FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

MEMORANDUM OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY CONTRA INTERLOCUTORY APPEAL AND APPLICATION FOR REVIEW BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL AND CITIZENS FOR KEEPING THE ALL-ELECTRIC PROMISE

James W. Burk (0043808)
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Phone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com

David A. Kutik (0006418)
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com

Grant W. Garber (0079541)
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
E-mail: gwgarber@jonesday.com

ATTORNEYS FOR APPLICANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

TABLE OF CONTENTS

Page

I. INTRODUCTION

In challenging the oral rulings made at the January 7, 2011 hearing ("January 7 Order"), Applicants The Office of the Ohio Consumers' Counsel ("OCC") and Citizens for Keeping the All-Electric Promise ("CKAP," collectively "Applicants") attempt to foist the burden of proving their privilege objections on the wrong entities. First, Applicants blame the Attorney Examiners, arguing that they issued the January 7 Order without conducting a document-by-document review of the materials at issue, and that they wrongly noted Applicants' failure to provide a privilege log. *See* pp. 5-6, *infra.* Next, they blame the Companies[1] for not anticipating Applicants' privilege arguments in the Companies' initial Motions to Compel. *See* pp. 8-11, *infra.* In Applicants' telling, the January 7 Order was wrong, and the blame lies elsewhere.

Applicants are mistaken. As the proponents of the privilege objections at issue, Applicants have the burden of proving the privilege and work product protections for each document they seek to withhold. *See* pp. 3-4, *infra.* And as demonstrated below, Applicants have not remotely met this burden because of their own failures. For example, although Applicants complain that the Attorney Examiners reviewed only a small number of the supposedly privileged documents at issue, there was a good reason for the abbreviated review: those few documents were the only ones Applicants provided to the Attorney Examiners at the January 7 hearing. In fact, litigating Applicants' privilege claims thus far has been an exercise in shadowboxing. Although this dispute has been litigated in motion to compel briefing, at oral hearing and now on interlocutory appeal, Applicants still have never produced *in camera* more than a handful of allegedly privileged documents, and they have not provided the Companies with identifying information (*e.g.*, author, recipient, and date) for a single such document.

[1] The "Companies" are Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company.

Instead, Applicants have provided only blanket objections and vague, overbroad descriptions of the types of documents at issue (*e.g.*, "communications made between OCC's attorneys' agents and Sue Steigerwald and/or her counsel"), leaving it to the Attorney Examiners and the Companies to guess what those documents are. Further, although Applicants complain that the Companies did not address privilege issues in the initial Motions to Compel, there was good reason for that as well: Applicants ignored the Companies' repeated inquiries regarding whether Applicants actually were withholding privileged documents. When the Companies filed their motions, they thus had no reason to believe that litigation of the privilege objections would be necessary. Applicants have the burden of proving their privilege objections, and the Commission should reject their attempts to foist that burden on other parties.

The Commission also should reject Applicants' substantive privilege arguments. Most of Applicants' substantive arguments relate to waiver and the "good cause" exception to the work product doctrine. *See* pp. 17-18, *infra.* But those arguments are irrelevant. Rather, the issue is whether the documents in question are privileged or work product protected in the first instance. Applicants largely ignore this topic. For example, although the Attorney Examiners repeatedly inquired at hearing regarding the applicability of the joint defense privilege given Applicants' divergent "interests" in this case, Applicants completely ignore that discussion in their interlocutory filing. Further, at the hearing, the Companies provided several case authorities addressing, among other things, Applicants' burden to prove their privilege claims, the use of privilege logs to demonstrate privilege, and the deficiencies in Applicants' joint defense privilege argument. Applicants also ignore these authorities. Applicants have failed to demonstrate that the January 7 Order was unjust and unreasonable, and the Commission should affirm it.

Further, Applicants' complaints about a "chilling effect" of the January 7 Order are wrong. The January 7 Order does not require the production of communications between attorneys, communications within OCC's internal staff, or communications between counsel for Applicants. Rather, the January 7 Order requires the production of highly relevant, responsive and non-privileged documents such as communications from customers to OCC and communications among non-lawyer members of CKAP. Applicants' concerns regarding the effect of the January 7 Order are unfounded.[2]

II. ARGUMENT

A. The Attorney Examiners Properly Found That Applicants Failed To Meet Their Burden To Establish The Attorney-Client Privilege And Work Product Doctrine.

The Attorney Examiners properly found that Applicants failed to establish the attorney-client privilege or work product protection for the documents at issue. (*See* Tr., 112:23-113:1.) Because the attorney-client privilege and work product doctrines "reduce the amount of information discoverable during the course of a lawsuit," those privileges are to be construed narrowly. *Ross v. City of Memphis*, 423 F.3d 596, 600 (6th Cir. 2005); *United States v. Henderson*, No. 1:07 CR 68, 2009 U.S. Dist. LEXIS 51855, *4 (N.D. Ohio June 5, 2009). "The privilege applies only where necessary to achieve its purpose and protects only those communications necessary to obtain legal advice." *See Ross* at 600.

Accordingly, the party claiming application of the privilege or work product protections bears the burden of proving each element of them. *In re Guardianship of Marcia S. Clark*, 2009

[2] Moreover, many of Applicants' other objections are moot. On January 13, 2011, the Attorney Examiners sent an e-mail to all parties indicating that OCC should bring to the upcoming January 18, 2011 pre-hearing conference "all documents which [it] claims are subject to attorney-client or trial preparation privileges but are otherwise responsive to FirstEnergy's discovery requests." Because the Attorney Examiners now intend to conduct a document-by-document *in camera* review of the documents at issue, the Commission should reject Applicants' interlocutory appeal for that additional reason.

Ohio 6577, ¶ 8 (10th App. Dist.). Such party cannot, however, rely on "blanket" assertions of privilege, which are "insufficient" to meet that burden. *Hitachi Medical Sys. Am., Inc. v. Branch*, No. 5:09 CV 1575, 2010 U.S. Dist. LEXIS 100597, *7 (N.D. Ohio Sept. 24, 2010), *citing Hackmann v. Auto Owners Ins. Co.*, No. 2:05 CV 876, 2009 U.S. Dist. LEXIS 15128, *3-4 (S.D. Ohio Feb. 6, 2009) *and Vita-Mix Corp. v. Basic Holdings, Inc.*, No. 1:06 CV 2622, 2007 U.S. Dist. LEXIS 59755, *3 (N.D. Ohio Aug. 15, 2007).

Rather, the party must demonstrate the privilege or work product protection for each specific document it seeks to withhold, typically by preparing a privilege log. *See United States v. Rockewell*, 897 F.2d 1255 (3rd Cir. 1990) ("[C]laims of attorney-client privilege must be asserted document by document, rather than as a single, blanket assertion."); *United States v. Exxon Corp.*, 87 F.R.D. 624, 637 (D.D.C. 1980) ("recognizing the necessity of asserting the attorney-client privilege in a manner specific enough to allow the court to adjudicate the merits of its invocation" and noting, "[a] mere assertion of the privilege, without a description of the document tailored to the assertion, is insufficient").

The Attorney Examiners properly found that Applicants failed to make this showing. Applicants have not remotely attempted a document-by-document showing of the privilege. They have not provided a privilege log nor any other basic description of the documents they seek to withhold. Rather, Applicants have offered blanket privilege objections for an unspecified number of responsive documents, leaving the Attorney Examiners (and the Companies) with no way to evaluate their claims. Rather than supply the Attorney Examiners *in camera* with all documents for which they allege a privilege, Applicants have submitted only a handful of "samples," with no explanation for how those documents are fairly representative of the (still unspecified) number of others they seek to withhold. And as discussed below, even those

samples strongly indicate that Applicants' view of the privilege is overly broad and improper. *See* pp. 14-15, *infra.* The Attorney Examiners properly found that Applicants failed to prove the privilege, and the January 7 Order should be affirmed in its entirety.

B. Applicants' Objections To The Procedure Followed By The Attorney Examiners Are Wrong.

1. The Attorney Examiners were unable to conduct an *in camera* review of all documents at issue because Applicants failed to provide them.

Applicants allege that the Attorney Examiners abused their discretion by failing to conduct a document-by-document *in camera* review of all materials Applicants seek to withhold on privilege or work product grounds. (*See* App., pp. 13-16.) According to Applicants, the Attorney Examiners wrongfully failed to hold an evidentiary hearing and based their ruling on only a sample of the documents at issue. (*See id.* at p. 15.)

There is a good reason why the Attorney Examiners did not review all of the allegedly privileged documents: Applicants have never provided them. Instead, Applicants provided only a small "sample" of those documents, which the Attorney Examiners reviewed and discussed with the parties. (*See* Tr., 66:6-70:8.) And contrary to Applicants' suggestion, the Attorney Examiners ***did*** hold a hearing—in fact, the purpose of the January 7 hearing was to address all outstanding discovery motions, including the motions to compel against OCC and CKAP. *See* Entry dated Jan. 3, 2011, ¶ 6. The burden to prove privilege and work product rests on Applicants, not the Attorney Examiners. Given Applicants' approach to meeting this burden, it is hard to see what else the Attorney Examiners could have done to satisfy them.

In support of their argument regarding *in camera* review, Applicants also cite *Peyko v. Frederick* (1986), 25 Ohio St. 3d 164. (*See* App., pp. 13, 14.) Applicants misrepresent this case. In fact, *Peyko* shows precisely why the January 7 Order is correct. In *Peyko*, the plaintiff sought discovery of an insurer's claim file, which the insurer contended was protected by the attorney

client privilege. *See Peyko* at 166. In response, and after noting that the burden of justifying a privilege objection rested with the insurer, the Court found that the insurer "offered no proof that any of the materials in the insurer's claims file were privileged, and he did not request the court to conduct an *in camera* inspection of the file." *Id.* Rather, the insurer merely "relied upon the blanket assertion that the file contained privileged communications . . . ." *Id.* Consequently, the Court overruled the insurer's privilege objection. *Id.*

Applicants' approach to their privilege objections has been identical to the unsuccessful insurer approach in *Peyko*—to rely on blanket objections without any document-by-document showing. The Attorney Examiners' ruling thus was properly identical to that in *Peyko*. In fact, unlike in *Peyko*, Applicants here had an opportunity to present all of the documents at issue for *in camera* review but failed to do so.[3] The Commission should affirm the January 7 Order on that basis.

2. The Attorney Examiners properly noted that Applicants failed to provide a privilege log.

Applicants complain that the Attorney Examiners wrongfully noted their failure to preserve objections through use of a privilege log. (App., pp. 24-26.) According to Applicants, privilege logs are not part of the typical practice at the Commission. (*See id.* at 24-25.)

Applicants' own filing belies that claim. Applicants acknowledge that the "standard practice of the Commission" is for a privilege log to be produced in response to a motion to compel, followed by an *in camera* inspection of documents. (App., p. 25.) Yet in response to the Companies' Motions to Compel, and despite repeated requests by the Companies, Applicants did not prepare privilege logs (nor did they prepare logs for the January 7 hearing). (*See* Tr.,

[3] Moreover, now that the Attorney Examiners have required Applicants to do so at the hearing scheduled for January 18, 2011 (the second such opportunity for a document-by-document examination), Applicants' challenge is moot.

32:7-10.) And when they had an opportunity to provide all allegedly privileged documents for *in camera* review, they provided only samples. The Attorney Examiners properly noted these failures in explaining their denial of Applicants' privilege objections.

Applicants' argument fails in three other ways. First, Applicants' blanket descriptions of their documents do not remotely comply with Rule 26(B)(6)(a) of the Ohio Rules of Civil Procedure. Under that rule, a party objecting to a document request under a claim of privilege must "identify and list the allegedly privileged documents the party seeks to withhold." *Huntington Nat'l Bank v. Dixon*, 2010 Ohio 4668, ¶ 20 (8th App. Dist.). Applicants' blanket privilege claims fall well short of that standard.

Second, Applicants complain that the Companies have not provided a privilege log in this case. (App., p. 26.) But, as Applicants admit, the typical practice before the Commission is that parties provide logs in response to motions to compel or when the privilege claims otherwise are called into question. Applicants have never challenged the Companies' privilege objections in this case.

Third, Applicants misrepresent the entry they cite from *S.G. Foods, et al. v. The Cleveland Elec. Illuminating Co., et al.*, Nos. 04-28-EL-CSS, *et al.*, Entry dated Apr. 30, 2007. That case does not stand for the notion that privilege logs are not to be provided in response to a privilege challenge. Rather, in that entry, the Attorney Examiner noted only that a privilege log is not required to be provided "when [the party] asserts the protection of attorney-client privilege"—*i.e.*, when the privilege objection is first made. *See Id.*, ¶ 6(d). At the January 7 hearing, the Attorney Examiners expressed concern that Applicants had failed to provide a privilege log by the time of the oral argument. (*See* Tr., 32:7-9.) The Attorney Examiners'

concern was not that Applicants failed to do so in connection with the initial responses. The January 7 Order is consistent with the usual practice at the Commission.

C. Applicants' Complaint Regarding The Scope Of The Companies' Motions To Compel Should Be Rejected.

Applicants also blame the outcome of the January 7 hearing on the Companies. They complain that the Companies failed to challenge their privilege objections in the initial Motions to Compel. (*See, e.g.*, App., p. 11.)

This argument is nonsense. Prior to filing the Motions to Compel, and in order to determine whether to challenge Applicants' privilege objections, the Companies repeatedly asked Applicants to confirm whether they were withholding documents based on privilege and to provide a privilege log. Specifically, in the "instructions" that accompanied their discovery requests, the Companies asked Applicants to "provide the date, author, and type of document" and other similar information for any document Applicants declined to produce based on privilege. (*See* First Set of Discovery Requests to OCC dated Nov. 4, 2010, Instruction 5 (attached as Ex. A); First Set of Discovery Requests to CKAP dated Nov. 4, 2010, Instruction 5 (attached as Ex. B).) From the outset, Applicants thus were on notice that the Companies might request a privilege log in response to privilege and work product objections. In responding to the Companies' discovery requests, Applicants objected based on privilege and work product, but did not indicate whether they were withholding any documents on that basis. Nor did they provide a log. (*See, e.g.*, CKAP Supp. Resp. to Interrog. No. 6 (attached as Ex. C); OCC Resp. to Interrog. No. 5 (attached as Ex. D).) Consequently, in a follow-up email, the Companies asked Applicants whether they were withholding documents based on privilege and, if so,

requested privilege logs.[4] (*See* Email from Garber to Corcoran dated Dec. 16, 2010 ("Please indicate whether the Consumer Parties are withholding any documents based on that objection. If they are, please provide a privilege log for those documents.") (attached as Ex. E); Email from Garber to Small, *et al.*, dated Dec. 14, 2010 (same) (attached as Ex. F).) Applicants did not respond to those inquiries and did not provide a log. Because Applicants did not indicate whether they were withholding documents based on privilege, the Companies had no reason to believe that Applicants' privilege objections were anything more than boilerplate or that litigation of those objections would be necessary.

The Commission should reject Applicants' attempt to blame the Companies for not anticipating their privilege arguments in drafting the initial motions. In essence, Applicants would have the Companies: (i) infer that Applicants were withholding documents based on privilege (even though they ignored Companies' inquiries to that effect); (ii) divine which documents Applicants were withholding, including the identifying information such as the author, recipient, date and general subject matter; (iii) reverse-engineer Applicants' arguments in support of the privilege for those documents; and (iv) respond to those phantom arguments.

This is preposterous. The first time Applicants indicated that they were even withholding documents based on privilege—much less provide a minimal basis for doing so—was in their memoranda contra the Companies' motions. And as Applicants acknowledge, the Companies were not permitted to reply to those memoranda. Given that the Attorney Examiners expressly indicated that those motion papers would be argued at the January 7 Hearing, it was appropriate

[4] In those emails, the Companies also asked whether Applicants had entered into a joint defense agreement and, if so, requested copies of such agreement. Applicants also ignored those requests. In fact, other than in the objections to discovery requests at issue here, the first time Applicants indicated the existence of such an agreement to anyone—the Companies or the Commission—was at the January 7 hearing.

for the Companies to argue and cite authorities regarding Applicants' privilege objections at that hearing.

D. Applicants' Substantive Arguments Regarding Attorney-Client Privilege And The Work Product Doctrine Fail.

Applicants' blanket claim that the attorney-client privilege and work product doctrine shield disclosure of responsive documents also fails. Applicants do not even attempt to demonstrate the privilege as to each document they seek to withhold, based on the author, recipient and nature of the communication or document. *See* pp. 4-5, *supra.* Indeed, the Application hints only vaguely as to that information. (*See* App., pp. 9, 15 (referring to documents "related to communications between OCC and CKAP").) Based on Applicants' filing, there appear to be two general types of documents at issue: (i) "communications directly made between OCC attorneys and Sue Steigerwald (a member of CKAP) and/or Kevin Corcoran (the CKAP parties' counsel)"; or (ii) "communications made between OCC's attorneys' agents and Sue Steigerwald and/or her counsel." (App., p. 18.) There is no disputing that these communications fall outside the traditional attorney-client privilege; neither Sue Steigerwald nor Kevin Corcoran are clients of OCC. In fact, as Applicants acknowledge, the only way these communications can be privileged is if they fall within a joint defense privilege. (*See* App., p. 20.)

Because Applicants have provided neither all allegedly privileged documents for *in camera* review nor a privilege log, it is impossible to address the merits of Applicants' privilege claims as to each document they seek to withhold. However, the January 7 Order included rulings regarding several general propositions of privilege law that can be applied to those documents. As set forth below, the Commission should overrule Applicants' challenges and affirm the following propositions:

- No joint defense privilege attaches to communications between OCC and CKAP because those parties do not share an identity of interest.
- The joint defense privilege does not apply to communications that do not involve counsel.
- The joint defense privilege does not apply to communications regarding past events.
- The joint defense privilege does not apply to communications or documents shared prior to the execution of the alleged joint defense agreement dated October 12, 2010.

1. No joint defense privilege attaches to communications between OCC and CKAP because those parties do not share an identity of interests.

The Attorney Examiners held that Applicants "have failed to establish an attorney-client privilege or trial preparation privilege as applies [sic] to the documents in question." (Tr., 112:23-113:1.) In doing so, the Attorney Examiners overruled Applicants' arguments that their interests were sufficiently common to invoke the joint defense privilege. (*See id.* at 51:25-52:2.) This holding should be affirmed.

In order for a communication to be subject to a joint defense privilege, the parties to that communication must share an "identical legal interest." *Leader Techs., Inc. v. Facebook, Inc.*, 719 F. Supp. 2d 373, 376 (D. Del. 2010); *Square D Co. v. E.I. Elecs., Inc.*, 264 F.R.D. 385, 391 (N.D. Ill. 2009) (rejecting joint defense privilege claim because entity "has not demonstrated that its interest is identical to [other entity's] interest); *Net2Phone, Inc. v. eBay, Inc.*, 2008 U.S. Dist. LEXIS 50451, *23 (D.N.J. June 26, 2008); *In re Diet Drugs Product Liability Litig.*, No. MDL 1203, 2001 U.S. Dist. LEXIS 5494 at 15 (E.D. Pa. April 19, 2001) ("the subject matter [of communications] must be a of a legal nature — something more than mere concurrent legal interest or concerns — ***and there may not exist any divergence in the interests***") (emphasis added); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974) ("The key consideration is that the nature of the interest be ***identical, not similar***, and be legal, not solely commercial.").

Here, Applicants seek to avoid production of responsive documents by arguing that their interests are sufficiently common to support a joint defense privilege. (*See* Tr., 49:11-14.) Specifically, at the January 7 hearing, Applicants cited oral and written joint defense agreements and claimed that the interest they share is to "develop[] a solution to the all-electric rate discount issue." (*See* App., pp. 21, 31; *see also* Tr., 51:25-52:2 ("The common interest is in working on a solution to the all-electric rate issue.").)

This argument fails for two reasons. First, Applicants told a different story when CKAP sought intervention in this case. To gain intervention, CKAP was required to demonstrate that existing parties—namely OCC—did not adequately represent its interests. *See* Rule 4901-1-11(B)(5). To meet this requirement, CKAP and its co-intervenors alleged that their interests "may diverge from the OCC since they have electricity as their sole source of power and are therefore at a higher financial risk of electric rate increases. That interest is different from, and not represented by, any other entity . . . ." (CKAP, *et al.*, Mot. to Intervene dated June 2, 2010, p. 3.) No doubt aware that disclosing their alleged joint defense agreement would jeopardize CKAP's proposed intervention, neither CKAP nor OCC mentioned its existence in the intervention filings. And this tactic paid off: in granting intervention to CKAP and its co-intervenors, that potential divergence of interests was the sole justification cited by the Attorney Examiners. *See* Entry dated Nov. 17, 2010, ¶ 16 ("The attorney examiner finds that intervention by movants in this case is justified by the unique circumstances found in this matter, in which the interests of different residential customer classes may potentially diverge."). Evidently, Applicants are content to describe their legal interests in whichever way is most expedient for the motions pending at the time. The Commission should reject this approach.

Second, the stated interest allegedly shared by Applicants is meaningless. Specifically, Applicants indicate that they share an interest in "developing a solution to the all-electric rate discount issue." (*See* App., pp. 21, 31; *see also* Tr., 51:25-52:2.) But this proves too much. ***Every party*** to this proceeding has an interest in "developing a solution" to the issues in this case—including the Companies. Because the attorney-client privilege shields responsive material from discovery, it is to be construed narrowly. *Ross*, 423 F.3d at 600. Because Applicants have utterly failed to articulate any meaningful interest they share to the exclusion of other parties, they should not be allowed to exclude their bilateral communications from discovery. The Attorney Examiners properly found that Applicants failed to establish a joint defense privilege.

2. The joint defense privilege does not apply to communications that do not involve counsel.

The Attorney Examiner also overruled Applicants' argument that documents sent among non-attorney representatives of OCC and CKAP are privileged. (*See* Tr., 63:3-17.) The Commission should affirm that the joint defense privilege does not apply to communications that do not involve counsel.

Courts consistently hold that where no attorney is included on a communication (*i.e.*, an e-mail), the joint defense privilege does not attach. *See, e.g., Schachar v. American Academy of Ophthalmology, Inc.*, 106 F.R.D. 187, 192-93 (N.D. Ill. 1985) ("[A]ny joint privilege still extends only to confidential communications from a client to his attorney, i.e., information communicated with the understanding that it would not be revealed to others, and to matters constituting protected attorney work product. Much of defendants' requests concern communications among co-plaintiffs about [another case]; those statements are not protected merely because they might reiterate matters confided in the parties' attorneys as well."); *United*

States v. Lucas, 2009 U.S. Dist. LEXIS 123884, *15 (N.D. Ohio 2009) ("The court agrees that this joint defense privilege requires the involvement of counsel."); *United States v. Gotti*, 771 F. Supp. 535, 545 (E.D.N.Y. 1991) ("The defendants would extend the application of the joint defense privilege to conversations among the defendants themselves even in the absence of any attorney during the course of those conversations. Such an extension is supported neither in law nor logic and is rejected.").

Just so here. For example, Applicants acknowledge the existence of communications between non-attorney representatives of OCC and Sue Steigerwald or other members of CKAP. (*See* App., p. 18.) But Applicants fail to cite any precedent for shielding those communications from discovery (much less respond to the Companies' authorities). Communications between non-lawyer employees of OCC and individual CKAP customers are not privileged and must be produced.

Moreover, Applicants' bare assertion of privilege for communications involving their "agents" does not bear scrutiny. Here, Applicants fail to provide any information regarding the role of their supposed "agents" or to explain why the involvement of those individuals was necessary to facilitate the attorney-client relationship. In fact, the handful of documents they produced *in camera* at the January 7 hearing suggests that Applicants' supposed "agents" are not junior lawyers, clerks or subject matter experts, but rather are individuals wholly outside the attorney-client relationship. For example, OCC alleged the privilege for a communication because it involved its "legislative liaison," an individual who is not an attorney. (*See* Tr., 66:6-10.) OCC did not, however, explain why that individual's involvement was necessary to facilitate attorney-client advice, much less address the precedent holding that communications with lobbyists are not privileged (even, in many cases, when the lobbyists are also attorneys).

See, e.g., In re Application of Chevron Corp., 10 MC 2, 2010 U.S. Dist. LEXIS 117679, *57 (S.D.N.Y. Nov. 10, 2010) ("Courts would have no hesitation in allowing otherwise appropriate discovery of lay lobbyists, public relations consultants, media representatives, and political organizers."); *Vacco v. Harrah's Operating Co., Inc.*, No. 1:07 CV 663, 2008 U.S. Dist. LEXIS 88158, *24 (N.D.N.Y. Oct. 29, 2008) ("[C]ommunications between a lobbyist and his or her client are not entitled to attorney-client protection solely by virtue of that relationship, even though the lobbyist may also be a licensed attorney."); *Cambrians for Thoughtful Development, U.A. v. Didion Milling, Inc.*, No. 07-C-246, 2007 U.S. Dist. LEXIS 88878, *7 (W.D. Wis. Nov. 27, 2007) (rejecting claim of privilege for communications with lobbyist). Applicants' claims regarding privilege for "agent" communications are unsupported.

3. The joint defense privilege does not apply to communications regarding past events.

The Attorney Examiner held that Applicants "have not established that privilege applies to documents regarding past conduct by FirstEnergy rather than documents relating to customers seeking legal advice for OCC." (Tr., 113:14-18.) This holding also should be affirmed.

Even where a joint defense privilege exists (and it does not exist here), it applies only to those communications that would otherwise be privileged. Conversely, "[i]f a communication or document is not otherwise protected by the attorney-client privilege or work product doctrine, the common interest doctrine has no application." *In re Commercial Money Center Inc. Equipment Lease Litigation*, 248 F.R.D. 532, 536 (N.D. Ohio 2008). Applicants admit this proposition. (*See* App., p. 30 ("[A] joint defense agreement's only limitation is that which the original privilege places on it . . . .").)

In Commission proceedings, communications regarding past events that do not seek legal advice are not privileged. In *OCC v. The Dayton Power & Light Co.*, No. 90-455-GE-CSS, OCC

contended that the attorney-client privilege applied to the names of customers who responded to a public solicitation by OCC regarding a utility's charges, notes of phone calls between customers and OCC and the substance of other conversations between OCC and customers. *See* Entry dated July 17, 1990, No. 90-455-GE-CSS, ¶ 4. The attorney examiner rejected this argument and ordered that those materials be produced, noting the difference between communications with customers regarding past events (which are not privileged) and communications regarding an "existing legal problem" (which are). *See id.* at ¶ 6. Put differently, communications strictly regarding past events are typically made as part of a fact-development investigation process rather than for purposes of seeking legal advice, and customers do not have an expectation of privacy in such communications. *See id.* The Commission affirmed this ruling in response to OCC's interlocutory appeal. *See* Entry dated Aug. 16, 1990, ¶ 7.

Here, even if Applicants can show that a joint defense privilege exists (and they cannot), such privilege does not exempt disclosure of communications regarding past conduct. Specifically, customer-provided narratives regarding their historical experience with all-electric rates and discounts are not privileged, regardless whether those customers happen to be members of CKAP, and regardless whether those communications have been sent between CKAP and OCC or between members of CKAP. The Commission should affirm that those documents must be produced.

4. The joint defense privilege does not apply to communications or documents shared prior to the execution of a purported joint defense agreement, dated October 12, 2010.

Applicants object to the Attorney Examiners' holding that they "have not established that the joint defense agreement privilege applies to any communications prior to its [sic] execution on October 12, 2010." Tr., 113:10-13. According to Applicants, because courts uphold oral

joint defense agreements, the Commission should find that a joint defense privilege between OCC and CKAP dates to June 2010. (*See* App., pp. 29-30.)

This argument fails. Applicants again want to have it both ways. At precisely the same time Applicants allege that they entered into a joint defense agreement to pursue their allegedly "common legal interest," CKAP represented to the Commission and parties that its interests differed from those of OCC. (CKAP Mot. to Intervene dated June 2, 2010, p. 3.) Given this representation, and given the conflicting (at best) evidence regarding whether Applicants shared joint interests as of June 2010, it was appropriate for the Attorney Examiners to find that no joint defense agreement applied prior to October 12, 2010, when the written agreement was executed.

5. Applicants' arguments regarding waiver and "good cause" are irrelevant.

Applicants devote several pages of their filing to arguments regarding waiver of attorney-client privilege and the "good cause" exception to the work product doctrine. (*See, e.g.*, App., pp. 10 n. 22, 16-20, 22-23, 26-28.) Applicants also devoted much of their argument at the January 7 hearing to the same topics. (*See, e.g.*, Tr., 63:3-64:10.)

Precedent and arguments regarding waiver of the privilege and the "good cause" exception to the work product doctrine are irrelevant. As the Attorney Examiners noted during the hearing, the parties currently dispute whether the attorney-client privilege and work product doctrine apply to Applicants and their communications in the first instance. (Tr., 63:12-15.) In the January 7 Order, the Attorney Examiners found that those protections do not apply here, and that is the issue before the Commission. By contrast, the January 7 Order did not address waiver and "good cause." Those are second-order issues that become relevant only if Applicants can demonstrate that the privilege and work product protections apply (and they have not done so). In the event that the Commission modifies the January 7 Order to find that specific

communications are privileged or protected work product, the Companies should be allowed to address those issues. But to date, Applicants have failed to show that the privilege or work product doctrine apply here, and their arguments regarding waiver and "good cause" are beside the point.[5]

III. CONCLUSION

For the above reasons, the Companies respectfully request that the Commission deny Applicants' Interlocutory Appeal.

[5] Applicants also cite precedent regarding application of the privilege to communications between in-house government attorneys and their state-agency clients. (*See* App., pp. 19-20.) This precedent also is irrelevant. The Companies do not seek communications between OCC attorneys and OCC staff, and the Attorney Examiners expressly excluded those communications from the scope of the January 7 Order. (*See* Tr., 122:8-9.)

DATED: January 14, 2011

Respectfully submitted,

James W. Burk
Counsel of Record
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, OH 44308
Phone: (330) 384-5861
Facsimile: (330) 384-3875
E-mail: burkj@firstenergycorp.com

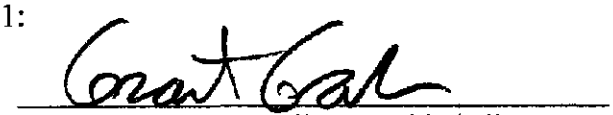
David A. Kutik
JONES DAY
North Point, 901 Lakeside Avenue
Cleveland, Ohio 44114-1190
Telephone: (216) 586-3939
Facsimile: (216) 579-0212
E-mail: dakutik@jonesday.com

Grant W. Garber (0079541)
JONES DAY
Mailing Address:
P.O. Box 165017
Columbus, Ohio 43216-5017
Street Address:
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
E-mail: gwgarber@jonesday.com

ATTORNEYS FOR APPLICANTS OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of the Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company Contra Interlocutory Appeal and Application for Review by The Office of the Ohio Consumers' Counsel and Citizens for Keeping the All-Electric Promise was delivered to the following persons by e-mail this 14th day of January, 2011:



An Attorney For Applicants Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company

Jeffrey L. Small
Maureen R. Grady
Christopher J. Allwein
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215
small@occ.state.oh.us
grady@occ.state.oh.us
allwein@occ.state.oh.us

Samuel C. Randazzo
Joseph E. Oliker
McNees Wallace & Nurick LLC
21 East State Street, 17th Floor
Columbus, Ohio 43215
sam@mwncmh.com
joliker@mwncmh.com

William L. Wright
John Jones
Public Utilities Section
Office of the Attorney General
180 E. Broad St., 6th Floor
Columbus, Ohio 43215
william.wright@puc.state.oh.us
john.jones@puc.state.oh.us

Richard L. Sites
General Counsel & Senior Director of Health Policy
Ohio Hospital Association
155 East Broad Street, 15th Floor
Columbus, Ohio 43215
ricks@ohanet.org

Thomas J. O'Brien
Bricker & Eckler LLP
100 South Third Street
Columbus, Ohio 43215
tobrien@bricker.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour and Pease LLP
52 E. Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
mhpetricoff@vorys.com
smhoward@vorys.com

David C. Rinebolt
Colleen L. Mooney
Ohio Partners for Affordable Energy
231 West Lima Street
Findlay, Ohio 45839-1793
cmooney2@columbus.rr.com
drinebolt@ohiopartners.org

Kevin Corcoran
Corcoran & Associates, Co., LPA
8501 Woodbridge Court
North Ridgeville, Ohio 44039
kevinocorcoran@yahoo.com

Cynthia Fonner Brady
Senior Counsel
Constellation Energy Resources, LLC
550 West Washington Blvd, Suite 300
Chicago, Illinois 60661
cynthia.brady@constellation.com

Exhibit A

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

Pursuant to Rules 4901-1-16, 4901-1-19 and 4901-1-20 of the Ohio Administrative Code, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") request the Office of the Ohio Consumers' Counsel to respond in writing and under oath to the following interrogatories; to produce or make available for inspection and copying documents responsive to the following requests for production; and to serve written responses to the interrogatories and requests for production within twenty days hereof. These interrogatories and requests for production of documents are governed by the following Instructions and Definitions:

INSTRUCTIONS

1. You are required to choose one or more of Your employees, officers or agents to answer the following interrogatories and to respond to the following requests for production, who shall furnish all such information which is known or available to You.

2. Where an interrogatory calls for an answer in more than one part, the parts should be presented in the answer in a manner which is clearly understandable.

3. You are under a continuing duty to supplement Your responses pursuant to Rule 4901-1-16(D) of the Commission's Rules of Practice as to expert witnesses and the subject matter of their testimony, responses discovered to be incorrect or materially deficient, and where the initial response indicated that the information sought was unknown or nonexistent but such information subsequently becomes known or existent.

4. If You claim any form of privilege as a ground for not completely answering any interrogatory, state the nature of the privilege and the general subject of the information withheld.

5. For any document that You decline to produce because of a claim of privilege or any other reason, provide the date, author, and type of document, the name of each person to whom the document was sent or shown, a summary of the contents of the document, and a detailed description of the grounds for the claim of privilege or objection to producing the document. If a claim of privilege is made only to certain portions of a document, please provide that portion of the document for which no claim of privilege is made.

6. If any document responsive to a request for production of documents is no longer in Your possession or control, please state why the document is no longer in Your possession or control, explain the circumstances surrounding the disposition of the document, identify the individual responsible for the disposition of the document, and state whether the document or copies thereof still exist.

7. Please identify all responses to requests for production of documents by the number of the request.

8. Where an interrogatory requests that a date be given, but You cannot recall the specific date, please respond by giving an approximate date or time frame, indicating that the date or time frame is approximate.

Exhibit B

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS OF OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY TO CITIZENS FOR KEEPING THE ALL-ELECTRIC PROMISE

Pursuant to Rules 4901-1-16, 4901-1-19 and 4901-1-20 of the Ohio Administrative Code, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") request that Citizens for Keeping the All-Electric Promise respond in writing and under oath to the following interrogatories; to produce or make available for inspection and copying documents responsive to the following requests for production; and to serve written responses to the interrogatories and requests for production within twenty days hereof. These interrogatories and requests for production of documents are governed by the following Instructions and Definitions:

INSTRUCTIONS

1. If necessary, You are required to choose one or more of Your employees, officers or agents to answer the following interrogatories and to respond to the following requests for production, who shall furnish all such information which is known or available to You.

2. Where an interrogatory calls for an answer in more than one part, the parts should be presented in the answer in a manner which is clearly understandable.

3. You are under a continuing duty to supplement Your responses pursuant to Rule 4901-1-16(D) of the Commission's Rules of Practice as to expert witnesses and the subject matter of their testimony, responses discovered to be incorrect or materially deficient, and where the initial response indicated that the information sought was unknown or nonexistent but such information subsequently becomes known or existent.

4. If You claim any form of privilege as a ground for not completely answering any interrogatory, state the nature of the privilege and the general subject of the information withheld.

5. For any document that You decline to produce because of a claim of privilege or any other reason, provide the date, author, and type of document, the name of each person to whom the document was sent or shown, a summary of the contents of the document, and a detailed description of the grounds for the claim of privilege or objection to producing the document. If a claim of privilege is made only to certain portions of a document, please provide that portion of the document for which no claim of privilege is made.

6. If any document responsive to a request for production of documents is no longer in Your possession or control, please state why the document is no longer in Your possession or control, explain the circumstances surrounding the disposition of the document, identify the individual responsible for the disposition of the document, and state whether the document or copies thereof still exist.

7. Please identify all responses to requests for production of documents by the number of the request.

8. Where an interrogatory requests that a date be given, but You cannot recall the specific date, please respond by giving an approximate date or time frame, indicating that the date or time frame is approximate.

Exhibit C

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

SUPPLEMENTAL RESPONSES AND OBJECTIONS TO FIRSTENERGY'S FIRST SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS BY CITIZENS FOR KEEPING THE ALL-ELECTRIC PROMISE

Citizens for Keeping the All-Electric Promise ("CKAP"), by and through its counsel, hereby submits its Responses and Objections to the First Set of Interrogatories and Requests for Production of Documents submitted to CKAP by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "FE") in the above-captioned case.

CKAP's responses to these discovery requests are being provided subject to, and without waiver of, the general objections stated below and the specific objections posed in response to each interrogatory and request for production of documents. The general objections are hereby incorporated by reference into the individual response made to each discovery request. CKAP's responses to these discovery requests are submitted without prejudice to, and without waiving any general objections not expressly set forth therein.

The submittal of any response below shall not waive CKAP's objections. The responses below, while based on diligent investigation and reasonable inquiry by CKAP, reflect only the current state of CKAP's knowledge and understanding and belief with respect to the matters about which the discovery requests seek information, based upon the information and discovery

INTERROGATORIES

INTERROGATORY NO. 3 Identify each and every document, exhibit or other thing You intend to introduce into evidence or otherwise display at the hearing in this matter.
RESPONSE: At this time, CKAP will introduce all the documents previously submitted at the Public Meetings held in this proceeding and those filed with the PUCO. Other documents, exhibits and testimony have not been identified.

INTERROGATORY NO. 6 Identify all Documents that in any way relate to or concern any issue in this case.
RESPONSE: Objection. This Interrogatory is vague, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. Also, Objection to the extent that the Company is inquiring into information exempt from discovery under the trial preparation doctrine, attorney work-product doctrine, joint defense doctrine, the attorney-client privilege, and/or privileged settlement discussions. Without waiving any specific or general objections, CKAP responds as follows: See Response to Interrogatory #3.

REQUESTS FOR PRODUCTION OF DOCUMENTS

REQUEST FOR PRODUCTION NO. 1: All Documents identified in response to the Companies' First Set of Interrogatories, including but not limited to Documents You identified in Your responses to the Companies' Interrogatory Nos. 3 through 6.
RESPONSE: See Response to Interrogatory #3.

REQUEST FOR PRODUCTION NO. 5: All Documents and Communications received from or sent to the Staff of the Commission or any customer of one of the Companies regarding the Companies' All-Electric Tariffs or related rates or credits, including but not limited to correspondence, emails, and handwritten notes.
RESPONSE: Objection, overbroad; as well as objection to the extent that the Company is inquiring into information exempt from discovery under the trial preparation doctrine, attorney work-product doctrine, and/or the attorney-client privilege. Without waiving any specific or general objections, CKAP responds as follows: See the response to Request for Production No. 1.

REQUEST FOR PRODUCTION NO. 6: All Documents reflecting, related or referring to the Companies' All-Electric Tariffs.
RESPONSE: Objection, overly broad. Without waiving any specific or general objections, CKAP responds as follows: See Response to Interrogatory #3.

REQUEST FOR PRODUCTION NO. 7: All Documents reflecting, based upon, or related to the Staff Report dated September 24, 2010, or referring to any analysis conducted based upon the Staff Report dated September 24, 2010.
RESPONSE: Objection to the extent that the Company is inquiring into information exempt from discovery under the trial preparation doctrine, attorney work-product doctrine, the attorney-client privilege, and privileged settlement discussions. Without waiving any specific or general objections, CKAP responds as follows: See Response to Interrogatory #3.

Exhibit D

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

RESPONSES AND OBJECTIONS TO
FIRSTENERGY COMPANIES' FIRST AND SECOND SETS OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC"), by and through its counsel, hereby submits its Responses and Objections to the First and Second Set of Interrogatories and Requests for Production of Documents submitted to the OCC by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy EDU" or the "Company") in the above-captioned case.

The OCC's responses to these discovery requests are being provided subject to, and without waiver of, the general objections stated below and the specific objections posed in response to each interrogatory and request for production of documents. The general objections are hereby incorporated by reference into the individual response made to each discovery request. The OCC's responses to these discovery requests are submitted without prejudice to, and without waiving any general objections not expressly set forth therein.

The submittal of any response below shall not waive the OCC's objections. The responses below, while based on diligent investigation and reasonable inquiry by OCC, reflect only the current state of the OCC's knowledge and understanding and belief with respect to the matters about which the discovery requests seek information, based upon the information and

RESPONSE:

Objection, the interrogatory is vague, and mischaracterizes the statement contained in a pleading submitted by the OCC to the PUCO. Objection to the extent that the Company is inquiring into information exempt from discovery under the trial preparation doctrine and/or the attorney-client privilege. Without waiving any specific or general objections, OCC responds as follows:

The OCC submitted a pleading on February 25, 2010 in this proceeding, entitled "MOTION FOR DECLARATION OF AN EMERGENCY AND MOTION TO ALTER RESIDENTIAL ALL-ELECTRIC RATES AND PAYMENT ARRANGEMENTS PENDING A PERMANENT RESOLUTION FOR PROTECTING RESIDENTIAL CUSTOMERS AND MOTION FOR AN INVESTIGATION INTO FIRSTENERGY'S BUSINESS PRACTICES REGARDING COMMITMENTS TO RESIDENTIAL CUSTOMERS, INCLUDING PROCEDURES TO OBTAIN ADDITIONAL INFORMATION AND MOTION FOR A HEARING BY THE OFFICE OF THE OHIO CONSUMERS' COUNSEL."

On page 2 of that pleading, the OCC stated the following: "The Commission should investigate the allegations of consumers regarding the promises made by FirstEnergy with respect to all-electric rates, including an investigation as to whether ratepayer or shareholder money was used to finance the inducement for construction of all-electric homes." The statement sought PUCO action to determine facts regarding whether "ratepayer or shareholder money was used." Since these categories were intended to be all-inclusive, these sources of financing must have been used. The OCC is unaware of any investigation or other determination by the PUCO Staff on this matter.

Prepared by: Counsel

INTERROGATORY NO. 5: Identify all facts and Documents supporting Your suggestion on pages 12 and 13 of the Memorandum in Support of Your Motion to Compel Responses to Discovery dated June 30, 2010 that the Commission should "assign[] responsibility for some portion (if not all) of the revenue shortfall to FirstEnergy" based on the Companies' "culpability."

RESPONSE:

Objection to the extent that the Company is inquiring into information exempt from discovery under the trial preparation doctrine and/or the attorney-client privilege. Without waiving any specific or general objections, OCC responds as follows:
See the response to Request for Production No. 1.

Prepared by: Counsel

Exhibit E

Subject:	**10-176-EL-ATA: Responses to FirstEnergy Companies' discovery requests**	
From:	Grant W Garber Extension: 6-3658 614-281-3658	12/16/2010 11:15 AM
To:	kevinocorcoran	
Cc:	David A. Kutik, burkj	

Kevin,

I'm writing regarding the responses of CKAP, Bob Schmitt Homes ("Schmitt"), Sue Steigerwald and Joan Heginbotham (collectively "Consumer Parties") to the Companies' Second Set of Interrogatories and Requests for Production of Documents. As with the Consumer Parties' responses to the first set, these responses are deficient in several ways and require immediate supplementation.

First, several of the Consumer Parties' responses inappropriately refer generally to documents submitted at public hearings or filed in the docket, without specifically identifying responsive documents. *See* Steigerwald and Heginbotham Resp. to Interrog. Nos. 7, 8, 13, 14 and RFP Nos. 8, 12; Steigerwald Resp. to RFP No. 11; Schmitt Resp. to Interrog. Nos. 7, 8, 14, 15 and RFP Nos. 8, 9, 11, 12, 13; CKAP Resp. to Interrog. 8, 9 14, 15 and RFP Nos. 8, 10, 11, 12. For example, Steigerwald and Heginbotham Interrogatory Nos. 11 and 12 seek information regarding instances when the Companies allegedly "promised" that all-electric rates would be permanent -- a core allegation by the Consumer Parties. *See also* Consumer Parties' Resp. to RFP No. 9. Identical interrogatories were propounded on Schmitt and CKAP. *See* Schmitt and CKAP Resp. to Interrog. Nos. 12, 13. Yet in response, the Consumer Parties refer generally to the docket. This is plainly insufficient. The Companies are entitled to know basic facts about the alleged "promises" that go to the heart of the Consumer Parties' dispute. Moreover, the Consumer Parties' responses suggest that they have no documents--none--to support those allegations other than those filed in the docket, and the Companies are entitled to know if that indeed is the case. Further, in response to Steigerwald/Heginbotham Interrogatory No. 10(c) and CKAP Interrogatory No. 11(c), which seek documents reflecting those parties' allegation that their property values have been "negatively impacted," those parties merely refer to the docket. Again, the Companies are entitled to know what (if any) documents support this allegation, which (along with many others) was made by the Consumer Parties in gaining intervention in this case.

Second, in Interrogatory No. 7, the Companies ask CKAP to identify its members and affiliates. In response, CKAP indicates that it "does not maintain" a list of its members. This response is insufficient. CKAP has represented to the parties (and the Commission) that it is an "affiliation of all-electric customers living throughout Northeast Ohio in FirstEnergy's service area." *See* Mem. in Support of Mot. to Intervene dated June 2, 2010, p. 1. The Companies are entitled to know who those affiliated customers are so, among other reasons, it can test the basis of their claims (which ostensibly are represented by CKAP). Moreover, the Companies are entitled to know the basic residence purchase information requested in Interrogatory No. 10. Should CKAP not provide these responses by December 20, the Companies reserve the right to move to strike CKAP from this case.

Third, in response to Request for Production No. 12, the Consumer Parties object based on, among other things, the "joint defense doctrine." Please indicate whether the Consumer Parties are withholding any documents based on that objection. If they are, please provide a privilege log for those documents. Further, please indicate whether the Consumer Parties have entered into any joint defense agreements and, if so, please produce them.

Fourth, in response to Interrogatory No. 9, Schmitt indicates that it already has communicated to the Companies the addresses and dates of construction of all its homes subject to any all-electric rate. Please indicate when that communication occurred and to whom that information was communicated.

Fifth, in response to Interrogatory No. 16, Schmitt responds "[s]ee attached advertisements." No

advertisements or other documents were attached to your email dated December 14, 2010. Please provide those "advertisements."

Sixth, at your earliest convenience, please provide a supporting sworn verification for the Consumer Parties' interrogatory responses, as required by Rule 4901-1-19(A).

Please provide these supplementations by December 20 or we will move to compel them.

Grant W. Garber
Jones Day
325 John H. McConnell Boulevard, Suite 600
Columbus, Ohio 43215
Phone: 614-281-3658
Fax: 614-461-4198
gwgarber@jonesday.com

Mailing Address:
P.O. Box 165017
Columbus, OH 43216-5017

Exhibit F

Subject:	**10-176-EL-ATA: OCC's responses to FirstEnergy Companies' discovery requests**
From:	Grant W Garber Extension: 6-3658 614-281-3658
	12/14/2010 10:21 AM
To:	small, grady, allwein
Cc:	David A. Kutik, burkj

Counsel:

I'm writing regarding OCC's responses to the Companies' First and Second Sets of Interrogatories and Requests for Production of Documents. The responses are deficient in several ways and require immediate supplementation.

First, OCC's response to Interrogatory No. 13 requires supplementation in three ways: (A) OCC objects based on "the trial preparation doctrine, attorney work-product doctrine and/or attorney-client privilege." Please indicate whether OCC is withholding any responses to this Interrogatory based on those objections and, if so, indicate the individual with whom the Communication occurred and the date on which it occurred. (B) OCC also objects that this Interrogatory is "overbroad regarding the timeframe 'since January 1, 2005.'" Given that OCC's allegations relate to purported conversations that occurred decades ago, and given that OCC has sought material from the Companies dating to the 1970s, the "January 1, 2005" limitation is more than reasonable and appropriate. If OCC has withheld responsive information on the basis of that objection, please provide that information. (C) In responding to this Interrogatory, OCC also refers to its response to Interrogatory No. 9, in which OCC indicates that its "investigation of this matter is on-going." To the extent OCC currently has responsive information, this is not a proper reason for withholding it. Any Communications subject to Interrogatory No. 13 should be disclosed now, not when OCC determines that its "investigation" is complete. Please confirm that OCC has disclosed all such Communications that have occurred.

Second, in response to Request for Production Nos. 1, 5 through 12 and 14, OCC states that it "has identified documents responsive to this request that will be provided, by inspection or otherwise, to the requesting party." Please confirm that such documents were provided in the service email dated December 10, 2010. If any such documents were not attached to that email, please provide them.

Third, in response to Request for Production Nos. 1, 5 through 12 and 14, OCC also states "see other documents filed with the PUCO in this case (Case No. 10-176-EL-ATA) and in the recordings of the local public hearings in this case per Ohio Adm. Code 4901-1-20(D)." This response is deficient. To the extent responsive documents appear on the Commission's website, please identify the date and docket description of all documents responsive to this request. To the extent responsive documents presented at the public hearings are publicly-available, please identify what they are and where they may be found. And to the extent such documents are not publicly-available, please produce them.

Fourth, in response to Request for Production Nos. 11 and 14, you object based on, among other things, the "joint defense doctrine." Please indicate whether OCC is withholding any documents based on that objection. If it is, please provide a privilege log for those documents and produce any joint defense agreement or similar agreement on which OCC bases that objection.

Fifth, at your earliest convenience, please provide a supporting sworn verification for OCC's interrogatory responses, as required by Rule 4901-1-19(A).

Please provide the supplementations described above by the end of the day on December 15 or we will move to compel them.

Also, OCC's responses to the Companies' Third Set of Interrogatories and Requests for Production of Documents were due this past Friday December 10. We haven't received them. Please provide those

responses by the end of the day on December 15 or we also will move to compel them.

Grant W. Garber
Jones Day
325 John H. McConnell Boulevard, Suite 600
Columbus, Ohio 43215
Phone: 614-281-3658
Fax: 614-461-4198
gwgarber@jonesday.com

Mailing Address:
P.O. Box 165017
Columbus, OH 43216-5017