

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the :
Application of The Dayton :
Power and Light Company :
d/b/a AES Ohio for : Case No. 22-900-EL-SSO
Approval of Its Electric :
Security Plan. :

- - -

In the Matter of the :
Application of The Dayton :
Power and Light Company :
d/b/a AES Ohio for : Case No. 22-901-EL-ATA
Approval of Revised :
Tariffs. :

- - -

In the Matter of the :
Application of The Dayton :
Power and Light Company :
d/b/a AES Ohio for : Case No. 22-902-EL-AAM
Approval of Accounting :
Authority Pursuant to :
R.C. 4905.13. :

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PREHEARING CONFERENCE

before Mr. Gregory Price and Ms. Patricia Schabo,
Attorney Examiners, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 1247,
Columbus, Ohio, and via videoconference, called at
10:08 a.m. on Friday, April 28, 2023.

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APPEARANCES:

Faruki PLL
By Mr. Jeffrey Sharkey,
Mr. D. Jeffrey Ireland,
and Ms. Melissa Watt
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and

AES Corporation
By Mr. Christopher Hollon,
Regulatory Counsel
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Dayton, Ohio 45432

On behalf of the Applicant.

Carpenter Lipps LLP
By Ms. Angela Paul Whitfield
280 North High Street, Suite 1300
Columbus, Ohio 43215

On behalf of The Kroger Company.

Boehm, Kurtz & Lowry
By Ms. Jody Kyler Cohn,
and Mr. Michael L. Kurtz,
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Cincinnati, Ohio 45202

On behalf of the Ohio Energy Group.

Carpenter Lipps LLP
By Ms. Kimberly W. Bojko
and Ms. Emma Easley
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Columbus, Ohio 43215

On behalf of the Ohio Manufacturers'
Association Energy Group.

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APPEARANCES: (Continued)

Kegler, Brown, Hill & Ritter Co., LPA
By Mr. Robert Dove
and Mr. Nicholas Bobb
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Columbus, Ohio 43215

On behalf of Ohio Partners for Affordable
Energy and City of Dayton.

McNees, Wallace & Nurick LLC
By Mr. Matthew R. Pritchard,
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On behalf of the Retail Energy Supply
Association.

Bruce J. Weston, Ohio Consumers' Counsel
By Ms. Maureen R. Willis
and Mr. John Finnigan,
Assistant Consumers' Counsel
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On behalf of the Residential Customers of
Dayton Power and Light d/b/a AES
Corporation.

IGS Energy
By Mr. Evan F. Betterton
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On behalf of the IGS Energy.

Spilman, Thomas & Battle PLLC
By Ms. Carrie H. Grundmann
110 Oakwood Drive, Suite 500
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On behalf of the Walmart, Inc.

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APPEARANCES: (Continued)

Bricker Graydon, LLP
By Ms. Rachael Mains
100 South Third Street
Columbus, Ohio 43215-4291

On behalf of the Ohio Hospital
Association.

Thompson Hine LLP
By Ms. Stephanie Chmiel
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Columbus, Ohio 43215

On behalf of the University of Dayton.

Bricker Graydon, LLP
By Mr. Dylan Borchers
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On behalf of ChargePoint.

Ohio Environmental Council
By Ms. Karin Nordstrom
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On behalf of the Ohio Environmental
Council.

Baker Hostetler LLP
By Mr. David F. Proano
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Cleveland, Ohio 44114

and

Baker Hostetler LLP
By Mr. Ali I. Haque
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Columbus, Ohio 43215

On behalf of the Ohio Energy Leadership
Council.

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APPEARANCES: (Continued)

Vorys, Sater, Seymour and Pease, LLP
By Mr. Michael J. Settineri
52 East Gay Street
Columbus, Ohio 43215

On behalf of the Constellation Energy
Generation, LLC, and Constellation
NewEnergy, Inc.

Hubay Dougherty, LLC
By Mr. Trent Dougherty
P.O. Box 12460
Columbus, Ohio 43212

On behalf of the Citizens Utility Board
of Ohio.

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

On behalf of the Staff of the PUCO.

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1 Friday Morning Session,
2 April 28, 2023.

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4 EXAMINER PRICE: Let's go on the record.
5 Good morning. The Public Utilities
6 Commission has set for prehearing conference at this
7 time and place Case No. 22-900-EL-SSO, in the Matter
8 of the Application of The Dayton Power and Light
9 Company d/b/a AES Ohio for Approval of Its Electric
10 Security Plan.

11 My name is Greg Price. With me is
12 Patricia Schabo. We are the Attorney Examiners
13 assigned to preside over today's hearing --
14 prehearing conference.

15 Let's begin by taking appearances
16 starting with the Company.

17 MR. SHARKEY: Jeff Sharkey from the
18 Faruki law firm on behalf of the Dayton Power and
19 Light Company doing business as AES Ohio.

20 EXAMINER PRICE: Office of Ohio
21 Consumers' Counsel.

22 MS. WILLIS: Thank you, your Honor.
23 Maureen Willis and John Finnigan on behalf of
24 Consumers' Counsel.

25 EXAMINER PRICE: RESA.

1 MR. PRITCHARD: Matt Pritchard on behalf
2 of the Retail Energy Supply Association with the law
3 firm McNees, Wallace & Nurick.

4 EXAMINER PRICE: Ohio Energy Leadership
5 Council.

6 MR. PROANO: Good morning, your Honor.
7 David Proano and Ali Haque from Baker Hostetler for
8 OELC.

9 EXAMINER PRICE: Ohio Manufacturers'
10 Association Energy Group.

11 MS. BOJKO: Thank you, your Honor. On
12 behalf of the Ohio Manufacturers' Association Energy
13 Group, Kimberly W. Bojko and Emma Easley with
14 Carpenter Lipps & Leland -- oh, excuse me, Carpenter
15 Lipps.

16 EXAMINER PRICE: Ohio Energy Group.

17 MS. COHN: Good morning, your Honor.
18 Jody Kyler Cohn and Michael Kurtz on behalf of the
19 Ohio Energy Group.

20 EXAMINER PRICE: IGS Energy.

21 MR. BETTERTON: Good morning, your Honor.
22 Evan Betterton and Stacie Cathcart on behalf of IGS
23 Energy.

24 EXAMINER PRICE: Kroger Company.

25 MS. WHITFIELD: Good morning, your Honor.

On behalf of Kroger Company, Angela Paul Whitfield
with the law firm Carpenter Lipps.

EXAMINER PRICE: University of Dayton.

MS. CHMIEL: Good morning. Stephanie
Chmiel of the law firm Thompson Hine for the
University of Dayton.

EXAMINER PRICE: Constellation.

MR. SETTINERI: Good morning, your
Honors. On behalf of Constellation Energy
Generation, LLC, and Constellation NewEnergy, Inc.,
Michael Settineri of the law firm Vorys, Sater,
Seymour and Pease.

EXAMINER PRICE: OP&A.

MR. DOVE: Good morning, your Honor. On
behalf of the Ohio Partners for Affordable Energy,
Robert Dove and Nicholas Bobb of the law firm Kegler,
Brown, Hill & Ritter, 65 East State Street, Suite
1800, Columbus, Ohio 43215.

EXAMINER PRICE: CUB Ohio.

MR. DOUGHERTY: Good morning, your
Honors. Trent Dougherty of the law firm of Hubay
Dougherty, LLC, on behalf of Citizens Utility Board
Ohio.

EXAMINER PRICE: Armada Power. Going
once? Going twice?

1 City of Dayton.

2 MR. DOVE: Good morning, your Honor.

3 Robert Dove with the law firm Kegler, Brown, Hill &
4 Ritter on behalf of the City of Dayton.

5 EXAMINER PRICE: Walmart.

6 MS. GRUNDMANN: Good morning, your Honor.
7 Carrie Grundmann with the law firm of Spilman, Thomas
8 & Battle on behalf of Walmart, Inc.

9 EXAMINER PRICE: Ohio Environmental
10 Council.

11 MS. NORDSTROM: Thank you, your Honor.
12 Karen Nordstrom on behalf the Ohio Environmental
13 Council.

14 EXAMINER PRICE: ChargePoint?
15 One Energy?

16 MR. BORCHERS: I'm sorry, your Honor. I
17 was having a technical issue. Dylan Borchers on
18 behalf of ChargePoint with the law firm Bricker
19 Graydon. Thank you.

20 EXAMINER PRICE: Thank you.

21 One Energy? Going once? Going twice?
22 Ohio Hospital Association.

23 MS. MAINS: Good morning, your Honor.
24 Rachael Mains for the Ohio Hospital Association from
25 the law firm Bricker Graydon. Thank you.

1 EXAMINER PRICE: And Staff.

2 MR. LYONS: Good morning, your Honor.
3 This is Shaun Lyons on behalf of Staff, along with
4 Werner Margard and Ambrosia Wilson.

5 EXAMINER PRICE: Thank you.

6 First order of business is we have a
7 subpoena for two Staff witnesses, I guess it is now,
8 filed on April 21, 2023. If OCC would like to just
9 briefly summarize the arguments they have already
10 made in the...

11 MS. WILLIS: Thanks, your Honor. Just
12 very briefly, the -- any party may file a motion for
13 a subpoena for persons to attend to give testimony
14 under the Commission Rules OAC 4901-1-25. There's
15 nothing in the Code that prohibits a subpoena to a
16 member of the PUCO Staff to attend and give testimony
17 at an evidentiary hearing. In fact, there are rules
18 where the Staff -- explicitly allowing parties to
19 subpoena persons that make or contribute to the Staff
20 Report of Investigation. And the PUCO has also ruled
21 that parties may subpoena PUCO Staff to testify at
22 hearings.

23 In this case we've also asked for
24 documents. We believe the documents are reasonably
25 calculated to lead to the discovery of admissible

1 evidence in this proceeding and are not unreasonable
2 or burdensome. Thank you.

3 EXAMINER PRICE: Thank you.

4 Mr. Lyons, care to respond briefly?

5 MR. LYONS: Yes, your Honor. Two basic
6 points here with regards to Mr. Lipthratt. He's had
7 no involvement in this case. He is not a witness in
8 this case, and we do have witnesses that are putting
9 on evidence that we believe would cover what OCC is
10 looking for here.

11 OCC references the -- the ability to
12 subpoena Staff who are involved in the Staff Report.
13 There is no Staff Report issued in this case so
14 while, you know, a subpoena may be issued of Staff,
15 we don't think it's proper in this instance.

16 And with regards to the second -- the
17 second subpoena, we believe that Staff is putting on
18 essential witnesses that covered the essential
19 subject matters here and there's -- they've yet to
20 identify who that person would be, and we believe
21 that Staff is covering all the bases here.

22 EXAMINER PRICE: Ms. Willis, if you could
23 address the status of Mr. Lipthratt. Mr. Lyons
24 represents he has no particular role in this case.

25 MS. WILLIS: Your Honor, Mr. Lipthratt

1 was the Staff witness who presented testimony in the
2 20-140 case. The 20-140 case dealt with the
3 Company's application to defer decoupling revenues.
4 As part of the settlement in that proceeding, the
5 parties have all agreed that part of those decoupling
6 revenues will be allowed to be collected from
7 consumers. So Mr. Lipthratt's testimony is sought
8 to -- for the purpose of cross-examining him on
9 regulatory practices and principles that he supported
10 and testified to in the -- with respect to the
11 deferred decoupling revenues in 20-140.

12 EXAMINER PRICE: Refresh me if I recall
13 or not, the 20-140 go to hearing?

14 MS. WILLIS: No, it did not, your Honor.
15 Testimony was submitted. Staff, OCC, and others
16 opposed the deferred decoupling -- the collection of
17 deferred -- or the deferred decoupling revenues on a
18 number of -- on a number of regulatory principle
19 grounds.

20 And so that's why we seek to bring
21 Mr. Lipthratt because certainly your Honor is aware
22 that as part of the three-prong test, one of the
23 prongs is whether or not the terms of the Stipulation
24 violate important policies and principles, and we
25 would believe that Mr. Lipthratt's testimony in that

1 proceeding and bringing him into this proceeding
2 would allow us to cross-examine the Staff as to
3 regulatory practices and principles related to
4 deferred decoupling revenues.

5 MR. SHARKEY: I'm sorry. Can I
6 interject? It did go to hearing.

7 MS. WILLIS: Oh, I'm sorry. I apologize.
8 There is no -- there is no decision. I apologize.
9 You are correct.

10 EXAMINER PRICE: So you had an
11 opportunity to cross-examine Mr. Lipthratt at that
12 time.

13 MS. WILLIS: Yes, we did, your Honor.

14 EXAMINER PRICE: And you will have the
15 opportunity to cross-examine Mr. Borer on any
16 inconsistent statements he makes vis-a-vis what
17 Mr. Lipthratt said.

18 MS. WILLIS: Your Honor, I would -- if
19 that is the case, yes. I mean, I've been in hearings
20 before where we've attempted to cross-examine a Staff
21 witness based on a prior Staff position involving a
22 different Staff member and my recollection is that
23 cross-examination was precluded because it was a
24 different Staff witness and we were not able to
25 pursue it.

1 So if the ruling is that we can fully
2 cross-examine Mr. -- Mr. Borer on the Staff position
3 and on the Staff testimony and he is familiar with
4 the Staff testimony that was presented by
5 Mr. Lipthratt, that does go a way toward -- toward
6 resolving our issue.

7 EXAMINER PRICE: Mr. Lyons, do you find
8 it objectionable if she questions Mr. Borer on
9 inconsistent -- allegedly inconsistent statements
10 that Mr. Lipthratt made? They are both presenting
11 the Staff's position in their respective cases.

12 MR. LYONS: So, your Honor, I think that
13 the prior statements wouldn't be -- under the Rules
14 of Evidence wouldn't be prior inconsistent
15 statements, but they would be admissible, and it's a
16 subject matter that is -- Mr. Borer is open for
17 testimony about, so I think that those prior
18 statements would be -- would be okay as representing
19 prior PUCO statements on the matter -- on the subject
20 matter.

21 EXAMINER PRICE: Okay. And with respect
22 to the John Doe aspect of your subpoena, why is
23 Mr. Borer inadequate?

24 MS. WILLIS: Well, your Honor,
25 obviously -- well, let me strike that.

1 It has just yet to be seen whether
2 Mr. Borer is -- will be able to answer all the
3 questions on the deferrals. And again, we are
4 limiting our request to specifically address one
5 provision in this -- in the Stipulation. This is not
6 a broad subpoena. It's to be -- go to one issue and
7 that's the RCR issue. Out of the entire settlement
8 there is one issue we are directing our questions to.
9 It's the RCR. So that's -- it's a rather complicated
10 issue. There's several different roles. There's a
11 very complicated history. There's parts and pieces
12 so it is something we want to be able to fully have
13 answered and so there is the fear that -- that Ms. --
14 that Ms. -- excuse me, that Mr. Borer is unable to
15 answer our questions, so we do not want to drop that
16 portion of the subpoena. We think we still have a
17 right to subpoena him and to have our questions
18 answered. But it is possible that Mr. Borer will
19 answer our questions and that that -- there will be
20 no need for that part of the subpoena.

21 EXAMINER PRICE: But under the Civil
22 Rules of Evidence, if this were a real court room,
23 which it's not, you don't get to just subpoena
24 witnesses for -- for deposition, expert witnesses,
25 the other side's expert witnesses that they don't

1 intend to present for testimony, do you?

2 MS. WILLIS: I'm sorry. Can you repeat
3 that?

4 EXAMINER PRICE: Sure. In a real
5 courtroom under the Civil Rules if a party has an
6 expert witness, they do not intend to -- they
7 retained for litigation but do not intend to present
8 testimony, you cannot do discovery vis-a-vis those
9 experts; is that correct?

10 MS. WILLIS: If it's a person that is not
11 intended -- or is not intended to testify as a
12 witness, that's correct.

13 EXAMINER PRICE: And these are Staff
14 experts. So you need to get your own expert and
15 testify as to these matters. These are Staff's
16 experts and Mr. Lipthrott they are not intending to
17 put on and the John Doe they are not intending to put
18 on because we know they've identified the pool of
19 Staff witnesses to four people so.

20 At this time we will go ahead and deny
21 the motion for subpoena for the Staff witnesses. The
22 Bench finds that the motion is unreasonable and
23 oppressive. No Staff Report has been filed, so the
24 rule allowing parties to subpoena witnesses who
25 participate in the Staff Report is inapplicable.

1 Staff filed testimony regarding the area identified
2 by the subpoena, and Staff filed testimony in support
3 of the Stipulation vis-a-vis in that I don't believe
4 at this point OCC has identified any reasonable
5 purpose for subpoenaing additional Staff witnesses
6 who under the Ohio Rules of Civil Procedure, which is
7 at least persuasive authority, would not be permitted
8 to be subpoenaed.

9 Vis-a-vis the documents Ms. Willis makes
10 clear by referencing the discovery standard that this
11 is just an attempt to avoid the rule prohibiting
12 discovery of Staff; and, therefore, the motion --
13 that aspect of the motion will be denied.

14 Go on to the motion to quash.

15 MS. WILLIS: Your Honor, if I might for
16 the record express an objection to the ruling. I
17 would object to all parts of the ruling and the
18 denial of the motion for subpoena duces tecum.

19 EXAMINER PRICE: Well, you certainly have
20 your objections noted. You certainly have the
21 opportunity to file an interlocutory appeal or to
22 raise the matter on brief as you find appropriate.

23 MS. WILLIS: Thank you.

24 EXAMINER PRICE: Mr. Sharkey, you filed a
25 motion to quash on April 24 vis-a-vis I believe

1 Mr. Donlon. Would you care to briefly summarize your
2 argument as to Mr. Donlon?

3 MR. SHARKEY: Sure, your Honor. The OCC
4 issued a subpoena asking Mr. Donlon to appear in
5 person and to bring an extensive volume of documents
6 with him. We have no objection to Mr. Donlon being
7 subpoenaed to appear in person; and we, in fact,
8 alerted you via e-mail previously intend to call him
9 as a witness in support of his prefiled testimony.

10 However, regarding the request that he
11 bring an onerous set of documents with him, we think
12 that aspect of the subpoena should be quashed for
13 various reasons. First of all, OCC admits in its
14 motion page 3 that the subpoena would "facilitate
15 parties' ability to conduct discovery." However, the
16 subpoena was issued after the discovery deadline in
17 this case had passed, and the Commission in the
18 Buckeye Energy case denied a similar subpoena issued
19 to a company employee for exactly that reason.

20 Second, to the best of our knowledge, OCC
21 already has all of the documents that it's asking to
22 be produced. It was -- it's asking for all documents
23 in a number of parties -- in a number of cases rather
24 including an ESP III case that OCC was a party to, a
25 number of others that OCC was a party to.

OCC in those cases served we call them me too discovery requests, essentially anything you give to anybody else give it to me. And to the best of our knowledge, OCC should already have everything.

In addition, your Honor, it's an unduly burdensome set of documents. And in this case there has been extensive discovery, and for reasons that perplex me, they asked Mr. Donlon to bring with him all the documents that the Company has produced in this case. Similarly, the ESP III case was extraordinarily voluminous in terms of documents, much more so than this one, so it's certainly unduly burdensome.

In addition, your Honor, OCC never explains how the documents in these other cases are conceivably relevant to this case. You just heard counsel for OCC talk about their -- the narrative of their challenge relating to the RCR, and they don't explain how any of these documents in these other cases have anything to do with the RCR.

And our fifth and final objection, your Honor, is that a number of these requests, in particular No. 2, 6, and 7, seek things like all communications and all writings. And those could -- to the extent they seek settlement communications,

1 that's improper.

2 And, finally, your Honor, to the extent
3 you are going to grant this motion -- to the extent
4 you don't quash the subpoena in any respect, that we
5 ask that OCC be required to pay all costs including
6 attorney fees, document processing fees, printing
7 fees.

8 EXAMINER PRICE: Ms. Willis, a brief
9 response?

10 MS. WILLIS: That would be Mr. Finnegan.

11 EXAMINER PRICE: Mr. Finnigan.

12 MR. FINNIGAN: Your Honor, I will address
13 that one. Thank you. Your Honor, we believe that
14 all the documents we requested in the subpoena are
15 within the issues that we intend to litigate at the
16 hearing. The rules allow us to file a motion for a
17 subpoena duces tecum to require a party to bring
18 documents to a hearing. That's what we've done here.

19 So this motion -- this motion that we
20 filed is within the rules. The reason that these
21 documents are important for us to obtain is that the
22 issues that we've raised here, it's basically seven
23 categories of documents but in -- we -- we need to
24 know whether these documents contain information that
25 relate to the issues covered by this Regulatory

1 Compliance Rider.

2 So walking through these one by one, the
3 discovery responses relating to the Regulatory
4 Compliance Rider are important in that we are just
5 asking here in this request that the witness bring
6 all discovery requests from other -- involving other
7 parties too. We've asked for that. We don't have
8 confirmation that we've received all of them, so I
9 wanted to close the door that to the extent that
10 there are discovery responses and -- and requests for
11 documents that we don't have, we would like to have
12 those. We need those.

13 EXAMINER PRICE: Mr. Sharkey, can you
14 confirm that OCC has received all of these discovery
15 responses?

16 MR. SHARKEY: I can.

17 EXAMINER PRICE: Mr. Sharkey has
18 represented that you have.

19 MR. FINNIGAN: Okay. Now we know that so
20 that's good to know and that helps us and that covers
21 that request.

22 The second one is communications that the
23 Company had either with other signatory parties or
24 with the Commission Staff regarding this Regulatory
25 Compliance Rider and the three deferrals that are at

1 issue here. Again, this is information that's
2 important to us in litigating these issues at the
3 hearing because we need to know what information was
4 exchanged between these parties leading up to the
5 hearing for us to be able to --

6 EXAMINER PRICE: Wouldn't that all be
7 settlement discussions?

8 MR. FINNIGAN: Some might be but we don't
9 know. We can't respond to that. But if they are,
10 that's something that the Company could respond to.
11 We didn't specifically ask for settlement
12 communications in our requests. We asked for all
13 communications. And so if the party -- or the
14 Company could claim a settlement privilege if they
15 wanted, we contend that there -- there is not a
16 settlement privilege that would cover this request.

17 EXAMINER PRICE: Did you ask for all
18 communications between the parties before the
19 discovery cutoff?

20 MR. FINNIGAN: Before the discovery?

21 EXAMINER PRICE: Cutoff.

22 MR. FINNIGAN: I would not be able to
23 confirm that, your Honor, without going back and
24 looking at our discovery requests to find that out.
25 I don't -- I don't believe we had this exact request,

1 but we may have asked it in substance in other
2 requests that we made throughout the course of the
3 case.

4 EXAMINER PRICE: Mr. Sharkey, in one of
5 the pleadings represents that this could be somewhere
6 north of 6,000 pages of documents. If Mr. Donlon
7 brought them at 10 o'clock on Tuesday at the
8 beginning of the hearing, what are you going to do
9 with 6,000 documents? I mean, how could you possibly
10 use them in the hearing if you were getting them at
11 10 o'clock and the hearing is going to begin at
12 10:05?

13 MR. FINNIGAN: Your Honor, that's for us
14 to figure out as we, you know, deploy our resources
15 to litigate the case, but we are acting within our
16 rights to ask for the documents. And if it's
17 relevant information, then we are entitled to get the
18 information and then it would be up to us to assign
19 different parties to review the information as we're
20 also litigating the case and we have got multiple
21 people assigned to the case. We've got analytical
22 staff that can help to us do that. The hearing is
23 likely to last several days, so we feel that that's
24 something that we could --

25 EXAMINER PRICE: You're not optimistic at

1 all. I was hoping we would get this up and down in a
2 couple days.

3 MR. FINNIGAN: But -- but we don't think
4 that would be grounds for denying our request, that
5 they are voluminous.

6 The next request, your Honor, has to do
7 with information that was exchanged in discovery from
8 the decoupling case, this 20-140-EL-AAM. And this
9 goes to the issue of whether the Stipulation in this
10 case is consistent with important regulatory
11 practices and principles because the Stipulation here
12 includes a decoupling deferral that was also the
13 subject of that case.

14 EXAMINER PRICE: And you were party to
15 that case.

16 MR. FINNIGAN: We were a party but --

17 EXAMINER PRICE: And it's your discovery
18 that you're asking that you receive from the Company,
19 discovery responses in that case you are asking them
20 to replicate in this case.

21 MR. FINNIGAN: That's part of the request
22 but the -- but the request asks for all discovery
23 requests and responses.

24 EXAMINER PRICE: How many parties were
25 there to the case besides OCC and AES? Ms. Bojko was

1 on the case.

2 MS. BOJKO: Yes.

3 EXAMINER PRICE: Kroger, OEG were on the
4 case.

5 MR. FINNIGAN: I would guess about a half
6 a dozen.

7 EXAMINER PRICE: Did you ask the
8 Company -- is there any reason for me -- I mean,
9 normal Commission practice is parties serve all
10 parties to the case with all discovery responses. Is
11 there any reason to believe that the Company did not
12 serve you with all the discovery responses in that
13 case?

14 MR. FINNIGAN: Well, your Honor, I can't
15 speak for what the Company did. However, if they did
16 do that, then they could simply respond to this and
17 say that they did and that would allay that concern
18 on our part.

19 EXAMINER PRICE: Mr. Sharkey, did you
20 serve all the discovery responses to all the parties
21 in that case?

22 MR. SHARKEY: Your Honor, there were no
23 discovery requests served in this case so there is no
24 responsive documents.

25 EXAMINER PRICE: There we go.

1 MR. FINNIGAN: And, your Honor, similarly
2 on item No. 4, it is asking for all discovery
3 responses and requests in the ESP III case. Again,
4 we have got the ones that OCC submitted to the
5 Company and the Company's responses to those, but we
6 don't know whether we have all the other ones that
7 they provided to other parties. We believe that we
8 requested that in that case, but again, this is
9 something that the Company could respond to our
10 motion for subpoena by saying that they either did
11 provide all of them in that case to us or they
12 didn't. And if they didn't, then we would need that
13 information to prepare for the hearing in this case.

14 EXAMINER PRICE: Thank you. At this time
15 we are going to grant the motion to quash. The
16 subpoena is unreasonable and oppressive. Frankly its
17 unreasonableness is illustrated by the fact they ask
18 for discovery responses even though OCC had every
19 reason to know there were no discovery responses in
20 20-140-EL-AAM because they were a party to the case.

21 No. 1 -- that's No. 1. No. 2, Mr. Donlon
22 has filed testimony in this case and has been
23 deposed. So the need to require him to -- to attend
24 the hearing is minimal. We will revisit the issue if
25 Mr. Donlon for some reason is not presented as a

1 witness next week. Then you can renew your motion to
 2 have him called, but vis-a-vis the documents it seems
 3 the Bench -- that these documents all fall under
 4 three categories, documents that are already in the
 5 possession of OCC because they received these
 6 discovery responses in all these cases; documents
 7 which were not requested or produced in discovery but
 8 the discovery cutoff for this case is past and courts
 9 do not support the use of trial subpoenas in lieu of
 10 discovery in any event under the Ohio Civil Rules,
 11 which are persuasive authority, not necessarily
 12 binding in this case; and, finally, any documents
 13 related to discovery would not be admissible or even
 14 reasonably calculated to lead to admissible evidence
 15 as they would be related to conversations of
 16 settlement negotiations.

17 And again, I just want to qualify the
 18 ruling that we would revisit the issue of subpoenaing
 19 Mr. Donlon if he is not presented as a witness for
 20 whatever reason.

21 Also just to be clear for the future, you
 22 know, we are never saying never. If there were a
 23 targeted narrow request for documents, that would
 24 certainly be something different than asking for all
 25 the discovery that was produced in three separate

1 cases including one where you had frankly every
2 reason to understand there was no discovery.

3 MR. FINNIGAN: Your Honor, there are two
4 other categories we've included in our motion for
5 subpoena that we haven't discussed yet and I would
6 ask for the opportunity to address that.

7 EXAMINER PRICE: Sure. I didn't mean to
8 cut you off.

9 MR. FINNIGAN: Thank you. So the last
10 two categories in our motion, No. 5 and 6, these
11 categories of requests ask for documents relating to
12 prudence reviews. One is for the OVEC deferral,
13 that's item No. 5. And the other is for the deferral
14 of prior Regulatory Compliance Rider costs. That's
15 item No. 6.

16 And our understanding is that the first
17 time the issue came up that there had been a prudence
18 review had -- was within the testimony of Mr. Borer
19 that was filed on Wednesday and that's the first time
20 we knew that a claim had been made that there was a
21 prudence review of the OVEC deferrals. And he speaks
22 to there being a prudence review of the RCR costs
23 too.

24 So that being the first time the issue
25 was raised, we had no opportunity to do discovery on

1 it up until then and that's why it's important that
2 we ask the Company what documents they have that were
3 produced in the course of this prudence review so
4 that we can review that and really see whether the
5 prudence review in this case conforms with the
6 Commission's accepted practices in other cases
7 because there have been a lot of other cases in front
8 of the Commission where the Commission has done
9 prudence reviews of OVEC costs.

10 And, your Honor, in this case all that we
11 know from Mr. Borer's testimony is that he said that
12 the Staff reviewed over a thousand pages of
13 accounting interest -- accounting entries and
14 supporting invoices. And that's all we know. And so
15 we are seeking more information about that.

16 However, in other cases where the
17 Commission has done prudence reviews, they go beyond
18 that and also do an operational and performance
19 review of all aspects of the operation of the plants
20 where they look at things like how --

21 EXAMINER PRICE: Mr. Finnigan, all of
22 that is covered in a separate case that OCC is a
23 party to that's been set for -- I believe we've had
24 comment periods and I believe we set for hearing. To
25 the extent that any costs are disallowed in that

1 prudence review, there is no doubt they would flow
2 back through Rider RIR --

3 MR. FINNIGAN: Well, your Honor, actually
4 this is a separate time period. So the deferral in
5 this case for OVEC costs covers a time period of 2014
6 through 2017 and also a few days at the end of 2019.
7 And the rider you are referring to is the
8 Reconciliation Rider that was approved in the ESP
9 case and there is a pending case now, I believe it's
10 21-65, where those costs from that time period are
11 under review. But that's a separate prudence review.
12 It's a separate time period. It's separate costs.

13 And the Commission's practice has been
14 there are -- there are the three companies, AES, AEP,
15 and Duke, and each time one files an application to
16 collect these OVEC costs, the Commission has ordered
17 a new prudence review for that period of time for
18 that company's claim of the costs.

19 That wasn't done here and it's not
20 covered by any other case and that's why it's really
21 essential that we get the documents that -- that
22 were -- were produced or reviewed as part of the
23 prudence review because without that we have nothing.

24 Now, in these other cases, all of those
25 other cases resolved in a written audit report that's

1 filed in the Commission docket. And so we can read
2 that audit report, and we get all the written
3 findings of the auditor as to the prudence of the
4 operation of the plants.

5 Here there was no written report and so
6 now if we don't get the documents that were reviewed
7 or any written report, we have no information to
8 question Mr. Borer on what did the -- what did the
9 prudence review consist of, what aspects of the costs
10 and the plant's operations and performance did the
11 Staff look at. We have nothing so all we could go on
12 would be merely asking questions and relying on his
13 answers without the type of information that's
14 produced in these other cases. And that's the
15 accepted regulatory practice that the Commission
16 follows in those cases that we feel is important to
17 follow here too to determine whether this Stipulation
18 conforms with the three-part test.

19 EXAMINER PRICE: Ms. Bojko.

20 MS. BOJKO: Your Honor, I am a bit
21 confused about the subpoena and why I have been
22 trying to search for it and look for it. This is a
23 subpoena attached to Mr. Donlon. There has been no
24 evidence that Mr. Donlon is responsible for or -- or
25 that these document requests are tied to Mr. Donlon.

1 To me it sounds like you are now tying this to
 2 Mr. Borer and it seems like if you are subpoenaing
 3 Mr. Donlon and documents have to be related to
 4 Mr. Donlon and I don't believe any of these have been
 5 shown to be related to Mr. Donlon which is my concern
 6 of why it's just a general discovery request that
 7 should have been served before the discovery cutoff.
 8 I mean, even for communications Mr. Donlon would have
 9 to be on those communications, or he's not going to
 10 be able to authenticate any of these documents.

11 MR. SHARKEY: Can I?

12 EXAMINER PRICE: You may.

13 MR. SHARKEY: The argument by counsel for
 14 OCC that they don't have anything is actually untrue.
 15 Staff served data requests upon the Company that were
 16 directed to OVEC. We provided to Staff hundreds of
 17 thousands --

18 EXAMINER PRICE: In this case?

19 MR. SHARKEY: In this case for the time
 20 period at issue of 2014 to 2017 period. So we
 21 produced -- we did provide staff hundreds of
 22 thousands of pages. OCC served upon the Company in
 23 its first or second set of document requests a me too
 24 request, and we provided to OCC each and every
 25 document that we provided to Staff.

1 So when counsel for OCC has told your
2 Honors they have nothing, that's not true. They have
3 every single piece of paper that was provided to
4 Staff. Further, your Honor, OCC was on notice that
5 the Company sought recovery of those amounts in this
6 case. They should have known from the date that we
7 filed the application that the prudence of any of
8 those expenditures was at issue. They had every
9 opportunity to conduct discovery. They had every
10 opportunity to review the documents the Company
11 produced. If they have failed to do that and conduct
12 their own analysis into whether the expenditures were
13 prudent, that's not the Company's problem. And it's
14 certainly not a reason to be subpoenaing documents
15 they already have and asking Mr. Donlon to bring them
16 to a hearing. So I think that's my response.

17 EXAMINER PRICE: Let's move on to your
18 last area, Mr. --

19 MR. PRITCHARD: Can I just? Just one.
20 Not to pile on but the notion that DP&L -- or that
21 the prudence review occurred in this case only being
22 discussed in Mr. Borer's testimony, that's what the
23 Company told me in discovery responses to me so --
24 which occurred before the settlement was filed so,
25 you know, whether Staff takes that view or not, but

1 that's what the Company was saying while discovery
2 was open in the case.

3 EXAMINER PRICE: Care to address your
4 last bucket of documents?

5 MR. FINNIGAN: Your Honor, I'm sorry.
6 What was your?

7 EXAMINER PRICE: I'll come -- we'll come
8 back to that.

9 MR. FINNIGAN: Okay. May I just address
10 the --

11 EXAMINER PRICE: No. I think we've heard
12 enough.

13 MR. FINNIGAN: The last one is the
14 Regulatory Compliance Rider. And again, it has to do
15 with prudence review of the costs that were included
16 in that deferral and these are costs associated with
17 prior ESPs and programs that the Company offered in
18 connection with the prior ESPs.

19 So our motion has to do with obtaining
20 the information that was reviewed in the prudence
21 review. And this -- you know, one of the things we
22 don't know is we don't know whether the information
23 that the Staff reviewed as part of its prudence
24 review only consists of information that the Company
25 produced in discovery to the Staff in this case. We

1 don't know that. We wouldn't know this unless they
2 would respond to this.

3 And --

4 EXAMINER PRICE: You will have an
5 opportunity to ask him when he is on the stand, and
6 in any event you can't do discovery against the
7 Staff. That's a long -- again goes back to
8 Ms. Bojko's point, you are trying to use Mr. Donlon
9 to do discovery that you wish you had the ability to
10 do against the Staff, and you can't do discovery of
11 the Staff. But Mr. Borer will be there, and you will
12 have a chance to ask him any questions you have as to
13 what he reviewed and what other documents he looked
14 at.

15 MR. FINNIGAN: Well, this is a subpoena
16 to Mr. Donlon and we are asking for the documents
17 that the Company produced to Staff in connection with
18 these different prudence reviews.

19 EXAMINER PRICE: All of which you could
20 have done in discovery and either the Company has
21 provided you which consistently in this every time we
22 raise the question Mr. Sharkey says, yes, we gave you
23 all the -- all the documents that were produced. So
24 prior to discovery cutoff, you had every opportunity
25 to look -- to get these documents. I assume that

1 anything in the data requests from the Staff that is
2 in this bucket are similar to -- have already been
3 produced to you similar to what Mr. Sharkey said.

4 I don't think, Mr. Finnigan, that any of
5 the latter areas we discussed cause me to reconsider
6 the ruling. Again, these documents all fall into
7 three buckets. They are documents which you already
8 possess; they are documents which you don't possess
9 but could have asked for in discovery, and discovery
10 cutoff has come and gone; or the documents relating
11 to the settlement negotiations which are not
12 admissible in any event. Therefore, the motion to
13 quash will be granted.

14 MR. FINNIGAN: Your Honor, I wanted to
15 just note for the record one other request, item
16 No. 7. We were asking for documents relating to the
17 corporate separation case and which we think are
18 relevant to the OVEC deferral, but I believe that
19 your ruling would cover our request on item No. 7.

20 EXAMINER PRICE: Yes. Thank you.

21 MS. WILLIS: Note our objection to your
22 Honor's rulings on this -- on granting the motion.

23 EXAMINER PRICE: Your objection is noted.
24 Thank you again. You can file an interlocutory
25 appeal or raise this on your brief as you choose to

1 do.

2 Last but not least, we have witness
3 order. Mr. Sharkey has represented we will be going
4 with Mr. Malinak first and then Mr. Donlon and then
5 Ms. Schroder.

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

7 EXAMINER PRICE: Mr. Settineri, you have
8 one witness. Do you have any availability issues?

9 MR. SETTINERI: Yeah, we do, your Honor,
10 with our -- Mr. Indukuri will be testifying. We ask
11 if we may have a date certain and time certain for
12 him for May 4, 9:00 a.m., assuming we start at 9:00
13 a.m. He has vacation plans subsequent, and we have
14 client rep issues prior to. We have socialized that
15 with the parties of the case and have some objections
16 and some agreements. May 4, 9:00 a.m., if we may.
17 And I don't know any cross estimates for him, but to
18 the extent parties can let us know if they have cross
19 for him, that would be helpful to know as well.
20 That's Mr. Indukuri, I-N-D-U-K-U-R-I.

21 EXAMINER PRICE: What day of the week is
22 May 4?

23 MR. SETTINERI: I'm sorry?

24 EXAMINER PRICE: What day of the week is
25 May 4?

1 MR. SETTINERI: Thursday.

2 EXAMINER PRICE: Thursday. I'm totally
3 thrown off by the fact that we're starting on
4 Tuesday. Is there a particular order or do you have
5 a date certain for either or any of -- any or all of
6 them?

7 MS. WILLIS: Your Honor, we have in terms
8 of the date certain for the first week, and we
9 have -- I would say that we have some more motions
10 that we would like to discuss after this including a
11 motion related to the timing of the hearing but at
12 this point --

13 EXAMINER PRICE: Is there a motion
14 pending?

15 MS. WILLIS: No. We would like to make
16 an oral motion.

17 EXAMINER PRICE: Okay. Thank you.

18 MS. WILLIS: So in terms of our witness
19 order, we have Mr. Wilson would be preferably first,
20 Mr. --

21 EXAMINER PRICE: Coming from out of town,
22 is there a date certain for Mr. Wilson?

23 MS. WILLIS: He is available actually --
24 he is available flexible -- his timing is flexible --

25 EXAMINER PRICE: Thank you.

1 MS. WILLIS: -- for this week -- or for
2 the week of May 2. And if we run into May 9, the
3 week of May 9, his flexibility goes away. So
4 Mr. Wilson, Mr. Morgan. We have -- we have
5 communicated to Mr. Sharkey and others that
6 Mr. Morgan is unavailable until May 8, I believe,
7 which would be the Friday. He is available --

8 EXAMINER SCHABO: Monday.

9 MS. WILLIS: I'm sorry. On Friday, on
10 the 5th, is the day that is the only day of the week
11 during the week of the 2nd that Mr. Morgan is
12 available. We have had discussions with Mr. Sharkey
13 and put out an e-mail to others that he would be
14 available for remote appearance, but other than that,
15 if it cannot be done remotely on May 8, he would
16 be --

17 EXAMINER SCHABO: May 5.

18 MS. WILLIS: I'm sorry, May 5, he would
19 have to slide to the next week. So that is the only
20 unavailability or availability that he has that we
21 can --

22 EXAMINER PRICE: We have the hearing room
23 reserved until Friday. This is very belated
24 information to the Bench who have to get court
25 reporters and hearing rooms.

1 MS. WILLIS: Understood. We were trying
2 to work it out with the Company, so as soon as we
3 were made -- we knew he had a prior commitment and
4 then the hearing date changed, when the hearing date
5 changed, he could not get rid of his prior commitment
6 so.

7 EXAMINER PRICE: I understand that. If
8 he -- we changed the hearing dates weeks ago.

9 MS. WILLIS: Understood. We were trying
10 to work it out between us and a lot of things got in
11 between so that's the way it went.

12 In terms of our final witness,
13 Mr. Fortney, we would like Mr. Fortney to be the last
14 witness. However, he is flexible and is available at
15 any time.

16 EXAMINER PRICE: Is there -- on the May 5
17 is there a time -- not a big fan of doing remote
18 hearings but it's nice we have the capability to do
19 it in case we need to. So is there a time on May 5
20 when he is available?

21 MS. WILLIS: Your Honor, I understand
22 that on May 5, I have got it right this time, on
23 May 5 he is available for the entire day.

24 EXAMINER PRICE: Okay.

25 MS. WILLIS: That's my understanding. I

1 will triple check but that is my understanding.

2 EXAMINER PRICE: I mean, I am not trying
3 to make your life difficult, but we do not have the
4 hearing room for Monday, May 8.

5 MS. WILLIS: Understood.

6 EXAMINER PRICE: We can all squeeze into
7 C but that would be pretty tight looking around here
8 and the list of the parties. Now, Intervenors tend
9 to fall off as the week goes by, but we would be
10 pretty tight.

11 MS. WILLIS: I would imagine the
12 cross-examination of our witnesses will be primarily
13 done by the Company and/or the Staff and that other
14 Intervenors may have very little interest in -- in --
15 that's my guess.

16 EXAMINER PRICE: They might want to
17 attend.

18 MS. WILLIS: Or you can attend
19 remotely -- no, you can't. If you could attend
20 remotely, that would be great.

21 EXAMINER PRICE: Thank you.

22 EXAMINER SCHABO: Ms. Grundmann, did you
23 want to be heard?

24 MS. GRUNDMANN: I just want to note to
25 the extent my understanding was that the hearing was

1 scheduled through Friday, I actually have a hearing
2 that begins the following Tuesday, I think that must
3 be the 9th in front of the Kentucky Commission and
4 will be traveling that day to be at the hearing so,
5 but I also have a motion to dismiss in federal court
6 on Monday, so moving it to Monday is particularly --
7 moving it to the subsequent week is particularly
8 problematic. Obviously the preference would be to
9 try to facilitate, if at all possible, the remote
10 appearance of the witness hoping that we conclude by
11 Friday but just wanted to bring that to your
12 attention.

13 EXAMINER SCHABO: Thank you.

14 EXAMINER PRICE: Mr. Lyons, we have three
15 or four staff witnesses. Are any of them date
16 certain?

17 EXAMINER SCHABO: You are on mute.

18 EXAMINER PRICE: You are on mute, Shaun.

19 MR. LYONS: That's correct, your Honor,
20 we have four witnesses. Ms. Messenger cannot testify
21 on Friday, the 5th, but otherwise they are all
22 available. We do have a preferred order which would
23 be, let's see here, Nicodemus, Benedict, Borer,
24 Messenger.

25 EXAMINER PRICE: Okay. You'll do your

1 best to have people available so in case we end the
2 day early that we can go and proceed with filling in
3 with a Staff witness. So all the parties should be
4 on notice we may, to the extent that we can, filter
5 in some of the Staff witnesses out of order so we can
6 get this done by Friday.

7 MS. WILLIS: Your Honor, if I might
8 request that the Staff witnesses go directly after
9 the Company witnesses and that OCC witnesses conclude
10 with -- that we conclude the hearing with OCC
11 witnesses.

12 EXAMINER PRICE: No. That request is
13 denied. Staff traditionally goes last and what I
14 just represented to everybody is we will filter in
15 Staff witnesses as necessary so that we have full
16 days and we don't spend Tuesday afternoon or Thursday
17 afternoon with nothing to do, but we are certainly
18 not going -- there is no basis for OCC's request that
19 they get to go last.

20 MS. WILLIS: Your Honor, please note my
21 objection on the record for that.

22 MS. BOJKO: Your Honor, is the Bench
23 entertaining a remote witness on the 5th? Is there
24 going to be a hybrid or something?

25 EXAMINER PRICE: I don't think we have

1 much -- I don't like it, but I don't think we have
 2 much choice. Walmart is not available on the -- on
 3 the Monday. We don't have a hearing room yet for
 4 Monday. If we opt for C, it's going to be tight.
 5 So, I mean, a series of bad options. The remote one
 6 seems to be the least bad option. What we could do
 7 is commence with Mr. Morgan at 9:00 and everybody
 8 could go to their -- and we have no ability to do
 9 hybrid in the hearing room, okay? So Mr. Morgan can
 10 commence at 9 o'clock and everybody after his
 11 testimony could come from their offices and start up
 12 with whoever is left after Mr. Morgan -- maybe -- you
 13 know, if we're lucky, he is the last one Friday and
 14 that's all we have to do.

15 MR. PRITCHARD: That would work for me.
 16 However, how would the out-of-town attorneys, if we
 17 have another witness afterwards, how would they -- I
 18 mean, they don't have offices and computers here.

19 EXAMINER PRICE: We would make this room
 20 available for everybody -- anybody who wanted to sit
 21 in the room can come down here and do it. It's just
 22 we don't have the capability in the hearing room.
 23 That's all.

24 EXAMINER SCHABO: Can we even get Webex
 25 in this room?

1 EXAMINER PRICE: I don't know. That's a
2 good question. Another thing -- we are informed by
3 our technical staff that we do have Webex capability
4 in this room, so yes. Ms. Schabo and I need to
5 discuss this a little bit more and see if what I am
6 saying works for her and I am not just running
7 roughshod over her interest, but it sounds like that
8 might be the least battle in terms -- given the
9 alternatives that we have.

10 MS. WILLIS: Your Honor, at the risk of
11 creating more animosity or difficulties, I have a
12 personal conflict on May 2 and would -- and as the
13 lead counsel would want to be available for the
14 hearing. And so on May 2, I would ask that we have a
15 hard stop at 3 o'clock. I have prior existing
16 personal commitments that existed prior to the
17 rescheduling, so I would ask for a hard stop at 3:00.
18 And on the following day, on May 3, a no start until
19 10:30 to accommodate my personal preexisting
20 commitments. And I have discussed these with the
21 Company. The Company had no objection.

22 EXAMINER PRICE: Again --

23 MS. BOJKO: What happens if we don't get
24 done by Friday?

25 EXAMINER PRICE: Oh, we'll get done by

1 Friday.

2 MS. BOJKO: Not if we have to stop at
3 3:00.

4 EXAMINER PRICE: We might not be stopping
5 at 6:00 on Wednesday, Thursday, and Friday. We will,
6 of course, accommodate any counsel's personal
7 scheduling difficulties, so we are happy to do that.

8 MS. WILLIS: Thank you, your Honor.

9 EXAMINER PRICE: We would appreciate next
10 time -- again, it's the -- we have an e-mail address.
11 You can just shoot us an e-mail saying I know the
12 hearing is starting on this date. Can we work around
13 this? We will work around that.

14 But I will say parties should be prepared
15 then 6:00, 7:00 the rest of the week because we have
16 got to get this done, although I really -- I'm
17 optimistic. It's four full hearing days. We should
18 be able to get this up and down. There is not that
19 many witnesses.

20 MR. SETTINERI: Your Honor, would it be
21 helpful to have like a table of cross estimates put
22 together? I know he have done that in other cases
23 and that's usually pretty helpful for planning in the
24 week.

25 EXAMINER PRICE: I was going to ask for

1 it on the first day. I wanted to give everybody the
2 weekend to think about it.

3 MR. SETTINERI: Thank you.

4 MR. FINNIGAN: Your Honor, we have a
5 discovery issue that just came up that we would like
6 to discuss, if we may.

7 EXAMINER PRICE: Sure.

8 MR. FINNIGAN: We've filed a set of
9 discovery in this case, it's our 20th set, and we
10 filed it on the 17th, so the last day that was
11 available to file discovery requests within the
12 procedural schedule. We had previously asked for --
13 after the Stipulation was filed that there be an
14 expedited time period for responding to discovery and
15 that was granted for 18th and 19th sets of discovery,
16 and the time period was shortened to 7 days. But for
17 this one it was a 10-day response time. So the
18 response time for this one was Thursday, yesterday.
19 And we received a partial response yesterday at the
20 close of business, and then I guess we received the
21 remainder of the response today. Jeff, is that --
22 can you confirm that?

23 MR. SHARKEY: The expectation is you are
24 going to receive the remaining documents. There is
25 another 39 documents we haven't served on you that

1 you will get today.

2 MR. FINNIGAN: Okay.

3 MR. SHARKEY: Served about 50 some
4 yesterday.

5 MR. FINNIGAN: So we may receive the
6 remainder of it today. There was also a claim of
7 privilege that was made for these documents. We did
8 not receive a privilege log, so we don't know how
9 many documents might be covered by the
10 attorney-client privilege request that was made. So
11 we ask that -- in conformity with the Commission's
12 usual practice in these kind of cases where privilege
13 is claimed that a discovery log be prepared and that
14 also that you do an in camera review to determine the
15 validity of any privilege claim and that we have that
16 done such that we have some time to review those
17 documents in advance of the hearing on Tuesday.

18 In addition to that, your Honor, one of
19 the requests, and this is item -- this is our request
20 for production of documents. It's item No. 4 -- give
21 me a moment here, your Honor.

22 EXAMINER PRICE: While you are looking,
23 Mr. Sharkey, can you provide the Bench by the end of
24 today all the documents that you are claiming
25 privilege?

1 MR. SHARKEY: Your Honor, that is easier
2 said than done. It exceeds a thousand.

3 EXAMINER PRICE: No -- no is a fair
4 answer.

5 MR. SHARKEY: We could grant the Bench
6 access to the same system that we use to review
7 documents, Relativity. It would be like a ton of
8 documents. Printing them would take it -- I don't
9 know when we would be able to get them all printed.
10 The OC -- I won't interject any further, but I would
11 like to respond further to Mr. Finnigan when he is
12 done.

13 EXAMINER SCHABO: I'm going to pause you
14 both real quick.

15 Karen, my estimate was bad. Do you have
16 a prior engagement you need to get to?

17 COURT REPORTER: I just have to be
18 downtown by 12:30, so we're fine.

19 EXAMINER PRICE: Let's go off the record
20 for a second.

21 (Discussion off the record.)

22 EXAMINER PRICE: Back on the record.

23 Mr. Finnigan.

24 MR. FINNIGAN: Your Honor, we were
25 discussing the issue of our request for a privilege

1 log with respect to the documents for which the
2 Company claims attorney-client privilege in their
3 response to our 20th set of discovery. So our
4 request is that the Attorney Examiners conduct an in
5 camera review and that the Company produce a
6 privilege log so that we have the opportunity to
7 review exactly what is the nature of the documents
8 for which they are claiming privilege and understand
9 what the basis of their privilege claim might be.

10 So we would ask for the privilege log and
11 the in camera review. We would ask that the in
12 camera review be done such that we have at least two
13 days in preparation before the hearing so that we
14 have the opportunity to review these documents.
15 Mr. Sharkey just now said that there are a thousand
16 for which privilege are claimed, so if the Attorney
17 Examiners determine that some of them are not
18 entitled to a attorney-client privilege claim, we
19 would like some time before the hearing begins to
20 review those documents and incorporate those into our
21 preparation.

22 This is something that the Company could
23 have responded on a more accelerated basis and it did
24 respond within a 7-day time frame on our other
25 discovery requests as -- as you ordered and that

1 could have been done here. But the first information
2 we received that there was going to be
3 attorney-client privilege for these documents was
4 late Thursday at the end of the day, and we had no
5 opportunity to bring this to your attention up until
6 now. And so that's our request.

7 EXAMINER PRICE: Mr. Sharkey, I do want
8 to clarify one point though. Traditional practice
9 people don't -- aren't required -- the Commission,
10 not in the real world -- required to produce
11 privilege logs until there is a motion to compel.
12 There has been no motion to compel and it would be
13 out of the normal for Mr. Sharkey to produce a
14 privilege log prior to that in our administrative
15 practice.

16 Mr. Sharkey.

17 MR. SHARKEY: Sure. Your Honor, OCC
18 waited until the last day of discovery to serve an
19 extraordinarily onerous set of discovery requests on
20 us. They could have served these very early in the
21 case. For example, RPD-1 asked for copies of all
22 e-mails sent or received by Patrick Donlon during the
23 period of June 1, 2022, through December 31, 2022,
24 which include the term OVEC. They served a similar
25 onerous request on -- as to Ms. Schroder and as to

1 the Company's CFO.

2 That's something they could have served
3 extraordinarily early in the case. They waited until
4 the very last day. And we have engaged in, you know,
5 extraordinary efforts, worked long hours, had the IT
6 department identify those documents. We served our
7 written responses yesterday which was the deadline,
8 and we served a good portion of the documents
9 yesterday. To be clear, we are also serving, we
10 believe, additional documents today.

11 We -- the suggestion we've missed a
12 deadline is actually incorrect. I am looking at the
13 Commission's rules on production of documents and
14 things and our deadline, it was shortened to 10 days,
15 but the party upon whom the request is served shall
16 serve a written request within 20 days. Our
17 documents weren't due within that period of time. In
18 fact, when I began the practice of law, we didn't
19 serve documents via e-mail. What would happen is
20 both sides would say, hey, the documents are ready
21 for you to come and look at them and then you drive
22 over to their offices and inspect them.

23 The rules still permit that, so it's
24 perfectly appropriate that the documents, some of
25 them are coming in today or later. That's consistent

1 with the rules. The fact that OCC has waited until
2 the very possible last moment to serve an
3 extraordinarily onerous request and then expects your
4 Honors to engage in a practice of reviewing thousands
5 of documents -- I'm sorry, yeah, thousands of
6 documents, I don't know how many pages that's going
7 to be, on short order is inappropriate.

8 And just to give you a little bit of
9 scope, I mentioned it earlier, when we did a search
10 of that time period, we identified 2,500 --
11 approximately 2,500 documents that were responsive,
12 your Honor. That period of time covers June 1, 2022,
13 through December 31, 2022. Covers the period of time
14 during which the Company was preparing the case for
15 filing and during which settlement negotiations were
16 ongoing.

17 So the term OVEC was in a lot, a lot of
18 documents including a lot of settlement
19 communications, so we've also excluded a lot of
20 documents we haven't produced on settlement grounds
21 but that was an extraordinary effort we have engaged
22 in to get those documents to OCC. The fact OCC has
23 waited until the last possible moment to serve this
24 request shouldn't entitle OCC to any delays. They
25 should file a motion to compel, we should have our

1 period of time to respond to it, and then if need be,
2 you could review the documents, but it shouldn't
3 affect the hearing date.

4 MR. FINNIGAN: Your Honor, we didn't wait
5 until the last minute to file these. The Stipulation
6 in this case was filed on April 10. All of our
7 discovery goes to the terms of the Stipulation.
8 What's real --

9 EXAMINER PRICE: Did Company request OVEC
10 deferral recovery in their application?

11 MR. FINNIGAN: They did but what's really
12 striking about the Stipulation in this case is that
13 the Stipulation allows the Company to collect OVEC
14 deferrals that were on the Company's books as of July
15 of last year. And so that alerted us why do they
16 want to go back to July of last year? Why don't they
17 just collect the deferral that's on the books?

18 Well, then it came out that --

19 EXAMINER PRICE: The time you are asking
20 for e-mails goes -- is way before that, way before
21 the Stip was filed. What's the time frame,
22 Mr. Sharkey?

23 MR. SHARKEY: June 1, 2022, through
24 December 31, 2022.

25 MR. FINNIGAN: Your Honor, the

1 Stipulation that was filed on April 10 alerted us to
 2 the fact that there was an issue about what the
 3 balance of the deferral account was for the OVEC
 4 charge. July was the date that was reflected in the
 5 Stipulation, so we thought why July. And then we
 6 learned that in September, the third quarter of last
 7 year, the Company charged off that regulatory asset.
 8 So they reduced the balance down to zero and they
 9 charged that expense to their purchased power and so
 10 now the amount of that regulatory asset account that
 11 they seek to collect \$30 million on is zero.

12 And so that's what our discovery goes to.
 13 So what we asked for is we asked for all of the
 14 e-mails both before and after the time period of the
 15 charge-off, which was probably around September of
 16 last year, so we asked for three months before, the
 17 three months after, what were the communications that
 18 were had internally about the charge-off? Why did
 19 you charge them off? Because to the extent that the
 20 account was reduced to zero and there is this
 21 charge-off, then there should be no basis for
 22 recovering any OVEC deferral costs because there's
 23 nothing -- there's nothing in that account to collect
 24 so.

25 EXAMINER PRICE: This is your 20th set of

1 discovery. What's the running total for
2 interrogatories and requests for production of
3 documents at this point?

4 MR. FINNIGAN: It would be reflected in
5 the Stipulation.

6 MS. BOJKO: It's in the Stipulation, your
7 Honor, 1,043 interrogatories, 163 DRs.

8 MR. PRITCHARD: Prior to the Stipulation.

9 EXAMINER PRICE: Not including the next
10 three. Again, Mr. Finnigan, we will do our best to
11 accommodate you but this is -- I don't understand why
12 you could not have made this discovery request long
13 ago. The period does not address the period leading
14 up to the Stipulation. It ends four months before
15 the -- three months before the beginning of filing
16 the Stipulation. And the Company always was seeking
17 recovery of these OVEC assets as I understand it in
18 the application. Nonetheless, we will do an in
19 camera review.

20 Mr. Sharkey, when can you have the
21 documents for the -- that you are requesting
22 privilege on for the Bench to review?

23 MR. SHARKEY: Best case is Monday is, I
24 believe, correct.

25 MS. WATT: We're talking paper copies?

1 MR. SHARKEY: Paper copies.

2 EXAMINER PRICE: Paper copies.

3 MR. SHARKEY: That needs to be -- we have
4 a set -- the documents are with the document
5 processor. They need to do something to do with
6 computerized processing. I understand that not at
7 all. Melissa can explain better what needs to be
8 done. And then maybe a day to print and that's --
9 that's on -- that's best case scenario. It may take
10 longer to print because we don't necessarily -- we
11 don't know how many documents there are. We don't
12 know what kind of documents there are.

13 EXAMINER PRICE: Have the documents to us
14 by the commencement of the hearing. We conveniently
15 have a period from 3 o'clock to 5 o'clock on Tuesday
16 to do the in camera review and so we will do the in
17 camera review and we will be commencing at 3 o'clock
18 on Tuesday.

19 MS. GRUNDMANN: Your Honor, can I say
20 something about the scope of the discovery just in
21 terms of the being concerned about the time? I heard
22 Mr. Finnigan say that it wasn't simply OVEC, but it's
23 the issue of the deferral or the charge-off. Would
24 there be any benefit to the Bench in adding
25 additional search terms to the searches in Relativity

1 such that what the Bench would review would be
 2 documents responsive to a request that concerns OVEC
 3 and/or a search term of charge-off or related terms?
 4 Because, quite frankly, my guess is there are
 5 probably going to be numerous documents that mention
 6 OVEC and so Relativity would -- would identify them,
 7 but they are not actually responsive to the issues
 8 for which OCC is seeking discovery. So just in terms
 9 of bandwidth and the review potentially before the
 10 Commission, was curious as to whether there might be
 11 a way that the parties could narrow your request as
 12 you would in any typical civil litigation seeking ESI
 13 information of this nature?

14 EXAMINER PRICE: I'm afraid Mr. Sharkey
 15 has already done the searches. We would be asking
 16 him to replicate the searches, which even though that
 17 might have been a great idea before, I hate to burden
 18 Mr. Sharkey with --

19 MR. SHARKEY: Can I consult with someone
 20 who knows how to use Relativity?

21 MS. GRUNDMANN: That's the reason I raise
 22 the question. As someone who has used Relativity, it
 23 just seems to me there would be a number of documents
 24 the Commission is going to review and you are going
 25 to see OVEC and it's not going to have anything to do

1 with the issues that OCC appears concerned with. So
2 a thousand documents could be 10,000 pages depending
3 on how big each document is.

4 EXAMINER PRICE: One second,
5 Mr. Finnigan.

6 Mr. Finnigan asked we stay on the record
7 to give the ruling. We have given the ruling that we
8 will do the in camera review on Tuesday at 3 o'clock,
9 and the Company will produce the documents for the in
10 camera review by the commencement of the hearing on
11 Tuesday.

12 At this time we are going to go off the
13 record and let the court reporter go on to her other
14 engagements, and we will continue discussing these
15 issues and potentially mirroring them while we're off
16 the record.

17 (Discussion off the record.)

18 (Thereupon, at 11:19 a.m., the
19 stenographic record was concluded.)

20 - - -

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, April 28, 2023,
and carefully compared with my original stenographic
notes.

Karen Sue Gibson, Registered
Merit Reporter.

(KSG-7454)

- - -

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Case No(s). 22-0900-EL-SSO, 22-0901-EL-ATA, 22-0902-EL-AAM

Summary: Transcript April 28th 2023 In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Its Electric Security Plan. - - - In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Revised Tariffs. - - - In the Matter of the Application of The Dayton Power and Light Company d/b/a AES Ohio for Approval of Accounting Authority Pursuant to R.C. 4905.13. electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs..