  
4 and I think there's been many pleadings filed about  
5 attorney/client privilege, and in Ohio the  
6 attorney/client privilege is recognized by statute.

7 Under the statute and under the case of  
8 Jackson v. Gregor, the attorney/client privilege can  
9 only be waived by the statute. The statute does  
10 contain the conditions of waiver. One of the  
11 conditions of waiver is testimony.

12 Mr. Jackson is presenting testimony on  
13 the financials. Because he voluntarily provided that  
14 testimony on the financials, we would assert that he  
15 waived the attorney/client privilege as to that  
16 information.

17 MR. OLIKER: Your Honor, I'm sorry to  
18 interject. I understand this is a public document, a  
19 press release issued by the AES Corporation which  
20 says that talking about significant factors that we  
21 project increased cost savings targets by \$45 million  
22 to \$145 million compared to 2011.

23 I understand that is an AES number but  
24 they're putting public representations about their  
25 ability to cut costs, yet they wouldn't let us know

1 on a company-by-company basis.

2 EXAMINER PRICE: Mr. Sharkey, you care to  
3 respond to all of this?

4 MR. SHARKEY: I hope to be able to  
5 respond to all of it.

6 First of all, your Honor, I believe that  
7 what you're being asked for here are advisory  
8 opinions relating to questions that have not yet been  
9 asked in depositions, to interrogatories that have  
10 been answered but there's no motion pending.

11 We don't have even the answer, much less  
12 the response of parties. So I believe this is an  
13 inappropriate time.

14 EXAMINER PRICE: You're offering me the  
15 easy way out.

16 MR. SHARKEY: I am, your Honor. I  
17 believe that's the appropriate time to decide an  
18 issue once it's actually live.

19 Second of all, your Honor, I believe  
20 that, if I heard Mr. Pritchard correctly, and maybe I  
21 misunderstood him, but he seems to be saying he  
22 should be entitled to receive the privileged  
23 documents because they have made a showing of good  
24 cause.

25 As your Honors well know, there's no good

1 cause exception to privileged documents. If  
2 documents are privileged, they're privileged, that's  
3 the end of the story.

4 There's a good cause exception relating  
5 to work product doctrines but that's also very narrow  
6 and I don't believe that that's at issue here. I'm  
7 not even sure why it would be, but IEU could, for  
8 example, make its own arguments as to his belief as  
9 to what costs the Dayton Power and Light Company  
10 should reduce.

11 If that's an argument they want to make,  
12 they're free to make it, but they won't need DP&L's  
13 privileged material or work product material to do  
14 so.

15 Finally, your Honor, if I may, regarding  
16 the scope of work product, I'm reading here from the  
17 Squire, Sanders & Dempsey case by the Ohio Supreme  
18 Court, cite 127 Ohio State 3rd 161 decided in 2010.  
19 It describes work product just as follows:

20 Says: The work is reflected of course in  
21 interviews, statements, memoranda, correspondence,  
22 briefs, mental impressions, personal beliefs, and  
23 countless other tangible and intangible ways.

24 So I believe that the Supreme Court of  
25 Ohio has held, your Honor, that work product can

1 extend to both the tangible documents and the  
2 intangible information.

3 EXAMINER PRICE: Thank you.

4 MR. ALEXANDER: Your Honor, just  
5 regarding the easy-way-out argument, your Honor, I  
6 believe this issue is before the Court. The  
7 documents at issue do contain DP&L accounting  
8 statements. DP&L has refused to provide redacted  
9 versions of those documents which include those  
10 accounting standards. So I believe the issue is  
11 before the Court.

12 MS. GRADY: And, your Honor, thank you.  
13 The easy way out will not necessarily be for today,  
14 it may be the easy way out but tomorrow at 9:00 a.m.  
15 we begin deposing Mr. Jackson and we certainly, OCC  
16 certainly has questions along this line and we will  
17 have to have those resolved. It would be great if we  
18 could have them resolved now.

19 And, in fact, if we want to resolve other  
20 things, I also have -- I could do an oral motion to  
21 compel based upon the failure of the company to  
22 produce the budget which I've asked for. So I think  
23 the issue is ripe, I think we ought to deal with it,  
24 and we can wait to discuss work product but work  
25 product is in anticipation of litigation.

1           The forecasts of the company that are  
2 produced on an annual basis as a regular course of  
3 business are in no way, shape, or form work product.

4           EXAMINER MCKENNEY: Thank you.

5           EXAMINER PRICE: I think we've heard  
6 enough, Mr. Sharkey.

7           MR. SHARKEY: Thank you, your Honor.

8           EXAMINER PRICE: Actually I now have a  
9 question for you.

10          MR. SHARKEY: You first or me first?

11          EXAMINER PRICE: I want you to respond to  
12 what she said about regular forecasts to be produced.  
13 Did you produce forecasts in the regular course of  
14 business and give them to the parties in discovery?

15          MR. SHARKEY: We have produced forecasts  
16 in the regular course of business, your Honor. The  
17 budget that Ms. Grady is referring to is a budget  
18 that starts with a top line revenue number that  
19 includes DP&L's projections as to likely results in  
20 this case.

21                 So the Dayton Power and Light Company was  
22 creating a budget, which is sound business to do  
23 that, could include its projected non-bypassable  
24 charge, for example, in this case.

25                 So those numbers are in there. And those

1 numbers that Dayton Power and Light -- first of all,  
2 I submit that that information is privileged because  
3 it came from the attorney's advice. The company  
4 consulted our firm, consulted Judi Sobacki, sought  
5 our advice as to what would likely happen in the  
6 case.

7 We provided that, they used that to  
8 monetize, for example, the non-bypassable charge. We  
9 cited ample documents in this motion, several  
10 financial documents that would disclose  
11 attorney/client's advice, retain their status as  
12 privileged work product documents.

13 So while we certainly have budgets and  
14 certainly produced them in the ordinary course, I  
15 would have to, before I could identify exactly what  
16 we have, I'd have to go back and look at the 50,000  
17 pages of documents and talk to my associates, your  
18 Honor, involved in the production of documents.

19 I can't respond, I don't have -- I'm  
20 leery of responding on the fly to claims of a failure  
21 to produce when there's no motion. I haven't had a  
22 chance to sit and go and prepare for that.

23 And then -- sorry, that's all.

24 EXAMINER PRICE: The Bench is more leery  
25 than you are. Honestly, we are on a lengthy tangent

1 here. We thought we were trying to give a little bit  
2 of clarity to Mr. Alexander and now we're getting  
3 oral motions to compel and other issues. We're not  
4 going to take oral motions to compel tonight.

5 Mr. Pritchard, if you have a motion to  
6 compel, go ahead and file it. We may only be buying  
7 ourselves 12 hours of peace and quiet, but we will be  
8 in the office tomorrow and we'll be available if and  
9 when this comes up.

10 But we're not altering or revisit our  
11 decision from last week. We attempted to give  
12 Mr. Pritchard some clarification and starting to get  
13 into hypothetical questions and I don't want to be  
14 answering hypothetical questions.

15 MR. SHARKEY: Thank you, your Honor.

16 EXAMINER PRICE: At that I think we would  
17 like to go off the record and see if we can come up  
18 with an answer to the first question whether or not  
19 the documents should be returned in their entirety  
20 and then we will see if we need to address the second  
21 question.

22 MS. GRADY: Your Honor, I thought we were  
23 going to be heard on whether the documents are really  
24 work product or attorney/client and I guess I was  
25 waiting for a chance to make those arguments.

1 EXAMINER PRICE: That's just related to  
2 if there are certain portions that need to be  
3 redacted.

4 MS. GRADY: Well, the basis of their  
5 redactions are that they are either DP&L, Inc. and a  
6 misstatement of your ruling or they are  
7 attorney/client work product.

8 EXAMINER PRICE: I understand, but if I  
9 rule in favor of Mr. Sharkey's first point, we won't  
10 have to get into the second point.

11 MS. GRADY: Which is that DPL, Inc.  
12 documents are not subject to discovery.

13 EXAMINER PRICE: I think Mr. Sharkey's  
14 first argument is should these documents be returned  
15 in their entirety. We don't need to get into the  
16 redaction question unless he loses that point. If he  
17 loses that point, then well get into the redaction  
18 question.

19 MS. GRADY: I thought I understood the  
20 premise of his argument they should be returned in  
21 their entirety because they are DPL, Inc. documents  
22 and not subject to discovery. The second ground  
23 being that the documents are covered by  
24 attorney/client work product.

25 EXAMINER PRICE: That's not my

1 understanding of what your argument was, Mr. Sharkey,  
2 but.

3 MR. SHARKEY: The microphone broke up a  
4 little bit so I didn't understand exactly what she  
5 said, but, your Honors, I think you accurately stated  
6 that our first argument is the documents are DPL,  
7 Inc. documents, they were inadvertently produced and  
8 they should be returned on that ground.

9 But there is no need or issue relating to  
10 privilege or work product to address that ground.  
11 It's a purely DPL, Inc. inadvertent production  
12 question. If you agree with that, then our other  
13 ground becomes mooted.

14 But if you were to disagree with me, then  
15 there are portions of these documents that disclose  
16 information that we contend is privileged work  
17 product, and so if you were to order us to -- if you  
18 would permit those documents to be subject to  
19 discovery, we'd ask to have them redact portions of  
20 them.

21 Is that how you understood my arguments?

22 EXAMINER PRICE: That's what I understood  
23 to be hearing. I think we can wait on the  
24 attorney/client and privilege documents in case he  
25 wins this first argument.

1 MS. GRADY: That's now how I understood  
2 his motion to compel, your Honor.

3 EXAMINER PRICE: I don't want to short  
4 you your argument so why don't you go ahead and make  
5 your argument and then well go from there.

6 MS. GRADY: Thank you, your Honor, that  
7 makes me very happy. Happy Valentine's Day.

8 The second premise of Mr. Sharkey's  
9 argument is that the Attorney Examiners have already  
10 held that these very materials are privileged and  
11 work product. And my first argument is, of course,  
12 that the work product is not involved here.

13 They're technical, if we look at the  
14 documents they're technical accounting memoranda  
15 which are prepared in the regular course of the  
16 business related to the impairment of assets. We  
17 could even look to 90D, document 90D, 53703 and  
18 AES --

19 MR. SHARKEY: Your Honor, let me make an  
20 objection to the reading into the record any  
21 specifics of these documents. I believe that that is  
22 inappropriate if this record's going to be become a  
23 public record.

24 EXAMINER PRICE: Why don't you try to  
25 make your argument without reading specific portions

1 of the documents into the record.

2 MS. GRADY: That's all right, your Honor.  
3 I will make the representation that AES makes a  
4 representation in the documents as to whether or not  
5 these documents are produced in the regular course of  
6 business, and of course they are.

7 An impairment analysis is done in the  
8 words of these documents when events occur that  
9 indicate that the value of an asset may be impaired,  
10 an impairment study is done.

11 So these are done in a regular course of  
12 business, there is nothing that shows that these are  
13 done in anticipation of litigation. So I believe  
14 that there is no work product at all involved with  
15 this.

16 With respect to the attorney/client  
17 privilege, your Honor, we look at these memos, again,  
18 they are technical accounting memos detailing an  
19 impairment analysis. There's no mention of attorney  
20 advice in all of these documents. There is not a  
21 mention of an attorney, there is no review by  
22 attorneys. It cannot be found in these documents.

23 There is no evidence to support  
24 Mr. Sharkey's claim. These are not the same  
25 materials that your Honors found were privileged and

1 work property. They're accounting memoranda, they're  
2 related to impairment analysis.

3 They contain information about the round  
4 2 budget long-term forecast and what assumptions were  
5 made in that document. They are an update to  
6 Mr. Jackson's testimony in terms of financial  
7 production.

8 These documents call into question  
9 Mr. Jackson's financial projections. Mr. Jackson's  
10 financial projections are based on last year's  
11 budget. He testified that those are accurate pro  
12 formas based upon his knowledge and expertise.

13 These documents give bits and pieces of  
14 the second budget LTF that show that the assumptions  
15 made by Mr. Jackson in his testimony are not  
16 appropriate.

17 EXAMINER PRICE: Is that it?

18 MS. GRADY: That's it.

19 MR. SHARKEY: I assume -- I'm just  
20 standing up to inquire whether you want me to respond  
21 or wait until you come back.

22 EXAMINER PRICE: Let's go off the record  
23 and see if we need to get into it further.

24 MR. SHARKEY: Thank you, your Honor.

25 (Off the record.)

1 EXAMINER PRICE: Let's go back on the  
2 record.

3 At this point we're going to deny the  
4 first part of Dayton Power and Light's motion to  
5 compel that the parties should be required to return  
6 these documents in their entirety. The Examiners  
7 find that to the extent that these documents were not  
8 discoverable because they were not in the possession  
9 of DP&L, DP&L is -- that argument is no longer  
10 relevant. DP&L inadvertently obtained these  
11 documents, provided them to the company -- provided  
12 them to the parties, so any argument they are not  
13 discoverable DPL documents is no longer relevant.

14 We will, however, at this point entertain  
15 arguments as to redactions.

16 MR. SHARKEY: Thank you, your Honor. I  
17 have brought with me three additional copies with --  
18 I'm sorry, two additional copies of the documents and  
19 one with a privilege log that identifies the portions  
20 of them that we believe are privileged or work  
21 product.

22 EXAMINER PRICE: The parties have the  
23 privilege log?

24 MR. SHARKEY: Your Honor, they have seen  
25 the proposed redactions. I discussed on the

1 telephone the proposed redactions with OCC, counsel  
2 for OCC and counsel for IEU yesterday I believe.

3 (Interruption.)

4 (Off the record.)

5 EXAMINER PRICE: Let's go back on the  
6 record.

7 At this point, Dayton Power and Light has  
8 passed out to all the parties copies of their  
9 proposed redactions and I will note for the record  
10 that they are proposing no redactions for the  
11 document dated September 30, 2012, and at the  
12 conclusion of this, I guess I will say at the  
13 conclusion of this hearing or as soon thereafter as  
14 possible, an unredacted copy of the September 30,  
15 2012, document will be provided to all the parties in  
16 this proceeding.

17 MS. GRADY: Thank you, your Honor.

18 MR. SHARKEY: Yes, your Honor, with the  
19 exception the document remains a highly confidential  
20 document and I don't believe all the parties have  
21 signed stipulated --

22 EXAMINER PRICE: All the parties who have  
23 received a protective agreement will receive a copy  
24 of the document.

25 MR. SHARKEY: That's correct, your Honor.

1                   EXAMINER PRICE: Why don't we start with  
2 the first one sequentially is the October 17  
3 document. Why don't we go to the first redaction and  
4 you can tell me what page that is on.

5                   Let's pause for a second. Mr. Pritchard  
6 made this point earlier. At this time we are going  
7 to take the transcript off of the public transcript  
8 and put it on a confidential basis. This  
9 confidential transcript will be filed under seal in  
10 the docket and will not be filed with the remainder  
11 of the transcript and it will be incumbent upon the  
12 parties to remind me at the conclusion to come off of  
13 the confidential basis and close this part of the  
14 public.

15                   (CONFIDENTIAL PORTION)

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(OPEN RECORD)

EXAMINER PRICE: Mr. Darr had an inquiry?

MR. DARR: Yes, and for purposes of the public record let me restate that inquiry, if that's okay.

EXAMINER PRICE: Please.

MR. DARR: My question is what constitutes external reporting, and this is in reference to the October 9, 2012, memorandum. It is

1 directed to a party referred to as External Reporting  
2 and I would like to know who or what that is.

3 EXAMINER PRICE: Mr. Sharkey?

4 MR. SHARKEY: Your Honor, it's our  
5 understanding that External Reporting relates to  
6 divisions of the company, but I will confess that I  
7 don't have an answer to Mr. Darr's question. I  
8 apologize, I missed that on the piece. I failed to  
9 ask my question -- ask that question to my client.

10 So I will tell you it's my understanding  
11 these documents have not been disclosed to anybody  
12 outside of the company and I, in addition, note, your  
13 Honor, there's accounting privileges and you've  
14 already ruled that certain information could be  
15 disclosed. It's my understanding that these  
16 documents have not gone outside the company, your  
17 Honor.

18 EXAMINER PRICE: Thank you.

19 Mr. Darr, follow-up?

20 MR. DARR: Yes, your Honor. I believe  
21 that the company in its federal filings has, in fact,  
22 made statements to the effect that there have been  
23 impairments. I think that's relatively common  
24 knowledge at this point in this case.

25 Presumably those impairments were based

1 on information that was shared or premised on the  
2 reporting that we're talking about here. There's  
3 some serious questions today as to the scope and  
4 validity of any claimed privilege and I just want to  
5 make sure we put that on the record so that it's  
6 clear that, as we go forward, these issues are going  
7 to come up again.

8 EXAMINER PRICE: I understand.

9 MR. DARR: They may come up in about 14  
10 hours.

11 EXAMINER PRICE: I understand.

12 MR. DARR: Thank you, your Honor.

13 EXAMINER PRICE: Thank you. One second.

14 (Off the record.)

15 EXAMINER MCKENNEY: Go ahead,  
16 Mr. Alexander.

17 MR. OLIKER: Your Honor, just on a  
18 mechanical --

19 EXAMINER PRICE: Let's finish the book  
20 here on what's going to happen next, then you may not  
21 need to ask your question.

22 The Bench's ruling has been certain of  
23 the proposed redactions will be granted, certain of  
24 the proposed redactions were denied. At this point  
25 Dayton Power and Light will produce copies, redacted

1 copies of these documents and give them to all the  
2 parties who have executed confidentiality agreements;  
3 is that correct?

4 MR. SHARKEY: That is correct, your  
5 Honor.

6 EXAMINER PRICE: Will you have those by  
7 the deposition tomorrow morning?

8 MR. SHARKEY: Your Honor, we will have to  
9 get them -- certainly they'll have them in the  
10 morning. The deposition starts I believe at 9:30.  
11 I'm not sure that I can promise that they are ready  
12 at 9:30 a.m. But they could certainly be ready early  
13 in the morning. The staff needs to do some work in  
14 terms of, as you know, redacting and copying and  
15 such. But certainly in the morning.

16 EXAMINER PRICE: Thank you.

17 MR. SHARKEY: Your Honor, I'd also ask  
18 that you order the parties who have copies of them,  
19 which I believe currently are OCC and IEU, to  
20 promptly destroy -- actually it's more than that  
21 because I believe SolarVision, Ms. Bojko has  
22 copies -- that you promptly return and destroy those  
23 documents.

24 MS. BOJKO: Return and destroy what?

25 EXAMINER PRICE: He gave us copies of the

1 proposed redactions. So all the patients that have  
2 copies of the proposed redactions have original  
3 copies and all the parties are directed to either  
4 return or destroy those original documents with the  
5 exception of OCC, because OCC and DP&L are going to  
6 work on a separate issue vis-à-vis their obligations  
7 under their record retention and we will not have to  
8 deal with that until some later date, if at all.

9 MR. SHARKEY: Just so we're clear, OCC  
10 will keep the one copy.

11 EXAMINER PRICE: One copy for record  
12 retention purposes. The remainder will be returned  
13 or destroyed to DPL.

14 MS. BOJKO: In lieu of just redacting,  
15 your Honor?

16 EXAMINER PRICE: They're going to do the  
17 redactions. Parties need to give back the unredacted  
18 copies. They will then give you new copies tomorrow.

19 MR. SHARKEY: That is correct, your  
20 Honor.

21 EXAMINER PRICE: During, if not at the  
22 beginning of the deposition.

23 MR. SHARKEY: I commit, your Honor, to  
24 having my staff work on this with all due haste.

25 MR. ALEXANDER: Your Honor, just for

1 deposition preparation purposes, FES had destroyed  
2 this document quite some time ago. It has not  
3 prepared deposition questions regarding this  
4 document. For that purpose we didn't have it. With  
5 DP&L's permission, I would like to redact this  
6 document solely for purposes of deposition  
7 preparation prior to destroying it tomorrow when DP&L  
8 provides FES with the redacted version of the  
9 document.

10 Would that be acceptable to DP&L?

11 MS. GRADY: We could ask that as well,  
12 your Honor. We're probably going to go back to  
13 our -- go back and finish preparing and we would  
14 rather have the documents.

15 EXAMINER PRICE: I understand. Here's  
16 what I will modify my previous ruling: Parties will  
17 return the documents to Mr. Sharkey when he presents  
18 them with the redacted copies. That way you can hold  
19 the unredacted copies hostage until he gets you --

20 MR. OLIKER: Return or destroy?

21 EXAMINER PRICE: Let's just close the  
22 loop and return them to Mr. Sharkey.

23 MR. SHARKEY: I'd like them returned but  
24 the electronic copies, I'd like those to be  
25 destroyed.

1 EXAMINER PRICE: Any electronic versions  
 2 need to be deleted from all your backups.

3 Anything else for us?

4 EXAMINER McKENNEY: Let's go off the  
 5 record.

6 (Discussion off the record.)

7 EXAMINER PRICE: Let's go back on the  
 8 record.

9 There is still a pending motion to compel  
 10 by Dayton Power and Light against OCC regarding  
 11 request for production of documents 11 and 13.  
 12 Another discovery conference will be set by  
 13 subsequent entry, however, OCC is directed to bring  
 14 all of the documents that would otherwise be subject  
 15 to the discovery request but for the privilege claim  
 16 for in camera review and also a privilege log to  
 17 enable Dayton Power and Light to argue its side of  
 18 the case.

19 With that, we are adjourned for the  
 20 evening. Thank you, all.

21 Off the record.

22 (Hearing adjourned at 6:37 p.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct excerpted transcript of the proceedings taken by me in this matter on Thursday, February 14, 2013, and carefully compared with my original stenographic notes.

\_\_\_\_\_

Julieanna Hennebert, Registered Professional Reporter and RMR and Notary Public in and for the State of Ohio.

My commission expires February 19, 2013.

(71491 open record)

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Summary: Transcript in the matter of The Dayton Power and Light Company hearing - Public Version - held on 02/14/13 electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Hennebert, Julieanna Mrs.