

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: Case No. 20-1502-EL-UNC
Edison Company, The :
Cleveland Electric :
Illumination Company, and :
The Toledo Edison Company. :

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PROCEEDINGS

before Ms. Megan Addison and Ms. Jack St. John,
Attorney Examiners, at the Public Utilities
Commission of Ohio, via Webex, called at 10:00 a.m.
on Friday, March 11, 2022.

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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
and Mr. Cory Lee
901 Lakeside Avenue East
Cleveland, Ohio 44114

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

Mr. Trent Dougherty
1391 Grandview Avenue
Columbus, Ohio 43212

On behalf of Citizens Utility Board of
Ohio.

McNeese, Wallace & Nurick, LLC
By Mr. Matthew R. Pritchard
Ms. Rebekah J. Glover
Mr. Bryce A. McKenney
21 East State Street, 17th Floor
Columbus, Ohio 43215

On behalf of Industrial Energy Users Ohio.

Bricker & Eckler
By Ms. Rachel Mains
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Columbus, Ohio 43215

On behalf of the Ohio Hospital
Association.

APPEARANCES: (Continued)

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

On behalf of Ohio Manufacturer's
Association Energy Group.

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

On behalf of Interstate Gas Supply, Inc.

Bruce J. Weston, Ohio Consumers' Counsel
By Ms. Maureen Willis,
Senior Counsel,
and Mr. John Finnigan
Assistant Consumers' Counsel
65 East State Street, Suite 200
Columbus, Ohio 43215

On behalf of Ohio Consumers' Counsel.

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

On behalf of Ohio Energy Group.

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

On behalf of the Staff of the PUCO.

Friday Morning Session,
March 11, 2022.

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EXAMINER ST. JOHN: 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 Jackie St. John, and with me is Megan Addison. And we are the Attorney Examiners assigned to preside over this prehearing conference. Now, let's begin by taking appearances starting with the Companies.

MR. KNIPE: Good morning, your Honors.

Appearing on behalf of Ohio Edison Company, The Cleveland Illuminating Company, and The Toledo Edison Company, I'm Brian Knipe, FirstEnergy Service Company, 76 South Main Street, Akron, Ohio 44308.

Also appearing on behalf of the Ohio Companies, the law firm of Jones-Day, are Michael Gladman, 325 John H. McConnell Boulevard, Columbus, Ohio 43215, and Ryan Doringo, North Point, 901 Lakeside Avenue, Cleveland, Ohio 44114.

1 EXAMINER ST. JOHN: Thank you. Although
2 not a party to this case, we have asked Mr. Lee to
3 attend, so Mr. Lee, would you like to make an
4 appearance at this time?

5 MR. LEE: Good morning. Yes, Corey Lee
6 on behalf of FirstEnergy Corporation, with Jones-Day,
7 North Point, 901 Lakeside Avenue, Cleveland, Ohio
8 44114.

9 EXAMINER ST. JOHN: Thank you. Next I
10 have Citizens Utility Board of Ohio.

11 MR. DOUGHERTY: Yes. Thank you. Trent
12 Dougherty for CUB Ohio, 1391 Grandview Avenue,
13 Columbus, Ohio 43212.

14 EXAMINER ST. JOHN: Thank you.
15 Industrial Energy Users Ohio.

16 MR. MC KENNEY: Good morning, your
17 Honors. On behalf of IEU Ohio, Bryce McKenney and
18 Matthew Pritchard, with the law firm of McNees,
19 Wallace & Nurick, 21 East State Street, 17th floor,
20 Columbus, Ohio 43215.

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

23 MS. MAINS: Good morning, your Honors.
24 This is Rachael Mains on behalf of the Ohio Hospital
25 Association, with the law firm Bricker & Eckler, 100

1 South Third Street, Columbus, Ohio 43215. Thank you.

2 EXAMINER ST. JOHN: Thank you.

3 Northwest Aggregation Coalition?

4 Ohio Manufacturers Association Energy
5 Group.

6 MS. BOJKO: Good morning, your Honors.
7 On being half of OMAEG, Kimberly W. Bojko, Thomas
8 Donadio, with the law firm Carpenter, Lipps & Leland,
9 280 North Ohio Street, Suite 1300, Columbus, 43215.

10 EXAMINER ST. JOHN: Thank you.
11 Interstate Gas Supply Inc.

12 MR. NUGENT: Good morning, your Honors.
13 On behalf of Interstate Gas Supply, Inc., Michael
14 Nugent, Evan Betterton, and Joseph Olikier, 6100
15 Emerald Parkway, Dublin, Ohio 43016.

16 EXAMINER ST. JOHN: Thank you.
17 Mr. Dove?

18 Ohio Environmental Council?

19 Ohio Consumers' Counsel?

20 MS. WILLIS: Thank you, your Honor. On
21 behalf of the Residential Customers of the
22 FirstEnergy utilities, Bruce J. Weston, Consumers'
23 Counsel, by Maureen R. Willis and John Finnigan, 65
24 East State Street, Suite 700, Columbus, Ohio 43215.
25 Thank you.

1 EXAMINER ST. JOHN: Thank you.

2 Environmental Law & Policy Center?

3 Ohio Energy Group?

4 MS. COHN: Good morning, your Honor. On
5 behalf of the Ohio Energy Group, Jody Cohn, Michael
6 Kurtz, and Kurt Boehm, from the law firm of Boehm,
7 Kurtz & Lowry, 36 East Seventh Street, Cincinnati,
8 Ohio 45202.

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

11 MR. LINDGREN: Thank you, your Honor.
12 On behalf of the Commission Staff, Ohio Attorney
13 General Dave Yost, by Thomas Lindgren, Werner
14 Margard, and Sarah Feldkamp, at 30 East Broad Street,
15 26th floor, Columbus, Ohio 43215.

16 EXAMINER ST. JOHN: Thank you. The
17 first thing I'd like to note today, as I'm sure many
18 of you have seen earlier in this week, the Commission
19 issued a request for proposals for audit services in
20 this case, and the Commission plans to select an
21 auditor on May 4th.

22 Now I'd like to turn to the discussion
23 of the in camera review. First I do have some
24 questions. I'm not sure if Mr. Gladman or
25 Mr. Doringo would be the appropriate parties to field

1 these questions to, but the first group of documents
2 that I'd like to discuss are documents 82, 83, 87,
3 and 145.

4 And specifically with those documents
5 I'd like to discuss just the very first couple pages
6 of the document. And for identification purposes
7 those have a navigation link at the bottom of the
8 page.

9 So my question for you is, is this a
10 general reference document that the Companies use in
11 many different context, or is this a document that
12 was prepared specifically to go along with the
13 remainder of those documents?

14 MR. DORINGO: Thank you, your Honor.
15 This is Ryan Doringo, I'll be fielding these
16 questions.

17 And I just wanted to note up front,
18 given the nature of the topic of discussion with
19 these privileged materials, I'm going to try to be as
20 circumspect as possible when speaking about these so
21 as to not potentially disclose privileged
22 information, so bear with me if it takes me a little
23 bit longer to respond than maybe normal.

24 But with respect to these documents, as
25 you probably have figured out, that these are all the

1 copies of the same spreadsheet that were attached to
2 different emails.

3 As to your question specifically, the --
4 this is -- well, let me back up. This is a
5 compilation of data that was prepared at the
6 direction of counsel for the Companies' use in
7 responding to the Commission's show cause directive
8 in September of 2020.

9 And specifically, if you would look at
10 the last three tabs of the spreadsheet, those contain
11 analyses performed at the request of counsel.

12 And I understand that there are lots of
13 tabs and it's a little unwieldy. So while the data
14 on the first number of sheets in that spreadsheet is
15 not -- I guess I would say was not created
16 specifically for the case, this is a compilation of
17 data collected and analyzed for purposes of this
18 proceeding.

19 And, your Honor, while we are on this
20 subject, because I think it might be useful, I wanted
21 to direct the Bench to what we would call the parent
22 emails for each of these attachments, the spreadsheet
23 attachments, which when you look at those, you'll see
24 that they are communications between counsel for the
25 Companies and Jones-Day, in most instances, or

1 internal counsel for the Companies, that specifically
2 regard responding to OCC's discovery request in this
3 case.

4 So for Log Item No. 82, the parent email
5 is Log Item No. 219. For Log No. 83, the parent
6 email is Log No. 79. For Log No. 87, the parent
7 email is Log No. 220, and for the Log No. 145, the
8 parent email is Log No. 225.

9 And I realize that that is not at all
10 intuitive during an in camera review given that these
11 are not sequential in order, but I think that was a
12 product of how the metadata sorted the items on our
13 log.

14 That is all I have on those first four
15 documents.

16 EXAMINER ST. JOHN: Okay. I appreciate
17 that. That's helpful. I guess to kind of ask my
18 question again: So specific to the very first page
19 or two of that document, were you saying that that is
20 a compilation that is related to the data in the
21 sequential tabs of those documents?

22 MR. DORINGO: Right. So I guess I was
23 referring to the spreadsheet as a whole being a
24 compilation of data that was analyzed and reviewed
25 for purposes of this proceeding at the request of

1 counsel.

2 The first tab just lays out, I guess,
3 the contents of the following tabs, but again, I
4 guess the meat of it is those last three tabs that I
5 referenced, take that data in the preceding tabs and
6 analyze them for purposes of this case. I'm sorry if
7 I'm -- if I'm missing your question, but is that
8 helpful?

9 EXAMINER ST. JOHN: That is helpful. I
10 guess my question is, you know, as we looked at the
11 very first couple documents, we were not sure if this
12 was a general reference document that would be used
13 in other contexts as well, or if it was created along
14 with the other tabs in those documents, and is
15 directly related to those.

16 MR. DORINGO: Yes. And so I can say
17 that this data would be used, I think, in other
18 contexts, but the compilation of the data and the
19 analysis performed here makes that document work
20 product and privileged protected. And yes, I
21 believe -- so I mean, the raw data, itself, would be
22 used in other contexts.

23 EXAMINER ST. JOHN: So --

24 MR. DORINGO: And there's a pivot
25 table -- excuse me, I apologize. There's a pivot

1 table at the end that sort of does the analysis for
2 purposes of responding to the Commission's directive.

3 EXAMINER ST. JOHN: Understood. When we
4 review the documents, there was not a question in our
5 minds about the large majority of the documents in
6 those -- those document numbers, so those aren't in
7 question.

8 But the last three sections that you're
9 referencing we -- you know, we were not questioning
10 the privilege of those documents, but specifically
11 the very first few pages.

12 And again, those are the pages that have
13 a link at the bottom of them to -- as it looked like,
14 it could have been a reference material that's used
15 generally.

16 So with that being said, is just the
17 very first page of the document, is that something
18 that you would be willing to produce, or do you
19 maintain that that is privileged and that was created
20 specific -- specific to the remainder of the
21 documents, and is privileged?

22 MR. DORINGO: Thank you. And just when
23 we are talking about the first page, since we're
24 working on a spreadsheet, I just want to make sure
25 I'm on the same page, but are we talking about the --

1 there's a tab titled Table of Contents, or the tab
2 titled Review Matrix?

3 EXAMINER ST. JOHN: Yeah, I believe it
4 would be the tab -- so we don't have, you know,
5 labels for the document in what we have been
6 provided, but I believe it is referencing a document
7 that would be considered a table of contents.

8 MR. DORINGO: Right. So I think,
9 standing alone, that that information would not be
10 privileged, but in the context of this compilation we
11 would assert privilege over it.

12 But if I could ask for -- you know,
13 after we field your questions, for a little bit of
14 time to confer with my client about whether we would
15 be able to sort of separate out this data, I would
16 appreciate that, rather than, you know, giving an
17 answer right now, given the potential privileged
18 implications of that.

19 EXAMINER ST. JOHN: Understood. All
20 right. Thank you. And let's move on to the next
21 group of documents.

22 MS. WILLIS: Your Honor, if I may, will
23 OCC be given a chance to be heard on these documents?
24 Is that your -- because we would like to be heard and
25 give a general response to the inquiry.

1 I guess we had asked for, originally, a
2 line by line review, we did not get that, but we
3 would be happy to provide commentary on the
4 spreadsheets, because I think the spreadsheets are
5 the items that your Honors have questions on.

6 And we have -- certainly have our
7 opinion and view on the spreadsheets and the
8 propriety of using attorney/client or work product to
9 shield facts, versus attorney/client advice or mental
10 impressions.

11 EXAMINER ST. JOHN: Just to be clear,
12 Ms. Willis, are your comments related to specific
13 items that we'll be discussing today, or are your
14 comments generally related to the in camera review as
15 a whole?

16 MS. WILLIS: Well, your Honor, I think
17 they could be categorized as arguments related to the
18 specific spreadsheets that your Honors identified
19 that they had questions on.

20 And we also have other comments on
21 spreadsheets, you know, we're prepared to talk about
22 the spreadsheets. I think those are the most
23 pertinent items.

24 As your Honors have indicated, you know,
25 there's where your questions are, so we would be

1 prepared to have -- address both these spreadsheets,
2 and generally the spreadsheet that -- the assumption
3 of privilege for spreadsheets and data and facts.

4 EXAMINER ST. JOHN: Okay. Understood.
5 Yes, we will -- we'll hear your arguments at this
6 time.

7 MS. WILLIS: Okay. Your Honor, with
8 respect to the spreadsheets themselves, we would
9 assert that these are facts or data compilation, and
10 it's not -- it's not entitled to attorney/client
11 privilege, and it does not -- would not divulge the
12 attorney's mental impression.

13 And if it's work product -- you know, it
14 can be under Civil Rule 26B if it's found to be work
15 product and not necessarily attorney/client, that
16 that protection can be removed if a party can
17 demonstrate there's a sufficient need for the
18 protected materials, which we believe we have
19 demonstrated.

20 And then, your Honor, I bring up
21 generally the question about whether there's been
22 waiver by the actions of the utilities in this -- to
23 this extent.

24 In Ohio there's expressed waiver and
25 there's implied waiver, and the expressed waiver

1 occurs if the client has shared that with a third
2 party.

3 We believe this information may have
4 been shared with the PUCO Staff, and so that would be
5 a waiver. And there's also an implied waiver, and
6 that's under the Hern test in Ohio.

7 And an implied waiver can result if
8 they -- if a party has, through affirmative action,
9 placed the protected information at issue by making
10 it relevant to the case, and we believe by the filing
11 of the affidavit and the supplemental response, that
12 it has made this information relevant to this case,
13 and therefore has impliedly waived that privilege.

14 So in all, your Honor, we are saying
15 that FirstEnergy utilities can't just pick and choose
16 which opponents it's going to give information to and
17 say it's not waiving privilege, and then maintain a
18 claim of confidentiality to obstruct others, and we
19 think that's what's going on here with respect to the
20 information that may have been provided to the PUCO
21 Staff, and/or the Blue Ridge Consulting Firm, with
22 respect to the show cause and the spreadsheet
23 information that we're talking about here.

24 EXAMINER ST. JOHN: Ms. Willis, I was
25 under the impression that we had already discussed

1 and made a ruling on the waiver claims at our last
2 prehearing conference.

3 I believe Mr. Doringo expressed at that
4 time that these documents had not been disclosed to
5 any third parties, and that he would let the Bench
6 know, and the parties know, if they were disclosed
7 between the time of that prehearing conference and
8 this prehearing conference. Mr. Doringo, is that
9 correct?

10 MR. DORINGO: That is correct, your
11 Honor. These have not been disclosed to Staff or
12 anyone else.

13 And I will say also that to the extent
14 anything has been disclosed to Staff in this case, or
15 others, that those materials have been produced to
16 OCC. And the same is true with the auditors that we
17 provided information to.

18 And I -- you know, I strongly disagree
19 with the characterizations of waiver, and the issue
20 of whether work product can apply -- work product
21 protection or privilege can apply to compilations of
22 materials.

23 The law in Ohio is very clear that it
24 can and does, but I think we're sort of past the
25 point, your Honor, as you mentioned, of reviewing or

1 returning to those issues.

2 EXAMINER ST. JOHN: Thank you.

3 Ms. Willis, is there anything you'd like to add?

4 MS. WILLIS: No, your Honor.

5 EXAMINER ST. JOHN: Okay. Thank you.

6 Moving on to the next group of
7 documents, I'd like to discuss documents 208
8 through 211.

9 You know, Mr. Doringo, as you've noted,
10 one of the difficulties with these documents is, you
11 know, as we're reviewing we don't know exactly how
12 the documents are related, and if they are related.

13 So my question to you is, is this group
14 of documents 208 to 211, is there a relationship
15 between that group of documents? And if so, what is
16 that relationship?

17 MR. DORINGO: Right. So in terms of the
18 subject matter, they are related in that they concern
19 review of certain vender payments, but they are not
20 of the same -- we call them families of documents,
21 right, when we're doing electronic discovery. So
22 they are not all attachments to the same
23 communication.

24 Three of them, however, are. The
25 spreadsheets -- I'll turn to those first. The 209,

210, and 211 are part of the same family of emails.
The parent document for all three of those items is
Log No. 200, which is a communication between counsel
and Ms. Mikkelsen.

EXAMINER ST. JOHN: I'm sorry, did you
say that was -- the parent is 200, 2-0-0?

MR. DORINGO: Yes, that's right, the
parent document is 200 for Log Nos. 209, 210 and 211.
So those are part of the same email family, and all
those spreadsheets are attached to that email.

This was, again, a compilation of data
prepared at the direction of counsel for analysis
relating to those vender payment issues that I
discussed, and any spreadsheet contains I guess
indications of matters that were specifically under
review by counsel at that time.

As for 208, like I said, the subject
matter is related, and I would assume that the work
that was being done in connection with the first
proof of documents we talked about fed into 208. But
yes, it's part of the same effort, I guess I would
say.

EXAMINER ST. JOHN: Okay. Thank you.
Ms. Willis, do you have any comments on that group of
documents?

1 MS. WILLIS: Yes, your Honor, and I
2 guess this really goes to sort of the approach that
3 we took.

4 When we looked -- relooked at the
5 spreadsheets, we tried to group the spreadsheets by
6 the subject matter, how the Companies had -- had
7 categorized the subject matter, and the 208 through
8 211 were categorized as vender payments in certain
9 cost centers.

10 So when we looked at that spreadsheet we
11 found that there were a number of other spreadsheets
12 on this privileged log that had that same -- that had
13 that same category.

14 So to the extent that your Honors are
15 considering whether or not the spreadsheets on the
16 vender payments for lines 209 through 211 are
17 privileged, we would expect that similar items -- and
18 we have got a list of them -- should be under review,
19 and should the Commission determine that the lines
20 208 through 211 are not subject to privilege and
21 should be disclosed, we would argue that similar
22 items on similar lines -- and again, I've got the
23 specific lines -- that the ruling would apply to
24 those lines as well, and those lines as well would be
25 subject to disclosure.

1 So I don't know what point in time you'd
2 like to hear what lines they are, but we have them --
3 we do certainly have them divided up by category, and
4 this category was vender payments and certain cost
5 centers, and so we took that category and found all
6 the line items that entailed Excell spreadsheets and
7 put them in that category.

8 EXAMINER ST. JOHN: I appreciate that.
9 Let's hold off on that further discussion until --
10 because -- let's hold off until a ruling is made on
11 the privilege of those documents, which I anticipate
12 to make later on in this prehearing conference.

13 MS. WILLIS: And, your Honor, we
14 might -- there is an issue that we need to discuss,
15 and I want to raise it just because I think it's out
16 there and it does need to be discussed.

17 We have seen that there are -- there are
18 several data lines that indicate that the company is
19 claiming privilege with regard to Tracy Klaes
20 communications, and Tracy Klaes is, of course, the
21 analyst for the Blue Ridge Consulting.

22 And there are a number of items where
23 the -- Tracy Klaes is listed as the author, and we
24 would question how that could be covered by the
25 Companies' attorney/client privilege, and how that

1 plays into all this. So that certainly is an issue
2 we want to raise and discuss.

3 EXAMINER ST. JOHN: Okay. Do you have
4 document numbers for those? Are there particular
5 document numbers for those?

6 MS. WILLIS: Yes, your Honor, we have
7 lines 100, 102, 149, and 158, all dealing with Tracy
8 Klaes. And the dates of those -- the dates vary on
9 those.

10 I think the -- I think one or two of
11 them are a spreadsheet, the other are communications.
12 But again, we have a hard time figuring out how a
13 communication with the auditor who was looking at the
14 vender payments could be considered privileged
15 information that the Company is asserting privilege
16 over.

17 EXAMINER ST. JOHN: Understood.

18 Mr. Doringo, I understand that these
19 were not documents that we had flagged for your
20 review to discuss during this conference, so at the
21 risk of kind of, you know, putting you on the spot
22 here, would you have any response to Ms. Willis'
23 comments about those four documents at this time?

24 MR. DORINGO: Yes, that the -- and I'm
25 trying to go through my log here and identify these.

1 My assumption is that these were
2 attachments to privileged emails being exchanged
3 between counsel during the audit process, which is
4 not surprising that the Companies would be conferring
5 with their counsel about responding to auditor
6 requests or questions.

7 I do not see, in my quick review of our
8 log, any email communications involving Ms. Klaes --
9 Mr. Klaes, I'm sorry, I'm not familiar with Tracy
10 Klaes. Is it Ms.?

11 MS. WILLIS: Yes.

12 MR. DORINGO: Okay.

13 -- Ms. Klaes in the logs. So my guess
14 is that they are attachments to emails, the
15 production of which would reveal the privileged --
16 the contents rather than the subject matter of the
17 privileged communications exchanged with counsel.

18 I'll also note that the Attorney
19 Examiners were provided with all of these documents
20 for their in camera review, and we would expect that
21 if there were questions about whether they were
22 privileged or not, that the Attorney Examiners are
23 well positioned to address those.

24 EXAMINER ST. JOHN: All right. Thank
25 you for that.

1 The last document that I wanted to
2 discuss is document No. 214. Mr. Doringo, could you
3 talk a bit more about this document and how you find
4 that it is privileged?

5 MR. DORINGO: Right. And this is -- so
6 this document contains notes by Ms. Mikkelsen for a
7 meeting, but those meeting notes reflect and
8 incorporate the advice and work product impressions
9 of counsel on a number of regulatory proceedings
10 pending, and anticipated in Ohio and elsewhere.

11 I'll note that among those issues are
12 responses -- the plan for responding to certain data
13 requests that the Companies have received, which had
14 not yet been produced to Staff in this case, and the
15 anticipated legal impact of House Bill 6 related
16 issues and other forums in which the Ohio -- I'm
17 sorry, in which FirstEnergy has operating companies.

18 So we believe that this reflects and
19 takes in advice and impressions of counsel relating
20 to the path forward at this point in time.

21 EXAMINER ST. JOHN: So you are saying
22 even though this document was not prepared by
23 counsel, that it includes impressions of counsel?

24 MR. DORINGO: Right. And certainly, at
25 least in the one instance where I mentioned that

1 the -- the plan for a response to Staff data requests
2 that had not been submitted yet, I think there's one
3 instance where it is very clear that the advice and
4 impressions of counsel are included in this document.

5 That said, we -- upon reviewing this
6 one, we did think that it may be appropriate to
7 provide a redacted version of this document. We'd be
8 willing to do so.

9 There are -- there's certainly factual
10 information we think in here and we could redact out
11 the problematic portions if necessary.

12 EXAMINER ST. JOHN: Okay. Thank you.
13 Ms. Willis, do you have any response to that?

14 MS. WILLIS: Thank you, your Honor.
15 Apparently I missed that one in the review, so I
16 don't have anything to add.

17 EXAMINER ST. JOHN: Okay. Thank you.
18 And, Ms. Willis, do you have anything else to add
19 generally, because otherwise I would like to take a
20 short break to review these documents briefly just
21 one more time before making a ruling, unless there's
22 anything you'd like to add before we take that break?

23 MS. WILLIS: Thank you, your Honor. I
24 do appreciate that. I just think generally, you
25 know, we should -- the Commission should err on the

1 side of if there is attorney/client privileged
 2 information and/or work product that can be redacted,
 3 and that the facts that are contained within these
 4 documents, the accounts, the information that's been
 5 put together and compiled by accountants with respect
 6 to amounts and accounts that may be related to show
 7 cause, or related to vender payments, that that
 8 information should be provided, and if it's part of a
 9 larger document, I would urge the Commission to
 10 redact anything that could be considered
 11 confidential, but to disclose -- to err on the side
 12 of disclosure of facts and information in
 13 spreadsheets, especially, your Honor, for purposes of
 14 transparency and allowing parties the discovery
 15 rights that they are entitled to under 4903.082.
 16 Thank you.

17 EXAMINER ST. JOHN: Thank you. And with
 18 that I'd like to take a short break. I'd encourage
 19 everyone, please do not log off of the Webex event,
 20 but instead feel free to stop your video and mute
 21 yourself if you have not already done so.

22 I'd like to come back -- take about a
 23 five-minute break -- let's take a little bit longer
 24 just so we have an opportunity to, you know, give
 25 these -- give your arguments and the documents the

1 full attention that they deserve, so let's come
2 back -- I think the time is 10:31, let's come back at
3 10:40. Thank you.

4 (Recess taken.)

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

7 I want to thank you all for your
8 patience as we took that break to rereview a couple
9 of the documents that we had discussed this morning.

10 Before I get to our rulings, I first
11 want to mention that during our in camera review we
12 were as minimally intrusive as we could be. As soon
13 as we identified that a privileged is attached to a
14 document, we stopped reviewing at that time.

15 I know there was a concern expressed
16 during our last prehearing conference on that point,
17 so I did want to confirm that we took that into
18 consideration and conducted our in camera review
19 accordingly.

20 So I do have a couple questions for
21 Mr. Doringo concerning documents 100 and 102, that
22 Ms. Willis flagged during our earlier discussion.

23 My question to you regarding those two
24 documents in particular, could you confirm the parent
25 email log numbers for those documents?

1 MR. DORINGO: Your Honor, I'm looking to
2 see if I can do that quickly.

3 EXAMINER ST. JOHN: Take your time.
4 Thank you.

5 MR. DORINGO: You asked for 100 and 102?

6 EXAMINER ST. JOHN: Yes.

7 MR. DORINGO: I can say that I don't
8 think I'm going to be able to quickly pull those
9 parent emails while we have everybody waiting here,
10 but I do -- based on the review that we did since
11 Ms. Willis raised that question, it looks like those
12 were draft responses to audit requests which would
13 explain why the original author would have been
14 Ms. Klaes, but they were edited by counsel and
15 others, I believe, in preparation for submission to
16 the auditor.

17 EXAMINER ST. JOHN: Okay. So at this
18 time you are confirming that those were either
19 attached to emails or drafts created by individuals
20 employed by the company in response to those -- I'm
21 sorry, could you say that one more time?

22 I'm trying to catch myself, because I
23 don't want to over speak and over share what the
24 documents are. So I'll ask you to please say what
25 you said again so I'm not over sharing more than what

1 you feel comfortable with.

2 MR. DORINGO: Of course. And I
3 appreciate that. But my understanding is that those
4 were either the requests or the draft responses that
5 were received from the auditor attached to
6 communications between counsel about responding to
7 those requests, which should explain the original
8 author of those documents being Ms. Klaes.

9 That said, I do not have the parent
10 emails in front of me right now, and I don't think I
11 would have them in the next couple minutes, so if we
12 learn differently, we are happy to alert the Bench.

13 EXAMINER ST. JOHN: Okay. I guess my
14 question to you -- I'm not sure who is going to be
15 fielding the discussion regarding the FERC
16 investigation that we planned to turn to next.

17 Are you going to be fielding that
18 discussion? And if not, would you have an
19 opportunity to possibly get answers to those
20 questions during the remainder of the prehearing
21 conference?

22 MR. DORINGO: Right. I will be
23 addressing the FERC matter, but there are others of
24 my team on this call who I know are working
25 diligently to try to answer this question while I

1 will be talking to you about the FERC.

2 EXAMINER ST. JOHN: Understood. Well,
3 with that being said, let's hold off on any ruling
4 for documents 100 and 102 at this time, and we can
5 turn to those two particular documents towards the
6 end of our prehearing conference.

7 MS. WILLIS: Your Honor, if I may be
8 heard very quickly, we -- in our earlier discussion I
9 talked about waiver, and your Honors had said that
10 that issue was addressed fully in the prior
11 prehearing conference.

12 Over the break I did get a chance to
13 relook at the transcript. Although I believe the
14 express -- the concept of expressed waiver was ruled
15 on, I don't think there was a ruling on implied
16 waiver, that there can be a waiver -- an implied
17 waiver under the Hern's test in Ohio related to the
18 filing of testimony and the filing of -- well, the
19 filing of the affidavit and the supplemental
20 response. So I just raise that for your
21 consideration.

22 EXAMINER ST. JOHN: Okay. Thank you.

23 Mr. Doringo, I'd like to next turn to
24 documents 82, 83, 87 and 145. My question to you is,
25 would the Companies be willing to produce just that

1 first page of the document that we had discussed
2 earlier in the prehearing conference?

3 MR. DORINGO: Yes, I think we would be,
4 if we're permitted to take out the compilation -- the
5 compilation I discussed earlier.

6 EXAMINER ST. JOHN: Yes. With that
7 understanding, we will ask you to produce just that
8 first page of the document then, and that again is
9 for documents 82, 83, 87, and 145.

10 Next, we find the document 214 should be
11 produced, and that the Company should produce, as
12 discussed earlier, a redacted version of that
13 document.

14 This next document is not one that we
15 have already discussed this morning, but we'll note
16 the documents 1, 10 and 233 appear to be the same
17 document.

18 Documents 10 and 233 were redacted,
19 while document 1 was withheld. To fix that
20 inconsistency we'd like to clarify to the parties
21 that they can reference the redacted documents 10 and
22 233 in place of document 1. We assume that was just
23 a minor oversight by the Companies.

24 Next, we find the documents 208 to 211,
25 that we discussed earlier in the prehearing

1 conference, we do find those documents to be
2 privileged.

3 And at this time, with the exception of
4 documents 100 and 102 which we have yet to rule on,
5 and the documents that I have already ruled on, we
6 find that the remainder of the documents in the
7 privileged log are privileged.

8 And with that, I will turn things over
9 to Judge Addison.

10 ATTORNEY EXAMINER ADDISON: Thank you,
11 Judge St. John.

12 EXAMINER ST. JOHN: I'm sorry to
13 interrupt, I think Ms. Willis was trying to speak and
14 was on mute.

15 MS. WILLIS: Thank you, your Honor. If
16 I may be heard just quickly. During our discussion I
17 had indicated there were a number of documents --
18 spreadsheets very similar to the -- to the
19 spreadsheets that your Honors identified as having
20 questions on, and would ask that we -- or ask that
21 the Bench consider the privilege -- whether privilege
22 is appropriate for those very similar documents.

23 I know we didn't have an opportunity to
24 go line by line, that that was done off the record,
25 so we would be prepared to provide a list of the

1 categories of documents, along with the lines that we
2 would ask the Bench to consider for purposes of
3 whether or not they should be produced.

4 EXAMINER ST. JOHN: We have gone through
5 the entirety of the privilege log, identified each
6 document item by item, with the caveat, of course,
7 that I've said before that we have -- as soon as we
8 recognized that a privilege existed, moved on to the
9 following document.

10 But I do want to confirm at this time
11 that we have looked at each document that has been
12 produced for in camera review, so to the extent,
13 Ms. Willis, that you would like to draw our attention
14 to other documents, I know that you have done that
15 already in this prehearing conference, the documents
16 relating to Ms. Klaes, but in terms of spreadsheets,
17 tables, things like that, we have reviewed those
18 documents and, again, the remainder of the documents
19 we have found to be privileged.

20 MS. WILLIS: Thank you, your Honor.

21 EXAMINER ST. JOHN: Thank you. And with
22 that, I'll go ahead and turn it over to you once
23 again, Judge Addison.

24 ATTORNEY EXAMINER ADDISON: Thank you
25 very much.

1 And if the parties could provide a
2 reminder to the Examiners that we still need to
3 address items 100 and 102 at the end of the
4 prehearing conference, we would certainly appreciate
5 that.

6 We know everyone has quite a bit on
7 their plate during this prehearing conference,
8 ourselves included, and we would certainly appreciate
9 the reminder.

10 Moving on to our second area of focus
11 today, during our previous prehearing conference held
12 on February 10th, 2022, we took up OCC's request that
13 we revisit our ruling on the motion to compel filed
14 by OCC on June 29th, 2021, requesting that
15 FirstEnergy disclose all documents given to the
16 Federal Energy Regulatory Commission, or FERC, as
17 part of their recent audit of the FirstEnergy
18 utilities.

19 As previously discussed, we denied the
20 motion to compel during the August 31st, 2021,
21 prehearing conference held in this proceeding, noting
22 that we would allow FERC to proceed with their
23 investigation in a confidential manner, and could
24 revisit this issue if and when the public audit was
25 released.

1 The audit report was publicly filed on
2 February 4th, 2022. After hearing some brief
3 arguments during that last conference, we instructed
4 parties to file additional memoranda before we
5 provided our decision.

6 As a preliminary matter, we thought we
7 would ask the parties if we still needed a ruling on
8 this issue, or if some other resolution had been
9 reached.

10 Specifically, we are curious if
11 FirstEnergy Corp. will otherwise be providing these
12 documents subject to the motion to compel in response
13 to a subpoena to FirstEnergy Corp.'s Vice-President,
14 Controller, and Chief Accounting Officer, Mr. Jason
15 Lisowski in the corporate separation case, which is
16 Case No. 17-974-EL-UNC.

17 MR. LEE: Thank you, your Honor. This
18 is Corey Lee on behalf of FirstEnergy Corp.

19 First I'd like to just clarify one
20 thing. There is both the -- two different FERC
21 matters at issue, the FERC investigation, which is
22 ongoing and has not been completed, and then there's
23 the FERC audit, which has been completed.

24 So with that as background, yes, there
25 has been a subpoena to FERC -- or to FirstEnergy

1 Corporation for the FERC communication relating to
2 the audit, and FirstEnergy Corporation will not be
3 providing those documents.

4 And we actually moved to quash
5 Lisowski's subpoena yesterday. And that is a
6 position the Corporation has taken -- consistently it
7 has not agreed to produce those documents to any
8 third party.

9 I would also add, too, your Honor that
10 OCC has actually moved to intervene in front of FERC,
11 so it has placed this issue of its entitlement to
12 documents in front of FERC itself.

13 ATTORNEY EXAMINER ADDISON: Thank you,
14 Mr. Lee.

15 In that case, I'd like to thank the
16 parties for filing additional memoranda on this
17 narrow question of whether the confidentiality
18 provisions still apply once the FERC audit report has
19 been released.

20 I believe the request has been slightly
21 narrowed since the initial filing, Ms. Willis, so I'd
22 like to confirm first and foremost, the two discovery
23 requests at issue are RPD-5-001, and
24 Interrogatory-06-003; is that correct?

25 MS. WILLIS: Yes, your Honor, that's my

1 understanding. And you are correct that we did
2 narrow those.

3 We narrowed those fairly early on,
4 recognizing that we should -- we were trying to reach
5 an agreement and accommodation, so we did not -- we
6 are not seeking FERC's nonpublic files or their
7 nonpublic documents, we are merely seeking the
8 documents that FirstEnergy entities, including
9 FirstEnergy Corp., and any subsidiary, may have
10 provided to FERC during the course of the audit and
11 afterwards.

12 ATTORNEY EXAMINER ADDISON: Thank you,
13 Ms. Willis.

14 And just to follow up from the previous
15 prehearing conference, OCC is obviously only
16 interested in those documents relating to Ohio
17 entities, correct?

18 MS. WILLIS: Yes, your Honor, that is
19 correct. So to the extent that documents would
20 include more than Ohio information, we would accept
21 the redactions on those documents.

22 ATTORNEY EXAMINER ADDISON: Thank you
23 very much.

24 And just to make the record as clear as
25 possible, I will mention, even though the

1 interrogatory has not been narrowed in scope, I would
2 just like to state for the record, with respect to
3 the FERC audit mentioned, OCC is also requesting, in
4 response to that interrogatory, the employees that
5 have met with the FERC staff either in person or via
6 virtual meeting, the employees interviewed by FERC
7 staff, and the employees that have communicated with
8 FERC staff.

9 We have read the pleadings, including
10 the additional memoranda filed on February 18th, but
11 do have some follow-up questions, and I believe I'll
12 begin with Ms. Willis.

13 Can you respond to the Companies' claim
14 that there's still an ongoing audit or investigation
15 at issue here? I believe Mr. Lee may have started
16 this for us. And if so, if there is an ongoing audit
17 or investigation, will granting your narrowed motion
18 to compel inhibit FERC's ability to conduct that
19 audit or investigation?

20 MS. WILLIS: Thank you for your
21 question, your Honor.

22 As I understand it, FirstEnergy is being
23 investigated with respect to HB 6 activities and
24 political and charitable contributions.

25 We were advised of that in a pleading

1 that was filed by FirstEnergy, and it was also
2 apparently disclosed in a filing before the
3 Securities & Exchange Commission.

4 We are told that there were two letters
5 that were sent to FirstEnergy with regard to the
6 investigation, and those were sent in, I believe,
7 2021, in February -- well, actually 2020, I
8 believe -- well, certainly we can get that date from
9 the Company.

10 But the investigation, your Honor, is a
11 completely different proceeding than the audit. The
12 investigation is under different standards with
13 different staff, and it is a completely different
14 scope.

15 The audit was of the entire FirstEnergy
16 Corp. and their affiliates, and whether or not they
17 were complying with the FERC restrictions on
18 affiliate transactions and on service company
19 accounting, and it was a very separate matter.

20 The investigation is a different matter
21 all together. So yes, we would -- we do understand
22 the investigation is ongoing, we do not understand
23 that the audit is ongoing.

24 The audit report was issued.
25 FirstEnergy actually even provided a response to that

1 audit report. It's at a much advanced stage, much
2 different than the investigation where there is no
3 audit -- there is no report that has been issued, no
4 findings, no -- as far as we know, certainly not in
5 the docket, there is no published audit or published
6 report of the investigation.

7 So they are two separate proceedings.
8 Although they might involve similar issues, they are
9 very separate proceedings.

10 So we do not believe that by asking for
11 the documents that FirstEnergy provided to FERC in
12 the audit would interfere with the separate
13 investigation that FERC is undertaking with respect
14 to FirstEnergy's HB 6 activities.

15 So I guess that's the answer to your
16 question. I hope I've given you enough. So if you
17 have any -- if you want to -- if you have further
18 questions, if I wasn't very clear, I can certainly
19 respond.

20 ATTORNEY EXAMINER ADDISON: Thank you,
21 Ms. Willis. I think that will be fine for now.

22 Mr. Doringo, would you like to respond?

23 MR. DORINGO: Yes. Thank you, your
24 Honor. The investigation staff's directions to the
25 Companies -- or to FirstEnergy were to maintain

1 records developed as part of the ongoing audit
2 conducted by FERC's Division by Audits & Accounting.

3 That audit and those records are
4 directly relevant to the ongoing investigation being
5 conducted by FERC. The -- we would note, as we have
6 in our pleadings, that the audit itself has not
7 completed, either.

8 OCC, as Mr. Lee mentioned, has moved to
9 intervene in the FERC -- and what if any rights it
10 has with respect to that confidential audit are going
11 to be addressed by FERC soon.

12 We think that while -- as we said in our
13 pleadings, that there is nothing in the Federal Power
14 Act of FERC's regulations, or any authority cited by
15 any party indicating that the confidentiality
16 protections of FERC statutes and regulations go away
17 once an audit report is published.

18 This is the worst type of case to allow
19 intrusion and to find an exception in those rules for
20 the production of confidential materials exchanged
21 with FERC in light of the ongoing confidential
22 investigation.

23 ATTORNEY EXAMINER ADDISON: Thank you,
24 Mr. Doringo.

25 Before I open it up to others to

comment, as noted in the responsive memorandum, you acknowledged during this particular phase in the FERC process, pursuant to the applicable regulations, FirstEnergy Corp. may, within 30 days, notify FERC whether it requests FERC review of certain findings through a shortened procedure, or contends that there are material facts in dispute which require cross-examination or more trial type proceeding.

My question is, was such a request made, and were either of these options selected?

MR. DORINGO: I am not aware of that right now. I did not represent FirstEnergy in that proceeding. If Mr. Lee has any information, I defer to him, but I do not know that answer.

ATTORNEY EXAMINER ADDISON: Thank you, Mr. Lee?

MR. LEE: Yes, your Honor. So I believe you're asking is the Company going to contest the findings of the audit report.

At this point in time, I do not believe the Company intends to contest the audit itself. That audit has now moved into its compliance phase where there may be additional disputes regarding compliance issues, but not the findings of the audit itself.

1 ATTORNEY EXAMINER ADDISON: Thank you
2 for that clarification.

3 MS. WILLIS: Your Honor, if I might add,
4 the FirstEnergy Corp. actually filed a response to
5 the audit where it -- and that response is dated
6 January 24th, 2022, where it agreed in large part
7 and -- to the audit recommendations and findings.

8 ATTORNEY EXAMINER ADDISON: Thank you
9 very much, Ms. Willis.

10 Mr. Doringo, in many of the FERC cases
11 that you cite in your pleading, particularly the
12 cases related to discussion and adoption of FERC's
13 procedural rules, they specifically cite to the fact
14 that information to be provided to the audit staff
15 will be done so on a nonpublic basis.

16 Is there a difference between nonpublic
17 and confidential?

18 MR. DORINGO: I don't think so. Maybe
19 we have used those words interchangeably, but I
20 think -- well, I think a nonpublic investigation
21 ensures for those under review in these comprehensive
22 FERC compliance investigations that the documents and
23 communications they exchange with FERC will not be
24 subject to disclosure later, which, you know,
25 promotes candor and efficiency in that process.

1 So I guess I do not -- maybe we did not
2 draw a distinction between the confidential nature
3 and the nonpublic nature.

4 I think it's a difference in how FERC
5 describes the confidential nature of the proceeding
6 in the regulations and the -- and in its
7 communications to parties under review who are told
8 that the documents will be placed in nonpublic files.

9 ATTORNEY EXAMINER ADDISON: Thank you.
10 Ms. Willis, would you care to respond to that?

11 MS. WILLIS: No, your Honor. I'm not
12 sure I could add anything to that discussion, but
13 thank you.

14 ATTORNEY EXAMINER ADDISON: Thank you.
15 Of course.

16 Ms. Willis, in the Companies' responsive
17 memorandum they note an offer to produce the
18 underlying documents that were provided to FERC
19 during the audit as a proposed compromise to this
20 issue.

21 Should the communications in response to
22 FERC's inquiries during the audit be held to a
23 different standard than the underlying documents?

24 Do we run the risk of revealing FERC's
25 internal deliberative process by granting your motion

1 to compel, even as it is narrowed?

2 MS. WILLIS: Your Honor, our position
3 would be that just the responsive documents could
4 be -- could be given to OCC and provided on a
5 public -- well, I guess they could be provided -- I
6 don't think it runs the risk of revealing FERC's
7 process, thought processes, or their audit.

8 Again, I think, you know, if you are
9 going to consider that argument, then, you know, we
10 get into this argument I suppose of whether or not
11 the -- the FERC audit, after it's completed, still --
12 whether those documents still remain nonpublic.

13 But I do not believe that the -- it runs
14 the risk of revealing FERC -- important FERC data
15 about the audit.

16 ATTORNEY EXAMINER ADDISON: Thank you.

17 MS. WILLIS: And I guess, your Honor,
18 just to quickly add, the offer of underlying
19 documents, certainly that -- you know, that is an
20 offer, we do appreciate the offer.

21 We do have a concern, and it's been a
22 concern that -- you know, it's been borne out by
23 practice, what FERC -- what FirstEnergy considers
24 appropriate documents for us to review is not
25 necessarily what we would consider appropriate

1 underlying documents, so there is that challenge that
2 we have not really been able to -- I mean, we haven't
3 even been able to agree on what HB 6 costs are in
4 this case.

5 So I would find it, you know, difficult
6 to just accept that FirstEnergy is going to give us
7 the appropriate underlying documents.

8 EXAMINER ADDISON: Thank you.

9 Mr. Doringo.

10 MR. DORINGO: Well, to the -- your
11 Honor, I think your question was -- and I just want
12 to clarify.

13 Was your question whether the production
14 of underlying records would reveal the deliberative
15 process in which FERC is engaged, or was it the
16 production of the responses themselves to the
17 request?

18 ATTORNEY EXAMINER ADDISON: Responses
19 themselves.

20 MR. DORINGO: Well, then, I thought
21 that's what your question was, and I disagree with
22 Ms. Willis that the production of the questions and
23 answers from FERC and received from FirstEnergy Corp.
24 during the audit absolutely reveal the heart of the
25 deliberative process.

1 That is exactly how the FERC collects
2 information, and would reveal the course of its
3 investigation.

4 Those are the primary means by which the
5 Companies are -- FirstEnergy Corp. communicated with
6 FERC during the process, and they are just the type
7 of thing that parties should not be entitled to.

8 And I would note that even in contested
9 audits before FERC, when parties are allowed to
10 intervene, those parties, in contested audits, do not
11 get the audit communications with -- exchanged with
12 FERC during the audit process. That's set out in
13 Order No. 675 from FERC and 114 FERC, Paragraph
14 61,178. So, you know, I do think there is an abiding
15 interest in protecting those communications.

16 And as to the -- our offer to produce
17 the underlying communications -- I'm sorry, the
18 documents that were produced for FERC, I would just
19 reiterate that, as I said in the pleadings more than
20 once, it was never the Companies' contention that a
21 document, just because it was provided to FERC, was
22 protected somehow in all other instances.

23 What we are seeking to protect is FERC's
24 investigative process itself. But -- and the problem
25 has been that OCC has framed its request solely with

1 reference to those communications with FERC.

2 So we offered to produce documents
3 without the Q and A responses to OCC. And I do not
4 share Ms. Willis' concern that they need have any
5 doubts about whether we would produce documents
6 relating to the Ohio Companies that weren't produced
7 to FERC. It's what we committed to do and would
8 endeavor to do, but they again rejected that offer.

9 ATTORNEY EXAMINER ADDISON: Thank you.

10 One final question, and then I'll open
11 it up for general comments from others that may want
12 to weigh in before we provide a ruling.

13 Mr. Doringo, is OCC correct that there's
14 an inconsistency in the application of these FERC
15 statutes with the comparable statute applying to the
16 Securities & Exchange Commission?

17 OCC alleges that FirstEnergy Corp. has
18 already produced, or is in the process of producing,
19 the documents it turned over to the SEC related to
20 its investigation. So how is this different?

21 MR. DORINGO: And my -- well, I'll back
22 up.

23 What we have produced -- or FirstEnergy
24 Corp., rather, Mr. Lee has produced to OCC, documents
25 that were made in productions to DOJ and the SEC, not

1 the communications with those regulators, but the
2 underlying documents that were made in productions to
3 them.

4 That is precisely what I have proposed
5 to OCC to resolve this dispute. So I do not see any
6 inconsistency with our position here as opposed to
7 the way FirstEnergy Corp. has handled other matters.

8 And I'll also remind the Bench that
9 those productions were a result of a similar
10 resolution where OCC was seeking a broader range of
11 materials, but in that instance decided that the
12 underlying documents weren't sufficient to address
13 their concerns.

14 ATTORNEY EXAMINER ADDISON: Thank you
15 very much.

16 Ms. Willis, any response?

17 MS. WILLIS: Your Honor, I would tee
18 this up for Mr. Finnigan, as to Mr. Finnigan would be
19 much more familiar with this than I. If you would
20 allow that, I'd appreciate that.

21 ATTORNEY EXAMINER ADDISON: Certainly.
22 Mr. Finnigan.

23 MR. FINNIGAN: Your Honor, our position
24 would be that, you know, the whole scope of documents
25 produced to FERC should be subject to discovery in

1 the case.

2 MR. LEE: Your Honor, if I may, I
3 believe Mr. Finnigan didn't really answer the
4 question that was asked of you, and to answer your
5 question, as part of our resolution around the SEC
6 documents, no communications with the SEC, any kind
7 of the Q and A back and forth, were produced, only
8 underlying factual documents were produced, which I
9 believe is similar to the resolution that the
10 Companies have suggested here.

11 ATTORNEY EXAMINER ADDISON: Thank you,
12 Mr. Lee.

13 Any other parties that would like to
14 weigh in at this time?

15 MS. BOJKO: Your Honor, this is Kim
16 Bojko with OMAEG. We did file responsive pleadings,
17 I think the pleading speaks for itself.

18 Just as discovery is considered, data
19 requests in Ohio audits are considered to be
20 discoverable.

21 I think that while the word
22 communication is used in OCC's request for
23 production, that it's very comparable that it's a
24 question and answer, a data request, and it should be
25 able to be produced by the FirstEnergy utilities.

1 Nobody is asking the FERC employees, the
2 members, officers, or employees of the Commission to
3 divulge any fact or information which may come to the
4 knowledge during the course of examination of the
5 books or the accounts of the utility, and that's
6 what's privileged under the investigatory privilege
7 here.

8 We're not asking that, we're asking
9 FirstEnergy utilities to produce the communications,
10 the written communications. And in fact, the
11 Interrogatory 06-003 only asks for identification of
12 the employees, so that's not even asking for
13 underlying documents or communications, just asking
14 please identify the employees.

15 So those things do not fall under the
16 privilege, and given that the audit report has been
17 filed, I think the investigatory privilege ends,
18 which I think was your Honor's original question
19 about how long it goes.

20 And the word confidential has been used
21 a lot today and in the last prehearing. There's a
22 distinction between what is privileged and what is
23 confidential.

24 If it's confidential, that can be
25 handled under a protective agreement, and that cannot

1 be allowed to be disclosed to the public, but that
2 doesn't mean that it's not disclosed to the parties.

3 So I think we have to be careful about
4 our use of confidential versus privileged, which have
5 different production results. Thank you, your Honor.

6 ATTORNEY EXAMINER ADDISON: Thank you,
7 Ms. Bojko.

8 Any other parties? Ms. Willis or
9 Mr. Doringo, do you have anything to add as a final
10 thought on the matter?

11 MR. DORINGO: No, your Honor. I think
12 the briefs and our statements today speak for
13 themselves.

14 MS. WILLIS: And likewise, your Honor, I
15 think we have fully briefed it and are ready for the
16 decision.

17 ATTORNEY EXAMINER ADDISON: Thank you.
18 I believe we are ready to provide a decision.

19 Upon consideration of the arguments
20 presented in the February 18th, 2022, memoranda and
21 discussion here today, the arguments of OCC and OMAEG
22 are well taken, and we will grant OCC's motion to
23 compel as to Interrogatory O6-003 and RPD-05-001 to
24 the extent that it has been narrowed as discussed
25 earlier during this conference.

Ohio Admin Code 4901.116 provides any party to a Commission proceeding may obtain discovery of any matter not privileged which is relevant to the subject matter of the proceeding. It is not grounds for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

As noted earlier, we denied OCC's June 29th discovery request to allow FERC to conclude its audit without interference from the discovery process in this proceeding.

That audit has now been completed per the express statement from the FERC Division of Audits and Accounting.

While the Companies admit, and the memorandum contra OCC's original June 29, 2021 motion to compel that these federal statutes and regulations expressly apply to FERC, the Companies also attempt to argue that they reflect and implement important federal rules and policy that implicitly extends to State regulators like this Commission. However, the Companies have produced no persuasive case precedent to substantiate that claim.

The cases regarding the Freedom of

1 Information Act cited by the Companies may be
2 informative to some limited extent as to how FERC may
3 choose to respond to a request for its records
4 regarding the audit, but they are not compelling or
5 on point for our purposes today.

6 Analogous to our own statute, RC
7 4901.16, which precludes Commission employees from
8 prematurely divulging information during the course
9 of its investigation, we find that the statutes and
10 regulations proffered by the Companies in their
11 responsive memoranda ultimately serve that same
12 purpose.

13 Furthermore, the provision of
14 information to FERC's audit staff as nonpublic during
15 the course of an audit is similar to the routine
16 procedural practice here at the Commission where
17 entities can provide Staff information on a nonpublic
18 basis during the course of an investigation.

19 Now that that audit has been publicly
20 filed, the requested information may and should be
21 disclosed through discovery.

22 Moreover, we believe our ruling today
23 will not improperly interfere with FERC's ongoing
24 nonpublic investigation of FirstEnergy Corp.'s
25 lobbying and governmental affairs activities, nor

1 cause an inappropriate intrusion into any applicable
2 deliberative process of FERC.

3 We are focused on the publicly available
4 audit report. While the Companies provided guidance
5 from FERC indicating that it is not uncommon for
6 information to be shared between audit staff and
7 enforcement staff to promote efficiency, that was
8 made in reference to encourage entities undergoing an
9 audit to be forthcoming with existing violations and
10 cooperate during that audit process.

11 Our ruling today is limited to those
12 documents and communications provided by the
13 Companies to FERC during the course of the audit.

14 It does not, however, cover any
15 communications from the audit staff to FirstEnergy,
16 or internal workpapers, draft reports, or internal
17 communications of the audit staff, whether the audit
18 staff subsequently provided such information to the
19 enforcement staff, or how the enforcement staff may
20 use any information during the course of its
21 investigation, which is separate as noted by several
22 parties during this conference call from the audit.

23 To the extent that there are concerns
24 regarding the confidentiality of information to be
25 produced, Ms. Bojko was quite correct indicating

1 during the last prehearing conference, and today's
2 conference, that the majority, if not all parties
3 have executed a confidentiality agreement with the
4 Companies.

5 Further, any disputes as to the
6 confidentiality of such information will be handled
7 through the routine mechanisms we have in place, and
8 with which I'm sure all the parties here are quite
9 familiar at this point.

10 As to timing for producing information,
11 Mr. Doringo, when would production be possible?

12 MR. DORINGO: Your Honor, can I
13 understand, please, before I answer that question,
14 the limitation to the documents that must be
15 produced? It might help inform my response there.

16 ATTORNEY EXAMINER ADDISON: Okay.

17 MR. DORINGO: So if I think I heard your
18 Honor correctly, the ruling is limited to documents
19 provided by the Companies to FERC during the audit,
20 and -- go ahead.

21 ATTORNEY EXAMINER ADDISON: Documents
22 and communications provided by the Companies to the
23 audit staff, correct.

24 MR. DORINGO: Right. And I think that
25 the ruling was not communications provided by audit

1 staff to the Companies, and my question just is, you
2 know, in terms of data requests and responses, of
3 course the request themselves, you know, will include
4 the communications of the Staff to the Companies and
5 others.

6 So I just want to be clear that those
7 data requests and responses are subject to being
8 compelled -- subject to the compelling production?

9 ATTORNEY EXAMINER ADDISON: Correct.

10 MR. DORINGO: In terms of timing, will
11 there be -- I assume -- can I ask whether there will
12 be a written ruling on this issue?

13 ATTORNEY EXAMINER ADDISON: Similar to
14 our prior prehearing conferences held in this and
15 other investigations related to what -- one of the
16 four investigations of the FirstEnergy utilities,
17 this will be all the parties get. There will be no
18 written ruling in response to our holdings here
19 today.

20 MR. DORINGO: Okay. Thank you, your
21 Honor. We do reserve all of our rights with respect
22 to this ruling and to take advantage of the -- of
23 rules of interlocutory appeal of course.

24 ATTORNEY EXAMINER ADDISON: Of course.

25 MR. DORINGO: And in terms of timing, I

1 would say given the length of the audit that
2 continued for, you know, some years, and the breath
3 of the audit and OCC's request, we would request 30
4 days at least to make a production, subject to any
5 motions of interlocutory appeal.

6 MS. WILLIS: Your Honor, if I may.

7 ATTORNEY EXAMINER ADDISON: You may.

8 MS. WILLIS: When you said that the
9 documents are to be produced, those are the ones that
10 the Companies provided to the audit staff.

11 The clarification, we had asked for all
12 FirstEnergy entities, whether it be the utilities or
13 the Corp. or the Service Company, because all of
14 those entities were subject to the audit, it was not
15 just the FirstEnergy utilities.

16 ATTORNEY EXAMINER ADDISON: Thank you
17 for that clarification, Ms. Willis.

18 I was granting the motion to compel as
19 it has been narrowed, so to the extent that I
20 misspoke, we will granting the motion to compel as we
21 discussed earlier in the conference.

22 MS. WILLIS: So that would include the
23 entities -- discovery of documents from FirstEnergy
24 entities, is that --

25 ATTORNEY EXAMINER ADDISON: Correct.

1 MS. WILLIS: Thank you.

2 MR. DORINGO: Your Honor, I'm sorry,
3 just trying to get this --

4 ATTORNEY EXAMINER ADDISON: Go ahead.

5 MR. DORINGO: Just to be clear, when you
6 say it includes production of documents from
7 FirstEnergy entities, I understand that to mean all
8 entities that were under -- that were party to that
9 audit, but so the limitation then is only those
10 documents which concern the Ohio Companies?

11 ATTORNEY EXAMINER ADDISON: Of course.
12 And I think we did make that designation earlier
13 during the conference, but thank you for making that
14 clarification, Mr. Doringo.

15 I do believe the 30-day time frame is
16 appropriate to allow the FirstEnergy utilities to
17 file an interlocutory appeal, if they so choose.

18 And if that would happen, we will of
19 course take that under advisement, and to the extent
20 that we need to adjust the timing of any production,
21 or if the Commission would later reverse our decision
22 here today, we can certainly -- that will certainly
23 be addressed at a later time.

24 Anything else in regards to the motion
25 to compel?

1 Okay. I will note we are, here at the
2 Commission, starting to slowly transition back into
3 meeting in the physical hearing rooms for purposes of
4 prehearing conferences and hearings.

5 I will note and advise everyone, in the
6 event that we do have future prehearing conferences,
7 we wanted to let everyone know that we will likely be
8 in person. Anything else? I'm sorry, did I hear
9 something?

10 MS. WILLIS: Yes, your Honor, that was
11 me. Yes, there were a couple other matters that we
12 wanted to raise for the Bench's attention.

13 The first matter is we were making a
14 motion for clarification of Examiner Price's letter
15 of withdrawal from presiding over this case and the
16 three other cases that he filed March 4th, 2022.

17 And specifically, we're seeking
18 clarification of Examiner Price's words that he
19 withdraws from presiding over the case, and the three
20 other cases.

21 We are asking for whether Examiner Price
22 will continue to have involvement either directly, or
23 indirectly, with anything and anyone regarding the
24 four cases, and if so, what would his involvement be?

25 And we give as an example, will Examiner

1 Price be supervising or advising any PUCO personnel
2 involved in these cases?

3 And also, is there a distinction between
4 the words withdraw from presiding, and the commonly
5 used judicial term recusal? Thank you.

6 ATTORNEY EXAMINER ADDISON: Thank you,
7 Ms. Willis. And you indicated that you'll be filing
8 this in the docket?

9 MS. WILLIS: Your Honor, if that is your
10 preference, we can do that, although we would
11 certainly accept clarification through this
12 prehearing.

13 ATTORNEY EXAMINER ADDISON: Thank you.
14 I think it would be our preference that this be filed
15 in the docket. We had quite a bit to move through
16 today, that obviously was not on our agenda. So I
17 would appreciate if OCC could make that filing for
18 us.

19 MS. WILLIS: Appreciate it, your Honor.

20 Secondly, I guess we raise the issue
21 about -- I mean, we raised the issue about whether or
22 not the schedule that we have got set out for this
23 proceeding will work.

24 We are wondering whether -- we are still
25 considering whether there would be a need for a

1 continuance or extension of the schedules that
2 were -- that we are under, so we are considering that
3 matter.

4 I raise that for the Bench's knowledge
5 so that you were aware that this is one of the
6 considerations we are -- that we are weighing.

7 And the other -- the last issue that we
8 wanted to briefly raise for future consideration is
9 that we have a number -- in the different proceedings
10 we have had issued -- have had subpoenas issued for a
11 number of FirstEnergy Corp. personnel, and in the
12 past the Bench has indicated a preference, or a
13 strong desire that we not file pleadings and
14 documents with multiple case headings on them, and
15 we're heading into these -- I mean, right now we're
16 still going to -- we're still under the subpoenas,
17 we're still trying to figure out whether -- because
18 of all the pleadings that have been filed, whether
19 the subpoenas will be upheld because of our motions
20 to quash, but we raise the issue that a lot of the
21 witnesses, like the corporate witnesses, their
22 testimony would be applicable to more than one case
23 number, and we would rather not have to bring these
24 witnesses in more than once and depose them multiple
25 times with different cases numbers, so we raise that

1 as an issue.

2 And I know there's been many, many times
3 when consolidation has been considered and ultimately
4 it has not been ruled upon, it has not been decided,
5 but we raise it as an issue that, you know, once
6 these depositions get started, if we don't have some
7 accommodation, we may have to issue -- and we don't
8 want to do that -- issue subpoenas for several
9 depositions in each different case that a witness
10 might be relevant in.

11 ATTORNEY EXAMINER ADDISON: Thank you.
12 Are you asking if we will allow parties to file a
13 subpoena in multiple case -- in multiple cases?

14 MS. WILLIS: Certainly that would be --
15 that would be -- yes, your Honor, I think that would
16 be a request -- that that would be one way to handle
17 it.

18 We're just raising that -- I think it's
19 an issue that we should be thinking about, and that
20 will require resolution at some point.

21 ATTORNEY EXAMINER ADDISON: Thank you,
22 Ms. Willis.

23 With that, I do believe the current
24 process of keeping these cases separate has been
25 working, especially to the benefit of the Attorney

1 Examiners to be able to sort everything out and not
2 convolute everything into one big proceeding as these
3 proceedings have not been consolidated.

4 So we will take that under advisement.
5 If the parties do feel it would be beneficial, that
6 would certainly be something we would entertain.

7 MS. WILLIS: Thank you.

8 EXAMINER ADDISON: Anything else for the
9 good of the order?

10 MR. DORINGO: Go ahead.

11 EXAMINER ST. JOHN: I think at this time
12 it might be a good point for us to revisit documents
13 100 and 102 that were subject to the in camera
14 review.

15 Mr. Doringo, I don't know if at this
16 time you have been able to obtain the information of
17 the parent document for those two line items.

18 MR. DORINGO: I have. The -- so the
19 parent email to those documents is an internal
20 discussion regarding the -- including counsel,
21 regarding the audit responses, some audit responses
22 submitted in the Rider DCR Case No. 2016-29.

23 That document, the parent email was not
24 subject to production in this case, and so it was
25 not -- it was not on the privilege log. We are happy

1 to separately provide it to the Attorney-Examiners.

2 My understanding that -- is that the
3 spreadsheet to -- that was attached to that email,
4 document No. 100, was modified -- though it was
5 received from Ms. Klaes, was modified by the
6 Companies in draft form in preparing the responses to
7 those audit requests.

8 EXAMINER ST. JOHN: Thank you for that
9 information.

10 With taking that into consideration, at
11 this time we will find both documents 100 and 102 to
12 be privileged.

13 And also for clarity of the record, I'd
14 like to address OCC's implied waiver argument head
15 on.

16 Just for clarity of the record, again,
17 we do not find anything to suggest that the Companies
18 meet the test for implied waiver of its privilege
19 that we found for the documents at issue in this in
20 camera review.

21 And unless there's anything else that
22 the parties would like to discuss before we sign off
23 for the day, hearing none, I'd like to thank you all
24 for your participation today, and with that we are
25 adjourned.

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(Thereupon, the prehearing was
adjourned at 11:45 a.m.)

- - -

CERTIFICATE

I do hereby certify that the foregoing
is a true and correct transcript of the proceedings
taken by me in this matter on Friday, March 11, 2022,
and carefully compared with my original stenographic
notes.

Valerie J. Grubaugh,
Court Reporter and Notary
Public in and for the State
of Ohio.

My commission expires August 11, 2026.

**This foregoing document was electronically filed with the Public Utilities
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Case No(s). 20-1502-EL-UNC

Summary: Transcript of the Ohio Edison Company hearing held on 03/11/22
electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and
Grubaugh, Valerie