

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the :
Review of the Political :
and Charitable Spending by:
Ohio Edison Company, The : Case No. 20-1502-EL-UNC
Cleveland Electric :
Illuminating Company, and :
The Toledo Edison Company.:

- - -

PREHEARING CONFERENCE

before Mr. Gregory Price, Ms. Megan Addison, and
Ms. Jacky St. John, Attorney Examiners, at the Public
Utilities Commission of Ohio, via Webex, called at
10:01 a.m. on Tuesday, August 31, 2021.

- - -

ARMSTRONG & OKEY, INC.
222 East Town Street, Second Floor
Columbus, Ohio 43215-5201
(614) 224-9481 - (800) 223-9481

- - -

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

APPEARANCES:

FirstEnergy Service Company
By Mr. Brian Knipe
76 South Main Street
Akron, Ohio 44308

Jones Day
By Ms. Michael R. Gladman
325 John H. McConnell Boulevard, Suite 600
Columbus, Ohio 43215

Jones Day
By Mr. Ryan A. Doringo
901 Lakeside Avenue East
Cleveland, Ohio 44114

On behalf of the Ohio Edison Company, The
Cleveland Electric Illuminating Company,
and The Toledo Edison Company.

Bruce J. Weston, Ohio Consumers' Counsel
By Ms. Maureen R. Willis,
Senior Counsel
and Mr. John Finnigan,
Assistant Consumers' Counsel
65 East State Street, Suite 700
Columbus, Ohio 43215

On behalf of the Residential Customers of
the Ohio Edison Company, The Cleveland
Electric Illuminating Company, and The
Toledo Edison Company.

Interstate Gas Supply, Inc.
By Mr. Evan Betterton,
Ms. Bethany Allen,
Mr. Joseph Olikier,
and Mr. Michael Nugent
6100 Emerald Parkway
Dublin, Ohio 43016

On behalf of the Interstate Gas Supply,
Inc.

- - -

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

APPEARANCES: (Continued)

Kegler, Brown, Hill & Ritter Co., LPA
By Mr. Robert Dove
65 East State Street, Suite 1800
Columbus, Ohio 43215

On behalf of the Natural Resources
Defense Council and Ohio Partners for
Affordable Energy.

The Ohio Environmental Council
By Ms. Miranda R. Leppla,
Mr. Trent Dougherty,
and Mr. Chris Tavenor
1145 Chesapeake Avenue, Suite I
Columbus, Ohio 43212

On behalf of The Ohio Environmental
Council.

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

On behalf of the Ohio Manufacturers'
Association Energy Group.

McNees, Wallace & Nurick LLC
By Ms. Rebekah Glover
and Mr. Matthew R. Pritchard
21 East State Street, 17th Floor
Columbus, Ohio 43215

On behalf of the Industrial Energy Users
of Ohio.

Boehm, Kurtz & Lowry
By Mr. Kurt Boehm,
Mr. Michael Kurtz,
and Ms. Jody Kyler Cohn
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

On behalf of the Ohio Energy Group.

- - -

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

APPEARANCES: (Continued)

Dickinson Wright PLLC
By Ms. Madeline Fleisher
150 East Gay Street, Suite 2400
Columbus, Ohio 43215

On behalf of the Citizens Utility Board
of Ohio.

Dave Yost, Ohio Attorney General
Mr. John Jones, Section Chief
By Mr. Werner L. Margard, III,
Assistant Attorney General
Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

On behalf of the Staff of the PUCO.

- - -

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

Tuesday Morning Session,
August 31, 2021.

- - -

EXAMINER ST. JOHN: The Public Utilities Commission of Ohio calls for a prehearing conference at this time and place Case No. 20-1502-EL-UNC being in the Matter of the Review of the Political and Charitable Spending by Ohio Edison Company, The Cleveland Electric illuminating Company, and The Toledo Edison Company.

My name is Jacky St. John and with me are Gregory Price and Megan Addison, and we are the Attorney Examiners assigned to preside over this prehearing conference.

Let's begin by taking the appearances starting with the Companies.

MR. KNIPE: Good morning, your Honors. Appearing on behalf of The Ohio Edison Company, The Cleveland Electric Illuminating Company, and Toledo Edison Company, I am Brian Knipe, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308. Also appearing on behalf of the companies from the Jones Day law firm are Michael Gladman, 325 John H. McConnell Boulevard, Suite 600, Columbus, Ohio 43215 and Ryan Doringo, North Point, 60 -- 901 Lakeside

1 Avenue, Cleveland, Ohio 44114.

2 EXAMINER ST. JOHN: Thank you.

3 Ohio Manufacturers' Association Energy
4 Group.

5 MS. BOJKO: Thank you, your Honors. On
6 behalf of the Ohio Manufacturers' Association Energy
7 Group, Kimberly W. Bojko with the law firm Carpenter
8 Lipps & Leland, 280 North High Street, Suite 1300,
9 Columbus, Ohio 43125.

10 EXAMINER ST. JOHN: Thank you.

11 Ohio Consumers' Counsel.

12 MS. WILLIS: Thank you, your Honor. On
13 behalf of the Ohio Consumers' Counsel and residential
14 customers of the FirstEnergy utilities, Maureen R.
15 Willis, John Finnigan, 65 East State Street, Suite
16 700, Columbus, Ohio 43215. Thank you.

17 EXAMINER ST. JOHN: Thank you.

18 Mr. Robert Dove.

19 MR. DOVE: Good morning, your Honor.
20 This is Robert Dove on behalf of the Ohio Partners
21 for Affordable Energy as well as Natural Resources
22 Defense Council with the law firm of Kegler, Brown,
23 Hill & Ritter at 65 East State Street, Suite 1800,
24 Columbus, Ohio 43215.

25 EXAMINER ST. JOHN: Thank you.

1 Ohio Environmental Council.

2 MS. LEPPLA: Good morning, your Honor.

3 On behalf of the Ohio Environmental Council, Miranda
4 Leppla, Trent Dougherty, and Chris Tavener, 1145
5 Chesapeake Avenue, Suite I, Columbus, Ohio 43212.

6 EXAMINER ST. JOHN: Thank you.

7 Environmental Law & Policy Center.

8 The Ohio Hospital Association.

9 Interstate Gas Supply, Inc.

10 MR. BETTERTON: Good morning, your Honor.

11 On behalf of the Interstate Gas Supply, Inc., is
12 myself, Evan Betterton, and Bethany Allen. We are
13 located at 6100 Emerald Parkway, Dublin, Ohio 4320 --
14 43016. My apologies.

15 EXAMINER ST. JOHN: Thank you.

16 Industrial Energy Users - Ohio.

17 MS. GLOVER: Thank you, your Honor. On
18 behalf of the Industrial Energy Users of Ohio,
19 Rebekah Glover from the law firm McNeese, Wallace &
20 Nurick, 21 East State Street, 17th Floor, Columbus,
21 Ohio 43215.

22 EXAMINER ST. JOHN: Thank you.

23 And Northwest Aggregation Coalition.

24 I believe that was all the parties. No,
25 excuse me. Next on my list, I'm sorry, Ohio Energy

1 Group.

2 MR. KURTZ: Thank you, your Honor. For
3 OEG, Mike Kurtz and Jody Kyler Cohn.

4 EXAMINER ST. JOHN: Thank you.
5 Citizens Utility Board of Ohio.

6 MS. FLEISHER: Good morning, your Honors.
7 Madeline Fleisher on behalf of Citizens Utility Board
8 of Ohio.

9 EXAMINER ST. JOHN: Thank you.
10 And on behalf of Staff.

11 MR. MARGARD: Thank you, your Honor. On
12 behalf of the Staff of the Public Utilities
13 Commission, Werner L. Margard, Assistant Attorney
14 General, 30 East Broad Street, 26th Floor, Columbus,
15 Ohio.

16 EXAMINER ST. JOHN: Thank you. I believe
17 that's all the parties we were expecting today. I
18 will go ahead and turn it over to Examiner Price now.
19 Thank you.

20 EXAMINER PRICE: Thank you.

21 Good morning, everyone. We have a full
22 plate of procedural issues to discuss this morning so
23 let's get right after it. But, first, I guess,
24 before punching the list, let's see if anybody has
25 any issues for the Bench to add to our already

1 lengthy agenda today. Are there other issues that
2 need to be discussed?

3 All right. Seeing none, the first issue
4 we have to deal with is the Companies filed a motion
5 to leave -- filed a supplemental response to the
6 September 5, 2020, show cause entry. The motion was
7 filed on August 6. No memoranda contra motion has
8 been filed, so at this time we will go ahead and
9 grant the motion and consider the Companies' response
10 attached to that filing to supplement its previous
11 response to the show cause order.

12 Second, it is kind of ancillary to this,
13 and it's not on our formal agenda, I'm assuming the
14 Consumers' Counsel is interested in deposing the
15 witness again? I don't know that to be true but is
16 that the case?

17 MS. WILLIS: Your Honor, yes, we would be
18 interested in that.

19 EXAMINER PRICE: Have the parties
20 discussed a date, or do we have a time frame when
21 this would work for the parties?

22 MS. WILLIS: Your Honor, honestly we have
23 not communicated with the -- the utilities about
24 that, but we can shortly. I think after we --
25 perhaps after this prehearing when we check our

1 calendars, we can do that.

2 EXAMINER PRICE: If the parties can get
3 together and let the Bench know in one week the
4 status of those discussions so we can keep this issue
5 moving forward.

6 MR. GLADMAN: Your Honor, may I be heard
7 briefly on that?

8 EXAMINER PRICE: You may.

9 MR. GLADMAN: It's Mike Gladman on behalf
10 of the Companies. I guess the one thing that sort of
11 folds into this as well and maybe some of the other
12 issues that are teed up, and Mr. Doringo will be
13 addressing those, the Companies are undertaking a
14 comprehensive review of their prior responses to the
15 discovery to see if there are any further
16 supplementation needed with respect to specific
17 interrogatories and document requests that have been
18 made.

19 And I guess two things with respect to
20 this. This request for deposition, A, as Maureen
21 indicated, we have not had any discussions about this
22 and this one is a little bit different, I would say,
23 because the first one Mr. Fanelli submitted an
24 affidavit in support of the show cause, and he is not
25 an affiant on this one.

1 And I guess, secondly, I think it would
2 be more proper for OCC and the other parties to see
3 how the supplementation of our prior responses goes
4 on this issue and then deal with a potential for a
5 deposition.

6 But with all that said, I understand
7 where you are coming from, and we will certainly
8 coordinate and work with OCC on this issue.

9 EXAMINER PRICE: Well, interestingly the
10 second item on our agenda was reporting on the status
11 of supplementing discovery responses so let's talk
12 about time frame when you think that will be done.

13 MR. GLADMAN: And I'm going to hand that
14 one off to my colleague, Mr. Doringo, who is prepared
15 to address that.

16 EXAMINER PRICE: Thank you.

17 MR. DORINGO: Thank you. And, Mike,
18 thank you.

19 Your Honor, as Mike said, we are going
20 through a comprehensive review of all of our
21 responses to date in this proceeding and -- and plan
22 to supplement those on a rolling basis as soon as we
23 can with target completion for that of September 17.

24 EXAMINER PRICE: Okay. That being the
25 case, why don't we reset the date for reporting to

1 the Bench on the discussion about the -- about
2 whether there will be or -- and when there will be
3 another deposition of Mr. Fanelli to September 24.
4 That will give parties a chance to see the
5 supplementations and then decide how they want to
6 proceed.

7 MR. GLADMAN: Thank you, your Honor.

8 MS. WILLIS: Thank you, your Honor. I
9 appreciate that. We do appreciate the Company
10 supplementing the responses.

11 EXAMINER PRICE: Okay. The next item on
12 our agenda is the pending motions to compel. I just
13 wanted to express our appreciation for everybody
14 giving us an updated list of what's in dispute. That
15 certainly helps us better prepare for the prehearing
16 conference. Let's start with INT-05-01.

17 MS. WILLIS: Your Honor.

18 EXAMINER PRICE: Yes.

19 MS. WILLIS: Mr. Finnigan will be
20 addressing the fifth set, and I will be addressing
21 the sixth set.

22 EXAMINER PRICE: Who will be addressing
23 the seventh set? Oh, there are none. Never mind.

24 MS. WILLIS: Right, there are none.

25 Thanks.

1 EXAMINER PRICE: Perfect. Mr. Finnigan,
2 I'm struggling with the relevance to this proceeding
3 in steps that the Company is going to take in the
4 future.

5 MR. FINNIGAN: Well, your Honor, the
6 action that they are taking may be occurring in the
7 future, but it relates to the regulatory proceedings
8 that were impacted by the House Bill 6 matter. So
9 this arises from the Companies' SEC disclosure that
10 they've been involved in the stakeholder meetings on
11 regulatory proceedings that impact the utilities, and
12 we've seen a good example of that with the recent
13 disclosure of the 4.3 million consulting fee as a
14 political payment that was charged to the utilities.

15 So it seems apparent to us that in these
16 stakeholder meetings they are discussing topics of
17 interest, topics that are relevant to costs that were
18 charged to the utilities, and how to remedy that. So
19 we believe that this information will be relevant to
20 the case.

21 EXAMINER PRICE: Mr. Doringo.

22 MR. DORINGO: Thank you. We also believe
23 that -- I mean, this request is not relevant to this
24 case, doesn't go to the political and charitable
25 spending by the -- by the Companies. I'm a little --

1 I guess I'm a little confused about Mr. Finnigan's
2 references to the \$4.3 million payment in connection
3 with stakeholder meetings but what I would say is to
4 the extent there have been stakeholder meetings in
5 Ohio -- concerning Ohio regulatory matters, OCC has
6 been included in those and will continue to be, but
7 again, we would stand primarily on the relevance
8 objection here.

9 EXAMINER PRICE: Okay. We are going to
10 go ahead and deny the motion to compel on this one.
11 It is a low bar for discovery, needs to be
12 information that's reasonably calculated to lead to
13 admissible evidence, but in this case it seems that
14 any evidence that this would result in would simply
15 be subsequent remedial measures whose -- it's not
16 admissible before the Commission. So we will grant
17 the motion -- we will deny the motion to compel at
18 this time.

19 The next one I have is RPD-05-01.
20 Mr. Finnigan, it occurs to me that if I grant your
21 motion to compel, you will have access to information
22 and be able to disclose information that the SEC --
23 or the FERC itself cannot disclose. That seems to be
24 kind of a paradox.

25 MR. FINNIGAN: Well, your Honor, that is

1 true because they are under -- they are in the
2 process of an audit. They won't release their
3 results until the audit is complete.

4 But the -- the other side of the story
5 there is that this is relevant information, that we
6 presume it is, because the FERC is auditing the
7 political and governmental spending related to House
8 Bill 6, the exact same topic covered by this
9 proceeding, and our position would be that just the
10 fact that there is a FERC audit does not cloak these
11 documents and this information with some kind of
12 magic dust that now makes it off limits to us because
13 the information would probably be highly relevant to
14 the matters that the Commission is investigating
15 here.

16 And if this information is off limits,
17 then it will really impair the OCC's ability to get
18 to this important information related to the
19 Companies' political and governmental spending that
20 the FERC is auditing.

21 EXAMINER PRICE: But this is
22 reflecting -- I mean, this particular request is
23 requesting communications from FERC to the Company
24 and the Company to FERC. I mean, it's -- this is
25 material related to their investigation that they

1 can't -- they need to keep confidential. This is not
2 some information that's otherwise in the Companies'
3 files that they are trying to use the FERC
4 investigation as a shield and say, oh, no, this is
5 accounting information you normally could have but
6 you can't because of the FERC filing. You are
7 literally asking questions about the FERC
8 investigation; is that correct?

9 MR. FINNIGAN: Well, not exactly, your
10 Honor. You're right in your description of the
11 request for production of documents in terms of how
12 it was originally framed. You've described that.
13 But in our motion to compel we saw the point that you
14 are raising now that we cannot ask for information
15 communicated from FERC to the Companies, so we've
16 limited our request to only ask for the documents
17 that the Companies' supplied to FERC, and we are no
18 longer seeking any information or documents that the
19 FERC communicated to the Company.

20 EXAMINER PRICE: Okay. Mr. Doringo.

21 MR. DORINGO: Thank you. And to respond
22 to Mr. Finnigan's last point, the request even as
23 modified by OCC's motion to compel goes for literally
24 all documents produced by FirstEnergy Corp. to -- to
25 FERC and is going to encompass, you know, any

1 number -- encompass any number of things from audit
2 responses to other communications with FERC staff.

3 I still think the danger of invading the,
4 of course, FERC auditing proceeding is still very
5 real even when Mr. Finnigan limits the request as he
6 does. And -- and we also have some other fundamental
7 issues with -- with the request. One that you
8 pointed out, your Honor, being that these documents
9 are protected -- to the extent, you know, we are
10 talking about files exchanged with FERC in the
11 context of the audit, those are protected from
12 disclosure.

13 We -- as you also correctly pointed out,
14 we are not claiming just because the document was
15 provided to FERC it's somehow cloaked with protection
16 forever. That's not our position.

17 But beyond these issues, you know, we
18 have real concerns about the scope of the audit which
19 is not just an audit of -- that includes political
20 and charitable spending and government
21 affairs-related issues but rather a comprehensive
22 audit for a five-year period of FirstEnergy Corp. as
23 a whole and it's subs -- subsidiaries including
24 regulated subsidiaries in other states that are
25 outside the Commission's purview.

1 So we think this request implicates
2 documents that are not in our -- in the Companies'
3 possession, custody, and control and that the scope
4 of the request far exceeds the bounds of permissible
5 discovery in this proceeding.

6 EXAMINER PRICE: Okay. We are going to
7 go ahead and deny the motion to compel. We will let
8 FERC proceed with their investigation in a
9 confidential matter. If and when a public audit is
10 released by FERC, we can revisit this issue at that
11 time.

12 Next up is RPD-05-06 and that will be
13 denied for the same reasons as INT-05-01.

14 Okay. RPD-05-07, Mr. Doringo, would you
15 like to speak to this?

16 MR. DORINGO: Yes, thank you, your Honor.
17 Going back to a point I just raised regarding
18 possession, custody, or control, this request and
19 several other ones that we are going to talk about
20 following this go -- go to -- go to, you know, issues
21 involving FirstEnergy Corp.'s Board of Directors.
22 This one talks about the -- and other FirstEnergy
23 Corp., you know, entities.

24 So this one talks about FirstEnergy
25 Corp.'s internal audit department and -- and focuses

1 on any audits performed recently relating to House
2 Bill 6-related activities, and I think this request
3 goes back to another issue you raised previously
4 about the relevance of the Companies' or of their
5 parent's actions going forward and addressing the
6 House Bill 6-related matters.

7 We don't see how that's relevant to
8 political and charitable spending by or allocated to
9 the Companies during the time period that we've set
10 for this case of 2017 through -- through 2019.

11 Beyond that the Companies are not --
12 contrary to OCC's view, I think, and this request and
13 other similar ones, the Companies are not in
14 possession of -- you know, of all the FirstEnergy
15 Corp.'s documents, whether that's related to the
16 internal audit committee -- or audit department, the
17 audit committee, or other committees of the Board of
18 Directors. And I will go ahead and stop there.

19 EXAMINER PRICE: But you are in
20 possession of some of them, right? You are in
21 possession of the documents that relate to the
22 utilities themselves; isn't that correct?

23 MR. DORINGO: Certainly to the extent
24 they relate to the utilities themselves, there would
25 be some documents that we are in possession of. This

1 request also -- I mean, it's phrased in terms of, you
2 know, every FirstEnergy director, executive, or
3 employee relating to the possibility of -- of the
4 internal audit department working on House Bill
5 6-related matters. So I think the expansive scope of
6 that, you know, to follow up on what I was also
7 saying, presents a real burden problem as well to
8 figure out who among those people have documents
9 related to the Companies.

10 EXAMINER PRICE: Mr. Finnigan, you're
11 defining FirstEnergy in this RPD as FirstEnergy
12 Corporation and all its affiliates; is that correct?

13 MR. FINNIGAN: Yes, your Honor, that's
14 correct.

15 EXAMINER PRICE: Would you be willing to
16 limit the scope of this to the FirstEnergy utilities?

17 MR. FINNIGAN: Well, your Honor, it seems
18 that the internal audit was conducted by FirstEnergy
19 Corporation, and it impacts the FirstEnergy
20 utilities, so I think that if we limit it in the way
21 you suggest, we would get nothing, so I don't feel
22 that we can limit it in that manner.

23 I would suggest that we need to get the
24 documents from the FirstEnergy Corp. because of what
25 we found in the Companies' recent filing where they

1 sought to supplement their response to the show cause
2 order.

3 We read in that filing that when the
4 deferred prosecution agreement was filed, that's the
5 first time that the utilities became aware that the
6 \$4.3 million consulting payment was a political
7 payment. So we've been doing discovery in this case
8 for about a year now and this is the first time we
9 learned that the utilities don't really know of the
10 costs on their books, which ones are political
11 payments and which ones aren't, unless FirstEnergy
12 Corp. tells them.

13 And so the only way we can discover the
14 extent the utilities' political and charitable
15 spending is to get these records from the court.
16 Now, happily the statutes allow the Commission to do
17 that because 4905.05 which speaks to the Commission's
18 jurisdiction says that the Commission has
19 jurisdiction over all records in the holding
20 company's system, not just records in the possession,
21 custody, and control of the utility and records we
22 really need to find the full extent of the Companies'
23 political and charitable spending in support of House
24 Bill 6. Without that we'll never know.

25 EXAMINER PRICE: Well, you have

1 subpoenaed FirstEnergy Corp. in other proceedings.
2 If you are asking for documents from FirstEnergy
3 Corp., isn't the -- isn't the proper route to go to
4 go ahead and file a subpoena with FirstEnergy Corp.
5 rather than try to do this through their affiliates?

6 MR. FINNIGAN: Well, we can do it either
7 way. We were just trying to cover all the bases by
8 doing that. Our contention would be we are entitled
9 to get the records in this proceeding but failing
10 that then that's why we've issued the subpoenas from
11 the Corp.

12 EXAMINER PRICE: Mr. Doringo,
13 Mr. Finnigan cites 4905.05 and a provision in there
14 related to electric utility holding company's system
15 that's exempt from the PU -- the Public Utility
16 Holding Company Act of 1935. Would you care to
17 respond to that?

18 MR. DORINGO: Yeah. I think the
19 expansive view that Mr. Finnigan has of the
20 jurisdiction created by 4905 is off place or
21 misplaced. 4905 creates jurisdiction over public
22 utilities in Ohio when acting as public utilities.
23 FirstEnergy Corp. is not -- or its affiliates that
24 are operating outside of Ohio do not fall within that
25 statutory definition.

1 I do not believe that the statute somehow
2 grants the Commission or OCC the right to every
3 document produced within the corporate family, and I
4 think that -- that can't be the law when we have
5 stringent corporate separation requirements in Ohio
6 and elsewhere requiring, you know, separation between
7 the -- you know, these entities in the corporate
8 family.

9 And beyond that, I think, you know, it's
10 well recognized in Ohio and most other -- maybe every
11 other jurisdiction, you know, the corporate
12 formalities are to be observed and represented among
13 distinct entities in corporate families who have
14 distinct legal rights and obligations and privileges
15 as well. And I think Mr. Finnigan's view of the
16 FirstEnergy corporate family, you know, read large
17 ignores a lot of those longstanding legal principles
18 and statutory principles.

19 EXAMINER PRICE: Thank you.

20 Mr. Finnigan, are the electric -- the
21 FirstEnergy utilities part of an electric utility
22 holding company's system exempt under Section 3(A)(1)
23 or (A)(2) of the Public Utility Holding Company Act
24 of 1935?

25 MR. FINNIGAN: Your Honor, I haven't

1 reviewed those statutes. I would have to check that,
2 but subject to check, my understanding is that it is
3 they are part of a utility holding company's system
4 with FirstEnergy Corp. as the parent company of that
5 system, and they --

6 EXAMINER PRICE: But it has to
7 be exempt -- it has to be an exemption under the
8 Public Utility Holding Company Act; is that correct?

9 MR. FINNIGAN: Your Honor, I would -- I
10 would have to review that. I can't -- I can't say
11 off the top of my head.

12 EXAMINER PRICE: Okay. Well, we will
13 deny the motion to compel at this time. These
14 documents are held by FirstEnergy Corp. as OCC is
15 aware. If they need to or can demonstrate a need for
16 this, they can file a motion for subpoena from
17 FirstEnergy Corp. as they've done in other cases
18 recently.

19 This takes us on to RPD-05-08.
20 Mr. Finnigan -- actually we are starting with
21 Mr. Doringo on this one. Mr. Doringo, would you like
22 to discuss the relevance of this particular request?

23 MR. DORINGO: Yes, your Honor. And
24 again, we do not believe this -- this request is
25 relevant going directly to future changes to

1 FirstEnergy Corp.'s approach to governmental affairs
2 engagement and its limitations on participation in
3 the political process. It does not go to political
4 spending by the Companies or allocated to them in the
5 past. So that's certainly point 1.

6 I think it's outside the scope of this
7 proceeding, the Commission's review here. Beyond
8 that I think we have similar issues about what we
9 just talked about where we are talking about things
10 that are in the possession, custody, or control of
11 FirstEnergy Corp., that -- that the Companies are not
12 going to have all these documents as well. Thank
13 you.

14 EXAMINER PRICE: Mr. Finnigan, certainly
15 OCC and the Commission have a shared interest in
16 FirstEnergy improving its transparency in government
17 relations and the political process. I don't think
18 we have to go over old ground to discuss that there
19 are some established -- or there have been some
20 issues surrounding House Bill 6. Do you have any
21 concern that requesting this in discovery presents a
22 chilling effect upon the Company making these
23 improvements because if they do nothing, they don't
24 have to respond to anything in discovery; if they
25 make improvements, then they are going to have to

1 provide the information to you in discovery, and
2 maybe they may not be prepared to move forward with
3 certain items at this point and it might delay these
4 improvements in the long run?

5 MR. FINNIGAN: Your Honor, what you're
6 suggesting certainly may be possible. However, that
7 has to be balanced against our right to obtain
8 relevant information in discovery and information
9 that may lead to the admissible evidence about what
10 their activities were regarding how they participated
11 in the political process.

12 So if we can't get at information
13 regarding what their practices are with regard to
14 political spending and who the decision makers are,
15 how they approach that, how they reach decisions, how
16 they thought it was proper to do what they did here,
17 then we just won't be able to have full discovery in
18 this case to understand the full extent of their
19 political spending in support of House Bill 6.

20 EXAMINER PRICE: But it would have to be
21 admissible evidence and that gets back to what I was
22 saying earlier, and I should have given you a better
23 chance to respond so I am going to now. You know,
24 there's a rule, evidentiary rule, we all learned in
25 law school subsequent remedial measures are not

1 admissible to prove liability because society has an
2 interest in companies or -- or individuals remedying
3 issues and not letting them linger to avoid making a
4 concession for liability for purposes. Aren't these
5 pretty much the equivalent of subsequent remedial
6 measures and don't those interests still exist?

7 MR. FINNIGAN: Well, yes, I think so,
8 your Honor, but we're mixing apples and oranges here
9 because what you are referring to as a rule of
10 evidence, that would apply at a hearing and we are
11 not seeking to introduce at a hearing what a change
12 was to their processor --

13 EXAMINER PRICE: You're -- but you're
14 seeking information that might be admissible. You
15 are seeking information that might lead to admissible
16 evidence, and it seems anything you get from this is
17 not going to be admissible.

18 MR. FINNIGAN: Well, I would -- I would
19 disagree with that, your Honor, respectfully because
20 if they change their process, what was the prior
21 process? And that's what we want. That would be
22 admissible. So that's why at the discovery level
23 it's a different consideration from at the hearing
24 level and the Rules of Evidence of what's admissible.

25 We are not seeking to admit this at a

1 hearing. We are seeking discovery what were the
2 processes before they were changed, and I would
3 submit that this information could lead to useful --
4 this discovery request would lead to useful
5 information about what those processes were that
6 caused these breakdowns that resulted in what we have
7 here.

8 EXAMINER PRICE: But we've had many other
9 discovery responses fulfilled by the Company.

10 Mr. Doringo, do you have a running count of the
11 discovery responses so far in this proceeding?

12 MR. DORINGO: I know that we are over --
13 I don't have an exact count, but I know we are over
14 500 when we were talking about subparts, you know,
15 individual requests and their subparts.

16 EXAMINER PRICE: We are going to deny the
17 motion to compel for the reasons any information in
18 this is not reasonably calculated to lead to
19 admissible evidence. Any information this might
20 result in would be inadmissible due to the rule
21 against the admission of subsequent remedial
22 measures.

23 That takes us on to RPD-05-10.

24 Mr. Doringo.

25 MR. DORINGO: Thank you, your Honor.

1 This request basically goes -- goes towards asking
2 for everything seen or produced by the independent
3 review committee of FirstEnergy Corp.'s Board of
4 Directors, which as, you know, very publicly
5 disclosed, conducted an investigation over the last
6 year or so that has been pretty wide ranging going
7 back to some of the things we discussed earlier.

8 One of them is the Companies are just
9 simply not in possession, custody, or control of the
10 information reviewed or produced by the independent
11 review committee as part of its investigation.

12 We also believe that this request is --
13 you know, implicates jurisdictional concerns
14 regarding the Commission's power to compel the
15 independent -- FirstEnergy Corp. to produce these
16 documents from its independent review committee and
17 that the request is overbroad in the sense that it's
18 not tailored at all just to political spending
19 allocated to the Companies or by the Companies.

20 EXAMINER PRICE: Well, let's play that
21 out, Mr. Doringo, in terms of if I deny the motion to
22 compel, OCC will simply -- well, OCC may file a
23 motion for subpoena with the Commission in this case
24 regarding FirstEnergy Corp. FirstEnergy Corp. is
25 located in Ohio. Why would they not have to -- if --

1 if you do not have the information and you cannot
2 produce it, why would FirstEnergy not be required to
3 produce it in response to an OCC subpoena?

4 MR. DORINGO: Thank you, your Honor. And
5 one thing, as you know, the -- this has been an issue
6 that's being addressed -- I think we are going to
7 address it September 14.

8 EXAMINER PRICE: Yes.

9 MR. DORINGO: I think there are many
10 issues with the subpoena requests to FirstEnergy
11 Corp. Prominently among those are that this review,
12 this independent review committee work, is part of a
13 privileged and confidential investigation conducted
14 by -- at the request of FirstEnergy Corp.'s Board of
15 Directors.

16 The Companies can assert that privilege,
17 and it's owned by FirstEnergy Corp. They certainly
18 have and will. Beyond that I think you get into
19 misuse of scope and burden as to third parties that
20 are raised in the context of a Rule 45 subpoena to an
21 entity -- any third party really.

22 And so I think there are certain
23 objections that -- that the FirstEnergy Corp. would
24 raise and has raised in another context other than
25 possession, custody, or control which obviously is

1 not one we would likely see from it.

2 EXAMINER PRICE: Mr. Finnigan.

3 MR. FINNIGAN: Your Honor, I think the
4 remaining responses in set 5, No. 10, 11, and 12, are
5 all substantially similar to the one you previously
6 denied, item No. 7, because they all seek documents
7 at the FirstEnergy Corp. level. And if it's your
8 ruling that if there are FirstEnergy Corp. documents,
9 they are outside the possession, custody, and control
10 of the utilities, and we cannot seek discovery in
11 this proceeding, then it would seem that that would
12 dictate that these last three also be denied and that
13 we would have to pursue these through subpoena rather
14 than through discovery requests in this case.

15 EXAMINER PRICE: Well, I appreciate your
16 efficiency, Mr. Finnigan. I agree with everything
17 you just said, so we will go ahead and deny
18 RPD-05-10, 11, and 12.

19 I believe that's all I have for the fifth
20 set of discovery; am I correct?

21 MR. FINNIGAN: Yes, your Honor. That's
22 correct in terms of the ones that were issued -- at
23 issue in our motion. But we would like to call your
24 attention to the fact that the Company is going to be
25 supplementing various interrogatories, and I suppose

1 that we'll just deal with that at a later date.

2 That's not before the -- your Honor at this time so.

3 EXAMINER PRICE: If you have an issue we
4 can address briefly that might head off disputes down
5 the line, I am certainly willing to entertain that.

6 MR. FINNIGAN: Well, sure. There's one,
7 I will give an example, is RPD-05 No. 2 and that asks
8 for communications between FirstEnergy and
9 Mr. Randazzo on certain topics. And what we don't
10 know is whether we are going to be met with another
11 objection that e-mail communications are not in the
12 possession, custody, and control of the utilities
13 even though the topics that we're seeking these
14 communications on impact the utilities like, for
15 example, the Commission's requirement to eliminate
16 the duty to file a distribution rate case by May of
17 2024.

18 So to the extent you can shed any -- or
19 provide any guidance to the parties as to whether
20 that type of information is discoverable, that would
21 help us get access to the information more quickly
22 than having to go file a subpoena for it.

23 EXAMINER PRICE: Companies?

24 MR. DORINGO: Thank you. So to
25 reiterate, the Companies are involved in -- in a

1 comprehensive review of their -- of their previous
2 responses and will supplement as necessary, and I
3 frankly have not had an opportunity to go through
4 every request cited in Mr. Finnigan's letter from
5 yesterday or the responses to those requests or
6 compare them to where we are in our review now.

7 I imagine there will be issues that we
8 need to work out with OCC going forward. We will
9 endeavor to do that, but I think it's a little
10 premature to try to resolve them at this point.

11 EXAMINER PRICE: Okay. Well, we'll let
12 this play out then. It doesn't seem like something
13 that lends itself to a quick resolution to head off
14 additional process, so we will kick that can down the
15 road until we have to address it.

16 Okay. That takes us down to the sixth
17 set. Ms. Willis.

18 MS. WILLIS: Thank you, your Honor.

19 I'm sorry. Were you waiting for a
20 response?

21 EXAMINER PRICE: No. I'm saying let's go
22 to the sixth set. I was just teeing you up.

23 MS. WILLIS: I'm ready.

24 EXAMINER PRICE: Why don't we let you go
25 forward then with INT-06-03.

1 MS. WILLIS: 6-03, okay. 6-03 really was
2 asking about information of the -- concerning the
3 identity of the FirstEnergy employees that worked on
4 the FERC audit. Unlike the previous discovery
5 requests here we are asking merely information that's
6 certainly not confidential. It's certainly not part
7 of the FERC investigation, so we are just asking to
8 identify those employees that are working on the FERC
9 audit on behalf of FirstEnergy.

10 EXAMINER PRICE: Mr. Doringo.

11 MR. DORINGO: Thank you, your Honor. We
12 don't see how this is relevant to the Companies'
13 political and charitable spending in this case or
14 likely -- or calculated to lead to admissible
15 evidence when we are talking about an ongoing, you
16 know, FERC investigation that we just, you know,
17 recognize is protected from -- from disclosure.

18 I don't agree that this wouldn't reveal
19 the -- any information that -- that is not conf --
20 any not -- I don't agree this isn't confidential
21 information is what I am trying to say. You know,
22 who FERC is meeting with or has met with and, you
23 know, the people that have responded to requests or
24 otherwise communicated with Staff, I think that could
25 reveal the direction of the investigation.

1 And again, we're also talking about
2 information regarding every FirstEnergy Corp. entity,
3 not just the Companies and FirstEnergy Corp. itself,
4 that is subject to this FERC audit.

5 EXAMINER PRICE: Ms. Willis, would you be
6 satisfied if we limited the scope of this request to
7 employees of the Company or Service Company employees
8 that allocate time to the Companies and we exclude
9 counsel?

10 MS. WILLIS: Your Honor, yes, to the --
11 although to the extent that it would involve
12 FirstEnergy Corp. employees, yes, we would agree. We
13 don't need to understand who -- you know, we know who
14 the counsel are. We would like to know who is
15 involved in the auditing and responding to FERC's
16 audit requests; so, yes, we would agree to that as
17 long as --

18 EXAMINER PRICE: I must not have been
19 clear. I was saying if we limit it to employees of
20 the FirstEnergy utilities or employees of the Service
21 Companies that allocate time to FirstEnergy
22 employees, would you be satisfied with this
23 discovery -- with that response?

24 MS. WILLIS: If I understand you to
25 exclude FirstEnergy Corp., I guess I would not.

1 Again, we want to -- the information we're seeking is
2 who are the people that are -- actually know the
3 information, who are the people that FERC is turning
4 to, and who is FirstEnergy, the utilities and the
5 Service Company, identifying as people with knowledge
6 and expertise.

7 We are hoping that will lead us to
8 potential employees to depose to find out more
9 information about, you know, the -- how the -- how
10 records are kept, how the Service Company is -- and
11 the Service Company and the utilities allocate costs
12 which are really very germane to this -- this issue
13 and these cases and as well as the other
14 investigation cases including corporate sep and the
15 DCR case.

16 So I -- I understand your wanting to
17 limit or offering a compromise. I'm just not willing
18 to accept it because I think it excludes FirstEnergy
19 Corp., although I don't even know who the FirstEnergy
20 Corp. person or persons would be. I would imagine
21 it's most FirstEnergy Service Company along with the
22 employees but do not know that.

23 EXAMINER PRICE: Okay. We'll deny the
24 motion to compel. We will allow FERC to continue its
25 investigation without any potential disruptions by

1 the PUCO or people operating under a motion to compel
2 from the PUCO. As I said earlier, if and when a
3 final public audit report is issued, we can revisit
4 this issue.

5 That takes us to RPD-06-03. Mr. Doringo,
6 we have your request for communications including
7 e-mail from one employee on a defined set of time and
8 a defined set of materials. Would you care to
9 address this?

10 MR. DORINGO: Yes, your Honor. The -- we
11 do have one employee with a relatively limited amount
12 of time, May 1, 2020, through the present. We
13 believe though that these -- this request remains
14 overbroad when, you know, we are including terms like
15 Account 923 or Account 426.1, adjust or adjustments,
16 reverse or reversal.

17 I think I understand what OCC is getting
18 at here. But the way they are going about it I think
19 is in the manner of a fishing expedition that's
20 targeted at really this time period Mr. Fanelli's
21 investigation, you know, relating to these issues,
22 but I think the problem here is the scope of the
23 requests, and I can just tell you we ran the numbers,
24 would return about 20,000 documents just for
25 Mr. Fanelli if we were to run these terms.

1 So while I don't -- while I think there
2 may be some relevant information included within
3 that, of course, the burden and expense of going
4 through that review is high.

5 EXAMINER PRICE: But I would suggest that
6 courts that have looked at these sort of discovery
7 requests, electronic e-discovery requests, have been
8 fairly liberal in granting these requests; is that
9 not true? Can you point to an e-discovery ruling
10 in -- either in the federal courts in this circuit or
11 an Ohio that would give me some authority to limit
12 this?

13 MR. DORINGO: I don't have a specific
14 case, not off the top of my head other than sort of
15 the general power you have and courts have to limit
16 overbroad and burdensome discovery which I think
17 these terms sort -- result in.

18 EXAMINER PRICE: Okay. Ms. Willis, care
19 to respond?

20 MS. WILLIS: Yes, your Honor. I do think
21 we did -- we did try to limit this in time and in
22 scope. These terms are clearly relevant terms. They
23 are what it's all about. We are talking about
24 misallocations. We are talking about adjustments and
25 reversal. We are talking about specific above the

1 line and below the line accounts, and Mr. Fanelli was
2 the -- you know, the -- one of the key persons from
3 our perspective. He did submit an affidavit. That
4 affidavit was on the scope of discovery -- was -- has
5 been the scope of the Company -- or has been the
6 Companies' response until very recently, so we
7 believe it's tailored.

8 And we also -- the research that we have
9 conducted has shown that the courts, as you
10 indicated, your Honor, that the courts have been
11 fairly liberal and that this type of discovery is
12 very common and commonly used and is favorable. It's
13 favorable. In fact, there's rules. There are rules
14 in the Civil -- Civil Rules of Procedure, I believe.
15 I can't recall them offhand. However, they were
16 cited in our motion to compel.

17 EXAMINER PRICE: We are going to grant
18 the motion to compel, but we are going to strike
19 certain of the words that are subject to the search.
20 My concern is that some of the ones that are
21 nonspecific to House Bill 6 like reverse, reversal,
22 allocate, that's just going to any utility employee
23 that deals with numbers is going to run across -- I
24 can't even fathom how many times they go to use the
25 word in an e-mail, allocate, reverse, or adjust.

1 So we're going to strike G, misallocate,
2 misallocation, allocate, or allocation. We are going
3 to strike H, reverse and reversal; I, adjust or
4 adjustments; and, J, reclassify or reclassified.
5 Beyond that we have specific entities, specific FERC
6 accounts, and specific types of expenditures. I
7 think that's a fair scope for that particular
8 employee's search.

9 MS. WILLIS: Thank you, your Honor.

10 EXAMINER PRICE: Moving on to
11 Ms. Mikkelsen, we are not going to need to go back
12 over that same ground. We will strike misallocate --
13 we will grant the motion to compel subject to
14 striking misallocate, misallocation, allocate or
15 allocation, reverse or reversal, adjust or
16 adjustments, and reclassify or reclassified. The
17 remaining provisions are narrowly tailored to produce
18 information relevant to this proceeding.

19 Mr. Doringo, let's talk about
20 Mr. Richards for a moment. As much as I would like
21 to limit the scope of this, it does create a problem
22 in the sense he was the person that was making these
23 accounting entries or making these change accounting
24 entries; is that not correct?

25 MR. DORINGO: So I know that he was

1 involved in the review. I can't tell you that he was
2 making the calls on changing the accounts or booking
3 those changes, but certainly he has been somebody
4 we've -- we've referenced as, you know, with
5 knowledge of those issues.

6 EXAMINER PRICE: Okay. Well, we will
7 stick with our previous ruling because we do have --
8 Ms. Willis, the FERC accounts that you have
9 identified are the ones where the -- where the costs
10 were -- the accounting treatment of the costs were
11 modified; is that correct?

12 MS. WILLIS: That's our understanding,
13 your Honor.

14 EXAMINER PRICE: Okay. Then I am going
15 to go ahead and strike misallocate, misallocation,
16 allocate, and allocation, reverse or reversal, adjust
17 or adjustments, and reclassify or reclassified.
18 Otherwise the motion will be granted.

19 MS. WILLIS: Thank you, your Honor.

20 EXAMINER PRICE: That simply leaves us
21 with -- that leaves us next with Mr. Jones.
22 Ms. Willis, you have a more extensive time period for
23 this one. This is no longer March 20 -- March 1,
24 2020, but now includes a much broader accounting --
25 broader time period. Care to address that?

1 MS. WILLIS: Correct, your Honor. I
2 believe that the broader time frame represents the
3 fact that we now know through statements that
4 FirstEnergy Corp. has made that Mr. Jones was
5 involved in HB6 activities for or over a longer
6 period of time than other individuals perhaps.

7 So I believe it's -- it's very consistent
8 with the charges that have been brought against
9 Mr. Jones on the federal level, and it's consistent
10 with the statements in the deferred prosecution
11 agreement, the information, the facts that
12 FirstEnergy Corp. agreed to as part of the deferred
13 prosecution agreement. So I do believe the longer
14 period -- time frame for Mr. Jones is -- is warranted
15 and that is why we chose that longer time frame.

16 EXAMINER PRICE: I will let you correct
17 this on the record. There have been no charges
18 against Mr. Jones, have there?

19 MS. WILLIS: I am sorry. There have not.
20 There -- there have not, yes, you are correct.

21 EXAMINER PRICE: They are allegations.

22 MS. WILLIS: You are correct, they are
23 allegations. And there are statements in the
24 deferred prosecution agreement that provide some
25 grounds for identifying or -- let me strike that.

1 There are -- there is the deferred
2 prosecution agreement which there are charges that
3 have been admitted to and facts which form a basis
4 for allowing us to do discovery on the more extended
5 time frame starting in January of 2017.

6 EXAMINER PRICE: Mr. Doringo.

7 MR. DORINGO: Thank you, your Honor. In
8 addition to, you know, sort of the breadth of the
9 request and the generality of the search terms that
10 are asked to be applied here, we also have serious
11 possession, custody, or control concerns as well. As
12 everyone on this call, you know, knows, Mr. Jones was
13 the CEO of FirstEnergy Corp. The Companies just by
14 virtue of being a subsidiary in that corporate family
15 do not have, you know, the right to all of Mr. Jones'
16 e-mails or the right to produce that.

17 So we think that the request is overbroad
18 in the first respect and improper for the second
19 respect in that we are being asked to produce
20 documents that we do not control.

21 EXAMINER PRICE: Are you saying that
22 Mr. Jones had no formal officer role with the
23 electric utilities? I understand he is a CEO of a
24 corporation. But was he also CEO of the electric
25 utilities?

1 MR. DORINGO: Your Honor, he was -- he
2 was a former officer of the -- of the utilities, not
3 the CEO of the utilities but a director of the
4 utilities, and I -- I know that to be true for
5 certain periods of time. I couldn't tell you those
6 verbatim off the top of my head but you are correct
7 but our -- the thing is that that sharing of officers
8 and directors among corporate family members does not
9 automatically make everyone's documents, you know,
10 everyone else's documents too. I think that that's
11 recognized in Ohio law, in federal law, and elsewhere
12 so just because he served as a director for the
13 Companies does not put his e-mails in our possession,
14 custody, or control.

15 EXAMINER PRICE: Okay. But this isn't --
16 this isn't FirstEnergy Corp.'s accounting records
17 versus the electric utilities' accounting records.
18 This is a single e-mail account. He didn't send out
19 e-mails as an Ohio Edison director one day and as a
20 Jersey Power & Light director the next day. He sent
21 out e-mails and didn't differentiate which particular
22 hat he was wearing at any one time, did he?

23 MR. DORINGO: I can't speak to what he
24 was saying in his e-mails. I agree. It is -- it is
25 a FirstEnergy Corp. account, yes, but I can't really

1 go farther than that.

2 EXAMINER PRICE: Okay. Ms. Willis, care
3 to respond?

4 MS. WILLIS: No, your Honor, nothing to
5 add.

6 EXAMINER PRICE: Thank you. Well, let's
7 just be consistent with our previous rulings. We'll
8 strike out misallocate, misallocation, allocate, and
9 allocation, reverse or reversal, adjust or
10 adjustments, and reclassify or reclassified and grant
11 the motion to compel the remaining issues.

12 MS. WILLIS: Your Honor, with respect to
13 the remaining RPD-06-08, we will concede consistent
14 with your earlier rulings on the fifth set that we
15 would expect your ruling to be consistent and are
16 willing to take our punishment.

17 EXAMINER PRICE: Thank you. Thank you.
18 At this time we are going to pause for a period.
19 Actually let's not. Let's take -- turn our attention
20 to the privilege log and allow Mr. Doringo to make
21 any arguments he has -- before we begin the in camera
22 review, let's let Mr. Doringo make any arguments he
23 has regarding the privilege log. We'll then allow
24 Ms. Willis to respond and then take a break while the
25 Examiners review the actual documents.

1 Mr. Doringo?

2 MR. DORINGO: Yes, thank you, your Honor.
3 So before you will be the privilege log to the extent
4 it covers the sixth set of discovery which I
5 understand OCC has challenged each entry on -- on the
6 log pertaining to the sixth set of discovery. These
7 are -- the documents we logged you can tell from the
8 descriptions they are communications at the direction
9 of counsel that were used for a number of purposes,
10 whether they were preparing to render legal advice
11 concerning Mr. Fanelli's affidavit or to provide
12 analyses for, you know, how that affidavit was going
13 to be prepared, what that affidavit was going to say.

14 All of these involve sort of those
15 attorney-directed analyses that meet both the work
16 product -- attorney-client privilege standard,
17 communications that were confidential within the
18 Company for the purpose of seeking legal advice
19 pertaining to Mr. Fanelli's affidavit, or other
20 analyses of political and charitable spending costs.
21 And they meet and satisfy the standard set by the
22 Work Product Doctrine or, you know, tangible material
23 created in anticipation of litigation.

24 Obviously we are all participating in
25 that litigation for which these were created right

1 now. And, you know, so -- and again, as set out in
2 the log, each of these documents was also created by
3 or at the direction of -- of counsel. So frankly,
4 you know, we think they fall squarely within the
5 attorney-client privilege and Work Product Doctrines
6 independently.

7 EXAMINER PRICE: Ms. Willis.

8 MS. WILLIS: Thank you, your Honor. I
9 would say that we have -- we do have 14 entries. I
10 suppose it would be -- with respect to communications
11 that are solely from an attorney to an employee of
12 FirstEnergy such as entry No. 1 that provided that,
13 they've shown that that is attorney-client privilege,
14 and subject to your in camera review, we would think
15 that may be a legitimate claim.

16 However, your Honors, the rest of these
17 entries, for instance, 2, 3, 4, 5, 6 are between
18 non-attorneys, none of the -- I'm sorry, with the
19 exception of Mr. Knipe being in entry 3, nothing is.
20 You know, Ms. Wright, Mr. Fanelli, those are the --
21 you know, those are not attorneys. Mr. Richards is
22 not an attorney. The -- you know, the recipients
23 that the e-mails are going back and forth to, some of
24 them are just not attorneys, and yet they are
25 claiming an attorney-client privilege which I think

1 is -- is -- is a real stretch.

2 You can't just put an attorney on an
3 e-mail and then make a claim that because that
4 attorney is included on the e-mail, that somehow it
5 changes the nature of the -- of the e-mail and
6 changes it -- takes it from being unprotected to
7 protected. I think that's not the way the
8 attorney-client privilege is meant to work, and I
9 don't think that's how it does work.

10 With respect to -- generally with respect
11 to work product, I would note that the Work Product
12 Doctrine, it does not preclude discovery being
13 conducted. It just requires that the parties show
14 that there is good cause, that it is very difficult,
15 I believe -- and I am paraphrasing the civil rules,
16 that it is difficult for the -- for a party to obtain
17 that information in any other way which I think
18 certainly, you know, is true for our discovery, so I
19 don't think the work product really is a shield,
20 although it can be -- it can be overcome by showing,
21 of my understanding, good cause and that that
22 information is not readily obtainable in other --
23 through other means.

24 So with those general comments, I can't
25 really -- it's very difficult for me to challenge

1 what -- what has been set out here, and I would
2 certainly leave it up to the -- to the Attorney
3 Examiners in the review of those documents just
4 knowing and being well aware that the attorney-client
5 privilege requires certain -- has certain
6 requirements and that those requirements are to be
7 met in order for the privilege to apply and in order
8 to preclude discovery from being had.

9 EXAMINER PRICE: Thank you. Okay.

10 MR. DORINGO: Your Honor, could I -- I'm
11 sorry. Could I just have one more word on this
12 issue, please?

13 EXAMINER PRICE: You may.

14 MR. DORINGO: Thank you. To the point
15 about work product, you know, these requests that we
16 are -- the requests that these documents were logged
17 in response to, one, were requests such as, you know,
18 produce everything that Mr. Fanelli reviewed or saw
19 essentially in the course of preparing his -- his
20 affidavit or doing other work related to this
21 litigation.

22 And it's not our position that data --
23 that the data itself that Mr. Fanelli relied upon
24 in -- in putting together his affidavit is somehow
25 protected from disclosure because some of it may have

1 been included in a work product document. OCC has
2 asked for data along those lines, and we have
3 produced it, but these documents that we are talking
4 about were created at the direction of an attorney.

5 I don't believe OCC has met the standard
6 of good cause to have them be produced over the work
7 product privilege that applies to them, and it's
8 certainly not the case we believe that just throwing
9 an attorney on an e-mail makes it privileged and
10 protected from disclosure but that's not the position
11 though we've taken here.

12 And then, finally, I did want to clear up
13 one issue. Ms. Willis was referring to entries on
14 the log that relate to the first set of discovery. I
15 believe what we had provided for in camera review
16 this morning relates to the sixth set of discovery
17 which is what we understood to be at issue in OCC's
18 motion for its in camera review.

19 So just to be clear with everyone and the
20 Attorney Examiners, not included in that packet were
21 those first two entries on the log, items 1 and 2.

22 EXAMINER PRICE: Thank you.

23 MR. DORINGO: We did not dispute as to
24 those.

25 EXAMINER PRICE: Thank you for clarifying

1 because I was confused by the different approaches.

2 Ms. Willis, did you intend for item 1 and
3 2 to be part of today's activities?

4 MS. WILLIS: Your Honor, for judicial
5 efficiency I would -- I would suggest that that would
6 be our view that it should be taken care of all at
7 once, and certainly the Company was well aware --
8 well, I would think that they understood that we were
9 talking about the entire discovery log and not just
10 the sixth set. So, yeah, I think it makes sense to
11 address them to the extent you can address them now.
12 We can certainly file another motion to compel and go
13 through that exercise again.

14 EXAMINER PRICE: I don't think that will
15 be necessary. As to items 1 and 2, FirstEnergy will
16 produce those for the Examiners to review in camera,
17 and then the next time we have an opportunity we will
18 issue just a written ruling on that issue and that
19 will be more expeditious than -- than doing another
20 motion to compel.

21 MS. WILLIS: Thank you, your Honor.

22 EXAMINER PRICE: We will only be looking
23 at items 6 -- 3 through 14.

24 Okay. At this time you can turn your
25 cameras off. I would suggest you not log off of the

1 system. And we will come back -- let's come back at
2 11:50. Thank you all.

3 We are off the record for now.

4 (Recess taken.)

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

7 We have reviewed in camera the documents
8 submitted by the FirstEnergy Companies, and as a
9 preliminary matter, we would agree the following
10 documents are attorney-client or work product
11 protected by attorney-client privilege or Work
12 Product Doctrine, and the motion to compel will be
13 denied. It's items 3 -- from the privilege log dated
14 May 12, 2021, item 3, 4, 5, 6, 7, 8, 9, and 11. All
15 of those documents are either part of a series of
16 advice issued by FirstEnergy counsel or clearly
17 labeled as attorney-client or prepared at the
18 direction of an attorney.

19 The remaining documents, 10, 12, 13, 14
20 are not labeled as attorney-client or prepared at the
21 direction of an attorney. It's not dispositive
22 alone, but it certainly puts them into question.
23 They all ultimately relate to OCC's request for
24 production of documents 6-12, so my question for the
25 parties is did the Companies respond with any

1 documents for RPD-6-12 and withhold these, or the
2 Company responded with no documents and said all the
3 documents that are responsive are part of Work
4 Product Doctrine?

5 MS. WILLIS: Your Honor, there's been
6 quite a bit of discovery so I can try to check right
7 now online but perhaps the Company could respond. I
8 can certainly look at our discovery log, but it's
9 going to take a couple minutes for that.

10 EXAMINER PRICE: Mr. Doringo.

11 MR. DORINGO: Yes, your Honor. I am
12 looking in my folders as well. I should be able to
13 get you an answer quickly. This is 6-12?

14 EXAMINER PRICE: Yes. Because 6-14
15 simply responds to -- references back to 6-12.

16 While you guys are looking, we will go
17 off the record so that the court reporter can take a
18 break.

19 (Discussion off the record.)

20 EXAMINER PRICE: Let's go back on the
21 record.

22 At this time we are going to adjourn the
23 prehearing conferences -- the conference. The
24 parties -- I am not sure I gave this ruling before
25 when we were on the record. I will do it again. The

1 motion to compel will be denied as items 3, 4, 5, 6,
2 7, 8, 9, and 11. The parties have committed to
3 undertake discussions whether the issues revolving
4 around items 10, 12, 13, and 14 can be resolved and
5 amicably resolved and report back to the Bench on --
6 by the close of business this Friday.

7 If parties are unable to resolve the
8 issue, the Bench will call for additional memoranda
9 on the -- on the legal issues surrounding these
10 particular discovery responses.

11 At the same time we also acknowledge that
12 we owe the parties a ruling on items 1 and 2, and the
13 Companies will as soon as possible provide the
14 Examiners with copies of the e-mails that are items 1
15 and 2.

16 The Attorney Examiners had indicated in
17 the entry on setting this prehearing conference that
18 we intended to set the new initial and reply
19 comments. Given the unfinished business coming out
20 of this prehearing conference, we will defer setting
21 those initial and reply comments. However, as we
22 indicated off the record, the Commission is
23 interested in moving forward with this case as
24 expeditiously as possible. This case has been open
25 for several months -- many months for discovery

1 purposes, and we have not yet gotten to the filing of
2 comments and reply comments regarding the Companies'
3 show cause response which they have now supplemented.

4 So I am not saying this has not been a
5 productive investigation, but we do want to move
6 forward with the next steps as quickly as possible.
7 And I will also remind the Companies that they are
8 going -- that they have agreed to attempt to
9 supplement all remaining discovery responses by
10 September 17, 2021, and OCC will indicate whether
11 they wish to depose Mr. Fanelli again by
12 September 24, 2021.

13 Any other matters that we need to address
14 before we go off the record?

15 MS. WILLIS: Your Honor, a slight matter.
16 I know that -- that there were a number of our
17 motions to compel data requests which were not
18 granted and there were some that were granted, and I
19 don't believe we've set a time period for the Company
20 to respond to those discovery requests that were
21 granted.

22 EXAMINER PRICE: Mr. Doringo, do you
23 have -- I know you guys have done some test runs;
24 your clients have done some test runs. We have
25 narrowed the scope of some of these, but I do

1 understand these are substantial e-discovery
2 requests. Do you have a time frame that you think
3 you can reasonably respond to the granted motions to
4 compel?

5 MR. DORINGO: Yeah. I will say that --
6 that the changes made to the search terms helped. I
7 don't have -- I think that will affect the number of,
8 you know, electronic hits we are getting back, and I
9 don't have those numbers yet even though I hope to
10 later today. I guess I would ask for three weeks
11 from today anticipating this will require a
12 significant, you know, document review and privilege
13 review. I think that's maybe aggressive, but we can
14 do it.

15 EXAMINER PRICE: I think that's fair.
16 Therefore, the Companies will respond by July -- or
17 September 21 to the motion -- to the motion -- to the
18 items for which the motion to compel was granted.

19 Anything else?

20 MS. WILLIS: Thank you, your Honor.

21 EXAMINER PRICE: Thank you.

22 At this time the prehearing conference
23 will be adjourned. We are off the record.

24 (Thereupon, at 12:08 p.m., the hearing
25 was adjourned.)

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 Tuesday, August 31,
2021, and carefully compared with my original
stenographic notes.

Karen Sue Gibson, Registered
Merit Reporter.

(KSG-7145)

- - -

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

9/13/2021 10:34:09 AM

in

Case No(s). 20-1502-EL-UNC

Summary: Transcript in the matter of the Ohio Edison Company hearing held on 08/31/21 electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.