BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

SIERRA CLUB'S MEMORANDUM *CONTRA* FIRSTENERGY SOLUTIONS CORP.'S MOTIONS TO QUASH AND FOR A PROTECTIVE ORDER

PUBLIC VERSION – CONTAINS REDACTED MATERIAL

Pursuant to O.A.C. 4901-1-12 and the Attorney Examiner's December 10, 2014 Entry, Sierra Club files this expedited response to the Motion to Quash Subpoena and Motion for Protective Order that FirstEnergy Solutions Corp. ("FES") filed on December 8, 2014. As explained below, Sierra Club's Motion for a Subpoena Duces Tecum is both reasonable and narrowly tailored, and there is no legitimate basis for FES's motion to quash. *See* O.A.C. 4901-1-25. Additionally, FES's request for a protective order is premature. Accordingly, FES's motions should be denied.[1]

I. Background

A. The Proposed Transaction with FirstEnergy Solutions Corp.

In this proceeding, the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("Companies") seek approval of a proposal that

[1] In its motion to quash, FES objected to Sierra Club's proposed timeline for production of responsive documents and information. This objection is now moot, as per the Attorney Examiner's December 10 order establishing a prehearing conference and filing schedule.

would have significant and far-reaching consequences for Ohio ratepayers. As part of its electric security plan ("ESP"), the Companies have requested that the Commission approve a non-bypassable rider that would tie their customers' bills to the economic fortunes of four major generating facilities owned wholly or partly by FirstEnergy Solutions Corp. ("FES"): the W.H. Sammis, Kyger Creek, and Clifty Creek coal plants, and the Davis-Besse nuclear plant.

If this rider, the Retail Rate Stability Rider ("Rider RRS"), is approved, the Companies would enter into a 15-year agreement with FES. Under that agreement, the Companies would commit to paying all of FES's costs for these facilities, purchasing all of FES's output from these facilities, and selling all of that output into the market. The Companies would then pass any costs or savings on to their ratepayers for the term of the contract. The rates paid by the Companies' customers over the next 15 years would therefore be directly linked to the economic performance of these four power plants. In other words, if Rider RRS is approved, this proposed transaction would create a subsidy for four generation facilities and impact customers' rates for 15 years.

B. Sierra Club's Discovery Requests

Given the enormous financial implications of the proposed transaction for the Companies' ratepayers,[2] Sierra Club and other parties are investigating these plants' projected costs and revenues. To enable a thorough review of these plants' future economic performance, Sierra Club has sought information about these plants' profitability and the potential risks to ratepayers that would stem from entering this proposed 15-year transaction. Consequently,

[2] Indeed, the Companies' ESP Application projects that Rider RRS would cost ratepayers hundreds of millions of dollars over the next several years. *See* Direct Testimony of Jay A. Ruberto, Attachment JAR-1 (projecting a cost to ratepayers of $167 million in 2016, $194 million in 2017, and $103 million in 2018). Although FES disputes this fact, *see* FES Mot. at 10 n.1, FES's claim is contradicted by the Application itself.

through discovery Sierra Club has requested relevant information such as potential environmental compliance requirements and their costs, and the Companies' assumptions in estimating the impact to ratepayers. Sierra Club has also investigated whether the proposed transaction between the Companies and their unregulated affiliate FES was the product of arm's-length bargaining, whether the negotiating teams' internal analyses support the assumptions presented in the ESP Application, and whether FES could terminate the transaction early if the plants were to become profitable again in the future so that FES—rather than ratepayers—would reap the benefits of such profits. This information is critical to assessing the reasonableness of the Companies' proposal.

Unfortunately, Sierra Club's efforts to seek this relevant and important information have been stymied by the Companies' frequent objections. The Companies have claimed that they do not possess much of this information, and that this information is instead within FES's possession, custody, or control. The Companies asserted this objection to numerous discovery requests,[3] including requests [redacted].[4] Thus, although Sierra Club has received some information concerning potential

[3] To date, the Companies have responded to at least nine Sierra Club discovery requests by claiming that the requested information is outside their "possession, custody, or control, including without limitation information within the sole possession of FirstEnergy Solutions Corp." *See* Resp. to SC-INT-16, [redacted]-70, -72, -103; SC-RPD-[redacted], -79, [redacted] The Companies have also objected to several other discovery requests by stating that such discovery seeks information regarding FES's (or corporate affiliates') management of generation assets. *See* Resp. to SC-RPD-54, [redacted] The Companies have responded similarly to requests for cost and revenue information from other parties.

[4] [redacted] For the Attorney Examiner's convenience, Sierra Club has attached copies of these key discovery responses. The redacted versions are attached to the public version of this brief, and the complete protected versions are attached to the unredacted brief being filed under seal. (The redacted version of SC-RPD-12 was incorrectly labeled as confidential; indeed, FES attached that same incorrectly-labeled discovery response to its motion.) Please note that although several of these responses are being provided under seal, Sierra Club does not agree with the Companies' objections and claims that only FES has this information and that all such information is confidential. We are submitting

future environmental compliance costs at Sammis, the information provided by the Companies remains incomplete. In addition, Sierra Club has been unable to obtain information from the Companies regarding FES's internal evaluations of the proposed transaction. Because FES's assessments could shed light on the potential costs and liabilities facing its power plants – and the concomitant subsidy that ratepayers would be forced to bear if Rider RRS is approved – this information is crucial for assessing the reasonableness of Rider RRS and the underlying proposed transaction between FES and the Companies.

C. Sierra Club's Subpoena

With the Companies contending that complete environmental compliance cost information is only in the possession of FES, and facing the fast-approaching deadline for intervenor testimony, Sierra Club has been forced to seek this information through a subpoena directed to FES. Accordingly, on November 25, 2014, Sierra Club filed a Motion for a Subpoena Duces Tecum pursuant O.A.C. § 4901-1-25. Through its subpoena, Sierra Club seeks, *inter alia*, FES's estimates of environmental compliance costs for its Sammis plant, as well as FES's evaluation of the proposed transaction with the Companies. The subpoena, which was served on FES on November 26, sought the production of six categories of key documents related to the Sammis plant and the proposed transaction with the Companies.[5] The subpoena also sought the appearance of a knowledgeable witness (or witnesses) on December 10, 2014. As the subpoena and accompanying motion demonstrated, the information being sought from FES is relevant to core issues in this proceeding. Sierra Club sought expedited treatment for its

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these materials under seal, however, because the Companies have declared this information to be confidential.

[5] *See* Sierra Club's Motion for a Subpoena Duces Tecum Directed to FirstEnergy Solutions Corp. ("SC Mot.") at 1-2 (Nov. 25, 2014); Subpoena Duces Tecum ¶¶ 1-6.

subpoena by submitting the subpoena and accompanying motion in person to the Attorney Examiner. O.A.C. § 4901-1-25(A)(2).

On December 4, 2014, counsel for FES sent a letter to counsel for Sierra Club. In its letter, FES agreed to provide the most recent cost and revenue projections sought in Topics 1 and 2, while raising myriad objections to the remaining portions of the subpoena. FES also objected to the timeframes set forth in the subpoena. FES threatened to file a motion to quash if the parties could not reach agreement.

Sierra Club responded to FES's letter the following day. In its response, Sierra Club explained the relevance of the information being sought, cleared up FES's misunderstanding about the scope of Topic 5, and further explained that FES's timing objections were unwarranted.[6] Although all of the information sought is relevant to this case, in the interest of compromise Sierra Club agreed to substantially narrow the scope of the subpoena. Specifically, Sierra Club withdrew its requests for the other cost and revenue information sought in Topics 1 and 2, and withdrew Topics 3 and 4 entirely. And, although the deadline for its testimony was just weeks away, Sierra Club provided FES with flexibility on timing, extending the date for producing the information sought in Topic 5 until December 12, and proposing that depositions begin more than a week later, on December 18.[7] Following subsequent discussions between the parties, FES agreed to produce a witness for Topics 1 and 2 on December 19, 2014, but nevertheless filed a motion to quash on Topics 5 and 6.

[6] Dec. 5 Letter at 2-3, 4 (attached to FES's motion to quash).

[7] Dec. 5 Letter at 2, 3. In a subsequent telephone call, Sierra Club agreed to further extend the deadline for Topic 6, suggesting that FES could provide this information on December 10. FES fails to mention this additional extension in its description of the parties' conferral. FES Mot. at 5.

II. Legal Standard

A subpoena served on a person other than a party to the proceeding should be upheld unless "it is unreasonable or oppressive."[8] The Commission has found that a subpoena is reasonable where it seeks relevant information, i.e., information that may lead to admissible evidence.[9] And the Commission has found that subpoenas were not oppressive where they were properly focused and not unduly burdensome.[10]

Although not binding on the Commission,[11] the standards set forth in Ohio Rule of Civil Procedure 45 are generally consistent with those established in O.A.C. 4901-1-25. A subpoena may be quashed or modified where, *inter alia*, the subpoena fails to allow reasonable time to complete, requires disclosure of protected material with no exception or waiver, or imposes an undue burden. Ohio Civ. R. 45(C)(3). If a motion to quash is based on a claim that responding to the subpoena would unduly burdensome, a court will quash or modify the subpoena unless the subpoenaing party can show a substantial need for the information which "cannot be otherwise met without undue hardship."[12] Ohio courts have held that the moving party carries the burden of proving that a subpoena is unduly burdensome.[13]

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[8] O.A.C. 4901-1-25(C); *see also In the Matter of the Complaint of Westside Cellular Inc. DBA Cellnet v. GTE Mobilnet Incorporated, et al.*, Case No. 93-1758-RC-CSS, 1998 WL 35478518, at *1 (P.U.C.O. Dec. 18, 1998).

[9] *See In the Matter of the Application of Duke Energy Ohio, Inc. to Establish & Adjust the Initial Level of Its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, at 5, 2010 WL 2344078 (P.U.C.O. June 2, 2010) (affirming attorney examiner's denial of a motion to quash).

[10] *See id.* at 6; *see also In re Duke Energy Ohio, Inc.*, Case No. 03-93-EL-ATA, et al., 2007 WL 581489 (P.U.C.O. Jan. 2, 2007) (narrowing subpoena to cover relevant information within the movant's possession or control, and otherwise rejecting movant's arguments that the subpoena is oppressive).

[11] *In the Matter of Roger S. Davis, Notice of Apparent Violation and Intent to Assess Forfeiture*, No. 14-1891-TR-CVF, 2014 WL 6687265, at *3 (P.U.C.O. Nov. 20, 2014) (noting that "the Commission is not bound by the Ohio Rules of Civil Procedure").

[12] Civ R. 45(C)(5). In its motion, FES misstates the legal standard that applies in Ohio judicial proceedings. FES suggests that a subpoenaing party must show both that it has a substantial need for the materials subpoenaed and that the subpoena would not impose an undue burden. FES Mot. at 7. This is

III. Argument

A. The Commission should compel FES to produce the environmental compliance and related cost information sought in Topic 6.

In Topic 6 of the subpoena, Sierra Club seeks any FES analyses that assess the Sammis coal plant's compliance with, or compliance costs associated with, nine pending or anticipated environmental regulations. The requested information amply meets the Commission's standards for a subpoena, and therefore FES's request to quash this portion of the subpoena should be denied.

First, Topic 6 of the subpoena is reasonable.[14] The information being sought relates directly to the Commission's evaluation of the Companies' Application. If Rider RRS is approved, and the proposed transaction with FES is executed, the Companies' customers will become financially responsible for all of the costs of the Sammis plant over the next 15 years, including the environmental compliance costs being sought herein. Because ratepayers will bear the entire costs of the Sammis plant for 15-year period, the parties must be given the opportunity to investigate whether this plant could face increased costs due to future environmental regulations. And because these prospective regulations have the potential to increase

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not the standard. Rather, where a party moves to quash based on undue burden, the court can uphold the subpoena, even if burdensome, if the subpoenaing party has a substantial need for the information. *See Future Communications, Inc. v. Hightower*, 2002-Ohio-2245, ¶ 18, 2002 WL 926769 at *4 (Ohio App. Franklin County May 9, 2002) (affirming denial of motion to quash where the trial court assumed that movant "had made the required showing of undue burden," but found that the subpoenaing party "demonstrated a substantial need for the requested information). Fortunately, the Commission need not wrestle with such problems here, because Sierra Club's narrowly-tailored subpoena poses no risk of undue burden, and there is a substantial need for this information.

[13] *See Future Communications, Inc. v. Hightower*, 2002-Ohio-2245, ¶ 17, 2002 WL 926769 at *3 (Ohio App. Franklin County May 9, 2002) (citing Civ. R. 45(C)(3)(d) and relevant cases).

[14] *See* O.A.C. 4901-1-25(C); *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR, at 5, 2010 WL 2344078 ("the Commission finds that the issue raised by . . . may lead to admissible evidence in this case; thus, supporting the finding that the subpoena is reasonable").

significantly the Sammis plant's operation costs, analyses of those regulations would be important to the parties' and Commission's review of the Companies' proposal. Thus, because this information is relevant to one of the central issues in this proceeding, Topic 6 is reasonable.[15]

Second, FES's compliance with the subpoena would not be oppressive or unduly burdensome.[16] In Topic 6, Sierra Club is requesting a specific category of documents concerning FES analyses and cost estimates of several prospective environmental regulations. Sierra Club is not requesting any analyses other than those which FES has already performed; producing such analyses would pose a modest burden on a company of FES's size and resources.[17] Indeed, given that FES has represented that all responsive information has already been provided to Sierra Club,[18] it would seem that this burden is virtually non-existent.

Assuming this representation is accurate, it is unclear why FES has even bothered to move to quash Topic 6. Presumably this means that FES already performed a thorough search for these responsive documents, and could therefore readily confirm that FES has performed no further analysis of the pending regulations listed in Topic 6. Although such a statement—an unequivocal acknowledgement that FES did not consider the costs of certain prospective regulations—would pose a minimal burden on FES, that information would be incredibly important to the parties' and Commission's review of Rider RRS as it would help demonstrate

[15] FES's unsupported claim to the contrary, *see* FES Mot. at 11-12, is without merit. Elsewhere in its motion, FES baldly asserts, in a pair of parentheticals, that the information being sought in Topics 5 and 6 is not relevant. *Id.* at 7, 8. FES has provided no support for these arguments, nor could it, because the requested information is directly relevant to this case.

[16] *See* O.A.C. 4901-1-25(C).

[17] *See, e.g.*, Case No. 12-1230-EL-SSO (order compelling FirstEnergy to produce information which it had compiled; burden on the Companies found to be particularly minimal in comparison to their size and resources).

[18] FES Mot. at 11.

the uncertainty of the future costs that ratepayers would be made responsible for paying under the rider. And FES should not be permitted to short-circuit the subpoena process through representations in a brief. If FES has not analyzed the potential costs of certain regulations, Sierra Club is entitled to confirm that fact from a competent witness.[19]

Although FES has asserted several other objections to Topic 6, none of these objections have merit. FES argues that Sierra Club has not shown a "substantial need" for the subpoenad material because the information being sought could be obtained from witnesses who filed testimony on the Companies' behalf, such as FirstEnergy witness Paul Harden.[20] FES's argument ignores the lengthy history of Sierra Club's repeated efforts to obtain the requested information from the Companies. Since early September, Sierra Club has been attempting to obtain from the Companies the exact information requested in Topic 6. In response to a request for production, [redacted][21] [redacted].[22] Sierra Club also followed up on its

[19] In its motion to quash, FES further claims that some of these analyses do not exist because the regulations have either not been finalized or have been supplanted by a subsequent regulation. FES Mot. at 11. It strains credulity to suggest that a large, sophisticated investor-owned electric utility like FirstEnergy and its affiliates would not consider the potential impacts, including cost impacts, of major proposed environmental regulations like those listed in Topic 6. (Indeed, we understand that FirstEnergy Corp. filed comments earlier this month on the proposed regulation listed in Topic 6(i), and FirstEnergy has also filed comments on several other of these regulations.) Nor does FES explain why it would no longer possess an analysis of a regulation, such as the Clean Air Interstate Rule ("CAIR"), that was only recently superseded, or of the Cross State Air Pollution Rule, which now that it has been upheld by the U.S. Supreme Court is replacing CAIR.

[20] FES Mot. at 7-9.

[21] [redacted]

[22] [redacted]

requests in correspondence with the Companies' counsel. Despite these repeated efforts, Sierra Club is faced with the Companies' ongoing objection that this information is "within the sole possession of FirstEnergy Solutions Corp." And for this very reason—because the Companies have asserted that the information in Topic 6 is not within their possession, custody, or control—FES is wrong in suggesting that such information could be obtained from the Companies' witnesses.[23] If the Companies' response is accurate, it would not be merely an "undue hardship" but indeed an impossibility for Sierra Club to obtain the information sought from any source other than FES.[24] Where the Companies have already refused the requested information through written discovery, seeking that same information through a deposition of the Companies' witnesses would be a fruitless endeavor, and requiring that such depositions be taken before the issuance of a subpoena is unreasonable and would unfairly prejudice Sierra Club. Because Sierra Club has a substantial need for the information sought in Topic 6, the information cannot be obtained from a source other than FES, and Sierra Club has made exhaustive efforts to obtain such relevant information from the Companies, FES's arguments are without merit.[25]

[23] Sierra Club's persistent efforts to obtain this information, and the Companies' responses to these discovery requests, also disprove FES's characterization of this subpoena as a "fishing expedition." FES Mot. at 8.

[24] *Cf. 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*, No. 12-160-EL-BGN, 2013 WL 2446463 at *7 (Ohio P.S.B. May 28, 2013) (affirming the ALJs' quash of subpoenas where the subpoenaing party "did not identify any substantial need or undue hardship that would occur absent the subpoenas being enforced"). Because Sierra Club has demonstrated a substantial need for the information in Topic 6, *Champaign Wind* supports denial of FES's motion to quash.

[25] FES's related argument that Sierra Club should have discussed Mr. Harden's testimony in its motion to quash, is a red herring. Mr. Harden contributed to the responses to [redacted]. If he could provide this information as a representative of the Companies, he would have already done so. Nor did Mr. Harden's direct testimony provide the information sought [redacted] The lack of information that Mr. Harden provided in response to Sierra Club's discovery requests simply underscores the need for this subpoena.

FES's further claim, that the term "analysis" is vague and overbroad,[26] is similarly misplaced. There is nothing "inherently vague" about this commonly-understood, widely-used term. The subpoena itself provides the necessary context for the analyses being sought; Sierra Club seeks those analyses that assess the Sammis plant's compliance with, or compliance costs associated with, a specified list of nine environmental regulations. FES cannot credibly claim that it does not understand what information is being sought (particularly given its representation that any such analyses have already been produced). Even if the context were not obvious from the subpoena, or the course of discovery in this proceeding, in its December 5 letter Sierra Club addressed this very issue, assuaging FES's concern that Topic 6 might be seeking "physical plant evaluations for [FES's] entire fleet and cost calculations for units which have nothing to do with this proceeding."[27] And the term "analysis" is used, without a specific corresponding definition, throughout the Companies' Application and in many of its discovery responses. In short, as a company owning many generation assets, and having to comply with ever-changing regulations and requirements, FES should understand the significance of this straightforward inquiry, and the Attorney Examiner should require compliance with it.

B. The Commission should compel FES to produce the evaluations of the proposed transaction sought in Topic 5.

In Topic 5 of its subpoena, Sierra Club has requested documents reflecting FES's evaluation of the proposed transaction between itself and the Companies. Because this information also meets the Commission's standards for a subpoena, FES's motion to quash this portion of the subpoena should be denied.

[26] FES Mot. at 11-12.

[27] Dec. 5 Letter at 5.

First, Topic 5 is reasonable.[28] The transaction between FES and the Companies is a key component of the proposed Rider RRS. In combination with this rider, the proposed transaction will tie the Companies' customers to the economic fortunes of FES's power plants for a 15-year period, yet the Companies have provided virtually no information—besides a draft term sheet—regarding the specific terms and conditions of the transaction. By seeking approval of Rider RRS, the Companies have put the financial viability of these plants, and the proposed transaction with FES, at the heart of this proceeding.

Second, production of the information sought in Topic 5 would be neither oppressive nor unduly burdensome.[29] In Topic 5, Sierra Club is requesting a narrow set of documents, namely, documents reflecting FES's evaluations of the proposed transaction with the Companies. Given that only twelve persons represented FES in developing, negotiating, and approving the transaction, and given that the transaction was developed over a period of less than three months earlier this year,[30] producing this information would not be unduly burdensome. Because FES has not satisfied the standards set forth in O.A.C. 4901-1-25(C), FES's request to quash Topic 5 should be denied.

In its motion, FES does not seriously contend that producing this information would be burdensome. Instead, FES argues that the information sought would be protected by the attorney-client privilege or the work product doctrine.[31] This argument lacks merit. Just as a party cannot simply ignore a discovery request where the information sought is privileged, FES

[28] *See* O.A.C. 4901-1-25(C).

[29] *Id.*

[30] *See* Companies' Resp. to OCC-INT-19. The "EDU Team" representing the Companies in negotiating the proposed transaction was formed on May 20, 2014, OCC-INT-19(c), and the proposed ESP was filed with the Commission on August 4.

[31] FES Mot. at 9-10.

cannot use a bald assertion of privilege to avoid responding to this subpoena. Rather, to the extent some documents or communications sought in Topic 5 may be subject to a claim of privilege, FES must fully respond to the subpoena and identify any such documents in a privilege log. With the benefit of this information, the parties will then have an opportunity to assess the legitimacy of the privilege claims. There is no basis for FES's suggestion that a subpoena should be quashed where some of the information sought is privileged,[32] and neither of FES's cited authorities support that proposition.[33]

FES further claims that the information sought in Topic 5 is not relevant because, although conceding that "the Companies[']due diligence in evaluating the proposed transaction may be relevant, what FES thought of the transaction is of absolutely no relevance to the question of the reasonableness of the proposed Rider RRS or its effect on the Companies and their customers." Again, FES's position lacks merit. Although FES itself is not a party in this proceeding, its proposed transaction with the Companies underlies a major component of the Companies' Application. FES's internal evaluations of this transaction, such as any discussions of costs and other liabilities facing Sammis, Davis-Besse, and the OVEC plants, its views on a potential 15-year subsidy from ratepayers, or whether FES expects to be able to cancel the agreement in future years in the event that these plants become profitable again, are directly relevant to the parties' and Commission's review of the proposed ESP.

[32] *See also, e.g.*, *Scott Elliot Smith Co. v. Carasalina, LLC*, 192 Ohio App. 794, 799-800 (Ohio App. Franklin Cty. 2011) (affirming denial of motion to quash based on a broad claim of privilege and explaining that privileged documents should be handled through the process prescribed in Civ. R. 45(D)).

[33] The excerpt cited from Dayton Power & Light's ESP proceeding involved an appeal of an attorney examiner's denial of a motion to compel. *See* Opinion and Order, Case No. 12-426-EL-SSO, at 8-9 (Sept. 4, 2013). The order cited from the Buckeye Wind proceeding likewise involved the review of a denial of a motion to compel. *In the Matter of the Application of Buckeye Wind, LLC for a Certificate to Construct Wind-powered Electric Generation Facilities in Champaign County, Ohio*, Case No. 08-666-EL-BGN, at 10, 2010 WL 1258698 (P.U.C.O. Mar. 22, 2010). Neither decision involved a pending motion to quash, and neither supports the novel legal theory—that unsupported claims of privilege can defeat a subpoena—asserted by FES here.

Put simply, FES owns generating assets whose financial viability will affect ratepayers' obligations under the proposed ESP. By the Companies' repeated admissions, much important information concerning these assets is "within the sole possession of FirstEnergy Solutions Corp.," including the cost and revenue projections, and an evaluation of the Sammis plant's future financial viability. As FES purportedly has sole possession of this information, it seems incredible to expect Sierra Club to obtain this information elsewhere without "undue hardship," especially after Sierra Club has made exhaustive efforts to obtain such information from the Companies.

FES also incorrectly asserts that, to the extent Topic 5 seeks communications with the Companies, that information has already been identified in the Companies' privilege log in response to SC-RPD-49. FES Mot. at 9-10. This is not the case, for several reasons. First, the majority of the documents and communications identified in the Companies' privilege log appear to be legal analyses related to the EDU Team's internal deliberations. Second, to the extent Topic 5 encompasses documents and communications that were transmitted between FES and the EDU Team, any such documents would not be privileged. Ohio law requires that FES be operated independently of the Companies, such that the communications between these two sets of parties would not be privileged. *See* O.A.C. 490 I: 1-37 -04(A)(I) ("Each electric utility and its affiliates that provide services to customers within the electric utility's service territory shall function independently of each other."). Indeed, if FES claimed that such communications or documents are privileged, that would establish that the proposed transaction was not the product of arm's-length bargaining.[34] Third, even though the Companies have claimed privilege with

[34] Moreover, Topic 5 of the subpoena would also serve as a necessary check on the sufficiency of the Companies' discovery responses. In SC-RPD-49, Sierra Club requested information that included communications between the Companies and FES. The Companies' initial response to this discovery request was inadequate, and, after Sierra Club pointed out these deficiencies in several letters to

respect to certain legal analyses relating to their internal deliberation, the Companies nevertheless produced numerous documents in response to SC-RPD-49. This indicates that FES is simply wrong in claiming that FES evaluations of the proposed transaction would necessarily implicate the work-product doctrine and attorney-client privilege.[35]

C. FES's request for a protective order is overbroad.

In addition to its motion to quash, FES has requested that the Commission issue a protective order for all the information sought in Sierra Club's subpoena.[36] Although Sierra Club does not oppose the protection of information that is truly confidential, FES's request is overbroad.

Sierra Club's subpoena requests should not raise any concerns with FES regarding privilege, work product, or confidentiality. As FES acknowledges, the Attorney Examiner has already entered a protective order in this proceeding, and Sierra Club has entered a protective agreement with the Companies. Pursuant to the terms of the protective order, Sierra Club will treat as competitively sensitive and confidential any information or documents FES produces which qualify as "confidential trade secret business information" under the protective order.[37] That does not mean, however, that every document requested by this subpoena is necessarily confidential or that an entire deposition should be treated as confidential. Such information must

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FirstEnergy's counsel, the Companies supplemented their response with many additional documents and communications. Given the inadequacy of the Companies' discovery responses, it is possible that Topic 5 could yield additional FES-EDU Team communications that the Companies failed to produce in discovery. Likewise, if this response by the Companies is accurate, and they indeed lack further responsive documents, FES's production of no new information in response to this subpoena will be neither duplicative nor burdensome.

[35] FES Mot. at 10.

[36] *Id.* at 12-15.

[37] Dec. 5 Letter at 2.

be non-public and be a trade secret or otherwise competitively sensitive for such protections to apply. Because FES seeks a protective order that would broadly apply to *all* information being sought by this subpoena, that request should be denied. Only information that is non-public and competitively sensitive should be entitled to a protective order. If FES narrows the scope of its request to only apply to such confidential information, Sierra Club would not oppose this motion.

IV. Conclusion

For the foregoing reasons, Sierra Club respectfully requests that the Attorney Examiner deny FES's Motion to Quash and the Motion for Protective Order, and uphold the subpoena duces tecum that Sierra Club served on November 26, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Memorandum Contra FirstEnergy Solutions Corp.'s Motion to Quash and for a Protective Order was served upon the following parties via electronic mail on December 15, 2014:

/s/ Christopher J. Allwein

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Summary: Memorandum Contra FirstEnergy Solutions Corporation's Motions to Quash and for a Protective Order - PUBLIC (REDACTED) version. electronically filed by Mr. Christopher J. Allwein on behalf of SIERRA CLUB