

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, The Cleveland Electric)	
Illuminating Company, and The Toledo)	Case No. 14-1297-EL-SSO
Edison Company for Authority to Provide for)	
a Standard Service Offer Pursuant to R.C.)	
4928.143 in the Form of An Electric Security)	
Plan)	

**MOTION OF FIRSTENERGY SOLUTIONS CORP. TO QUASH THE SUBPOENA
DUCES TECUM OF THE PJM POWER PROVIDERS GROUP AND THE ELECTRIC
POWER SUPPLY ASSOCIATION AND UNOPPOSED MOTION OF FIRSTENERGY
SOLUTIONS CORP. FOR A PROTECTIVE ORDER**

Pursuant to Rule 4901-1-25(C), O.A.C., FirstEnergy Solutions Corp. ("FES") respectfully moves the Commission to quash the subpoena issued by the PJM Power Providers Group and Electric Power Supply Association ("Joint Movants") on December 1, 2014 (the "Subpoena"). As demonstrated in the attached Memorandum in Support, the Subpoena is entirely focused on PJM-related avoidable cost rate ("ACR") information and is overbroad, oppressive and unduly burdensome. This information is deemed confidential by PJM and FERC and may not be disclosed to competitors like Joint Movants even pursuant to protective order. Moreover, this information has nothing to do with this case. All of the relevant Sammis and Davis Besse historic cost and revenue information has already been disclosed, as have the projections for future costs and revenues. The ACR for prior PJM auctions offers no relevant information for this case. Accordingly, this is an improper attempt by competitors to obtain confidential information about these plants in order to create their own bid strategies in future PJM auctions. This sort of gamesmanship is inappropriate under a variety of legal standards, and the Subpoena should be quashed in its entirety.

If the Commission does not quash the Subpoena in full, FES respectfully requests that it delay the response time for the Subpoena for 30 days in order for FES to bring this issue to the attention of the FERC enforcement division. Further, in the event that the Commission requires FES to produce documents related to the Subpoena or to make one of its employees available for deposition, pursuant to Rule 4901-1-24(D), FES respectfully moves for a protective order to safeguard the highly confidential and competitively sensitive nature of the information requested in the Subpoena. Joint Movants have indicated that they are willing to agree to a protective agreement and do not oppose a protective order.

Date: December 8, 2014

Respectfully submitted,

/s/ Mark A. Hayden

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SOLUTIONS CORP.

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**MEMORANDUM IN SUPPORT OF MOTION TO QUASH AND UNOPPOSED
MOTION FOR PROTECTIVE ORDER**

I. INTRODUCTION

The Subpoena is flawed in several respects. The Subpoena seeks information which is deemed confidential by PJM and FERC rules. The Subpoena also seeks information which has absolutely nothing to do with this case, as all relevant cost and revenue information for Sammis and Davis Besse ("the Plants") has already been disclosed. Instead, the Subpoena is an improper attempt by competitors to obtain confidential ACR information in order to structure their own bids in future PJM auctions. This is clearly improper, and the Subpoena should be quashed in its entirety.

If the Commission does not quash the Subpoena in full, FES respectfully requests that it delay the response time for the Subpoena for 30 days in order for FES to bring this issue to the attention of the FERC enforcement division. Further, in the event that the Commission requires FES to produce documents related to the Subpoena or to make one of its employees available for deposition, pursuant to Rule 4901-1-24(D), FES respectfully moves for a protective order to safeguard the highly competitively sensitive nature of the information requested in the Subpoena.

Joint Movants have indicated that they are willing to agree to a protective agreement and do not oppose a protective order.

II. OVERVIEW AND RELEVANT FACTS

On August 4, 2014, the Companies filed their Application for their fourth electric security plan, Powering Ohio's Progress ("ESP IV"). One component of ESP IV is the Economic Stability Program.¹ As explained in the Companies' Application, the Economic Stability Program "will act as a retail rate stability mechanism against increasing market prices and price volatility for all retail customers over the longer term."² The Economic Stability Program includes a detailed description of a proposed purchased power transaction between the Companies and FES whereby the Companies would purchase all of the generation output of certain assets owned by FES.³

As part of their Application, the Companies included highly confidential and competitively sensitive forecasting, pricing and cost information belonging to FES (the "Proprietary Data") which is related to FES's internal business operations and the Plants. The Application and subsequent discovery have included all relevant historic cost and revenue data for the Plants, as well as projections for the future cost and revenues for the Plants.⁴

Notwithstanding the transparent and complete disclosure of all relevant information, on December 1, 2014 Joint Movants moved for the Subpoena which was served on December 2, 2014. The Subpoena seeks documents by December 8, 2014 and to have FES provide an

¹ See Case No. 14-1297-EL-SSO, Application at 9 (Aug. 4, 2014).

² *Id.*

³ See Case No. 14-1297-EL-SSO, Direct Testimony of Jay A. Ruberto at 3 (Aug. 4, 2014).

⁴ See, e.g., Lisowski Direct Testimony; SC Set 1 – INT – 16 and Attachment 1 – Competitively Sensitive Confidential.

unnamed employee to be deposed, on December 10, 2014, over three topics, each of which relate to historic PJM auction bid caps for the Plants.

1. The completed PJM RPM Avoidable Cost Rate Template (Alternative Bid Cap spreadsheet) submitted by FES and supporting bid cap work papers for the W.H. Sammis and Davis Besse plant in each of the last three Base Residual Auctions;
2. Communications to and responses from the Independent Market Monitor (“IMM”) regarding FES PJM RPM Avoidable Cost Rate for the W.H. Sammis and Davis Besse plants for each of the last three Base Residual Auctions; and
3. Identify what the IMM gave to FES as the default cap or alternative cap (including the energy and auxiliary services offset used by PJM when calculating the sales caps) for the W.H. Sammis and Davis Besse plants in each of the last three Base Residual Auctions.

Each of these requests relates to the PJM Base Residual Auction (“BRA”). Capacity rates in PJM are set via the Reliability Pricing Model (“RPM”) auction process that constitutes PJM’s capacity market.⁵ The RPM auction process acquires all the necessary capacity needed for the Load Serving Entities participating in RPM. Suppliers are subject to a must-offer obligation in the RPM markets. The independent market monitor (“IMM”) has determined that the capacity markets are structurally concentrated, meaning that each supplier theoretically has sufficient market power to affect price. As a result, all supply offers are subject to price caps.

PJM offer caps are set via an extensive administrative process. In brief, offers must be based on a resource’s short run marginal costs, or “avoidable” costs. Specifically, suppliers’ caps are partially established by the avoided cost rate (the “ACR”), as specified in section 6.8 of Attachment DD of the PJM tariff. The ACR values used in the PJM auction process reflect an

⁵ In detail, LSE charges for capacity are made up of a weighted average of capacity clearing prices in the BRA, and three incremental auctions. These are clearing auctions, and each sets a corresponding capacity price for the locational delivery areas (“LDAs”) within PJM. Load prices would further be modified by adjustments between forecast quantities and actual load allocation shares and peak load responsibility. Generators are paid the price they clear at in any specific auction in which they are sold.

attempt to administratively set the determination of such “avoidable” costs, allowing not only for typical marginal short-term costs, but also allowing for the types of incremental investment that would be expected with maintaining large, capital intensive projects. ACR values are not publicly disclosed by PJM.

On December 5, 2014, in a letter to counsel for Joint Movants, FES objected to the Subpoena.⁶ The Joint Movants have refused to withdraw the Subpoena, necessitating this Motion.⁷

III. LAW AND ARGUMENT

A. Motion To Quash

1. **The Commission and Ohio Courts routinely grant motions to quash subpoenas that are overbroad, unduly burdensome or otherwise unreasonable.**

The Commission routinely grants motions to quash where the subpoenas at issue are overbroad, unduly burdensome or otherwise unreasonable. For example, in *In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN, 2013 Ohio PUC LEXIS 110 (May 28, 2013), an intervenor had sought several subpoenas related to a host of information from the applicant regarding a wind project’s shadow flicker limitations and the likelihood of blade shear incidents. *Id.* at *18. The applicant argued that the subpoenas were overbroad and unduly burdensome. In agreeing that the subpoenas should be quashed, the Commission noted that the request for information was “extraordinarily overbroad” and “that it would be unreasonable to force a nonparty to expend its time and resources toward a request that

⁶ See attached Letter to Joint Movants from FES, dated December 5, 2014 (“FES Letter”).

⁷ See attached Letter from Joint Movants to FES, dated December 8, 2014 (“Joint Movants Letter”).

is unlimited in scope.”⁸ Likewise, the Commission quashed the subpoena related to blade shear incidents as similarly overbroad. The Commission further noted that the intervenor had failed to show how it would suffer an “undue hardship” in the absence of the subpoenaed information.⁹ Ohio courts concur and routinely grant motions to quash subpoenas that are overbroad or unduly burdensome.¹⁰

2. The Subpoena seeks information which is not likely to lead to the discovery of admissible evidence.

As discussed above, the Companies have already produced all relevant historic and future projected cost and revenue information for the Plants.¹¹ The Joint Movants have not contested this, or sought additional information about the Powering Ohio’s Progress Plan. Instead, the Subpoena relates solely to the ACR value for the Plants for each of the last three BRA’s. As all relevant cost and revenue information for the Plants has already been disclosed, there can be no good faith reason for these requests.

⁸ *Id.* at *19.

⁹ *Id.* at *20. *See also, In the Matter of the Complaint of the Ohio Consumers’ Counsel, Stand Energy Corporation, Incorporated, Northeast Ohio Public Energy Council, and Ohio Farm Bureau Federation v. Interstate Gas Supply, Inc.*, Case No. 10-2395-GA-CSS, 2011 Ohio PUC LEXIS 1202 at *4-5 (Nov. 2, 2011) (granting motion to quash because subpoena was unreasonable); *In the Matter of the Complaint of Buckeye Energy Brokers, Inc., v. Palmer Energy Company*, Case No. 10-693-EL-CSS, 2011 Ohio PUC LEXIS 406 (Mar. 30, 2011) (granting motion to quash).

¹⁰ *See, e.g., Hoerig v. Tiffin Scenic Studios, Inc.*, 3rd Dist. Seneca No. 13-11-18, 2011-Ohio-6103, ¶ 24 (affirming trial court’s decision to quash a subpoena because the cost to an employer of returning the witness to testify constituted an undue burden); *Wright v. Perioperative Med. Consultants*, 1st Dist. Hamilton No. C-060586, 2007-Ohio-3090, ¶¶ 11, 18 (reversing trial court and holding that motions to quash should have been granted because, among other reasons, the subpoenas were unduly burdensome); *Martin v. Budd*, 128 Ohio App. 3d 115, 120 (Ohio Ct. App., Summit County 1998) (holding that trial court’s failure to grant a motion to quash a subpoena duces tecum was an abuse of discretion because the subpoena created an undue burden and because the plaintiff failed to show a substantial need for the requested information); *Eitel v. Eitel*, 1996 Ohio App. LEXIS 3821, 12-13 (Ohio Ct. App., Pickaway County Aug. 23, 1996) (affirming trial court’s decision to quash subpoenas that were unreasonable, oppressive, unduly burdensome and that would not lead to relevant testimony).

¹¹ *See, e.g., Lisowski Direct Testimony*; SC Set 1 – INT – 16 and Attachment 1 – Competitively Sensitive Confidential.

The Joint Movants claim that the Subpoena seeks information relevant to the expected future financial performance of the Plants. “Historical avoided cost rates and bid strategies are important to understand the applicants’ position on future projections versus historical results and the viability of the assets at issue.”¹² This statement evidences a misunderstanding of PJM markets. The ACR value does not determine the revenue received by FES for the Plants. Instead, the Plants receive the BRA clearing price if they clear in the auction. The ACR value is only an administrative construct within the BRA to prevent market manipulation. Finally, FES’s “bid strategies” are confidential and are beyond the scope of this proceeding. How FES bid the Plants in the past is not necessarily indicative of how the Companies will bid the plants if the ESP is approved as filed.

As Joint Movants are also participants in the BRA, it appears that Joint Movants are requesting the ACR information to construct their own bidding strategies or to improperly obtain confidential information about FES. Moreover, the Subpoena requests information about FES’s historical ACR values and communications. Historical ACR values or bid strategies are not at issue in this proceeding and do not necessarily reflect how the Plants would be bid by the Companies going forward.

Finally, there is no guarantee that the BRA will remain in its current form throughout the ESP period. In fact, PJM publicly disclosed extensive proposed changes to the BRA process on December 3, 2014.¹³ If approved, these changes would have a significant impact on the BRA

¹² Joint Movants Letter, p. 2.

¹³ <http://www.pjm.com/~media/committees-groups/committees/elc/capacity/capacity-performance-proposal-summary-of-key-design-elements.ashx>

and accordingly on the Plants. Therefore historic ACR values are not necessarily indicative of future BRA outcomes.

3. FERC prohibits competitors like FES and the Joint Movants from sharing the confidential data requested by the Subpoena.

Not only is this request inappropriate under Ohio's discovery rules, it is also inappropriate under well-established federal precedent. Well established FERC authority makes clear that it is inappropriate for competitors like FES and the Joint Movants to share confidential information which could be used to affect federal markets.¹⁴ The potential for gamesmanship and market manipulation with this data is obvious, since Joint Movants' members include several competitors who could use this information to adjust their bid strategies in future auctions. FES is not aware of any exception to this rule for producing pursuant to protective agreement or a stipulation that only certain employees at Joint Movants will have access to the information. Therefore the Subpoena should be quashed in its entirety as being prohibited by FERC rules and beyond the jurisdiction of the Commission.

The potential for misuse of this information is so high, even if the Commission were to uphold the Subpoena and approve the protective order, FES would likely seek an informal opinion from the FERC enforcement division prior to disclosure to address whether FES can disclose this information to Joint Movants even pursuant to Commission Order, and also to ensure that it would be lawful in FERC enforcement's eyes for the Joint Movants to have or possess the information.

¹⁴ See Prohibition of Energy Mkt. Manipulation, Order No. 670, FERC Stats. & Regs. ¶ 31, 202 (2006), reh'g denied, Order No. 670-A, 114 FERC ¶ 61,300 (2006) (codified at 18 C.F.R. § 1c); 16 U.S.C. §824v (2006); Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 59.

4. The ACR information requested by the Subpoena is so confidential that PJM and the Market Monitor are expressly prohibited from disclosing it.

The Subpoena requests confidential BRA information which is not publicly available from any source. In fact, PJM is prohibited from disclosing this confidential FES information to Joint Movants by The Amended and Restated Operating Agreement of PJM Interconnection, L.L.C., § 18.17.1. The Market Monitor is similarly prevented from disclosing this information by PJM Open Access Transmission Tariff, Attachment M – Appendix, § I(A). As this information is deemed so confidential that both PJM and the IMM are prohibited from disclosing it, it is inappropriate for Joint Movants to seek to circumvent the confidential nature of this information by misuse of discovery rules in this proceeding.

5. Subpoena is procedurally deficient and seeks to impose unreasonable burdens on FES.

Joint Movants have further failed to demonstrate that they have a substantial need for the subpoenaed material, which, even if relevant (although it is not), does not impose an undue burden on FES, a non-party to this proceeding. Following the case law discussed above, Joint Movants' requests, even if relevant (which they are not), impose an undue burden on FES in the absence of a demonstrated substantial need on the part of Joint Movants.¹⁵ Further, Joint Movants have failed to identify any "undue hardship" that they will suffer in the absence of its tightly compressed production and deposition schedule.

B. Unopposed Motion For Protective Order

Much like the Proprietary Data that was filed with the Companies' Application, and granted protection in a recent Entry in this proceeding, the information that is the subject of the

¹⁵ See *Martin* at 119; *Wright* at ¶18; *Hoerig* at ¶32.

Subpoena is highly confidential and competitively sensitive in nature and proprietary to FES and potentially the Companies if the ESP is approved as filed. It thereby warrants protection as a trade secret. As demonstrated below, FES has at all times safeguarded this information. Further, the public disclosure of this information would cause competitive harm to FES and place FES at a severe competitive disadvantage.

Pursuant to Rule 4901-1-24(A)(7), the Commission may issue an order to protect trade secrets from public disclosure.¹⁶ Under Ohio law, the determination of trade secret status is made pursuant to Section 1333.61(D). In pertinent part, Section 1333.61(D) provides that a “trade secret” is:

Information . . . that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

R.C. 1333.61(D).

Here, the information sought in the Subpoena readily satisfies both prongs of Section 1333.61. As discussed above, ACR values are created to prevent market manipulation and to limit potentially improper bid strategies. Competitors are affirmatively prohibited from sharing this information and colluding on bids by federal law. PJM and the IMM are also expressly prohibited from disclosing this information. FES has taken steps at all times to protect this information. Accordingly, it is clear that the information requested is a trade secret worthy of

¹⁶ See Rule 4901-1-24(A)(7).

protection pursuant to Section 1333.61(D)(1) because this information bears “independent economic value.” Its public disclosure would place FES at a severe competitive disadvantage and would cause grievous economic harm to FES.¹⁷ Access to this information by a competitor would not only disclose confidential information about the Plants, but also FES’s bid strategies at PJM. Further, FES has at all times safeguarded the information related to these topics and access to this information is restricted and not publicly available. FES has thereby made reasonable efforts to maintain its secrecy. The Commission should continue its routine practice of granting protection to confidential information.

Moreover, the Commission routinely grants protection to cost, pricing, and forecasting information like the information sought in the Subpoena and protects trade secrets that are contained in deposition transcripts or exhibits from public disclosure.¹⁸

FES therefore requests that any production in response to the Subpoena be treated under the terms and conditions of the protective agreement already in place between Joint Movants and the Companies. This agreement has already been approved by both Joint Movants and the

¹⁷ Topics 3, 4 and 5 request all “communications” between FES and its “shareholders,” financial institutions or the Companies, as well as draft term sheets regarding the proposed purchased power transaction. It is quite possible that trade secret information related to Topics 1, 2 and 6 would fall under these Topics as well.

¹⁸ See, e.g., *In the Matter of the Fuel Adjustment Clause of Columbus Southern Power Company and Ohio Power Company and Related Matters for 2010*, Case No. 10-268-EL-FAC, 2014 Ohio PUC LEXIS 104 at *20-21 (May 14, 2014) (granting trade secret protection to “competitive cost and financial information” related to coal inventories and contracts); *In the Matter of the Application of Duke Energy Ohio, Inc. to Adjust Rider DR-IM and Rider AU for 2010 SmartGrid Costs and Mid-Deployment Review*, Case No. 10-2326-GE-RDR, 2012 Ohio PUC LEXIS 89 at *2-7 (Jan. 25, 2012) (granting protection to growth projections and other forecasting information pursuant to Section 1333.61); *In the Matter of the Application of Ohio Power Company and Columbus Southern Power Company for Authority to Merge and Related Approvals*, Case No. 10-2376-EL-UNC, 2011 Ohio PUC LEXIS 1253 (Nov. 18, 2011) (granting trade secret protection to, among other things, the volume of customer load related to generation rates as well as other price and cost information); *In the Matter of the Application of Duke Energy Ohio, Inc., for an Increase in Electric Distribution Rates*, Case No. 08-709-EL-AIR, 2009 Ohio PUC LEXIS 989 at *3-4 (Nov. 13, 2009) (granting protection to deposition transcripts and exhibits that contained trade secrets).

Attorney Examiner in this proceeding, and ensures that FES's confidential data is treated appropriately. Joint Movants do not oppose the entry of such an order.¹⁹

¹⁹ Joint Movants' Letter pp. 1-2.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant FES's Motion to Quash. In the alternative, should the Commission decide to grant the Subpoena, in whole or in part, FES respectfully requests thirty days from the date of the Commission's order to potentially consult with FERC's enforcement division regarding the Subpoena. Further, to the extent FES is required to produce information that is the subject matter of the Subpoena, the Commission should issue a protective order.

Date: December 8, 2014

Respectfully submitted,

/s/ Mark A. Hayden

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ATTORNEY FOR FIRSTENERGY
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CERTIFICATE OF SERVICE

I certify that the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 8th day of December, 2014. The PUCO's e-filing system will electronically serve notice of the filing of this document on the following parties:

Association of Independent Colleges and Universities of Ohio, Buckeye Association Of School Administrators, Buckeye Wind LLC, Citizens Coalition, City Of Akron, City Of Cleveland, Constellation NewEnergy Inc., Council Of Smaller Enterprises, Direct Energy Services LLC, Duke Energy Ohio Inc., Dynegy Inc., Energy Professionals of Ohio, EnerNOC Inc., Environmental Law & Policy Center, Exelon Generation Company, LLC, Hardin Wind LLC, IBEW Local 245, IGS Energy, Industrial Energy Users Of Ohio, Kroger Co., Mid-Atlantic Renewable Energy Coalition, Monitoring Analytics LLC, MSC, Nextera Energy Resources, Northeast Ohio Public Energy Council, Northwest Ohio Aggregation Coalition, Nucor Steel Marion, Inc., Ohio Advanced Energy Economy, Ohio Association Of School Business, Ohio Consumers Counsel, Ohio Energy Group, Inc., Ohio Environmental Counsel, Ohio Hospital Association, Ohio Manufacturers' Association, Ohio Power Company, Ohio Partners For Affordable Energy, Ohio School Boards Association, Ohio Schools Council, PJM Power Providers Group, Power4Schools, Retail Energy Supply Association, Sierra Club, The Cleveland Municipal School District, The Electric Power Supply Association, Wal-Mart Stores East, LP, and Sam's East, Inc.

/s/ Mark A. Hayden

An Attorney for FirstEnergy Solutions Corp.

Mark A. Hayden
Associate General Counsel

December 5, 2014

330-761-7735
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VIA EMAIL ONLY

Howard Petricoff

Gretchen Petrucci

Michael Settineri

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52 E. Gay St.

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Re: Case No. 14-1297-BL-SSO- P3 Subpoena Duces Tecum to FirstEnergy Solutions Corp.

Dear Howard:

I have received the PJM Power Providers Group and Electric Power Supply Association ("Joint Movants") subpoena to FirstEnergy Solutions Corp. ("FES"). Please consider this letter an effort to resolve a discovery dispute pursuant to OAC 4901-1-24 and 4901-1-25.

The Joint Movants' subpoena is procedurally deficient in several respects. The subpoena was not served until December 2, 2014, less than 6 days before FES was purportedly obligated to produce responsive documents and less than 8 days before FES was purportedly obligated to appear at a deposition. This is not a reasonable period of time for a third party to respond to a subpoena. In fact, under the Commission rules a party to a proceeding is provided with 20 days in which to respond to requests for production. *See* OAC 4901-1-20(C). It is inappropriate to ask a non-party to respond in such an accelerated fashion when the Commission provides a party with three times as much time to prepare a response. Similarly, it is unduly prejudicial to demand a third party witness to appear for a deposition on less than 8 days' notice.

Compounding this problem is the Joint Movants' failure to address the confidential nature of the information sought and agreement that all responsive information should be produced pursuant to the Companies' protective agreement recently approved by the Attorney Examiner. These tactics are unreasonable and oppressive, and alone would be grounds for quashing the subpoena. *See* OAC 4901-1-25(C).

Unfortunately, the problems with the subpoena are not mere clerical issues which could be addressed by changing the date of the deposition. The subpoena itself also seeks information which is irrelevant to this proceeding and not likely to lead to the discovery of admissible evidence. Specifically, the subpoena seeks information relating to the Sammis and Davis Besse Avoidable Cost Rates for each of the last three Base Residual Auctions ("BRA"). As the Joint Movants are well aware, the Companies have already produced all relevant cost and revenue information for both Sammis and Davis Besse for the last three years. *See* SC Set 1 – INT – 16 and Attachment 1 – Competitively Sensitive Confidential. As all relevant cost and revenue information for these plants has already been disclosed, there can be no good faith reason for this request. Your subpoena is highly questionable and clearly intended solely to harass FES and to

improperly obtain confidential PJM bid information to use competitively against FES. This is particularly troubling and inappropriate coming from Joint Movants, since they are also participants in the BRA.

Not only is this request inappropriate under Ohio's discovery rules, it is also inappropriate under well-established federal precedent. Well established FERC authority makes clear that it is inappropriate for competitors like FES and the Joint Movants to share confidential information which could be used to affect federal markets. *See* Prohibition of Energy Mkt. Manipulation, Order No. 670, FERC Stats. & Regs. ¶ 31, 202 (2006), reh'g denied, Order No. 670-A, 114 FERC ¶ 61,300 (2006) (codified at 18 C.F.R. § 1c); 16 U.S.C. §824v (2006); Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 59. The potential for gamesmanship and market manipulation with this data is obvious, since Joint Movants' members include several competitors who could use this information to adjust their bid strategies in future auctions. The potential for misuse of this information is so high, even if the Commission were to uphold this subpoena, FES would likely seek an informal opinion from the FERC enforcement division prior to disclosure to address whether FES can disclose this information to Joint Movants even pursuant to Commission order, and also to ensure that it would be lawful in FERC enforcement's eyes for the Joint Movants to have or possess the information. As all cost information has already been provided in this case, and this subpoena appears directed solely to gain a competitive advantage, the subpoena must be withdrawn.

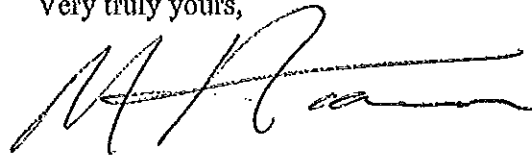
The subpoena is also inappropriate because it seeks competitive bid information which Joint Movants are prohibited from obtaining from PJM by federal law. PJM is prohibited from disclosing this confidential FES information to Joint Movants by The Amended and Restated Operating Agreement of PJM Interconnection, L.L.C., § 18.17.1. The Market Monitor is similarly prevented from disclosing this information by PJM Open Access Transmission Tariff, Attachment M -- Appendix, § I(A). It is inappropriate for Joint Movants to seek to circumvent the confidential nature of this information by misuse of discovery rules in this proceeding.

In addition to being legally flawed, the information requested in the subpoena is not reasonably likely to lead to the discovery of admissible evidence. Historical ACR values or bid strategies are not at issue in this proceeding and do not necessarily reflect how the plants would be treated by the Companies going forward. Moreover, there is no guarantee that the BRA will remain in its current form throughout the ESP period. In fact, PJM has publicly disclosed that it is considering significant changes to the BRA, and may be publicly disclosing those changes later this year. *See* PJM Interconnection, L.L.C., PJM Capacity Performance Updated Proposal (Oct. 7, 2014), available at <http://www.pjm.com/~media/documents/reports/20141007-pjm-capacity-performance-proposal.ashx>. Therefore historic results are not necessarily indicative of future outcomes.

The subpoena is improper, procedurally deficient, seeks irrelevant information, and seeks information which cannot be disclosed under PJM rules and federal law. Therefore, please let me know by 4 p.m. on December 8, 2014 if Joint Movants agree to withdraw the subpoena. If

Joint Movants do not withdraw the subpoena by that time then FES intends to file a motion to quash the subpoena and for a protective order.

Very truly yours,

A handwritten signature in black ink, appearing to read 'M. A. Hayden', with a long horizontal flourish extending to the right.

Mark A. Hayden



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December 8, 2014

VIA ELECTRONIC MAIL

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Re: *Case No. 14-1297-EL-SSO-P3*
Subpoena Duces Tecum to FirstEnergy Solutions Corp.

Dear Mark:

I am in receipt of your December 5, 2014 correspondence in which FirstEnergy Solutions Corp. ("FES") states that it will file a motion to quash the subpoena and for a protective order unless the PJM Power Providers Group and Electric Power Supply Association ("Joint Movants") withdraw the subpoena by 4:00 p.m. today. Although your correspondence to me did not contain any alternatives to comply with the subpoena other than a complete withdrawal, the Joint Movants are willing to make certain accommodations to address the concerns you raised in your letter.

FES' first concern is that it does not have a reasonable period of time to comply with the subpoena. In our subpoena we had chosen the data for document production and deposition to match the existing request by the Sierra Club. That would obviate the need for two depositions, and our assumption was that the three discrete sets of documents requested in the subpoena are items that are routinely maintained. The Joint Movants are willing to provide additional time to FES to respond to the document production required by the subpoena provided we have enough time to review the document production to assist with testimony preparation.

The second concern raised in your letter of December 5th centers on confidentiality. Specifically, FES takes the position that it is inappropriate for FES to share certain information sought by the subpoena with the Joint Movants based on FERC orders and the PJM Operating Agreement. To address and avoid that issue, we suggest entering into a protective agreement which mirrors the agreement entered into between the FirstEnergy Utilities

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Legal Counsel

Mark A. Hayden, Esq.

December 8, 2014

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and the Joint Movants. Under that agreement only outside counsel and expert witnesses without market trading responsibilities can view the "competitively sensitive" documents. Once again we would let FES declare what was competitively sensitive and would abide by that decision unless and until the Attorney Examiner decided otherwise.

FES' last concern appears to be that the information requested in the subpoena is not reasonably likely to lead to the discovery of admissible evidence. As you know, the Commission allows broad discovery in its proceedings and the standard for discovery is much broader than the standard for the admissibility of evidence. The applicants in this case have put at issue future projections of markets and implied that current revenues received by the generation plants at issue are not sufficient to sustain their operation going forward. Historical avoided cost rates and bid strategies are important to understand the applicants' position on future projections versus historical results and the viability of the assets at issue. This information is certainly discoverable, especially given your own statement that "historic results are not necessarily indicative of future outcomes." As that statement implies, historical results could be indicative of future outcomes and, therefore, the information sought by the Joint Movements through the subpoena is discoverable.

I hope you find the above offer of compromise acceptable to resolve any concerns FES has as to the production of the sought information and the timing of the production and the deposition. I look forward to your prompt response by close of business tomorrow (December 9, 2014). Please do not hesitate to call me if you would discuss this correspondence.

Sincerely,



M. Howard Petricoff

MHP/skb

cc: Michael J. Settineri
Gretchen L. Petrucci

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Case No(s). 14-1297-EL-SSO

Summary: Motion OF FIRSTENERGY SOLUTIONS CORP. TO QUASH THE SUBPOENA
DUCES TECUM OF THE PJM POWER PROVIDERS GROUP AND THE ELECTRIC POWER
SUPPLY ASSOCIATION AND UNOPPOSED MOTION OF FIRSTENERGY
SOLUTIONS CORP. FOR A PROTECTIVE ORDER
electronically filed by Mr. Scott J Casto on behalf of FirstEnergy Solutions Corp.