

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

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

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

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

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

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

- - -

PROCEEDINGS

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

1 APPEARANCES:

2 Faruki, Ireland & Cox, PLL
3 By Mr. Charles J. Faruki and
4 Mr. Jeffrey S. Sharkey
5 500 Courthouse Plaza, SW
6 10 North Ludlow Street
7 Dayton, Ohio 45402

8 On behalf of the Company.

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

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

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

23 On behalf of IEU-Ohio.

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

28 On behalf of FES.

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

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

1 APPEARANCES (Continued):

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

6 On behalf of SolarVision.

7 Mike DeWine, Ohio Attorney General
8 By Mr. Devin Parram
9 Assistant Attorney General
10 Public Utilities
11 180 East Broad Street
12 Columbus, Ohio 43215

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

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

19 On behalf of Honda.

20 - - -
21
22
23
24
25

Thursday Evening Session,

February 14, 2013.

- - -

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

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

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

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

EXAMINER McKENNEY: Thank you.

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

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

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

5 EXAMINER MCKENNEY: Thank you.

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

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

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

16 EXAMINER MCKENNEY: Thank you.

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

19 EXAMINER MCKENNEY: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

25 EXAMINER PRICE: Aren't the documents

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

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

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

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

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

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

3 It is our position -- step back.

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

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

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

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

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

1 protection or immunity from discovery.

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. SHARKEY: Thank you, your Honor.

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

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

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

4 MR. SHARKEY: That is true.

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

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

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

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

1 appropriately allocated --

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

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

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

18 Is that all for --

19 EXAMINER PRICE: Yes.

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

25 We -- I have assigned one of our

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

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

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

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

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

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

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

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

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

25 (Off the record.)

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

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

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

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

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

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

20 EXAMINER PRICE: Mr. Pritchard?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. PRITCHARD: There are I believe

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

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

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

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

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

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

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

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

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

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

13 EXAMINER PRICE: If we need to.

14 MR. PRITCHARD: Correct, your Honor.

15 EXAMINER PRICE: Thank you.

16 EXAMINER McKENNEY: OCC.

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

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

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

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

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

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

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

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

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

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

10 MS. GRADY: And L.

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

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

16 EXAMINER PRICE: Fair enough. Anything
17 else?

18 MS. GRADY: No, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

1 statute.

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

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

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

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

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

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

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

5 That's all I have, your Honor.

6 EXAMINER PRICE: Thank you.

7 Mr. Alexander?

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

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

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

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

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

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

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

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

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

4 MR. ALEXANDER: Thank you, your Honor.

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

7 MR. ALEXANDER: Thank you, your Honor.

8 EXAMINER McKENNEY: Mr. Sharkey?

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

12 EXAMINER PRICE: Sure.

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

20 EXAMINER PRICE: The attorney.

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

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

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

15 MR. SHARKEY: Yes, your Honor.

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

18 Mr. Alexander?

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

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

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

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

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

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

13 Anything further?

14 MR. PRITCHARD: Just one clarifying
15 question.

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

18 (Laughter.)

19 EXAMINER PRICE: Go ahead.

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

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

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

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

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

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

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

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

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

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

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

1 on a company-by-company basis.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 EXAMINER PRICE: Thank you.

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

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

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

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

4 EXAMINER MCKENNEY: Thank you.

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

7 MR. SHARKEY: Thank you, your Honor.

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

10 MR. SHARKEY: You first or me first?

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

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

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

25 So those numbers are in there. And those

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

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

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

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

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

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

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

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

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

15 MR. SHARKEY: Thank you, your Honor.

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

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

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

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

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

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

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

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

25 EXAMINER PRICE: That's not my

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

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

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

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

21 Is that how you understood my arguments?

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

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

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

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

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

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

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

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

1 of the documents into the record.

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

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

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

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

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

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

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

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

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

17 EXAMINER PRICE: Is that it?

18 MS. GRADY: That's it.

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

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

24 MR. SHARKEY: Thank you, your Honor.

25 (Off the record.)

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

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

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

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

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

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

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

3 (Interruption.)

4 (Off the record.)

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

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

17 MS. GRADY: Thank you, your Honor.

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

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

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

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

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

15 (CONFIDENTIAL PORTION)

16 - - -
17
18
19
20
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

- - -

(OPEN RECORD)

EXAMINER PRICE: Mr. Darr had an inquiry?

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

EXAMINER PRICE: Please.

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

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

3 EXAMINER PRICE: Mr. Sharkey?

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

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

18 EXAMINER PRICE: Thank you.

19 Mr. Darr, follow-up?

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

25 Presumably those impairments were based

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

8 EXAMINER PRICE: I understand.

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

11 EXAMINER PRICE: I understand.

12 MR. DARR: Thank you, your Honor.

13 EXAMINER PRICE: Thank you. One second.

14 (Off the record.)

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

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

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

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

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

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

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

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

16 EXAMINER PRICE: Thank you.

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

24 MS. BOJKO: Return and destroy what?

25 EXAMINER PRICE: He gave us copies of the

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

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

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

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

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

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

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

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

25 MR. ALEXANDER: Your Honor, just for

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

10 Would that be acceptable to DP&L?

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

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

20 MR. OLIKER: Return or destroy?

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

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

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

3 Anything else for us?

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

6 (Discussion off the record.)

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

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

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

21 Off the record.

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

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 excerpted transcript of the proceedings taken by me in this matter on Thursday, February 14, 2013, and carefully compared with my original stenographic notes.

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

My commission expires February 19, 2013.

(71491 open record)

- - -

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

3/1/2013 1:26:38 PM

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