

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the :
Application of The Dayton :
Power and Light Company : Case No. 12-426-EL-SS0
for Approval of its :
Electric Security Plan :

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

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

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

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

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PROCEEDINGS

before Mr. Gregory Price and Mr. Bryce McKenney,
Hearing Examiners, at the Public Utilities Commission
of Ohio, 180 East Broad Street, Room 11-A, Columbus,
Ohio, called at 10:00 a.m. on Thursday, March 7,
2013.

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APPEARANCES:

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On behalf of The Dayton Power and Light
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By Mr. Joseph E. Olikier
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On behalf of the Industrial Energy Users
of Ohio.

Bruce J. Weston, Ohio Consumers' Counsel
By Ms. Melissa R. Yost,
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On behalf of the Residential Customers of
The Dayton Power and Light Company.

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On behalf of SolarVision, LLC.

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On behalf of the FirstEnergy Service
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1 APPEARANCES: (Continued)

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3 By Mr. Philip B. Sineneng
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6 On behalf of Duke Energy Retail Sales,
7 LLC and Duke Energy Commercial Asset
8 Management, Inc.

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1 Thursday Morning Session,
2 March 7, 2013.

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4 EXAMINER McKENNEY: Good morning,
5 everyone. The Public Utilities Commission calls at
6 this time and place Case No. 12-426-EL-SS0, being In
7 the Matter of the Application of the Dayton Power and
8 Light Company for Approval of an Electrical Security
9 Plan.

10 My name is Brice McKenney. With me is
11 Gregory Price. We are the attorney examiners
12 assigned by the Commission to hear this case.

13 The purpose of this morning's proceeding
14 is to resolve all pending discovery disputes before
15 it goes to hearing. We are currently scheduled for
16 hearing on March 18, 2013.

17 At this time let's take the appearances
18 of the parties, beginning with the Dayton Power and
19 Light Company.

20 MR. SHARKEY: Thank you, your Honor, Jeff
21 Sharkey from the law firm Faruki, Ireland & Cox,
22 appearing on behalf of the Dayton Power and Light
23 Company.

24 EXAMINER McKENNEY: Thank you.

25 MR. PRITCHARD: Matt Pritchard and Joe

1 Oliker from the law firm McNees, Wallace & Nurick, on
2 behalf of IEU-Ohio.

3 MR. ALEXANDER: Trevor Alexander, Calfee,
4 Halter & Griswold, on behalf of FirstEnergy
5 Solutions.

6 MS. YOST: Melissa Yost, deputy
7 consumers' counsel, and Tad Berger, assistant
8 consumers' counsel, on behalf of the Ohio Consumers'
9 Counsel, 10 West Broad Street, Columbus, Ohio 43215.
10 Thank you.

11 MR. SINENENG: My name is Philip B.
12 Sineneng from Thompson Hine, on behalf of Duke Energy
13 Retail Sales, LLC and Duke Energy Commercial Asset
14 Management, Inc.

15 EXAMINER MCKENNEY: At this time let's go
16 ahead and move forward with the discovery disputes
17 pending in this case.

18 Mr. Sharkey, you have the floor.

19 MR. SHARKEY: Yes, your Honor, and I
20 think there's two issues pending as to DP&L's motion
21 to compel OCC. The first one is DP&L's request for
22 production No. 11 to OCC, which sought OCC's
23 communications with third parties related to the ESP
24 or the MRO case.

25 Your Honors' ruling as to IEU has held

1 that the communication as to the MRO cases are
2 irrelevant, so I think that aspect of it is now ruled
3 upon, but there's not been a ruling as to
4 communications between OCC and third parties with
5 regard to the ESP case.

6 And just to be clear, your Honor, the
7 original scope of the request was to any third party,
8 but we have proposed in negotiations and will stand
9 by with OCC that we are seeking only communications
10 with actual parties to the case, so if there was a
11 third party who had nothing to do with the case, we
12 are not seeking communications between OCC and them
13 but really the actual parties to the case.

14 Our argument, your Honor, is --

15 EXAMINER PRICE: Mr. Sharkey, you are
16 excluding settlement discussions?

17 MR. SHARKEY: Absolutely, your Honor,
18 yes. The argument, your Honor, is fairly simple.
19 Those communications are neither privileged nor
20 entitled to work product. They're communications
21 between consumers' counsel and other parties to the
22 case not relating to settlement negotiations. We
23 believe we are entitled to them in discovery.

24 EXAMINER McKENNEY: All right. Thank
25 you, Mr. Sharkey.

1 OCC.

2 MS. YOST: Thank you. I believe
3 Mr. Sharkey just addressed request for No. 11 only;
4 is that right?

5 MR. SHARKEY: Yes, your Honors, that's
6 correct.

7 MS. YOST: I'd like to take this
8 opportunity to address DP&L's request No. 11 that was
9 served upon OCC. OCC relies on the case of the
10 Supreme Court of Ohio, Jackson v. Greger, which is a
11 2006 ruling by the Court.

12 Your Honors, I have extra copies here.

13 EXAMINER PRICE: We've reviewed it.

14 Jackson addresses waiver of
15 attorney-client privilege. I think the first thing
16 you need to do is establish attorney-client applies,
17 and then we can talk about waiver.

18 MS. YOST: Thank you, your Honor.

19 OCC's objection to No. 11 included
20 several objections. One was that it was overly broad
21 and unduly burdensome. And I brought the documents
22 that OCC has identified as being responsive to that
23 request, and I think the number of documents shows
24 why it was overly broad and unduly burdensome. We
25 put a lot of hours into trying to identify any

1 communications we received during the ESP proceeding.

2 With that being said, there are joint
3 documents that have been filed in this proceeding.
4 Some of the documents other parties have been the
5 original author of and OCC has commented on or has
6 joined. There's at least two pleadings that OCC did
7 originally author and submitted those to other
8 intervenors for comment and also gave them the option
9 to join that pleading.

10 So, in essence, what we see here is the
11 product of the attorneys for the intervenors, in
12 essence, reviewing documents that are filed and
13 commenting upon them, sharing legal strategy, and
14 based upon the Supreme Court's 2006 determination in
15 the Jackson case, that privilege has been established
16 and it's not waived.

17 EXAMINER PRICE: Why is it established?

18 MS. YOST: The communications that I'm
19 going to present, your Honor, are just those
20 communications between attorneys for the intervenors
21 sharing, again, their legal positions, legal thoughts
22 in the filing and joint pleadings and other strategy.

23 That being said, what I have --

24 EXAMINER PRICE: That's not a
25 communication between an attorney and a client. It

1 may be work product. I'm not understanding why you
2 are calling this attorney-client privilege, and
3 Jackson only applies to attorney-client privilege.

4 MS. YOST: Right

5 EXAMINER PRICE: You are arguing work
6 product. Jackson is inapplicable.

7 MS. YOST: No, your Honor. For instance,
8 OCC, the privilege with OCC is that of the Consumers'
9 Counsel, which is Mr. Weston. Any advice that I
10 would give in regards to filings of pleadings I would
11 have to share those with him, and then he would make
12 the decision whether that was the route that OCC was
13 going to take. So my client has taken my advice, and
14 I have shared my --

15 EXAMINER PRICE: I thought your client
16 was the residential consumers of the state.

17 MS. YOST: It's the privilege of the
18 Consumers' Counsel. We represent them and act on
19 their behalf, but the privilege is that with the
20 Consumers' Counsel.

21 EXAMINER PRICE: Do you have a privilege
22 log?

23 MS. YOST: Yes. But I just want to
24 explain something, your Honor. To the extent that
25 OCC does believe that these materials are protected

1 with attorney-client privilege, we also recognize
 2 that only OCC can assert OCC's privilege. So that
 3 being said, the first group of documents are
 4 documents that are responsive to the request No. 11,
 5 and these are documents that have been drafted by
 6 other parties. They include other parties'
 7 attorneys' legal analysis and comments, and we're not
 8 in a position to assert that these are privileged.

9 What I did do was notify the parties that
 10 these would be produced today, and, in essence, I'm
 11 just going to turn these over to the Bench for a
 12 determination whether OCC should release these
 13 pursuant to.

14 EXAMINER PRICE: Do you have a privilege
 15 log for these?

16 MS. YOST: No, I don't. There were too
 17 many volumes and too many e-mails. We really
 18 couldn't produce a log.

19 EXAMINER PRICE: I think we told you that
 20 you needed to produce a privilege log.

21 MS. YOST: Well, your Honor, I am not
 22 asserting that these are privileged.

23 EXAMINER PRICE: Then just give them to
 24 Mr. Sharkey.

25 MR. OLIKER: What are those documents

1 exactly, Melissa?

2 MS. YOST: Those are a lot of pleadings
3 that IEU drafted. I think FES drafted pleadings.
4 There are comments of SolarVision, comments about
5 a --

6 EXAMINER PRICE: So are you making any
7 work product claims on these documents?

8 MS. YOST: It's not my work product, your
9 Honor

10 MR. OLIKER: Your Honor, I understand
11 that OCC has not asserted the common-interest
12 privilege doctrine, but I think that there's
13 something important to note about the Public
14 Utilities Commission of Ohio proceedings. They're
15 not federal court proceedings. They're not civil
16 proceedings. They involved numerous parties that can
17 identify with issues that they all support. When we
18 file joint pleadings, everybody is signing.

19 EXAMINER PRICE: Mr. Olikier, I understand
20 what you are saying, and we are willing to take
21 arguments, but nobody is claiming it yet. She's not
22 claiming the privilege. She just gave the documents
23 to Mr. Sharkey. If you want to claim the
24 work-product privilege at this point, then we'll
25 entertain that, but she made it clear that she is not

1 claiming work-product privilege.

2 MR. OLIKER: Thank you, your Honors.
3 That's why I am standing. Seeing the train going
4 down the track, I felt the necessity to assert
5 myself.

6 EXAMINER PRICE: Okay.

7 MR. OLIKER: At this time we would like
8 to assert that there is privilege attached to those
9 documents and that we have the right to assert that,
10 given that much of it has been drafted by the
11 attorneys from the law firm McNees, Wallace & Nurick.

12 EXAMINER PRICE: This is where a
13 privilege log would be helpful because I would like
14 to be able to distinguish what documents involve
15 pleadings and what documents just involve
16 communications.

17 MR. OLIKER: The difficult position that
18 we are in at this point is the motion to compel was
19 not filed against IEU-Ohio. It was filed against
20 OCC. We were also under the understanding that they
21 were going to provide a privilege log, so I am
22 slightly taken aback by that issue coming to the
23 foreground at this point, so I don't know exactly how
24 to respond, except that we could potentially provide
25 a privilege log.

1 EXAMINER PRICE: Let me ask a question of
2 Mr. Sharkey.

3 MR. SHARKEY: Yes, your Honor.

4 EXAMINER PRICE: Are you seeking through
5 discovery documents related to joint pleadings made
6 through the parties?

7 MR. SHARKEY: Your Honor, we are seeking
8 any communications that may be between those parties.
9 We believe that they're relevant to the case and are
10 discoverable as to legal or factual positions or
11 concessions parties may have made. We are seeking
12 all communications.

13 EXAMINER PRICE: Thank you.

14 MR. OLIKER: Mr. Pritchard just notified
15 me that we did previously submit a privilege log and
16 we discussed it in our last discovery conference. I
17 did not bring a copy with me, though, your Honor.

18 EXAMINER PRICE: You had a privilege log
19 of all the documents she is going to produce?

20 MR. OLIKER: I believe so, from our
21 perspective.

22 EXAMINER PRICE: The ones that you had
23 claimed.

24 MR. OLIKER: Which would be slightly
25 different than the ones that she provided, but yes.

1 EXAMINER PRICE: Okay. The common
2 interest doctrine, Mr. Pritchard, requires that the
3 parties' interest be identical. How can you square
4 the idea that IEU's interests representing industrial
5 consumers would be identical with OCC's interest in
6 residential consumers?

7 MR. OLIKER: I believe that the issues in
8 these pleadings were fairly focused on, off the top
9 of my head, the four topics, the amount of the
10 nonbypassable charges, which parties can rally around
11 two issues. You have end users, who obviously don't
12 want to pay those charges, and you also have an
13 interest in preventing subsidies that would
14 destabilize the competitive market, issues such as
15 FirstEnergy Solutions could support. And we also had
16 issues regarding the procedural schedule. Every
17 party has identical interest in having a fair
18 procedural schedule.

19 There were also issues related to
20 standard filing requirements. Every party can say
21 they have an identical interest in having an
22 application comply with the standard filing
23 requirements, which are the rules of the Commission.

24 Besides those three issues, I can't off
25 the top of my head remember any other things that the

1 parties would have a divergence of opinion about.

2 EXAMINER PRICE: Are the Commission staff
3 on any of these communications?

4 MS. YOST: Very few, your Honors.

5 EXAMINER PRICE: Are you saying you have
6 an identical interest with Commission staff, whose
7 obligation is to balance the interest of everybody,
8 consumers, marketers, and DP&L's shareholders alike?

9 MR. OLIKER: With respect to pleadings,
10 such as compliance with the standard filing
11 requirements, I think the Commission staff would
12 share the common interest in that, also the
13 procedural schedule. Not remembering all of the
14 pleadings that may have been sent to staff, it is
15 hard to determine whether there was on a particular
16 one.

17 EXAMINER PRICE: Ms. Yost has some
18 supplemental.

19 MS. YOST: Yes. There was one pleading
20 that I believe staff wanted us to indicate -- I think
21 it was an early pleading drafted originally by FES
22 where there is a notation that staff did not object
23 to an extension of the procedural schedule.

24 But other than that, I believe most of
25 the pleadings have been the same parties, which is,

1 IEU, FES, OCC, Kroger, Honda, Wal-Mart, Sam's Club,
2 OP&E. That's the majority of the group that has been
3 working together, your Honor.

4 EXAMINER PRICE: Mr. Sharkey, are you
5 going to respond to their arguments?

6 MR. SHARKEY: Your Honor, I believe that
7 you have correctly pointed out the defect in the
8 common-interest privilege, namely, that the parties
9 don't have an identity of interests.

10 EXAMINER PRICE: Why can't they? If they
11 share on just a narrow issue, like a procedural
12 schedule, why can't the common-interest privilege
13 apply to that communication? There's no requirement
14 that it be permanent, is there?

15 MR. SHARKEY: No, your Honors. If it was
16 purely as to procedural schedule, I suppose that they
17 may have an identity of interest as to those items.

18 But, for example, your Honor, if you
19 recall, there was some detailed briefing as to what
20 DP&L's rates would be on a going-forward basis, and
21 on those pieces were OCC and IEU. Both customers,
22 arguably, they have a common, but there were also, if
23 I recall correctly, CRES providers, SolarVision, who
24 is neither a customer nor a CRES provider, who
25 certainly has -- all of those parties have a fairly

1 different -- very different interests in those items,
2 and I thus believe that they cannot be subject to a
3 common-interest privilege.

4 MS. YOST: Your Honor, I just want to
5 make sure that something is clear. OCC does have a
6 privilege log of documents that have been joint
7 filings with intervenors and OCC's comments on
8 documents that were produced by other intervenors,
9 and we are asserting attorney-client privilege. I
10 just want to make that clear. I have a privilege
11 log, and I can produce these.

12 To the extent that we are the main
13 authors of the documents, we assert that is our
14 attorney-client work. We shared it. To the extent
15 that a document was provided to us and we edited that
16 document and provided our edits, again, that's the
17 two categories that OCC is asserting is protected by
18 the attorney-client privilege, and based on the
19 Jackson case that privilege was not waived by the
20 sharing of such information.

21 EXAMINER PRICE: Mr. Sharkey, care to
22 respond?

23 MR. SHARKEY: I would like to seek a
24 clarification because there's two brown folders. In
25 light of Mr. Olier's objections, I haven't looked at

1 any of the documents, despite the fact they have been
2 handed to me.

3 EXAMINER PRICE: I'm watching you.

4 MR. SHARKEY: I don't understand exactly
5 the distinction between what is in the two folders,
6 so can I ask Ms. Yost to clarify?

7 EXAMINER PRICE: I think that the folder
8 that you have, which I will ask you now to give to
9 Mr. Olier, contains documents that were produced by
10 parties other than OCC and OCC was copied on those
11 documents.

12 MR. SHARKEY: Okay.

13 EXAMINER PRICE: I believe that behind
14 door No. 2, which Ms. Yost is holding, are documents
15 produced by OCC and then subsequently communicated to
16 other parties.

17 MR. SHARKEY: Okay.

18 MS. YOST: That is correct, in addition
19 to documents produced by IEU or FES that we edited
20 and contains our edits.

21 EXAMINER PRICE: But the documents that
22 you have are outbound communications, and the
23 documents that Mr. Olier has are inbound
24 communications. Is that a way to put it?

25 MS. YOST: Not specifically because

1 sometimes we did receive those communications and we
2 just copied on them. It goes both ways.

3 EXAMINER PRICE: Can you give us the
4 privilege log of the documents you have?

5 MS. YOST: Absolutely. Would you like
6 the documents now?

7 EXAMINER PRICE: Yes, please. Thank you.

8 MR. SHARKEY: Your Honor, if I may, the
9 privilege log that Ms. Yost handed to me contains
10 repeated statements that the recipients were various
11 people "and others." The reference to "and others"
12 is entirely inconsistent with the principle of
13 preparing privilege logs. We need to know all of the
14 recipients to know whether or not a document is
15 privileged.

16 MS. YOST: Your Honor, I would disagree.
17 That's irrelevant. To the extent that we've produced
18 a lot of documents and the e-mail doesn't necessarily
19 print out all the names, but these were --

20 EXAMINER PRICE: If "and others" was the
21 Columbus Dispatch, you can't claim privilege, can
22 you?

23 MS. YOST: Fair enough, your Honor. But
24 the others are intervenors that we were working with
25 on these joint pleadings.

1 EXAMINER PRICE: You have not provided
2 the Bench with the others either.

3 MS. YOST: What do you mean, "the
4 others," your Honor?

5 EXAMINER PRICE: We don't have a full
6 copy of who these were emailed to.

7 MS. YOST: It doesn't print off that way.
8 We can attempt to get those other names and just
9 write them on a piece of paper.

10 EXAMINER PRICE: Mr. Sharkey, do you care
11 to respond to Ms. Yost's argument the OCC-drafted
12 documents are attorney-client privileged, and that
13 privilege has not been waived pursuant to Jackson?

14 MR. SHARKEY: Yes, your Honor. I believe
15 that any communications that -- your Honor, I believe
16 that any communications between Ohio Consumers'
17 Counsel and third parties are by definition not
18 privileged because those communications are not
19 between an attorney and his or her client.

20 And to the extent I don't know what is in
21 these documents to comment on whether they contain
22 advice that Ms. Yost provided to her client that were
23 then sent to third parties, but it appears that
24 Ms. Yost, with her client's permission, has
25 authorized the sharing of these documents with third

1 parties. I haven't heard any claim that Consumers'
2 Counsel did not authorize the sharing of these
3 documents with third parties so I believe that that
4 would constitute a waiver, your Honor.

5 MS. YOST: Your Honor, if I just may
6 point out, DP&L has not provided any case law that
7 contradicts the Supreme Court's holding in Jackson.
8 In Jackson the common law waiver of the
9 attorney-client privilege is no longer in effect in
10 Ohio. In essence, you have to waive the privilege
11 two ways: One, voluntarily testifying, and second,
12 with consent.

13 The Consumers' Counsel, who does own the
14 privilege, did authorize me to share my legal advice,
15 which is contained in these documents, with
16 intervenors. He did not waive the privilege, and
17 that has not been waived.

18 And I will just add, your Honor, based on
19 the Jackson case, to the extent that "and others" was
20 the Columbus Dispatch, that still would not amount to
21 a waiver of that privilege.

22 EXAMINER PRICE: So, in other words,
23 OCC's position is everything you ever do is
24 privileged and it can never not be privileged unless
25 you consent to its waiver. Even if you file

1 testimony with this Commission, it is privileged
2 because you have not expressly waived the privilege.

3 MS. YOST: No. I think testimony would
4 waive it. That's when you are testifying.

5 EXAMINER PRICE: Testimony is a bad
6 example, but everything you do is privileged and it
7 can never be waived.

8 MS. YOST: No, not everything. Only
9 legal advice is under the privilege that the Supreme
10 Court has said can only be waived two ways in Ohio,
11 and that is by voluntarily testifying, such as with
12 testimony, it's gone. The second would be if they
13 consent to waive the privilege, your Honor. I find
14 no case law that says --

15 EXAMINER PRICE: That is a very broad
16 claim.

17 MS. YOST: You would have to take that up
18 with the Supreme Court of Ohio.

19 EXAMINER PRICE: I am taking it up with
20 you because I am not talking about the waiver
21 question. I am talking about the fact that you say
22 that every interaction that you have with every
23 intervenor is still privileged.

24 MS. YOST: No, I don't say that, your
25 Honor. These are very specific to the edits of legal

1 documents. That's what I'm saying.

2 EXAMINER PRICE: I can see the
3 work-product claim. I am struggling with the
4 attorney-client claim. I can see the work-product
5 claim, these are our attorneys' work product on
6 drafts that may be filed with the Commission and
7 shared with other parties. That's the privilege I
8 can see.

9 But what I am having trouble with is that
10 it contains your confidential legal advice to
11 Mr. Weston, and yet it's okay that you give it to
12 IEU, and then doesn't matter, Dayton can never get
13 it.

14 MS. YOST: That's right, your Honor,
15 because under the rules only information that is not
16 privileged is discoverable.

17 EXAMINER PRICE: Mr. Sharkey, you look
18 like you want to respond.

19 MR. SHARKEY: Minor point, your Honor,
20 because I agree with the theme of many of your
21 questions. But the only point I have to add is that
22 Ms. Yost did state Consumers' Counsel authorized her
23 to provide the information to the intervenors. I
24 believe that under any description of waiver, even an
25 exceedingly broad one, when the Consumers' Counsel

1 authorized her to share those, that constitutes a
2 waiver. I don't believe they were privileged to
3 begin with, your Honor, because they were shared with
4 third parties, but, in any event, that would be a
5 waiver.

6 EXAMINER MCKENNEY: Mr. Olikier.

7 MR. OLICKER: I just want to piggy-back on
8 that issue. We had previously asked for
9 communications with rating agencies and banks. They
10 authorized those communications. Is that a waiver?

11 EXAMINER PRICE: I believe the Bench's
12 ruling was that these were still subject to the
13 attorney work-product privilege and not the
14 attorney-client privilege, and I believe there are
15 cases out there that say communications with outside
16 auditors and rating agencies does not waive the
17 work-product privilege.

18 MR. OLICKER: Thank you, your Honor. I
19 was seeing the tandem, and I wanted to explore that.
20 Thank you, your Honor.

21 EXAMINER PRICE: We are all trying to be
22 consistent with this, Mr. Olikier.

23 MR. OLICKER: Your Honor, I'm sorry to
24 trouble you again, but I am not sure how we were
25 treating these documents versus Ms. Yost's documents,

1 whether you wanted me to follow up on my
2 understanding of the common-interest privilege.

3 EXAMINER PRICE: No. I think we've heard
4 a lot about the common-interest privilege. I guess
5 at this time you should give them to us for the
6 in-camera review, and we will make do without the
7 privilege log.

8 I understand you assert work-product
9 privilege as to these documents; is that correct?

10 MR. OLIKER: That's correct, your Honor.

11 EXAMINER PRICE: You are not asserting
12 attorney-client privilege to these documents.

13 MS. YOST: Having not seen all of the
14 documents, your Honor, I have difficulty saying that
15 I'm not. I apologize for that.

16 EXAMINER PRICE: Do you want to take some
17 time to look at those or have Mr. Pritchard look at
18 those while we move on to other topics?

19 MR. OLIKER: That would be very helpful.

20 EXAMINER PRICE: Okay.

21 MR. SHARKEY: One last point, your Honor.
22 I understand that what you described as the documents
23 behind door No. 1 were IEU and other generated
24 communications. At this point IEU is the only one
25 who has voiced an objection to the production of

1 materials that they originated. In the absence of
2 anyone else having made such an assertion, I believe
3 we would be entitled to any other documents authored
4 by any other party in the folder.

5 MR. PRITCHARD: I believe at the first
6 discovery conference, this issue was raised, and
7 other parties, including SolarVision, raised
8 objections at that time. Although they are not here
9 today, but they did previously object.

10 EXAMINER PRICE: Mr. Alexander.

11 MR. ALEXANDER: FES does object as well.
12 This was discussed at the previous conference. OCC
13 asserted the objection. Their request was directed
14 to OCC and so we haven't been heard thus far, but I
15 join in with Mr. Olier's comments from earlier.

16 EXAMINER PRICE: Duke Retail.

17 MR. SINENEG: No objection, your Honor.

18 EXAMINER PRICE: No objection?

19 MR. SINENEG: No.

20 EXAMINER McKENNEY: Mr. Sharkey, let's
21 move on to RPD 1-13.

22 MR. SHARKEY: Thank you, your Honors.
23 Before I turn to the merits, we have reached an
24 agreement with Ohio Consumers' Counsel that I am
25 going to withdraw, in part, that motion without

1 prejudice. In particular, we are withdrawing the
2 portion of that motion that sought any drafts of
3 testimony that may have been exchanged between
4 consumers' counsel and their outside third-party
5 experts.

6 We continue to seek any communications,
7 any other communications, between the Office of the
8 Consumers' Counsel and its third-party experts, and
9 it's going to be clear the withdrawal of the motion
10 as to testimony is without prejudice, your Honor.

11 EXAMINER MCKENNEY: Thank you. Please
12 proceed.

13 MR. SHARKEY: I thought Ms. Yost wanted
14 to say something.

15 MS. YOST: Thank you, your Honor. OCC
16 has served upon Dayton Power and Light the same
17 discovery questions that they served upon us that are
18 at issue with their motion to compel. To the extent
19 that Dayton Power and Light no longer seeks draft
20 testimony shared between OCC and its third-party
21 experts or the comments on draft testimony between
22 OCC and its third-party experts, OCC would also not
23 seek that from Dayton Power and Light at this time.

24 However, we would also make that motion
25 without prejudice, that to the extent later on Dayton

1 Power and Light again renews its motion to compel as
2 to produce draft testimony and comments on that draft
3 testimony, OCC would seek that from Dayton Power and
4 Light.

5 Thank you.

6 EXAMINER PRICE: Do you care to explain
7 why you have not responded then to RPD 1-13?

8 MS. YOST: I'm sorry, your Honor?

9 EXAMINER PRICE: Well, go ahead,
10 Mr. Sharkey.

11 MR. SHARKEY: Happy to, your Honor,
12 however you prefer to proceed, but my argument will
13 be pretty brief. We believe that any communications
14 that OCC has had with third-party experts are
15 discoverable. We've cited some case law from other
16 jurisdictions, not the Commission but from other
17 jurisdictions across the country, who have held
18 you're entitled to any communications a party has
19 with experts to determine what may have been
20 influencing their opinion in any way, shape, or form.

21 And what is information considered by an
22 expert is defined very broadly, and, your Honor, our
23 reply in support of our motion, in fact, quotes
24 arguments made by Maureen Grady, counsel for the Ohio
25 Consumers' Counsel, from a January 30 conference

1 before your Honors that is consistent with our
2 arguments.

3 EXAMINER PRICE: Has the consumers'
4 counsel provided you the assumptions given to the --
5 the information that is set forth -- there is
6 information set forth in the civil rules as to the
7 exact parameters, which escape me at the moment.
8 They're very specific as to what should be provided
9 from testifying experts, including the assumptions
10 given by the attorney to the experts. Have they
11 provided that to you?

12 MR. SHARKEY: They have not provided any
13 communications between them -- between Ohio
14 Consumers' Counsel and the experts. The sum and
15 substance of what we have, your Honor, would be the
16 expert's prefiled testimony on those subjects but
17 none of the communications or list of assumptions or
18 anything like that, your Honor.

19 EXAMINER PRICE: Ms. Yost, why have you
20 not provided that as set forth in the Ohio Civil
21 Rules? And Ms Grady did cite to it in the last
22 discovery conference. Why have you not provided
23 that, at least, to Dayton?

24 MS. YOST: Your Honor, because that
25 information has not specifically been requested by

1 the company. To the extent they have conducted one
2 deposition of an expert and there are two more to go
3 forward next week, if they want to inquire of the
4 witness what they actually relied on that was
5 provided, that's fair, and OCC would not object to
6 that, consistent with Civil Rule 26. But I do have a
7 document to kind of outline OCC's position. I'd like
8 to share this with the Bench, your Honor.

9 EXAMINER PRICE: You may.

10 MS. YOST: Your Honor, what I provided to
11 the Bench and counsel for DP&L is Ohio Civil Rule 26.
12 Civil Rule 26 is on General Provisions Governing
13 Discovery. If I could have you turn to what is
14 marked -- it should be also flagged page 3 of 6, the
15 top of that document, your Honor. And in regards to
16 what I'm referencing you to is Civil Rule
17 26(B)(5)(b), which is the second paragraph on page 3.
18 This speaks in regards to obtaining discovery from
19 experts.

20 Specifically it states: "As an
21 alternative or in addition to obtaining discovery
22 under division (B)(5)(a) of this rule, a party by
23 means of interrogatories may require any other party
24 (i) to identify each person whom the other party
25 expects to call as an expert witness at trial, and

1 (ii) to state the subject matter on which the expert
2 is expected to testify. Thereafter, any party may
3 discover from the expert or the other party facts
4 known or opinions held by the expert which are
5 relevant to the stated subject matter. Discovery of
6 the expert's opinions and the grounds therefor is
7 restricted to those previously given to the other
8 party or those to be given on direct examination at
9 trial."

10 I will also contend the rule is
11 consistent with the --

12 EXAMINER PRICE: I understand what this
13 rule says. I guess I direct your attention to (d)
14 and ask you why you have not given to Dayton the
15 information that you have handily set forth, if I
16 remember off the top of my head, in (d)(i), (d)(ii),
17 and (d)(iii). That information clearly is subject to
18 disclosure and would have been responsive to the
19 request. Why haven't you given it to them?

20 MS. YOST: Your Honor, I agree that it is
21 subject to disclosure, but I disagree that it is
22 responsive to the request.

23 EXAMINER PRICE: They asked for any
24 communications.

25 MS. YOST: That's right, your Honor.

1 EXAMINER PRICE: And there are three
2 categories of communications that are responsive.
3 Why wouldn't you given them to them? Because they
4 didn't specifically ask for (d)(i), (d)(ii), and
5 (d)(iii)?

6 MS. YOST: No, your Honor. In regards to
7 the documents we have produced, which we have them
8 all. We have a privilege log, specific to (ii),
9 "identify facts or data that the party's attorney
10 provided and that the expert considered in forming
11 the opinions to be expressed," Your Honor, they asked
12 for all communications received or sent to
13 third-party expert witnesses.

14 To the extent there were facts or data
15 that OCC provided to these experts, I can't testify
16 that the expert considered these in forming the
17 opinions to be expressed. How you determine that is
18 either, A, through depositions. That's fair enough.
19 Ask our witnesses, "What data or facts did OCC
20 counsel provide to you that you relied on?" I can't
21 testify what they actually relied on. They can only
22 testify to that.

23 In addition to that, there have been no
24 interrogatories asking specifically what facts of
25 data provided by OCC did your experts -- and we have

1 three of them -- rely on in forming their testimony.
 2 So I can't attest that every document there or any
 3 documents there --

4 EXAMINER PRICE: But your expert could
 5 have told you.

6 MS. YOST: I'm sorry?

7 EXAMINER PRICE: Your expert could have
 8 told you.

9 MS. YOST: They just asked us to produce
 10 all documents, your Honor. It is overly broad and
 11 unduly burdensome, and we made that objection, and by
 12 the number of documents we produced, it goes to show
 13 that. All they have to do is ask that in discovery,
 14 either through the deposition or interrogatory. They
 15 just asked us to produce everything, your Honor. We
 16 are not objecting to producing stuff that is
 17 consistent with Civil Rule 26.

18 EXAMINER PRICE: I'm not sure what
 19 argument you're making. Are you saying their request
 20 is overly burdensome or not subject to discovery?

21 MS. YOST: I am saying more than one
 22 objection. It was overly burdensome. It was unduly
 23 broad, and, also, to the extent that there are
 24 correspondence between OCC and our experts, that
 25 those are not subject to discovery except under those

1 (i), (ii), (iii) conditions.

2 To the extent that "identify assumptions
3 that the party's attorney provided and that the
4 expert relied on in forming the opinions to be
5 expressed," your Honor, only the experts can tell us
6 that.

7 EXAMINER PRICE: But it is your expert.
8 You can ask them.

9 MS. YOST: Your Honor, I don't have a
10 document that says, "Here are the opinions that I
11 relied on, that OCC provided and I relied on." I
12 don't have a document in the stack that I'm producing
13 that says that, your Honor. So, no, I --

14 EXAMINER PRICE: But your experts could
15 have identified which assumptions and information
16 they relied on in forming their opinions. You're
17 treating your experts like they should be serving
18 separate discovery on them. They're your experts.
19 You should be asking them, "What did you rely on?"

20 MS. YOST: Your Honor, it is a request to
21 produce documents. Is there a document that says
22 that? I don't have a document that says that, your
23 Honor. What you are saying is absolutely right. If
24 he sends me an interrogatory, "Identify all the data
25 or facts provided by OCC's attorney that they relied

1 on," that's not a document that I have in my
2 possession. That's a document we would have to
3 answer in terms of an interrogatory, not a request to
4 produce.

5 This is a response to a request to
6 produce, and there is no obligation to create
7 documents. You just produce what you have that's
8 responsive. I've brought all the documents that we
9 have that are responsive, your Honor, and we're not
10 saying that they can't ask our witnesses these
11 questions.

12 But this has been some project trying to
13 identify all the communications and then have
14 multiple copies for the Bench's in-camera review, and
15 still, it's been overly broad and unduly burdensome.
16 We are willing to give them the information if they
17 ask for the information, your Honor. They haven't
18 asked.

19 EXAMINER PRICE: Mr. Sharkey.

20 MR. SHARKEY: First of all, your Honor,
21 it's really two comments. Ms. Yost repeatedly stated
22 that the standard was that they were required to
23 provide us information the experts relied upon in
24 forming the opinions to be expressed. That's not the
25 term used in the rule that she circulated. The term

1 used in the rule is "that the expert considered."
2 Certainly the expert considered any and all
3 information that was provided to them, some of which
4 may have been important to their experts and some of
5 which may not.

6 We cited in our reply brief a couple of
7 cases. I'll read from them briefly. One is the In
8 re Commercial Money case. It's 248 F.R.D. at
9 page 537. "A testifying expert has considered data
10 or information if the expert has read or reviewed the
11 privileged materials before or in connection with
12 formulating his or her opinion." It is "read or
13 reviewed" under that standard.

14 There's another case. It's the Evercare
15 case that we have a Lexis cite for. "An expert is
16 deemed to have considered anything received,
17 reviewed, read, or authored by the expert."

18 So we believe, first of all, your Honor,
19 our request for all communications between OCC and
20 the expert is entirely appropriate and is consistent
21 with the rule. Second of all, your Honor, even if we
22 were entitled only to information relied upon by the
23 expert, when we've asked for all communications
24 between OCC and the expert, they should have provided
25 to us, at a minimum, the communications that they are

1 not objecting to that they relied upon and then
2 asserted objections as to the others. They provided
3 neither.

4 EXAMINER PRICE: Thank you.

5 MS. YOST: Your Honor, may I respond?

6 EXAMINER PRICE: Sure.

7 MS. YOST: Mr. Sharkey is wrong. When I
8 said "the expert relied on forming," that is (iii).
9 (ii) there does say, "Identify facts or data that the
10 party's attorney provided and that the expert
11 considered in forming the opinions to be expressed."
12 I just want to make that clarification. I didn't
13 misread that. They are two separate paragraphs.

14 And, your Honor, if I may approach the
15 Bench in regards to the cases cited by Mr. Sharkey.

16 EXAMINER PRICE: Sure.

17 MS. YOST: Your Honor, what I want to
18 provide is Federal Rule 26.

19 EXAMINER PRICE: Why are you giving us
20 Federal Rule 26? Earlier Ms. Grady said we should be
21 relying upon this rule.

22 MS. YOST: Yes, your Honor. But he's
23 relying upon federal cases. I want to demonstrate to
24 the Bench the cases he is relying on are in regards
25 to rules that are no longer on the books. I am also

1 handing notes to the Federal Rule 26.

2 EXAMINER PRICE: Thank you.

3 MS. YOST: Previously I provided the
4 Bench a copy of Civil Rule 26. There's a second tab
5 there on page 5 of 60. As the Bench is aware, and
6 OCC has raised this in the past, the Ohio Civil
7 Rules, specifically Rule 26, was amended July 1,
8 2012, and on the top of page 5 of 60, there indicates
9 the staff notes.

10 And in regards to the 7/1/12 amendment it
11 states, "Civil Rule 26(B)(5)(b) is amended to clarify
12 the scope of expert discovery and align Ohio practice
13 with the 2010 amendments to the Federal Rules of
14 Civil Procedure relating to a party's ability to
15 obtain discovery from expert witnesses who are
16 expected to be called at trial. The amendment
17 provides work product protection for draft reports
18 and communications between attorneys and testifying
19 experts, except for three categories of
20 communications: Communications that relate to
21 compensation for the expert's study or testimony;
22 communications containing facts or data that the
23 party's attorney provided and that the expert
24 considered in forming the opinions to be expressed;
25 and communications containing any assumptions that

1 the party's attorney provided and that the expert
2 relied upon in forming the opinions to be expressed."

3 And, your Honor, if I can now turn your
4 attention to Federal Rule 26, specifically the top of
5 page 4, your Honor, it starts with (C) and it says,
6 "Trial-Preparation Protection for Communications
7 Between a Party's Attorney and Expert Witnesses," and
8 then it goes on to identify the three categories that
9 are discoverable:

10 "(i) relate to compensation for the
11 expert's study or testimony;

12 "(ii) identify facts or data that the
13 party's attorney provided and that the expert
14 considered in forming the opinions to be expressed;
15 or

16 "(iii) identify assumptions that the
17 party's attorney provided and that the expert relied
18 on in forming the opinions to be expressed."

19 This is consistent with the amendments to
20 Ohio Rule 26. If you could turn to the very last
21 page of this document, page 6, under "History," it
22 indicates that these were amended December 1, 2010.

23 So, your Honor, my purpose of going
24 through this exercise is to show that the cases that
25 DP&L rely on, two specifically, are in regards to the

1 interpretation of Rule 26 that no longer exists. It
2 was amended in 2012.

3 And I have copies of DP&L's cases that I
4 can provide to you to show that they are construing
5 the 1993 amendments.

6 EXAMINER PRICE: I understand. But let's
7 go back to where you drew our attention to.

8 MS. YOST: Yes, your Honor.

9 EXAMINER PRICE: First full paragraph, I
10 believe this is the notes of the Advisory Committee
11 on the 2010 amendments, and the first full paragraph
12 on page 34.

13 MS. YOST: Yes, your Honor.

14 EXAMINER PRICE: The second sentence
15 says, "At the same time, the intention is that facts
16 or data be interpreted broadly to require disclosure
17 of any material considered by the expert from
18 whatever source that contains factual ingredients.
19 The disclosure obligation extends to any facts or
20 data 'considered' by the expert in forming the
21 opinions to be expressed, not only those relied upon
22 by the expert."

23 So that being said, since you clearly
24 have communications that contains this information,
25 again my question is, why haven't you disclosed those

1 communications? Or are you saying that he needs to
2 ask the question in deposition first and then make
3 his request for production of documents?

4 MS. YOST: Your Honor, could I see what
5 you are reading from? I got lost there.

6 EXAMINER MCKENNEY: Notes, page 34.

7 MS. YOST: Of the federal notes?

8 EXAMINER PRICE: The one you gave me.

9 MS. YOST: Yes, sir. And where are you
10 reading from, sir?

11 EXAMINER PRICE: The first full paragraph
12 on 34, second and third sentences.

13 MS. YOST: Yes, your Honor. I think that
14 is consistent. I am saying I don't know what our
15 experts considered, your Honor. I can't testify to
16 what they did consider and what they didn't consider
17 in forming their opinions.

18 EXAMINER PRICE: But your experts know.

19 MS. YOST: My experts know, yes.

20 EXAMINER PRICE: They refused to tell
21 you?

22 MS. YOST: Your Honor, I did not ask
23 them. I produced all documents. They didn't ask to
24 answer interrogatories, and that goes to my point.
25 It's a question. It's not a request to produce the

1 documents that exist. There's no document that shows
2 that, your Honor, and that's my problem here.

3 EXAMINER PRICE: Mr. Sharkey, do you care
4 to respond?

5 MR. SHARKEY: I guess two points, your
6 Honor. One, I think "considered" is a very broad
7 term that would include not only things that were
8 relied upon, but in the cases we cited include the
9 terms "received, read, reviewed."

10 Ms. Yost has criticized those cases, but
11 they are interpreting the term "considered," which is
12 in the Ohio rules, the federal rules, and the various
13 comments. So while they may have been applicable to
14 a prior version of the rules, they are still
15 interpreting the applicable rule "considered" that
16 shows that it is a very broad request.

17 Secondly, your Honor, the argument
18 made by Ms. Yost that she needs to have us identify
19 which documents -- she doesn't have a document which
20 identifies which documents are responsive to our
21 request I believe, your Honor, in not the appropriate
22 standard.

23 We're served with discovery requests all
24 the time for production of documents, and we go and
25 we determine which documents are responsive. The

1 fact that I don't know immediately, that I may need
2 to do some digging with the client or other places
3 doesn't excuse me from having to make the effort to
4 determine which documents are responsive to the
5 requests. Otherwise, any request that came into my
6 office I would say, "I don't have a document that
7 tells me what's responsive. I don't know what's
8 responsive." That is not the standard. You need to
9 go and determine which documents are responsive to
10 the requests.

11 MS. YOST: Your Honor, would you like the
12 provision of the cases to show that they reflect
13 analysis based on the rule that was from 1993?

14 EXAMINER PRICE: I don't think it's
15 necessary. You've made the argument when they use
16 the word "considered," it means "considered," and, at
17 a minimum, it would be persuasive authority in
18 interpreting what was meant by "considered." The
19 same word was carried over from 1993 to 2010. It's
20 not clear to me why "considered" would mean something
21 different in 1993 than it did the 2010, but I think
22 we have thoroughly investigated this particular set
23 of arguments.

24 MS. YOST: Your Honor, if it said
25 identify all communications that contained facts or

1 data that was provided to them by the attorneys, I
 2 could identify those documents. I can't -- you know,
 3 you instruct your experts in certain things. I don't
 4 know what they actually considered in making their
 5 opinions, your Honor. That's all I'm trying to say.
 6 We don't have any documents --

7 EXAMINER PRICE: But you have a duty to
 8 investigate. Mr. Sharkey is exactly correct. You
 9 don't appear to have even asked your experts which
 10 facts or data they considered. We will address that
 11 when we do the ruling. Whatever we are going to rule
 12 on this after we take a break and discuss it, we will
 13 address it at that point.

14 MS. YOST: Your Honor, do you have OCC's
 15 privilege log and the documents that have been
 16 identified as responsive?

17 EXAMINER PRICE: I'm not sure. Again,
 18 you have kind of lost me on this because I think
 19 you're just saying you don't know, so I'm not sure
 20 how you're claiming privilege.

21 MS. YOST: I'm not saying I don't know,
 22 your Honor. I said I have no documents that identify
 23 that.

24 EXAMINER PRICE: Okay. Yes, we would
 25 like to see the privilege log, at a minimum.

1 MS. YOST: Your Honor, I would note there
2 may be documents included on this privilege log that
3 are contained in OCC's documents that we are turning
4 over today that would not be subject to the motion to
5 compel based upon the stipulation between DP&L and
6 OCC.

7 EXAMINER PRICE: Just to be clear, you're
8 claiming that all of these are attorney-client
9 privilege.

10 MS. YOST: Yes, your Honor. We did
11 identify that there were no communications with our
12 third-party experts and other parties or others
13 regarding this case, so there's no documents that are
14 responsive to part of the request. So the
15 communications that have been with third-party
16 experts are with OCC personnel, and those are
17 contained on our privilege log.

18 EXAMINER McKENNEY: Let's go ahead and
19 move on. The next motion I have is IEU's motion to
20 compel. Just to be clear, I want to make sure I have
21 everything that was in that motion. I have
22 interrogatories 10-10 to 10-15 and interrogatory
23 10-16, interrogatory 10-17 and 18, interrogatory
24 11-1, interrogatory 12-2 through 12-6, interrogatory
25 12-10 to 12-12, RPD 12-01 through 12-24, minus 12-14.

1 MR. PRITCHARD: I didn't have the list
2 when you were going through them, but that sounds
3 about right. I would clarify that we had a few
4 interrogatories, I believe they were from set 10,
5 about expense reductions. Since your ruling during
6 the Craig Jackson deposition, DP&L has provided some
7 updated responses that are reflected in their memo
8 contra that they filed on Friday. We believe those
9 issues have been resolved.

10 EXAMINER PRICE: Which ones have been
11 resolved?

12 MR. PRITCHARD: They are interrogatories
13 10-10 through 10-15, and a part of interrogatory 11
14 also requested the cost savings, but interrogatory
15 11-1 also had some other parts that are still
16 unresolved.

17 EXAMINER McKENNEY: Mr. Pritchard, do you
18 wish to proceed?

19 MR. PRITCHARD: Yes, your Honor. I would
20 also note that I believe we are going to start
21 getting into confidential portions. Not everything
22 I'm going to reference is confidential, but there are
23 going to be parts mixed in throughout that I am not
24 sure that will be easily addressed without the whole
25 portion being under seal.

1 MR. SHARKEY: Your Honor, we discussed
2 this earlier, and I communicated with all of the
3 people in the room, except for her, who I do not know
4 who she is, and I don't know if she has a
5 confidentiality agreement with the Dayton Power and
6 Light Company or not, so I would now ask if you would
7 inquire.

8 MS. MOHLER: Hi, I'm Mallory Mohler with
9 Carpenter, Lipps & Leland. I am here on behalf of
10 Kim Bojko representing SolarVision.

11 EXAMINER MCKENNEY: Do you have a
12 confidential agreement with SolarVision, Mr. Sharkey?
13 You do, but not with this particular counsel?

14 MR. SHARKEY: Your Honor, I do have a
15 confidentiality agreement with SolarVision. I'm
16 sorry, I missed her name, but if she would agree to
17 treat any communications that she hears here as
18 confidential and not to share them with any third
19 parties or with the client, I would not object to
20 counsel for SolarVision being in the room.

21 EXAMINER PRICE: Can you make that
22 presentation?

23 MS. MOHLER: I agree to that.

24 EXAMINER PRICE: At this time we will go
25 to the confidential portion of our transcript, so we

would otherwise note.

(CONFIDENTIAL PORTION.)

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Thursday Afternoon Session,
March 7, 2013.

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EXAMINER PRICE: Back on the record.
Back to the public portion of our transcript.
(Public portion.)

EXAMINER PRICE: With respect to Dayton
Power and Light Interrogatory OCC 1-11, the Examiners
find that OCC and IEU have established that the
common interest doctrine, broadly construed, applies
where communications involve draft pleadings,
including edits and comments upon draft pleadings.
We, therefore, determine with respect to draft
pleadings, the attorney-client privilege applies and
those documents are not discoverable.

All other nonsettlement documents, OCC
and IEU have not established the common interest
doctrine applies. These documents, other
nonsettlement communications, the distribution list
of these documents includes parties with a wide
variety of interests, including, in some cases,
unnamed parties to the communications. Therefore, at
this point OCC and IEU have not established the
attorney-client privilege applies and those documents
should be disclosed to Dayton Power and Light.

1 EXAMINER McKENNEY: With regards to OCC
2 1-13, consistent with the rules provided to us by
3 OCC, we find that all facts and data provided to the
4 experts should be considered as having been
5 considered by the experts and, therefore,
6 discoverable.

7 As to assumptions provided by OCC to its
8 experts, it is OCC's responsibility to inquire about
9 whether those experts relied upon those assumptions.
10 If the experts did rely upon the assumptions provided
11 to them by OCC, then those assumptions are
12 discoverable.

13 Other communications with the experts are
14 not discoverable.

15 With regards to IEU's distribution rate
16 case data, we have reviewed the documents provided to
17 us. Today we find that the documents are all
18 attorney-client and work-product privilege, and,
19 therefore, are not discoverable.

20 However, the underlying facts and data
21 that led to the documents provided to us today
22 regarding the distribution rate case may not fall
23 under the attorney-client work-product privilege.

24 EXAMINER PRICE: Finally, with respect to
25 the documents where the dispute was whether or not

1 the documents are in the possession or control or
2 access of Dayton Power and Light, we find those
3 documents are not discoverable. Documents that
4 Dayton Power and Light employees have access to in
5 their capacity as shared employees are not
6 discoverable and are not within the rightful control
7 or authority of the utility, Dayton Power and Light;
8 therefore, those documents are not discoverable and
9 may be withheld.

10 MR. SHARKEY: Question, your Honor.

11 EXAMINER PRICE: Yes.

12 MR. SHARKEY: I didn't exactly understand
13 your second ruling as to OCC's communications with
14 its experts. Maybe if I see the written record I
15 will, but can I ask a little more information on the
16 scope of that ruling?

17 EXAMINER PRICE: I think the point is
18 that OCC needs to -- you have asked for all
19 communications. The general rule is communications
20 are not discoverable except with the three exceptions
21 outlined in Ohio Civil Rules 26(D), I think. OCC's
22 duty is to determine whether any of these
23 communications fall within those three exceptions,
24 and to the extent they do, they need to tender those
25 communications to you.

1 MR. SHARKEY: Thank you, your Honor.

2 MR. OLIKER: Your Honors, I have two
3 questions. First, on the issue with the pleadings
4 not being disclosed by common interest, so the ruling
5 is all draft pleadings themselves do not have to be
6 disclosed but the e-mail communications --

7 EXAMINER PRICE: The e-mail
8 communications attached do not need to be disclosed.

9 MR. OLIKER: Okay. So the only things
10 that need to be disclosed are e-mails that do not
11 involve draft pleadings.

12 EXAMINER PRICE: Yes.

13 MR. OLIKER: Okay. Thank you.

14 The second question, the ruling on the
15 underlying facts and data related to the distribution
16 rate cases may be disclosed. I'm just trying to
17 understand.

18 EXAMINER PRICE: We are just trying to
19 say that this ruling is not a bar to further
20 discovery of facts regarding what are current
21 elements of a rate case, the things we discussed
22 earlier, the current elements of a rate case, what
23 goes in the rate base, operating expenses.

24 MR. OLIKER: In our motion to compel, one
25 of the issues we addressed was produce all documents

1 related to the distribution rate case. I believe we
2 would have already asked for that information in that
3 discovery request.

4 EXAMINER PRICE: The only three things
5 that we have are the three Excel spreadsheets. The
6 only thing we ruled upon were the three Excel
7 spreadsheets that Dayton provided the privilege log
8 and the copies, and we reviewed those in camera and
9 have come to the conclusion that those are
10 attorney-client privilege. That's the whole extent
11 of our ruling.

12 MR. OLKER: I'm trying to understand
13 how -- maybe I can ask Jeff if there are additional
14 documents that he didn't provide to the attorney
15 examiners today that would be covered by the
16 information we've asked. Maybe that would help on
17 how I should proceed based on the ruling.

18 MR. SHARKEY: I need to look further at
19 the question and inquire of my client. My
20 understanding and recollection is that we have
21 produced a comprehensive set that is responsive to
22 that request. But it could be if they are relating
23 to phrases that are broad in there that I don't
24 recall as I stand here, but I don't believe that -- I
25 believe we produced all documents responsive to the

1 particular request you moved on.

2 MR. OLIKER: And the source information
3 that you mentioned, the source data for those
4 documents -- there are sources, right?

5 MR. SHARKEY: There are sources for many
6 of the numbers. I couldn't tell you, for example,
7 there are -- for example, there are opinions there as
8 to likely return on equity. I don't know if there
9 are source documents that the client has done other
10 than what is considered to be a reasonable return on
11 equity, so it would depend on item by item, number by
12 number in some circumstances.

13 MR. OLIKER: I wish Dona were here. The
14 information, for example, we were talking about, what
15 is rate base and depreciation, those would be all the
16 inputs that go into the analysis. Having not seen
17 the documents, I can't say that, but I would imagine
18 there are inputs that would go into that. That
19 information came from other documents and would be
20 related to the analysis, and I believe we requested
21 them.

22 I'm just trying to figure out whether we
23 have to go through another round of discovery to ask
24 for something I think we already asked for, what
25 position that puts us in.

1 Are you going to produce those documents
2 now?

3 MR. SHARKEY: Your Honor, I believe this
4 would be better handled off the record between Joe
5 and I because I can't substantively answer his
6 question without going back past other document
7 requests.

8 EXAMINER PRICE: I think that makes
9 sense. The only thing we ruled on were the three
10 documents you presented and that's it. We are not
11 giving advisory rulings. That is the only thing
12 before us, so I think that probably makes sense.

13 MR. SHARKEY: Thank you, your Honor.
14 Nothing further for me.

15 MS. YOST: Your Honor, I know you haven't
16 addressed the time frame, but I would ask for an
17 adequate time. One, to the extent you are, in
18 essence, granting part of the motion to compel
19 against OCC, we would have the right of interlocutory
20 appeal under the Commission Rule 15(A). And, plus,
21 due to our contacts with other experts to identify
22 the categories that you have identified, we would ask
23 for adequate time, if you could.

24 Thank you.

25 EXAMINER PRICE: You have two sets

1 experts in there, one set of in-house experts --

2 MS. YOST: Those weren't the
3 communications they were seeking, your Honor.

4 EXAMINER PRICE: You were only looking
5 for outside experts?

6 MR. SHARKEY: That's right, your Honor.
7 It's the outside experts whose information -- the
8 communications between OCC and the outside experts.

9 EXAMINER PRICE: What do you think would
10 be a reasonable turnaround time?

11 MS. YOST: Plus I would like Joe and I to
12 get together and go through the documents and be
13 specific as to what the Bench has ruled.

14 Friday of next week, Jeff?

15 EXAMINER PRICE: Friday of next week for?

16 MS. YOST: For turning over documents
17 that are responsive.

18 EXAMINER PRICE: No. No. There's no
19 reason that the documents with respect to
20 communications between the parties can't be turned
21 over by -- I would want to say Friday, but can't be
22 turned over by noon on Monday.

23 MS. YOST: Your Honor, I would also point
24 out the right to take an interlocutory appeal would
25 be as of Tuesday, so I think as of Wednesday, absent

1 us filing an interlocutory appeal.

2 EXAMINER PRICE: I suggest if you don't
3 want to turn over the documents, you probably want to
4 file it before noon on Monday. That's the deadline
5 for turning over the third-party communication
6 documents. I know the rule gives you five days, but
7 I'm shortening it because we have a pending hearing.

8 MS. YOST: Thank you, your Honor.

9 EXAMINER PRICE: As to the outside
10 experts, you're saying eight days to communicate with
11 your outside experts?

12 MS. YOST: Only because we have
13 depositions scheduled. One expert is scheduled
14 Monday, the next is Tuesday.

15 MR. SHARKEY: I suggest, your Honor, if
16 Ms. Yost is able to bring the documents, and it
17 didn't seem like an unreasonable volume of documents,
18 those are information we could use.

19 EXAMINER PRICE: The point of asking for
20 them in discovery is so he can use them in
21 deposition. If you are saying, "I'm not going to
22 give them to him until after the deposition," all you
23 are doing is setting up a situation where he comes to
24 me and says, "I want to recall this witness," and I'm
25 going to say yes.

1 MS. YOST: Your Honor, I just don't know
2 the witnesses' availability. They are outside
3 experts and have other jobs. That's a concern. So I
4 would ask that to the extent that OCC does not file
5 an interlocutory appeal, we would produce everything
6 Wednesday by noon.

7 EXAMINER PRICE: It's your risk.
8 Wednesday at noon is fine with the Bench, but if
9 they're not tendered to Mr. Sharkey in time to use in
10 his deposition, he will have the right to recall your
11 witness, and that's just -- he's going to have the
12 right to depose the witness as to these documents
13 before this witness testifies.

14 MS. YOST: I appreciate that, your Honor.
15 To the extent we can get it sooner, we will do that.

16 EXAMINER MCKENNEY: Mr. Olikier.

17 MR. OLIKER: Could we go off the record
18 and talk to Mr. Sharkey for a second?

19 EXAMINER PRICE: Yes.

20 (Recess taken.)

21 EXAMINER PRICE: Mr. Olikier.

22 MR. OLIKER: Your Honor, my understanding
23 of the ruling on source data for the distribution
24 rate case is that we asked for it, but we are not
25 allowed to see the documents in front of you. The

1 problem we are having is counsel is reading our
2 discovery requests to say, Although you've asked for
3 analyses and studies regarding the distribution rate
4 case, the source documents are not covered in what
5 you asked for.

6 We're off the record, right?

7 EXAMINER PRICE: No, we're on the record.

8 MR. OLIKER: And we asked for all the
9 analysis related to distribution rate case. The
10 problem is now he's saying, Well, this isn't covered
11 because your request for production of documents only
12 said provide documents identified in response to the
13 interrogatories above.

14 The other problem is in several other
15 discoveries, we asked, Please provide a separate
16 accounting for your transmission, distribution, and
17 generation function. It's the distribution function
18 which provides your ability to determine which
19 aspects go into rate base and what your expenses may
20 be, and we have asked this for several years, each
21 year of the ESP, past years

22 Now he's telling me, Well, you never
23 asked for this information and we're not going to
24 give it to you. He is putting us in the difficult
25 position that we feel we asked for this information.

1 The ruling is narrow to cover the actual facts, and
2 which we've asked for in different discovery, and now
3 he's trying --

4 EXAMINER PRICE: Let me correct it. The
5 ruling is narrow to cover the specific documents, the
6 three Excel spreadsheets that were their analysis of
7 what a rate case would produce. I think a caveat to
8 our ruling is we weren't saying that the underlying
9 facts or data, how much is in rate base, what taxes
10 might be, what depreciation may be, is not subject to
11 being -- is not subject to the attorney-client
12 privilege.

13 We will let Mr. Sharkey respond, but we
14 don't know what other questions you've asked. We
15 only know the questions that are in front of us and
16 we only know the documents that he produced, and he
17 said, These are all the documents responsive to the
18 question and this is all we have.

19 Our caveat was just we weren't saying the
20 facts just are -- just because the facts are included
21 or in this document that they're not discoverable
22 forever.

23 MR. OLIKER: The problem, the difficulty
24 it puts us in, now we have a case of the company not
25 willing to provide forthcoming discovery with a

1 hearing fast approaching, and I don't see how we can
2 possibly resolve this in the next eight days. I see
3 where this is heading, and it doesn't look pretty.

4 EXAMINER PRICE: Mr. Sharkey.

5 MR. SHARKEY: Yes, your Honor. I most
6 strenuously disagree with the assertion by Mr. Olier
7 that we have not appropriately responded to discovery
8 requests. As to the specific item that Mr. Olier
9 cited to you, 10-18, it identified -- and I'm quoting
10 here. "Identify any studies or analysis related to
11 DP&L's ability to increase its distribution revenue
12 by filing an application to increase base
13 distribution rates."

14 Those three documents are DP&L's study or
15 analysis of that information. This request didn't
16 say underlying data, accounting records. It asked
17 for studies and analysis performed by DP&L related to
18 its ability to increase its distribution rates. You
19 just ruled that is privileged.

20 The other requests that Mr. Olier
21 responded to, I need to look at them one by one.
22 They are not sitting in front of us at the moment.
23 But DP&L has produced documents that they have
24 requested.

25 We don't have an obligation to produce

1 documents that they haven't requested, your Honor.
 2 They have made arguments that DP&L should have
 3 maintained different accounting records at a more
 4 granular level than it did. We can deal with those
 5 arguments later. I still can't produce documents
 6 that don't exist.

7 EXAMINER PRICE: IEU.

8 MR. PRITCHARD: I believe we requested
 9 information and documents associated with how you
 10 would break out the FERC Form 1 total company numbers
 11 to the distribution level. That's the source data.
 12 To the extent that it exists only in those documents,
 13 we would request either a five-day supplement time to
 14 either supplement their original response, which I
 15 believe our discovery requests contained, or allow us
 16 to file new discovery today with a shortened
 17 discovery time frame so that IEU could get the
 18 information before the hearing.

19 Otherwise, we're going to be in the
 20 precarious position where ten days from now if we
 21 serve discovery requests, they would be due the first
 22 day of the hearing. Depending on what they get and
 23 when their witnesses testify, we may be supplementing
 24 testimony the first week, having to file notices of
 25 deposition as the hearing is going on to try to

1 depose witnesses.

2 I believe that we asked for the breakdown
3 of the information, which would be the source
4 information, in our first and second sets of
5 discovery. So rather than get into a fight about
6 what was asked for and whatnot, if we could ask today
7 what we think we already asked for, the source
8 information, and have a shortened response time.

9 EXAMINER PRICE: If IEU files today or
10 tomorrow, it's already 1:45, today or tomorrow,
11 discovery that is related to distribution rate base
12 expenses, O&M, plant in service, taxes, discovery
13 related to the facts that would underlie a
14 distribution rate case, then the company would be
15 directed to respond within five days, five calendar
16 days.

17 MR. OLIKER: Thank you, your Honor.

18 MR. PRITCHARD: One clarification, we
19 were also asking for the breakdown on the same kind
20 of information but for the transmission rate case.
21 Would your directive today on the five days also
22 apply to the underlying factual information for
23 transmission case?

24 EXAMINER PRICE: Yes.

25 Mr. Sharkey.

1 MR. SHARKEY: Your Honor, when we were
2 off the record, we were having a discussion with
3 Mr. Olikar and Mr. Pritchard, and the scope of the
4 discovery request they are describing sounds like it
5 would be all underlying data that would relate to or
6 support a distribution rate case.

7 Your Honor, that is a massive project.
8 You know how much work goes into preparing a
9 distribution rate case. If they wanted that
10 information, they could have and should have asked
11 for it more than a year ago. This case has been
12 pending for over one year.

13 I think a five-day deadline for the
14 Dayton Power and Light Company to respond to this
15 information they could have or should have asked for
16 quite a long time ago would be very, very difficult
17 for DP&L if the requests that come in are as broad as
18 Mr. Pritchard and Mr. Olikar described to me when off
19 the record.

20 EXAMINER PRICE: Let's go off the record
21 one moment.

22 (Discussion off record.)

23 EXAMINER PRICE: Although Mr. Sharkey's
24 objections are noted, and we understand them, we do
25 believe that they can respond within five days, at

1 least as to distribution, although the ruling is they
2 should respond to distribution and transmission. If
3 for some reason transmission is not going to happen
4 in five days, the parties should contact the attorney
5 examiners, and we will deal with it then.

6 MR. SHARKEY: To be clear, they will be
7 serving requests on us. Five days within service for
8 responding?

9 EXAMINER PRICE: Five days within
10 service.

11 You will be serving electronically?

12 MR. OLIKER: Of course.

13 EXAMINER PRICE: Anything else? Any
14 other clarifications?

15 Thank you. We are adjourned.

16 (The hearing adjourned at 1:52 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 Thursday, March 7, 2013, and carefully compared with my original stenographic notes.

Rosemary Foster Anderson,
Professional Reporter and
Notary Public in and for
the State of Ohio.

My commission expires April 5, 2014.
(RFA-71731)

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Case No(s). 12-0426-EL-SSO, 12-0428-EL-AAM, 12-0429-EL-WVR, 12-0672-EL-RDR, 12-0427-EL-ATA

Summary: Transcript in the matter of The Dayton Power and Light Company hearing held on 03/07/13 electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Anderson, Rosemary Foster Mrs.