

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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PROCEEDINGS

before Mr. Gregory Price, Attorney Examiner, and
Ms. Megan Addison, Law Clerk, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 11-A,
Columbus, Ohio, called at 2 p.m. on Thursday,
December 18, 2014.

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APPEARANCES:

FirstEnergy Corp.
By Mr. James W. Burk
and Ms. Carrie M. Dunn
76 South Main Street
Akron, Ohio 44308

Calfee, Halter & Griswold LLP
By Mr. James Lang
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Cleveland, Ohio 44114

Jones Day
By Mr. David A. Kutik
901 Lakeside Avenue
Cleveland, Ohio 434114

On behalf of the Applicants.

Bruce E. Weston, Ohio Consumers' Counsel
By Mr. Larry Sauer
Mr. Michael Schuler
Mr. Kevin Moore,
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

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

Earthjustice
By Mr. Shannon Fisk
Northeast Office
1617 John F. Kennedy Boulevard, Suite 1675
Philadelphia, Pennsylvania 19103

Williams Allwein & Moser, LLC
By Mr. Christopher J. Allwein
1500 Third Avenue, Suite 330
Columbus, Ohio 43212

On behalf of the Sierra Club.

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APPEARANCES: (Continued)

Bricker & Eckler, LLP
By Mr. Dane Stinson
and Mr. Dylan Borchers
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Columbus, Ohio 43215-4291

Bricker & Eckler, LLP
By Mr. Glenn S. Krassen
1001 Lakeside Avenue East, Suite 1350
Cleveland, Ohio 44114

On behalf of the Northeast Ohio Public
Energy Council.

Ohio Partners for Affordable Energy
By Ms. Colleen Mooney
231 West Lima Street
Findlay, Ohio 45846

On behalf of the Ohio Partners for
Affordable Energy.

McNees, Wallace & Nurick LLC
By Mr. Matthew Pritchard
21 East State Street, 17th Floor
Columbus, Ohio 43215

On behalf of the Industrial Energy Users
of Ohio.

IGS Energy
By Mr. Joseph Olikier
6100 Emerald Parkway
Dublin, Ohio 43016

On behalf of IGS Energy.

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

On behalf of PJM Power Providers Group
and the Electric Power Supply
Association.

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APPEARANCES: (Continued)

Taft, Stettinius & Hollister LLP
By Mr. Mark Yurick
and Mr. Devin Parram
65 East State Street, Suite 1000
Columbus, Ohio 43215

On behalf of The Kroger Company.

Mike DeWine, Ohio Attorney General
By Mr. William L. Wright,
Section Chief
Mr. Ryan O'Rourke
Mr. Thomas Lindgren
Mr. Thomas McNamee,
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 6th Floor
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On behalf of the Staff of the PUCO.

Kravitz, Brown & Dortch, LLC
By Mr. Michael Dortch
65 East State Street, Suite 200
Columbus, Ohio 43215

On behalf of Dynegy, Inc.

Duke Energy Ohio, Inc.
By Ms. Amy Spiller
and Ms. Jeanne Kingery
139 East Fourth Street
Cincinnati, Ohio 45201

On behalf of the Duke Energy Ohio, Inc.

Direct Energy
By Mr. Joseph M. Clark
21 East State Street, 19th Floor
Columbus, Ohio 43215

On behalf of the Direct Energy Services,
LLC; Direct Energy Business, LLC; and
Direct Energy Marketing, LLC.

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APPEARANCES: (Continued)

Boehm, Kurtz & Lowry
By Mr. Kurt Boehm
36 East Seventh Street, Suite 1510
Cincinnati, Ohio 45202

On behalf of the Ohio Energy Group.

Carpenter Lipps & Leland LLP
By Ms. Kimberly W. Bojko
Ms. Rebecca Hussey
Mr. Jon Allison
280 North High Street, Suite 1300
Columbus, Ohio 43215

On behalf of the Ohio Manufacturers'
Association Energy Group.

FirstEnergy Corp.
By Mr. Mark A. Hayden
76 South Main Street
Akron, Ohio 44308

Latham & Watkins LLP
By Mr. David L. Schwartz
555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304

On behalf of FirstEnergy Services.

Dickinson Wright, PLLC
By Mr. Terrence O'Donnell
150 East Gay Street, Suite 2400
Columbus, Ohio 43215

On behalf of the Mid-Atlantic Renewable
Energy Coalition.

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Thursday Afternoon Session,
December 18, 2014.

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EXAMINER PRICE: Let's go on the record.

LAW CLERK ADDISON: The Public Utilities
Commission of Ohio calls for a prehearing conference
at this time and place Case No. 14-1297-EL-SSO, being
in the Matter of the Application of Ohio Edison
Company, The Cleveland Electric Illuminating Company,
and The Toledo Edison Company for Authority to
Provide a Standard Service Offer Pursuant to RC
4928.143 in the Form of an Electric Security Plan.

My name is Megan Addison and with me is
Gregory Price and we are the attorneys assigned to
preside over this prehearing conference. Let's go
ahead and begin by taking appearances starting with
the company.

MR. BURK: Thank you, your Honor. On
behalf of Ohio Edison, The Cleveland Electric
Illuminating Company, and The Toledo Edison Company,
James W. Burk and Carrie M. Dunn, 76 South Main
Street, Akron, Ohio. Also representing the companies
today David Kutik of the Jones Day law firm and he is
located at 901 Lakeside Avenue, Cleveland, Ohio.
Also today I would like to make the appearance on

1 behalf of James Lang and Trevor Alexander of the
2 Calfee, Halter & Griswold law firm. Their address is
3 the Calfee Building, 1405 East 6th Street, Cleveland,
4 Ohio.

5 MR. HAYDEN: Good afternoon, your Honor.
6 On behalf of FirstEnergy Solutions, Mark Hayden, 76
7 South Main Street, Akron, Ohio 44308. Joining me
8 today on behalf of FirstEnergy Solutions is David
9 Schwartz from the law firm of Latham & Watkins.
10 Address is 555 Eleventh Street Northwest, Suite 1000,
11 Washington, D.C., 20004.

12 MS. SPILLER: Good afternoon, your Honor.
13 Amy Spiller and Jeanne Kingery on behalf of Duke
14 Energy Ohio, 139 East Fourth Street, Cincinnati, Ohio
15 45202.

16 MR. DORTCH: Good afternoon, your Honors.
17 Michael Dortch, Kravitz, Brown & Dortch, on behalf of
18 Dynegy, Inc.

19 MR. SETTINERI: Good afternoon, your
20 Honors. Mike Settineri, law firm of Vorys, Sater,
21 Seymour & Pease, 52 East Gay Street, Columbus, Ohio
22 43215, on behalf of PJM Power Providers Group and the
23 Electric Power Supply Association.

24 MR. PRITCHARD: Good afternoon, your
25 Honors. On behalf of the Industrial Users of Ohio, I

1 am Matt Pritchard with the law firm of McNees,
2 Wallace & Nurick, 21 East State Street, Columbus,
3 Ohio 43215.

4 MR. OLIKER: Good afternoon, your Honors.
5 On behalf of IGS Energy, Joseph Olikier, 6100 Emerald
6 Parkway Dublin, Ohio 43016.

7 MR. ALLWEIN: Good afternoon, your Honor.
8 On behalf of Sierra Club, Christopher J. Allwein,
9 Williams, Allwein & Moser, 1500 West Third Avenue,
10 Suite 330, that's Columbus, Ohio 43212 and Shannon
11 Fisk of Earthjustice, 1617 John F. Kennedy Boulevard,
12 Suite 1675, Philadelphia, Pennsylvania 19103.

13 MS. BOJKO: Thank you, your Honors. On
14 behalf of the Ohio Manufacturers' Association Energy
15 Group, the law firm of Carpenter Lipps & Leland, I am
16 Kimberly W. Bojko. Also I would like to enter the
17 appearance of Rebecca Hussey and Jon Allison, 280
18 North High Street, Columbus, Ohio 43215, Suite 1300.

19 MR. YURICK: Good afternoon, your Honor.
20 On behalf of The Kroger Company, Mark Yurick and
21 Devon Parram of the firm Taft, Stettinius &
22 Hollister, 65 East State Street, Suite 1000, that's
23 Columbus, 43215.

24 MR. O'ROURKE: Good afternoon, your
25 Honor. Ryan O'Rourke on behalf of the staff. Also

entering an appearance of Thomas McNamee and Thomas Lindgren. Address is 180 East Broad Street, 6th Floor, Columbus, Ohio 43215.

MR. BOEHM: Good afternoon, your Honor. Kurt Boehm appearing on behalf of the Ohio Energy Group, the law firm of Boehm, Kurtz & Lowery, 36 East Seventh Street, Suite 1510, Cincinnati, Ohio 45202.

MR. SAUER: Thank you, your Honors. On behalf of the residential customers of FirstEnergy, the Office of the Ohio Consumers' Counsel, Bruce J. Weston, Consumers' Counsel, Larry Sauer, Mike Schuler, Kevin Moore, Assistant Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215.

EXAMINER PRICE: Congratulations on your new position, Mr. Sauer.

MR. SAUER: Thank you, your Honor.

MR. STINSON: Thank you, your Honor. On behalf of Northeast Ohio Public Energy Council, Glenn S. Krassen, 1001 Lakeside Avenue, Suite 1350, Cleveland, Ohio 44114; Dane Stinson and Dylan Borchers, 100 South Third Street, Columbus, Ohio 43215 of the firm Bricker & Eckler. Thank you.

MR. CLARK: On behalf of the Direct Energy Services, LLC; Direct Energy Business, LLC;

1 and Direct Energy Marketing, LLC, Joseph M. Clark, 21
2 East State Street, 19th Floor, Columbus, Ohio 43215.

3 MS. MOONEY: On behalf of the Ohio
4 Partners for Affordable Energy, I'm Colleen Mooney,
5 231 West Lima Street, Findlay, Ohio.

6 MR. O'DONNELL: On behalf of Mid-Atlantic
7 Renewable Energy Coalition, Terrence O'Donnell,
8 Dickinson Wright, 150 East Gay Street, Suite 2400,
9 Columbus, Ohio 43215.

10 EXAMINER PRICE: Thank you. Anybody
11 else? Did we miss anybody?

12 Okay. We have four issues to take up
13 today in relation to some other matters the parties
14 mentioned while we were off the record. We have the
15 OCC and NOPEC requests for certification of the
16 interlocutory appeal, we have an IGS motion to
17 compel, we have an FES motion to quash a subpoena
18 from the Sierra Club, and we have an FES motion to
19 quash a subpoena from PJM Power Producers.

20 Are there any other pending motions other
21 than the matters we discussed off the record that we
22 need to rule on today?

23 Okay. Let's begin today with the
24 OCC/NOPEC request for certification of interlocutory
25 appeal. The Examiners have, of course, read all the

1 pleadings that have already been filed with respect
2 to all the motions. But, Mr. Sauer, if you would
3 like to take a couple of minutes to briefly highlight
4 your arguments.

5 MR. SAUER: Mr. Stinson.

6 MR. STINSON: Thank you, your Honor. I
7 understand you have read the motions and the replies,
8 and you are fully informed, but just by way of quick
9 background on December 8, 2014, NOPEC and OCC did
10 file the request to certify the interlocutory appeal
11 of the Examiner's entry of December 1. The entry
12 denied the joint movants' motion to compel
13 FirstEnergy to provide confidential information under
14 the form of a protective agreement that the
15 Commission had -- that had commonly been used before
16 the PUCO.

17 Instead the entry approved a two-tier
18 joint protective agreement. Under the first tier of
19 the agreement confidential information would be
20 provided to the parties as traditionally would be the
21 case under the protective agreement proposed by the
22 joint movants. Under the second tier of the
23 agreement only the parties' counsel, counsels'
24 employees, and consultants who were not involved in
25 the decision making for competitors or customers

could have the competitively-sensitive confidential information.

We are here before the Commission on the motion to certify the interlocutory appeal. The Bench is aware of the standards for doing that. The Bench must find either that the ruling is a departure from the past precedent, presents a new or novel issue, and/or resolves a prejudice to the parties if the Commission ultimately reverses the Examiner's ruling.

As stated in the motions and responses that the ruling is a departure from the past precedent, the cases cited by the joint movants show that when the Commission has compelled the use of a protective agreement, it has compelled to use the form of the agreement proposed by the joint movants. The Commission most recently compelled the use of the agreement in the recent Duke ESP case.

As to a new or novel issue, the Commission has never compelled to use or otherwise to sanction to use a tier-protected agreement. The entry of December 1, 2014, does compel -- excuse me, presents a new issue for the Commission. As to prejudice, the two-tiered agreement proposed by FirstEnergy would restrict the consultants that NOPEC

1 and OCC could use in this proceeding. For example,
 2 the use of that agreement would prohibit NOPEC of
 3 even considering the use of a consultant expert
 4 witness employed for FE or for FirstEnergy of the
 5 last ESP case. Also the --

6 EXAMINER PRICE: Could you tell me why
 7 your expert -- your expert, outside expert, I assume
 8 you are talking Mr. Frye; is that correct?

9 MR. STINSON: That was the witness that
 10 was used in the last ESP proceeding.

11 EXAMINER PRICE: Why is he any different
 12 because he is employed by NOPEC than any of the other
 13 outside experts who are employed by IGS, Direct
 14 Energy, or any of the other CRES providers?

15 MR. STINSON: I believe under the
 16 agreement someone like Mr. Frye who gives advice to
 17 other competitive providers would be precluded from
 18 having access to the competitively-sensitive --

19 EXAMINER PRICE: I understand that. Why
 20 is he different from any of the other marketers? He
 21 is advising people on retail competitive wholesale
 22 bids in FirstEnergy Service territory just like IGS
 23 or Direct Energy, if they had an outside consultant,
 24 they have to choose them, correct? The fact that he
 25 is employed by NOPEC doesn't make it any different

1 than any other CRES provider, does it?

2 MR. STINSON: All those persons under the
3 agreement -- under the proposed protective agreement
4 by FirstEnergy would be precluded from having
5 competitively-sensitive information.

6 EXAMINER PRICE: So, no, he is no
7 different.

8 MR. STINSON: Yeah.

9 EXAMINER PRICE: Sorry.

10 MR. STINSON: There is also prejudice
11 involved by the fact that the parties to the
12 proceeding, in this case NOPEC, would not have access
13 to the information and the costs that they would be
14 paying for in the FirstEnergy and FirstEnergy
15 Solutions purchase power agreement. NOPEC's members
16 and OCC's residential customers would be expected to
17 pay the cost of the ESP plans at issue, but customers
18 are not given access to that cost if, in fact, the
19 two-tiered agreement hides the costs of the PPA to
20 the public.

21 EXAMINER PRICE: Mr. Stinson.

22 MR. STINSON: Yes.

23 EXAMINER PRICE: Under the normal
24 one-tiered confidentiality agreement you wouldn't be
25 sharing that with the customers anyway, would you?

1 MR. STINSON: Well, that's a protective
2 one-tier --

3 EXAMINER PRICE: But you wouldn't be
4 sharing it with your customers. You are not going to
5 share it with the residential customers of Ohio, are
6 you?

7 MR. STINSON: The person who had access
8 to the information signed a nondisclosure agreement,
9 protective agreement. In this case what would happen
10 would be that NOPEC's executive director and NOPEC's
11 board would sign the agreement, the nondisclosure
12 agreement, would be given access --

13 EXAMINER PRICE: I understand that.

14 MR. KUTIK: Your Honor, could Mr. Stinson
15 either speak up or turn on his microphone?

16 MR. STINSON: I'm sorry.

17 EXAMINER PRICE: I understand what you
18 are saying about the board members, but I'm just
19 saying you said you couldn't share with the
20 customers. Under any circumstances, any protective
21 agreement, you are not going to share the information
22 with the customers, right?

23 MR. STINSON: No.

24 EXAMINER PRICE: Okay.

25 MR. STINSON: No.

1 EXAMINER PRICE: That's not relevant,
2 right? Sharing it with the customers is not at
3 issue. It is sharing it with the board members.

4 MR. STINSON: We would limit it to
5 sharing with the executive director and the NOPEC
6 board members. And, in fact, we are asking no more
7 than what FE -- I'm sorry, keep referring to them as
8 FE. We are asking no more than what FirstEnergy
9 Solutions and FirstEnergy did with respect to the
10 protective order in this case. If you look at the
11 motion for protective order in that case, FirstEnergy
12 and FirstEnergy Solutions entered into a
13 nondisclosure agreement which was restricted to
14 provide the information to FirstEnergy for purposes
15 of the transaction in this case only. That's the
16 same thing we are asking for.

17 In fact, here FirstEnergy is going to
18 become a customer of FirstEnergy Solutions.
19 FirstEnergy Solutions is provided that information
20 to -- FirstEnergy Solutions provided information to
21 FirstEnergy. So there's no difference in providing
22 that information to us. FirstEnergy Solutions
23 obviously has some type of security that FirstEnergy
24 is not going to provide or use that information
25 beyond the confines of this agreement and that's what

1 we are proposing too is that our board members, our
2 executive directors of NOPEC have the information.
3 It's sufficiently protected by the protective
4 agreement we have and won't be used beyond the
5 confines of this agreement. And that's our summary.

6 EXAMINER PRICE: Mr. Sauer, who does OCC
7 employ that they can't operate under with the
8 two-tiered agreement proposed by the companies?

9 MR. SAUER: Are you specifically saying
10 OCC employees or outside consultants?

11 EXAMINER PRICE: OCC employees.

12 MR. SAUER: Just employees?

13 EXAMINER PRICE: Yeah.

14 MR. SAUER: I don't know that there is
15 anyone we would not be able to share two-tiered
16 information with.

17 EXAMINER PRICE: Okay. With respect
18 again to your outside experts, that's the same
19 restriction of every other -- there is nothing
20 special about OCC's outside experts. That's the same
21 restriction all the other parties of this proceeding
22 are operating under; is that correct?

23 MR. SAUER: All the parties were provided
24 the same protective -- to my understanding all
25 parties were provided the same protective agreement

1 and asked to sign the same protective agreement.

2 EXAMINER PRICE: I thought in the
3 companies' pleadings it indicated that the witnesses
4 you used in the last FES SSO, outside experts,
5 wouldn't be precluded from participating; is that
6 correct? Am I misstating that? Mr. Wilson, would he
7 been able to participate in this proceeding under the
8 two-tiered agreement?

9 MR. SAUER: I believe he would.

10 EXAMINER PRICE: Who else did you have
11 last time in the SSO case?

12 MR. SAUER: I think Mr. Wilson was the
13 only outside consultant we had.

14 EXAMINER PRICE: So what's the prejudice
15 to OCC if all of your employees can operate under the
16 two-tiered agreement and the outside expert you
17 typically use? Because I think Mr. Wilson actually
18 testified in the last two FE SSO proceedings and the
19 outside experts you typically use that operate under
20 the agreement, where is the prejudice to OCC?

21 MR. SAUER: Well, the prejudice could
22 come in if we go beyond a consult we've used in the
23 past and that consultant would have a restriction
24 under the two-tiered --

25 EXAMINER PRICE: Do you have a consultant

1 you wish to retain that you can't under the
2 two-tiered agreement?

3 MR. SAUER: Are you saying has that
4 happened?

5 EXAMINER PRICE: Yeah. I am asking is
6 there anybody who you would otherwise retain for this
7 proceeding but for the two-tiered agreement?

8 MR. SAUER: I don't think we found that
9 person yet. Your Honor?

10 EXAMINER PRICE: Yes.

11 MR. SAUER: In the -- in the company's
12 memo contra to our interlocutory appeal there were a
13 couple of statements that OCC had signed a two-tiered
14 agreement in the AEP case and that is not correct.
15 What they attached to the motion to compel was an
16 unexecuted document between AEP and FirstEnergy. If
17 you would like to see it, I have an executed document
18 that was used in that case that does not have the
19 two-tiered requirements.

20 There is another case that they cited
21 that was -- had protected information in it. It was
22 an Ohio Power storm damage case and that case we
23 signed the standard protective agreement despite it
24 having confidential information involving vendors.

25 And the third case that they had cited in

1 their --

2 EXAMINER PRICE: You are saying the Ohio
3 Power storm damage was not a two-tiered.

4 MR. SAUER: The protective agreement was
5 the standard agreement. It did not have two-tiered
6 protection.

7 EXAMINER PRICE: Just for purposes of
8 today's argument let's just call it number of tiers.
9 It was either one-tier or two-tier and that way the
10 record will be clear.

11 MR. SAUER: Okay. The third case we
12 cited we did not intervene and did not have
13 a necessity to sign a protective agreement.

14 EXAMINER PRICE: How about they cite a
15 number of, I will say, vintage cases but fairly older
16 cases where the Commission had blessed eyes only for
17 attorneys cases. Do you have any quibble with those?

18 MR. SAUER: I have not been presented a
19 protective agreement under those conditions before,
20 and I haven't found one that our office has signed.

21 EXAMINER PRICE: Thank you.

22 Mr. Kutik?

23 MR. KUTIK: Well, your Honor, I would be
24 glad to address it, but I guess I would ask as a
25 matter of order if there is anyone else who wants to

1 speak in favor of the motion, have them be heard
2 before our comments.

3 EXAMINER PRICE: Fair enough. Would
4 anyone like to speak in favor of NOPEC's and OCC's
5 interlocutory appeal?

6 Mr. Olikier.

7 MR. OLIKER: Just briefly, your Honor. I
8 think we all know that FirstEnergy has employed
9 witnesses in the past that were outside experts that
10 do lots of work in the PJM energy work, Dr.
11 Monschnitzer, Jonathan Lesser. These are individuals
12 that advise people all over PJM and they have seen
13 confidential information for these companies so I
14 think it's, you know, kind of unfair to allow them to
15 do that and then not allow others to.

16 EXAMINER PRICE: Thank you.

17 Anybody else?

18 Mr. Kutik.

19 MR. KUTIK: Thank you, your Honor. The
20 motion before us fails on each of the tiers or parts
21 of the requirement for interlocutory appeal. It
22 fails to show that there is departure from past
23 precedent. And specifically what their error is
24 assuming that what was good to protect information in
25 a prior case somehow is precedent as to what's

1 appropriate to protect information in this case.

2 What that argument overlooks is that the information
3 in the prior case is different in time and scope and
4 with respect to the players involved in the
5 marketplace than this case.

6 What the common thing that the Bench did
7 here to the prior cases is to balance the interest of
8 the parties, the interest of the parties in obtaining
9 discovery versus the interest in the parties giving
10 up that information and protecting legitimate trade
11 secrets and proprietary information. That's the
12 common thing.

13 And to say that simply because a
14 protective order worked in a prior case without
15 looking at the information that's being protected and
16 the protection that's needed because it's different
17 information is an error. So, for example, the fact
18 that there was a one-tiered protective agreement in
19 ESP -- in our ESP III case is irrelevant because it
20 wasn't the type of information about generation costs
21 or specific plants or pricing or pricing forecasts
22 that there were -- that exist here wasn't involved in
23 that case.

24 The second error is the notion that this
25 case involves something new. As you observed in your

1 questions to counsel, attorneys' eyes only or
2 multi-tiered protective agreements are not new. They
3 are not new at the Commission. Beside the Westside
4 Cellular we cited The River Gas versus Biehl case, a
5 case I was, in fact, involved in where there's
6 attorneys' eyes only protection. And the Commission
7 found that to be appropriate given the information
8 that was available in that case.

9 Similarly -- or thirdly, there is no
10 demonstration that there has been prejudice. There
11 was an argument made that, gee, if we sign this
12 protective agreement, somehow we are violating our
13 professional duties to our clients. Well, that would
14 be a surprise to the parties that have signed
15 attorneys' eyes only protective agreements in --
16 before -- in Commission cases and in cases in civil
17 court and in intellectual property cases where this
18 is very common. It would also be a surprise to the
19 16 parties that have already signed this protective
20 agreement.

21 And with respect to the specific
22 prejudices that they mention, again, it's very vague.
23 The protective agreement allows a lawyer to
24 characterize the information without revealing it.
25 So what they are saying is they want to sit down with

1 their client and say, gee, the cost -- the X cost at
2 Y plant is N for 2018. Are they really going to have
3 that type of discussion with their client? Of course
4 not.

5 And their further comment that, gee,
6 there is no -- there is no harm to FirstEnergy
7 Solutions here is also wrong. NOPEC is a customer.
8 There are ongoing negotiations. There are ongoing
9 services. There was a recent amendment to an
10 agreement. It's an ongoing relationship, and for a
11 customer to find out about FirstEnergy Solutions
12 costs and pricing, pricing expectations, clearly is
13 an advantage to NOPEC. The -- it is undisputed that
14 NOPEC's executive director is the same person that's
15 the -- that's in charge of NOPEC, Inc., a CRES
16 provider. They said, well, gee, NOPEC, Inc., is
17 inactive.

18 Well, if that's so, and maybe they are
19 not doing business, the fact of the matter is they
20 reupped for their corporate certification two years
21 ago and they reupped for their CRES certification
22 this year. So if they are not interested in doing
23 business, why did they do that?

24 There are real harms here and the Bench
25 appropriately balanced the harms here and, in fact,

1 we have gone forward. They have signed the agreement
2 that you -- you have blessed and they have gotten the
3 information and we are moving forward with the case
4 and that's what we should do in this case.

5 EXAMINER PRICE: Mr. Stinson? Mr. Sauer?

6 MR. STINSON: Thank you. Just a few
7 other comments. As far as a departure from
8 precedent, that the agreement that the joint movants
9 have offered has been used by the Commission for
10 decades. I think it is a traditional and standard
11 agreement that should be honored and has been honored
12 by the Commission. Whenever the Commission has
13 compelled the use of an agreement, it has been that
14 agreement.

15 There would be a departure of precedent
16 by the current entry by compelling the use of the
17 two-tiered agreement that FirstEnergy has proposed.

18 EXAMINER PRICE: Let's talk about that
19 for a second because I know you mentioned the Duke
20 agreement in your pleading. Isn't it true that the
21 issues -- the dispute between the Duke -- between
22 Duke Energy Ohio and the intervenors in that case was
23 a different dispute than we are talking about here?
24 In the Duke case, if I recall correctly, Duke wanted
25 to preclude the use of the information in any

1 subsequent proceeding. And Duke also, I believe,
2 asked the intervenors to acknowledge that the
3 confidential information was, in fact, a trade
4 secret, and Duke also asked the intervenors to
5 acknowledge the company would suffer irreparable harm
6 if the information was disclosed. Isn't that true?

7 MR. STINSON: Those were the issues that
8 were specifically raised in the Duke agreement. The
9 Duke -- the Duke agreement did have a two-tiered
10 protective provision in it, and the Commission
11 ordered the single-tiered protection.

12 EXAMINER PRICE: Nobody briefed the
13 two-tiered issue, did they, Mr. Stinson?

14 MR. STINSON: Pardon me?

15 EXAMINER PRICE: Nobody breached the
16 two-tiered issue, did they?

17 MR. STINSON: I don't believe so but the
18 point is from our citation of that case it's the most
19 recent when the Commission had compelled the use of a
20 protective agreement. It compelled the use of the
21 single-tiered protective agreement. And that's the
22 Commission precedent. The Commission has never
23 compelled or sanctioned the use of a two-tiered
24 agreement.

25 I believe FirstEnergy mentioned the

1 Westside and River Gas cases. Those are both cases
2 where the parties voluntarily -- voluntarily entered
3 into those types of agreements. The Commission never
4 ruled on them, never sanctioned them, never did
5 anything. They recognized that the parties did it.

6 And the other cases, the court cases,
7 that FirstEnergy cites, the parties had also entered
8 into the attorneys' eyes only agreement, and the
9 court actually found they got a raw deal by the -- by
10 the parties' attorneys and said -- the courts said
11 they couldn't change that so they had to honor the
12 attorneys' eyes only agreement and there were other
13 ways to protect the competitively-sensitive agreement
14 information and that way is to limit the use of
15 agreements to the proceeding at issue.

16 Again, that's the standard in that case
17 and, again, I am stating that's what FirstEnergy and
18 FirstEnergy Solutions has done in this case.
19 FirstEnergy has the information based upon the -- its
20 limited use for this proceeding only and that's what
21 we are asking for. I don't know why we should be
22 treated differently.

23 EXAMINER PRICE: Anybody else?

24 Mr. Kutik.

25 MR. STINSON: As far as the prejudice

1 too, Mr. Kutik presented that. I will go to the
2 customer. NOPEC is a customer. NOPEC is a
3 competitor. I don't think in a prior case that we've
4 cited -- have made that distinction. In their
5 memorandum and replies FirstEnergy has indicated that
6 NOPEC is a -- is a customer, but NOPEC has an
7 agreement with FirstEnergy Solutions through 2019,
8 beyond the point at which this information will still
9 be deemed confidential.

10 I believe FirstEnergy cites to the fact
11 that FES and NOPEC have -- have had ongoing, and the
12 key word is had ongoing, conversations and agreements
13 in the past. There's no indication those are going
14 to be ongoing in the future. FirstEnergy has
15 restructured its operations. My understanding is
16 they are no longer offering service to residential or
17 small commercial customers. They are focusing on
18 industrial customers, and they are only servicing
19 aggregations that they have. There is no indication
20 there are further agreements coming.

21 As far as NOPEC -- NOPEC, Inc., as a
22 compet --

23 EXAMINER PRICE: Can you explain for the
24 Bench who NOPEC, Inc., is?

25 MR. STINSON: NOPEC, Inc., is a certified

1 CRES before the Commission that is not operational
2 and has never been operational.

3 EXAMINER PRICE: Is NOPEC, Inc., for
4 profit?

5 MR. STINSON: No, it is not for profit.

6 EXAMINER PRICE: Who owns NOPEC, Inc.?

7 MR. STINSON: The sole owner of NOPEC,
8 Inc., is NOPEC.

9 EXAMINER PRICE: And is Mr. Kutik's
10 representation that the president -- the executive
11 director of NOPEC the aggregation is the same person
12 who is the president; is that correct?

13 MR. STINSON: Those are both in the
14 Commission's records, yes.

15 EXAMINER PRICE: Does NOPEC, Inc., have a
16 Board of Directors?

17 MR. STINSON: Not to my knowledge.

18 EXAMINER PRICE: Do they have any
19 officers besides the president?

20 MR. STINSON: I would have -- I would
21 have to check on that. Again, that would be in the
22 Commission's certification files. Yes, I do believe
23 they have -- I have that. I believe there is a
24 separate Board of Directors.

25 EXAMINER PRICE: You know my next

1 question is going to be is the Board of Directors the
2 same individuals as the NOPEC board so.

3 MR. STINSON: Well, there's a different
4 Board of Directors. And subject to check, I would
5 say they are not the same, that the governance is
6 separate or different between the two, that NOPEC is
7 a council of governments under Section 67 of the
8 Revised Code and their board is comprised of I
9 believe persons who are public officials from the
10 various communities that make up NOPEC. The Board of
11 Directors of NOPEC, Inc., are separate and distinct
12 individuals.

13 EXAMINER PRICE: Can you explain to me
14 why you believe that a government aggregator is not a
15 direct competitor to a competitive retail electric
16 supplier in any -- in that government aggregator's
17 service territory? Even if your customer -- if FES
18 were, and I understand they may not be any more,
19 offering an individual offer for any individual in
20 the NOPEC zone, why is NOPEC not a competitor to FES
21 under that circumstance?

22 MR. STINSON: Are you talking about NOPEC
23 or NOPEC --

24 EXAMINER PRICE: NOPEC the government
25 aggregation.

1 MR. STINSON: NOPEC the governmental
2 aggregation?

3 EXAMINER PRICE: Yes.

4 MR. STINSON: I'm sorry, could you
5 restate that, please?

6 EXAMINER PRICE: Sure. NOPEC is a
7 government aggregation. Isn't it competing with
8 other marketers for customers? Isn't it competing
9 with Direct Energy, IGS, FES for customers?

10 MR. STINSON: It doesn't compete with
11 those customers in the same sense.

12 EXAMINER PRICE: Why?

13 MR. STINSON: It's a governmental
14 aggregation, and FES is the one who's handling the
15 aggregation.

16 EXAMINER PRICE: But if I am a customer,
17 if I am a retail shopping customer, I might have my
18 selection of a governmental aggregation offer, a
19 standard service offer, and an offer by any number of
20 marketers. Aren't all of those offers competing with
21 each other?

22 MR. STINSON: I don't believe so in
23 that -- I don't see how the NOPEC the aggregation can
24 be a competitor of FirstEnergy Solutions when
25 FirstEnergy Solutions is providing the service to the

1 governmental aggregation.

2 EXAMINER PRICE: Is there some
3 arrangement that FES won't make an individual offer
4 in NOPEC's area?

5 MR. STINSON: I don't know if I can
6 answer that on the public record, your Honor.

7 EXAMINER PRICE: Oh, that's not a
8 problem. Can we clear the room of anybody who has
9 not signed a confidentiality agreement and we will go
10 on the --

11 MS. SPILLER: With NOPEC or with the
12 applicant?

13 MR. KUTIK: With the company.

14 EXAMINER PRICE: That's with the company.
15 I hate to clear everybody from the room.

16 MR. OLIKER: Can you write it on a piece
17 of paper?

18 MR. KUTIK: Your Honor, what was your
19 question, just so we can be clear?

20 EXAMINER PRICE: I just asked if
21 Mr. Stinson is saying he can't imagine how
22 FirstEnergy Solutions is a competitor to the
23 aggregation when FirstEnergy Solutions is the
24 supplier behind the aggregation. I was simply asking
25 is FES precluded -- it has individual offers or had

1 individual offers out there in the past from taking
2 customers in the aggregation who choose to go with
3 the individual offer as opposed to the aggregation
4 offer? I am asking is there some contractual pre --
5 issue precluding that. That's all I am asking but
6 it's not worth the trouble clearing this entire room
7 so we will move on.

8 Mr. Olikar, anything you would like to
9 add to the voluminous record?

10 MR. OLIKER: I think enough has been
11 said, your Honor.

12 EXAMINER PRICE: Mr. Kutik, you can have
13 the last word.

14 MR. KUTIK: Your Honor, just a few
15 points. Again, the fact that there was a most recent
16 order in the Duke case on a protective agreement is
17 of no moment given the difference in the information
18 that was at issue there and here. The notion that
19 all these relationships with FirstEnergy are in the
20 past tense with NOPEC is directly refuted by
21 Mr. Smith's affidavit which we attached as Exhibit C
22 to our original memorandum contra to their motion to
23 compel.

24 Mr. Smith said specifically that they
25 have -- it has -- it currently has a number of

1 ongoing relationships, and they are -- they are --
 2 they regularly meet with NOPEC. They have -- they
 3 have amended their master agreement several times,
 4 and they have recently arrived at an agreement in
 5 principle on another service agreement. It is an
 6 ongoing organic relationship which has a number of
 7 fronts and a number of services that are provided.
 8 And those are the facts that are undisputed on the
 9 record.

10 And, lastly, your Honor, in terms of
 11 their -- of NOPEC, Inc.'s renewal application they
 12 specifically said that NOPEC expected to obtain
 13 wholesale information in order to provide retail
 14 generation service to eligible customers within
 15 Northeast Ohio Public Energy Council's electric
 16 aggregation program member communities. So they
 17 obviously have represented to the Commission that
 18 they want to be active at some time in the future.

19 MR. OLIKER: Your Honor, I apologize.

20 EXAMINER PRICE: Mr. Oliker.

21 MR. OLIKER: I indicated I didn't want to
 22 say anything else but there is one brief thing I
 23 would like to say, if I may.

24 EXAMINER PRICE: Fire away.

25 MR. OLIKER: The notion that these facts

1 are somehow a little different is astounding to me
2 given that you were in the DP&L case, so were many of
3 the parties in this room, and I am currently looking
4 at redacted testimony of Jonathan Lesser regarding a
5 technical accounting memorandum of very confidential
6 information of DP&L's, so FES's outside witnesses did
7 look at that information, and it is very similar.

8 EXAMINER PRICE: I understand what you
9 are saying, Mr. Olikier, but just because Duke may
10 have made one decision or Dayton Power and Light may
11 have made one decision as to what they felt was
12 proper, I don't think it's binding on FirstEnergy.

13 Maybe Dayton Power and Light should have
14 had a two-tiered system. I don't know. They made
15 the decision that they made and there were no
16 disputes thankfully over protective agreements in the
17 DP&L SSO, lots of other disputes but none over the
18 protective agreement and I appreciate that. But I
19 don't think you can necessarily hold DP&L's legal
20 decision against the company. We can -- we can only
21 go with the dispute that's in front of us.

22 But I did actually have a question for
23 Mr. Kutik and that is is this the first time
24 FirstEnergy has used a two-tiered agreement?

25 MR. KUTIK: No, your Honor. There --

1 there was what I will call a manner of a two-tiered
2 agreement in the Rider AER rider case. I don't -- I
3 don't want to represent to the Bench that it was the
4 same, but it had two tiers.

5 EXAMINER PRICE: What you are saying it
6 was different from the ones that have been
7 previously -- in the two previous SSO cases.

8 MR. KUTIK: Yes. It was different than
9 the ESP III protective order.

10 EXAMINER PRICE: Mr. Sauer.

11 MR. SAUER: Yes.

12 EXAMINER PRICE: If the two -- if a
13 different from the one-tiered standard agreement was
14 acceptable in 11-5201-EL-RDR, why is this not
15 acceptable today? I would let you have the last word
16 after all.

17 MR. SAUER: Can you refresh my
18 recollection? What is the case you are referring to?

19 EXAMINER PRICE: It was the Commission's
20 audit of FirstEnergy's alternative energy rider.

21 MR. SAUER: That had a two-tiered?

22 EXAMINER PRICE: Mr. Kutik has
23 represented and that was my recollection there was
24 some form of a two-tiered protective agreement. We
25 didn't litigate this issue thankfully.

1 MR. SAUER: That seems to be my
2 recollection as well but there was only a single
3 nondisclosure certificate. There wasn't any
4 difference in the treatment of the materials. It was
5 essentially like a one-tiered arrangement. They may
6 have marked documents differently, but you didn't
7 have to treat them or handle them differently or
8 sequester them from one group of people versus
9 another group of people.

10 EXAMINER PRICE: Okay. Fair enough.

11 Okay. At this time the application for
12 interlocutory appeal -- certification for
13 interlocutory appeal will be denied. The Attorney
14 Examiners find that OCC and NOPEC have not
15 demonstrated any prejudice as a result of the ruling.

16 Further the Examiners find that the rule
17 is not a departure from past precedent. The Duke
18 case cited by the parties is -- had offered different
19 issues that were in dispute. It is not at all
20 dispositive of the issues in this motion.

21 In addition, Examiners find this is not a
22 new or novel issue. Protective agreements have been
23 disputed and litigated before this Commission dating
24 back into the '70s and '80s as the cases cited by the
25 company demonstrate.

1 With that we will take up IGS's motion to
2 compel. Mr. Olikier, you have the privilege of going
3 first.

4 MR. OLIER: Sure, your Honor. Would you
5 like me to first discuss the motion to compel itself
6 or also the arguments against it?

7 EXAMINER PRICE: However you would like
8 to proceed. We read the pleadings so your summary.

9 MR. OLIER: Thank you, your Honor. Just
10 from a high level we are asking just for forecasts
11 regarding commodity prices of electricity, natural
12 gas, and coal from Judah Rose that he's produced in
13 the past few years.

14 And the arguments against producing those
15 forecasts, there is three of them: No. 1, its
16 relevance and then they say the request is overly
17 broad and, third, that it's confidential information
18 of third parties.

19 Regarding relevance I am not going to
20 spend too much time on this because the bar is so low
21 for relevance in discovery. These are very complex
22 cases and it doesn't even have to be relevant
23 evidence. You have to ask for evidence that may lead
24 to relevant evidence.

25 EXAMINER PRICE: Let's -- I understand

1 what you are saying. And let's try to narrow this a
2 bit. If this were frozen orange juice futures,
3 that's not going -- is that relevant or are you
4 saying, yes, that is relevant because if we can show
5 that he made a bad forecast on anything, cattle
6 futures, frozen orange juice?

7 MR. OLIKER: Sure. I can take it that
8 way, your Honor. We are not asking for that
9 information. We are only --

10 EXAMINER PRICE: What are the commodities
11 you are asking for?

12 MR. OLIKER: Electricity, natural gas,
13 and coal and regarding electricity we are -- we only
14 care about PJM. We are not trying to be on a fishing
15 expedition. We are not trying to be overly
16 burdensome to the companies. We are willing to
17 narrow our request to a defined period of time and
18 for certain commodities. That discussion didn't
19 really come up until they addressed it in the memo
20 contra. We were just sort of met with a stone wall.
21 We could have gladly tried to come to an amenable
22 arrangement.

23 So we are just concerned with those
24 commodities that are relevant to this case. If he
25 got orange juice futures wrong, we'll let that pass.

1 By -- and I think that does address the overly broad
2 issue we talked about. Yes, we did say five years.
3 Understanding that that may be a lot of information
4 we would be happy to narrow that.

5 We do believe that the Duke forecast that
6 we have asked for that was produced in 2011 should be
7 provided because that was a forecast that was
8 provided to this Commission. It would be really
9 interesting so see was Mr. Rose correct when he was
10 telling the Commission what he thought was going to
11 happen over the next several years, especially given
12 that everybody knows what happened to electricity
13 prices in 2012. That forecast is particularly
14 situated to see how good he is at predicting the
15 future.

16 EXAMINER PRICE: Can I ask you a question
17 about the Duke information?

18 MR. OLKER: Yes.

19 EXAMINER PRICE: Have you propounded
20 discovery to Duke who is also a party in this case
21 regarding these two issues, the testimony and the
22 forecasts?

23 MR. OLKER: We did not propound
24 discovery to Duke because we were more largely
25 focused on Mr. Rose and because he is a FirstEnergy

1 witness it seemed suitable to go through FirstEnergy
2 and we also don't have a confidentiality agreement
3 with Duke regarding the 2011 case. We didn't access
4 confidential information at that time.

5 EXAMINER PRICE: A minor speed bump in
6 this case though.

7 MR. OLIVER: Yes. Had this been Duke's
8 2014 ESP case, we wouldn't have had to ask them. We
9 would have just had to tell them we were going to use
10 it in accordance with the Commission's current
11 rulings. So I think that the Commission has provided
12 some good policy guidance that when you do provide
13 information in one case, you should expect it may
14 come out later if it's relevant subject to normal
15 evidentiary objections.

16 EXAMINER PRICE: So, Ms. Spiller, in
17 amicably resolving this issue, if IGS were willing to
18 sign the traditional Duke confidentiality agreement,
19 would you provide to IGS the unredacted copy of
20 Mr. Rose's testimony as well as forecasts which is in
21 your possession and you are, in fact, a party to this
22 proceeding?

23 MR. OLIVER: I've already asked.

24 MS. SPILLER: I would not, your Honor.

25 EXAMINER PRICE: You would not.

1 MS. SPILLER: I would not, no, sir, and
2 the reason for that goes back to the fundamental
3 reason for which confidential information is produced
4 and the parameters pursuant to which that
5 confidential information is produced.

6 There has been much said in the motions
7 filed before this Commission and this Bench about the
8 balance, the balance that needs to be struck in the
9 discovery process to prevent a fishing expedition, to
10 ensure litigants the opportunity to get the
11 information they fairly and reasonably need to
12 prepare their case for prosecution or defense against
13 the need for companies to protect their confidential
14 information. And there is a wealth of authority out
15 there, be it from federal court, state courts, or
16 this Commission, about the need to protect
17 confidential information.

18 The Commission struck that balance in the
19 Duke case when it afforded testimony from Judah Rose
20 and his workpapers as well as other information that
21 the company prepared confidential treatment. That
22 protection exists today. IGS has never challenged
23 it. In the Duke Energy case --

24 EXAMINER PRICE: I don't think they are
25 challenging it. They just would like access to it.

1 What I thought I heard Mr. Olikier say he would sign
2 the confidentiality agreement today.

3 MR. OLIER: Absolutely, your Honor.

4 MS. SPILLER: In 2011, Duke Energy Ohio
5 produced confidential information pursuant to
6 confidentiality agreements. This notion of
7 Mr. Olikier suggesting that a 2014 confidentiality
8 agreement is the traditional one, I certainly take
9 exception with that, your Honor. The
10 confidentiality --

11 EXAMINER PRICE: Commission decision
12 notwithstanding.

13 MS. SPILLER: Yes, sir. The
14 confidentiality agreement in 2011 had two key
15 components. One, that the parties in exchange for
16 receiving the confidential information agreed they
17 would use it for purposes of the Duke case and the
18 Duke case only.

19 They also agreed that at the conclusion
20 of the Duke case they would destroy the information
21 or give it back to me. Those were the conditions for
22 receipt. IGS Energy did not accept or was not
23 willing to accept those conditions and never received
24 the information.

25 Mr. Olikier now wants to take information

1 that I produced under very specific parameters and
2 use it for whatever reason and whatever reason he may
3 like. That leaves me very uncertain with respect to
4 the protections that my confidential information
5 deserves. And, in fact, I think it turns the
6 discovery process on its head.

7 EXAMINER PRICE: I've always been struck
8 by in reading the pleadings in other cases and the
9 Commission's decision of the Duke SSO by this notion
10 that as the owner of the information, Duke can
11 preclude other parties from using inconsistent
12 statements against a witness in subsequent or other
13 proceedings. Do you have an Ohio case or federal
14 court case that supports that notion that I am
15 unaware of?

16 MS. SPILLER: Your Honor, I certainly was
17 not intending to litigate in this docket issues that
18 are raised in ours, but in the interlocutory appeal,
19 the application for rehearing in our case, neither of
20 which I have with me, we did cite to authorities that
21 routinely hold and give court-directed guidance in
22 terms of the scope of the confidentiality agreement
23 that says you will use it for this case and this case
24 only.

25 EXAMINER PRICE: And I am going to

1 instruct him he can use it for this case and this
2 case only.

3 MS. SPILLER: But the case in which the
4 information is produced. Our information was
5 produced pursuant to an accepted confidentiality
6 agreement that said we would use it in this case and
7 this case only. I am not the applicant in this
8 proceeding.

9 EXAMINER PRICE: I understand that but
10 the bar -- but the bar is do you have information
11 which is reasonably calculated to lead to admissible
12 information in this proceeding, and it sure sounds to
13 me like you do.

14 MS. SPILLER: But, your Honor, do I
15 really? What Mr. Olier wants is information to
16 purportedly test the credibility of a witness.

17 EXAMINER PRICE: Yes.

18 MS. SPILLER: How does he appear on the
19 stand? What he wants to say is if Mr. Rose was off
20 by some mark in 2011 in my case under facts relevant
21 to my circumstances, the zone in which Duke Energy
22 Ohio operated in PJM, that somehow now under
23 different facts, different circumstances, and with
24 respect to a different zone, if he is wrong in my
25 case, he must be wrong here.

1 EXAMINER PRICE: I don't know. He is
2 going to use it for some -- first of all, he is only
3 going to use it if it is admissible and that's going
4 to be the Bench's decision and I can't predict how he
5 is going to use it, but the bar is simply is it
6 reasonably calculated to lead to admissible
7 information? And there is no -- no authority to say
8 the fact that you are not the applicant somehow
9 precludes you from that particular standard.

10 MS. SPILLER: Your Honor, I would
11 respectfully disagree. What he is inviting is I
12 think a complete lack of protection with respect to
13 confidential information.

14 EXAMINER PRICE: There will be tons of
15 protection. It will be confidential, and I even
16 indicated I would be willing to insist on the
17 stipulation they use it for this proceeding and this
18 proceeding only and then destroy it upon your
19 request.

20 MS. SPILLER: But, your Honor, I think
21 the problem that I have is we are forever -- these
22 little creeps away from a confidentiality agreement,
23 expectations that -- that Duke Energy Ohio had when
24 it -- when it entered into confidentiality agreements
25 three years ago, we had the expectation at that time

1 that our agreement would be pro -- that our
2 information would be protected, it would be returned,
3 it would be destroyed, and it would forever be
4 outside of the reach of these litigants; and, now,
5 Mr. Olikier wants to reach back in.

6 EXAMINER PRICE: He doesn't want to. I
7 am just looking for an easy off-ramp. This was my
8 suggestion. I was looking to see if there was a way
9 to amicably resolve the dispute between he and the
10 companies.

11 So, Mr. Kutik, in the absence of an easy
12 resolution, what do you have for us?

13 MR. KUTIK: Well, first, your Honor, the
14 requests themselves are overbroad. You can look at
15 the first page of the motion to compel, all forecasts
16 of electric price produced by Judah Rose since 2009.
17 All, not limited to market, not limited to PJM, all
18 forecasts of commodity prices produced by Judah Rose
19 including orange concentrate, if that's what he did.

20 So we are clearly talking about things
21 that are well beyond the scope of this case, and
22 Mr. Rose has submitted an affidavit which indicated
23 the burden that would be put upon ICF to do -- to
24 comply with this request.

25 More importantly -- or, in addition, I

1 guess I should say, there is the matter of the fact
2 that a large portion of these forecasts are for
3 client specific projects. These are forecasts that
4 were done, many with client-suggested inputs and
5 assumptions, which would reveal two things that are
6 confidential to those clients of ICF. One,
7 attitudes, philosophies, strategies about the market.
8 I want you -- Mr. Rose, I want you to be bullish on
9 natural gas prices. Oh, that client is bullish on
10 gas prices. That tells us something. That tells
11 people in the market something.

12 It can also tell about why a particular
13 forecast was done. Why are they looking at a
14 forecast for this unit? Oh, they must want to sell
15 it, those type of things, which, again, go to
16 strategies and proprietary business plans of clients.

17 And all to what end? We have provided
18 IGS with forecasts of ICF that are ICF's and ICF's
19 alone. They have that. They can test that.

20 EXAMINER PRICE: Mr. Kutik, I have a
21 question about that issue. The discovery response
22 asks for everything after 2000 -- some date in 2009,
23 I am not sure of the precise date.

24 MR. KUTIK: 2009.

25 EXAMINER PRICE: 2009 on, you offered

1 Mr. Olikier seven quarterly reports dating back to
2 2013. Are the companies willing to go back and give
3 them all of the quarterly reports from 2009 on?

4 MR. KUTIK: Yes. In terms of the other
5 problem with the client-specific information, it's
6 that it will prolong the hearing, your Honor. If
7 those are admitted or suggested or crossed, then we
8 are going to have mini trials on each one of those as
9 to which assumptions were his, which assumptions were
10 the clients, and do you agree with that, do you not
11 agree with that, and all to what end since we are
12 willing to provide and we have provided forecasts
13 from ICF and ICF alone.

14 We also have in his CV disclosed 19
15 publications, 113 speeches, and 122 past testimonies
16 so there is a wealth of information IGS can go find
17 to talk to Mr. Rose about his great body of work.
18 This information also isn't stale as the suggestion
19 might have been made. We were talking to the 2009.
20 In this case, for example, the information was going
21 to be protected for 60 months, five years, so it
22 isn't.

23 By seeking such a broad request, by
24 seeking information which clearly has no business
25 being in this case that belongs to other parties that

1 aren't here to defend themselves, this suggestion or
2 this request is a mere fishing expedition since there
3 are other ways to test Mr. Rose's credibility.

4 EXAMINER PRICE: Thank you.

5 Mr. Olikier, the company has graciously
6 offered to give you all of the ICF quarterly
7 forecasts through -- from 2009 on. Can you respond
8 to Mr. Kutik's points about the client proprietary
9 forecasts and the risks that that might pose to those
10 clients who are not parties to this proceeding?

11 MR. OLIER: First, regarding the ICF
12 forecasts themselves, it's my understanding that's
13 not what they used in this case so if that's the
14 client-specific forecast here, why would an ICF
15 forecast necessarily compare? Well, you would want
16 to see the other client-specific forecasts they
17 provided.

18 EXAMINER PRICE: Aren't those owned by
19 clients who aren't parties to this proceeding?

20 MR. OLIER: They're -- they -- perhaps.
21 They did not produce all the contractual agreements
22 with those parties, and my understanding is according
23 to the companies, they may be produced according to
24 court order so there is some sort of fallback
25 provision that is available in that and that would be

1 in your discretion, your Honor.

2 But just comparing the ICF forecast I
3 don't think necessarily allows us to have a good idea
4 of Mr. -- Mr. Rose's credibility and his accuracy
5 because it allows the company to selectively decide
6 effectively which forecasts we can review.

7 EXAMINER PRICE: No, that's not right.
8 They didn't say -- they are going to give you all the
9 quarterly forecasts. They are not going to give you
10 the three out of the four they like the best. They
11 are willing, as I understand Mr. Kutik's
12 representation, to give you all the quarterly
13 forecasts which ICF has published from 2009 to this
14 day.

15 MR. OLIKER: Yes, they are but they are
16 not willing to give any ones that may be specific to
17 Ohio, for example, that's probably the closest to
18 what we are going to see in this case. I don't know
19 if those forecasts would be the same PJM node --
20 there are things that I just can't know because I
21 haven't seen the other forecasts. There may be ones
22 that are completely on point.

23 For all I know he told somebody else
24 power prices are going to be 40 percent lower, but I
25 don't know that because I haven't seen them. And

1 that's the purpose of discovery is to allow us to
2 examine those other forecasts to determine.

3 EXAMINER PRICE: I understand,
4 Mr. Olikier. When you say you don't know what those
5 forecasts may have, it sure sounds like a fishing
6 expedition.

7 MR. OLIER: It is only discovery of
8 specific things that are relevant to his testimony.
9 Of course, I don't know what they say. I have not
10 seen them, but I know what I want to see exactly.
11 That's why it's not a fishing ex petition.

12 EXAMINER PRICE: Okay. Mr. Kutik, last
13 word?

14 MR. KUTIK: Your Honor, again, this is a
15 balance as in most discovery disputes. And
16 Mr. Olikier certainly has enough ammunition to go
17 after Mr. Rose without interfering with other
18 people's business plans.

19 MR. OLIER: Also one last thing.

20 EXAMINER PRICE: I promised him the last
21 word but go ahead.

22 MR. OLIER: To the extent other parties
23 do have confidential information, we don't care who
24 the parties are, they can redact any of the
25 information that might disclose their names. That's

1 not the issue. It's the information and the location
2 of the forecast.

3 EXAMINER PRICE: I understand what you
4 are saying but if -- I will use somebody that's
5 defunct like Ormet, so I am not committing anything.
6 If it's a forecast request of power prices in the PJM
7 node for a large aluminum producer that requires 600
8 megawatts per day, everybody is going to know who
9 that is.

10 MR. KUTIK: Or, your Honor, a particular
11 unit for a particular company.

12 MR. OLIKER: And I can't share it with
13 anybody under the current ruling for confidentiality.
14 It would be me and somebody else who doesn't make
15 decisions that would be able to do anything with it.

16 EXAMINER PRICE: Good point. Okay. At
17 this time the IGS motion to compel will be granted in
18 part. The companies are directed, as they have
19 agreed to provide, as soon as possible the quarterly
20 ICF forecasts from 2009 on. The client proprietary
21 ones, balancing the interests of IGS to obtain the
22 information versus the interests of I don't know how
23 many nonparties to this proceeding, I find that --
24 the Attorney Examiners find that the balance weighs
25 in favor of the nonparties, and we will go ahead and

1 deny that part of the motion to compel.

2 With respect to the unredacted copy of
3 Judah Rose and the forecasts he prepared for the Duke
4 proceeding, the motion to compel will be denied. I
5 believe IGS should seek that information from a party
6 to this proceeding using all legal means at your
7 disposal.

8 MR. OLIKER: And, your Honor, if I may --

9 EXAMINER PRICE: You may.

10 MR. OLIKER: -- clarify, my understanding
11 is the time period for discovery is past unless there
12 is an exception provided to that.

13 EXAMINER PRICE: The exception is
14 provided now.

15 MR. OLIKER: So if I --

16 EXAMINER PRICE: You may seek discovery
17 of Duke Energy Ohio through any means necessary. The
18 unredacted copy of Judah Rose's testimony and
19 accompanying forecasts from the 2011 SSO proceeding
20 notwithstanding the fact that the discovery deadline
21 has come and gone.

22 MR. OLIKER: Thank you, your Honor.

23 MS. SPILLER: Your Honor, if I may, for
24 the sake of clarity, my rights in responding to that
25 would be what? I'm assuming --

1 EXAMINER PRICE: He is going to ask, you
2 are going to say no, he is going to file a motion to
3 compel, and you are going to file a memorandum
4 contra. And when I rule, I suspect you will file an
5 interlocutory appeal.

6 MR. OLIKER: Your Honor, may I request an
7 expedited discovery request instead of a 20-day
8 turnaround?

9 EXAMINER PRICE: I think she's got the
10 document. Yes, you may.

11 MR. OLIKER: Thank you, your Honor.

12 EXAMINER PRICE: Thank you. Moving on to
13 our next issue, we have the FirstEnergy Solutions'
14 motion to quash the subpoena filed by the Sierra
15 Club. Just for clarity sake is my understanding,
16 Mr. Hayden and Mr. Fisk -- is Mr. Fisk or Mr. Allwein
17 doing this?

18 MR. ALLWEIN: Mr. Fisk.

19 EXAMINER PRICE: Mr. Fisk, my
20 understanding the only issues in dispute are the
21 topic 5 and topic 6 as outlined in the pleadings; is
22 that correct?

23 MR. HAYDEN: That is correct, your Honor.
24 We have agreed to produce the information contained
25 in topics 1 and 2. We have done some of that and

1 continue to do that. And they have agreed to drop
2 topics 3 and 4 at this point. The only thing for
3 purposes of our discussion are 5 and 6.

4 EXAMINER PRICE: Thank you. Your motion
5 to quash, Mr. Hayden. You go first.

6 MR. HAYDEN: Thank you, your Honor. And
7 I won't regurgitate all the pleadings at this point,
8 but I will take the topics in order. With respect to
9 topic 5, I think the main thrust of their argument,
10 if I understand it correctly, is that Sierra Club
11 needs this information to get FES's evaluation of the
12 documents because it would appear to shed some light
13 on the potential costs and liability of the
14 transaction.

15 And, of course, that's not even discussed
16 or highlighted in their subpoena, but on that front
17 the companies have already produced plenty of
18 information. We can go through the testimony and the
19 discovery. And Sierra Club assumes for some reason
20 FES has additional information that it's not
21 producing and that's not the case.

22 But otherwise what FES, which is a
23 nonparty to this proceeding, nor are they the
24 applicant, nor are they the utility, what they think
25 of the transaction is wholly irrelevant at this point

1 and Sierra Club doesn't provide any additional
2 rationale to support their argument on that front.

3 What is relevant though is what the
4 buyer, the applicant, the utility, and not the seller
5 was thinking of when they conducted the transaction.
6 We have provided plenty of information both in
7 testimony and discovery on that front. And,
8 moreover, I would say the best indication --

9 EXAMINER PRICE: When you say we, you
10 mean FES?

11 MR. HAYDEN: I am talking about FES, your
12 Honor.

13 EXAMINER PRICE: Okay.

14 MR. HAYDEN: Moreover, the best
15 indication of the details of the transaction I think
16 can be had through review of the term sheet which
17 through the companies has been provided through
18 discovery. It has been produced as well as all the
19 associated testimony and discovery around that issue.
20 So that's point No. 1 with respect to topic 5.

21 Point No. 2 is that Sierra Club
22 misunderstands the nature of the privilege that's
23 being asserted here in the JDA. To begin the
24 companies have provided all nonprivileged
25 communication between the two teams, between the

1 utilities and the FES, as well as a substantial, very
2 comprehensive privilege log. So with --

3 EXAMINER PRICE: Do you have a copy of
4 the privilege log? Do you have two copies of the
5 privilege log for the Bench?

6 MR. HAYDEN: I don't have it with me, but
7 we can certainly produce it in quick order.

8 EXAMINER PRICE: Okay. Just -- just for
9 logistics purposes do you have a copy of the
10 documents that are covered by the privilege log
11 today?

12 MR. HAYDEN: I don't have it with me
13 today. I do not, your Honor.

14 EXAMINER PRICE: Okay. Let's go. Please
15 proceed.

16 MR. HAYDEN: With regard to work product
17 created by one team, that information is still
18 entitled to protection under the JDA. The fact that
19 the two teams were negotiating at arm's length does
20 not destroy the common interests privilege in this
21 case because those two teams shared that interest in
22 contemplating litigation.

23 The common interest was established under
24 the JDA requires commonality with respect to
25 litigation. There isn't a requirement for universal

1 commonality so just because the two sides were
2 working at an arm's length transaction does not mean
3 that somehow the privilege has been destroyed as
4 Sierra Club would suggest.

5 EXAMINER PRICE: I am going to remember
6 this when Mr. Kutik is talking about the joint
7 defense agreement later.

8 MR. HAYDEN: Okay.

9 MR. KUTIK: All I want is a log, your
10 Honor.

11 MR. HAYDEN: Your Honor, so those are my
12 comments with respect to topic 5. I don't know if
13 you want to take these in hand or.

14 EXAMINER PRICE: Let's go forward on
15 topic 6 and we will bounce back and forth.

16 MR. HAYDEN: Okay. Topic 6, with respect
17 to the environmental compliance materials, certainly
18 the companies have not stymied Sierra Club's efforts
19 to obtain that information. We have properly
20 answered that information, gave them the information
21 we have notwithstanding their objections. And the
22 real problem is the poorly-worded questions.

23 EXAMINER PRICE: That's harsh.

24 MR. HAYDEN: It's true, your Honor. So
25 they issue poorly-worded questions. We provide a

1 response based upon our interpretation, and then they
2 continue to ask questions based upon because they
3 simply can't believe our response, hence, we're here
4 talking about topic 6.

5 The fact of the matter is that Sierra
6 Club has not filed a motion to compel on any response
7 to date. So far if the objections were improper,
8 they would have filed that motion. In my view the
9 fact that they didn't file is evidence that it would
10 be difficult to assert the merits of their discovery.

11 But notwithstanding that we've provided
12 supplemental responses. There's a timeline here. On
13 November 25 -- and I can walk through each of the
14 discovery requests, but we provided supplemental
15 responses on this topic on November 25. Sierra Club
16 issued its subpoena on FES on November 25. The
17 companies served Sierra Club set 4 responses on this
18 very same topic from December 4 through December 6.
19 And I think they filed their subpoena before they
20 reviewed the information that we gave to them, so I
21 think they jumped the gun a little bit on that; but,
22 now, they have the responses.

23 So the companies identified all the
24 documents that I think are responsive to this topic 6
25 in response to Sierra Club Set 1, 2, and several in

1 set 4. So one of the many problems that I wanted to
 2 note though is that they wrongly assumed that the
 3 term analysis can only be encompassed by a series of
 4 written documents and that's simply not the case.
 5 Just because a proposed regulation came out, folks
 6 can review that regulation, they can study that
 7 regulation, they can consider it, they can evaluate
 8 it, they can analyze it. They can do whatever they
 9 want with it. That doesn't mean there was a whole
 10 slew of documents that were created as a result of
 11 that. So that's one particular issue.

12 The other one is the subpoena is
 13 unnecessary because the companies have provided a
 14 witness who is willing to speak on this exact matter.
 15 That deposition has not taken place. We are working
 16 on scheduling the deposition. But certainly with
 17 respect to Witness Harden that conversation can take
 18 place between the witness and Sierra Club.

19 EXAMINER PRICE: Can you just help me out
 20 here? Who is Witness Harden employed by?

21 MR. HAYDEN: He is a shared service
 22 executive.

23 EXAMINER PRICE: He is a shared service
 24 executive.

25 MR. HAYDEN: Yes.

1 EXAMINER PRICE: Thank you.

2 MR. HAYDEN: And so, lastly, with respect
3 to Sierra Club's concern about the objections that
4 the companies have lodged notwithstanding -- well,
5 the objections the companies have lodged because the
6 information is not in their possession. In virtually
7 all cases, and I am happy to walk through all those
8 relevant discovery requests as well, in virtually all
9 cases that information has been produced or
10 supplemented in some way, shape, or form.

11 So there are several though that were
12 listed in Sierra Club's memo contra that -- that have
13 no relation whatsoever to topic No. 6 as they have
14 indicated that topic to be described in their
15 subpoena. So in nearly every case notwithstanding
16 the assertions in the memo contra we have
17 supplemented that information and provided what we
18 felt they were asking for in the first place.

19 EXAMINER PRICE: Mr. Fisk.

20 MR. FISK: Thank you, your Honor. Well,
21 I think my first question -- or my first comment
22 would be it's unclear who Mr. Hayden is representing
23 here. He keeps --

24 EXAMINER PRICE: He is representing
25 FirstEnergy Solutions.

1 MR. FISK: Right, but he keeps referring
2 to "we" in terms of the companies and what the
3 companies have provided in this case. My
4 understanding is that the motion to quash is from
5 FirstEnergy Solutions not from FirstEnergy or the
6 applicants in this proceeding. And so to credit FES
7 with things that the companies may or may not have
8 produced in this case isn't how you judge a motion to
9 quash that's directed at FirstEnergy Solutions.

10 On topic 5, the relevance here is pretty
11 clear. What's at issue in this proceeding is a
12 nonbypassable rider being proposed by FES's
13 affiliates under which ratepayers would be asked to
14 pay billions of dollars to subsidize an operation of
15 FES's power plants for 15 years on the promise that
16 conditions may change in the future that might make
17 it beneficial for ratepayers.

18 The fundamental question we have is what
19 is the agreement between FES and its affiliates under
20 this rider going to look like? And, in particular,
21 is FES expecting to be able to cancel the agreement
22 or terminate the agreement once its plants become
23 profitable again?

24 The proposed agreement according to the
25 applicants' modeling would cost ratepayers

1 approximately \$450 million in the first few years,
2 and it's only in the out years that it would
3 allegedly become beneficial to ratepayers. If FES is
4 expecting and is able to just simply terminate the
5 contract once its plants become profitable again,
6 that purported benefit of this entire agreement
7 disappears.

8 And we've asked the companies about this
9 issue, and their response has been essentially, well,
10 an agreement -- the actual agreement hasn't been
11 drafted. Here is a term sheet that doesn't address
12 this issue. So we filed a subpoena to also inquire
13 about this issue with FES.

14 As for privilege, the companies have
15 provided a privilege log; FES has not. FES cannot
16 avoid a subpoena simply by saying everything we might
17 have is privileged. If they want to claim that
18 everything they could have that's relevant to the
19 request is privileged, they need to provide a
20 privilege log that identifies the documents they
21 claim are privileged and describe why they are
22 allegedly privileged so that we can assess that and
23 challenge it.

24 As for topic 6 on the environmental
25 compliance costs, the request here that we made is

1 clear with one modification that we made in
2 discussions with the company. In particular we asked
3 for any assessment that FES has of the potential
4 future environmental compliance costs for nine
5 proposed or already approved environmental
6 regulations.

7 The one clarification that we did make in
8 a follow-up letter was that we were specifically
9 asking about the Sammis plant, not all of FES's
10 plants. The suggestion that somehow the word
11 analysis is unclear frankly is meritless. If there
12 are documents -- if there are documents -- thanks.
13 If there are documents analyzing the issue, they
14 should produce them. And we've asked for a witness
15 so if there were other analyses of the -- of the
16 costs, we can inquire of that witness.

17 As for Mr. Harden's submitting testimony
18 in this proceeding, it's true he has submitted
19 testimony on behalf of the companies in this
20 proceeding. But every time we've asked the companies
21 for information regarding environmental compliance
22 costs, all they've given us is a two-page spreadsheet
23 with costs for two regulations on it with no support,
24 and they claim that the carbon price that they are
25 using covers any potential costs related to carbon

1 regulations and then the statement that any other
2 information is in the possession of FES.

3 Having seen that repeatedly in discovery
4 responses from the company, we did -- took the next
5 logical step which is to file a subpoena asking FES
6 for that information. It's wholly unfair for FES to
7 now try to punt that issue directly back to the
8 companies who have already told us they don't have
9 anything else.

10 EXAMINER PRICE: Anybody else care to
11 weigh in on this topic before we go back to
12 Mr. Hayden?

13 Mr. Hayden.

14 MR. HAYDEN: Thank you, your Honor. I
15 will set aside the factual mischaracterizations that
16 were embedded in counsel's comments there and try to
17 talk to the substance. The fact that there may be a
18 termination provision within the agreement is not
19 relevant for this purpose nor is it covered by the
20 subpoena requests, but in any event, as I indicated
21 previously, all those particular provisions, the
22 applicable and relevant provisions, are embedded in
23 the term sheet which was provided in discovery.

24 With respect to the remaining issues in
25 topic 6 I am happy to go through each one of the

1 regulations that they have cited in their subpoena
2 and talk about all the information that we actually
3 have provided, and to the extent we haven't provided
4 any of that, it does not exist, and we've repeatedly
5 indicated that previously.

6 With respect to topic 5 --

7 EXAMINER PRICE: Are you willing to
8 produce a witness as to the issues in topic 6?

9 MR. HAYDEN: Absolutely, your Honor, and
10 that witness would be Mr. Harden. He is the one most
11 knowledgeable about the regulations that Sierra Club
12 has cited in that request and --

13 EXAMINER PRICE: He will be speaking on
14 behalf of the FirstEnergy Solutions?

15 MR. HAYDEN: He is speaking on behalf of
16 the applicants, the companies in this case, because
17 he is the one who is most knowledgeable.

18 EXAMINER PRICE: I am asking if
19 FirstEnergy Solutions is willing to produce a
20 witness.

21 MR. HAYDEN: If Solutions were to produce
22 any witness in this case, it would be Mr. Harden
23 because he is, in fact, the one most knowledgeable of
24 those regulations.

25 EXAMINER PRICE: I guess my point is if I

1 issue -- if I deny the motion to quash and you
2 produce Mr. Harden, Mr. Harden will understand that
3 he is there on behalf of FirstEnergy Solutions; he is
4 not there on behalf of the companies. And he is not
5 going to say the companies don't have that
6 information even if FirstEnergy Solutions has it.

7 MR. HAYDEN: He is not going to say that,
8 your Honor. He will answer these questions to the
9 best of his ability.

10 MR. KUTIK: But he is a witness on behalf
11 of the companies.

12 EXAMINER PRICE: I understand that. And
13 if I deny the motion to quash, it would be great if
14 the -- if the witness was produced the same day as
15 the companies' deposition for -- to benefit
16 everybody, but I will leave it to the parties to sort
17 that out.

18 The privilege log issue seems to be
19 somewhat intractable given that we don't have the
20 privilege log. I'm happy to convene again next week,
21 but I know the parties have their pretrial work to do
22 and --

23 MR. PARRAM: And Christmas.

24 EXAMINER PRICE: -- and the holidays.

25 MR. HAYDEN: Your Honor, it's my

1 understanding that we -- that the privilege log with
2 respect to the questions to the companies about those
3 communications has been produced to Sierra Club.

4 MR. FISK: We have received a privilege
5 log from the companies. We have not received a
6 privilege log from FES.

7 EXAMINER PRICE: I think what Mr. Hayden
8 is saying there is no other privilege log; is that
9 correct?

10 MR. HAYDEN: That is correct, your Honor,
11 because with respect to the other communications that
12 I think we are talking about on topic 5, they are
13 neither relevant and they are privileged.

14 EXAMINER PRICE: Now, you just lost me.
15 If there is documents that are privileged, are you
16 saying they are not relevant, or are you saying they
17 are privileged?

18 MR. HAYDEN: There's two questions at
19 hand from Sierra Club. One is produce communications
20 from --

21 EXAMINER PRICE: Let me start over again.
22 I asked my question poorly. The privilege log
23 provided by the companies encompasses all -- in the
24 FirstEnergy Solutions' opinion encompasses all
25 relevant but privileged documents; is that correct?

1 MR. HAYDEN: In Solutions' opinion, yes,
2 that log produces all communications which are
3 relevant and privileged.

4 EXAMINER PRICE: Okay. There are no
5 other relevant documents for which you are citing a
6 claim of privilege.

7 MR. HAYDEN: That's correct. However,
8 now, Sierra Club is asking for not communications
9 within the EDU team but within the FES team,
10 negotiations between two teams.

11 EXAMINER PRICE: That's correct.

12 MR. HAYDEN: The communications that have
13 been produced was pursuant to Sierra Club's discovery
14 request. We have produced all nonprivileged
15 communications and logged all privileged
16 communications on that front. What they are asking
17 for now, I believe, is communications of employees of
18 FES that are part of that team, and my argument, as I
19 stated earlier, your Honor, is those communications
20 are not relevant.

21 EXAMINER PRICE: I understand that you
22 are arguing they are not relevant. My question is
23 are you saying they are solely not relevant but there
24 is no privilege claim associated with them, or are
25 you saying I don't think they are relevant, but if

1 the Bench determines they are relevant, I am going to
2 have a privilege claim behind that?

3 MR. HAYDEN: It would be the latter of
4 the two, your Honor. They are privileged under the
5 joint defense agreement that I mentioned earlier.

6 MR. FISK: We would contend they are both
7 relevant and if there is going to be a claim of
8 privilege, we are entitled to a privilege log, and
9 our subpoenas also requested a witness on these
10 topics which we believe are directly relevant given
11 that the entire -- the only beneficiary of this
12 proposed rider is FES, so it is directly relevant to
13 what FES is expecting to have in the agreement that
14 carries out this rider.

15 EXAMINER PRICE: The only solution to
16 this that's not quick but it's better than the
17 alternative is to do an in camera review, so we are
18 going to have to schedule an in camera review which
19 FES will be directed to produce a privilege log of
20 any document, whether you think it's relevant or not,
21 as long as you are responsive to their request for
22 which you are making a claim of privilege and any
23 document that you believe that's not relevant but
24 they would think so, and the Bench will review these
25 documents and determine the relevancy and whether or

1 not the privilege should apply at that time.

2 MR. HAYDEN: Just so I'm clear, your
3 Honor, this would be -- it sounds like this is
4 associated with topic 5.

5 EXAMINER PRICE: We are on topic 5.

6 MR. HAYDEN: Produce the privilege logs
7 associated with that request.

8 EXAMINER PRICE: Yes, and bring --
9 whatever day we decide for the in camera review, we
10 will discuss that off the record, but whatever day we
11 decide you should provide both the privilege log and
12 the documents for the Bench to review.

13 MR. HAYDEN: Okay. Thank you.

14 MR. FISK: Thank you, your Honor. And,
15 your Honor --

16 EXAMINER PRICE: Quit while you're ahead.

17 With respect to topic 6 on the motion to
18 quash, we are going to go ahead and deny the motion
19 to quash and FirstEnergy is -- Solutions is directed
20 to produce a witness and any documents which you have
21 not yet produced, and I understand that you argue
22 there may be none, a witness and any documents which
23 are responsive to topic 6 which you have not yet
24 produced.

25 MR. OLIKER: Your Honor, could I request

1 a clarification?

2 EXAMINER PRICE: Pardon me?

3 MR. OLKER: Would the documents be
4 provided to parties as soon as available rather than
5 at the deposition itself so parties have an
6 opportunity to review them in advance?

7 EXAMINER PRICE: What day is the
8 deposition?

9 MR. OLKER: Depends on the witness.

10 MR. FISK: If the witness is Mr. Harden,
11 we have tentatively discussed January 5 or 6, but I
12 don't -- I don't know that the 6th -- have we settled
13 on that? Okay. January 6.

14 EXAMINER PRICE: Mr. Hayden, what's a
15 reasonable time to produce the documents?

16 MR. HAYDEN: We have not started that
17 review, and I just don't know how many of those
18 documents exist to be honest with you, your Honor.

19 EXAMINER PRICE: I understand. Please
20 produce them unless otherwise ordered by the Bench,
21 and you can seek additional leeway if you need it,
22 but please produce them one week prior to the
23 whatever deposition date is agreed upon for
24 Mr. Harden.

25 Does that work, Mr. Olier?

1 MR. OLIKER: That's great, your Honor.
2 Thank you.

3 MR. FISK: Your Honor, one other
4 clarification on topic 5, with regards to a witness
5 on that topic from FES?

6 EXAMINER PRICE: Let's look at the
7 documents and then we will make a decision.

8 MR. FISK: Okay. Thank you, your Honor.

9 EXAMINER PRICE: Anything else?

10 Okay. Next up we have a motion to quash
11 the subpoena from PJM Power Producers. The motion
12 was filed by FES so we are back to Mr. Hayden.

13 MR. HAYDEN: Your Honor, Mr. Schwartz is
14 going to be arguing this.

15 EXAMINER PRICE: Mr. Schwartz.

16 MR. SCHWARTZ: Yes, thank you, your
17 Honor.

18 EXAMINER PRICE: Came to town, had two
19 different purposes.

20 MR. SCHWARTZ: Isn't that funny? Yes, I
21 enjoyed it. Thank you.

22 Thank you for letting me speak on this
23 topic, your Honor. And I really want to break it
24 down into three basic categories. The first basic
25 category is the applicable standard and the -- you

1 know, we obviously have a situation where there is a
 2 subpoena to a nonparty. It's not like -- as you
 3 know, your Honor, it's not like a normal discovery
 4 effort. Some of the cases that Mr. Settineri cited
 5 were parties to a proceeding and so this is a
 6 different topic. This is a nonparty issue and there
 7 is a particularly high burden when we are dealing
 8 with confidential, sensitive market data and even a
 9 higher burden when we are dealing with market data
 10 for generation in PJM, so I am going to talk a little
 11 bit about what that is.

12 I am going to talk a little bit about the
 13 relevance issue. The relevance issue is particularly
 14 important here and what I am going to explain is that
 15 the information -- the reasons for the information
 16 that Mr. Settineri asked, it would be impossible for
 17 the information that he asked for to provide the
 18 information he says he wants. They do not match up.
 19 So I am going to explain that.

20 And then I am going to explain how there
 21 is no other relevant purpose in this proceeding in
 22 our view for how this -- you know, for how the
 23 disclosure of this -- for the subpoena with respect
 24 to this information.

25 And then we are going to talk a little

1 bit, and I will try to make it all very brief, but I
2 just want to outline it about the unique level of
3 confidentiality of PJM and some of the history around
4 that and the PJM requirements so that's sort of the
5 breakdown. I can go through each very, very quickly.

6 You know, with respect to the applicable
7 standard, we all know there is a particularly high
8 level with respect to market -- market data, and when
9 you are balancing substantial need to undue burden
10 with competitive, confidential information, the undue
11 burden that's discussed by Ohio courts is not
12 necessarily the burden of production. The undue
13 burden is the burden associated with the harm
14 resulting from the disclosure. So that's an
15 important thing.

16 And Mr. Settineri in his memorandum
17 contra was explaining that the production of the
18 information is not difficult. Frankly, that's
19 probably true. The production of the information is
20 not difficult, but the harm that results from it is
21 substantial. That's the undue burden we have to
22 balance here. And there are a number of cases in
23 Ohio, if we want to go through cases. We don't have
24 to go through cases that deal with highly
25 confidential information and the very difficult level

1 of burden that has to be reached where it's a very
2 high level of substantial need in that direct nexus.

3 So moving on to the relevance point
4 because I think that's the most important one for us
5 to fully understand here, in the ESP III memoranda
6 contra on page 4 and 5, Mr. Settineri describes why
7 he wants this information. And what he says on page
8 4 is knowing how -- and I won't list the units; I'll
9 just say the units. Knowing how the units fared in
10 the last three auctions and how close they were to
11 being excluded from capacity payments is ex --

12 MR. SETTINERI: I am going to interrupt
13 briefly. Are you reading from page 5?

14 MR. SCHWARTZ: Page 4.

15 MR. SETTINERI: It's filed under seal.

16 MR. SCHWARTZ: Understood.

17 MR. SETTINERI: I am making sure.

18 MR. SCHWARTZ: And on page 4 when I read
19 that portion, I am not going to read the confidential
20 portion of it, and I am just calling it the units.
21 And I am not describing -- I am not going to identify
22 the confidential portion when I say it.

23 MR. SETTINERI: I'm sorry to interrupt.
24 I want to make sure.

25 MR. SCHWARTZ: Thank you. Thank you for

1 the clarification. Knowing how the units fared in
2 the last three auctions and how close they were from
3 being excluded from capacity payments is extremely
4 important for the Commission to consider.

5 And then on page 5, the memorandum contra
6 states to determine the probability or the likelihood
7 that the units will clear in the future, and I just
8 said the units, will clear in the future and that
9 there will be capacity earned, revenue earned by the
10 utilities, it is important to know the recent
11 projected price compared with the clearing bids.

12 So basically what Mr. Settineri is saying
13 is he -- that P3 and EPSA need to know, first,
14 whether the units cleared in previous auctions;
15 second, how close they were from not clearing; and,
16 third, whether the units are likely to clear in the
17 future.

18 But let's look at what he requested.
19 What he requested is avoidable cost rate data and the
20 IMM, the market monitor's, resulting offer cap for
21 the plants in the last three auctions. So we have to
22 at least understand what the avoidable cost data is
23 and what the I -- the IMM's offer cap is.

24 Avoidable cost data is data that is
25 the -- it is partial cost data. It's a partial cost

1 data using PJM-specific methodology for saying if you
2 bid above this level, then you may be exercising some
3 type of market power issue, so we are not going to
4 let you bid above this level. PJM and IMM don't look
5 at all the costs. They only look at the costs that
6 would otherwise be avoidable. It's a very selective
7 subset. And so what they are looking at are short
8 run costs. They are not looking at total costs, not
9 a cost-of-service analysis. It is a short run cost
10 issue.

11 The other thing, but the most important
12 part of this, and then so the way this works is that
13 a generator will submit the avoided cost data. The
14 IMM will look at it. The IMM will come back and say
15 this is your offer cap, so the IMM could modify that
16 and lower it. And the idea is that this is the
17 maximum level you can bid.

18 In Mr. Settineri's memorandum contra it
19 almost suggests that will be the bid and that's
20 absolutely not true. Generators can bid at any level
21 they want below that bid. In fact, they could bid
22 zero. So if they bid zero and they say I want to be
23 a price taker, they bid zero knowing what the IMM
24 thinks is the maximum offer cap or knowing what this
25 partial set of selective formula of costs might be

1 won't tell him whether the units cleared in previous
2 auctions, how close they were to clearing, whether
3 the units are likely to clear in the future. It will
4 not get him the information that he is looking for.

5 There are a couple of other things we
6 need to make sure we think about here which is is
7 there any -- even though Mr. Settineri didn't ask for
8 this, he didn't say I want it to help evaluate the
9 costs of the facilities. He didn't say that in the
10 memorandum contra. The memorandum contra stated
11 wanted to evaluate whether it was going to clear in
12 the future. And as I explained, that won't happen.
13 Even if he were to send in another discovery request
14 and say you know what? I really want this data for
15 another reason. I want this data to show another way
16 to look at costs.

17 What I wanted to explain and the reason I
18 laid out what this avoided cost data was intended to
19 try to accomplish is that it doesn't get there. The
20 FERC has time and time again, and we could go through
21 specific citations, but when they set up this
22 mechanism for PJM which, by the way, is not unique to
23 because it's the same mechanism that they use in many
24 of the other RTO markets.

25 What they are trying to do is not -- is

1 affirmatively not capture all costs. It's not a cost
2 of service. They explain it's not a cost of service.

3 So in order to evaluate costs, you can't
4 do that with this data -- with these data. So in
5 that sense there is no other way to obtain any
6 relevant information resulting from this information.

7 The final area -- oh, one other piece
8 before we -- one other piece on relevance before we
9 get to the unique level of confidentiality. PJM
10 consistently changes its tariff as we know. It makes
11 filings all the time to change its methodology.

12 On Friday, December 12, PJM filed to
13 overhaul its capacity market rules including the
14 calculation of avoided cost rates. So to the extent
15 that P3 and EPSA are seeking to make future
16 predictions based on past calculations of avoided
17 cost rates, there really is no -- there is no way you
18 can get there in terms of trying to figure out what
19 they are going to bid in the future anyway. But even
20 if there was some semblance of mechanism, now,
21 these -- assuming that PJM's filing from December 12
22 gets accepted by the FERC and becomes part of the
23 tariff, this methodology will change dramatically.

24 There will be an inclusion of firm gas
25 supply and transportation costs. There will be an

1 inclusion of costs of increased risks associated with
2 stricter performance and a higher risk of incurring
3 higher penalties and there are a number of other
4 specific changes to the avoided cost rates. So
5 that's the relevance piece.

6 We think there is no relevance, so then
7 when you look at the other side of the scale, the
8 other side of the scale is, well, what's the harm?
9 What's the undue burden here? And the undue burden
10 is unique. It's not just like the other Ohio cases,
11 in Goodyear and some of the other competitive market
12 data cases, where -- where motions to quash were
13 granted and subpoenas were denied in the Ohio courts.

14 It's unique in PJM because the PJM tariff
15 says you may not divulge any of this information.
16 Under any circumstances you may not divulge it. PJM
17 has a very specific mechanism that limits personnel
18 who could see it, password protected data. It's not
19 just through a nondisclosure or confidentiality
20 agreement.

21 PJM and the IMM in many other
22 proceedings, including a proceeding that P3 was part
23 of in New Jersey, it was the Moper proceeding, that
24 was sort of the predecessor of the Hanna case that we
25 have discussed in the recent past. And in that case

1 certain parties did seek -- and it was in the
2 district court in New Jersey. And certain parties
3 did seek highly confidential bid data of a generator
4 called CVP, and the IMM specifically came in and
5 provided really an unusually strong series of
6 language of all of the issues and concerns that would
7 result from this disclosure.

8 And the IMM said information shared with
9 PJM and the market monitor that's related to offer
10 data is so highly sensitive that participants in any
11 nonregulated market should not share this type of
12 information with anyone. The IMM said information
13 about long-lived assets like generation units do not
14 grow stale quickly. In the wrong hands they can
15 damage the integrity of the market for years. The
16 IMM said there's no practical way to prevent the use
17 of such information once it's obtained by persons
18 active in or advising those active in the organized
19 markets. And the IMM said no protective order will
20 be sufficient to eliminate the potential risk of
21 market-sensitive information.

22 And, your Honor, the risk of this
23 disclosure, it's not just hypothetical. In fact, in
24 this proceeding when Mr. Settineri sort of alluded to
25 this a moment ago indirectly in this proceeding, P3

1 and EPSA have already disclosed sensitive market
 2 data. What we believe to be inadvertently in a
 3 discovery request they specifically asked information
 4 and referenced and alluded to in questions 57 and 58
 5 in set 2 of their interrogatories, they referenced
 6 information that included inadvertently competitive
 7 sensitive market data. And while we believe that was
 8 not intentional, that's precisely the risk that we
 9 are dealing with here and that market data is not
 10 nearly as significant as the issues when we're
 11 dealing with offer cap and bid-related data.

12 And that's all I have for now. Thank
 13 you.

14 EXAMINER PRICE: Thank you. Anybody else
 15 care to weigh in before we discuss this with
 16 Mr. Settineri?

17 Mr. Settineri, before you begin I have
 18 one simple question for you. FirstEnergy Solutions
 19 has pointed out that they are a nonparty. It occurs
 20 to me that one party in this proceeding does have
 21 this information and that's the independent market
 22 monitor. Have you solicited this information from
 23 the market monitor yet?

24 MR. SETTINERI: Your Honor, I am not
 25 aware if we have done that. So at this time I would

1 say no. But, again, I haven't consulted with my
2 co-counsel on that.

3 EXAMINER PRICE: Doesn't it make more
4 sense --

5 MR. SETTINERI: I am not aware of any
6 solicitation to the independent market monitor.

7 EXAMINER PRICE: Doesn't it make more
8 sense to solicit discovery from a party to the
9 proceeding before we begin subpoenaing nonparties?

10 MR. SETTINERI: Well, your Honor, the
11 discovery obviously deadline has passed, and
12 FirstEnergy Solutions is the entity that produced the
13 spreadsheets with all the information, the detailed
14 information, and so it's a very simple process to
15 issue the subpoena and I think it's especially
16 efficient that we are here to discuss it.

17 EXAMINER PRICE: I understand. Again, I
18 am just -- I think notwithstanding the fact those
19 arguments that -- they are not maybe a traditional
20 nonparty since they are the owners of the generation
21 in question, I just think as a general principle, it
22 might be better to solicit discovery from an actual
23 party before we move on to the nonparties. But go
24 ahead with your response.

25 MR. SETTINERI: Thank you, your Honors,

1 and my response will be brief. In terms of the three
2 categories, the standard for a nonparty the subpoena
3 was served pursuant to the Commission's rules for
4 subpoenas. Those subpoenas incorporate discovery
5 rules, the bar for discovery that you talked about,
6 so it's not whether it's relevant. It's whether the
7 information requested is reasonably calculated to
8 lead to the discovery of admissible evidence. That's
9 the standard here. As FES admitted, this is not
10 burdensome. This is easily available information
11 that's most likely electronic in nature that could be
12 provided very quickly and very easily in that
13 regards.

14 Now, in terms of the relevance, in terms
15 of the confidentiality of the information and the
16 use, FES had pointed out some pages from our
17 memoranda contra, but I also point out in our
18 memoranda contra at page 3, we said, "Because the
19 companies have represented that these plants are
20 facing questionable economic viability, the
21 credibility of those claims must be tested."

22 We also make a similar statement later at
23 page 6 saying that this information that we seek is
24 "essential in determining whether a unit is
25 economical and able to compete in the capacity

1 market." And what's really interesting about these
2 spreadsheets they are unit specific. And putting on
3 my engineering hat when I look at it, you can see
4 that you have breakouts in the information, what's
5 avoidable, what's not avoidable. My understanding is
6 that certain investments that aren't essential to
7 operate aren't included in that information.

8 So at the end of the day that information
9 is very helpful to be able to look at a market
10 participant and get a flavor for the avoidable costs
11 versus maybe the cap and also whether investments
12 have or have not been made and how that -- and how
13 those investments are being recovered. So that is
14 very helpful information.

15 And in terms of not why we need it but
16 why -- I'll just point out from Mr. Donald Moul, vice
17 president of commodity operations, FES, and FES is
18 not a party to this proceeding, but he is going to
19 testify on behalf of the companies. He states in his
20 testimony "I will discuss why the future of the
21 plants is uncertain and how the economic stability
22 program will provide certainty and support resource
23 diversity."

24 He also states again "The economic
25 viability of the plants is in doubt" and that's at

1 page 2 of his testimony on line 12 -- 17.

2 "Market-based revenues for energy and capacity has
3 been at historic lows and are insufficient to permit
4 FES to continue operating the plants to make the
5 necessary investments. Near-term forecasts for
6 energy and capacity prices are unfavorable and while
7 Company Witness Rose forecasts market prices for
8 energy and capacity would increase over time, the
9 plants may not survive to see these better days."

10 That is very -- that puts this
11 information front and center in this proceeding.
12 These -- again, these workpapers that we seek, the
13 spreadsheets are going to provide detailed cost
14 breakdowns when you compare the spreadsheet template
15 we submitted with the information that was in
16 Mr. Lisowski's testimony and also referenced in FES's
17 memo contra. It's a lot more detailed than the
18 templates, and it's a different breakout that's very
19 helpful.

20 We can take this raw data, and we will be
21 able to apply it against some of the projections and
22 forecasts to see -- to make our decision, our
23 determination, not FES's, not the companies', but
24 whether we think these units would generate dollars
25 and whether they will be viable in the capacity

1 auctions.

2 The date will be use -- also be used to
3 show these plants we believe will not be shut down as
4 indicated in Mr. Moul's testimony. And it also
5 provides an understanding of the avoidable costs,
6 again going back to the reference I made earlier
7 about the investments, comparing what was our
8 avoidable costs and then knowing what that is,
9 knowing what happened in the market, you get a flavor
10 for what is trying to be recovered through the market
11 activity. So to us it's certainly relevant but there
12 is a bar for discovery here and we believe it has
13 been achieved.

14 In terms of confidentiality if this
15 information is so important it cannot be disclosed,
16 PJM doesn't disclose it, FERC won't allow it, we will
17 have to go to FERC to get permission to even disclose
18 this, I attached a case to our memorandum contra that
19 were -- FERC addressed a very similar issue and
20 looked at a protective agreement and said there's a
21 protective agreement in place. We believe that's
22 sufficient.

23 Now, FES has indicated an issue that we
24 became aware of on Monday, and we do take
25 confidentiality very seriously just like every other

1 company in this room. And whether it's privileged
2 communications inadvertently disclosed or any other
3 inadvertent disclosure, we are investigating that
4 issue, but we do take this very seriously. We will
5 have a protective agreement in place for these -- for
6 this information, and we are more than willing to
7 discuss other protections that you may deem
8 necessary, but we do take it very seriously. And I
9 kind of -- I kind of think of things very simple and
10 what this all boils down to me is that we have FES is
11 selling a car and that's what it is. We are selling
12 a car, and the Commission, the ratepayers, and the
13 parties should be able to look under the hood and see
14 what is under the hood. I am not going to buy a car
15 if I can't look under the hood.

16 That's all. Thank you, your Honor.

17 EXAMINER PRICE: Thank you.

18 Anybody else care to weigh in before we
19 go back to Mr. Schwartz?

20 MR. SCHWARTZ: Thank you, your Honor.
21 Let's start with the standard and the burden. You
22 know, the -- this is not regular discovery. I mean,
23 FES is not a party here. Under Ohio law, which is
24 not unusual, you have to compare the substantial need
25 to the undue burden that is not reasonably likely to

1 obtain relevant evidence. It's just not the same
2 standard. It's a higher level for subpoenaing a
3 nonparty and I think we should keep that in mind and
4 that balance is important.

5 Second of all, you know, Mr. Settineri
6 described a number of other instances. He talked
7 about some of the investments. He talked about the
8 templates. He talked about other pieces of data that
9 he thinks will come out of this. But all of those
10 pieces of data are trying to accomplish the same
11 thing, to set the offer cap.

12 And what he is trying to -- when he
13 says -- when Mr. Settineri says we are trying to test
14 whether the economic viability of the facilities is
15 really in doubt, you can't tell that by seeing what
16 the offer cap is because if you really want to clear,
17 if somebody really wants to clear, they bid lower.
18 You can't tell by looking at what PJM says your
19 maximum price you are allowed to offer is as to what
20 the economic viability of the facilities would be.

21 In fact, the information that is helpful
22 in support of the statement the economic viability is
23 in doubt is in the companies' application and
24 testimony and exhibits. That's where that
25 information resides, not in information with respect

1 to what the maximum price is that you are allowed to
2 include.

3 I'll just speak louder.

4 EXAMINER PRICE: Just project. You'll be
5 fine.

6 MR. SCHWARTZ: When you look at if your
7 maximum price includes all avoided -- all avoidable
8 costs and you are adding more facilities, adding
9 upgrades to your facilities, this is -- this is what
10 Mr. Settineri is talking about, he says I want to see
11 what those upgrades are, and he says I want to know
12 whether investments were made, not made, and how they
13 were recovered.

14 That information is not in the PJM data.
15 PJM data tells you here is the maximum amount you can
16 bid. By the way we are going to increase that
17 maximum amount to reflect capital expenditures that
18 are being added naturally. I mean, they are all
19 going forward -- short run going forward costs. If a
20 generator wants to make sure they clear, regardless
21 of what those upgrades are they could bid zero and
22 take the clearing price.

23 As to -- and then the last point as to
24 confidentiality, Mr. Settineri said, oh, don't worry
25 about it. There is a FERC case out there where a

1 party to the proceeding, the named party in the
2 proceeding, the filing party in the proceeding, was
3 forced to provide this confidential data. Again --
4 you know, with a protective order.

5 Again, this is a very different standard
6 than the standard associated with subpoenaing a
7 nonparty and I would point your Honor back to the New
8 Jersey District Court case in the Hanna case where
9 that information was not permitted precisely because
10 of the risk associated -- associated with potential
11 disclosures.

12 And that's all I have, your Honor, unless
13 you have any questions.

14 EXAMINER PRICE: Mr. Settineri, response?

15 MR. SETTINERI: Two points, your Honor.
16 It's the data in the spreadsheet that matters.
17 That's very important, just as important as the end
18 result, and that, again, goes back to the level of
19 detail that's in that template.

20 And, No. 2, I think of FES as a party to
21 this proceeding because frankly they are the ones
22 that are going to benefit from this. So in a way I
23 think of it that way and I think the subpoena was a
24 valid exercise by P3 and EPSA and certainly I will
25 need the evidence that will be used in this

1 proceeding.

2 EXAMINER PRICE: Okay. At this time
3 balancing the interests of PJM Power Producers who
4 need the information and the interests of a nonparty,
5 whatever we might feel in our hearts is still
6 technically a nonparty, balancing those interests we
7 are going to go ahead and grant the motion to quash.

8 The Bench does note that this information
9 may be in the possession of an actual party to this
10 proceeding, and we will grant P3 a one-time exception
11 to the discovery cutoff date to seek that information
12 from the independent market monitor. If they object
13 to disclosure, then we will deal with it at that
14 point.

15 Yes, sir.

16 MR. SATTERWHITE: And if I may, as
17 Mr. Olikier did, we just request an expedited
18 discovery timeframe for that.

19 EXAMINER PRICE: Unfortunately the
20 independent monitor is not here to defend himself
21 but --

22 MR. SETTINERI: We can ask for it if we
23 need to.

24 EXAMINER PRICE: Give them 10 days. Give
25 them 10. We will go with 10 days. It is going to be

1 interesting to see what his response is to this.

2 MR. SCHWARTZ: Your Honor, may I just
3 make one note about that?

4 EXAMINER PRICE: Yes.

5 MR. SCHWARTZ: In the past when the
6 independent market monitor has received a request
7 like this as a party in a proceeding, the independent
8 market monitor has gone through an internal process
9 that involves alerting the individuals that this
10 information is being requested and bringing them in
11 to that discussion as well and that's what happened
12 in the New Jersey case. And we would expect that to
13 happen as well so any -- any individuals --
14 individual market participants that objected would
15 kind of work with the independent market monitor with
16 respect to that issue.

17 EXAMINER PRICE: That's not surprising
18 and I am sure we will be able to deal with that when
19 that comes up.

20 MR. SCHWARTZ: Okay. Thank you, your
21 Honor.

22 EXAMINER PRICE: Thank you. Let's go off
23 the record.

24 (Discussion off the record.)

25 EXAMINER PRICE: Let's go back on.

1 Okay. The next issue we have aggregation
2 data as requested by IGS. Mr. Oliker?

3 MR. OLIKER: Yeah. What's at issue right
4 now is two discovery requests. One is related to the
5 total aggregation data within FirstEnergy's service
6 territory. The second one was regarding aggregation
7 data of NOPEC, but I have inquired to NOPEC's counsel
8 because it was my understanding at least some of the
9 that data had been brought to the public and I was
10 going to defer to whether or not they would consider
11 that information confidential whether or not we
12 sought that.

13 What is critically important to us for
14 this proceeding is the disclosure of total
15 aggregation data within FirstEnergy's service
16 territory. And as I understand the companies'
17 position is their concern that they believe they are
18 prohibited from disclosing that. I believe it's Rule
19 4901:1-25-025(B), but the way I read that Commission
20 rule is it is prohibited from disclosing
21 aggregator-specific information which would be, for
22 example, NOPEC would be a good example, their
23 information would be held confidential unless they
24 needed to make it public.

25 But the way I read the rules it wouldn't

1 apply to the total amount of aggregation statistics
2 in the service territory. And also I would add to
3 the side of that even though that's the case, and we
4 are not talking about taking this information and not
5 making it confidential, we would like to have it to
6 be in the public record, the total aggregation
7 statistics, but we would be willing to hold it
8 confidential if the Bench deemed it was necessary.

9 So I guess there are a few different ways
10 we could tackle the issue, but I would like to hear
11 what the company has to say. I understand their
12 misgivings of not acting -- or wanting to make sure
13 anything they do is in accordance with the
14 Commission's rules.

15 MR. KUTIK: Your Honor, I think, first,
16 we should talk about what the requests are. Good
17 start. "Please provide the percentage of FirstEnergy
18 distribution customers that are receiving generation
19 service through a community aggregation program."
20 That's IGS set 2 interrogatory 36.

21 Second, "Please provide the percentage of
22 FirstEnergy distribution customers that are receiving
23 generation service through a community aggregation
24 that is administered by the Northeast Ohio Public
25 Energy Council." That's -- that's set 2

1 interrogatory 37.

2 First, our objection is that it's
3 irrelevant; and, in fact, Mr. Olikier never indicated
4 why this would be of any moment in this case. I
5 can't think of any, and we will be glad to hear it.

6 Secondly, there -- there is certainly --
7 if this is provided would certainly be specific as to
8 specific government aggregators. The Cleveland
9 Electric Illuminating there is only one government
10 aggregator. For Toledo Edison there is only one
11 government aggregator. So the idea that you can kind
12 of mush it around, and we really don't know who is
13 the player here is -- is not right.

14 The two rules that are at play here, your
15 Honor, first, there's Ohio Administrative Code
16 4901:37-04(D)(4) which basically says anything that
17 an EDU gets from a CRES supplier or aggregator is --
18 we have to hold confidential. That's No. 1.

19 No. 2 is the rule that Mr. Olikier cited,
20 4901:1-25-02(D) -- (D)(5) -- or (5)(D) -- (5)(B) that
21 says any information received pursuant to certain
22 rules, which I'll mention in a second, is deemed
23 confidential information. That information includes
24 the number of customers by class in each aggregated
25 group, the total number of customers in each

1 aggregated group, the total number of customers by
2 class, and the total number of customers.

3 This is all information we believe is
4 covered by the rule and there is good reason for that
5 because it's competitively-sensitive information and
6 for that reason, your Honor, we would -- we objected
7 and we still object.

8 MR. OLIKER: Your Honor, briefly.

9 EXAMINER PRICE: One second, Mr. Oliker.
10 I am going to ask Mr. Stinson to weigh in because he
11 seems to have a unique interest in this question.

12 MR. STINSON: We do have an interest and
13 the information obviously is confidential and, like
14 Mr. Kutik, I have no idea why it's relevant to this
15 proceeding.

16 EXAMINER PRICE: So just to summarize
17 NOPEC objects to the release of the information.

18 MR. STINSON: They do, we do.

19 EXAMINER PRICE: Mr. Oliker, now is your
20 turn to talk about relevance.

21 MR. OLIKER: Sure. One of the things
22 that's contained in the companies' application is
23 that it has a vibrant shopping in each of its service
24 territories. And there is a question of whether
25 shopping is vibrant or whether it is inorganic

1 shopping as a result of aggregation. And one of the
2 things we would like to explore in our testimony and
3 in this case is the percentages of actual switching
4 versus municipal aggregation switching. And this is
5 directly relevant to that issue and to how the
6 competitive markets are working in FirstEnergy.

7 EXAMINER PRICE: Actual switching is
8 different from aggregation switching?

9 MR. OLKER: Switching that is done
10 through --

11 EXAMINER PRICE: Individual contracts.

12 MR. OLKER: Exactly.

13 EXAMINER PRICE: I know what you mean.

14 MR. OLKER: Organic versus inorganic as
15 we would consider it.

16 EXAMINER PRICE: Harsh once again.

17 MR. OLKER: I would like to address too,
18 I am not sure if Mr. Kutik did it on purpose, but the
19 parts of the rule he was citing regarding disclosure
20 of customer classes, I do believe that related to the
21 individual information provided by a specific
22 aggregator. It wasn't related to the total
23 aggregation statistics of all of them together.

24 EXAMINER PRICE: If there is one
25 aggregator, the two numbers are going to be the same.

1 MR. OLIKER: We don't care about the
2 service territories. You can lump them all in
3 together. It could be the entire FirstEnergy system,
4 all -- what's the percentage. It doesn't have to be
5 broken down by distribution utility.

6 EXAMINER PRICE: Fair enough. Strangely
7 enough I am not going to start waiving Commission
8 rules off the top of my head. We'll take this matter
9 under advisement. We will either rule by subsequent
10 entry or we will rule at the prehearing conference
11 where we are going to deal with the in camera review
12 so that's going to take a couple of days for a
13 ruling.

14 MR. OLIKER: Okay. Could I at least ask
15 the parties if they would object to Mr. -- I am not
16 going to mention his name yet, if IGS were to present
17 a witness on this issue that we could potentially
18 supplement that line item once we do obtain the
19 information, assuming the Bench was to agree with us?

20 EXAMINER PRICE: You will have to ask the
21 parties. We will let you supplement if you win this
22 point.

23 MR. OLIKER: Thank you, your Honor.

24 EXAMINER PRICE: Thank you.

25 MR. KUTIK: Your Honor, before I get to

1 the two other items that are not the subject of any
2 pending motion, I did want to advise the Bench and
3 Mr. Olikar about what information we are able to
4 produce from ICF because I wanted to be accurate, and
5 I didn't want there to be any misunderstanding.

6 My -- I am advised that the first report that we can
7 provide -- I guess the earliest report that we can
8 provide is the first quarter of 2010. There are no
9 reports in 2009. And we are willing to produce the
10 reports starting with the first quarter of 2010. We
11 just wanted to advise the Bench of that fact.

12 EXAMINER PRICE: I will modify my
13 previous ruling such that you are directed to produce
14 reports beginning first quarter of 2010.

15 MR. KUTIK: Thank you, your Honor.

16 In certain of our discovery, your Honor,
17 we asked for delineation of communications that took
18 place between or among the parties, and we were
19 advised in response that there were -- there was a
20 joint defense agreement, and the joint defense
21 agreement was produced by certain parties. And five
22 parties appeared to indicate that they were
23 withholding disclosure of the communications because
24 of the joint defense agreement.

25 And those parties were OCC, NOPEC, OEC

1 and EDF, and NOAC, and Sierra Club. When we advised
2 or asked these parties are you going to produce a
3 privilege log, OEC and EDF and NOAC basically said,
4 well, we really have -- we have no communications, we
5 have no documents so obviously there is no need to do
6 a privilege log so we are not concerned about them.

7 OCC and NOPEC advised us that they will
8 provide a privilege log, but we don't have a date for
9 that, and so we would ask for a date for the
10 privilege log to be produced. Sierra Club did not
11 respond, so obviously if they have documents, that we
12 would like a privilege log at the same time we get
13 the NOPEC and OCC privilege logs.

14 EXAMINER PRICE: Mr. Sauer, what day
15 would you like to produce this privilege log?

16 MR. SAUER: Your Honor, would Tuesday,
17 the 23rd, be acceptable?

18 EXAMINER PRICE: Mr. Stinson, Tuesday,
19 the 23rd?

20 MR. STINSON: We are agreeable to that.

21 EXAMINER PRICE: Mr. Kutik?

22 MR. PRITCHARD: Your Honor, I know this
23 issue has been raised in another pending case and
24 parties have been addressing it, and since this issue
25 seems to crop up in many of these cases, I am kind of

1 curious, there has been no discussion yet of
2 relevance, and normally these questions go to
3 parties' communications, pretrial motions.

4 EXAMINER PRICE: He just wants a
5 privilege log.

6 MR. FISK: Your Honor, on behalf of
7 Sierra Club, I would add that our objection actually
8 was on the grounds of relevance as opposed to the
9 joint defense agreement, and we -- we still believe
10 that objection stands, though we would be willing to
11 supplement our response consistent with the deadline
12 that is being agreed to.

13 MR. KUTIK: My concern about the
14 calendar, your Honor, only is that if we are going to
15 be talking about in camera, we might want to have an
16 in camera inspection of those documents as well. I
17 am not sure that we will, but we would -- at least I
18 want that opportunity to raise that at that time.

19 EXAMINER PRICE: Let's go off the record
20 for one moment.

21 (Discussion off the record.)

22 EXAMINER PRICE: Let's go back on the
23 record.

24 Based upon a lengthy discussion off the
25 record, we are going to have the in camera review of

1 the privilege log and potentially the documents
2 related to -- FES's documents, what we discussed
3 earlier, we are having an in camera review. That
4 review will take place on the 30th at 10 o'clock at
5 the Commission office here in room 1A -- 11A.

6 At the same time any issues between the
7 parties that -- communication between the parties
8 which the parties intend to claim a privilege based
9 upon the existence of a joint defense agreement
10 should be identified in the privilege log submitted
11 to FirstEnergy by December 23.

12 Also on the 30th we will review the
13 privilege log. We will do an in camera review of the
14 privilege log, and the Bench will take up arguments
15 as to the relevance of discovery of communications
16 between the parties.

17 Did I say that correctly? Anybody object
18 to what I just said?

19 Okay. Mr. Kutik.

20 MR. KUTIK: Yes, your Honor. We asked in
21 our discovery for what I'll call several
22 witness-related requests, for example, identification
23 of prior testimony; documents exchanged between the
24 party and the expert or the witness; documents that
25 were reviewed, relied upon, or generated by the

witness; the CV of the witness; the witness's contract for services, if any; depositions of witnesses; any opinions that were provided; and any work product.

All but three of the parties either said they didn't know or identified a witness. Only three parties said we are not going to have a witness. So we can understand that parties aren't going to produce discovery about their witnesses up until the time that they have to file their witness material. And so what we would request is that all of our witness-related discovery be supplemented on the 22nd.

EXAMINER PRICE: Any objections?

Ms. Bojko.

MS. BOJKO: I think the rules require us to supplement our discovery. I am not sure that the date of the 22nd -- I think the rules -- I don't have them in front of me, but I think it says within a reasonable period of time so. Five days? So I guess my objection would only be to the requirement of the 22nd necessarily. The intent was to supplement as soon as possible but maybe not necessarily on the 22nd.

EXAMINER PRICE: You really want me to

1 ruin your holiday weekend and make it five days after
2 the 22nd?

3 MS. BOJKO: No, but I want the rule -- I
4 want us to be required to follow the rules which
5 allow the time period if we deem it necessary as
6 opposed to requiring it the 22nd. I want the rules
7 to be applicable.

8 MR. KUTIK: Well, the rules would apply
9 now. I am -- I would bet dollars to doughnuts that
10 every party in this room that's going to file knows
11 who is going to be their witness and is probably
12 working on their testimony and probably has the
13 workpapers in some short order.

14 So the idea that producing materials
15 related to your witness at the time you are filing
16 your testimony is burdensome or somehow isn't in
17 compliance with the rules is absurd.

18 MR. OLIKER: Your Honor, I disagree.

19 MS. BOJKO: Yeah, I disagree.

20 EXAMINER PRICE: Okay. Fire away. Why
21 do you disagree?

22 MS. BOJKO: What? Why do I disagree?

23 EXAMINER PRICE: With what he said.

24 MS. BOJKO: Because my testimony isn't
25 required to be filed until 5:30 on December 22.

1 Until that time I do not know for sure whether I am
2 going to submit that testimony, and I am not
3 obligated by the rules to make that decision a day
4 early or two days earlier than what -- whether the
5 company believes its absurd or not absurd. It's the
6 requirement of the rules.

7 EXAMINER PRICE: Mr. Olikar?

8 MR. OLIKER: Yeah, I would agree.
9 Parties may have a good idea who is going -- you
10 don't really know who is going to testify until you
11 get internal sign-off on the testimony and the
12 witness is willing to say he agrees with everything.
13 Yes, there may be some parties that know but I
14 wouldn't say that everybody does.

15 EXAMINER PRICE: And everybody will
16 decide at 5:29 -- you better hope the electronic
17 filing system doesn't collapse.

18 No, it's fine. I've heard enough. In
19 deference to the rule parties will supplement no
20 later than -- well, I'm afraid we are at the 28th of
21 December because I think that's the -- Monday, the
22 28th; is that correct?

23 MS. BOJKO: 29th is Monday.

24 EXAMINER PRICE: 29th is Monday. All
25 parties will supplement by Monday the 29th of

1 December all their -- all of their discovery
2 responses without fail.

3 MR. OLIKER: If we know earlier, we will
4 supplement earlier.

5 EXAMINER PRICE: I appreciate that and
6 I'm sure Mr. Kutik will too.

7 MR. SETTINERI: Your Honor, just for
8 clarification because I haven't looked at the
9 discovery response, there's been no request to us or
10 conversation with the companies about the response
11 that I am aware of, you just stated that all
12 discovery responses must be supplemented. Can we
13 hone this down?

14 EXAMINER PRICE: We are talking about the
15 witness discovery responses --

16 MR. KUTIK: Yes.

17 EXAMINER PRICE: -- Mr. Kutik has raised.

18 MR. KUTIK: And I specified the request
19 in my discussion earlier.

20 EXAMINER PRICE: Yeah.

21 MR. SETTINERI: Okay. Witness
22 disclosure.

23 EXAMINER PRICE: Witness-related, CV,
24 background, whole nine yards.

25 MR. SETTINERI: Thank you, your Honor.

1 MR. OLIKER: Sorry, your Honor. To avoid
2 something happening down the road, I know that a
3 potential witness that I've identified has been
4 deposed but has confidential information that would
5 be owned by another party or pursuant to another
6 confidentiality agreement. I don't know how the
7 Bench would like to treat that because I know we have
8 had issue with that, and we can deal with it today
9 unless the company is not asking for that.

10 MR. KUTIK: No. I think the way to do
11 that, discuss that is to discuss it with us off the
12 record, and we can determine whether that's something
13 we want or we want to fight about or not fight about.

14 EXAMINER PRICE: I'm with Mr. Kutik.
15 Notwithstanding everything we've discussed today, we
16 are trying to keep the Bench out of discovery issues
17 to the extent possible so why don't you guys talk
18 about that offline and then, if necessary, we will be
19 here the 30th.

20 MR. OLIKER: Trying to reduce us from
21 coming back here.

22 EXAMINER PRICE: Anything else?

23 Ms. Spiller.

24 MS. SPILLER: If we are done with this
25 discussion, I would like to go back to the motion to

1 compel from IGS Energy.

2 EXAMINER PRICE: Sure. Let's go back.

3 MS. SPILLER: Just very briefly and for
4 clarification, the ruling was two part in respect of
5 information that Judah Rose may have produced for
6 other companies. You denied the motion to compel
7 with regard to nonparties, granted the motion to
8 compel with respect to Duke Energy Ohio. So I would
9 ask for the Bench's clarification if Duke Energy Ohio
10 were not a party to this proceeding, would it be
11 subject to that aspect of your motion that denied?

12 EXAMINER PRICE: I actually only ruled
13 with respect to -- I haven't ruled anything with
14 respect to Duke. I was using the shorthand of Judah
15 Rose's information related to the Duke Energy
16 proceeding. I was not making any motion -- I was not
17 making ruling on any motion to compel any discovery
18 he may have given you. He is not giving you any
19 discovery. And you've not denied -- you have not
20 responded to the discovery. He hasn't given you and
21 no ruling has been made.

22 As to your theoretical question, if you
23 were no longer a party to this proceeding, I have no
24 idea. At that point it's going to be up to
25 Mr. Olikier to demonstrate he has no other way of

1 getting it, and we will go from there. I don't know.
2 I can't give you a theoretical ruling.

3 MR. OLIKER: I'm glad to serve it.

4 MS. SPILLER: Your Honor, then I would
5 give Duke Energy's oral withdrawal from this case.

6 MR. OLIKER: And I would oppose it.
7 Sorry, your Honor.

8 EXAMINER PRICE: If you have a subpoena
9 for Duke Energy, I guess you better start preparing
10 it.

11 MR. OLIKER: Your Honor, are you saying
12 you are allowing Duke Energy Ohio to immediately
13 withdraw from this case?

14 EXAMINER PRICE: I am not making any
15 rulings on this issue in the time we have remaining.
16 If Duke cares to withdraw from this, then they are
17 going to make that decision to withdraw, and we will
18 take up this issue if you have got some other motion
19 or something you want to file. Again, I am not
20 giving any advisory rulings at this point as to how
21 this is going to be handled.

22 MR. OLIKER: Thank you, your Honor.

23 MR. FISK: Your Honor, one other quick
24 question.

25 EXAMINER PRICE: Oh, no.

1 MR. FISK: On the FES privilege log, I do
2 not believe that we have seen the joint defense or
3 common interest agreement that they are claiming.
4 Would your Honor need that for purposes of the in
5 camera review?

6 EXAMINER PRICE: Have you asked for the
7 joint defense agreement?

8 MR. FISK: We have not because discovery
9 was closed before.

10 MR. KUTIK: It's been produced.

11 EXAMINER PRICE: It's been produced?

12 MR. HAYDEN: Yes, it has.

13 EXAMINER PRICE: It's been produced.

14 MR. FISK: Where? Okay.

15 EXAMINER PRICE: As long as Mr. Fisk is
16 raising the issue, any party which has a joint
17 defense agreement cares to defend that agreement
18 probably wants to provide the Bench a copy on
19 December 30 just to make sure we don't issue any bad
20 rulings. Okay?

21 Anything else?

22 Thank you all. We are adjourned. We
23 will reconvene on December 30 at 10 a.m. in this
24 hearing room unless otherwise ordered by the
25 Commission.

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Off the record.

(Thereupon, the hearing was adjourned at
4:27 p.m.)

- - -

CERTIFICATE

I do hereby certify that the foregoing is
a true and correct transcript of the proceedings
taken by me in this matter on Thursday, December 18,
2014, and carefully compared with my original
stenographic notes.

Karen Sue Gibson, Registered
Merit Reporter.

(KSG-5977)

- - -

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Summary: Transcript in the matter of Ohio Edison Company, Cleveland Electric Illuminating Company and Toledo Edison Company hearing held on 12/18/14 electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.