

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the :
Review of Ohio Edison :
Company, The Cleveland :
Electric Illuminating :
Company, and The Toledo : Case No. 17-974-EL-UNC
Edison Company's :
Compliance with :
R.C. 4928.17 and Ohio Adm.:
Code Chapter 4901:1-37. :

- - -

In the Matter of the 2020 :
Review of the Delivery :
Capital Recovery Rider of :
Ohio Edison Company, The : Case No. 20-1629-EL-RDR
Cleveland Electric :
Illuminating Company, and :
The Toledo Edison Company.:

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PREHEARING CONFERENCE

before Mr. Gregory Price, Ms. Megan Addison, and Ms.
Jacky St. John Werman, Attorney Examiners, at the
Public Utilities Commission of Ohio, via Webex,
called at 10:01 a.m. on Tuesday, September 14, 2021.

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APPEARANCES:

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

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

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

Jones Day
By Mr. Corey Lee
901 Lakeside Avenue East
Cleveland, Ohio 44114

On behalf of FirstEnergy Corp. and
FirstEnergy Service Company.

Bruce J. Weston, Ohio Consumers' Counsel
By Ms. Maureen R. Willis,
Senior Counsel
Mr. John Finnigan,
and Mr. William Michael,
Assistant Consumers' Counsel
65 East State Street, Suite 200
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 Ms. Bethany Allen
and Mr. Evan F. Betterton
6100 Emerald Parkway
Dublin, Ohio 43016

On behalf of the Interstate Gas Supply,
Inc.

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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, Ohio Partners for
Affordable Energy, and Calpine Energy
Solutions LLC.

Carpenter Lipps & Leland LLP
By Ms. Kimberly W. Bojko
and Mr. Thomas V. 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 Mr. Matthew Pritchard
21 East State Street, 17th Floor
Columbus, Ohio 43215

On behalf of the Industrial Energy Users
of Ohio.

Bricker & Eckler, LLP
By Mr. Dane Stinson
and Mr. Glenn Krassen
100 South Third Street
Columbus, Ohio 43215-4291

On behalf of Northeast Ohio Public Energy
Council.

Whitt Sturtevant LLP
By Mr. Mark A. Whitt
and Mr. Lucas A. Fykes
88 East Broad Street, Suite 1590
Columbus, Ohio 43215

On behalf of the Retail Energy Supply
Association, Direct Energy Business LLC,
and Direct Energy Services LLC.

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APPEARANCES: (Continued)

Dave Yost, Ohio Attorney General
Mr. John Jones, Section Chief
By Mr. Thomas Lindgren
and Mr. Werner L. Margard, III
Assistant Attorneys General
Public Utilities Section
30 East Broad Street, 26th Floor
Columbus, Ohio 43215

On behalf of the Staff of the PUCO.

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.

Bricker & Eckler, LLP
By Mr. Devin Parram
100 South Third Street
Columbus, Ohio 43215-4291

On behalf of the Ohio Hospital
Association.

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1 Tuesday Morning Session,
 2 September 14, 2021.

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4 EXAMINER ST. JOHN: Now let's go on the
 5 record.

6 The Public Utilities Commission of Ohio
 7 calls for a prehearing conference at this time and
 8 place Case No. 17-974-EL-UNC, being in the Matter of
 9 the Review of Ohio Edison Company, The Cleveland
 10 Electric Illuminating Company, and The Toledo Edison
 11 Company's Compliance with Revised Code Section
 12 4928.17 and Ohio Administrative Code Chapter
 13 4901:1-37 as well as Case No. 20-1629-EL-RDR, being
 14 in the Matter of the 2020 Review of the Delivery
 15 Capital Recovery Rider of Ohio Edison Company, The
 16 Cleveland Electric Illuminating Company, and The
 17 Toledo Edison Company.

18 As stated in the September 2, 2021,
 19 entries, these prehearing conferences are being held
 20 together today, but the cases have not been
 21 consolidated.

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

1 Now, let's begin by taking appearances,
2 starting with the Companies.

3 MR. KNIPE: Good morning, your Honors.
4 On behalf of Ohio Edison Company, The Cleveland
5 Electric Illuminating Companies, and The Toledo
6 Edison Company, I'm Brian Knipe, FirstEnergy Service
7 Company, 76 South Main Street, Akron, Ohio 44308.
8 Also appearing on behalf of the Companies the law
9 firm of Jones Day, Michael Gladman, 325 John H.
10 McConnell Boulevard, Suite 600, Columbus, Ohio 43215.

11 EXAMINER ST. JOHN: Thank you.

12 Next, I have FirstEnergy Corp. and
13 FirstEnergy Service Company.

14 MR. LEE: Good morning, your Honors.
15 Appearing on behalf of FirstEnergy Corp. and
16 FirstEnergy Service Company is Corey Lee with Jones
17 Day at address 901 Lakeside Avenue, Cleveland, Ohio
18 44114.

19 EXAMINER ST. JOHN: Thank you.

20 Ohio Consumers' Counsel.

21 MS. WILLIS: Thank you, your Honor. On
22 behalf of the residential customers of the
23 FirstEnergy utilities, Maureen R. Willis, John
24 Finnigan, and William Michael, 65 East State Street,
25 Suite 700, Columbus, Ohio 43215. Thank you.

1 EXAMINER ST. JOHN: Thank you.

2 Interstate Gas Supply, Inc.

3 MS. ALLEN: Good morning, your Honors, on
4 behalf of Interstate Gas Supply, Inc., Bethany Allen,
5 6100 Emerald Parkway, Dublin, Ohio 43016.

6 EXAMINER ST. JOHN: Thank you. Retail
7 Energy Supply Association.

8 MR. FYKES: Good morning, your Honor. On
9 behalf of Retail Energy Supply Association, Lucas
10 Fykes and Mark Whitt of the law firm Whitt
11 Sturtevant, LLP. Address is 88 East Broad Street,
12 Suite 1590, Columbus, Ohio 43215.

13 EXAMINER ST. JOHN: Thank you. Northeast
14 Ohio Public Energy Council.

15 COURT REPORTER: He's muted. Mr. Stinson
16 is speaking, but he's muted.

17 EXAMINER ST. JOHN: Thanks, Karen.

18 MR. STINSON: Is that better?

19 EXAMINER ST. JOHN: We can hear you now.

20 MR. STINSON: Can you hear me now? On
21 behalf of the Northeast Ohio Public Energy Council,
22 Dane Stinson and Glenn Krassen, Bricker & Eckler,
23 LLP, 100 South Third Street, Columbus, Ohio 43215.

24 EXAMINER ST. JOHN: Thank you.

25 Environmental Law & Policy Center.

1 Next on my list I have Ohio Environmental
2 Council.

3 MS. LEPPLA: Good morning, your Honor.
4 On behalf of the Ohio Environmental Council, Miranda
5 Leppla. Address is 1145 Chesapeake Avenue, Suite I,
6 Columbus, Ohio 43212.

7 EXAMINER ST. JOHN: Thank you.

8 Next on my list I have Mr. Robert Dove.

9 MR. DOVE: Good morning, your Honor. On
10 behalf of the Natural Resources Defense Council, Ohio
11 Partners for Affordable Energy, and Calpine Energy
12 Solutions, Robert Dove, the law firm of Kegler,
13 Brown, Hill & Ritter, 65 East State Street, Suite
14 1800, Columbus, Ohio 43215.

15 EXAMINER ST. JOHN: Thank you.

16 Citizens Utility Board of Ohio.

17 MS. FLEISHER: Good morning, your Honors.
18 On behalf of the Citizens Utility Board of Ohio,
19 Madeline Fleisher, Dickinson Wright, 150 East Gay
20 Street, Suite 2400, Columbus, Ohio 43215.

21 EXAMINER ST. JOHN: Thank you.

22 Industrial Energy Users - Ohio.

23 MR. PRITCHARD: On behalf of the
24 IEU-Ohio, Matt Pritchard, law firm McNees, Wallace &
25 Nurick, 21 East State Street, Columbus, Ohio 43215.

1 EXAMINER ST. JOHN: Thank you.
 2 Ohio Manufacturers' Association Energy
 3 Group.

4 MR. DONADIO: Tom Donadio on behalf of
 5 the Ohio Manufacturers' Association Energy Group with
 6 the law firm of Carpenter Lipps & Leland, LLP,
 7 located at 280 North High Street, Columbus, Ohio
 8 43215. Thank you.

9 EXAMINER ST. JOHN: Thank you.
 10 Direct Energy.

11 MR. FYKES: Good morning. On behalf --
 12 on behalf of Direct Energy Business, LLC, and Direct
 13 Energy Services, LLC, Lucas Fykes and Mark Whitt of
 14 the law firm Whitt Sturtevant, LLP, 88 East Broad
 15 Street, Suite 1590, Columbus, Ohio 43215.

16 EXAMINER ST. JOHN: Thank you.
 17 Ohio Energy Group.

18 MR. KURTZ: Good morning, your Honors.
 19 For OEG Mike Kurtz and Jody Kyler Cohn, Boehm, Kurtz
 20 & Lowry.

21 EXAMINER ST. JOHN: Thank you.
 22 Ohio Hospital Association.

23 MR. PARRAM: Good morning, your Honor.
 24 On behalf of the Ohio Hospital Association, Devin
 25 Parram from the law firm Bricker & Eckler, 100 South

1 Third Street, Columbus, Ohio 43215.

2 EXAMINER ST. JOHN: Thank you.

3 And last on my list I have the Office of
4 the Ohio Attorney General.

5 MR. LINDGREN: Your Honor, on behalf of
6 the Staff, Ohio Attorney General Dave Yost by Werner
7 Margard and Thomas Lindgren, Assistant Attorneys
8 General. The address is 30 East Broad Street, 26th
9 Floor, Columbus, Ohio 43215.

10 EXAMINER ST. JOHN: Thank you.

11 I believe that's all the parties we were
12 expecting today, so I will go ahead and turn it over
13 to Attorney Examiner Price.

14 Greg, I'm sorry. You're muted.

15 EXAMINER PRICE: Man. Sorry about that.
16 We have a number of issues to address this morning.
17 We have OCC's motion to compel filed in 20-1629 on
18 August 26, 2021. We have a motion -- motions to
19 quash subpoenas filed by FirstEnergy Corp. and
20 FirstEnergy Service Corp. on -- July 19, 2021. We
21 also would like to discuss a procedural schedule in
22 Case 17-974. As everybody is aware, the audit report
23 was filed yesterday, so it's time to move forward
24 with comments, supplemental comments, and hopefully
25 get a hearing date on this calendar for everybody to

1 work towards.

2 Are there any other issues besides those
3 three that the parties would like addressed today?

4 MS. COHN: Your Honor, OEG has a pending
5 motion to intervene out of time.

6 EXAMINER PRICE: Oh, that's right. What
7 date did you file that?

8 MS. COHN: I think it was August 31.

9 EXAMINER PRICE: Okay. Does anybody
10 object to OCC -- OEG's pending motion to intervene
11 out of time?

12 I don't see any objection. Did we get a
13 memo contra from anybody on that?

14 MS. COHN: Not that I'm aware of.

15 EXAMINER PRICE: I don't think so either.
16 Okay. At this time OEG's Motion to
17 Intervene will be granted.

18 MS. COHN: Thank you, your Honor.

19 EXAMINER PRICE: It will be a party to
20 this proceeding. Thank you.

21 MS. COHN: Thank you.

22 MR. GLADMAN: Examiner Price, I had one
23 other related issue. I don't know if the timing's
24 right, but I will put it out there. I just wanted to
25 advise the parties and you that the Companies intend

1 to move for a protective order regarding some limited
2 trade secret information in the redacted version of
3 the publicly filed corporate separation report. We
4 will be filing that in the next few days. Happy to
5 discuss but I at least wanted to give folks a heads
6 up that was coming.

7 EXAMINER PRICE: Thank you very much. We
8 will take it under advisement once the motion is
9 filed and everybody has had a chance to take a look
10 at it and file memo contra, if they so choose.

11 MR. GLADMAN: Thank you, your Honor.

12 EXAMINER PRICE: In the interim we will
13 protect the document until the motion is actually
14 filed, and ruled upon, by the Companies.

15 MR. GLADMAN: Thank you, your Honor.

16 EXAMINER PRICE: Okay. Let's start with
17 the motion to compel filed by Ohio Consumers' Counsel
18 on August 26, 2021. Who will be speaking for OCC?

19 MS. WILLIS: That -- thank you, your
20 Honor. On the motion to compel related to the
21 20-1602 case, that would be Attorney Bill Michael.

22 EXAMINER PRICE: Mr. Michael. And who
23 will be handling this for the Company?

24 MR. MICHAEL: Yes, your Honor.

25 MR. GLADMAN: It's Mike Gladman, your

1 Honor. I will.

2 EXAMINER PRICE: Okay. Thank you. Well,
3 we've read the motion to compel and the memo contra
4 and the reply. So we will just move directly to the
5 items. I don't think that we need to spend any time
6 on preliminary statements.

7 Mr. Gladman, INT-02-002 you have not
8 responded to items C and E. Can you explain your
9 objections to these items.

10 MR. GLADMAN: Your Honor, it's my
11 understanding we've agreed to supplement our
12 responses to those two interrogatory subparts and
13 have communicated that with OCC and those will be
14 forthcoming. So hopefully that addresses that one.

15 EXAMINER PRICE: Very good. We will
16 defer ruling. If OCC finds the supplementation is
17 insufficient, they should raise it with the Bench at
18 the appropriate opportunity.

19 That then takes us to Request for
20 Production of Document 02-002. And we have item B
21 has not yet been addressed.

22 Mr. Gladman.

23 MR. GLADMAN: Yes, your Honor. So I
24 am -- if it's okay to take items B and D together
25 with respect to this one because our arguments are

1 essentially the same. It's a couple fold here.

2 First of all, the request for copies of
3 documents relating to communications with the
4 counterparty referred to in this SEC filing and
5 documents related to actions that the Company took
6 with respect to the individual who was appointed to
7 the position as a regulator are not relevant to what
8 we are getting at in this proceeding and that is
9 simply stated whether the payments pursuant to the
10 consulting agreement actually impacted rates and
11 should be returned to the Companies' Ohio customers.

12 In addition, your Honor, the Companies
13 have already produced to OCC the underlying
14 consulting agreement, its amendment, documents
15 concerning payments made under the consulting
16 agreement, and calculations of how those payments
17 impacted any on the rates the consumers paid.

18 So with respect to those two, we believe
19 that, A, it's not relevant; and, B, to the extent it
20 is, we have already provide sufficient information to
21 OCC.

22 EXAMINER PRICE: Thank you.

23 Mr. Michael. Mr. Michael.

24 MR. MICHAEL: May I have a moment? Your
25 Honor, can you hear me?

1 EXAMINER PRICE: We can intermittently.

2 MR. MICHAEL: I apologize, your Honor,
3 but I am having problems with my audio right now.
4 Could your Honor restate the discovery item at issue,
5 please?

6 EXAMINER PRICE: I don't think that's
7 going to help us. We are -- you are very much
8 breaking up. What I would suggest, Mr. Michael, is
9 perhaps you call in on one of the audio lines.

10 MR. SCHMIDT: Mr. Michael, if you have a
11 phone handy, you can go up in the Webex window and
12 click on the Audio and Video tab, and then the first
13 option on that menu is to Switch Audio. If you click
14 Switch Audio, you can input a phone -- your phone
15 number and then have Webex call you. And once you
16 answer that phone, it will automatically change your
17 audio from your computer audio to your telephone
18 audio.

19 EXAMINER PRICE: While Mr. Michael
20 attempts to reinstate his audio, why don't we set
21 aside the motion to compel and move on to the motion
22 to quash and we will come back to this once Bill
23 is -- is with us again.

24 Okay. Let's move on then and we will
25 come back to the motion to compel in a minute. Let's

1 move on to the motion to quash subpoenas. Subpoenas
2 were filed by OCC on June 25, 2021, and a motion to
3 quash was filed by FirstEnergy Corp. on July 19,
4 2021.

5 Mr. Lee, I believe you will be speaking
6 for the Companies; is that correct?

7 MR. LEE: That's correct, your Honor.

8 EXAMINER PRICE: Thank you.

9 And who will be speaking for OCC? Ms.
10 Willis?

11 MS. WILLIS: That would be Mr. Finnigan.

12 EXAMINER PRICE: Mr. Finnigan, excellent.

13 MR. FINNIGAN: Good morning, your Honor.

14 EXAMINER PRICE: Good morning,
15 Mr. Finnigan. Mr. Finnigan, I have a simple
16 question. Let's start with these. We'll work
17 through the four items beginning with No. 1. Have
18 you received from the Companies the documents that
19 you are seeking the disclosure of in item 1?

20 MR. FINNIGAN: Your Honor, we don't know
21 and that's why we filed the subpoena. So the
22 background of this is that we have received documents
23 from the utilities that they purport to be the
24 consulting agreement and any amendments, so the same
25 thing we are asking for here.

1 The concern we have is this, we -- the
2 Company -- or the FirstEnergy Corp. entered into a
3 deferred prosecution agreement on July 22 and that's
4 filed in the record of 21-502 and we would ask you
5 that you take administrative notice of that in this
6 case.

7 And in that filing the utilities
8 indicated that it was not until the deferred
9 prosecution agreement was filed that they first
10 learned that the \$4.3 million payment to someone's
11 company who became the chair of the Commission was
12 for political purposes. And that's even though the
13 utilities and FirstEnergy Corp. share the same CEO
14 and that CEO is also on the Board of both entities.

15 So while the utilities told us that they
16 gave us the consulting agreement and all amendments,
17 we don't know if the documents in FirstEnergy Corp.'s
18 files might contain additional information. If they
19 do, we would like those.

20 If the FirstEnergy Corp. tells us that
21 what we received from FirstEnergy utilities is the
22 exact same thing they have, we are not asking for two
23 copies of the same thing. We'll accept that. We
24 only want any additional information that's in the
25 files of FirstEnergy Corp., and it's apparent to us

1 from the utilities' filing in the 1502 case that they
2 don't know what's in the files of FirstEnergy Corp.
3 until FirstEnergy Corp. releases it.

4 EXAMINER PRICE: Mr. Lee, care to
5 respond?

6 MR. LEE: I do, thank you, your Honor.
7 First, I would think that the position stated by OCC
8 here varies fairly significantly from what they
9 stated in their motion contra. In the motion to
10 quash, FirstEnergy Corp. and FirstEnergy Service
11 Company stated, in fact, that the consulting
12 agreement and amendments that had been provided by
13 the Companies are, in fact, the same as those in the
14 filings of the Company and there would be no
15 additional evidentiary value by having the Company
16 produce those same documents again.

17 OCC stated that, in fact, was not the
18 case and they, in fact, did want the same documents
19 again and now they come here today with a change of
20 their argument.

21 So the FirstEnergy Corp. and Service Co.
22 have already stated in their motion to quash that, in
23 fact, the documents it would produce are, in fact,
24 the same as those that have been provided by the
25 Companies.

1 EXAMINER PRICE: Mr. Finnigan, would you
2 like the final word?

3 MR. FINNIGAN: Yes, your Honor. This
4 development that the utilities don't know what's in
5 the files of FirstEnergy Corp. is a fairly
6 late-breaking development. The deferred prosecution
7 agreement was -- became public on July 22, and it
8 wasn't until after that that the utilities in the
9 1502 case asked to supplement the record and
10 acknowledge that they didn't know anything about the
11 4.3 million payment being a political payment.

12 So that's when it first become apparent
13 to us that these subpoenas of FirstEnergy Corp. are
14 very important to get all of the information that's
15 available and that the utilities don't know. So what
16 Mr. Lee is referring to of the briefing on the
17 motions to quash, that occurred before this
18 development that I just described.

19 EXAMINER PRICE: I'm not sure I share
20 your interpretation of the deferred prosecution
21 agreement and the acknowledgments that FirstEnergy
22 utilities are making pursuant to them. FirstEnergy
23 utilities have for some time represented that the
24 payments may be improper or unsubstantiated, and I
25 don't think it necessarily adds anything that now

1 they are also conceding that they were political
2 spending versus not political spending.

3 FirstEnergy Corp., FirstEnergy Service
4 Corp. are nonparties to this proceeding. You are
5 able to obtain these documents from FirstEnergy
6 utilities. You have obtained the documents from
7 FirstEnergy utilities. You really don't have a right
8 that I can see to double-check their work, so we will
9 go ahead and grant the motion to quash as to item 1.

10 MR. FINNIGAN: Your Honor, may I just say
11 that -- you know, as I mentioned earlier, we are not
12 interested in any duplicate documents. We are only
13 seeking in this subpoena any documents that
14 FirstEnergy Corp. might have that would be additional
15 to what we received from the utilities.

16 EXAMINER PRICE: I think the language of
17 this tracks exactly with what you've asked for the
18 utilities. The utilities have provided these
19 documents to the Staff. They provided these
20 documents apparently to the auditor. I think they
21 have provided -- made the necessary disclosures, and
22 I don't believe it's necessary to burden a nonparty
23 with some idea that there may be additional documents
24 that you can't identify at this time. So I am going
25 to go ahead and grant the motion to quash item 1.

1 Let's go ahead and move on to item No. 2.
2 Mr. Finnigan, would you care to speak to this?

3 MR. FINNIGAN: Yes, your Honor. This
4 relates to an internal investigation that was
5 disclosed in FirstEnergy Corp.'s SEC filings and they
6 state in the SEC filings that this internal
7 investigation resulted in decisions to terminate a
8 number of executives for violation of FirstEnergy
9 policies and its code of conduct related to this
10 consulting agreement.

11 We believe this information is germane to
12 the corporate separation case because we know that
13 from the deferred prosecution agreement and other
14 information that the consulting agreement was paid to
15 the person who became the Chair for services to be
16 performed after he became the Chair and one of which
17 was implementing nuclear subsidy legislation which
18 later became House Bill 6.

19 Now, the costs of the consulting
20 agreement were charged to the utilities. So this
21 appears to be a clear corporate separation violation.
22 The merchant company was subsidized by this payment
23 charged to the utilities for the consulting
24 agreement.

25 This request for the internal

1 investigation keys on information that would be
2 relevant to these -- this corporate separation
3 violation, A, the disclosure in the SEC filing that
4 there were violations of the FirstEnergy code of
5 conduct which could be relevant or lead to admissible
6 evidence as to whether it violates the code of
7 conduct under the corporate separation law and
8 regulations and also the decision to terminate the
9 executives were for their actions in connection with
10 the consulting agreement which, as I described,
11 appears to be a corporate separation violation
12 because of the subsidization of the merchant company.

13 So we have questions about, you know,
14 what were the activities that, you know, led to this
15 consulting agreement that caused the cost to be
16 allocated to the companies. Now, we just received
17 the audit report in the corporate separation case
18 yesterday. We've only had a chance to skim it, but
19 the report does seem to say that there's a glaring
20 lack of controls in the companies' cost allocation
21 practices. And this would be a good illustration of
22 that.

23 And so we think that the information that
24 we are seeking through the subpoena is highly
25 relevant, very important to this case. Now, the

1 Company has claimed privilege with respect to this
2 investigation, but it's interesting that if you read
3 their motion to quash carefully, they do not claim
4 that the entire report is privileged. They just
5 claim that a number of the documents would be
6 privileged associated with this report.

7 So we would ask that if your Honor grants
8 our subpoena, our motion for subpoena here, and
9 denies the motion to quash, that the Company file a
10 privilege log per the Commission's usual practice
11 when there is a claim of privileged documents and
12 then your Honor can review those one by one to
13 determine which ones are privileged and which ones
14 are not.

15 But we believe there will be a number of
16 documents that aren't privileged in the form of
17 company records, things like e-mails, text messages,
18 and so forth, that are described in the -- some of
19 which are described in the deferred prosecution
20 agreement that will be relevant to these corporate
21 separation violations that -- that we describe. So
22 that's why we are seeking this information, your
23 Honor.

24 EXAMINER PRICE: In a previous prehearing
25 conference, if my memory is correct, FirstEnergy

1 represented that the executives were not terminated
2 for violating the affiliate code of conduct, but they
3 were terminated for violating a different code of
4 conduct in -- code of conduct according to
5 FirstEnergy's internal practices; isn't that correct?

6 MR. GLADMAN: That is correct on behalf
7 of the Companies, your Honor, if you are directing it
8 to me, but we did represent that.

9 MR. LEE: And factually is correct on
10 behalf of the FirstEnergy Corp. and FirstEnergy
11 Service Company.

12 MR. FINNIGAN: And, your Honor, we would
13 submit that, you know, the test isn't what
14 interpretation of the code of conduct the Company
15 seeks to apply, but it's what the documents say. And
16 that we are entitled to review the documents to
17 determine whether they might lead to admissible
18 evidence in this proceeding.

19 I mean, this is like the companies'
20 interpretation that they didn't have to discuss
21 anything related to contributions to Generation Now
22 being related to House Bill 6 unless those
23 contributions occurred after the bill was struck.
24 That was their interpretation at Mr. Fanelli's
25 deposition so I would urge, your Honor, not to accept

1 the Companies' unchecked interpretations, of course
2 they are going to interpret that most favorably to
3 the Companies, but allow the OCC to engage in the
4 broad rights of discovery that it has under the
5 statute and rules.

6 EXAMINER PRICE: Yeah, but you don't have
7 broad rights to discovery versus people we don't
8 regulate. You have broad rights of discovery in this
9 case vis-a-vis the utilities, but you don't have
10 broad rights of discovery vis-a-vis the unrelated
11 FirstEnergy Corp. and FirstEnergy Service Corp.

12 But let's move on to Mr. Lee real fast.
13 Mr. Lee, do you object to producing a privilege log
14 regarding the documents that otherwise would be
15 responsive to this?

16 MR. LEE: Your Honor, producing a
17 privilege log here would be unnecessarily burdensome.
18 Just as to give some background, what we are talking
19 about here, within days of the Householder indictment
20 and arrestment the independent corporation of the
21 FirstEnergy Board of Directors, their independent
22 Board members filed a separate committee. They hired
23 their own law firm, Squire Sanders, who then went out
24 and have been in the process of doing an
25 investigation that has spanned over a year.

1 So we are not talking about a small
2 amount of documents to log here. We are talking
3 about potentially thousands of documents that would
4 have to be logged, so we would object to having to go
5 through a process of logging thousands of documents
6 which are clearly on their face privileged.

7 Now, if, in fact, what the OCC is asking
8 for are -- are factual documents that were considered
9 during the investigation, we are not claiming that by
10 the fact that something being considered
11 investigation is now automatically privileged.

12 However, that's not what the OCC asked for. They
13 didn't make -- ask for factual documents. They asked
14 for the internal investigation file.

15 If they think the specific factual
16 documents are, in fact, relevant to their -- their
17 subpoena or their investigation or this audit, they
18 should ask for those factual documents and not seek
19 the entire investigation file.

20 EXAMINER PRICE: But you know what the --
21 they have -- are you offering to provide to OCC all
22 factual documents, or are you saying they should ask
23 for them? Because I don't think they can ask for
24 documents when they don't have -- have not received
25 anything from you yet.

1 MR. LEE: I think we could consider what
2 they -- if they are asking for -- you know, if they
3 think there are certain areas which might be relevant
4 to the corporate separation or the DCR audit, if they
5 were to ask for those categories of documents, we
6 could then consider their request and see if, in
7 fact, they would be, one, relevant and, two,
8 non-burdensome.

9 Not knowing what they consider to be
10 actually relevant on a factual basis, I really can't
11 respond here. So because the OCC didn't frame their
12 request in a way to allow us to make a meaningful
13 response, I can't -- I can't make a hypothetical
14 response of what we might do depending on what they
15 might ask for.

16 EXAMINER PRICE: If OCC limited the scope
17 of its request solely to the report of decision to
18 terminate certain executives, would that be a more
19 manageable privilege log for you?

20 MR. LEE: If it was like -- just like a
21 log for the report status, that is a manageable
22 privilege log.

23 MR. FINNIGAN: Your Honor, may I be heard
24 on this?

25 EXAMINER PRICE: Yeah. This is as good a

1 time as any. Sure.

2 MR. FINNIGAN: Your Honor, I would ask
3 that in any of the numerous civil lawsuits that have
4 been filed against FirstEnergy Corp., whether anyone
5 else has asked for this internal investigation
6 report, and if so, whether there is some privilege
7 log that they have already prepared in connection
8 with those requests in the civil litigation that they
9 could just use in this context.

10 MR. LEE: And, your Honor, may I speak to
11 that?

12 EXAMINER PRICE: You may.

13 MR. LEE: In fact, that log -- not log,
14 the internal investigation has been requested in
15 other litigations. There have been objections to
16 producing that and, in fact, parties there, in fact,
17 have agreed that communications between outside
18 counsel and the corporation need not be logged so
19 there is no privilege log. It has already been
20 produced or already been made.

21 EXAMINER PRICE: Okay. Well, here is how
22 we are going to proceed. Mr. Lee will produce a
23 privilege log to the parties and the Examiners
24 limited to documents, limited to reported decision to
25 terminate certain executives for violation of

1 FirstEnergy policies and its code of conduct.

2 Mr. Lee will also produce for the Attorney Examiners
3 a copy for in camera review of the internal
4 investigation. We've heard a lot about this internal
5 investigation, but we are in no position to make any
6 rulings as to whether or not it's privileged sight
7 unseen.

8 MR. LEE: Your Honor, I would also remind
9 you that while -- there's another issue here beyond
10 the privilege issue. There is both the
11 investigation -- I am not even sure a final report
12 exists. If there is one, we will log it but there is
13 also a separate privilege between the independent
14 board and FirstEnergy Corp. I am -- honestly do
15 not -- this is an issue we -- had not been raised
16 before, the independent committee's privilege versus
17 the Company privilege, and I honestly do not know if
18 the Company even has copies of those reports, or they
19 are solely within the custody of the independent
20 committee outside of FirstEnergy Corp.

21 EXAMINER PRICE: Well, I think we are
22 going to stick to this ruling now.

23 MR. LEE: Okay.

24 EXAMINER PRICE: If you don't agree with
25 the ruling, we've certainly had interlocutory appeals

1 filed in these cases, and I believe you would have a
2 right to file an interlocutory appeal if you don't
3 agree with the decision within the next five business
4 days.

5 So let -- we will address final ruling on
6 the issues in item 2 once we have had a chance to
7 look at the privilege log and a chance to do an in
8 camera review of the internal investigation.

9 We would like you to produce all those
10 documents within one week. If that is not
11 reasonable, feel free to follow up with the Bench
12 later.

13 MR. LEE: And just for confirmation,
14 Examiner Price, you are talking about a final report
15 is what you're asking us to log; is that correct?

16 EXAMINER PRICE: I am asking for the
17 report that led the Company to terminate its
18 executive Mr. Jones and the other two executives.

19 MR. LEE: Okay.

20 EXAMINER PRICE: If there is a subsequent
21 report dealing with additional issues, I am not
22 looking for that to be produced.

23 Okay. Let's move on to item 3.

24 Mr. Finnigan, you may begin with this one.

25 MR. FINNIGAN: Thank you, your Honor.

1 Your Honor, you've already ruled on copies of the
2 consulting agreement but this is a bit different from
3 that. So in this one we're referencing an SEC
4 disclosure that FirstEnergy Corp. made that it came
5 to a belief that the payments under the consulting
6 agreement were for some purpose other than the
7 purposes represented in the consulting agreement.

8 Now, when they gave us the copies of the
9 consulting agreement and the amendments, we can't
10 tell from those documents what it is that led them to
11 this belief that the payments were for some other
12 purpose. We know now from the deferred prosecution
13 agreement that the purpose was for services to be
14 performed by that person after they became the Chair
15 but there must be a -- a number of documents that led
16 the Corporation to make that conclusion that the
17 purpose of the payments was for services to be
18 performed at a later date, things like e-mails,
19 things like text messages, or documents exchanged in
20 electronic communications. Those are the things that
21 we're after in this subpoena request.

22 We feel that these are important to the
23 corporate separation case because, again, they go to
24 this issue of the 4.3 million payment was for this
25 nuclear subsidy legislation that benefited the

1 merchant company but the costs of which were charged
2 to the utilities.

3 And we feel like it's important to get to
4 the underlying documents here and really dig into
5 this, and it really relates to the corporate
6 separation audit filed yesterday that I just
7 mentioned, that complete breakdown of cost allocation
8 controls within the Company. This is the independent
9 auditor saying this and so, you know --

10 EXAMINER PRICE: You are saying the
11 independent auditor used the phrase "complete
12 breakdown"?

13 MR. FINNIGAN: Well, words to that
14 effect.

15 EXAMINER PRICE: Words to that effect.
16 Okay. Mr. Finnigan, the consulting agreement was
17 between FirstEnergy utilities, I believe, and
18 Mr. Randazzo's Sustainability Funding Alliance. Have
19 you asked the Companies for this information in
20 discovery and been refused?

21 MR. FINNIGAN: Your Honor, I am not sure
22 that's true that the agreement was between the
23 utilities and Sustainability Funding Alliance. I
24 would need to check that. I do know the costs were
25 charged --

1 EXAMINER PRICE: If it's a corporate
2 separation violation, it would have had to have been
3 between the Companies. Otherwise corporate
4 separation wouldn't be involved.

5 MR. FINNIGAN: Well, it was involved
6 because the intent of the agreement was for the Chair
7 to render services to pass legislation that included
8 this nuclear subsidy to benefit the merchant
9 companies. So that's the art of the corporate
10 separation violation.

11 EXAMINER PRICE: I will turn around and
12 ask Mr. Gladman this question, Mr. Gladman, have you
13 been -- has OCC asked for information along the lines
14 of item 3 from the utilities and been -- and been
15 refused?

16 MR. GLADMAN: One of the discovery
17 requests that's at issue in the motion to compel
18 relates to its Companies' beliefs about the
19 consulting payments, and so it seems to attract this
20 language here. I will note I don't have the
21 consulting agreement in front of me either.
22 Mr. Finnigan has it. I don't believe it's actually
23 with the utilities. And so I guess I want to at
24 least square that back up.

25 MR. FINNIGAN: And, your Honor, we did

1 ask this same request to the utilities. We were told
2 that this information is not within their possession,
3 custody, or control, among other objections. And so
4 that's why we are here today to obtain it.

5 EXAMINER PRICE: Mr. Gladman.

6 MR. GLADMAN: That is accurate. That is
7 part of our response in addition to obviously the
8 fact that this has all been laid out in the DPA, the
9 deferred prosecution agreement, and the fact they are
10 seeking to, as Mr. Lee has pointed out, probe into
11 the investigative privilege of Corp., it is outside
12 the possession, custody, and control of the
13 utilities.

14 EXAMINER PRICE: Okay. Mr. Lee, care to
15 speak to this?

16 MR. LEE: Yes, your Honor. I think,
17 first of all, you have properly mentioned in order
18 for the OCC to show that there is no undue burden on
19 Corp. and Service Company, they should first ask for
20 these documents to the utilities and see what the
21 resolution is there.

22 Secondly, this request by asking for a
23 belief infringes upon the investigatory privilege and
24 the attorney-client privilege and work product
25 privilege rather than asking for factual documents.

1 EXAMINER PRICE: Well, I think they are
2 asking for the factual documents that underlie your
3 belief. If you have a belief based upon fact A, fact
4 B, and fact C, then they are entitled to facts A, B,
5 and C, are they not?

6 MR. LEE: And I believe they've requested
7 documents with Randazzo from the Companies and have
8 not -- my understanding is that has not yet been
9 resolved so there is no reason to put FirstEnergy
10 Corp. and FirstEnergy Service Company through the
11 undue burden of a nonparty as being involved in these
12 audits when there's still an outstanding discovery
13 request of the companies.

14 EXAMINER PRICE: Well, Mr. Gladman just
15 indicated those documents are not within the
16 Companies' possession or control.

17 MR. LEE: Well, I think that was two
18 separate issues, one, the belief that there was some
19 other payment versus direct communications with
20 Randazzo and some other individuals which you've
21 already ordered the Companies to produce
22 communications with.

23 MR. FINNIGAN: Your Honor, our request,
24 if you --

25 EXAMINER PRICE: Mr. Finnigan.

1 MR. FINNIGAN: Your Honor, our request in
2 the 20-1502 case was identical to this request. We
3 were met with the objection it's not in their
4 possession, custody, or control and that's why we are
5 here.

6 EXAMINER PRICE: I agree. Mr. Lee is
7 trying to fine -- thread a very fine needle, and I
8 don't think it's going to work in this case. We will
9 deny the motion to quash, but we will require that
10 only factual documents be produced. We are not
11 asking for any attorneys' theories or otherwise
12 privileged documents. If there are documents that
13 are responsive -- that are responsive that you
14 believe are privileged, you should produce a
15 privilege log, and we will go from there.

16 Okay. Mr. Finnigan, item 4.

17 MR. FINNIGAN: Your Honor, last but not
18 least this is another SEC disclosure and this is
19 another category of information that we asked from
20 the utilities, and they didn't have the information
21 in their files so that's why we're here, just like
22 the last one. But this one goes to something that
23 was disclosed in the SEC filings for where the
24 Company said that through their internal
25 investigation they found that there were over 10

1 years of costs that were misallocated to the
2 utilities or had a lack of proper supporting
3 documentation, and we then learned that this includes
4 the \$4.3 million payment.

5 But now what we have received is we have
6 just received a list of what those 10 years of costs
7 are. And we've received some supporting
8 documentation in the form of purchase orders and
9 invoices and just some of that accounting information
10 but what we don't know is who determined that these
11 were the 10 years of misallocated costs, what
12 criteria did they use, what accounts did they
13 examine, what accounts didn't they examine, did they
14 only go back 10 years, who made the decisions to do
15 these allocations, why was this not prevented by the
16 cost allocation manual.

17 So none of those questions were answered
18 by the audit in this case or by the documents they
19 gave us which were just the list of the charges and
20 some purchase orders and invoices so there are a lot
21 of documents, we suspect, that these auditors
22 reviewed to come up with this list, the 10 years of
23 misallocated costs, and we feel this is really
24 important to get into the background of how this
25 massive corporate separation violation occurred.

1 EXAMINER PRICE: Mr. Lee.

2 MR. LEE: One, I would disagree this is a
3 massive corporate separation issue. As the audit
4 report that just came out recently noted, there was
5 only some minor issues which the report found. They
6 found no massive corporate -- corporate separation --

7 EXAMINER PRICE: We don't need to spend a
8 lot of time on that. The audit report speaks for
9 itself. Counsel's hyperbole is counsel's hyperbole.
10 We don't need to --

11 MR. LEE: Okay, your Honor. So
12 secondarily the OCC has been given the information
13 which they need to look at misallocations and why
14 they occurred. That information has been provided by
15 the Companies. To the extent they are now looking
16 for, once again, information from the internal
17 investigation, that information is privileged.

18 They've been given the nonpublished
19 information by the Companies that go to the
20 misallocations themselves. To the extent -- so they
21 have what has been misallocated, how it's been
22 clarified. They have the relevant information they
23 have requested. The additional information they are
24 seeking is privileged information from the internal
25 investigation.

1 EXAMINER PRICE: Mr. Gladman, care to
2 speak to us as to what the Companies have provided
3 already?

4 MR. GLADMAN: I believe that Mr. Lee has
5 accurately represented the fact that we have provided
6 the appropriate information and response to this
7 request.

8 EXAMINER PRICE: I think there is a
9 couple items still in dispute, but I am not sure what
10 all has been agreed to. That's why we want to do the
11 motion to compel first. Let's -- I am going to
12 deny -- wrong way. I am going to grant the motion to
13 quash as to item 4. It seems to me that we have an
14 entire audit report on this topic, and OCC has got
15 the opportunity to pursue discovery including motions
16 to compel. If we reach a point where the Companies
17 are saying they don't have documents that are
18 relevant, that are not in their possession, or
19 control, we can revisit this issue.

20 MR. FINNIGAN: Your Honor, we have
21 already made this exact request in the 1502 case and
22 were met with that objection, but is it your ruling,
23 your Honor, that we should submit this request in the
24 DCR case through discovery of the utilities in that
25 proceeding?

1 EXAMINER PRICE: Well, when I looked at
2 the discovery for the DCR case, it seemed to track
3 fairly closely to this. I wouldn't say it's word for
4 word, but I would say it's pretty similar, and I do
5 understand that there are some items that are still
6 unresolved. But we'll go from there. There's no
7 reason to be burdening a nonparty while there is
8 still outstanding discovery disputes that may result
9 in these documents being produced.

10 MR. FINNIGAN: Your Honor, just to
11 clarify, if we meet the same objection we received
12 before that these documents are not in the
13 possession, custody, or control of the utilities, do
14 we have the right to return here and seek a subpoena
15 at that time?

16 EXAMINER PRICE: Yes.

17 MR. FINNIGAN: Thank you.

18 EXAMINER PRICE: Absolutely. Okay. So
19 just to recap, we are going to grant the motion to
20 compel as to item 1. As to item 2, FirstEnergy Corp.
21 will produce a privilege log and a copy of the
22 internal investigation related to the termination of
23 the executives for in camera review.

24 MR. FINNIGAN: Excuse me, your Honor.
25 You prefaced your comments by saying you were going

1 to grant the motion to compel. Did you mean that?

2 EXAMINER PRICE: Granting the motion to
3 quash, I'm sorry. All right. We are granting the
4 motion to quash as item 1.

5 As item 2, the FirstEnergy Corp. will
6 produce a privilege log as well as the internal
7 investigation relating to the termination of certain
8 executives for in camera review only.

9 As to item 3, we will deny the motion to
10 quash. FirstEnergy Corp. should produce all fact
11 documents that relate to this request.

12 And we will grant the motion to quash as
13 to item 4, subject to the ability of OCC to later
14 seek a subpoena in the event that these documents are
15 not -- the relevant documents are not in the
16 possession, control of FirstEnergy utilities and the
17 only way to get them is from the Corporation.

18 MR. FINNIGAN: Thank you, your Honor.

19 MS. WILLIS: Your Honor, if I might
20 interject, is -- could we have a deadline established
21 for the response? I think that would be helpful for
22 us to work toward a target.

23 EXAMINER PRICE: Let's go with one week.

24 MR. LEE: I'm sorry. Is that one week
25 for the producing of all these documents or one week

1 for producing a privilege log and the limited
2 reports, if any exist?

3 EXAMINER PRICE: It was for both.

4 MR. LEE: Okay.

5 EXAMINER PRICE: Well, I mean, if there
6 is an issue, you should bring it to the Bench's
7 attention, and we will go from there.

8 MR. LEE: Your Honor, I honestly -- to be
9 transparent I do not know the burden that is going to
10 be associated with finding the documents associated
11 with 3 and if there is an issue, we will try to work
12 with the parties here; and, if necessary, we will
13 come back before the court, or before the Commission.

14 EXAMINER PRICE: Thank you. Okay. At
15 this point we will return to our discussion on the
16 motion to compel.

17 Mr. Michael, can you hear us now? I
18 cannot hear Mr. Michael. Can anybody hear
19 Mr. Michael?

20 MR. KNIPE: No, your Honor.

21 MR. MICHAEL: Oh. Can you hear me now,
22 your Honor?

23 EXAMINER PRICE: Yes, we can.

24 MR. MICHAEL: Okay. Great.

25 EXAMINER PRICE: Okay. Let's start over

1 with RPD-02-002, items B and D. Mr. Gladman, for
2 Mr. Michael's benefit, if you could restate your
3 objections, I would appreciate it.

4 MR. GLADMAN: Certainly, your Honor. The
5 arguments here really on subparts B and D are really
6 twofold. First of all, the Companies have already
7 produced to OCC the underlying documents to give them
8 what they're looking for, the consulting agreement
9 and its amendment, the documents concerning payments
10 made under the consulting agreement, calculation of
11 the payments impacts, if any, on the rates paid by
12 the Ohio customers.

13 That's really what this proceeding is
14 about and they have that necessary information.
15 Seeking information about FirstEnergy Corp.'s
16 internal investigation and related government
17 investigations, their request for a copy of all
18 communications with the counterparty to the
19 consulting agreement, that's subpart B, and all
20 documents relating to actions FirstEnergy took to
21 help the individual referenced become appointed to
22 his or her positions, of part D, are not tailored to
23 that specific narrow purpose here which is whether or
24 not there was any impact on rates to the utilities'
25 customers.

1 EXAMINER PRICE: Mr. Michael.

2 MR. MICHAEL: Well, your Honor, I would
3 assert that the relevance of the documents go to the
4 collection method, the amount, the effect on consumer
5 rates, and lastly what FE knew and when it knew it.
6 The Consumers' Counsel's Office has not yet ruled out
7 seeking a potential forfeiture under 4905.54. And
8 the information regarding when FirstEnergy knew of
9 the issues with the payments and how they treated it
10 could potentially factor into the PUCO's exercise of
11 its authority under that statute.

12 EXAMINER PRICE: Okay. We are going to
13 deny the motion to compel as to B and D. As to B,
14 the motion to compel will be denied because this
15 request is broader but duplicative of discovery
16 requests that OCC has already made in 20-1502. They
17 asked for some extensive word search requests, and I
18 believe that anything that you are looking for here
19 would be swept up in that request. There is no sense
20 making the Company do the same work twice.

21 As to D, that issue is simply not
22 relevant to this proceeding. That's the U.S.
23 Attorney's job and they are doing it well and so the
24 motion will be -- to compel will be denied as to D.

25 Mr. Gladman, C.

1 MS. WILLIS: Your Honor, if I could ask a
2 question. Yes, and I understand that -- your ruling
3 on the B in terms of duplic -- there being
4 duplicative materials. I guess we're in a situation
5 where we have four different investigations, and we
6 are trying to create a record that is germane to each
7 one of those investigations.

8 And so there is a difficulty where we ask
9 for documents and receive the documents in one
10 docket. There is the difficulty of can we use those
11 documents in the other investigations and so we have
12 gotten to the practice of asking for each set of
13 documents in each separate proceeding because we have
14 no consolidated proceedings and we want to avoid an
15 evidentiary problem in terms of trying to use
16 discovery received in one proceeding and use it in a
17 different proceeding.

18 So I guess I'm concerned about the ruling
19 that might create -- you know, might shut down the
20 discovery in one docket and not -- and then, you
21 know, preclude us from using that discovery in the
22 separate docket.

23 EXAMINER PRICE: Ms. Willis, I've been
24 doing this a long time, and I cannot recall any
25 instance of failing to take administrative notice of

1 a document filed in one Commission docket in a second
2 one. I cannot fathom a theory that would rule out an
3 otherwise admissible discovery response from one
4 docket to the -- to another docket. I just don't see
5 that as a risk that outweighs the burden of asking
6 the Company to do the same work four times because we
7 have four investigations as well as, frankly, the
8 quadrennial review that's hanging out there also so.

9 Not everything will be admissible but it
10 would not be a ground -- appropriate grounds for
11 admission -- or admissibility just because it was
12 produced in a separate docket in a separate discovery
13 request.

14 MS. WILLIS: Thank you, your Honor, for
15 that instruction because we will, you know -- we will
16 ask for administrative notice and that will make
17 things easier, so we won't have to ask duplicative
18 and create that burden for the Company. Appreciate
19 that.

20 EXAMINER PRICE: Mr. Gladman, E and F.

21 MR. GLADMAN: Yes, your Honor. I think I
22 can make my arguments here, but I believe this is --
23 is -- dovetails with the request we just dealt with
24 on the motion to quash and the documents you've
25 ordered produced. These are likely duplicative going

1 to FirstEnergy's belief that the payments under the
2 consulting agreement were for purposes other than
3 represented within those agreements and the belief of
4 FirstEnergy that the true purpose may have been
5 related to the consulting agreement.

6 A couple of things on that, I guess in
7 addition to the fact I believe this has already been
8 addressed by your order with respect to the motion to
9 quash the subpoenas to the parent, Corp., first, I am
10 getting concerned because we are slipping back into
11 the, both in the discovery requests and what
12 Mr. Michael's response and argument was, referring
13 generically to FirstEnergy. You know, that's been
14 going on for a long, long time here. It is
15 exceedingly frustrating to the Companies because
16 there are really differences here with respect to
17 that. So I would note that with respect to this one.

18 And for that reason, and I guess on a
19 related note, this is squarely directed at probing
20 what FirstEnergy Corp. did and believed with respect
21 to those payments, consulting agreement, and its
22 internal investigations there.

23 Of course, a large bit of that has
24 already been documented in detail in the deferred
25 prosecution agreement but for all those reasons ask

1 the motion to compel be denied here.

2 EXAMINER PRICE: Well, as to the general
3 question about FirstEnergy, I think you are entirely
4 correct, and we would appreciate it in this case and
5 the other parallel cases if all parties, to the
6 extent possible, please refer to FirstEnergy
7 utilities or CE, TE, and OE when you are referring to
8 the utilities. Please refer to FirstEnergy Corp.
9 when you mean FirstEnergy Service or FirstEnergy
10 Service Corp. when you mean the Corporation or the
11 Service Company.

12 It is -- it is very confusing to the
13 Bench to see FirstEnergy here but not be clear that
14 it's limited to the utilities so -- and as to these
15 two responses, Mr. Michael, are these limited to
16 FirstEnergy utilities, or are you asking broader than
17 that?

18 MR. MICHAEL: Your Honor, I would say we
19 are asking broader than that. And this goes to the
20 overall jurisdiction question that the Commission has
21 over FirstEnergy Corp. in this case. And if I might
22 address that right now, it seems like an appropriate
23 time.

24 EXAMINER PRICE: Fire away.

25 MR. MICHAEL: Under 4905.05, if your

1 Honor has a copy of that statute available.

2 EXAMINER PRICE: Uh-huh.

3 MR. MICHAEL: The statute, your Honor,
4 provides for a jurisdiction over every public
5 utility, and then it lists a number of different
6 entities over which the Commission has jurisdiction.

7 EXAMINER PRICE: Uh-huh.

8 MR. MICHAEL: One of those entities is to
9 the persons or companies of such public utilities.
10 We assert, your Honor, that FirstEnergy Corp. fits
11 that definition as the utilities are owned by
12 FirstEnergy Corp. So I appreciate Mr. Gladman's
13 comments regarding the proper use of the entities but
14 that, of course, assumes that the Commission doesn't
15 have jurisdiction over FirstEnergy's Service
16 Corporation, and as just outlined, we would argue
17 that the Commission does in this instance under
18 4905.05.

19 EXAMINER PRICE: I think your argument
20 is -- is entirely viscerated by the next phrase when
21 it actually specifically addresses a narrow group of
22 utility holding company systems where we do have
23 jurisdiction is the classic the exception proves the
24 rule. The statute is making clear that we do have
25 jurisdiction over electric utility holding companies

1 that were exempt under PUHCA which -- or PUHCA now
2 has been repealed so there are no electric utility
3 holding company systems that are exempt under PUHCA
4 because PUHCA does not exist.

5 And, in addition, although I could be
6 wrong, I don't recall that FirstEnergy when PUHCA was
7 still in existence was an exempt holding company, so
8 I think you make an interesting argument, but I think
9 it is entirely wrong. Thank you.

10 MR. MICHAEL: Your Honor, I just would
11 like to point out we're not -- at least I am not
12 relying on the exemption language. You are
13 absolutely right; I don't think that applies anymore.

14 EXAMINER PRICE: I understand. I
15 understand.

16 MR. MICHAEL: Your Honor, there are
17 semicolons --

18 EXAMINER PRICE: I understand what you
19 are saying, but the legislature took up the question
20 of holding companies in the statute and made it clear
21 when we have jurisdiction over holding companies and
22 when we don't. So I don't think that anybody
23 believes that we have jurisdiction over FirstEnergy
24 Corp. the same way we have jurisdiction over
25 FirstEnergy utility.

1 And in any event it is clear at this
2 point that E and F have been addressed when we
3 require FirstEnergy Corp. to produce the documents in
4 item 3 of your subpoena, so we will deny the motion
5 to compel at this time.

6 Mr. Michael, RPD-02-003B, would you care
7 to speak to that?

8 MR. MICHAEL: Yes, your Honor. Perhaps
9 Mr. Gladman can state his objections. I don't know
10 that I have heard them with respect to B yet.

11 EXAMINER PRICE: Mr. Gladman, your
12 objections to B, please.

13 MR. GLADMAN: I would be happy to. I do
14 note I am still hearing about 60 percent of what
15 Mr. Michael says which causes me some concern when I
16 am trying to respond to opposing counsel, but with
17 that I will go forward, and I will raise it again if
18 I think it's critical.

19 So -- so subpart B is looking for all
20 documents relating to information that FirstEnergy,
21 again with the language, has provided to third
22 parties outside FirstEnergy regarding these charges
23 with respect to consulting agreements, political
24 advocacy, and other matters.

25 A couple of things on this one. I think

1 this one is moot. The Company has already provided
2 responsive documents on subpart B's request and D's
3 request to the extent they seek documents about the
4 Companies' provision of information to third parties
5 with the Companies' efforts to refund those charges.
6 OCC already has them.

7 The Companies have produced their
8 responses to Staff's initial Data Request and, as
9 noted above, the responses to the auditor's request
10 with respect to this. And, of course, OCC now has
11 the final audit report. To the extent they are
12 seeking information from FirstEnergy Corp. and not
13 the utilities, I would revert back to my same
14 objection about possession, custody, and control.

15 EXAMINER PRICE: Mr. Michael.

16 Ms. Willis, Mr. Finnigan, I think you are
17 going to have to pinch-hit here because this is
18 entirely not working. I want to give you guys a fair
19 chance. I'm with Mr. Gladman.

20 MR. MICHAEL: Thank you, your Honor.

21 EXAMINER PRICE: Mr. Michael, we are
22 calling in a pinch hitter here for you.

23 MR. MICHAEL: Revert back to my prior
24 argument regarding jurisdiction apply.

25 EXAMINER PRICE: I heard revert back to

1 his prior argument, and so since we denied his prior
2 argument, we will go ahead and deny the motion to
3 compel now.

4 Let's take a break until Mr. Michael can
5 get a line for a minute so we can -- so one of you
6 can replace him.

7 MR. MICHAEL: Can you hear me, your
8 Honor?

9 EXAMINER PRICE: Go ahead, Ms. Willis.
10 You can give him the bad news.

11 MS. WILLIS: Bill, we are having trouble
12 hearing your argument. You are breaking up and
13 opposing counsel says he can only hear about 60
14 percent of your arguments and that presents a
15 problem. We've been asked to pinch --

16 EXAMINER PRICE: I believe now it has
17 extended to Ms. Willis.

18 MS. WILLIS: Your Honor, perhaps -- I am
19 trying to think of a solution. I honestly am not
20 prepared. I am not counsel on that case, so I really
21 don't have the background for that -- for the
22 specific arguments that Mr. Michael was to present.
23 I am not sure that Mr. Finnigan does either. I don't
24 know that Mr. Finnigan is even counsel on that case
25 so.

1 MR. SCHMIDT: Mr. -- I'm sorry,
2 Mr. Michael. This is Micah. I sent you the
3 instructions on connecting via your phone for audio.
4 They are in the chat window. Can you see those?

5 EXAMINER PRICE: Are you guys -- or is
6 OCC's counsel in your office together?

7 MS. WILLIS: No, your Honor, we are not.

8 EXAMINER PRICE: On the one hand, I
9 believe you bear the risk making sure you have a
10 connection that works. We only have one item left,
11 and so we will simply schedule a second session to
12 deal with this one item. I don't want to prejudice
13 you by not allowing you to speak to this, but it
14 is -- we have reached the point where it's simply not
15 workable so. Let's move on.

16 MR. GLADMAN: Your Honor, may I?

17 EXAMINER PRICE: Yes, Mr. Gladman.

18 MR. GLADMAN: I apologize. I apologize.
19 I was just going to suggest if OCC and the Bench were
20 fine with going on the submissions, the written
21 submissions, that would be fine with the Companies.
22 If, however, you do personally want that second
23 session, we are, of course, happy to do that as well.

24 MS. WILLIS: We are okay with that,
25 Mr. Gladman. I appreciate that suggestion.

1 MR. GLADMAN: Sure thing.

2 EXAMINER PRICE: Well, I -- I would like
3 the clarification if we are talking about FirstEnergy
4 utilities or FirstEnergy Corp. because I think -- the
5 answer -- the ruling is contingent upon the answer to
6 that question.

7 MS. WILLIS: Perhaps something we could
8 provide in writing.

9 EXAMINER PRICE: No. I actually think
10 the easiest answer, and so we are not getting bogged
11 down in this, is I will grant the motion to compel as
12 it relates to FirstEnergy utilities.

13 MR. GLADMAN: Your Honor, is that just on
14 02-003? We have already had rulings on the other
15 ones.

16 EXAMINER PRICE: I was on 03-01. I
17 thought we had finished the last one.

18 MR. GLADMAN: Okay. Can I just get a
19 recap here? You have denied the motion to compel
20 with respect to RPD-02-002, all subparts, correct?

21 EXAMINER PRICE: Yes. Well, B was the
22 only one that was live.

23 MR. GLADMAN: Could you say that again?
24 I'm sorry.

25 EXAMINER PRICE: We denied the motion to

1 compel as to 02-003B. That was the only subpart that
2 was at issue.

3 MR. GLADMAN: Okay. But also -- but I
4 was correct on 02-002, correct?

5 EXAMINER PRICE: Yes.

6 MR. GLADMAN: Okay. Thank you, your
7 Honor. And so now, I'm sorry, you are now on 03, the
8 interrogatory. I apologize.

9 EXAMINER PRICE: That's okay. And as to
10 03-01, we will grant the motion to compel as it
11 relates to the FirstEnergy utilities. We'll deny the
12 motion to compel as it relates to FirstEnergy Corp.

13 MR. GLADMAN: Thank you, your Honor.

14 EXAMINER PRICE: Thank you.

15 Okay. The last piece of business we have
16 today is so we have now received a copy of the long
17 awaited corporate separation second report. It is
18 time to set a comment period from that. Do we have
19 any objections to having comments begin 30 days from
20 today and reply comments 15 days after that?

21 MS. WILLIS: Your Honor, I think that
22 generally is a reasonable schedule. I would note,
23 however, though that -- and it may -- I may be
24 speaking -- we may have received it today. I had a
25 request into the Company to receive the redacted --

1 or the unredacted version of the audit report. And
2 to the extent that, you know, we get that, that would
3 be great, and the 30 days will work. You know, I
4 hesitate that, you know, we certainly wouldn't want
5 to, you know, rely on a 30 days and get the
6 unredacted report, you know, 20 days down the road.
7 So I would really appreciate receiving copies of the
8 unredacted report from the Company as we have
9 requested.

10 MR. GLADMAN: Your Honor, I believe we've
11 already provided that.

12 EXAMINER PRICE: Okay. So I can rely on
13 the fact even if you haven't provided it yet, it will
14 be done by the close of business today.

15 MR. GLADMAN: Yes, your Honor.

16 EXAMINER PRICE: Perfect.

17 MR. PRITCHARD: Your Honor, Matt
18 Pritchard with IEU-Ohio.

19 EXAMINER PRICE: Yes.

20 MR. PRITCHARD: I am not sure if we
21 executed the protective agreement in this specific
22 proceeding with the Company. I have not yet, since
23 the audit report came out yesterday, asked for the
24 confidential report, but before we move forward to
25 final scheduling, I just want to confirm the Company,

1 to the extent we have a protective agreement, that
2 they will also expeditiously provide that to us,
3 whether it's today or tomorrow. I just want
4 confirmation before I confirm I have no objections to
5 your 30 days.

6 MR. GLADMAN: So I'm also having a hard
7 time hearing Matt, but I think I got the gist of it,
8 your Honor. I would ask that -- so I don't know the
9 answer to that either, Matt, whether you guys have
10 executed that confidentiality agreement. If you
11 have, then we will certainly likewise produce it in
12 prompt fashion.

13 MR. PRITCHARD: Thank you.

14 EXAMINER PRICE: Okay. So by my
15 calculations which -- well, let me rephrase that.
16 We're going to set the 30 days from today, but we
17 will put out an order memorializing it to make sure
18 the dates are clear, and I don't miscalculate the
19 dates. Hopefully the comments will serve to narrow
20 the issues in this already very large proceeding.

21 I would like to set a hearing date. I
22 believe OMAEG had some days in November that did not
23 work, so I would ask their counsel if they could
24 remind me what days those were, or is that no longer
25 true?

1 MR. DONADIO: Your Honor, there was a
2 jury trial scheduled up in Cleveland, but because of
3 the resurgence of COVID-19, that is going to be
4 rescheduled, and we have not received the rescheduled
5 date yet.

6 EXAMINER PRICE: Okay.

7 MR. DONADIO: Thank you.

8 EXAMINER PRICE: Thank you. That's very
9 helpful. Is November 15 -- check that. Is
10 November 16 too aggressive for a hearing date for the
11 parties?

12 MS. WILLIS: Your Honor, if we went
13 forward with that hearing date, what would be the
14 date that you would associate testimony being due?

15 EXAMINER PRICE: Probably November 2.

16 EXAMINER ST. JOHN: Are we talking about
17 a hearing date for this case of November 18; is that
18 correct?

19 EXAMINER PRICE: No. I was looking at
20 16, Tuesday the 16th.

21 EXAMINER ST. JOHN: Okay. Thank you.

22 MR. PRITCHARD: Your Honor, I apologize
23 if I am still breaking up. We would be filing
24 comments in the middle of October and reply comments
25 at the end of October, but we would only have a few

1 days to then turn around and file testimony on the
2 reply comments. I would just ask maybe that we have
3 two weeks in between. That way we can limit the
4 amount of requests for rebuttal testimony to address
5 the reply comments.

6 EXAMINER PRICE: That makes -- I think
7 that's a good point, Mr. Pritchard. The difficulty
8 we face is that our hearing calendar is -- in
9 December is already -- we've got hearings in the
10 quadrennial review and the consolidated SEET case for
11 November 29. We have hearings for another case on
12 December 8. That's the DSE cases. And then we have
13 the holidays.

14 We could push to December 14 but that's
15 going to require everybody be back to back to back
16 hearings. I mean, it's basically the same group of
17 counsel, right? It's all of us? So I don't want to
18 ruin people's Christmas holidays, go the 20th or
19 27th.

20 MR. PRITCHARD: Your Honor, we could
21 instead of 30 days and 15 days, maybe we could cut a
22 few days out of each of those schedules and at least
23 give us a few extra days in between reply comments.

24 MS. WILLIS: And I would add we are
25 engaged in settlement discussions with regard to the

1 quadrennial review and the SEET cases. There has
2 been a bit of back and forth. I remain somewhat
3 hopeful that perhaps we can reach -- reach an
4 agreement and that hearing on the quadrennial review
5 would go away.

6 EXAMINER PRICE: Am I really that lucky,
7 Ms. Willis? I don't think so.

8 MS. WILLIS: Well, it appears that they
9 are going a little better than you would think.

10 EXAMINER PRICE: I mean, Mr. -- I think
11 Mr. Pritchard has an excellent suggestion. We could
12 go with 20 days and 10 for comments and reply
13 comments but that is going to be tight.

14 So I really am willing to defer to the
15 consensus of the parties whether you would rather
16 have a shorter comment period and go forward in
17 November or the longer period and kick this to after
18 the first of the year because that's kind of the
19 choice we are looking at.

20 MS. WILLIS: If I may weigh in quickly, I
21 would kick it to after the first of the year. I
22 think with all the things going on, we also have
23 another audit coming out I think in October --

24 EXAMINER PRICE: Yes.

25 MS. WILLIS: -- with the related -- all

1 these -- you know, the issues that there's carryover
2 between lots -- a lot of the different proceedings so
3 that's my vote.

4 EXAMINER PRICE: Ms. Willis, you kicked
5 the Examiners in an interlocutory appeal a couple
6 weeks ago going posthaste and so I --

7 MS. WILLIS: I'm not sure which
8 interlocutory -- interlocutory appeal that would be,
9 your Honor.

10 EXAMINER PRICE: One we haven't ruled on
11 yet in this case -- or in the corporate separation
12 case but we'll let bygones be bygones.

13 MS. WILLIS: Appreciate that.

14 EXAMINER PRICE: We will look at -- let's
15 stick with the 30 and 10 comment period and we will
16 do the hearing after the first of the year.

17 EXAMINER ST. JOHN: Are we going with 30
18 and 10 or 30 and 15?

19 EXAMINER PRICE: 30 and 15, Ms. St. John,
20 thank you.

21 EXAMINER ST. JOHN: Thank you.

22 EXAMINER PRICE: How about Tuesday,
23 January 11, to commence the hearing?

24 MS. WILLIS: Your Honor, that would be
25 great.

1 EXAMINER PRICE: Okay.

2 MR. GLADMAN: Your Honor, may I? And I
3 don't mean to throw a fly in the ointment because I
4 agree with everything that's said to date. I do have
5 a jury trial in the Northern District scheduled for
6 January 18 and that kind of back to back would be
7 aggressive and difficult. You know, we can make it
8 work if that's where it needs to be, but I might ask
9 back it up a little bit earlier as much as I hate to
10 put that on top of the New Year holidays.

11 EXAMINER PRICE: We can do Tuesday, the
12 4th. Okay.

13 MS. WILLIS: I think that would be great.
14 It gives people a chance to recover from the
15 holidays. Thank you.

16 EXAMINER PRICE: I don't think we are
17 going to be recovering from Ohio State winning the
18 National Championship this year so.

19 MR. GLADMAN: That thought came to mind
20 and went right out of my mind.

21 EXAMINER PRICE: Should be a much briefer
22 recovery time.

23 MR. LINDGREN: Your Honor, I should
24 confirm the auditor for that date and if there is a
25 problem, we will bring it to your attention right

1 away.

2 EXAMINER PRICE: That would be great.

3 MR. LINDGREN: Great.

4 EXAMINER PRICE: Both auditors, I'm sure
5 that both Sage and Daymark will be requested to
6 testify.

7 MR. LINDGREN: Okay.

8 EXAMINER PRICE: So we will -- we will
9 make the hearing date Tuesday, January 4. When we
10 put out the entry memorializing the comment period,
11 we will fill in the remainder of the testimony
12 deadlines and discovery deadlines at that time. That
13 should come out by the end of this week.

14 Do we have anything else for the Bench?
15 We have accomplished a lot today.

16 MR. GLADMAN: Not for the Companies, your
17 Honor, thank you.

18 MS. WILLIS: I think that's it as far as
19 OCC, your Honor, thank you.

20 EXAMINER PRICE: Thank you.

21 I will note that there are interlocutory
22 appeals pending in each case, and we should be
23 issuing an entry separately in each case addressing
24 those interlocutory appeals.

25 With that we are adjourned. Let's go off

1 the record.

2 (Thereupon, at 11:25 a.m., the hearing
3 was adjourned.)

4 - - -

5 CERTIFICATE

6 I do hereby certify that the foregoing is
7 a true and correct transcript of the proceedings
8 taken by me in this matter on Tuesday, September 14,
9 2021, and carefully compared with my original
10 stenographic notes.

11

12

13 Karen Sue Gibson, Registered
14 Merit Reporter.

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15 (KSG-7152)

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Summary: Transcript September 14th 2021

In the Matter of the Review of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's Compliance with R.C. 4928.17 and Ohio Adm. Code Chapter 4901:1-37.

- - -

In the Matter of the 2020 Review of the Delivery Capital Recovery Rider of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.