

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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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.:

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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
10:00 a.m. on Thursday, February 10, 2022.

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

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APPEARANCES:

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

Jones Day
By Mr. 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,
Mr. Joseph Oliker,
and Mr. Michael Nugent
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 and Ohio Partners for
Affordable Energy.

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

On behalf of the Ohio Energy Group.

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

On behalf of the Ohio Hospital
Association.

APPEARANCES: (Continued)

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

On behalf of the Staff of the PUCO.

Mr. Thomas R. Hays
8355 Island Lane
Maineville, Ohio 45039

On behalf of Northwest Aggregation
Coalition.

Environmental Law & Policy Center
By Ms. Janean R. Weber
21 West Broad Street, 8th Floor
Columbus OH 43215

On behalf of the Environmental
Law & Policy Center.

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Thursday Morning Session,
February 10, 2022.

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EXAMINER ST. JOHN: Let's go on the
record.

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 appearances
starting with the Company.

MR. KNIPE: Good morning, your Honors.
Appearing on behalf of Ohio Edison Company, The
Cleveland Electric Illuminating Company, and The
Toledo Edison Company, 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 Michael Gladman, 325 John

H. McConnell Boulevard, Columbus, Ohio 43215 and Ryan Doringo, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114.

EXAMINER ST. JOHN: Thank you.

Citizens Utility Board of Ohio.

Industrial Energy Users - Ohio

MR. McKENNEY: Good morning, your Honors.

On behalf of IEU-Ohio, Matthew Pritchard and Bryce McKenney from the law firm McNees, Wallace & Nurick, 21 East State Street, Columbus, Ohio 43215.

EXAMINER ST. JOHN: Thank you.

Ohio Hospital Association.

MS. MAINS: Good morning, your Honors.

Rachael Mains and Devin Parram on behalf of the Ohio Hospital Association with the law firm Bricker & Eckler, located at 100 South Third Street, Columbus, Ohio 43215.

EXAMINER ST. JOHN: Thank you.

Northwest Aggregation Coalition. Anyone for Northwest Aggregation Coalition?

MS. WILLIS: Tom, you're on mute.

MR. HAYS: Tom Hays, excuse me, 8355 Island Lane, Maineville, Ohio.

EXAMINER ST. JOHN: Thank you.

Ohio Manufacturers' Association Energy

1 Group.

2 MS. BOJKO: Thank you. On behalf of
3 OMAEG, Kimberly W. Bojko, Thomas Donadio, with the
4 law firm Carpenter Lipps & Leland, 280 North High
5 Street, Suite 1300, Columbus, Ohio 43215.

6 EXAMINER ST. JOHN: Thank you.

7 Interstate Gas Supply, Inc.

8 MR. NUGENT: Good morning, your Honor.
9 On behalf of the Interstate Gas Supply, Inc., Michael
10 Nugent, Evan Betterton, and Joseph Olikier, 6100
11 Emerald Parkway, Dublin, Ohio 43016.

12 EXAMINER ST. JOHN: Thank you.

13 Mr. Dove.

14 MR. DOVE: Good morning, your Honor.
15 Robert Dove on behalf of Natural Resources Defense
16 Council with the law firm Kegler, Brown, Hill &
17 Ritter, 65 East State Street, Suite 1800, Columbus,
18 Ohio 43215. I also represent Ohio Partners for
19 Affordable Energy.

20 EXAMINER ST. JOHN: Thank you.

21 Ohio Environmental Council.

22 Ohio Consumers' Counsel.

23 MS. WILLIS: Thank you, your Honor. On
24 behalf of the residential customers of FirstEnergy
25 utilities, Bruce J. Weston, Consumers' Counsel, by

1 Maureen Willis and John Finnigan, 65 East State
2 Street, Suite 700, Columbus, Ohio 43215.

3 EXAMINER ST. JOHN: Thank you.

4 Environmental Law & Policy Center.

5 MS. WEBER: Yes, your Honor. Janean
6 Weber, Environmental Law & Policy Center, 21 West
7 Broad Street, 8th Floor, Columbus, 43215.

8 EXAMINER ST. JOHN: Thank you.

9 Ohio Energy Group.

10 MS. COHN: Good morning, your Honor. On
11 behalf of OEG, Jody Cohn, Michael Kurtz, and Kurt
12 Boehm from the law firm Boehm, Kurtz & Lowry, 36 East
13 Seventh Street, Suite 1510, Cincinnati, Ohio 45202.

14 EXAMINER ST. JOHN: Thank you.

15 And on behalf of Staff.

16 MR. MARGARD: Thank you, your Honor. On
17 behalf of the Commission Staff, Werner Margard,
18 Thomas Lindgren, and Sarah Feldkamp, 30 East Broad
19 Street, 26th Floor, Columbus, Ohio.

20 EXAMINER ST. JOHN: Thank you.

21 I believe that was everyone we were
22 expecting today. With that, I will go ahead and turn
23 things over to Judge Price.

24 Judge Price, you are on mute.

25 EXAMINER PRICE: Sorry about that. We

1 have a number of things to clean up today, motions to
2 address. We'll start with OCC's motion to accept
3 additional authority a recent case in the Court --
4 U.S. Court of Appeals, and we will go ahead and grant
5 the motion to accept the additional authority.

6 Let me just hasten to add we will give
7 proper weight to this. We are not saying this case
8 is decisive by any means, but we will accept the
9 additional authority.

10 The next issue we have OCC requested that
11 we revisit our ruling on the motion to compel filed
12 by OCC requesting FirstEnergy to disclose all
13 documents given to the Federal Energy Regulatory
14 Commission as part of their recent audit of the
15 FirstEnergy utilities.

16 I guess my first question for the
17 Companies is do we need to make a ruling on the
18 motion to compel, or are you prepared to go ahead and
19 disclose these documents since the audit has been
20 publicly disclosed?

21 MR. DORINGO: Thank you, your Honor. We
22 do -- we need a ruling. We are not prepared to
23 disclose those documents. Speaking for the
24 Companies, I'll note there are many documents that do
25 not relate to the Companies and involve, you know,

1 many entities regulated in other jurisdictions that
2 are involved in the FERC proceedings.

3 And I would say that the audit report is
4 issued, but the landscape hasn't changed. The FERC's
5 audit is ongoing. It's moved to the compliance
6 phase, but as the letter order attached to OCC's
7 correspondence filed on the docket earlier this week
8 or late last, as that letter order shows, FirstEnergy
9 Corp. is still required to file, make some upcoming
10 filings including the information plan, various
11 quarterly reports, and it still has time to object to
12 the FERC's recommendations, or certain of the FERC's
13 recommendations that is not already responded to.

14 But more fundamentally there is nothing
15 about the publication of the audit report that
16 removes the nonpublic nature of the confidential
17 documents. The Federal Power Act in FERC regulations
18 protect those documents from disclosure without
19 regard to when the audit report comes out. So we
20 stand on our objections to those requests and are not
21 willing to produce the documents.

22 EXAMINER PRICE: Ms. Willis.

23 MS. WILLIS: Thank you, your Honor. I
24 would note that OCC would be willing to accept only
25 the Ohio documents. You know, we are not interested

1 in the non-Ohio documents. To the extent there are
2 non-Ohio documents, those could be redacted or not
3 provided. We are interested in FirstEnergy utilities
4 Ohio and findings that relate to FirstEnergy
5 utilities Ohio.

6 In terms of whether or not the filing of
7 the report constitutes a -- whether documents that
8 underlie the report remain confidential, I'm -- I
9 would be interested in seeing what case law there is
10 on that. My understanding is not -- is in opposite
11 to that. I believe once the report is filed the
12 doc -- it's similar -- similar to the -- to the
13 PUCO's Staff Report. Once the Staff Reports are
14 filed, the underlying documents, data requests, what
15 went into the report, those become public. They are
16 no longer protected by the investigatory privilege.

17 And as I understand it, the FERC -- the
18 motion -- or the FERC regulation that precludes
19 disclosure is very similar to the PUCO where it's an
20 investigatory privilege. Once that investigation is
21 over, and it is over, they have produced a report.
22 It has been publicly filed, and FirstEnergy has, in
23 fact, filed a letter, a notification saying it is
24 willing to abide by most of those findings.

25 So I don't -- I don't agree that -- that

1 the -- there is a privilege that still exists. We,
2 of course, contended, your Honor, that there was not
3 a privilege during -- during that period. That was
4 not accepted by your Honors but we would maintain now
5 that -- that any privilege that existed is now gone
6 and that data request documents underlying the
7 publicly-filed document should be available to
8 parties.

9 EXAMINER PRICE: Mr. Doringo.

10 MR. DORINGO: Yes. We fundamentally
11 disagree that the investigation is over for the
12 reasons that I already stated, and I just go back
13 again, the 16 USC Section 825b says no member,
14 officer, employee of the Commission shall divulge any
15 fact or information which may come to its knowledge
16 during the course of examinations of books or other
17 accounts. So that's what the reg says.

18 The FERC's letter on this case and its
19 other public statements about this case say that the
20 documents relating to the audit will be placed in
21 nonpublic files. FERC cannot disclose these
22 documents now, and it couldn't disclose them before.

23 Your Honor, the last time we discussed
24 this issue, you -- in discussing this issue with
25 Mr. Finnigan, you noted that there was a paradox here

1 that if you granted OCC's motion to compel, that they
2 would get access to and be able to produce documents
3 that FERC itself cannot. We respectfully submit that
4 that is the exact same position we are in today.

5 MS. BOJKO: Your Honor, may OMAEG be
6 heard on the issue?

7 EXAMINER PRICE: Please.

8 MS. BOJKO: Two points. In addition,
9 OMAEG supports OCC's motion to compel on the
10 confidentiality piece. If there is a document that
11 is truly deemed confidential and protected under
12 trade secret law, that can be handled under a
13 protective agreement. I believe most parties on the
14 phone have a protective agreement, so they don't need
15 to be released to the public, but they need to be
16 released to the parties under those protective
17 agreements.

18 And then additionally I would just note
19 counsel for FirstEnergy utilities did not respond to
20 OCC's willingness to just seek Ohio documents, but I
21 would add in case they are contending that there are
22 no Ohio documents, that the FERC report on page 50
23 specifically states that there's a question of
24 whether funding was allocated to the FirstEnergy FPUs
25 located in Ohio. And then there are also a couple

1 other references to Ohio companies receiving HB 6
2 funds, so I would just note if they are going to
3 contest that portion of the motion, that we would
4 argue that there are Ohio relevant documents, and we
5 believe those should be disclosed and released to the
6 parties whether it be under a confidentiality
7 agreement or not. Thank you.

8 EXAMINER PRICE: I believe the
9 difficulty, Ms. Bojko, is FirstEnergy is not
10 asserting that the documents are trade secrets under
11 Ohio law. He is asserting they are confidential. We
12 have a similar situation, as Mr. Doringo pointed out,
13 in Ohio where before the Commission Staff Report was
14 issued, a Commission Staff member can't divulge any
15 information regardless of whether trade secret or
16 not.

17 The difference, of course, at least
18 Mr. Doringo is arguing, is that in Ohio once the
19 Staff Report is filed, then all bets are off, and he
20 appears to be saying that's not true on the federal
21 level. I think the best thing we can do at this
22 point is take additional memoranda on this question,
23 so I would like this to be on the narrow question of
24 once the FERC audit report has been released whether
25 the confidentiality provisions are still in place.

1 Ms. Willis believes she has cases that
2 say that the answer to that is no and has challenged
3 Mr. Doringo to come forward with the cases to say the
4 answer is yes. And I think that's a fair challenge.
5 So let's have parties file memoranda by Friday,
6 February 18, any parties who wish to file. No party
7 is under an obligation to file a memorandum on this
8 question.

9 And with that let's move on to the in
10 camera review. We have a pending motion for an in
11 camera review. We have not yet granted the motion
12 for in camera review, although we have obtained the
13 documents from the Company as well as the privilege
14 logs. So, Ms. Willis, at a high level, if you would
15 like to explain why you believe these documents
16 are -- contain information which is not privileged.

17 MS. WILLIS: Thank you, your Honor. As
18 your Honor knows, burden of proof is on the party
19 asserting the privilege and that generally speaking
20 the privilege -- privileges are to be narrowly
21 construed so that you -- you do not -- because a
22 privilege actually reduces the amount of information
23 that's discoverable.

24 Now, the Companies have claimed that the
25 mere production of the -- the privilege log is -- is

1 enough and that we should just be satisfied and go
2 walk -- go walk away. But there's a lot -- you know,
3 if we take a look at the privilege log itself,
4 there's issues even with the privilege log that was
5 produced.

6 We would note that a large number of the
7 entries show communications where no attorney was
8 involved. That's 173 of the 234 entries show no
9 attorney being involved. So to the extent that there
10 is no attorney involved, I think that raises the
11 specter of real -- is the attorney-client privilege
12 being accurately claimed.

13 Secondly, with respect to the privilege
14 log, there is a number of entries that do not even
15 indicate who the communication was distributed to.
16 And that's 102 of the 234 entries don't indicate
17 that. And if we don't know who they were distributed
18 to, we don't know whether or not the privilege was
19 waived because as your Honor knows, the privilege --
20 the attorney-client privilege and the work product
21 doctrine can be waived if the information is
22 disclosed to third parties.

23 Another problem with the privilege log is
24 that a number of the entries, 23, in fact, don't even
25 indicate who the author is or indicate a numerical

1 author, so I think that also raises questions as to
2 really is this a privilege or is this a document
3 generated by a non-attorney not containing legal
4 information.

5 Another issue I believe that's with the
6 privilege log is that we can't tell whose privilege
7 it is that's being asserted. We don't know whether
8 it's FirstEnergy Service Company, whether it's the
9 FirstEnergy utilities, or FirstEnergy Corp.

10 And then, finally, your Honor, the -- the
11 final issue that we raise with respect to the
12 privilege log is the crime fraud exception. There
13 has been -- FirstEnergy Corp. has admitted to the
14 honest services wire fraud charges under -- under the
15 law.

16 EXAMINER PRICE: Ms. Willis, can we come
17 back to the crime fraud exception in a little bit? I
18 would like to hear from FirstEnergy generally about
19 the points you have raised before we move on to the
20 more interesting question on the crime fraud
21 exception.

22 MS. WILLIS: Sure.

23 MR. GLADMAN: Your Honor, Mike Gladman
24 for the Companies here. I'll start with this
25 statement, the Companies have absolutely no concern

1 that an in camera review of any of these 234
2 documents will reveal any improperly logged document,
3 let alone anything nefarious. That's the starting
4 point. We have meticulously reviewed each of these
5 documents again, and they are all plainly privileged
6 and not subject to disclosure.

7 But even though we harbor no such
8 concerns, we are very concerned about this request in
9 going forward. There's three main reasons for that
10 and I guess I will focus on the first two and defer
11 the crime fraud issue as you suggested.

12 First, this is not a routine and ordinary
13 proceeding as OCC seems to suggest. An in camera
14 review is an extraordinary procedure that is used
15 very sparingly. We cite a litany of cases for that
16 well established proposition. It's only warranted
17 where there are specific facts establishing a good
18 faith basis to believe the privilege claims are
19 unfounded.

20 And I'll be frank, that's also very
21 consistent with my experience dealing with privilege
22 challenges. Questions and discussions about specific
23 log entries are not usual. That's usually resolved
24 through counsel. But seeking an in camera review is
25 very unusual. Before this case I had seen it four

1 times in a 30-year career, and it's only been granted
2 twice.

3 And the real part that's interesting
4 there it's related to two or three entries. It's not
5 a sweeping undisciplined challenge to 234 documents
6 based upon some allegations of the need for
7 transparency. There is no specific facts here
8 establishing a good faith basis to question these
9 privilege claims. Again, to the contrary, OCC's
10 filings amount to nothing more than rank speculation
11 and, to be honest, reckless conjecture.

12 For each document the Companies'
13 privilege logs identify the date, the author, the
14 primary recipients, the CC, the privilege type, and a
15 narrative description reflecting the specific basis
16 for redacting the documents.

17 OCC's statements are simply wrong in this
18 regard. They keep raising this issue about who does
19 the privilege belong to. Let me say it one more
20 time, we said it in our filings, the Companies
21 created these logs, produced these logs, and takes
22 full ownership of these logs. Contrary to OCC's
23 requests, the Companies are not asserting any
24 privilege for FirstEnergy Corp. or any other
25 affiliate. And to be clear, to the extent that OCC

1 thinks that this -- these documents have anything to
2 do with FirstEnergy Corp.'s internal investigation,
3 they do not. It has nothing to do with any of that.

4 Instead 212 of the 234 documents are
5 dated after this Commission's September 15, 2020,
6 show cause order. And this really gets to the heart
7 of the issue and our concern here. Accordingly, and
8 not surprisingly, the vast majority of the documents
9 at issue on this log relate to this proceeding itself
10 including various discovery requests from OCC and
11 others, legal counsel's interpretation of those
12 requests, discussions among counsel and in-house and
13 outside counsel for FirstEnergy about how to respond
14 to those requests, and general legal strategy is
15 reflected in these documents.

16 212 out of the 234 are largely about this
17 case, and I will be honest, that's why most times in
18 civil litigation the parties agree we are not logging
19 documents once the proceeding starts. Otherwise you
20 are creating privileged documents by the score every
21 single day that would otherwise be responsive. So
22 that's why this is a bit unusual that we are having
23 to deal with this.

24 I suggest it would be highly unusual and,
25 in fact, inappropriate for your Honor to be reviewing

1 the interworkings of the Company's strategy of this
 2 very proceeding where you are presiding that goes to
 3 the very heart of the attorney work product
 4 privileges and there is a real risk going forward not
 5 just in this proceeding but of others of a chilling
 6 effect if parties know their conversations with
 7 counsel are going to be reviewed by the ultimate
 8 arbiter in the case and that is precisely what OCC
 9 asks you to do.

10 I want to address briefly one more point
 11 here, and it seems to go to the heart of OCC's
 12 primary argument which there appears to be a belief
 13 that the Companies are seeking attorney-client
 14 privilege for communications involving only
 15 nonlawyers, and I have got two responses to that.
 16 First, it's a technical issue about how privilege
 17 logs are generated. They are automatically generated
 18 by the document hosting software, and the information
 19 including author, recipient is automatically
 20 populated based on the top e-mail in the chain.

21 As you might imagine, many of these
 22 e-mails include pages and pages of communications
 23 that go on and on, and it would be onerous and
 24 unproductive to try to include a description of a log
 25 entry for all 14 e-mails on a chain. So for

1 convenience and efficiency, that's how it's
2 populated.

3 The way that is remedied though the far
4 right column which is where we manually after
5 reviewing these documents put a detailed description
6 of what's going on here. And that seems to be the
7 portion that OCC is not paying attention to.

8 Secondly, it is, in fact, black letter
9 law that communications between non-attorneys are
10 privileged when the communications were to secure,
11 relay, or implement legal advice. And having
12 reviewed these documents, I can tell you that is very
13 often what is going on, communications among counsel
14 and someone in-house, a non-attorney taking legal
15 advice from Mr. Knipe or Jones Day or otherwise and
16 then discussing what counsel has asked them to do to
17 help respond to, for example, discovery requests.
18 OCC has simply provided no specific facts to
19 establish a good faith basis to question these
20 claims.

21 And again, I'll end where I started,
22 which is all that said and notwithstanding the
23 concerns, we are not concerned if you ultimately need
24 to go through 234 of these documents and invest that
25 time. We think it will be inefficient, but we do

1 think there is some collateral consequences that are
2 worth considering very carefully in establishing
3 future precedent that you are willing to review
4 hundreds and hundreds of privileged documents just
5 because OCC said we don't like any of those
6 allegations.

7 EXAMINER PRICE: Well, ironically one of
8 the in camera reviews we have done was a situation
9 where OCC was claiming privilege vis-a-vis a third --
10 as part of a joint agreement with a third party, and
11 it was the Companies that asked for the in camera
12 review, and we did hold the in camera review and was
13 very productive.

14 Just to be clear, Mr. Gladman, do you not
15 believe that it's a good faith argument that the fact
16 that the attorneys -- there's no attorney clearly on
17 the communication chain is arguments why it should be
18 reviewed. I mean, I am not going to disagree with
19 you that an in camera review is an intrusion into the
20 attorney-client privilege. That's black letter law
21 as you said. But the question is you don't believe
22 that is sufficient basis to look into a given
23 document.

24 MR. GLADMAN: Yes, your Honor, that's
25 correct. And I will tell you what we've provided on

1 these privilege logs goes well beyond what is
2 required as a minimal basis. We don't have to
3 provide the to, from, the cc's. I've seen logs over
4 the years that are routinely upheld that just provide
5 the narrative description communication with counsel
6 regarding specific issue in litigation, right?

7 There's always a concern that you are
8 walking a tight rope here between providing enough
9 information that a meaningful decision can be made
10 and revealing too much information which gets you
11 close to waiver at times. These privilege logs if
12 you go too far, you can get into the specific
13 details. You can cross that line.

14 So that's the balancing act but we go far
15 beyond privilege logs that I have seen routinely
16 approved in other proceedings.

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

19 MS. WILLIS: Just briefly, your Honor.
20 OCC -- although they may not be routine and ordinary
21 in civil practice, I think the Commission has seen a
22 number of these. I've been involved in these. I do
23 appreciate that the Attorney Examiner Price was
24 involved in the 10-176 proceeding where OCC had to
25 produce a privilege log, go through line by line each

1 one of the documents at FirstEnergy's request.

2 There's -- there's been also several others that if
3 Mr. Gladman would like cites to those, I can provide
4 those cites to it. So I don't think it's so
5 extraordinary.

6 I would also say we are in extraordinary
7 times here with this case, with this Company given
8 the HB 6 scandal. So what may not be ordinary may
9 not be called for in this case. So I would say that.

10 EXAMINER PRICE: Ms. Willis, the due
11 process clause doesn't change because these are
12 extraordinaries times. I mean, that only gets you so
13 far. You have the argument about, yes, we are a very
14 document heavy litigation, and we do have in camera
15 reviews from time to time; but, I mean, they have
16 their rights under the law. That doesn't change
17 because their parent company agreed to a crime; isn't
18 that correct?

19 MS. WILLIS: Understood, your Honor. I
20 am pointing out policy and how the Commission can
21 consider policy as well as the law. I would also
22 say, your Honor, that, you know, in terms of
23 Mr. Gladman's referencing that there's black letter
24 laws that allow attorney-client privilege over
25 communications that secure, relay, or implement legal

1 advice, well, that may be true, your Honor, but in
2 the -- in the privilege log description, it doesn't
3 use those terms. It's not secure, relay, or
4 implement; it's reflect. And so understanding how --
5 how lawyers are very careful about the words chosen,
6 I would mention that that -- these reflecting in
7 my -- is my understanding that's different than
8 securing, relaying, or implementing.

9 So in terms of that, I do think it raises
10 questions, and I do think that the privilege log does
11 raise questions. We are not saying or suggesting
12 there's nefariousness or there's -- or we are
13 conjecturing that they are hiding things.

14 All we are saying is we are entitled just
15 to be able to make sure that the claim of privilege
16 is being adequately supported by FirstEnergy and
17 that, in fact, there is privilege; and, in fact, it
18 has not been waived.

19 EXAMINER PRICE: Mr. Gladman, I reviewed
20 exactly one of these documents, and it was the
21 initial document because it was cited by OCC in their
22 memo. And what I find interesting about that
23 document is I understand what you're saying that it
24 was the forwarding of legal advice. But the
25 commentary, the statement that was at the top of the

1 document, that certainly had nothing to do with the
2 legal advice. That was just a statement. I won't go
3 into what it is. It is public record here. It was a
4 statement that seems to me you could have redacted
5 the rest of the document and left that statement in
6 place without undermining the legal advice contained
7 in the rest of the document.

8 And so isn't that an example of maybe a
9 review is necessary to make sure that the claims are
10 not too sweeping? I notice in your defense there are
11 many documents that are flagged as redacted and many
12 documents that are flagged as withheld. But isn't
13 that one example an example maybe the claim perhaps
14 is too sweeping?

15 MR. GLADMAN: Your Honor, I guess I would
16 have to say I need to go back and look specifically
17 at that document. I wasn't prepared to walk all
18 through 234. I know you are not asking me to.
19 Obviously there is concern about having a discussion
20 in this forum about what is actually on a document
21 that we claim is privileged. I am happy to look at
22 that again, and we can circle back, if needed. But
23 if there's -- you know, look, if you think and you
24 reach the conclusion preliminarily that, gee, I get
25 there is the legal advice and it's being forwarded to

1 folks that are dealing with that legal advice -- and
2 by the way, to respond to Ms. Willis's distinction
3 between reflecting and relaying, I'm not sure I
4 understand that. You know, it's set forth. That's
5 the idea.

6 If your conclusion is that there maybe
7 should have been a redaction of certain portions of
8 it and a little bit of it should have been produced,
9 I will respect that conclusion. I would have to go
10 back and look at exactly it, but I don't think that
11 still justifies an examination of 234 of these
12 documents.

13 I mean, what we are getting to on a point
14 is, look, we tried this once before where OCC
15 succeeded in persuading you to look at FE Corp.
16 documents and you reach the conclusions they were all
17 appropriately logged and privileged. These seem to
18 be conflating that and this feels like an end run
19 around it. In fact, their original motion they filed
20 here, they thought that these privilege logs had
21 something to do with FirstEnergy Corp. again, and
22 they had to correct this. I'm just concerned that we
23 are getting to a place that counsel's representation
24 that documents are, in fact, privileged as reflected
25 in a privilege log gets to be meaningless if every

1 time there is a privilege log produced, there is
2 going to be an in camera review based on what we've
3 seen here which is very little.

4 EXAMINER PRICE: Anybody else care to
5 speak to the motion?

6 Okay. We are going to go ahead and grant
7 the motion to do the in camera review. I respect
8 what Mr. Gladman is saying, and we will be as
9 minimally intrusive as we can, particularly --
10 particularly because of your software somebody is
11 forwarding attached legal advice and that's showing
12 as a lawyer was not on the e-mail chain, then we will
13 stop reviewing this quickly once we identify that
14 situation.

15 I also certainly understand that in a
16 large company preparing discovery responses, lawyers
17 are not always on every single discovery, every
18 single e-mail regarding preparing discovery
19 responses. Does not mean those discovery responses
20 are -- those communications are not work product
21 privilege.

22 I think we just -- as to the scope of the
23 in camera review, Ms. Willis raises issue of the
24 crime fraud exception, and I asked her to defer
25 discussing it until after we had moved on whether or

1 not we are actually even going to do an in camera
2 review. Now we've decided to do it, I guess
3 Ms. Willis would like to speak to that.

4 MS. WILLIS: Thank you, your Honor.
5 Under the crime -- the crime fraud -- let me back up
6 a second. The crime fraud exception is -- when you
7 have crime fraud, the attorney-client privilege does
8 not attach. Under the crime fraud exception the
9 communications are made in furtherance of the crime
10 or to facilitate or actively conceal a crime or
11 fraud.

12 And the -- it is noted as a -- as an
13 exception that is to the attorney-client. That's
14 part of common law in Ohio. I state Moskovitz versus
15 Mt. Sinai, 69 Ohio St. 3d 638. A party seeking to
16 invoke the exception has to demonstrate a factual
17 basis of showing probable cause to believe that a
18 crime or fraud has been committed and that
19 communications were in furtherance of the crime or
20 fraud.

21 The crime that we -- we are speaking of
22 involved FE Corp. and the CEO, former CEO Jones, and
23 former PUCO Commission -- or Commissioner Randazzo,
24 and Mr. Householder. Those are the crimes that
25 continued. We believe those continued -- those

1 crimes were in continuation until at least the
2 resignation of former Chair Randazzo which occurred
3 in November of 2020, could be even longer because
4 there were --

5 EXAMINER PRICE: There are no could bes.
6 As you just indicated, you have to have evidence.

7 MS. WILLIS: Your Honor, yes, I take
8 that. We will conservatively say November 2020 would
9 be --

10 EXAMINER PRICE: No. What I am asking,
11 what is your evidence that the crime was continuing
12 as of November 2020?

13 MS. WILLIS: Well, your Honor, we
14 understand --

15 EXAMINER PRICE: Do you have an affidavit
16 to present to the Bench?

17 MS. WILLIS: Your Honor --

18 EXAMINER PRICE: Do you have a document
19 to that effect?

20 MS. WILLIS: Your Honor, what we have is
21 the deferred prosecution agreement where FirstEnergy
22 admitted to --

23 EXAMINER PRICE: Again, Ms. Willis,
24 nobody is arguing at this moment that a crime was not
25 committed. But there are two parts to this. One is

1 was a crime committed.

2 MS. WILLIS: Yes.

3 EXAMINER PRICE: And, two, the
4 communications were in furtherance of the crime or
5 fraud. Both of those elements need to have a factual
6 basis. The courts are clear the communications
7 defending against past conduct do not fall within the
8 crime fraud exception. So now you -- I was going to
9 ask you what your outside date is, and I appreciate
10 your outside date is November 2020.

11 MS. WILLIS: Yes.

12 EXAMINER PRICE: My question is what
13 facts, what documents, what affidavits do you have to
14 present to the Bench today that supports your
15 argument that these communications were in
16 furtherance of a crime or fraud?

17 MS. WILLIS: Well, your Honor, we do --
18 again, I refer back to the deferred prosecution
19 agreement which contains the FirstEnergy Corp.'s
20 admission that -- to the crime of honest services
21 wire fraud involving former -- involving former
22 Commissioner -- former Chairman Randazzo. Mr.
23 Randazzo resigned in November 2020. And so that is
24 the connection. We do not have at this time an
25 affidavit stating that, but we would be happy to

1 provide an affidavit based on the deferred
2 prosecution agreement for your Honor to consider.

3 EXAMINER PRICE: I'm still not
4 understanding what the evidence of the continuing --
5 the exception applies to communications that in some
6 way facilitate or actively conceal a crime. What I'm
7 not hearing is evidence these communications meet
8 that standard through December '20. And again, you
9 know, it can't -- the courts are clear. It can't be
10 speculation or belief. It needs to be facts, and
11 nobody -- nobody is minimizing the fact they did
12 agree to a -- to a crime. The question is what facts
13 do you have that these communications facilitate or
14 actively -- are being used to actively conceal that
15 crime.

16 MS. WILLIS: Your Honor, at this time we
17 have our pleading where we -- where we filed before
18 the Commission. We do not have an additional --
19 additional evidence other than the pleading and
20 related documents that have been provided to us in
21 discovery. But we have not prepared exactly
22 specifically what you're asking for.

23 EXAMINER PRICE: Mr. Gladman.

24 MR. GLADMAN: I think I can be brief on
25 this. Again, we are dealing with the conflation of

1 FirstEnergy Corp. and the Companies. The Companies
2 have not been charged with any crime, have not pled
3 guilty to any crime or charged with engineering any
4 fraud. The DPA has nothing to do with the Companies.
5 It has to do with, as Ms. Willis readily conceded,
6 she said the crime we are talking about involved
7 FirstEnergy Corp.

8 That's the end of the argument. You
9 don't get to break the Companies' privilege based
10 upon something that an affiliate did. That's No. 1.
11 OCC has made no showing to the contrary or as
12 required, and as you noted, that the attorney-client
13 communications were in support of an ongoing crime or
14 fraud.

15 And I for one take high offense that
16 this -- this sort of accusation is thrown out so
17 casually, so recklessly. I am counsel for the
18 Companies. We have others who are counsel for the
19 Companies who are on many of these communications.
20 And the suggestion here without a shred of evidence
21 put in a public filing is somehow that we as counsel
22 are involved in communications that are in support of
23 an ongoing crime, I think we've now established they
24 have no evidence to that affect, but it's really
25 offensive and frustrating to see these kinds of

1 filings and arguments made without any supporting
2 evidence. They're specious, and they should be
3 rejected just as your Honor rejected similar
4 arguments with respect to FirstEnergy Corp.

5 EXAMINER PRICE: Ms. Willis, would you
6 care to clarify you are not referring to any of the
7 counsel in this virtual room?

8 MS. WILLIS: Your Honors, certainly not
9 making those kind of accusations. Again, FirstEnergy
10 Corp. -- I think if you read our filing, our filing
11 is very clear. We are not naming names. We're not
12 saying counsel is involved. We are not claiming
13 nefariousness. We're not claiming -- we're just
14 raising this issue, gee, we should consider this when
15 we are looking at documents.

16 EXAMINER PRICE: Anybody care to speak in
17 support of Ms. Willis?

18 Okay. I'm sorry. Somebody care to
19 speak?

20 MR. HAYS: Tom Hays.

21 EXAMINER PRICE: Mr. Hays.

22 MR. HAYS: It's nice to see you again.
23 We do not -- did not file the motion and we followed
24 what they -- what counsel for the Companies has said.
25 And we are not -- we are certainly not saying that.

1 I think though what Ms. Willis is trying to get at is
2 that you have a pattern of things that keep coming to
3 light, and I would say you've accepted now the FERC
4 audit report. And I would encourage you, and I know
5 you will, Mr. Price --

6 EXAMINER PRICE: I don't recall
7 accepting -- I don't recall accepting the FERC audit
8 report. I accepted --

9 MR. HAYS: I thought that was the first
10 item that you did where you said you were going to
11 accept the initial -- the initial -- your first --

12 EXAMINER PRICE: Ms. Willis, was I
13 unclear that I was accepting the court of appeals'
14 decision, not the FERC audit report?

15 MR. HAYS: So you are not going to accept
16 the FERC audit report or review it just so I'm clear.

17 EXAMINER PRICE: Let Ms. Willis answer my
18 question and then I will get to your question.

19 MS. WILLIS: I'm sorry, your Honor. What
20 was your question?

21 EXAMINER PRICE: Was I unclear that we
22 were accepting the court of appeals' decision, not
23 the FERC audit report?

24 MS. WILLIS: I understood your ruling to
25 be that we were going to be asked to brief the issue

1 on the FERC audit report and that briefs were due on
2 February 18 of 2022.

3 EXAMINER PRICE: That is as to the
4 underlying documents. You have a motion -- maybe
5 some of the confusion is we have so many proceedings.
6 You have two motions for additional authority. One
7 is for a court of appeals' decision and that is ripe.
8 And we also have one for the -- for the FERC audit.

9 MS. WILLIS: That's a statement we're
10 asking for -- on the FERC audit what OCC's request
11 was that you revisit the issue on our motion to
12 compel.

13 EXAMINER PRICE: I think in one of the
14 other proceedings though you put that in as
15 additional authority.

16 MS. WILLIS: Yes, your Honor, I believe
17 we have. I can't tell you which -- that may have
18 been the corporate separation proceeding, and I do
19 apologize. The proceedings all get mixed up. There
20 is very common issues between them all so it's a
21 little difficult for two -- two OCC attorneys to keep
22 track of all that.

23 EXAMINER PRICE: Understandable. Just to
24 be clear, Mr. Hays, we have not been asked to in this
25 proceeding, and we have not accepted the FERC audit

1 report as additional authority.

2 MR. HAYS: Then I guess what I would --
 3 my reply would be if this is going to be considered
 4 on the briefings for the 18th, that it does contain
 5 in my -- my legal experience highly relevant
 6 information about how the Company and its
 7 subsidiaries through -- through the subsidiary FESC,
 8 which I think is the Service Company, commingled
 9 things and lacked -- lacked adequate controls and
 10 violated federal laws and violated state --
 11 correspondingly if you look at are there parallel
 12 state laws.

13 EXAMINER PRICE: And, Mr. Hays,
 14 specifically -- Mr. Hays, how is that relevant to --
 15 how is that relevant to whether these communications
 16 were in furtherance of a crime or fraud?

17 MR. HAYS: Well, that has to do with the
 18 dates of those documents during which time the
 19 federal audit found that there were, in fact,
 20 obfuscations -- I'm sorry, never can say that word --
 21 and other significant irregularities. And they cite
 22 chapter and verse on a here is what the federal
 23 standards are. These things didn't comply. Those,
 24 if the feds chose to, would be the basis for criminal
 25 action. They haven't said they would, haven't said

1 they wouldn't. I would also correct the record --

2 EXAMINER PRICE: Why do you think
3 accounting irregularities, whatever their scope,
4 would be the basis for a federal crime? Can you
5 point to the federal crime you believe that you are
6 referring to?

7 MR. HAYS: No. What I am saying is -- I
8 think what I am saying is the same way that when
9 you -- when the PUCO has standards that are in its
10 regulations, the violation of those can be both civil
11 and criminal, and I'm suggesting that the court in
12 its review can legitimately look at what they say,
13 here are the federal standards, here is what they say
14 they didn't do.

15 The court can then ask the question are
16 these things that -- potentially violations of either
17 state or PUCO regulation or Ohio law. And what I am
18 suggesting is or asking is when these things come in
19 on the 18th, that those things be considered.

20 I would also say I think there has been a
21 little overstatement as to what was said about the
22 subsidiaries. My recollection of the last time the
23 feds spoke on the issue of the subsidiaries is they
24 said everything is still under consideration meaning
25 who they are going to pursue and what -- where their

1 investigation is at. My -- my distinct recollection
2 is what was said it's to be determined.

3 And so what I am saying is the counsel
4 for the subsidiaries has been saying essentially
5 we're exonerated. I don't believe that's the state
6 of affairs.

7 MR. GLADMAN: Your Honor, may I respond
8 to that? This is so far outrageous I have to be
9 heard on this.

10 EXAMINER PRICE: I agree. It's far
11 afield, and you will have a chance to respond but let
12 him finish, please.

13 MR. HAYS: That was it. I just simply
14 wanted to say I believe that that statement was an
15 overstatement, that the Companies, that the
16 subsidiaries, Mr. Randazzo, and other people that are
17 unindicted now, that all the Attorney General, the
18 U.S. Attorney General from Cincinnati, said was
19 what -- I'm not going to answer that question right
20 now. That's to be determined. If my recollection is
21 wrong, I apologize. I don't believe it is.

22 EXAMINER PRICE: Mr. Gladman, your
23 response.

24 MR. GLADMAN: I guess the initial
25 response is this has nothing to do with the issue

1 before you, nothing. So nothing I said about whether
2 the crime fraud exception applies and why it doesn't
3 apply is changing, and I don't need to address
4 anything in that regard. There was zero showing of
5 any sort that the Companies were engaged in any crime
6 or engineering any fraud.

7 I am not going to speak for FirstEnergy
8 Corp. about an ongoing FERC audit. I think you made
9 clear with your questioning of Mr. Hays his casual
10 statements about that could lead to a criminal
11 prosecution of some unnamed entities. There's no
12 merit or basis for that.

13 And then, secondly, his recollection
14 which, again, you know, in these proceedings I would
15 really appreciate if folks had their facts down
16 before they throw out these casual statements about
17 what they recall the former U.S. Attorney said, you
18 know, a year and a half ago. They spoke about
19 different entities. I will tell you as a matter of
20 fact that U.S. Attorney has never suggested that the
21 Companies engaged in any wrongdoing or under any
22 investigation, under any suspicion, or are going to
23 be indicted in any way, shape, or form.

24 Of course, the investigation is ongoing
25 at the discretion of the Department of Justice. But

1 to casually lump in entities that have nothing to do
2 with this, were never mentioned by that U.S. Attorney
3 is frankly outrageous.

4 EXAMINER PRICE: Thank you.

5 Anybody else care to weigh in?

6 Okay. At this time we will indicate that
7 we do not believe that a basis for invoking the crime
8 fraud exception exists. We are guided by the case
9 State, ex rel., Nix V. City of Cleveland, 83 Ohio St.
10 3d 379, which I believe was recently cited as
11 recently as 2020 by the Supreme Court as still is
12 good law.

13 As we indicated within our discussion
14 with Ms. Willis, in order to invoke the crime fraud
15 exception, you have to demonstrate a crime or fraud
16 has been committed and there is no question that the
17 FirstEnergy Corp. has agreed to a federal crime. But
18 it also indicates that you must have evidence, a
19 factual basis, that the communications were in
20 furtherance of a crime or fraud. And OCC and Mr.
21 Hays have not been able to demonstrate that the
22 communications were in furtherance of a crime or
23 fraud, and we will not consider the crime fraud
24 exception during the in camera review.

25 Yes. I am not sure who is asking to be

1 heard. Nobody? Okay. Sorry about that.

2 At this time we are looking at a healthy
3 box of documents. It's 274 entries. It had been my
4 hope when we scheduled this that we could take a
5 break and then reconvene and have a ruling but that's
6 just not practical. If we spend one minute on each
7 entry, that would be 234 minutes and we will be here
8 for four hours. I don't want to keep everybody on
9 hold for four hours. I know everybody has other
10 matters to attend to.

11 We will schedule a second prehearing
12 conference which at that point we will give our
13 ruling and also then address the issue of the FERC
14 audit reports and whether the documents that the
15 Companies have provided to FERC continue to be
16 confidential. That will give us a chance to digest
17 the memoranda that are due on February 11. So you
18 can expect we will be scheduling the second
19 prehearing, the additional prehearing conference --
20 I'm sorry, February 18, at some point after
21 February 18. I am not sure if it will be February 22
22 or the following week so.

23 Are there any other issues before the
24 Bench?

25 MS. WILLIS: Your Honor, a couple

1 questions. With respect to would your Honor be
 2 willing to -- to entertain a little bit of argument
 3 on the waiver of attorney-client privilege and how
 4 the disclosure to government agency would waive that
 5 attorney-client privilege? I think that's an issue
 6 with respect to the privilege log because I think
 7 what we have is we have some of the materials
 8 diverging or that would involve that, and I think
 9 there was also a request as part of the privilege log
 10 or the in camera review that when disclosures were
 11 made to third parties, that their -- that the Company
 12 be required to advise the Commission and those
 13 parties.

14 EXAMINER PRICE: I appreciate you
 15 reminding me of that. Ms. Willis, do you have a
 16 discovery request outstanding to the Companies on
 17 this issue?

18 MS. WILLIS: Well, your Honor, I think
 19 that's a great question, a very relevant question. I
 20 can't tell you off the top of my head whether we do.
 21 I would hope we do in one of the four proceedings
 22 that we are involved in. But that would take me some
 23 time to confirm.

24 EXAMINER PRICE: I just don't think it's
 25 ripe for the Bench. I think the best way hopefully

1 the Bench doesn't have to deal with this at all, true
2 of all discovery questions, but I don't think it's an
3 unfair discovery request which would not be unfair to
4 require supplementation. If you haven't made the
5 discovery request and the Companies have not disputed
6 it and we haven't filed a motion to compel, I think
7 those are the steps we should take before we start
8 asking for this sort of ruling from the Bench.

9 MS. WILLIS: I will say, your Honor, it
10 was my understanding that the Companies in response
11 to our motion for in camera review and that specific
12 request, it's my understanding the Companies agreed
13 to that in their filing. But certainly they can
14 correct me if I'm wrong that they agreed that they
15 would be willing to provide that kind of notice.

16 EXAMINER PRICE: That's a caveat somewhat
17 but I will let Mr. Gladman speak to that, or
18 Mr. Doringo, whichever one is appropriate.

19 MR. GLADMAN: I am going to defer to
20 Mr. Doringo on this one, your Honor.

21 MR. DORINGO: Thank you. You're right,
22 Ms. Willis, that in our -- in our response to the
23 motion for in camera review, part of their request
24 was disclose production of privileged materials to --
25 to alert the Bench if privilege -- the Company's

1 privileged material are disclosed elsewhere.

2 And what we said in our response is
3 should there be a compelled production of our
4 privileged materials. We would alert the Bench and
5 OCC and all the other parties here to -- to that
6 circumstance. However, we did reserve the right in
7 that filing to raise all arguments about the effects
8 of that involuntary disclosure of privileged
9 materials should it happen. So that's as far as we
10 went and I think that's responsive to what Ms. Willis
11 was raising.

12 MS. WILLIS: I guess, your Honor, I think
13 our request was really even with respect to the
14 privilege log that has been provided that -- and that
15 your Honor has agreed to do the in camera review,
16 that if those documents have been disclosed for --
17 you know, to the federal government, to the SEC, to
18 third parties voluntary or involuntary, you know, we
19 would like to know because I think that does present
20 a question about whether there has been either an
21 express or implied waiver of the attorney-client
22 privilege.

23 EXAMINER PRICE: I think this is why this
24 is just better handled through the discovery process
25 and not try to short circuit the process. It sounds

1 like Mr. Doringo is willing to comply with the
2 discovery request along these lines, but clearly the
3 beauty of having it in writing is that then the
4 parties will know what they are or are not agreeing
5 to. And if there is a dispute, we're here, and we'll
6 be happy to address a motion to compel at that point.

7 MS. WILLIS: Thank you, your Honor. I
8 would have hoped we could have had this taken care of
9 as part of the privilege log process. However --

10 EXAMINER PRICE: I am not seeing the
11 relationship for the privilege log process.

12 MS. WILLIS: Well, your Honor, we have
13 moved to compel. That's how -- why we are here today
14 on the in camera review. We moved to compel. We
15 were given documents and then a privilege log
16 produced saying we're not going to -- this is -- this
17 is information we are not going to provide because
18 it's covered by various privileges, whether it be --
19 mostly attorney-client and some work product.

20 So as part of that, that's what our --
21 what our -- if you read through our motion for in
22 camera review, we are saying, hey, as part of this
23 review, the in camera review, the Bench should know
24 whether or not these documents have been produced to
25 third parties including voluntary and involuntary

1 disclosure to the government, U.S. Government, to
2 SEC, to the Department of Justice. That was all part
3 of -- and I apologize if your Honor did not
4 understand that clearly enough through our -- our
5 motion for in camera review.

6 EXAMINER PRICE: I'm still not sure I
7 understand but let's break this down just a second.

8 MS. WILLIS: Sure.

9 EXAMINER PRICE: In your original motion
10 were you asking for these 234 documents or whether
11 any documents that were previously privileged were
12 disclosed to any other party?

13 MS. WILLIS: I think, your Honor, we
14 were -- if I recall, and it's been a little while
15 since we drafted the document, if I recall, we were
16 being very specific about the in camera review. We
17 were tying it to the in camera review. I do think
18 that generally as, you know, a general
19 supplementation request, that's not an unreasonable
20 way to go, and we will certainly put that in writing,
21 you know, so that it can be clarified. But I believe
22 the motion for in camera review really was related to
23 this particular privilege log and as part of this,
24 your Honor's review, in camera review, that that
25 information be provided.

1 EXAMINER PRICE: Okay. I thought it was
2 broader than it was, and we will simply ask the
3 Companies have any of the documents in the 234
4 entries been disclosed over a claim of privilege to
5 any other government entity or civil litigant?

6 MR. DORINGO: Thank you, your Honor.
7 These documents have not been disclosed to any third
8 parties, entities, or other litigants.

9 EXAMINER PRICE: And if they are
10 disclosed between now and the next prehearing
11 conference, we would appreciate if you would alert
12 the Bench.

13 MR. DORINGO: We understand and will do.

14 EXAMINER PRICE: Thank you. Does that
15 work, Ms. Willis?

16 MS. WILLIS: As best it can, yes, it did
17 work. Thank you.

18 EXAMINER PRICE: Any other questions,
19 issues we need to address in this proceeding?

20 MS. WILLIS: Well, your Honor, I would
21 note that we -- we do have a motion for an
22 independent auditor and an independent review panel
23 that is pending. That was filed I believe in -- back
24 in October of 2022 [sic] so I know that is pending.
25 I know that your Honors are waiting until after the

1 filing of comments. That's my understanding.
 2 Comments have been filed. Reply comments have been
 3 filed. So that -- I just raise that issue for your
 4 Honor's attention.

5 EXAMINER PRICE: We are well aware, and
 6 we will be issuing a ruling -- a ruling on that
 7 question will be forthcoming soon.

8 MR. FINNIGAN: Your Honor, may I ask a
 9 point of clarification?

10 EXAMINER PRICE: You may ask.

11 MR. FINNIGAN: And this is, I guess, more
 12 to Mr. Doringo but I understand that, you know,
 13 there's a commitment that the Companies will disclose
 14 when any document for which there is a claim of
 15 privilege is disclosed to a government agency or to a
 16 third party who is a civil litigant. I just want to
 17 make sure we are operating from the same definition
 18 of the word disclosed and that our intent would be
 19 that that would include any production of a document
 20 under a protective agreement where there is a claim
 21 of confidentiality, that that would be within the
 22 definition of a disclosure for which there will be
 23 notification.

24 MR. DORINGO: I always find myself under
 25 questioning from Mr. Finnigan at these things, but I

1 am happy to answer you, John. We will -- we would
 2 not, you know, claim privilege for documents that
 3 were produced subject to a protective order.
 4 Confidentiality and privilege are, of course,
 5 different things, and if those documents are
 6 disclosed to third parties voluntarily, while I
 7 imagine it would be most surely involuntary, we will
 8 let you know.

9 MR. FINNIGAN: Thank you.

10 EXAMINER PRICE: I will just note for the
 11 record that the law on involuntary disclosures or
 12 attorney-client privilege is not simple and not
 13 clear. It is not a simple matter. We don't need to
 14 start briefing that, but it is -- it is a tangle and
 15 not all states or all jurisdictions handle it the
 16 same way so.

17 With that anything further?

18 MS. WILLIS: No, your Honor, but thank
 19 you and I appreciate the cooperativeness of
 20 Mr. Doringo.

21 EXAMINER PRICE: And Mr. Gladman too.
 22 Let's not leave out Mr. Gladman.

23 Thank you all. At this time we are
 24 adjourned.

25 We are off the record. (End 11:03am)

CERTIFICATE

I do hereby certify that the foregoing is
a true and correct transcript of the proceedings
taken by me in this matter on Thursday, February 10,
2022, and carefully compared with my original
stenographic notes.

Karen Sue Gibson, Registered
Merit Reporter.

(KSG-7228)

- - -

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

Summary: Transcript in the matter of the Ohio Edison Company hearing held on 02/10/22 electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.