

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

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:

- - -

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 2:00 p.m. on Wednesday, January 30,
2013

- - -

APPEARANCES:

Faruki, Ireland & Cox, PLL
By Mr. Jeffrey S. Sharkey
Mr. Charles J. Faruki
Mr. Adam Sadlowski
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, Ohio 45402

The Dayton Power and Light Company
By Ms. Judi L. Sobecki
1065 Woodman Drive
Dayton, Ohio 45432

On behalf of The Dayton Power and Light
Company.

McNees, Wallace & Nurick, LLC
By Mr. Frank P. Darr
Mr. Matthew R. Pritchard
Mr. Joseph E. Olikier
Mr. Samuel C. Randazzo
Fifth Third Center, Suite 1700
21 East State Street
Columbus, Ohio 43215

On behalf of the Industrial Energy Users
of Ohio.

Office of the Ohio Consumers' Counsel
By Ms. Maureen R. Grady
Mr. Tad Berger
Ms. Melissa R. Yost
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215

On behalf of the Residential Customers of
The Dayton Power and Light Company.

Krieg Devault, LLP
By Mr. Steven M. Sherman
One Indiana Square, Suite 2800
Indianapolis, Indiana 46204

On behalf of Wal-Mart Stores East, LP and
Sam's East, Inc.

APPEARANCES: (Continued)

Christensen Law Office, LLC
By Ms. Mary W. Christensen
8760 Orion Place, Suite 300
Columbus, Ohio 43240

On behalf of People Working
Cooperatively, Inc.

Mike DeWine, Ohio Attorney General
By William Wright, Section Chief
Public Utilities Section
Mr. Devin D. Parram
Mr. Thomas W. McNamee
Assistant Attorneys General
180 East Broad Street, 6th Floor
Columbus, Ohio 43215-3793

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

Boehm, Kurtz & Lowry
By Mr. David F. Boehm
Mr. Michael L. Kurtz
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

On behalf of Ohio Energy Group.

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

On behalf of SolarVision, LLC.

Ice Miller, LLP
By Mr. Christopher L. Miller
250 West Street, Suite 700
Columbus, Ohio 43215

On behalf of the City of Dayton, Ohio.

APPEARANCES: (Continued)

Ohio Environmental Council
By Mr. Trent A. Dougherty
Ms. Cathryn N. Loucas
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212

On behalf of the Ohio Environmental
Council.

Whitt Sturtevant, LLP
By Mr. Mark A. Whitt
Mr. Gregory L. Williams
Mr. Andrew J. Campbell
The KeyBank Building
88 East Broad Street, Suite 1590
Columbus, Ohio 43215

On behalf of Interstate Gas Supply, Inc.

Duke Energy Ohio, Inc.
By Ms. Jeanne W. Kingery
155 East Broad Street, 21st Floor
Columbus, Ohio 43215

On behalf of Duke Energy Sales, LLC and
Duke Energy Commercial Asset Management,
Inc.

Taft, Stettinius & Hollister, LLP
By Mr. Zachary D. Kravitz
Mr. Mark Yurick
65 East State Street, Suite 1000
Columbus, Ohio 43215

On behalf of the Kroger Company.

Honda of America Manufacturing, Inc.
By Mr. M. Anthony Long
Mr. Asim Z. Haque
24000 Honda Parkway
Marysville, Ohio 43040

On behalf of Honda of America
Manufacturing, Inc.

APPEARANCES: (Continued)

Calfee, Halter & Griswold LLP
By Mr. James F. Lang
Ms. Laura McBride
1400 KeyBank Center
800 Superior Avenue
Cleveland, Ohio 44114

Calfee, Halter & Griswold, LLP
By Mr. N. Trevor Alexander
1100 Fifth Third Center
21 East State Street
Columbus, Ohio 43215

FirstEnergy Service Company
By Mr. Mark A. Hayden
76 South Main Street
Akron, Ohio 44308

On behalf of the FirstEnergy Service
Corporation.

Vorys, Sater, Seymour & Pease, LLP
By Mr. M. Howard Petricoff
Ms. Gretchen L. Petrucci
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008

On behalf of the Exelon Generation
Company, LLC, Exelon Energy Company, Inc.
Constellation NewEnergy, Inc.,
Constellation Energy Commodities Group,
Inc., Retail Energy Supply Association.

- - -

1 Wednesday Afternoon Session,
2 January 30, 2013.

3 - - -

4 EXAMINER MCKENNEY: The Public Utilities
5 Commission of Ohio calls, at this time and place,
6 Case No. 12-426-EL-SSO, et al., being in the
7 Application of The Dayton Power and Light Company to
8 Establish a Standard Service Offer in the Form of an
9 Electric Security Plan.

10 My name is Bryce McKenney, with me this
11 afternoon is Gregory Price, and we are the attorney
12 examiners assigned by the Commission to hear this
13 case.

14 At this time I'll take appearances of the
15 parties, beginning with the Company.

16 MR. SHARKEY: Your Honors, this is Jeff
17 Sharkey, from the law firm of Faruki, Ireland & Cox,
18 representing The Dayton Power and Light Company. I
19 have with me, Charlie Faruki and Adam Sadlowski.
20 Excuse me, I almost neglected to introduce,
21 co-counsel is in the back row, Judi Sobecki is with
22 us, as well as Dona Seger-Lawson and Craig Jackson.

23 EXAMINER MCKENNEY: Thank you.

24 MR. PRITCHARD: On behalf of the law firm
25 of McNees, Wallace, and Nurick, representing the

1 Industrial Energy Users of Ohio, I am Matt Pritchard
2 and with me is co-counsel Frank Darr and Joe Olikier.

3 EXAMINER MCKENNEY: Thank you.

4 OCC.

5 MR. BERGER: Yes. Your Honor, I'm Tad
6 Berger, with me is Maureen Grady and Melissa Yost, on
7 behalf of the Ohio Consumers' Counsel.

8 EXAMINER MCKENNEY: Thank you.

9 MR. SHERMAN: I'm Steve Sherman, from the
10 law firm of Krieg Devault, on behalf of Wal-Mart
11 Stores East and Sam's East.

12 EXAMINER MCKENNEY: Thank you.

13 MS. CHRISTENSEN: Your Honor, Mary W.
14 Christensen, on behalf of People Working
15 Cooperatively, Inc.

16 EXAMINER MCKENNEY: Thank you.

17 MR. PARRAM: Good morning, your Honors.
18 On behalf of the Staff of the Public Utilities
19 Commission of Ohio, Ohio Attorney General Mike
20 DeWine, by Assistant Attorneys General Tom W. McNamee
21 and Devin D. Parram.

22 And I would also like to enter the
23 appearance of counsel for Ohio Energy Group,
24 attorneys David Boehm and Michael Kurtz.

25 EXAMINER MCKENNEY: Thank you.

1 MS. BOJKO: Thank you, your Honors. On
2 behalf of SolarVision, Kimberly W. Bojko, with the
3 law firm of Carpenter, Lipps and Leland, 280 North
4 High, Columbus, Ohio.

5 EXAMINER MCKENNEY: Thank you.

6 MR. MILLER: Good afternoon, your Honors.
7 Christopher L. Miller of the law firm of Ice Miller,
8 250 West Street, Columbus, Ohio 43215, on behalf of
9 the City of Dayton.

10 EXAMINER MCKENNEY: Thank you.

11 MR. DOUGHERTY: Your Honors, on behalf of
12 the Ohio Environmental Council, Trent Dougherty and
13 Cathy Loucas, 1207 Grandview Avenue, Suite 201,
14 Columbus 43212.

15 EXAMINER MCKENNEY: Thank you.

16 MR. WILLIAMS: Good afternoon, your
17 Honors. On behalf of Interstate Gas Supply, Mark
18 Whitt, Greg Williams, and Andrew Campbell of Whitt
19 Sturtevant, 88 East Broad Street, Columbus, Ohio
20 43215.

21 EXAMINER MCKENNEY: Thank you.

22 MS. KINGERY: Good afternoon, your
23 Honors. On behalf of Duke Energy Retail Sales and
24 Duke Energy Commercial Asset Management, Jeanne
25 Kingery, 155 East Broad Street, Columbus, Ohio 43215.

1 EXAMINER MCKENNEY: Thank you.

2 MR. KRAVITZ: On behalf of Kroger, Zach
3 Kravitz and Mark Yurick, from the law firm of Taft,
4 Stettinius and Hollister.

5 EXAMINER MCKENNEY: Thank you.

6 That concludes all the intervenors. Oh,
7 sorry.

8 MR. ALEXANDER: On behalf of FirstEnergy
9 Solutions Corp., Trevor Alexander, from the law firm
10 of Calfee, Halter and Griswold. Also appearing are
11 Jim Lang and Laura McBride from Calfee Halter, and
12 Mark Hayden from FirstEnergy.

13 EXAMINER MCKENNEY: Thank you.

14 I believe now that concludes all -- nope.
15 Oh, I'm sorry.

16 MR. HAQUE: No problem. On behalf of
17 Honda of America Manufacturing, Inc., Asim Haque and
18 also Tony Long.

19 EXAMINER MCKENNEY: Thank you.

20 MS. PETRUCCI: Good afternoon. On behalf
21 at Exelon Generation Company, LLC, Exelon Energy
22 Company, Inc., Constellation Energy Commodities
23 Group, Inc, Constellation NewEnergy, Inc., and the
24 Retail Energy Supply Association, the law firm of
25 Vorys, Sater, Seymour and Pease, 52 East Gay Street,

1 Columbus, Ohio, M. Howard Petricoff, and I'm Gretchen
2 Petrucci.

3 EXAMINER MCKENNEY: Thank you.

4 All right. The purpose of today's
5 hearing is to discuss the discovery disputes that are
6 currently pending in this case. Before we move
7 forward there was comments made off the record
8 regarding some motions that are being withdrawn.

9 Would you like to make a statement?

10 MR. PRITCHARD: Yes, your Honor. Matt
11 Pritchard on behalf of IEU-Ohio. We're withdrawing
12 four requests from our first motion to compel. Those
13 are Interrogatory 1-13 and Interrogatory 1-17, and
14 we're withdrawing two Requests for Admission, RFA
15 1-25 and RFA 1-28.

16 EXAMINER MCKENNEY: Thank you.

17 I think what we'll do is we'll start with
18 the motions that were filed furthest back and move
19 our way to the more present motions that were filed.
20 I believe the one that I see is IEU-Ohio's motion to
21 compel filed on December 18th, 2012, which has been
22 partially withdrawn three times now. I have
23 Interrogatories 1-11, 1-20, 1-23, 2-12, Requests for
24 Admission 1-6, 1-12, and 1-16. Is that correct?

25 MR. PRITCHARD: Yes, your Honor.

1 EXAMINER MCKENNEY: Would you like to go
2 through those --

3 MR. PRITCHARD: Yes, your Honor.

4 EXAMINER MCKENNEY: -- make your
5 arguments at this time.

6 MR. PRITCHARD: Our first request is
7 Interrogatory 1-11. We requested the market value of
8 DP&L's generation assets. DP&L has provided --
9 partially provided information. They have also
10 claimed that there is privileged information
11 regarding the second study of the market value of the
12 generation.

13 We believe that the information is
14 important to this case. It goes to DP&L's financial
15 integrity claim. Depending on the valuation of their
16 generation assets, we believe that if the value of
17 the generation assets is a certain value, they could
18 sell those assets and cure any of their financial
19 integrity problems. We believe discovery on this
20 issue is relevant. It goes to the heart of this
21 claim.

22 We don't believe that DP&L has
23 demonstrated that the study itself is privileged.
24 They have voluntarily disclosed information on the
25 same subject matter. The study that they provided

1 us, I believe that we are entitled to see all their
2 studies to determine if the information they provided
3 us is consistent with their other internal
4 discussions.

5 EXAMINER MCKENNEY: Would the Company
6 like to respond?

7 MR. SHARKEY: Yes, your Honor. In fact,
8 we have documents pursuant to the prior order that
9 have been withheld in response to that request. If I
10 may, your Honor, I have provided two copies of a
11 chart that I have left for you on the bench and we've
12 distributed that chart to various parties and we have
13 some more to make sure everyone gets them.

14 In our chart, those documents have been
15 identified as Category No. 6 on page 2 of the chart.
16 The category numbers came from IEU, itself, I
17 believe. And if you'll note on my chart, the same
18 documents that would be responsive to that request
19 which was IEU Interrogatory 1-11 would also be
20 responsible -- responsive, rather, to a number of
21 OCC's requests; it's OCC Interrogatories 333, 334,
22 and Request for Production 69, 71 and 73. So the
23 same stack of documents would be responsive to both
24 sets of requests and that's the only overlap that I
25 believe exists today.

1 Our response, your Honor, is that these
2 particular documents at issue here relate to a
3 goodwill impairment at DPL Inc. As your Honors may
4 or may not be aware, in the third quarter of last
5 year, DPL Inc., DP&L's parent company, took a
6 goodwill impairment, wrote down the value of the
7 goodwill on its books of -- it was an asset on its
8 book.

9 DP&L, the regulated utility, at the same
10 time took a write-down of the value of certain of its
11 assets. So there were two write-downs: An asset
12 write-down by DP&L and a goodwill write-down at DPL
13 Inc.

14 DP&L has produced the documents relating
15 to the write-down of its assets, however, it's our
16 position that the write-down of the goodwill, the
17 goodwill impairment rather, is at the DPL Inc. level,
18 that it is irrelevant, therefore, at this proceeding
19 and that DPL Inc. is in fact not subject to discovery
20 before the Commission. We've cited those cases in
21 various briefs that we've filed.

22 So it is our position that the items that
23 we've given to you related to the DPL Inc. goodwill
24 write-down are both irrelevant and really not subject
25 to discovery.

1 EXAMINER PRICE: Ms. Grady.

2 MS. GRADY: Yes, your Honor. I would
3 request that I be permitted to address that argument
4 because it is related to OCC. As the Company
5 correctly noted, it is related to OCC Interrogatory
6 333, 334, and our Requests for Production 69, 71, and
7 73, and I'll keep my arguments very brief.

8 If you look at Exhibit 7 to our motion to
9 compel you will see a copy of 333 and 334. We were
10 seeking discovery on information reported in the DP&L
11 Form 10Q for quarterly period September 20th, 2012,
12 where the Company actually indicated that it
13 conducted the goodwill analysis and that it had
14 estimates and assumptions about revenue, operating
15 cash flow, capital expenditures, growth rates, and
16 discount rates that were used in the Company's
17 testing for the latest goodwill impairment analysis.

18 Our discovery was directed at the DP&L
19 specific information that was provided that went into
20 the AES specific documents. So we believe it is not
21 AES information; it was DP&L provided information
22 that AES then used.

23 These same factors, these same concepts
24 are presented in the financial integrity analysis of
25 Mr. Chambers and Mr. Jackson. We want to test

1 whether or not those same assumptions and those
2 materials are consistent with what they're providing
3 to the Ohio Commission.

4 With respect to DP&L's claim that it is
5 not in DP&L's custody, OCC would note that OCC's
6 requests were in the form of interrogatories. And
7 under 4901-1-19, when information is requested in
8 interrogatories, it needs to be merely known or
9 readily available; the standard is not in the
10 possession and control.

11 So we would advocate, your Honor, that
12 that information was known and readily available,
13 that's the standard under 4901-1-19, and we believe
14 it is highly relevant given the same assumptions are
15 made with respect to financial integrity, a charge
16 that DP&L is seeking to collect from customers in the
17 amount of a mere \$687 million.

18 EXAMINER MCKENNEY: Thank you.

19 MR. PRITCHARD: The only thing additional
20 to that I would note is we've asked for DP&L specific
21 information. To the extent that DP&L transmitted
22 information about the market value of its generation
23 assets to DPL Inc. for the purposes of whatever study
24 DPL Inc. might have done, we're seeking the DP&L
25 specific generation information in this request.

1 EXAMINER MCKENNEY: Thank you.

2 EXAMINER PRICE: Mr. Sharkey.

3 MR. SHARKEY: Yes, your Honor. It is --
 4 the documents at issue were generated on behalf of
 5 DPL Inc. They are not in the possession of The
 6 Dayton Power and Light Company itself and it's thus
 7 our position that the documents are both irrelevant
 8 to this proceeding because it's a goodwill write-down
 9 at the DPL Inc. level and also not within DP&L's
 10 possession.

11 EXAMINER PRICE: Have you tendered to the
 12 parties the DP&L portion, the DP&L information and
 13 data that was sent up to DPL?

14 MR. SHARKEY: There is not DP&L data that
 15 was sent up to DPL related to those transactions is
 16 my understanding from the client, your Honor. So
 17 I've asked the client that and they've told me there
 18 is no such materials.

19 EXAMINER PRICE: Ms. Grady, do you care
 20 to respond to that?

21 MS. GRADY: Your Honor, our request also
 22 went to AES. If information was submitted to AES by
 23 DP&L or on DP&L's behalf, we find it very hard to
 24 believe that AES, the acquirer of DP&L, conducts a
 25 goodwill impairment analysis based on its own

1 independent assumptions made about a relatively
2 unknown company at that point when AES acquired the
3 Company. So I find it astounding that DP&L did not
4 provide information to AES and/or DPL Inc. to do the
5 study.

6 EXAMINER MCKENNEY: Let's let Mr. Sharkey
7 answer that. Did you provide any data or information
8 to AES?

9 MR. SHARKEY: Your Honor, if I may ask
10 the client; Craig Jackson's here. My understanding
11 is that DPL Inc. provided information to AES, but The
12 Dayton Power and Light Company did not.

13 MR. JACKSON: That's correct.

14 EXAMINER MCKENNEY: Okay.

15 MS. GRADY: Your Honor, I would then
16 further argue that DPL Inc. had to have been given
17 information by DP&L. DPL Inc. is a mere holding
18 company.

19 EXAMINER PRICE: I understand the
20 assumption you want to make, but there's no evidence.
21 I mean, I hear what you're saying, but you need
22 evidence that they did, not just you can't imagine
23 that they didn't. I don't think that's going to
24 meet the -- their counsel's representation is they've
25 given you everything Dayton Power and Light had. Is

1 that correct, Mr. Sharkey?

2 MR. SHARKEY: That's my understanding,
3 you're right, your Honor.

4 MS. GRADY: The other question would
5 really go to my interrogatory which is known or
6 readily available.

7 EXAMINER PRICE: I don't think -- can you
8 show me a case where the Commission has said that
9 documents in the hands of an affiliate are readily
10 available from the affiliate? Mr. Pritchard looks
11 like he's going to.

12 MR. PRITCHARD: I've actually cited a
13 case; it was a Columbia case. The Commission had
14 said if the documents were accessible even though
15 they're in the affiliate's possession.

16 EXAMINER PRICE: Do we have a cite to
17 that?

18 MR. PRITCHARD: It's in my first motion
19 to compel, your Honor. If you give me a second, I
20 can pull it up.

21 EXAMINER PRICE: That would be helpful.

22 MS. GRADY: It's in OCC's motion to
23 compel as well.

24 MR. PRITCHARD: Yes, your Honor. The
25 case that I'm referencing is In the Matter of the

1 Complaint --

2 EXAMINER PRICE: Just the case number is
3 fine.

4 MR. PRITCHARD: Oh, sorry.
5 08-360-GA-CSS. It was an October 2nd, 2009, entry at
6 page 2.

7 EXAMINER PRICE: Thank you.

8 MS. GRADY: Your Honor, I might add, in
9 my motion to compel, page 18, footnote 63, I make
10 reference to the finding of the Commission that an
11 entity has a legal duty to discover and produce
12 readily-available evidence pertaining to its case, In
13 the Matter of Carpet Color Systems, 85-1076-TP-CSS,
14 Opinion and Order at 22, May 17th, 1988, as well as a
15 General Dynamics case that's listed in footnote 63,
16 page 18, of my motion to compel, filed 1/23/12.

17 EXAMINER PRICE: Thank you.

18 EXAMINER MCKENNEY: Mr. Sharkey, do you
19 care to respond?

20 MR. SHARKEY: Yes, your Honor. Two
21 points, your Honor. First of all, In the Matter of
22 the Manchester Group, the 08-360 case, I believe that
23 Mr. Pritchard was referring to, the Commission in
24 fact denied the request that the Company produce
25 information of all its affiliates, subsidiaries, and

parent corporations, and ordered only to produce documents that it had access to, as I read that decision.

There's also another case, your Honor. It's 10-2586, In the Matter of Duke Energy Ohio, and it's a December 13th, 2010, Commission opinion that the same issue came up and I'll read it to you. The Commission said we will, open quote, require Duke to produce only information and documents within the possession of Duke Energy Ohio, not its affiliates, close quote.

MS. GRADY: And, your Honor, I would point out that that's documents. Again, there's a different standard for documents. The rules require that documents, that they be in the possession, custody, and control. Interrogatories says information known or readily available. Two different standards.

MR. PRITCHARD: I would also note on the Duke MRO order, our motion to compel had been denied because we had failed to demonstrate that the information in Duke affiliate's possession was relevant, not that -- I don't believe the Commission reached the decision --

EXAMINER PRICE: It stands for the

1 proposition that Mr. Sharkey is citing.

2 MR. PRITCHARD: They denied it on the
3 grounds of relevance. I'm not sure it states that if
4 the -- just because the documents were in the
5 possession.

6 EXAMINER MCKENNEY: All right. At this
7 time let's go ahead and move on to the next one. I
8 believe I have 1-20. Is that correct, Mr. Pritchard?

9 MR. PRITCHARD: Yes, your Honor.

10 EXAMINER MCKENNEY: All right. Go ahead.

11 MR. PRITCHARD: Your Honor, Interrogatory
12 1-20 has sought information of the people that helped
13 prepare an AES presentation. We attached the AES
14 presentation to our interrogatories. And,
15 specifically, at page 14 of that slide, AES was
16 discussing ongoing events at DP&L. We are simply
17 seeking any information that DP&L knows about parties
18 that might have helped prepare that section of the
19 DP -- of the AES presentation relative to DP&L.

20 The purpose that we seek this information
21 for is to further clarify future interrogatories and
22 potentially to depose parties that might have
23 information related to DP&L.

24 EXAMINER MCKENNEY: Thank you.

25 Mr. Sharkey.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. SHARKEY: Yes, your Honor.

Interrogatory 1-20 does refer to a presentation that was made by AES, and it asks DP&L to identify the person or persons responsible for preparing the September 20th, 2012, presentation contained in that attachment. I was reading from it there.

That is another attempt to get discovery from the AES Corporation. And they've asked for who was responsible for preparing the presentation as a whole, that's persons at AES, and it's again information that is both irrelevant and beyond the scope of discovery as AES is not subject to discovery before this Commission.

MS. GRADY: Your Honor, at the very risk of inviting anger or criticism, I would note that with respect to the former argument, when DP&L produced the document that was supposedly responding, it's DP&L 004, responding to OCC Interrogatory 333 and 334, it shows the recipients of the information that is sought to be withheld. Some of the recipients are employees of DP&L. So Mr. Jackson and Mr. Campbell stand out in my mind, they are employees of DP&L, they did receive the information, and that would be inconsistent with the arguments made by counsel.

1 EXAMINER PRICE: We'll let Mr. Pritchard
2 respond to Mr. Sharkey, and then we'll let
3 Mr. Sharkey come back around on that.

4 MR. PRITCHARD: Yes. We have not served
5 discovery on AES in this presentation. We're asking
6 for information in DP&L's knowledge or control. DP&L
7 has not stated that it does not know the information
8 or does not partially know any of the information,
9 just that the information relates to AES and it --

10 EXAMINER PRICE: Well, let's talk about
11 relevance then.

12 MR. PRITCHARD: Yes, your Honor.

13 EXAMINER PRICE: If AES makes the
14 presentation, how is it relevant to Dayton's case?

15 MR. PRITCHARD: We're just -- the
16 presentation itself might not be relevant. The
17 people that have information related to the case
18 might be relevant. We're seeking the discovery of
19 evidence that might be reasonably calculated to lead
20 to the discovery of future evidence. Certain parties
21 from AES have knowledge of DP&L. They might be on a
22 list of witnesses we would depose.

23 EXAMINER PRICE: You could ask them for a
24 roster of their corporate employees and eventually
25 somebody might have knowledge of Dayton Power and

1 Light. I don't know that that's reasonably
2 calculated to lead to admissible material.

3 MR. PRITCHARD: The slide discusses the
4 ongoing withdrawal of the MRO and the replacement
5 with an ESP based on what the Commission had done in
6 the AEP-Ohio ESP case, your Honor.

7 EXAMINER PRICE: Mr. Sharkey, do you care
8 to respond?

9 MR. SHARKEY: I believe, your Honor, I
10 have little to add to the issue relating to the ESP
11 Interrogatory 120 at this point.

12 EXAMINER PRICE: Well, I think you might
13 need to respond to Ms. Grady's point that some of the
14 recipients are Dayton Power and Light employees.

15 MR. SHARKEY: I believe Ms. Grady's point
16 related back to the argument relating to the prior
17 request at issue. And, as to that, I would like to
18 have a moment to talk to my client.

19 EXAMINER PRICE: Pardon me?

20 MR. SHARKEY: As to that, I would like a
21 moment to talk to my client to ask them about that
22 question that she raised.

23 EXAMINER PRICE: Take a moment.

24 MR. SHARKEY: Because it's my
25 understanding that they were all -- may I?

1 EXAMINER PRICE: Yeah.

2 MR. SHARKEY: Thank you, your Honor.

3 The response is that these people -- let
4 me step back. As you know, corporate separation
5 rules permit employees to perform services on behalf
6 of multiple entities, and that these entities --
7 these persons who performed services on behalf of DPL
8 Inc. and DP&L and these services related to this
9 goodwill impairment, which is a DPL Inc. asset
10 impairment, were doing that work on behalf of DPL
11 Inc. and not on behalf of The Dayton Power and Light
12 Company.

13 EXAMINER PRICE: Thank you for clarifying
14 that.

15 MR. SHARKEY: Thank you, your Honor.

16 EXAMINER PRICE: Mr. Pritchard has one
17 quick comment on this.

18 MR. PRITCHARD: One final clarification.
19 I would also note that some of the discovery
20 responses are from parties with DPL Inc. e-mail
21 addresses and AES e-mail addresses. We're just
22 seeking information about DP&L related to this case,
23 to the extent that DP&L knows, we believe we have --
24 we should have it.

25 EXAMINER PRICE: Thank you.

1 Next one, Mr. Pritchard?

2 EXAMINER MCKENNEY: The next one I see is
3 1-23?

4 MR. PRITCHARD: Yes, your Honor. 1-23
5 and 2-12 overlap. There we've asked for information
6 broken down from the total company level to a
7 distribution, generation, and transmission level. In
8 1-23, we ask for the return on equity, contribution
9 to net income, contribution to earnings per share,
10 and contributions to margin for DP&L's distribution
11 function. And in 2-12, we asked for the annual
12 contribution to net income or margin associated with
13 years 2009 through '17.

14 We have slowly obtained some of this
15 information. We received supplemental responses on
16 November 16th, December 18th, and January 24th.
17 However, there is still outstanding information.

18 We have not been provided the return on
19 equity for the distribution company. We have not
20 been provided contribution to earnings per share for
21 the distribution company. We have not been provided
22 contribution to net income and margin for the
23 transmission and generation for years 2009 and 2010.
24 And we have not been provided information on the
25 contribution to net income for the distribution,

1 transmission, and generation for years 2012 through
2 2017.

3 The Company has represented to us
4 multiple times that either the information didn't
5 exist or that we had obtained all of it, and since
6 then we have received multiple supplements with the
7 information we requested. Our motion to compel is we
8 think we're entitled to all this information. It
9 goes to corporate separation issues and the true
10 cause of their financial harm. And every time we've
11 been told that nothing else exists, something else
12 comes up.

13 EXAMINER PRICE: Mr. Sharkey.

14 MR. SHARKEY: Yes, your Honor. They have
15 -- IEU was asked a number of different discovery
16 requests relating to separate breakdowns of return on
17 equity and other such information that The Dayton
18 Power and Light Company has earned on its
19 transmission, distribution, and generation assets.

20 At this point we have produced a number
21 of documents relating to those topics to OCC -- to
22 IEU, excuse me. To our knowledge -- to my knowledge,
23 we have produced them all. We have looked a number
24 of times. We've made numerous requests.

25 I'll note that Interrogatory 1-23 and

1 2-12 both begin "Identify any documents that describe
2 or discuss...." We have identified and produced all
3 such documents in DP&L's custody which we are aware
4 of and can find.

5 EXAMINER MCKENNEY: Mr. Pritchard,
6 nothing further?

7 MR. PRITCHARD: Nothing further, your
8 Honor.

9 EXAMINER MCKENNEY: All right. Let's
10 move on.

11 MR. PRITCHARD: Our next request is
12 Request for Admission 1-6. There we've asked DP&L to
13 admit as a result of the merger of DP&L, that DPL and
14 DPLER have represented that they expect their cost of
15 capital to increase.

16 Again, we're asking DP&L information. We
17 believe this information's relevant because the
18 overall cost of capital of its affiliates can affect
19 DP&L's financial integrity claim.

20 For instance, DP&L's testimony in this
21 case is directly related to the financial information
22 of DPL Inc. They've modified their return on equity
23 to mirror that of the parent company.

24 To the extent that there's additional
25 information that would affect such issues of cost of

1 capital that are imputed to the parent company, we
2 believe that it could be imputed to their financial
3 integrity analysis that they presented on behalf of
4 DP&L.

5 EXAMINER PRICE: Mr. Sharkey.

6 MR. SHARKEY: Yes, thank you. The
7 request, it's short, so I'll read it to you: "Admit
8 that as a result of the AES-DPL merger, DPL" -- it's
9 DPL the parent -- "and DPLER" -- an affiliate of
10 DP&L -- have represented that they expect their cost
11 of capital to increase."

12 That's seeking discovery as to DPL Inc.
13 and DPLER and what they've represented their
14 expectations to be. It's our position that the
15 regulated utility, DP&L, is not obligated to respond
16 on behalf of its affiliates.

17 EXAMINER MCKENNEY: Anything further,
18 Mr. Pritchard? All right. Let's move on to the next
19 one.

20 MR. PRITCHARD: Yes, your Honor. Our
21 next Request for Admission is 1-12. We've asked that
22 DP&L "Admit that in 2010, DPLER began providing CRES
23 services to business customers located outside of
24 DP&L's distribution service area." DP&L has not
25 responded; has not denied for lack of knowledge

1 again.

2 We believe this information is relevant
3 because DP&L has represented, through
4 publicly-available documents, that they provide power
5 to DPLER. I don't want to go into the confidential
6 part of what those transactions are, but I believe I
7 can state publicly that DPLER's transactions affect
8 DP&L's total company financial integrity claim in
9 this case.

10 To the extent that DPLER is operating
11 outside of The Dayton Power and Light service area,
12 the DP&L financial integrity claim would not even be
13 related to the Dayton area. We're seeking
14 information to demonstrate that this is tied to
15 DPLER's competition elsewhere in the state.

16 EXAMINER MCKENNEY: Mr. Sharkey.

17 MR. SHARKEY: Again, briefly, your Honor.
18 It's the same issue. The request is "Admit that in
19 2010, DPLER began providing CRES services to business
20 customers located outside DP&L's distribution service
21 area." We've objected to responding on the grounds
22 that it's irrelevant. DPLER is not subject to
23 discovery.

24 EXAMINER MCKENNEY: Thank you.

25 Mr. Pritchard.

1 MR. PRITCHARD: Moving on to our next
2 request. It's related to our previous interrogatory
3 about the AES presentation. We've asked that AES
4 admit that the attached presentation --

5 EXAMINER PRICE: Which number is this?

6 MR. PRITCHARD: What?

7 EXAMINER PRICE: Which number is this?

8 MR. PRITCHARD: Sorry. 1-16, RFA 1-16.
9 I believe it asks that they admit that the
10 presentation is an accurate copy.

11 EXAMINER PRICE: Mr. Sharkey.

12 MR. SHARKEY: Very briefly, your Honor.
13 Again, it's an AES presentation; not subject to
14 discovery here.

15 EXAMINER MCKENNEY: Thank you. That
16 concludes everything that was in that motion; is that
17 correct?

18 MR. PRITCHARD: Yes, your Honor.

19 EXAMINER MCKENNEY: Thank you.

20 Moving on. Next I have IEU's next motion
21 to compel which was filed on January 3rd, 2013,
22 regarding Interrogatory 3-1(A) through (F), 3-2(A)
23 through (F), 3-3(A) through (F), and Requests for
24 Production of Documents 1 through 4, as well as a
25 cost allocation manual. Is that all correct?

1 MR. PRITCHARD: Yes, your Honor.

2 EXAMINER MCKENNEY: All right. Let's go
3 through the interrogatories and requests for
4 production of documents before we get to the cost
5 allocation manual. So we'll start with 3-1.

6 MR. PRITCHARD: Yes. 3-1 parts (A)
7 through (F), 3-2 parts (A) through (F), and 3-3(A)
8 through (F) are all seeking the same general
9 information; that is, any study or analysis that DP&L
10 has done on its ability to reduce its expenses and/or
11 increase its revenue.

12 The second and the third requests were
13 specific to in the event that part of the service
14 stability rider or switching tracker was denied in
15 whole or in part. DP&L has indicated that they have
16 a privileged document that is responsive.

17 Briefly, in their memo contra they argue
18 not that the information in the document was
19 privileged, but if they disclosed the document it
20 would allow parties to reverse engineer the
21 attorneys' mental impressions about the legal merits
22 of their case. They cited several cases for the
23 proposition that if you can reverse engineer
24 attorneys' mental impressions that the information,
25 the document itself is privileged.

1 The first case, Alexander versus Federal
2 Bureau of Investigation, that case merely held that
3 when a client or a lawyer recorded on a piece of
4 paper the -- summarized their conversation, that
5 piece of paper was also protected by the
6 attorney-client privilege just as the original
7 conversation was.

8 The next case that they have cited is
9 Kelly v. Ford Motor Company about the board of
10 directors' minutes. That case said that where the
11 board of directors' minutes contained conversations
12 from the board of directors and counsel, seeking
13 legal advice, that the board of directors' minutes
14 were privileged for the reason that the board of
15 directors were seeking legal advice, not on the
16 independent ground that all board of directors'
17 minutes could be privileged.

18 Finally, the Simon v. Searle case that
19 they have cited for risk management studies, allow
20 this kind of document to be withheld. That case said
21 that the attorney-client privilege did not apply to a
22 risk management study, but that the work-product
23 doctrine did. They held that the reserve amounts in
24 that case were calculated, among other things, on the
25 likelihood of success, chances of settling the case,

1 and so the attorneys' mental impressions as they did
2 the calculations that directly impacted the reserve
3 amounts were work product.

4 We don't believe that the same is true
5 here. We're seeking general business advice about
6 DP&L's ability to reduce its expenses or increase its
7 revenue. Furthermore, even if the work-product
8 doctrine did apply as it did in the Simon case, we
9 believe that good cause exists for the production of
10 that evidence.

11 In previous cases where utilities have
12 claimed financial harm, the Commission has held that
13 perhaps the most important information is a utility's
14 ability to reduce its expenses and increase its
15 revenue on its own. The theory behind that is that
16 the utility could fix any self-inflicted problems
17 rather than push that onto ratepayers. So we believe
18 that even if it is work product, it should be
19 produced.

20 EXAMINER MCKENNEY: Thank you.

21 Mr. Sharkey.

22 MR. SHARKEY: Yes, your Honor. The issue
23 before the Commission on this particular request is
24 whether certain cost-saving documents that DP&L has
25 prepared are either attorney-client privilege or

1 protected by the work-product doctrine.

2 As your Honors know, it is settled that
3 documents are protected by those privileges if they
4 would reveal legal advice. So that extends beyond
5 documents that are purely communication between an
6 attorney and a client, and extend to information that
7 would reveal the attorney's advice.

8 For example, if the attorney advises the
9 client, provides legal advice to the client, and then
10 the client records it in a diary, the diary is not
11 intended to be communication to the attorney, it is a
12 diary, but it records the legal advice and if it was
13 produced it would reveal the legal advice. That
14 information is privileged then.

15 Similarly, if legal advice is provided at
16 a board of directors' meeting, and the information is
17 recorded, the legal advice is recorded in the
18 minutes. Again, those minutes aren't necessarily
19 communication between the attorney and the client,
20 but it's privileged.

21 The most applicable facts to our case
22 situation here, your Honor, deal with reserve
23 amounts, and we have cited three cases here that all
24 have held that reserve amounts on clients' books and
25 records are protected by the attorney-client

1 privilege document; that would be the Simon case, the
2 Certain Underwriters case, and the General Electric
3 cases cited on pages 3 and 4 of our memorandum.

4 The case reserves as to the specific
5 cases in those books -- in those cases were sitting
6 on a client's books as the attorney's expectation as
7 to the likely liability and likely damages that the
8 plaintiff in a particular case the attorney was
9 handling would receive. Those were accounting
10 statements. They were not communications that were
11 intended to be directed to the attorney, but
12 producing them would have revealed the attorney's
13 advice.

14 The court in those cases thus held that
15 because the attorney's advice would be revealed if
16 these case reserve accounting statements were
17 produced that they were therefore protected by the
18 attorney-client privilege and not subject to
19 production.

20 Here, your Honor, DP&L's counsel,
21 Ms. Sobecki and our firm, have provided advice to
22 DP&L regarding the expected results as to this case.
23 DP&L has publicly stated and, as you know, there's a
24 ROE target that the Commission has identified in the
25 AEP case of 7 to 11 percent. DP&L has stated that

1 its goal in this case is to somehow end up within
2 that range.

3 DP&L's accountants and other people
4 within the Company have taken counsel's advice as to
5 likely results and thus determined what type of cost
6 cuts, if any, the DP&L company would have to make so
7 that it could maintain a ROE within that range.

8 Thus, your Honor, if The Dayton Power and
9 Light Company was required to produce those
10 documents, it would be a mathematical exercise to
11 back-determine DP&L's advice counsel -- start over --
12 the advice of DP&L's counsel as to the likely results
13 of the case. Those documents are thus much like the
14 case reserve documents that have been held to be
15 protected by attorney-client privilege and
16 work-product doctrines.

17 Your Honor, I've got copies of the
18 documents here and there's a privilege log on top.
19 There's also a privilege log of the documents in the
20 chart that I left. So your Honors have two copies.
21 Other people here have one copy of the privilege log.

22 And actually, your Honor, I apologize.
23 Just for the record so that we have a clean record,
24 those documents in my chart were Category 8 and
25 that's what they're identified on the privilege logs.

1 EXAMINER MCKENNEY: Mr. Pritchard.

2 EXAMINER PRICE: Mr. Pritchard has a copy
3 of the privilege log, does he not?

4 MR. PRITCHARD: Yes, your Honor.

5 MR. SHARKEY: Yes, he does, your Honor.

6 MR. PRITCHARD: Just two quick points.
7 First, in our motion to compel we cited a case where
8 the Commission held that when a lawyer asked its --
9 when a lawyer communicated advice to the utility's
10 employees and then the utility's employees then
11 conducted a review of the underlying facts of the
12 case that those facts were not privileged and subject
13 to any privilege, attorney-client, or work product,
14 just because they were done on behalf of a lawyer.

15 And, second of all, to the extent that
16 any information in there is privileged, we would ask
17 that you conduct an in camera review and only redact
18 the portions of those documents that would allow a
19 reverse engineering of the legal advice.

20 EXAMINER PRICE: Mr. Pritchard, can you
21 read for me again, read your Interrogatory 3-1?

22 MR. PRITCHARD: Yes, your Honor. One
23 second. I'll read the exact language of the motion
24 -- of the request.

25 Interrogatory 3-1 reads: "Since the

1 acquisition of DPL by AES, has DP&L, DPL, or AES
2 performed any analysis, study, and/or made any
3 recommendations of any potential cost savings
4 measures or revenue enhancements for DP&L?" And then
5 we have parts --

6 EXAMINER PRICE: That's enough.

7 Mr. Sharkey, clearly, this interrogatory
8 is directed at more than just contingent upon the
9 filings. It says since the merger occurred.
10 Everything that you've -- have you tendered to them
11 any documents that were before the litigation, from
12 the time period between the merger and the
13 litigation?

14 MR. SHARKEY: My understanding, your
15 Honor, I can check with the client again if you'd
16 like, is that there aren't such documents. This
17 began in anticipation of this litigation and which
18 was filed back in the spring of last year, and we
19 were preparing for it well before that, even
20 contemplating preparations for it back at the time of
21 the AES acquisition.

22 So I believe you have in that stack all
23 of the documents. You'll see that some of them are
24 significantly older, we can look through them and
25 determine the dates, but there are numerous documents

1 in that stack that are many months old. If I can
2 have a minute, your Honor.

3 EXAMINER PRICE: So your client's
4 representation is after the merger there was no --
5 the new acquiring company didn't do any "tell us any
6 cost cuts you can make to make yourself more
7 efficient"? You didn't think about doing cost cuts
8 until you filed this case.

9 MR. SHARKEY: Your Honor, I believe that
10 there were cost cuts -- I have to look through the
11 privilege log. My understanding is we have all of
12 the documents relating to all cost cuts analysis
13 since that time. I can doublecheck with my client.
14 I believe that to be an accurate representation,
15 though, your Honor.

16 If you note, your Honor, some of the
17 documents within the privilege log date back to
18 February of 2012; that's the first one on page 7.

19 EXAMINER PRICE: I understand.

20 MR. SHARKEY: There are certainly many
21 that are older, but related generally to this case.

22 EXAMINER PRICE: We will take a look at
23 them one by one.

24 MR. SHARKEY: Okay. One other point,
25 your Honor. Although we believe that all of them are

1 privileged because they could be used, as I
2 articulated, to reverse engineer the legal advice, if
3 you look at the privilege log for Category 8, you'll
4 note we have bolded, Art Meyer's name appears on a
5 number of the documents and he was general counsel of
6 DP&L at the time.

7 EXAMINER MCKENNEY: Mr. Pritchard, would
8 you like to respond?

9 MR. PRITCHARD: Nothing further about the
10 Interrogatories 3-1, 3-2, or 3-3, your Honor.

11 EXAMINER MCKENNEY: Would you like to
12 move on to --

13 MR. PRITCHARD: Yes. The last issue is a
14 Request for Production of Documents 1-4, the cost
15 allocation manual. Your Honor, we believe that the
16 cost allocation manual is relevant for multiple
17 purposes. It was cited by DP&L's own witness
18 testimony in this proceeding for the proposition of
19 law that they are in compliance with corporate
20 separation.

21 The Commission's standard filing
22 requirements for an electric security plan require
23 the EDU to demonstrate that they are in current
24 compliance with corporate separation. As you are
25 aware, corporate -- they're under functional

1 corporate separation which requires them to satisfy
2 the state policy requirements in section 4928.02 of
3 the Revised Code. Subsection (H) requires that there
4 not be any anti-competitive subsidies between
5 competitive business units or affiliates such as the
6 generation function and noncompetitive units such as
7 the distribution function.

8 This document discusses how DP&L
9 allocates the cost of the various business functions
10 of DP&L. It goes to the heart of whether there is or
11 could be anti-competitive subsidies. We also believe
12 that this document could impact the financial
13 integrity claim relative to where the costs are being
14 allocated internally.

15 We have reviewed the document. DP&L
16 brought it up to our offices in Columbus. It
17 consists of two binders, roughly the size of the one
18 I have in front of me here. The cost allocation
19 manual did not have the board of directors' minutes
20 in it when we reviewed it.

21 Subsequent to reviewing it, DP&L has
22 indicated that it does not believe that any page in
23 the cost allocation manual is relevant nor have we
24 demonstrated is relevant. They've countered that we
25 should meet again and review it page by page and

1 identify the specific pages that we wanted.

2 We've already accommodated their request
3 once and went through the document for multiple hours
4 with multiple employees. We determined that the
5 whole -- we thought the whole document was relevant.
6 We briefed this issue in our motion to compel.

7 And, finally, in regards to the board of
8 directors' minutes, as I discussed earlier, the cases
9 they have cited stand for the proposition of law that
10 board of directors' minutes can be subject to the
11 attorney-client privilege when the board of
12 directors' minutes contained discussions between the
13 directors and counsel, seeking legal advice.

14 They have made no claim in their
15 memorandum contra or any communication to us that
16 there was any legal advice sought or given. They've
17 just withheld it under a claim that it could be
18 withheld.

19 EXAMINER MCKENNEY: Thank you.

20 Mr. Sharkey.

21 MR. SHARKEY: Yes, your Honor. As
22 Mr. Pritchard correctly articulates, there's two
23 issues, really, as to the cost allocation manual;
24 one, a relevancy objection and also a privilege
25 objection.

1 Your Honor, we've got two binders here.
 2 The black binder contains what was in DP&L's stack of
 3 materials. So the black binder contains the
 4 materials that IEU has been previously entitled to
 5 inspect. The smaller white binder here contains the
 6 materials that were withheld on privilege and I'll
 7 come back to that. But those are what are in these
 8 two separate binders.

9 The cost allocation manual contains
 10 information that The Dayton Power and Light Company
 11 considers confidential, including lists of employees,
 12 various financial information relating to how it
 13 relates to its affiliates and such.

14 EXAMINER PRICE: You don't have a
 15 confidentiality agreement with IEU-Ohio?

16 MR. SHARKEY: We do, your Honor, but
 17 we've permitted IEU to inspect the document to
 18 determine whether it was relevant or not. IEU has
 19 not identified any specific issue to which it
 20 believes any of the information in the cost
 21 allocation manual is relevant despite a number of
 22 requests. There's been general claims that it's
 23 relevant to this issue, but not that it shows
 24 anything in particular. So we believe, your Honor,
 25 that the cost allocation manual is simply irrelevant

1 in this proceeding.

2 EXAMINER PRICE: They only have to get
3 over a low bar, though, Mr. Sharkey. They only have
4 to get over the idea that it's reasonably calculated
5 to lead to admissible materials. They don't have to
6 show that it would or wouldn't be admissible.

7 MR. SHARKEY: Agreed, your Honor, and
8 that's why we permitted them to inspect it so that
9 they would have an opportunity to look at it and at
10 this point they haven't identified any specific issue
11 to which they believe that there's anything there.

12 By the way, there's no allocation -- let
13 me step back.

14 This is not a complaint case or a
15 Commission proceeding related to DP&L's compliance
16 with its cost allocation manual or corporate
17 separation rules; that's not the issue in this case.
18 We thus think that the cost allocation manual is
19 irrelevant, your Honor.

20 May I address the privilege issue, your
21 Honor, if we're done with that?

22 EXAMINER PRICE: Please.

23 MR. SHARKEY: Mr. Pritchard missed one,
24 but there's two categories of documents in the white
25 binder there that we believe are privileged.

1 The first is the board minutes which
2 contain the -- step back.

3 DP&L's board minutes, at every meeting,
4 with minor exceptions occasionally, DP&L's counsel is
5 present, it's Tim Rice, and he is the secretary and
6 he's responsible for preparing the minutes. So all
7 of the board minutes were prepared -- all of the
8 board meetings were done with the expectation of
9 receiving advice from counsel. All of the minutes
10 were prepared by counsel with minor exceptions which
11 are, as you'll see when you review the binder,
12 minutes that deal with things that are utterly
13 irrelevant in this case.

14 There are, in addition, two documents
15 within the stack, they're in tabs 41 and 42 there,
16 and listed on page 7 of the privilege log, your
17 Honor. It's a list of litigation claims. In
18 essence, one of the corporate separation rules
19 requires a list of various information about pending
20 litigation against The Dayton Power and Light Company
21 and it's listed on the chart as being prepared by the
22 legal department. There's no recipient because the
23 recipient's the CAM, your Honor.

24 So that's -- there's those two additional
25 documents and we believe they're privileged because

1 it's a listing and description of pending legal
2 claims prepared by DP&L's counsel.

3 EXAMINER PRICE: You're making a pretty
4 sweeping claim. What I'm hearing, if I'm hearing it
5 correctly, is because DP&L's general counsel took the
6 minutes of the meeting and attended every meeting
7 that everything is privileged irrespective of what
8 was discussed. In which case you could rule out the
9 board of directors' minutes from every corporation in
10 this country. That being the case, I would suspect
11 that somewhere there is a court case saying -- you'll
12 get your turn, Mr. Pritchard.

13 MR. PRITCHARD: That's the one they
14 cited.

15 EXAMINER PRICE: That being the case, I
16 expect there will be a court case out there saying
17 all board of directors' meetings are privileged. Can
18 you cite to that case?

19 MR. SHARKEY: I cannot, your Honor. We
20 believe that the minutes are entitled to be
21 considered privileged because, again, they're
22 prepared by counsel for The Dayton Power and Light
23 Company.

24 EXAMINER PRICE: Now we'll let
25 Mr. Pritchard brief us on his case.

1 MR. PRITCHARD: Sorry, your Honor. The
2 second case they quote, they cite the Great Plains
3 Mutual Insurance Company case. It states that just
4 because a lawyer is present at the board of
5 directors' meetings, does not make the minutes
6 privileged. It again goes to the heart of whether
7 legal advice was sought or given.

8 EXAMINER MCKENNEY: Do you have a
9 citation for that case?

10 MR. PRITCHARD: Yes, your Honor. It's
11 150 F.R.D. 193. It's a federal case out of the
12 District Court of Kansas.

13 EXAMINER MCKENNEY: Thank you.

14 EXAMINER PRICE: As I go through your
15 privilege log, Mr. Sharkey, there are some instances
16 where you talk about, looking at No. 53 for example,
17 legal advice regarding issues relating to the merger
18 with AES. Is that just a portion of the six pages or
19 are all six pages going to be legal advice related to
20 the merger with AES?

21 MR. SHARKEY: I apologize, your Honor.
22 Which item are you referring to?

23 EXAMINER PRICE: Item 53. I'm just using
24 it as an example.

25 MR. SHARKEY: Item 53?

1 EXAMINER PRICE: Right.

2 MR. SHARKEY: Your Honor, without pulling
3 out that specific document, I don't know the answer
4 to your specific question. I can look at them, but I
5 believe --

6 EXAMINER PRICE: I guess I have a more
7 general question, and that is when you're flagging
8 these minutes as specifically including legal advice,
9 was it your understanding -- and you're reviewing
10 them, was it the entire document or was it going to
11 be two or three or four pages out of the six pages?

12 MR. SHARKEY: There are segments of them,
13 your Honor, not the entirety of them that reflect
14 specific legal advice provided at the meeting. For
15 example, sometimes by Art Meyer, sometimes there
16 might be work product, there's some presentations by
17 Dona Seger-Lawson within the minutes as well to the
18 board related to this proceeding which we would
19 assert is work product.

20 EXAMINER PRICE: Well, there could be
21 other, there could be issues beyond this proceeding,
22 too.

23 MR. SHARKEY: There are --

24 EXAMINER PRICE: We are going back to
25 2010.

1 MR. SHARKEY: I'm sorry. Yes, your
2 Honor. By and large, the minutes deal with things
3 such as the AES-DPL merger, many matters relating to
4 the declaration of dividends and such, and you'll see
5 largely, if not entirely, irrelevant.

6 EXAMINER PRICE: I guess my concern is if
7 we were to rule against you on your very broad
8 privilege claim, then we're going to have to -- we're
9 probably going to need to give this back to you and
10 say, okay, now we need specific privilege claims
11 because obviously you're claiming the entire thing is
12 privileged and there might be better cases for some
13 specific subsets of it.

14 MR. SHARKEY: There are -- your Honor,
15 there are if you were to reject the argument that
16 they are broadly privileged, yes, there are. In
17 fact, I have tabs on a document here. It may be
18 better if we switched binders.

19 EXAMINER PRICE: Mr. McKenney and I need
20 to discuss the broad privilege claim first. If we
21 have to come back to it, we'll come back to it.

22 MR. SHARKEY: Thank you, your Honor.

23 EXAMINER MCKENNEY: Okay. Moving on. I
24 believe that concludes IEU's motion to compel.

25 MR. PRITCHARD: Yes, your Honor.

1 EXAMINER MCKENNEY: The next one I see
2 here is DP&L's motion to compel filed on January 9th,
3 2013. I believe that was to compel IEU to respond to
4 Interrogatories 1 through 7, Request for Production
5 of Documents 1 through 9. Is that correct,
6 Mr. Sharkey?

7 MR. SHARKEY: Yes, your Honor, I believe
8 so.

9 EXAMINER PRICE: Have any of these been
10 resolved?

11 MR. SHARKEY: I, your Honor, also have --
12 I've given you, your Honors, a chart of the motions
13 as to DP&L. I also have a chart of the motions that
14 The Dayton Power and Light Company has filed. Can I
15 approach, your Honor?

16 EXAMINER PRICE: Please.

17 MR. SHARKEY: Your Honor, the chart that
18 has been brought up to you is a chart of motions to
19 compel that DP&L has filed as to IEU and OCC. You'll
20 see I've divided them into categories; they're the
21 categories that The Dayton Power and Light Company
22 has used.

23 The motion is identified. They're all --
24 DP&L's filed one motion so it's all Motion 1. And
25 you'll see in the status column that as to IEU, three

1 motions have been withdrawn, withdrawn as to three
2 categories rather, that would be INT 1-3, and Request
3 for Production No. 1-9. IEU, just two days ago, I
4 believe, has produced that information to us.

5 Category No. 3 alleged errors in the
6 filing which was IEU INT 1-4, 1-5, 1-6, and 1-7. IEU
7 recently produced that information to us, so we've
8 withdrawn the motions as to those four categories.

9 And then the request for production as to
10 IEU Request for Production 1-1, that motion was
11 withdrawn by The Dayton Power and Light Company in
12 its reply filed in support of its motion to compel.

13 EXAMINER MCKENNEY: Mr. Sharkey, you may
14 proceed.

15 MR. SHARKEY: Thank you, your Honor.

16 The first two subjects that remain
17 pending as to IEU are Interrogatories 1-1 and 1-2.
18 Those interrogatories, generally speaking, ask IEU to
19 state yes or no, whether it believes The Dayton Power
20 and Light Company should be permitted to earn a
21 reasonable return on equity, and whether it should be
22 entitled to a non-bypassable charge designed to allow
23 The Dayton Power and Light Company to earn a
24 reasonable return on equity. They're simple
25 questions, both of them, your Honor.

1 And instead of getting a response as to
2 them, what we received from IEU is citations to IEU's
3 briefs that it filed in the AEP case, and we believe
4 those briefs don't answer the questions posed and
5 that we're thus entitled to a response.

6 If I may, your Honor. For example, the
7 first question is "State whether IEU agrees that DP&L
8 should be given an opportunity to earn a reasonable
9 return on equity." All we're asking is a simple yes
10 and no, instead of citations to briefs in other cases
11 that may or may not be relevant in this case. In
12 fact, IEU has taken the position that AEP is not
13 precedential here.

14 EXAMINER MCKENNEY: Thank you,
15 Mr. Sharkey.

16 MR. PRITCHARD: Yes, your Honor. This
17 isn't a question about a simple yes and no. They've
18 asked whether DP&L, which has three lines of
19 business, generation, transmission, and distribution,
20 should be able to earn a reasonable return on its
21 equity.

22 The discussion we cited in the AEP case
23 states that the generation business, by statute, is
24 on its own in a competitive market. The transmission
25 portion of an EDU is regulated by FERC. The

1 Commission has statutes on its books in Chapter
2 4909.19 -- or, sorry, Chapter 4909 that address a
3 EDU's distribution business. The AEP case discusses
4 IEU's position relative to the generation portion,
5 the transmission portion, and the distribution
6 portion.

7 The question asks whether the total
8 company should get an ROE. Parts of it aren't
9 governed by the ESP and MRO statutes, so we've
10 pointed them to our discussions with legal analysis
11 saying the Commission has the power, under 4909, to
12 regulate, provide that return to the distribution
13 company, but to the generation and transmission
14 businesses there are different rules that apply.

15 EXAMINER PRICE: Let me understand this.
16 What you're saying is they asked a question about
17 your legal position or your position in this case and
18 you say go read our AEP brief, it may or may not be
19 similar?

20 MR. PRITCHARD: It discussed whether --
21 the portions that we cited, it wasn't the whole
22 briefs, they were specific pages that we provided
23 references to. The pages discuss whether --

24 EXAMINER PRICE: But those were related
25 to AEP. They weren't related to DP&L.

1 MR. PRITCHARD: Correct. But they were
2 related to the AEP claim that they were entitled a
3 non-bypassable rider to earn a reasonable return on
4 equity. The return on equity and the non-bypassable
5 claim, we briefed for 20 pages. Additionally --

6 EXAMINER PRICE: And you couldn't
7 summarize that in response to those interrogatories?

8 MR. PRITCHARD: In response to
9 Interrogatory 1, we identified that the legal
10 framework for an ESP proceeding was whether it was
11 better than an MRO, not whether they should be able
12 to earn a return on equity. Then we provided 20
13 pages of legal analysis backing up that position.

14 In regards to Interrogatory 2, whether
15 they should have a non-bypassable charge to ensure
16 financial integrity. We claimed it was IEU-Ohio's
17 position that section 4928.143(B)(2)(b) and (B)(2)(c)
18 were the only sections that apply to non-bypassable
19 charges, as well as the phase-in statute, 4928-144.

20 EXAMINER PRICE: That was your response?

21 MR. PRITCHARD: That was in our response.
22 Then, in addition, we referenced 20 pages of legal
23 analysis that we filed in the AEP case related to
24 that issue as well.

25 EXAMINER MCKENNEY: Mr. Sharkey, do you

1 care to respond?

2 MR. SHARKEY: Only very briefly, your
3 Honor. The response that Mr. Pritchard referenced
4 relating to citations in the statute, says, I'm
5 reading from the response, "Ohio law only allows
6 non-bypassable generation related charges in very
7 limited and statutorily-defined circumstances," and
8 cites to the statute. It doesn't even include an
9 answer as to whether they believe the statute applies
10 or doesn't apply and we followed up asking for a
11 reason and we have no response to that. You can't
12 read their responses to simple yes or no questions
13 and figure out if their answer is yes or no.

14 That's all I have on that one. If you'd
15 like me to move on to the next.

16 EXAMINER PRICE: When you say they are
17 simple yes or no questions, these weren't requests
18 for admission, though, these were interrogatories,
19 right?

20 MR. SHARKEY: They weren't, but they were
21 contention interrogatories, your Honor, that asks for
22 IEU's legal or factual position and they -- I'm
23 quoting, "State whether IEU agrees --

24 EXAMINER PRICE: Okay.

25 MR. SHARKEY: -- with the following

1 statement."

2 MR. PRITCHARD: May I respond briefly,
3 your Honor?

4 EXAMINER PRICE: Uh-huh.

5 MR. PRITCHARD: The rule on
6 interrogatories state that where the response to an
7 interrogatory can be derived by publicly-available
8 information is a sufficient response to identify
9 where the document can be located and the pages of
10 those documents.

11 We followed that rule. We thought we
12 answered it with saying that different rules applied.
13 Then we cited and provided the specific page
14 references for our legal discussion on these issues.

15 EXAMINER MCKENNEY: Thank you,
16 Mr. Pritchard.

17 Mr. Sharkey, let's move on then.

18 MR. SHARKEY: Yes, your Honor. The next
19 issue in DP&L's pending motion to compel relates to
20 Request for Production 1-2 which asked IEU to produce
21 documents that may be used at depositions or hearing.

22 IEU responded to that request by
23 identifying a number of documents with reasonable
24 specificity that we don't object to that description,
25 but one of the items in its -- in IEU's list is,

1 quote -- I'm sorry, documents, quote, in the public
2 domain, close quote. We believe that IEU needs to
3 identify and produce documents in greater specificity
4 than identifying them as being in the public domain.

5 EXAMINER MCKENNEY: Mr. Pritchard.

6 MR. PRITCHARD: Yes, your Honor. We
7 believe that they asked us what we might produce and
8 we told them what we might produce. We've
9 supplemented our response to identify -- now that we
10 expect to provide expert testimony, that we will also
11 introduce expert testimony. And our various briefs
12 and discovery responses back and forth have indicated
13 that our challenges with determining what documents
14 we are going to introduce at a deposition or the
15 hearing was directly tied to the lack of information
16 and understanding of the case we had.

17 Until late December, we had very -- we
18 had outstanding discovery requests in our first and
19 second sets, and we were receiving sets three
20 through, I believe we're up to eight, we received
21 them in late December and January.

22 Since receiving that information we have
23 determined what issues we think we need to pursue in
24 testimony. We've begun the process of drafting
25 testimony. We've updated our responses to indicate

1 that we are going to file testimony. At this time we
2 don't have anything further to add. We're still
3 reviewing the case.

4 EXAMINER PRICE: Do you intend to
5 supplement once you have something further to add?

6 MR. PRITCHARD: We believe that we have
7 fulfilled the response.

8 EXAMINER PRICE: So that would be no, you
9 don't intend to supplement.

10 MR. PRITCHARD: No, your Honor.

11 EXAMINER MCKENNEY: I see OCC had raised
12 the same issue?

13 MR. BERGER: Yes, your Honor.

14 EXAMINER MCKENNEY: Do you care to
15 address that?

16 MR. BERGER: That DP&L raised the same
17 issue with us, with our response?

18 EXAMINER MCKENNEY: Yes.

19 MR. BERGER: Yes, I do want to address
20 that.

21 With respect to that argument, your
22 Honor, first of all, the documents that we may
23 introduce in a deposition or at a hearing are
24 documents that are first, in the first instance,
25 going to be reviewed by counsel and constitute

1 attorney work product consequently.

2 They reflect the attorney's evaluation of
3 strategy and tactics in a particular proceeding and
4 how to proceed, what documents to introduce out of a
5 range of documents. Nonetheless, we've identified
6 the general range of documents that there are that we
7 possibly might introduce which would include the
8 discovery responses of the parties, SEC filings, a
9 range of documents --

10 EXAMINER PRICE: FCC filings?

11 MR. BERGER: SEC.

12 EXAMINER PRICE: Oh, I'm sorry. Too many
13 acronyms.

14 MR. BERGER: It becomes evident at the
15 time that we file testimony, a certain specificity of
16 the issues that we've created and the focus of our
17 attention in the case. So at that point in time the
18 Company will be certainly well aware of the issues we
19 intend to present and will have exhibits associated
20 with our testimony.

21 The only question will be are they
22 entitled to see what cross-examination exhibits, for
23 example, we might present at the time of the hearing
24 or at the time of deposition. I suggest to you that
25 that's a matter of attorney work product, you know,

1 that would reveal an attorney's strategy and tactics
2 and how to proceed. Thank you.

3 EXAMINER PRICE: So you're claiming
4 privilege as to that?

5 MR. BERGER: At this time, we said our
6 experts have not to date -- I'm sorry, we're looking
7 at --

8 EXAMINER PRICE: RPD 1-2. Are you
9 claiming attorney-client privilege on that?

10 MR. BERGER: We're claiming it's work
11 product, yes.

12 EXAMINER PRICE: Do you have a privilege
13 log?

14 MR. BERGER: At this time we've
15 identified everything that we have, without waiving
16 our objections, so yes.

17 EXAMINER PRICE: Okay. At this time you
18 have supplemented the discovery requests and told
19 them everything you intend to use?

20 MR. BERGER: Yes. We stated without
21 waiving any specific or general objections and we
22 listed five categories of information: DP&L's
23 responses to discovery requests of the parties; DP&L
24 and AES filings with the SEC; DP&L filings and/or
25 discovery responses in previous proceedings

1 reflecting its financial condition; stipulations
 2 between parties in previous proceedings involving
 3 DP&L where DP&L agreed to a specified result; and
 4 Commission opinion and orders and entries in previous
 5 proceedings. These are all the things that we, at
 6 this time, foresee we may introduce as exhibits.
 7 Nonetheless, we are saying that this information is
 8 subject to the attorney work product rule.

9 EXAMINER PRICE: Mr. Sharkey.

10 MR. SHARKEY: Yes, your Honor. Generally
 11 speaking, we're satisfied with the list that was
 12 provided to us by OCC, but we have an objection to
 13 one of the items that OCC lists in its response.

14 One of the items that it lists that it
 15 may use is filings or discovery responses in previous
 16 proceedings. Without case numbers, without
 17 descriptions sufficient for us to identify what
 18 documents it is that it's referring to. So that's
 19 really the --

20 EXAMINER PRICE: So your sole, then, your
 21 sole issue remaining on the motion to compel is which
 22 proceedings they intend to introduce discovery
 23 exhibits from.

24 MR. SHARKEY: Yes. We'd like them to be
 25 compelled to identify with sufficient specificity the

1 filings or discovery responses in previous
2 proceedings so that we could determine what documents
3 those are. That's the remaining dispute.

4 EXAMINER PRICE: OCC can agree to that?

5 MR. BERGER: Well, it was my
6 understanding that Ms. Grady had spoken with
7 Mr. Sharkey about what proceeding in particular and
8 he had indicated that, I think it was -- oh, that's
9 not that one. We'll provide the case numbers, your
10 Honor.

11 EXAMINER PRICE: If you get the case
12 numbers, is that sufficient?

13 MR. SHARKEY: That is, your Honor.

14 EXAMINER PRICE: Okay. One out of the
15 way.

16 EXAMINER MCKENNEY: Mr. Sharkey, we're
17 going to move on to 1-5 and 1-6; is that correct?

18 MR. SHARKEY: Yes, your Honor. That's
19 Request for Production 1-5 and 1-6.

20 1-5 sought communications between IEU and
21 its members relating to the ESP application. DP&L
22 withdraws that motion to compel. Those documents
23 have been provided.

24 1-6, your Honor, seeks IEU's
25 communications with its members relating to DP&L's

1 MRO application. As an initial matter, your Honor,
 2 of course, neither IEU nor its members are attorneys.
 3 We believe those communication aren't privileged.
 4 I'm not sure if IEU is standing on a privilege
 5 objection or not. My understanding is that IEU is
 6 standing on an objection that those communications
 7 are irrelevant. We believe that objection is not
 8 meritorious.

9 DP&L's MRO application and ESP
 10 application both sought to implement non-bypassable
 11 charges that would have similar structures. They
 12 both sought to implement competitive bidding that
 13 would be done and similar percentages at a -- in
 14 similar manners. Many of the witnesses were
 15 identical. When DP&L withdrew its MRO application
 16 and filed its ESP application within the same docket,
 17 same case number --

18 EXAMINER PRICE: But that was your
 19 decision, not their decision.

20 MR. SHARKEY: It certainly was. I guess
 21 it's just I --

22 EXAMINER PRICE: The overlapping
 23 witnesses, again, is your decision, not their
 24 decision.

25 MR. SHARKEY: It is, your Honor. But the

1 overlapping nature of it is why we believe those
2 issues are irrelevant. So I suppose you could say
3 the decision to file it in the same case number was
4 purely our decision and may or may not have anything
5 to do with its relevance.

6 But the fact is those two applications
7 were highly related and, thus, communications IEU had
8 with its members as to the MRO application are, you
9 know, reasonably calculated to lead to admissible
10 evidence in this case, your Honor, relating to DP&L's
11 ESP application in light of the fact that the two --
12 the structures of the two applications were so
13 similar.

14 EXAMINER PRICE: But it is also true,
15 though, that they have different statutory tests,
16 don't they? I mean, the MRO application is going to
17 be held to one standard and the ESP application is
18 going to be held to an entirely different standard.

19 MR. SHARKEY: There are some different
20 statutory tests, you're certainly right, your Honor,
21 but there's also very similar underlying factual
22 issues that may relate to those tests.

23 For example, rate blending is provided in
24 the MRO statute, as your Honor knows. The ESP plan
25 that DP&L has proposed, proposes to satisfy its SSO

1 obligations through the implementation of a rate
2 blending plan. That is just one of the many
3 similarities between the two cases. So we believe
4 that it clears the, what you've described earlier,
5 your Honor, as the minimal relevance bar.

6 EXAMINER PRICE: Mr. Pritchard.

7 MR. PRITCHARD: Yes, your Honor.
8 IEU-Ohio has produced all communications it has with
9 its members that were not privileged that relate to
10 the ESP.

11 In regards to the MRO application, we
12 filed a protective -- a motion for protective order
13 because we don't believe that any of that information
14 would be relevant.

15 And we are claiming privilege. DP&L's
16 brief has argued that privilege cannot attach because
17 IEU-Ohio and the members are neither law firms. We
18 are claiming privilege to documents that contain
19 audio recordings of meetings between the IEU-Ohio
20 members and their counsel. These are similar to
21 documents we've already provided to DP&L. We have
22 monthly meetings.

23 EXAMINER PRICE: Do you have a privilege
24 log?

25 MR. PRITCHARD: Yes. And a document of

1 the audio recordings.

2 EXAMINER PRICE: Can we have it?

3 Thank you.

4 MR. PRITCHARD: I apologized to
5 Mr. Sharkey earlier that I did not provide him a
6 privilege log, but there are seven documents that are
7 identified and those are the recordings of IEU-Ohio
8 meetings.

9 We have monthly meetings. An open
10 session in the morning that is not confidential. We
11 have provided all those audio recordings that relate
12 to the ESP. In the afternoon of our monthly meetings
13 we have closed, confidential sessions where counsel
14 provides legal advice and recommendations to the
15 clients, and the clients weigh that evidence and
16 provide us guidance on how they would like to proceed
17 with cases. Those are what the recordings are.

18 Many of the recordings are not specific
19 to DP&L's ESP. The meetings, the recordings are an
20 hour to two hours long that we discuss various
21 ongoing cases including the ESP application.

22 EXAMINER PRICE: Can you respond to
23 Mr. Sharkey's argument that because the ESP and the
24 MRO have overlapping subject matters that you
25 should -- that that should clear the reasonably

1 calculated to lead to admissible evidence standard?

2 MR. PRITCHARD: I would point out, your
3 Honor, that they haven't asked for any subject matter
4 of overlapping information. They've asked for all
5 communications related to that.

6 As you pointed out earlier, there are
7 many parts of the MRO that would not be related to an
8 ESP application. We've indicated in e-mails to DP&L
9 that we thought their requests were overly broad and
10 suggested that they provide more specific requests so
11 that we could provide more specific responses.

12 I don't believe that the MRO application
13 would be relevant in any event or that the IEU-Ohio
14 communications about the MRO would be relevant. It's
15 an application that never proceeded to hearing.
16 There is no order in the case. And since the onset
17 of the case, settlement discussions were going on.
18 There was no testimony filed by any intervenors in
19 this case. It's just a matter that parties were
20 trying to settle and was not resolved.

21 EXAMINER PRICE: Thank you.

22 MR. SHARKEY: May I respond briefly, your
23 Honor?

24 As to the open portions of the meetings
25 related to the MRO application, we don't have those

1 materials either, so I believe there is no privilege
2 objection to stand on as to those.

3 And, certainly, as to the closed
4 meetings, if there was legal advice that was being
5 provided by the McNees firm to members of IEU, we
6 would have no objection to that information being
7 redacted or otherwise not provided, but we believe
8 we're entitled to the other information of the closed
9 portions of the meeting.

10 MR. PRITCHARD: You mean open?

11 MR. SHARKEY: It's our position, your
12 Honor, that if it was open to the public that we
13 would be entitled to any and all information that was
14 provided during that portion of the meeting.

15 And as to the closed portion of the
16 meeting, if there's legal advice being provided, I
17 don't know what was in those transcripts or what's in
18 the notes that were provided to you, we wouldn't
19 object to that information being redacted, but we
20 believe the other information should be provided.

21 EXAMINER PRICE: It's audio recordings,
22 not the transcripts.

23 Mr. Pritchard, is it possible to separate
24 out, I guess my question is, the confidential portion
25 of your monthly meetings is that strictly

1 attorney-client advice from beginning to end, or is
2 it a range of topics, some of which involves
3 attorney-client privilege?

4 MR. PRITCHARD: I would say generally
5 almost the entire discussion, if not the entire
6 discussion, is attorney-client privilege. Most of
7 the discussions are not relative to DP&L's ESP in any
8 event. To the extent that you determine any of it
9 needed to be produced, we would request that we have
10 the opportunity to cut the audio files down to only
11 the DP&L portions.

12 As you are aware, DP&L's ESP wasn't filed
13 until October. There's not been many conversations
14 at length about the ESP. What we've given our
15 clients is our legal advice and summaries about where
16 the case stands thus far, where it's likely to go,
17 and the implications of it, and received our clients'
18 advice. I believe that all of our DP&L-related
19 conversations would be privileged, your Honor.

20 And the open sessions in the morning are
21 in the same format that we provided relative to the
22 ESP, so there should be no problem redacting that
23 stuff.

24 EXAMINER PRICE: I guess I'm confused.
25 Have you given him the open sessions?

1 MR. PRITCHARD: We gave him the open
2 sessions for everything related to the ESP. So we
3 gave them the meetings for October, current. We had
4 written minutes and audio recordings from March --
5 or, no, from April forward that would have at least
6 tangentially discussed their MRO application. But we
7 have not produced the non-privileged stuff related to
8 the MRO on the grounds that we don't believe it's
9 relevant.

10 EXAMINER PRICE: You're standing on your
11 relevance claim.

12 MR. PRITCHARD: Correct, your Honor.

13 EXAMINER PRICE: Mr. Sharkey.

14 MR. SHARKEY: Briefly, your Honor. I'm
15 not going to say anything more about the open
16 portions of the meeting; I believe we've fully
17 covered that.

18 We'll accept, as to the closed portions
19 of the meetings related to the MRO, we'll accept
20 Mr. Pritchard's representation that those are
21 attorney-client privileged and we'll save you the
22 trouble or worry of potentially listening to the
23 tapes. So we will continue our motion as to the open
24 portions, but withdraw as to the closed related to
25 the MRO.

1 EXAMINER PRICE: Thank you.

2 Mr. Pritchard, you can have this back. I
3 don't want it. We'll keep the log. You can have
4 your recordings.

5 MR. PRITCHARD: Thank you, your Honor.

6 EXAMINER PRICE: Thank you.

7 EXAMINER MCKENNEY: Mr. Sharkey, are you
8 ready to move on to RPD 1-7?

9 MR. SHARKEY: Yes, your Honor. This same
10 issue is also in the pending motion to compel OCC;
11 that's item 1-11. It deals with communications
12 between the parties to the case. In essence what we
13 have asked in our discovery request is that
14 communications between parties to the case be
15 produced.

16 We either strongly suspect or know that
17 there have been extensive communications because, for
18 example, your Honor, there have been numerous joint
19 applications, joint motions, et cetera, filed
20 throughout the course of the case.

21 So far between IEU and OCC, I am holding
22 the entirety of the documents that have been produced
23 in response to our request for their communications
24 with other counsel. It's -- excluding the cover
25 e-mail to me that was from Debra Bingham, who is one

1 of the representatives of OCC, I don't know if she's
2 a secretary or what, but she is who sends us all of
3 the things, there's four pages, four pieces of paper
4 here, your Honor. We believe we're entitled to
5 communications that IEU has had with other parties to
6 the case and OCC has had with other parties to the
7 case.

8 EXAMINER PRICE: Mr. Pritchard.

9 MR. PRITCHARD: Yes, your Honor. We have
10 produced the IEU-Ohio communications to DP&L. We
11 don't believe that there is anything responsive to
12 this request about IEU-Ohio's communications that
13 they don't already have.

14 EXAMINER PRICE: When you say "IEU-Ohio's
15 communications," are you strictly referring to
16 Mr. Murray's communications as executive director, or
17 are you referring to Mr. Pritchard and Mr. Olier and
18 Mr. Darr in your capacity as counsel for IEU?

19 MR. DARR: You forgot Mr. Randazzo.

20 EXAMINER PRICE: I was getting to him
21 eventually.

22 MR. PRITCHARD: We believe the request
23 sought IEU-Ohio's communications itself and not
24 communications for counsel. So we believe we've
25 produced IEU-Ohio's communications, your Honor. And

1 I can state that in his role as executive director,
2 Kevin Murray does not have any communications.

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

5 MR. SHARKEY: Yes, your Honor. We
6 believe that we would be entitled not only to
7 communications that had Kevin Murray as a "to" or a
8 "from," but also if it had Mr. Murray as a "cc" on a
9 particular e-mail. And, in addition, we believe that
10 we would be entitled to any items that were
11 communication, for example, between Mr. Randazzo and
12 an attorney at OCC that were forwarded to Mr. Murray,
13 to Kevin.

14 We wouldn't be entitled to, for example,
15 if Sam Randazzo says look at what I've got, it says
16 such and such and such and such, I think that's a
17 good idea or a bad idea. I think those should be
18 redacted as communications between Mr. Randazzo and
19 Mr. Murray as attorney-client communications. No
20 objection there.

21 But the fact that there were other
22 communications that would not be privileged
23 communications, we would be entitled to those, we
24 believe, your Honor.

25 EXAMINER PRICE: Mr. Pritchard.

1 MR. PRITCHARD: Yes, your Honor. Again,
2 Kevin Murray is an employee of our law firm, and as
3 his role as executive director of IEU-Ohio the only
4 communications that exist are the audio recordings,
5 the confidential and the closed session.

6 He has not sent out or received or been
7 copied on any communications as his role as executive
8 director of IEU-Ohio. And we don't believe that they
9 have requested e-mails between counsel in this case.

10 EXAMINER PRICE: OCC care to respond to
11 Mr. Sharkey?

12 MR. BERGER: Your Honor, we were relying
13 on Mr. Pritchard's arguments here with respect to IEU
14 because those are -- our communications are the ones
15 with IEU regarding various joint motions that were
16 filed and he has indicated that his understanding,
17 it's our understanding that the ones between counsel
18 are not being requested and we have no communications
19 with Mr. Murray.

20 We're also assuming that settlement
21 communications that were made between the parties are
22 not being requested. If they are, we need to be
23 informed of that because we object on the basis that
24 those settlement communications would be
25 confidential. Thank you.

1 EXAMINER PRICE: Mr. Sharkey.

2 MR. SHARKEY: Yes, your Honor. As to
3 OCC, our request wasn't communications between OCC
4 and Kevin Murray; it was between OCC and any of the
5 parties to the case.

6 I understand Mr. Pritchard's argument to
7 be that Mr. Murray doesn't have, in his capacity as a
8 executive director, didn't receive any such e-mails.
9 I'm not sure if he received such e-mails or not;
10 that's a capacity question -- argument by
11 Mr. Pritchard. But as to OCC, whether Mr. Murray
12 received those documents and in what capacity is
13 irrelevant.

14 OCC has exchanged, we believe, numerous
15 e-mails with numerous other parties relating to
16 preparation of motions, applications, and I suspect
17 enumerable other issues.

18 As to the question raised by OCC's
19 counsel as to the settlement communications, we would
20 not ask for settlement communications that OCC had
21 related to other parties, but we believe we're
22 entitled to any other and all communications that OCC
23 has with other parties to the case.

24 EXAMINER PRICE: I just need some
25 clarification, Mr. Sharkey. You're asking for any

1 communications between OCC and any other party, but
2 you're not necessarily asking for any communications
3 between IEU's counsel and any other parties; is that
4 right?

5 MR. SHARKEY: IEU and OCC, in one sense,
6 sit in a little bit different positions because --

7 EXAMINER PRICE: I'm just asking for
8 clarification.

9 MR. SHARKEY: Yes. Okay. Yes, your
10 Honor. IEU is an entity that is represented by a law
11 firm. So we served discovery requests on IEU as to
12 its communications and so I believe those are what
13 we're entitled to.

14 OCC is also a party unto itself, so we're
15 entitled to communications between OCC and other
16 parties.

17 MR. BERGER: Just on that, your Honor, we
18 have provided a number of documents relating to our
19 communications with other persons, I think is the
20 question. Certainly communications with the public
21 that we've had, we have provided those
22 communications. In terms of communications between
23 OCC and other parties, again I believe he's accepting
24 communications between OCC counsel and counsel for
25 other parties. If I'm misstating that --

1 EXAMINER PRICE: No, I don't think he is.

2 MR. SHARKEY: You are correct, your
3 Honor. I am not excluding those communications.

4 EXAMINER PRICE: Do you have responsive
5 communications between OCC and other parties'
6 counsel?

7 MR. BERGER: I believe we do.

8 MS. YOST: May I address?

9 EXAMINER PRICE: You may.

10 MS. YOST: Your Honor, part of OCC's
11 response was the interpretation of IEU's motion for
12 protection. We interpreted that part of that motion
13 for protection was to protect the communications that
14 we have had with IEU. There's been, as Mr. Sharkey
15 says, we have done numerous pleadings as a joint
16 entity. So to the extent that we felt numerous
17 communications were subject to that motion for
18 protection that we were not going to turn over any
19 documents until that motion for protection was ruled
20 on.

21 Notwithstanding that, in addition to
22 that, as Mr. Berger said, a lot of the communications
23 are amongst numerous intervenors in regards to
24 proposals, settlement proposals.

25 EXAMINER PRICE: They're not asking for

1 settlement proposals.

2 MS. YOST: I'm sorry?

3 EXAMINER PRICE: They're not asking for
4 settlement proposals.

5 MS. YOST: And I appreciate that
6 clarification.

7 I guess my next issue would be in regards
8 to a lot of the joint pleadings we have done, some of
9 the communications have had attached pleadings which
10 incorporate certain attorneys' edits, drafts, and
11 those go back and forth. Under Ohio law, you know,
12 the attorney-client privilege is not waived unless
13 there's specific statutory mechanisms to waive that
14 privilege, and the Supreme Court has held that
15 sharing of attorney-client privileged advice or
16 information does not waive that privilege.

17 So to the extent they have shared it, my
18 interpretation of Ohio law is that privilege is not
19 waived. So to the extent that an attorney's edits to
20 a document would reveal attorney-client information,
21 we would also be not willing to produce that.

22 EXAMINER PRICE: Do you have a privilege
23 log for communications that would be discoverable but
24 for your privilege claim?

25 MS. YOST: Well, to the extent that maybe

1 Mr. Sharkey --

2 EXAMINER PRICE: That's a yes or no
3 question. Do you have a privilege log?

4 MS. YOST: No. Because most of those
5 edits are not our edits. Most of the documents were
6 drafted by IEU; they were the main author of a
7 majority of the documents. Ultimately, all the
8 documents were filed in final form. Whether or not
9 Mr. Sharkey is seeking those drafts, that's something
10 maybe he could answer and then we could be more
11 responsive.

12 EXAMINER PRICE: We'll give him a chance
13 to respond.

14 MR. SHARKEY: Your Honor, I think our
15 request was reasonable when we asked for
16 communications between OCC and any other party of the
17 case, that we would be seeking all of those
18 communications. In prior communications I hadn't
19 heard an objection to producing settlement
20 communications, but we understand and will not seek
21 if they were exchanging settlement offers amongst
22 themselves; we believe that's something we're not
23 entitled to. But, your Honor, we certainly think
24 we're entitled to any communications in between the
25 parties.

1 And the issues as to IEU, whether they
2 have access to the documents, are very different than
3 OCC. OCC certainly has access to all of the
4 documents that were requested.

5 EXAMINER PRICE: Do you care to respond
6 to their privilege claim?

7 MR. SHARKEY: Yes, your Honor. I
8 apologize, your Honor, I didn't --

9 EXAMINER PRICE: The communications
10 between attorneys for the various parties are
11 privileged and they've not been waived because they
12 haven't been communicated between the third parties.

13 MR. SHARKEY: First of all, your Honor, I
14 guess there's two points. One, there's certainly a
15 common interest privilege and the Ohio Commission has
16 recognized it. But to have a common -- to assert a
17 common interest privilege you need to show a common
18 interest as to the communication. Without a
19 privilege log and without the documents, we don't
20 know who was on the communications and, thus, we
21 don't know if there was a common interest as to the
22 particular communications.

23 But, your Honor, there are many parties
24 to this case who have many divergent interests, some
25 of which are not customer interests at all, and we

1 believe that to the extent any of those parties were
2 copied on any of those communications that then the
3 underlying communications would not be privileged,
4 which is, I guess, my first response, your Honor.

5 My second response, your Honor, is the
6 Commission recently held, it's In the Matter of the
7 Application of Ohio Edison Company, Case No. 10-176,
8 that if a party shows up to one of these hearings
9 without the documents and/or a privilege log that the
10 privilege is waived and the documents must be
11 produced.

12 EXAMINER PRICE: So we have.

13 MR. PRITCHARD: May I respond, your
14 Honor?

15 EXAMINER PRICE: I'm not sure why you're
16 -- it's relevant to you, but go ahead.

17 MR. PRITCHARD: The privilege claim is
18 between privileged communications between them and
19 our counsel for IEU-Ohio. Their privilege is our
20 privilege as well that they are raising under the
21 common interest doctrine, your Honor. And we have
22 brought a privilege log of those communications and
23 the communications themselves.

24 And to address the common interest issue,
25 all the intervenors that were sent on these e-mails

1 have met during the MRO proceeding, during the
2 settlement negotiations, crafted settlement
3 proposals, discussed settlement, their position with
4 the Company, and therefore --

5 EXAMINER PRICE: You guys keep saying,
6 "settlement." DP&L has said clearly they're not
7 asking for settlement documents.

8 MR. PRITCHARD: They say there's no
9 interest among these parties. We're the same parties
10 that got together --

11 EXAMINER PRICE: You've got different
12 settlement and litigation interests. I'm not going
13 to accept that your settlement interests and your
14 litigation interests are the same.

15 MR. OLIKER: Your Honor, I'm sorry, if I
16 may interject for one moment, please.

17 EXAMINER PRICE: You may.

18 MR. OLIKER: If you look at the pleadings
19 that have been exchanged between the parties, there
20 have been main themes, the non-bypassable charge,
21 customer parties and marketers as well can solidify
22 around the principle that Dayton Power and Light does
23 not deserve a non-bypassable charge to stabilize its
24 market principles, and it causes more people to pay,
25 and everybody who has signed these pleadings or

1 looked at these pleadings has a common interest.

2 As well as the procedural schedule, which
3 was another pleading, everybody has a right and a
4 common interest in a fair procedural schedule. And I
5 believe that these parties all were in agreement that
6 they could support a similar concept.

7 MS. YOST: Your Honor?

8 EXAMINER PRICE: Yes.

9 MS. YOST: I just want to clarify. I
10 never indicated I didn't bring a log. I'm just not
11 calling it a privilege log. My concerns are these
12 may not be our documents or our privilege to release.
13 So I have a log of the communications; I have brought
14 that. I have brought the correspondence. Some of
15 the attachments of the actual documents that were
16 draft are not included, but I have a log and I can
17 provide that.

18 I would also like to provide the Supreme
19 Court case law that I was referring to, from 2005.
20 May I approach the Bench and provide a copy?

21 EXAMINER PRICE: You may.

22 MS. YOST: I'll provide a copy to
23 Mr. Sharkey, too. Paragraph 11 is what I'm referring
24 to.

25 EXAMINER PRICE: Have you given

1 Mr. Sharkey the log?

2 MS. YOST: Yes, I should have given it to
3 him. Sorry, it's not stapled. And we have numerous
4 documents and this is the most recent log, but we are
5 adding to it with every e-mail we get.

6 MR. SHARKEY: I apologize, your Honor,
7 I've not received a copy of the log. Is that --

8 MS. YOST: Yeah, I'm going to bring you
9 one.

10 MR. SHARKEY: Thank you.

11 EXAMINER PRICE: Mr. Pritchard, while
12 we're taking this break, why don't you distribute
13 your privilege log also.

14 MR. PRITCHARD: We had only brought one
15 copy of the log of documents for your Honor.

16 MR. OLIKER: I could probably trouble
17 docketing, your Honor.

18 EXAMINER PRICE: We'll get to that then.

19 MS. YOST: Your Honor, in regards to
20 paragraph 11, that kind of sums it up. In essence,
21 the attorney-client privilege is not waived by
22 sharing the information with the third party. The
23 Supreme Court has held that one of the provisions in
24 the Ohio statute must be -- are the only mechanisms
25 to waive that privilege.

1 This is a different view than what I
2 think we all were taught in law school, but I
3 Shepardized this case and it's still good law.

4 So to the extent that attorneys were
5 sharing their attorney-client information with us,
6 under recent Supreme Court law that was not a waiver
7 of that privilege.

8 EXAMINER PRICE: Mr. Sharkey.

9 MR. SHARKEY: Briefly, your Honor. The
10 privilege log that was distributed by Ms. Yost, I
11 believe is inadequate to establish privilege. Simply
12 because we have a sending party and a receiving
13 party, I assume that these are principally e-mails,
14 but we don't have any indication of who received
15 copies of the various documents. And again, many of
16 the topics related to settlement communications, and
17 we're not seeking those.

18 But without an ability to identify who
19 all the copies were and determine whether in fact
20 they in fact had a common interest with, in this
21 case, OCC, we believe we're entitled to the
22 documents.

23 And also, I'm not sure, I don't
24 understand if they were -- the documents were or were
25 not produced. I apologize. I don't know if I heard

1 Ms. Yost address that question. Maybe she did and I
2 missed it.

3 MS. YOST: We have the documents here.

4 EXAMINER PRICE: She has the documents.

5 MR. SHARKEY: Okay. Thank you.

6 MS. YOST: My concerns are not in regards
7 to asserting a joint defense privilege or common
8 interest privilege. It's just the matter of some of
9 these documents that were provided to us are edits of
10 attorneys and it's their attorney-client information
11 and it's not waived by sharing it with a third person
12 under Ohio law. That's my point. Nothing beyond
13 that. Thank you.

14 EXAMINER PRICE: Mr. Sharkey.

15 MR. SHARKEY: Briefly, your Honor. If,
16 for example, IEU provided, even under this argument
17 that Ms. Yost has identified, and I need to read and
18 research further about it, but even under that theory
19 that means that we couldn't send a discovery request
20 to IEU saying give us your privileged communications,
21 but you can still stand on a privilege objection.
22 But Ms. Yost can't assert IEU-Ohio's privilege
23 objections.

24 EXAMINER PRICE: Do you care to respond
25 to the case that Ms. Yost cited or is this the first

1 you've seen it?

2 MR. SHARKEY: It's the first I've seen
3 it, your Honor. I'd have to read it and read it as
4 to how the facts have been applied. I don't have
5 anything to say in response to it.

6 EXAMINER PRICE: Okay.

7 EXAMINER MCKENNEY: Do you have something
8 further?

9 MS. YOST: Just briefly. Again, you
10 know, our first notion was that these documents were
11 protected under the motion for protection filed by
12 IEU. Second, I'm not calling it a privilege log.

13 EXAMINER PRICE: I understand.

14 MS. YOST: It's a log of communications.

15 EXAMINER PRICE: I understand.

16 MS. YOST: Thank you.

17 EXAMINER MCKENNEY: Ms. Bojko?

18 MS. BOJKO: Your Honors, if some of us
19 that are named on this privilege log can speak. I
20 know it's not our motion for protective order, but I
21 think that public policy would dictate that you don't
22 want us all to file a motion for protective order on
23 these documents and on this issue and that is why I
24 think many of us are still in the room, though, to
25 protect our interests.

1 It has been a longstanding Commission
2 policy to have people with a common interest, or I
3 don't want to use a common interest agreement, so to
4 speak, but people that can rally around a certain
5 issue or topic, such as a procedural schedule, could
6 come together and jointly file pleadings and motions
7 in front of this Commission in order to save the
8 Commission the time and expense, as well as parties'
9 time and expense.

10 In fact, some of the intervention
11 standards that we have put before us do just that
12 which is try to prevent people from having counsel
13 litigating multiple times on multiple issues. In
14 discovery requests, we're supposed to read everybody
15 else's requests before we also submit discovery
16 requests, also not to duplicate efforts.

17 I think it's been a longstanding
18 Commission policy to do that and I would hate to see,
19 whether you want to call it attorney-client
20 privilege, work product, up until drafts are actually
21 filed, things of this nature, I think this is a
22 slippery slope and I think it's going to discourage
23 parties to come together to do common interest kind
24 of pleadings.

25 EXAMINER PRICE: I understand that, but

1 the parties aren't giving us any -- and I understand
 2 what you're saying, but you're not giving the bench
 3 any way to differentiate the sort of communications
 4 that you're talking about that commonly have been
 5 allowed and not been discoverable and not dredged up
 6 in anything else. What we're hearing is broad claims
 7 of common interest and we all have a common interest
 8 against DP&L and that everything is subject to that.

9 So you're not really giving us an
 10 opportunity to make anything -- to distinguish
 11 between talking about a procedural schedule versus
 12 things that may or may not be waiving attorney-client
 13 privilege subject to the case that Ms. Yost would
 14 like us to follow.

15 MS. BOJKO: Your Honor, I think the
 16 privilege log that was just handed to you --

17 EXAMINER PRICE: It's not a privilege
 18 log.

19 MS. BOJKO: I'm sorry. The document --

20 EXAMINER PRICE: It's a log.

21 MS. BOJKO: The log that was just handed
 22 to you does do that in some respect; it tells
 23 specifically a procedural schedule. But I would also
 24 say that if you look at the actual documents that
 25 have been filed in the record you will see joint

1 documents and you will see that there had to be some
2 kind of coordination to arrive at those joint
3 documents that are filed.

4 But my point of interjecting was more to
5 say just because the parties didn't file a protective
6 order to protect those interests, we are trying to
7 save the Commission's time as well as the parties'
8 expense and be present here to protect those
9 interests. I would like the record to reflect that
10 we have not waived any of those by not filing a
11 motion for protective order, and we can do that if
12 that's the Court's desire for us to do that, your
13 Honor's desire.

14 EXAMINER PRICE: Mr. Sharkey, last word
15 on this?

16 MR. SHARKEY: Nothing further from me,
17 your Honor.

18 EXAMINER MCKENNEY: Mr. Sharkey, let's go
19 ahead and move on to the next one. I have Request
20 for Production 1-8 and also 1-12; is that correct?

21 MR. SHARKEY: Yes, your Honor. Those two
22 requests, the first one directed to IEU, and the
23 second one directed to OCC, raise substantially the
24 same questions as this, only the issues relate to
25 communications relating to the AEP ESP order, so I

1 don't feel the need to reargue it.

2 I'll also say that this morning OCC has
3 provided, via e-mail, documents that they state were
4 responsive and has handed to me this morning -- I'm
5 sorry, in advance of this conference, a privilege
6 log. I've not had an opportunity to carefully review
7 or respond to those, so I'm not able, today, to
8 respond, really, to those because I just received
9 them earlier today.

10 EXAMINER PRICE: I'm having trouble
11 getting over the relevance hurdle on communications
12 regarding AEP. Maybe you can help me with that.

13 MR. SHARKEY: Certainly, your Honor.

14 We believe that the AEP case was an ESP
15 proceeding that had, within it, certain
16 non-bypassable charges, a stability charge designed
17 to arrive at a stabilization rider pursuant to the
18 same statute, so it's the same facts and the same
19 statute, and that AEP also had blending schedules
20 there, so we believe that we would be entitled -- we
21 believe that the case is similar, it's precedential,
22 and that the communications --

23 EXAMINER PRICE: What would you do with
24 these communications?

25 MR. SHARKEY: Your Honor, once we saw

1 them, you know, we would know a better answer to
2 that, but we believe that they may contain admissions
3 that would be useful to us in this case and analysis
4 in this case, your Honor.

5 EXAMINER PRICE: I'm troubled by the
6 answer of we'll figure out what we would do with them
7 once we see them. That's not going to get you over
8 reasonably calculated to lead to admissible evidence.

9 MR. SHARKEY: Well, your Honor, without
10 -- given the similarities between the two cases, we
11 believe that they may. Without having seen the
12 documents we can't know what specifically is in
13 there, but we believe that it's reasonably calculated
14 to lead to evidence that would be admissible; maybe
15 or maybe not, but we don't know until we see the
16 documents and see what's there.

17 MS. GRADY: Your Honor, Mr. Sharkey was
18 correct in his representation that we supplemented
19 that response this morning. We provided 37 pages of
20 information to respond to the discovery, even though
21 we do believe it is not reasonably calculated to lead
22 to the discovery of admissible evidence. For
23 purposes of good faith and pushing things forward, we
24 did respond.

25 On the reasonably-calculated issue, I

1 would note that, your Honor, if we get into a
2 position -- or, we get into a ruling where your
3 Honors rule that a case or any other cases related to
4 any other party's case, we could be talking about a
5 huge burden being placed on parties to respond to any
6 case that had a relevant issue that someone believed
7 related to another party's filing case. I think we
8 would be in a very burdensome and difficult position
9 if we were required to do so.

10 Having said all that, I do have copies,
11 should the Bench desire, I do have copies of the
12 privilege log for this, for our responses to Request
13 for Production No. 12, along with the documents in
14 question.

15 EXAMINER PRICE: Please.

16 Mr. Sharkey, would you care to respond to
17 the slippery slope to an undue burden?

18 MR. SHARKEY: Briefly, your Honor. We've
19 asked for communications limited to one specific
20 case. I don't believe this request is unduly broad
21 or unduly burdensome. It's certainly possible if we
22 said any -- all communications related to any case
23 pending before the proceeding, that may be overly
24 broad and unreasonable, but that's not what we asked
25 for.

1 MS. GRADY: Your Honor, if I could add.
 2 I did also provide, as part of our objection, we
 3 objected on the basis of privilege. And I do
 4 provide, your Honors, the Bench with a copy of the
 5 joint defense agreement that was reached between OCC
 6 and the parties that would impact upon the confident
 7 -- or, the privilege log.

8 Several of the documents listed on the
 9 privilege log were e-mail communications between OCC
 10 and representatives of APJN, an intervenor which OCC
 11 was engaged in a joint defense agreement with,
 12 executed on 9/20/11.

13 EXAMINER PRICE: Thank you.

14 EXAMINER MCKENNEY: Mr. Pritchard.

15 MR. PRITCHARD: Yes. With regards to
 16 their motion to compel us. This was a topic that we
 17 filed and discussed in our motion for protective
 18 order. We claimed that they failed to demonstrate
 19 any connection link between the cases. They have
 20 not, in response to our motion for protective order,
 21 identified any specific connection and they haven't
 22 asked for any specific connection once they did
 23 identify them.

24 There are various aspects of the AEP case
 25 that would have nothing to do with this case. For

1 instance, AEP requested a distribution investment
2 rider. Anything IEU-Ohio would have in its
3 possession related to that wouldn't affect any of
4 their proposals in this case.

5 Moreover, we've brought our privilege log
6 of IEU-Ohio's communications, and again it's going to
7 be the confidential closed-session meetings. We
8 could bring that up to your Honor, unless they are
9 not seeking that.

10 And then the other IEU-Ohio
11 communications we would have would be the open
12 meetings in the morning, but we don't believe that
13 information is relevant.

14 EXAMINER PRICE: Mr. Sharkey.

15 MR. SHARKEY: Very briefly, your Honor,
16 because many of the points I've already responded to.
17 We would happily narrow our request to communications
18 relating to the non-bypassable charge that was
19 approved in the ESP order, I forget the name, but
20 everybody in the room is familiar with the charge,
21 and anything relating to any rate blending. So, for
22 example, we would drop any requests that were related
23 solely to the distribution investment rider or
24 anything other than those two subjects.

25 EXAMINER PRICE: Are the parties willing

1 to, subject to what Mr. Sharkey just said, tender
2 documents, or are you standing on relevance and other
3 objections?

4 MR. PRITCHARD: We are standing on our
5 relevance objection with regard to non-bypassable
6 charges and the MRO. We still don't believe any of
7 IEU-Ohio's communications about the AEP proposal,
8 regardless of the charge.

9 EXAMINER PRICE: Thank you.

10 MS. GRADY: Your Honors, we have provided
11 all documents that are responsive, regardless of our
12 objections, standing objection on relevance, the only
13 documents not produced are those set forth in the
14 privilege log.

15 EXAMINER PRICE: Thank you.

16 EXAMINER MCKENNEY: Mr. Sharkey, RPD
17 1-13.

18 MR. SHARKEY: Yes. Thank you, your
19 Honor. Request for Production 1-13 asked for
20 communications relating to OCC's experts. Just to
21 clarify, we're not seeking communications between
22 OCC's counsel and its internal experts, but we
23 believe we would be entitled to communications that
24 OCC's internal experts had with third parties related
25 to this case again. And also that any communications

1 with anyone from OCC to any external experts that OCC
2 has engaged, I believe they've engaged two or three
3 external experts.

4 EXAMINER PRICE: You want communications
5 between OCC and the experts they've retained to
6 testify in this case?

7 MR. SHARKEY: Yes, your Honor.

8 EXAMINER PRICE: Consumers' Counsel.

9 MR. BERGER: Your Honor, the
10 communications between OCC and the experts we've
11 retained in this case would constitute attorney work
12 product and we do have a privilege log with respect
13 to those communications here.

14 And with respect to any communications
15 between and among our outside experts, we represent
16 that there have been no such communications, no such
17 written communications, so there would be nothing to
18 produce in that respect.

19 It's my understanding that those are --
20 with respect to any communications between OCC's
21 in-house analysts and other persons, I think those
22 are largely confined to communications that those
23 in-house people had with representatives of IEU that
24 we thought were going to be subject to the motion for
25 protective order that IEU had filed, so.

1 And we've already provided a list of
2 documents related to that, I believe. But we don't
3 think that those should be subject for the same
4 reasons that Ms. Yost has already indicated. Those
5 are subject to the common interest exception --
6 common interest privilege. Thank you.

7 MR. SHARKEY: Upon further reflection,
8 your Honor, Mr. Berger is right that the second
9 category I listed would be a subcategory of the
10 earlier topics. I don't think we need to address
11 that any further. He's right on that point.

12 As to the former point, though, we
13 believe -- let me step back.

14 Ms. Grady mentioned to me earlier, at
15 least in other cases, and I don't know about this
16 case or not, that OCC had non-testifying experts.
17 It's our belief and our position that such
18 communications would be work product. That's one of
19 the classic definitions of work product. We're going
20 to sit on a similar work product objection later. So
21 we're not seeking those types of communications.

22 But we believe the communications with
23 the testifying experts we would be entitled to see.
24 For example, what information those experts have been
25 provided, what they've relied upon, what arguments

1 they've been asked to provide, we'd be entitled to
2 all of those communications, your Honor.

3 And, again, to be clear --

4 EXAMINER PRICE: I understand that you're
5 entitled to discovery regarding their expert
6 witnesses and who they are and what their background
7 is and what they intend to testify and what they
8 intend to rely on.

9 It seems that your request is broader
10 than that and entails any communications that you're
11 talking about. Are you talking about the contract
12 from OCC and the expert? How much they're being
13 paid? Anything they're being asked to look into? Is
14 that what you're talking about?

15 MR. SHARKEY: We're seeking all of the
16 communications, your Honor, because we think we'd be
17 entitled to use those communications. You know, we
18 don't know what those communications are, but, for
19 example, if the attorney had directed the witness to
20 particular information or made representations or
21 provided information, I think we're entitled to see
22 all of that because, in the end, any communication
23 they've had related to the case they're going to be
24 relying upon, it's our belief.

25 EXAMINER PRICE: Do you have any

1 Commission precedence of similar requests being
2 granted as to what you're asking here?

3 MR. SHARKEY: I am not aware of any as I
4 stand here, your Honor. I apologize.

5 EXAMINER PRICE: No problem.

6 MR. BERGER: Your Honor --

7 MR. SHARKEY: May I finish? I'm also not
8 aware of any Commission precedent rejecting such a
9 discovery request either.

10 EXAMINER PRICE: Thank you.

11 MR. BERGER: I believe that everything
12 he's talking about is trial preparation material
13 prepared in anticipation of litigation, usually based
14 upon the attorney's instructions as to what the
15 attorney in OCC would want that person to do.

16 And, you know, obviously there's an
17 independent element that the expert has there, but
18 it's prepared in anticipation of litigation and it
19 reflects the attorney's evaluation of strategy and
20 tactics and therefore it's subject to attorney work
21 product. Thank you.

22 EXAMINER PRICE: Mr. Sharkey, go ahead.

23 MR. SHARKEY: Your Honor, I believe we're
24 entitled to test the independence, whether these
25 experts are offering opinions that they, themselves,

1 have come with or have been asked to sponsor. We
2 believe we could use potential communications to
3 impeach those experts.

4 I'd also say that we at DP&L have both
5 testifying and non-testifying experts and we have
6 responded to numerous discovery requests asking for
7 information provided to our testifying experts and
8 we've provided that every time.

9 EXAMINER PRICE: Thank you.

10 EXAMINER MCKENNEY: Mr. Sharkey, I
11 believe that concludes all the things that were in
12 that motion; is that correct?

13 MR. SHARKEY: You are correct, your
14 Honor.

15 EXAMINER MCKENNEY: All right. The next
16 motion, I believe, I seemed to have lost track
17 slightly. Is it OCC's motion to compel?

18 MS. GRADY: Yes, your Honor. We have two
19 motions to compel.

20 EXAMINER MCKENNEY: Let's go ahead and
21 start with those.

22 EXAMINER PRICE: Let's go off the record
23 for one second.

24 (Off the record.)

25 (Recess taken.)

1 EXAMINER MCKENNEY: While we were off the
2 record, Mr. Sharkey indicated he would like to make
3 some clarifying statements.

4 MR. SHARKEY: Yes, your Honor. Two of
5 them. One, going back to the cost-savings point that
6 I had colloquially with Attorney Examiner Price.
7 Just to clarify, DP&L has and has provided to you a
8 stack of documents that are all of its documents
9 relating to an extensive exercise that The Dayton
10 Power and Light Company engaged in to reduce its
11 costs. You have all of those documents where DP&L
12 has made concerted efforts.

13 But, to be clear, there are undoubtedly
14 hundreds and thousands of documents where potentially
15 the subject is where a purchasing agent was saying
16 well, we've been buying this brand of toilet paper,
17 can we save \$2 by switching to that brand, you know.
18 Those are not the types of documents that we
19 understood to be requested and have not been provided
20 to you.

21 So I just want to be clear that any
22 document related to cost savings, which potentially
23 could be innumerable, have not been produced and we'd
24 object as being overly broad. But we do have the
25 analysis that DP&L has done as to sort of more

1 broad-based cost-saving efforts.

2 EXAMINER PRICE: Thank you.

3 MR. SHARKEY: That was the first point.
4 I believe we might have been talking cross each other
5 and I might not have understood you, but off the
6 record I figured the points that you had made.

7 The second clarifying point, your Honor,
8 and I'm not sure this was unclear or not, in terms of
9 OCC's communications with experts, we're seeking only
10 the communications with outside experts. So if, for
11 example, Mr. DeJuan was to be a witness and Ms. Yost
12 sent Mr. DeJuan an e-mail, we're not seeking that.
13 But to the extent they've got outside experts, we're
14 seeking those. I think that was clear.

15 EXAMINER PRICE: It was.

16 MR. SHARKEY: Okay. Somebody asked me a
17 question suggesting maybe it wasn't, so I thought I
18 would clarify.

19 EXAMINER PRICE: That was my
20 understanding.

21 MR. BERGER: Is he seeking outside
22 experts' communications with third persons or
23 in-house people?

24 EXAMINER PRICE: He's seeking any
25 communications between any OCC employee and

1 third-party experts that you have retained for the
2 purposes of this litigation; is that correct?

3 MR. SHARKEY: Exactly right, your Honor.

4 MR. BERGER: And that's what's in our
5 privilege log. Okay.

6 EXAMINER MCKENNEY: All right. OCC.

7 MS. GRADY: Yes, your Honor. Following
8 Mr. Sharkey's lead, I'd ask for the Bench's
9 permission to put points of clarification in, very
10 briefly, with respect to Interrogatory 333 and 334.
11 We had a discussion, quite a lengthy discussion that
12 went on and on. However, I think there's very
13 pertinent information that's come to my attention
14 that we should raise in our arguments.

15 We had a discussion about Mr. Jackson and
16 Mr. Campbell and how they were DP&L Inc. They
17 were -- they had a hat of DP&L Inc. on when they
18 received the information from AES -- from DPL Inc.
19 regarding the goodwill asset impairment. It's my
20 understanding then, the testimony filed in 12-426,
21 Mr. Jackson identifies himself as a senior vice
22 president and CFO of DP&L company, not employed by
23 DP&L Inc.

24 Further, Mr. Campbell, in testimony filed
25 in the fuel adjustment clause proceeding, the case

1 number escaping me, also testified that is he
2 employed by DP&L company as the vice president and
3 controller.

4 EXAMINER PRICE: Mr. Sharkey, it seems
5 like you would like to respond to that.

6 MR. SHARKEY: I would like to respond,
7 your Honor, but I'll be brief because we've covered
8 this to some extent. But there's no doubt that some
9 employees including, for example, Mr. Jackson, may
10 have done work on behalf of both The Dayton Power and
11 Light Company and DPL Inc. As your Honors are well
12 aware, there's corporate separation principles that
13 require time done on various affiliates to be billed
14 to those specific affiliates.

15 The goodwill impairment at issue was at
16 the DPL Inc., the parent level, their time and work
17 related to that parent work, and we, thus, submit to
18 your Honor that it is beyond the scope of discovery.
19 Again, there was a DP&L, the regulated utility, asset
20 impairment and we've provided discovery on that. We
21 believe the goodwill impairment is beyond the scope
22 of discovery.

23 EXAMINER PRICE: Do you want to respond
24 to that?

25 MS. GRADY: No, your Honor. I think

1 we've beat the dead horse.

2 EXAMINER MCKENNEY: Would you like to
3 move forward with the --

4 MS. GRADY: Yes, I would, your Honor. I
5 would focus your Honor's attention on DP&L 33 because
6 I think the document that they provided, the chart of
7 motions to compel is very helpful. This is -- this
8 chart starting on 33, running to 36, relates to
9 documents that they have identified that are
10 responsive to OCC Interrogatories 227, 239, 268, and
11 Request for Production of Documents 33.

12 We believe -- the first point I think to
13 be made is in the motion responding to our motion in
14 opposition to OCC's motion to compel discovery
15 responses, the Company solely claimed that the
16 information was privileged, associated with work
17 product. There was no attorney-client privilege
18 claimed in that motion. We would believe that by
19 failing to claim that attorney-client, it has waived
20 the right and has forgone the opportunity to argue
21 that it is attorney-client that protects them.

22 With respect to the work product, your
23 Honors, we understand -- let me strike that.

24 Under work product, the work product does
25 not absolutely shield information from discovery. If

1 there is good cause shown by a party after the
2 privilege is affirmatively shown, then discovery may
3 be had. We believe there is good cause here.

4 We believe that the evidence that DP&L is
5 seeking to shield are their financial forecasts as
6 they relate to different levels of the service
7 stability rider and different moves to the
8 competitive market; both issues which are crucial key
9 issues in this proceeding. So we believe that those
10 are the financial -- those are financial forecasts.

11 We do not have the software nor are we
12 licensed to use the software that was produced, that
13 was used by NorthBridge and Associates to produce the
14 financial runs and, therefore, we believe good cause,
15 there is good cause that OCC would not be able to
16 otherwise obtain that information.

17 EXAMINER PRICE: Why couldn't you have
18 retained your own experts?

19 MS. GRADY: Your Honor, we most certainly
20 have retained experts. We do not have the financial
21 modeling capability that DP&L has with all the vast
22 resources and all the information and all the inputs
23 and runs, we just do not have that ability, nor do we
24 have the particular software and application that the
25 Company used for those purposes.

1 EXAMINER PRICE: Aren't there cases out
2 there, though, saying that economic disparity between
3 the parties is not good cause? The fact that they
4 might be able to afford it and you can't, although
5 I'm sympathetic to that, aren't there cases out there
6 saying that is not good cause?

7 MS. GRADY: Well, your Honor, I have
8 cases that would argue opposite, that opposite point.
9 There very well may be cases out there, but the case
10 authority that I am aware of and I'm prepared to cite
11 to you is of the opposite view.

12 Secondly, your Honor, we believe that the
13 information, it would actually be information that is
14 discoverable under the Ohio Civil Rule of Evidence
15 26(B)(6) -- I'm sorry, (B)(5)(d) section (i) and
16 section (ii). Those rules were amended in 2012 to
17 bring them into compliance with the Federal Rules of
18 Evidence.

19 And under those rules, communications
20 between a party's attorney and any witness that's
21 identified as an expert witness may be -- may be
22 produced despite privilege claims if they identify
23 facts or data that the party's attorney provided and
24 the expert considered in forming his opinion and that
25 -- or that they identify assumptions that the party's

1 attorney provided and the expert relied upon.

2 There is case law, your Honors, with
3 respect to the non-testifying expert that suggest
4 that if the non-testifying expert provides data,
5 information, or assumptions and inputs, and gives
6 those to a testifying expert that that work product
7 privilege is -- that the work product privilege no
8 longer applies.

9 Given this reading of the rule and given
10 the fact that parties are entitled to cross-examine,
11 and to the extent an expert, a testifying expert
12 relies on a non-testifying expert's work, that
13 parties should be able to cross-examine the
14 testifying expert as to those underlying facts and
15 data they have relied upon and used for purposes of
16 their testimony.

17 EXAMINER MCKENNEY: Mr. Sharkey.

18 MR. SHARKEY: Yes, your Honor. Let me
19 start by addressing the question about the
20 attorney-client privilege listed in the log.

21 Ms. Grady is correct that that's in
22 error. The log lists from pages 33 to 36 in my
23 chart. It's the work-product doctrine that we're
24 standing on as to those objections, your Honor.

25 And, specifically, your Honor, The Dayton

1 Power and Light Company has engaged the consulting
2 economic firm NorthBridge to assist it in this case.
3 NorthBridge has -- is not engaged as a testifying
4 expert and in fact was engaged by our firm and they
5 have provided various advice including their analysis
6 of what would happen under alternative scenarios if
7 the Commission were to, for example, approve such and
8 such level of SSR, approve this different blending
9 schedule and such.

10 I don't believe --

11 EXAMINER PRICE: Is there an easy way,
12 I'm sure it's in the documents you've given to us
13 already, but when you say it's NorthBridge, is it
14 D. Segal that's NorthBridge, or is it A. Brannan
15 that's NorthBridge if you look through here?

16 MR. SHARKEY: In these -- the author of
17 -- in each of the pieces, your Honor, and I
18 apologize, I have a set of the documents here for you
19 as well, they're being brought up, but it is the
20 author.

21 EXAMINER PRICE: And which authors is it?

22 MR. SHARKEY: Frank Huntowski, Dave
23 Segal, Andrew Brannan, and Neil Fisher. All of those
24 people are representatives of NorthBridge, your
25 Honor.

1 EXAMINER PRICE: So Segal, Brannan,
2 Fisher --

3 MR. SHARKEY: -- Huntowski. Every person
4 in the author column on that chart, your Honor, is a
5 NorthBridge person.

6 EXAMINER PRICE: Okay. That's what I was
7 looking for.

8 MR. SHARKEY: Your Honor, there is in
9 fact an engagement letter for our firm and it is
10 sitting in the stack of documents that you have.
11 It's not responsive to the request which was for the
12 analysis, but I wanted you to be able to see that in
13 fact they were engaged by our firm.

14 I don't believe that there is any
15 dispute, your Honor, that the information is work
16 product, and I understand the question is whether or
17 not good cause exists for DP&L to be --

18 EXAMINER PRICE: I think she is disputing
19 the work product. I think she's saying if the
20 underlying facts were given to a testifying witness
21 then there is no work product defense or privilege.
22 Is that correct, Ms. Grady?

23 MS. GRADY: Your Honor, I think that's a
24 close paraphrasing, yes.

25 MR. SHARKEY: Well, your Honor, if --

1 there are no testifying experts in our case that have
2 relied upon in their testimony, cited, used the
3 NorthBridge materials. Those materials have been
4 used purely for litigation and settlement strategy
5 for the Company. And, in fact, NorthBridge, as
6 you'll see in the stack of documents, has evaluated
7 what will happen under settlement proposals,
8 different potential litigation proposals, so we
9 believe that by definition that information is work
10 product.

11 And I guess that argument that providing
12 it to a person would waive the work product status,
13 your Honor, is simply wrong. The Ohio Supreme Court
14 in the In re Election case that we cite as to the
15 other remaining issue in our other memo in op says
16 that providing work product to either representatives
17 of the client or even its agents does not waive its
18 work product status. So providing it to such people
19 certainly does not. That's directly consistent with
20 the In re Election case.

21 If I may, then, your Honor, respond to
22 what I believe is the principal argument is that
23 could cause exists. The Ohio Supreme Court and The
24 American Bar Association have recognized that there
25 are sort of, for the good cause question, two

1 different categories of work product.

2 One is the tangible work product. So if
3 it's a car accident case, for example, and I went and
4 took pictures of the damage done to the automobile,
5 but then, the next night, the automobile was stolen,
6 that is the tangible work product and the
7 circumstances that I describe may be something that
8 they could get through discovery.

9 But there's also the sort of opinion or
10 intangible work product that relates to the thoughts
11 and analysis of the party's attorneys or its agents,
12 and the ABA has stated in materials we've described
13 to you that that material is almost absolutely
14 protected. The Ohio Supreme Court, in the Sebaly,
15 Shillito and Dyer case that we've described and cited
16 in our memo in op, your Honor, says that you can get
17 that type of information only if the underlying
18 opinion is directly at issue.

19 So, your Honor, in the SS&D case that
20 I've mentioned, the general counsel for a client had
21 fired the Sebaly, Shillito and Dyer -- I'm sorry,
22 the --

23 EXAMINER PRICE: Squire Sanders.

24 MR. SHARKEY: Thank you. The Squire
25 Sanders firm. Had fired them because he believed

1 that the Squire Sanders firm had been performing
2 inadequately.

3 Squire Sanders then sued to try to get
4 its fees, a couple million dollars, I believe, they
5 were owed to it, and sought to get its former
6 client's general counsel's documents and depositions
7 as to their thought process as to why they were
8 fired. The court said in that case the thought
9 process of the general counsel was directly at issue
10 because it was why was the SS, the Squire Sanders
11 firm fired, so that information in fact was
12 discoverable.

13 But here, your Honor, the issue in this
14 case has nothing to do with NorthBridge's
15 conclusions. What NorthBridge thinks is irrelevant.
16 Its mental thoughts and impressions are not at issue
17 in this case, and that SS&D Supreme Court case thus
18 says they can't get it.

19 Secondly, your Honor, the Jackson Ohio
20 Supreme Court case shows that they can get the
21 information -- they can't get the information if they
22 can hire their own experts and attempt to duplicate
23 it. OCC is certainly free to hire its own experts,
24 use its own methodologies to try to determine what
25 would happen if DP&L's service stability rider was

1 lowered by 5 or 10 million dollars, what affect that
2 would have on DP&L's ROE; what would happen if the
3 blending percentages were altered, what affect would
4 that have on DP&L's ROE. That's certainly something
5 that OCC could do.

6 So they can't establish either two
7 critical elements: One, that NorthBridge's thoughts
8 and processes are directly at issue in this case;
9 and, two, that there's a compelling need.

10 EXAMINER PRICE: Why do you say that
11 their thoughts and processes are not directly at
12 issue in this case? You're asking for a rate
13 stability rider in an amount to get you a return on
14 equity of 7 to 10 percent. Isn't that what
15 NorthBridge has done?

16 MR. SHARKEY: Your Honor, the underlying
17 facts are absolutely at issue, but in the SS&D case
18 that I've described, SS&D, the law firm was fired
19 because they said, the client said, that the general
20 counsel had concluded that SS&D was doing a bad job,
21 that they were performing inadequately.

22 So in that case the mental conclusions of
23 the former client's general counsel were directly at
24 issue. What did that counsel think, what did the
25 general counsel for the former client think were

1 directly at issue in the case. That's what you need
2 to show.

3 Here, NorthBridge are not engaged as
4 testifying experts. Whether they think A, B, or C is
5 not directly at issue in the case. It's -- meaning
6 their thoughts, what they think, what they believe,
7 why they've done things.

8 What's at issue in this case, your Honor,
9 is whether DP&L's rates are reasonable, whether they
10 comply with the statute, whether it's supported
11 factually. What NorthBridge thinks is not directly
12 at issue in the case as to any of those issues.
13 That's what I'm saying. Their mental impressions are
14 not something the Commission needs to decide or
15 evaluate in this case.

16 EXAMINER PRICE: Ms. Grady.

17 MS. GRADY: Thank you, your Honor. If I
18 could briefly respond. The case law I would cite for
19 showing good cause, Pearl Brewing Company versus
20 Joseph Schlitz Brewing Company, 415 Federal Supp.
21 1122, from the Southern District of Texas, 1976,
22 found if there's potential unfairness to the
23 plaintiff, and after the balancing of expenditures of
24 time and resources that would be necessary in order
25 to have the discovering party do the work on their

1 own in an already protracted and delayed case, which
2 we have here, they concluded that good cause was
3 shown and ordered discovery of the information being
4 requested.

5 With respect to the arguments that
6 Mr. Sharkey made about waiver. We are not contesting
7 waiver. We are saying that under the policy of the
8 Ohio Civil Rules 26 there is a work product as well
9 as attorney-client -- let me strike that.

10 Work product, there are exceptions to
11 work product, and the two court cases I would cite
12 where the courts ordered that a testifying expert's
13 information that was supplied to -- or, a
14 non-testifying expert's information that was work
15 product and was supplied to a testifying expert was
16 ordered to be produced in two cases that I'm aware
17 of.

18 The first being Heitmann versus Concrete
19 Pipe Machinery, 98 Federal Rules Decision 740, coming
20 out of the Eastern District of Missouri in 1983. As
21 well as Delcastor, Inc. versus Vail Associates, Inc.,
22 108 Federal Rules Decision 405, coming out of the
23 District of Colorado in 1985, which ordered the work
24 product produced and shared with the -- ordered the
25 work product produced by a non-testifying expert and

1 shared with the testifying expert to be subject to
2 discovery.

3 There are policy reasons behind that and,
4 quite briefly, those policy reasons are as follows:
5 That disclosure allows for a party to effectively
6 cross-examine the experts on all bases for the
7 opinions expressed, including the influence of a
8 party's attorney and/or their non-testifying expert.

9 The fact that work-product doctrine is
10 not violated or diminished when attorneys are free to
11 develop legal theories and protected work product
12 provided they do not share that with the testifying
13 expert.

14 The third policy, your Honor, being that
15 allowing the discovery of the work product provided
16 by a non-testifying expert to a testifying expert
17 allows a bright line requiring disclosure and
18 provides litigants with certainty and the ability to
19 avoid unnecessary discovery disputes.

20 EXAMINER PRICE: Mr. Sharkey.

21 MR. SHARKEY: I will respond briefly,
22 your Honor. I was writing furiously, so I don't know
23 if I've got it all accurately, but the cases cited
24 were a 1976 case out of the Southern District of
25 Texas, a 1983 case out of the Eastern District of

1 Missouri, and I believe another case cited by -- my
2 notes only reflect "DC," so I missed the exact
3 wording.

4 MS. GRADY: The District -- Colorado
5 District Court.

6 MR. SHARKEY: Thank you, very much.

7 I'll cite, to your Honors, three Ohio
8 Supreme Court decisions that are consistent with our
9 arguments and essentially mandate the arguments we've
10 made.

11 The Squire, Sanders and Dempsey argument,
12 the 2010 decision by the Supreme Court of Ohio which
13 mandates that the mental issues be directly at issue.

14 There's the Jackson case, your Honor, by
15 the Ohio Supreme Court cited in 2006. That's the one
16 that held that if experts can -- if the other side
17 can hire experts to determine or perform an analysis,
18 then it is not -- I'm sorry, then it retains its work
19 product status.

20 Finally, your Honor, there's the In re
21 Election case that's cited and argued in our other
22 memorandum in opposition that holds that work product
23 can be provided to agents of the party and retain its
24 work product status. Certainly you can provide it to
25 your -- the party can provide it to its

1 representatives. Otherwise, what would be the point,
2 your Honor, of hiring non-testifying experts.

3 EXAMINER PRICE: But I think in all
4 fairness, that case -- doesn't that case revolve
5 around whether or not the privilege was waived, where
6 she's saying good cause shown. They're trying to
7 demonstrate good cause. She's not claiming that you
8 waived work product. She's claiming that even though
9 you do have a valid -- you may have a valid work
10 product claim, they've still shown good cause.

11 MR. SHARKEY: Well, as to the good cause
12 point, the Squire, Sanders and Dempsey say they have
13 to show that their mental impressions are directly at
14 issue, your Honor.

15 And the Jackson case says you can hire
16 your own expert. Inevitably, your Honor, parties
17 hire non-testifying experts. This suggestion that
18 somehow, if somebody sees it, who's going to be a
19 testifying witness, that it loses its work product
20 status, would largely lose a lot of advantages of
21 hiring non-testifying experts to advise you on
22 litigation. I don't think that's the law in Ohio.

23 EXAMINER PRICE: Would you care to
24 distinguish the two cases?

25 MS. GRADY: Well, your Honor, I think the

1 important distinction is these were pre-2012. In
2 2012, the Ohio Rules of Civil Procedure were amended.
3 They provided an exception to work-product doctrine.

4 EXAMINER PRICE: You're asking the
5 Commission, which is bound by Supreme Court
6 precedent, but not so much by Ohio Civil Rules
7 precedent, to give greater weight to the one we're
8 not bound by than the one we are bound by, aren't
9 you?

10 MS. GRADY: Your Honor, I'm understanding
11 that the Commission generally follows civil rules,
12 and to the extent that the procedural rules -- the
13 Ohio civil rules, and to the extent that the
14 procedural rules of the Commission do not address an
15 issue, it looks to the Ohio Rules of Civil Procedure
16 for guidance.

17 EXAMINER MCKENNEY: All right. I think
18 that's all we're going to hear on that issue at this
19 time.

20 MS. GRADY: Thank you.

21 EXAMINER MCKENNEY: Would you care to --

22 MS. GRADY: Moving on to Request for
23 Production 89. This is a little bit more -- we will
24 be talking about work product a little more because
25 that is the objection.

1 In Request for Production of Document 89,
2 we asked that DP&L provide a copy of all documents
3 that it has provided during 2012 and 2013 to the
4 three credit rating agencies, specifically with
5 documents that relate to the credit worthiness of the
6 company, its future business condition, and its
7 ability to repay interest and principal.

8 We fully set forth in our motion to
9 compel why we believe this is reasonable. Needless
10 to say, Mr. Chambers, the Company's expert, testifies
11 for 59 pages about the importance of credit rating
12 agencies and also testifies as to the actions taken
13 by the credit rating agencies with respect to DP&L.
14 We are just seeking to find out what information DP&L
15 provided to these credit rating agencies during 2012
16 and 2013.

17 We would note, your Honors, as you're
18 well aware, the burden of proof on asserting
19 privilege lies with the party asserting it, not with
20 the party that is challenging it. We also believe
21 that with respect to work product privilege that's
22 being claimed, there has been no showing that the
23 documents were produced in anticipation of litigation
24 which is one of the three prongs required for the
25 work product showing.

1 In anticipation of litigation does not
2 mean that documents prepared through the regular
3 business process in the ordinary course of business
4 are protected. There is no work product immunity for
5 these.

6 We submit, your Honor, that information
7 that DP&L has provided to the credit rating agencies
8 during 2012 and 2013 was information that it
9 regularly provides to credit rating agencies and that
10 were not documents and information created
11 specifically in anticipation of litigation.

12 These companies, and Mr. Chambers
13 testifies that these companies have regular
14 interactions with the credit rating agencies, and
15 part of the interaction with the credit rating agency
16 is for the utility to advise the credit rating agency
17 of the regulatory climate in the state, and that is
18 what this information directly goes to.

19 I would note again, your Honor, now we
20 are talking about not a non-testifying witness, but a
21 testifying witness, and under Ohio Civil Rule
22 26(B)(5)(d), discovery of communications between an
23 attorney and a testifying expert are not -- are not
24 subject to privilege if the testifying witness
25 considers the facts and the data that the party's

1 attorney provided, and if the testifying witness
2 relies upon assumptions provided by the party's
3 attorney.

4 Again, these were the 2012 amendments to
5 the Ohio Civil Rules of Procedure following the
6 Federal Rules of Civil Procedure which amended them
7 two years earlier.

8 I also have, your Honor, to the extent
9 that your Honor wishes, I have a series of
10 Sixth Circuit cases which go to that exact point
11 which essentially was codified, if you will, in the
12 holdings of the Sixth Circuit as well as the Federal
13 Circuit courts. The majority of courts found that
14 this was not work product, as well as attorney-client
15 was not shielded, and should be produced if the
16 witness, the testifying witness relies on the
17 information as part of their testimony.

18 EXAMINER PRICE: Did your witness rely
19 upon the information as part of his testimony?

20 MR. SHARKEY: No, your Honor. I believe
21 she might be referring to -- your Honor, I'm not sure
22 which witness she's referring to. I believe she's
23 referring to Mr. Chambers. Mr. Chambers was not
24 involved in any of the communications with any of
25 these credit rating agencies.

1 Those are communications that have
2 happened between Dayton Power and Light
3 representatives, including Ms. Sobecki, one of the
4 attorneys representing DP&L, and the credit rating
5 agencies. There's no communications between
6 Mr. Chambers and the credit rating agencies that have
7 occurred that relate to the case. Those are not the
8 documents that are being withheld, your Honor.

9 MS. GRADY: Your Honor, if I may quote
10 from the rule. The rule says that communication
11 between a party's attorney and any witness identified
12 as an expert witness, as Mr. Chambers as well as
13 Mr. Jackson have been identified, regardless of the
14 form of communications, are protected by division
15 (B)(3) of the rule, except to the extent that the
16 communications, and this is subsection (ii), identify
17 facts or data that the party's attorney provided and
18 that the expert considered in forming the opinions to
19 be expressed.

20 In subsection (iii), the information is
21 more specific, related to assumptions, more akin to
22 opinion work product provided, that the party's
23 attorney provided and the expert relied upon.

24 So there are two different distinctions
25 being that if the party considered it in forming its

1 opinions, it is not -- it is not covered. And if the
2 party relied upon assumptions in forming the
3 opinions, it is not covered and is subject to
4 discovery.

5 So I don't believe that we have to show
6 that the expert relied upon it; merely that the
7 expert -- that it was facts and data that the party's
8 attorney provided and that the expert considered in
9 the filing of his testimony and in the expression of
10 the opinions contained therein.

11 EXAMINER PRICE: Mr. Sharkey.

12 MR. SHARKEY: First of all, your Honor,
13 if I could go back to our earlier arguments that OCC
14 should produce the communications it had with its
15 experts, I believe that the communications -- the
16 argument Ms. Grady was just making seemed to be
17 directly related to our argument.

18 EXAMINER PRICE: The Bench understood
19 that.

20 MR. SHARKEY: Thank you, your Honor.

21 Secondly, and more importantly, I'm still
22 a little puzzled by her argument. These
23 communications, perhaps if I could deliver a copy of
24 them to you, these are communications between DP&L
25 and credit rating agencies; largely PowerPoint

1 presentations. They have not been provided to
2 Mr. Chambers who's our witness who's testifying
3 generally relating to credit rating agencies'
4 policies and procedures. Those are not documents
5 that he's seen, that he relied upon.

6 EXAMINER PRICE: I think that's probably
7 the source of the issue is he generally was talking
8 about credit rating issues. And what you're
9 representing to us is although he generally was
10 speaking about credit ratings, the actual
11 communications and the result of the communications
12 between you and the credit agencies were never
13 supplied to him.

14 MR. SHARKEY: Well, your Honor, if they
15 want -- two things. Start with the big picture. The
16 real information that's sensitive in these documents
17 is DP&L's projections of revenue that it's going to
18 receive in this case.

19 And from a -- first of all, from a
20 50,000-foot view, your Honor is well aware that the
21 interaction of credit rating agencies and the
22 issuers, the debt issuers like Dayton Power and
23 Light, they have regular communications and it's very
24 important to all issuers of debt that they be able to
25 communicate on a confidential basis with those credit

1 rating agencies.

2 DP&L, like many other issuers, has
3 communicated on a confidential basis and provided the
4 credit rating agencies its projections of what
5 revenues it expects to receive through this case.

6 Mr. Faruki clarifies it just so we're
7 clear. DP&L's conclusions of its projected revenue
8 were based upon advice of counsel, Ms. Sobecki, and
9 our firm have provided such advice to the firm -- to
10 DP&L. In fact, Ms. Sobecki was involved in making
11 the presentations to the credit rating agencies.

12 So that information, we don't believe,
13 first of all, that Mr. Chambers needed or didn't
14 need, but that's an entirely separate issue as to
15 whether or not these communications are discoverable.

16 The courts have held that work product
17 such as your expectations as to the results of the
18 case, if they are provided to a third party who is
19 your agent, retain its work product status, that's
20 the In re Election case that we described, your
21 Honor. And there's a couple of cases that are --

22 EXAMINER PRICE: I don't think she's -- I
23 don't think she's arguing that you waived work
24 product.

25 MR. SHARKEY: I believe --

1 EXAMINER PRICE: I think she's saying
2 that your expert witness relied upon this
3 information, therefore, she's entitled to discovery.

4 MS. GRADY: Or consider the
5 information --

6 EXAMINER PRICE: Or consider the
7 information.

8 MS. GRADY: -- in forming the opinions
9 that it expressed in testimony. Mr. Sharkey -- I
10 haven't heard Mr. Sharkey say yet that his experts,
11 Mr. Jackson and/or Mr. Chambers or other witnesses
12 that testify as to the financial integrity of the
13 company have not considered the information provided
14 to the credit rating agencies and that's what I'm
15 waiting to hear.

16 MR. SHARKEY: Well, certainly it's true.
17 I think I've been fairly clear that Mr. Chambers has
18 not seen, received, heard any of this information and
19 he's been the witness who's testified as to the
20 financial integrity issue, your Honor.

21 Mr. Jackson was and is the CFO, because
22 he has seen information, in fact participated in
23 preparing information that was the -- that is work
24 product, doesn't waive the work product nature of it.
25 Mr. Jackson is the CFO. Work product, as your Honors

1 know, can be prepared by the client, by the attorney,
2 by agents of the client. As long as it's work
3 product, it's protected.

4 Mr. Jackson, as the CFO, participated in
5 preparation of his expectations as to what the
6 Commission may do and what, you know, part of that is
7 advice of counsel, so that information, just because
8 Mr. Jackson was involved, doesn't terminate its work
9 product status.

10 MS. GRADY: Your Honor --

11 MR. SHARKEY: The client has to be -- if
12 I can finish, your Honor. The client has to be
13 involved in preparing the work product documents.

14 MS. GRADY: I'm sorry, I didn't mean to
15 interrupt. Are you finished?

16 MR. SHARKEY: I am finished.

17 MS. GRADY: If I may quickly respond,
18 your Honor. Mr. Jackson is one of the primary
19 witnesses in this case that presents the pro forma
20 financials of the Company to show that the Company
21 will be in desperate straits, that it needs a
22 financial integrity charge of \$687 million to be paid
23 for by the customers of this utility.

24 He has detailed, very detailed analysis
25 of financial reports, financial forecasts, and that

1 type of information is the type of information we
2 believe was provided to the credit rating agencies
3 and affected DP&L's rating.

4 In addition, Mr. Chambers testifies, in
5 his testimony, of his assessment of DP&L's financial
6 integrity.

7 So to the extent that -- going back to
8 Mr. Jackson, to the extent that he considered this
9 information, and part of the information, part of
10 producing the information, perhaps meeting with the
11 credit rating agencies, perhaps providing documents,
12 and he presents testimony, and the testimony
13 considers, we're not even close to relied on, just
14 considers, then the work product is waived or the
15 work product exception applies under the Ohio Civil
16 Rules of 26(B)(5)(d) subsection (ii), and should be
17 produced.

18 It's essentially an issue of being able
19 to sufficiently cross-examine and have the right to
20 cross-examine an expert witness who is testifying on
21 a very significant issue as to the underlying facts
22 and data of his testimony.

23 EXAMINER PRICE: I have a question for
24 Ms. Grady first. Are you alleging that Mr. Jackson
25 has not provided any discovery regarding his

1 underlying testimony, or are you saying he's provided
2 some discovery but you also want these documents?

3 MS. GRADY: It is the latter, your Honor.
4 He has provided some discovery, but this discovery is
5 in particular relevant in that it will help us judge
6 if the information being provided to the Commission
7 and being provided in Mr. Jackson's testimony is
8 consistent with the information that they're
9 providing to the credit rating agencies.

10 EXAMINER PRICE: Mr. Pritchard.

11 MR. PRITCHARD: I'm not sure if you would
12 like to address this now or later, your Honor, but
13 based on counsel for DP&L's representations that
14 they've provided the assumptions of the likelihood
15 success of their case to third parties, I believe we
16 have a waiver claim on our second motion to compel,
17 requests for -- or, Interrogatories 3-1 through 3-3,
18 if you disclose, voluntarily disclose information
19 that is either subject to an attorney-client
20 privilege or work product --

21 EXAMINER PRICE: I don't think it's that
22 simple, Mr. Pritchard.

23 MR. PRITCHARD: He said that if there's
24 some sort of agency relationship that it would retain
25 its status. I'm not quite sure how the utility and

1 the credit rating agency have agency status.

2 EXAMINER PRICE: I think the word
3 "agency" is something -- and I know that they use
4 this in their pleading, that's probably not the term
5 I would have used. But there's certainly cases out
6 there that say giving work product to outside
7 auditors does not waive the work product.

8 The question for us is: Are the credit
9 ratings the moral equivalent as outside auditors --
10 not "moral" -- are the equivalent to outside auditors
11 in the sense they're both performing a gatekeeper
12 function. That's the question we have to ask.
13 Clearly, it's not just because they disclose to a
14 third party; you can disclose to some third parties
15 without waiving privilege.

16 MR. PRITCHARD: That is my understanding
17 as well, your Honor.

18 MR. SHARKEY: Briefly, your Honor,
19 regarding the agency question, and you hit on the
20 question of whether or not the auditors and the CRA,
21 the credit rating agency sit in similar shoes.

22 Auditors and credit rating agencies both
23 provide information and opinions to outside
24 investors. The reason that they exist, the reason
25 that both exist is to provide their candid opinions

1 to outside investors.

2 Both of them, credit rating agencies and
3 auditors are engaged by the client. In this case
4 DP&L has auditors, DP&L has credit rating agencies
5 that it's signed contracts and it's hired. Both the
6 credit rating agencies and the auditors, your Honor,
7 are under duties to maintain confidentiality.

8 And, in fact, I believe Mr. Chambers'
9 declaration describes at pretty good length the
10 duties of confidentiality that the credit rating
11 agencies owe to the person they've signed a contract
12 with, the issuer, in this case The Dayton Power and
13 Light Company. So we believe they sit in very
14 similar shoes.

15 I used the word "agency" simply because
16 that was the word used the In re Election case that
17 was cited by -- that was used by the Ohio Supreme
18 Court there. In that case it was a sufficient agency
19 relationship, merely that the persons at issue were
20 engaged and asked to do services by the attorney.
21 They didn't even have a formal contract necessarily.
22 That's certainly a much more attenuated relationship
23 than The Dayton Power and Light Company has with the
24 credit rating agencies that the Ohio Supreme Court
25 has found sufficient.

1 Also, your Honor --

2 EXAMINER PRICE: In the In re Election,
3 wasn't it the campaign manager?

4 MR. SHARKEY: There were two witnesses --
5 if I can step back, your Honor. In that case, the
6 lawyer for the candidate had asked two people to go
7 to watch the counting of the ballots. Those two
8 people then provided the information to the campaign
9 manager, your Honor, yes.

10 So I guess point taken, it was the
11 campaign manager, but there's still no, necessarily,
12 clear duties of confidentiality like the credit
13 rating agencies owe here.

14 And if I may also briefly address the
15 arguments made by Ms. Grady that essentially would
16 say that any time a client was involved with
17 preparing work product and later testified that that
18 would waive the work product protection. The whole
19 purpose of the work product protection is to allow
20 the clients, including its witnesses, to create work
21 product and protect it from discovery.

22 And this information that we seek to
23 protect here, your Honor, namely projected results as
24 to what the Commission would decide as to things like
25 the level of the SSR, are, we believe, the heart of

1 what should be protected and that DP&L would be
2 irreparably damaged in its litigation and settlement
3 decisions if that kind of information was disclosed.

4 EXAMINER PRICE: Thank you.

5 Ms. Grady.

6 MS. GRADY: Very briefly, your Honor. I
7 know it is getting late.

8 EXAMINER PRICE: We've got the room all
9 night.

10 MS. GRADY: Directing your attention to
11 DP&L 37 and 38, that's where their privilege log
12 takes on this issue. I guess I have -- the questions
13 that I have for DP&L are listed under, like for
14 instance, under 3, there's "banks," and I'm not sure
15 what credit rating agency is called "banks." I'm not
16 aware of one.

17 And the other question I have is it's
18 curious that the authors of these documents are
19 sometimes listed as DPL or DP&L. And given our prior
20 discussion about Mr. Jackson and whether he was DP&L
21 or whether he was DP&L Inc., I think it raises an
22 interesting question as to if it is -- if the authors
23 were DPL or it was -- the information was somehow
24 created by DP&L or DP&L Inc., whether or not that
25 somehow would disseminate the work product, because

1 now we're talking about DP&L sharing it with DP&L
2 Inc. And we get into all different kinds of issues,
3 issues that were kind of raised by Mr. Jackson and
4 the discussion about whether his -- the information
5 that he had was in the form of DP&L or DP&L Inc. and
6 what hat he was wearing.

7 EXAMINER PRICE: Mr. Sharkey, do you
8 wanted to respond that?

9 MR. SHARKEY: Your Honor, I think most of
10 these points have been argued extensively. May I
11 consult briefly with my client?

12 EXAMINER PRICE: You may.

13 MR. SHARKEY: One point of clarification,
14 your Honor, is the recipients of point 3 are banks,
15 they're also, you know, they have contracts signed
16 with DP&L and have confidentiality agreements signed
17 with DP&L. We believe that they also fit within the
18 scope of people we would be permitted to share
19 confidential information. It's important that those
20 banks have an understanding, your Honor, of --

21 EXAMINER PRICE: They're not providing
22 any gatekeeper function; they're investors. I mean,
23 credit rating agencies, I can see performing a
24 gatekeeper function like an outside auditor of why
25 you wouldn't want to erode that relationship. These

1 are banks; they're just investors.

2 MR. SHARKEY: Well, your Honor, I would
3 submit that's even a more direct relationship. The
4 relationship from the client to an auditor or a CRA
5 to a bank is -- if that's sufficient, then
6 information provided directly to a bank, with whom
7 you've got contracts, these aren't prospects, these
8 are people who have contracts who've agreed to hold
9 the information confidential, we believe that would
10 be sufficient as well.

11 EXAMINER PRICE: I guess the question
12 Ms. Grady is asking is given that these are AES-DPL
13 documents, why are we having this discussion at all.
14 Why aren't you simply standing on the idea that these
15 are not in DP&L's possession and we shouldn't even be
16 talking about them?

17 MR. SHARKEY: Can I consult with my
18 client, your Honor?

19 EXAMINER PRICE: You may. I'm not sure
20 if she's helping or hurting your case, but.

21 MR. SHARKEY: Your Honor, as to these --

22 EXAMINER PRICE: Just one minute.

23 MR. SHARKEY: I apologize. I thought you
24 were ready.

25 EXAMINER PRICE: Now you can proceed.

1 MR. SHARKEY: Thank you, your Honor.

2 The response to your question, your
3 Honor, is that the credit rating agencies rate the
4 credit of both DPL and DP&L, and it's provided as to
5 both. So we have not made an assertion that this was
6 not in the custody of The Dayton Power and Light
7 Company.

8 But that doesn't, I think, undermine or
9 alter the fact that some of the other documents that
10 have been issued and we discussed earlier today were
11 not within the custody or control of The Dayton Power
12 and Light Company, and so that's the reason.

13 So the author column, I think fairly
14 corrected by my discussions with the client, would
15 include The Dayton Power and Light Company.

16 EXAMINER PRICE: Thank you.

17 EXAMINER MCKENNEY: At this time I think
18 that concludes all the pending motions. Is there
19 anything further from either parties that they would
20 like to discuss on the record at this time?

21 MR. SHARKEY: Not from DP&L, your Honor.
22 I'm sure you're glad to hear.

23 EXAMINER MCKENNEY: Thank you.

24 MR. PRITCHARD: None, your Honor.

25 EXAMINER MCKENNEY: OCC?

1 MS. GRADY: Well, your Honor, given the
2 recent discovery requests we see coming in, we would
3 expect that we're going to be having more motions to
4 compel. We would appreciate the opportunity, should
5 we have more than one motion to compel that arises
6 because of insufficient responses, to have a
7 discovery conference as we did today to more
8 expeditiously rule on these matters given the
9 impending hearing date.

10 EXAMINER MCKENNEY: We'll take that under
11 advisement and consider it as we move forward.

12 Anyone else have anything else they would
13 like to add? Thank you all. At this time --

14 EXAMINER PRICE: Let's go off the record
15 for about 10 minutes.

16 (Off the record.)

17 (Recess taken.)

18 EXAMINER MCKENNEY: We've reviewed the
19 arguments made by the parties and the motions and the
20 documents in camera. At this time we're going to go
21 ahead and rule on a number of those. Some of those
22 we'll defer ruling until a later date which will be
23 ruled on by a subsequent entry.

24 Regarding IEU's motion to compel filed on
25 December 18th and subsequently withdrawn, we're going

1 to deny in total. I'm not going to read through
2 those. I believe that's 1-11, 1-20, 1-23, 2-12, and
3 Requests for Admission 1-6, 1-12, and 1-16. Each of
4 those are denied for being information held by an
5 affiliate.

6 In regards to IEU's motion to compel,
7 regarding Interrogatories 3-1, 3-2, and 3-3, those
8 are also denied. However, we will grant the motion
9 to compel for the cost allocation manual; however,
10 the Company is directed to redact information in the
11 board minutes that it finds to be privileged and then
12 to submit to IEU a privilege log with that cost
13 allocation manual.

14 EXAMINER PRICE: Just to clarify, we're
15 denying the broad attorney-client claim as to the
16 board minutes. If you want to redact certain
17 portions of the board minutes, feel free to redact
18 them and provide a privilege log to IEU.

19 MR. SHARKEY: Thank you, your Honor.
20 That's how I understood it.

21 EXAMINER PRICE: Okay.

22 MR. SHARKEY: May I ask a clarifying
23 question, your Honor? There was also, within the
24 CAM, the log that's prepared by DP&L's counsel of all
25 pending claims and pending litigation regarding The

1 Dayton Power and Light Company, and we'd also assert
2 a privilege claim as to --

3 EXAMINER PRICE: We find that as
4 privileged also.

5 MR. SHARKEY: Thank you, your Honor.

6 MR. OLIKER: Your Honor, for
7 clarification --

8 EXAMINER PRICE: Yes.

9 MR. OLIKER: -- the basis for denying 3-1
10 through 3-3, would that be -- can you give us the
11 basis for that now?

12 EXAMINER PRICE: They were -- the
13 analysis was prepared at the direction of their
14 attorney, Ms. Sobecki, underlying those documents.

15 EXAMINER MCKENNEY: Prepared in
16 anticipation of litigation.

17 MR. OLIKER: Okay. Thank you.

18 EXAMINER PRICE: We reviewed the
19 underlying documents in camera and it is clear that
20 the documents were prepared in anticipation of
21 litigation and at the direction of their counsel.

22 MR. OLIKER: And, I'm sorry, I don't want
23 to belabor the point.

24 EXAMINER PRICE: No.

25 MR. OLIKER: The underlying expense

1 reductions themselves, just an understanding --

2 EXAMINER PRICE: They cannot be easily
3 extracted. We took a look at the documents. There's
4 no way to extract out what's clearly their attorney's
5 advice from these documents. I know I'm saying trust
6 me, but, you know, the examiners have looked at these
7 in camera and the documents need to be withheld.

8 MR. OLIKER: Thank you, your Honor.

9 EXAMINER PRICE: As to Dayton Power and
10 Light's motion to compel against IEU-Ohio, it is
11 granted as to Interrogatories 1-1 and 1-2. IEU is
12 directed to more fully answer the questions in 1-1
13 and 1-2.

14 Mr. Sharkey, I wanted to confirm that
15 Interrogatory -- RPD 1-5 was withdrawn.

16 MR. SHARKEY: I'm sorry, your Honor. Let
17 me --

18 EXAMINER PRICE: RPD 1-5 is related to
19 the ESP.

20 MR. SHARKEY: Yes, your Honor.

21 EXAMINER PRICE: Okay. It is denied as
22 to RPD 1-6 which sought information related to the
23 MRO application on the grounds of not reasonably
24 calculated to lead to admissible information.

25 We are going to defer ruling on the DP&L

1 motions to compel, vis-à-vis OCC, based upon our
2 discussion off the record that OCC should be provided
3 an opportunity to file a memo contra and Dayton
4 should have a chance to respond to the memo contra.

5 We're going to deny the request for
6 production of documents 1-8 and 1-12 related to
7 communications between the parties regarding the AEP
8 case based on relevance.

9 We're going to defer ruling on RPD 1-13,
10 communications between OCC and its third-party
11 experts at this time. I believe OCC desires to file
12 a memo contra on that motion to compel.

13 With respect to OCC's motion to compel,
14 Interrogatories 227, 239, and 255 will be denied
15 based upon attorney-client -- attorney work product.
16 I think those are the ones we've been discussing as
17 the ones involving the NorthBridge materials.

18 RPD 89 will be denied based upon
19 attorney-client work -- attorney work product. And
20 255, 260, and 261 will be denied based upon they are
21 seeking discovery from documents in the possession of
22 DP&L's affiliates.

23 MR. ALEXANDER: Your Honor, just repeat,
24 89 was denied?

25 EXAMINER PRICE: RPD 89 was -- OCC RPD 89

1 was denied, yes.

2 MR. ALEXANDER: Thank you, your Honor.

3 MR. OLIKER: Your Honor, I'm sorry, one
4 last follow-up.

5 EXAMINER PRICE: No problem.

6 MR. OLIKER: And I understand the
7 sensitivity of the information you're talking about
8 with the expense reductions, but you're not saying
9 the information itself is off limits for
10 cross-examination, depositions, regarding possible --

11 EXAMINER PRICE: I'm saying the documents
12 themselves are denied.

13 MR. OLIKER: Fair game for
14 interrogatories, your Honor?

15 EXAMINER PRICE: Pardon me?

16 MR. OLIKER: But it's fair game for
17 interrogatories describing the actual expense
18 reductions that would be possible?

19 MR. FARUKI: Well, I would object to
20 that.

21 EXAMINER PRICE: I'm not going to -- I'm
22 not going to give blessing to any future questions.

23 MR. OLIKER: Okay.

24 EXAMINER PRICE: If you've got questions
25 in subsequent discovery and depositions you want to

1 ask, you should ask them and we'll deal with them
2 that way. I can't give blessing to them. But the
3 essence of these is work product and work product has
4 to be a tangible thing, it has to be a document, so
5 we're only denying the request to produce the
6 documents.

7 MR. OLIKER: Thank you, your Honor. I'm
8 just trying to understand the parameters of the
9 ruling.

10 EXAMINER PRICE: And that's the easiest
11 way to think of it is we're denying production of the
12 documents at this time.

13 MR. OLIKER: Thank you, your Honor.

14 EXAMINER MCKENNEY: Further questions?

15 EXAMINER PRICE: Did we get everything?
16 Need clarifications?

17 MR. SHARKEY: I want to say thank you
18 very much for your close attention, your Honors, and
19 for staying this late.

20 EXAMINER PRICE: It's not a problem.
21 Let's go off the record for one minute.

22 (Off the record.)

23 EXAMINER PRICE: As we've discussed
24 earlier, OCC is entitled to file a motion -- a memo
25 contra to Dayton Power and Light's motion to compel.

1 OCC is directed to file it within a week from today.

2 Dayton Power and Light is entitled to
3 file a reply to that memo contra and they're directed
4 to file it within a week from the service of the memo
5 contra.

6 In the event that OCC declines to file a
7 memo contra, there was a new Supreme Court case that
8 was raised for the first time in our arguments, so
9 Dayton is still authorized to file a reply within two
10 weeks from today in the event there is no memo contra
11 filed.

12 Beyond that, I believe the parties have
13 all agreed that they will act expeditiously and
14 reasonably in responding to the discovery requests
15 where the motions to compel have been granted.

16 Anything else?

17 We will see you all at hearing. We are
18 adjourned.

19 (Thereupon, the proceedings concluded at
20 5:56 p.m.)

21 - - -

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Wednesday, January 30, 2013, and carefully compared with my original stenographic notes.

Carolyn M. Burke, Registered
Professional Reporter, and
Notary Public in and for the
State of Ohio.

My commission expires July 17, 2013.

- - -

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

2/13/2013 9:53:58 AM

in

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

Summary: Transcript of the Application of the Dayton Power and Light Company hearing held on 01/30/13 electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Burke, Carolyn M. Mrs.