

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 10 a.m. on Tuesday,
December 30, 2014.

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1 APPEARANCES:

2 FirstEnergy Corp.
3 By Mr. James W. Burk
4 and Ms. Carrie M. Dunn
5 76 South Main Street
6 Akron, Ohio 44308

7 On behalf of the Applicants.

8 Bruce E. Weston, Ohio Consumers' Counsel
9 By Mr. Larry Sauer
10 Mr. Michael Schuler
11 Mr. Kevin Moore,
12 Assistant Consumers' Counsel
13 10 West Broad Street, Suite 1800
14 Columbus, Ohio 43215-3485

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

19 Williams Allwein & Moser, LLC
20 By Mr. Christopher J. Allwein
21 1500 Third Avenue, Suite 330
22 Columbus, Ohio 43212

23 On behalf of the Sierra Club.

24 Bricker & Eckler, LLP
25 By Mr. Dane Stinson
and Mr. Dylan Borchers
100 South Third Street
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.

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APPEARANCES: (Continued)

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.

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.

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APPEARANCES: (Continued)

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
Columbus, Ohio 43215

On behalf of the Staff of the PUCO.

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.

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

On behalf of FirstEnergy Services.

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Tuesday Morning Session,
December 30, 2014.

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LAW CLERK ADDISON: Let's go on the
record.

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 for 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 by
the Commission to preside over this prehearing
conference. At this time I would like to take
appearances of the parties beginning with the
company.

MR. BURK: On behalf of the companies,
James W. Burk, Carrie M. Dunn, 76 South Main Street,
Akron, Ohio 44308.

MR. HAYDEN: Good morning, your Honors.
On behalf of FirstEnergy Solutions, Mark Hayden.

MR. PARRAM: Good morning. On behalf of

1 The Kroger Company, the law firm of Taft, Stettinius
2 & Hollister, Attorneys Mark Yurick and Devin Parram,
3 65 East State Street, Suite 1000 Columbus, Ohio
4 43215.

5 MR. SETTINERI: Good morning. On behalf
6 of PJM Power Producers Group and the Electric Power
7 Supply Association, Mike Settineri, Vorys, Sater,
8 Seymour & Pease, 52 East Gay Street, Columbus, Ohio
9 43215.

10 MR. PRITCHARD: Matt Pritchard on behalf
11 of Industrial Energy Users of Ohio. I am with the
12 law firm of McNeese, Wallace & Nurick, 21 East State
13 Street, Columbus, Ohio 43215.

14 MR. OLIKER: Good morning, your Honors.
15 On behalf of IGS Energy, Joseph Olikier, 6100 Emerald
16 Parkway, Dublin, Ohio 43016.

17 MR. ALLWEIN: Good morning, your Honors
18 and counsel. On behalf of the Sierra Club,
19 Christopher J. Allwein with Williams Allwein & Moser,
20 1500 West Third Avenue, Suite 330, Columbus, Ohio
21 43212.

22 MR. O'ROURKE: Thank you, your Honor. On
23 behalf of staff, Ryan O'Rourke, Tom McNamee, Thomas
24 Lindgren, 180 East Broad Street, 6th Floor, Columbus,
25 Ohio 43215.

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

4 MS. BOJKO: Thank you, your Honor. On
5 behalf of the law firm of Carpenter Lipps & Leland, I
6 am Kimberly W. Bojko, also Rebecca Hussey and Jon
7 Allison, 280 North High Street, Columbus, Ohio 43215.

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

15 MR. STINSON: Thank you, your Honor. On
16 behalf of the Northeast Ohio Public Energy Council,
17 Glenn S. Krassen, 1001 Lakeside Avenue East, Suite
18 1350, Cleveland, Ohio 44114, Dane Stinson, Dylan
19 Borchers, 100 South Third Street, Columbus, Ohio
20 43215, the law firm Bricker & Eckler.

21 EXAMINER PRICE: Thank you.

22 We are here today to discuss issues
23 related to FirstEnergy Solutions' motion to quash the
24 subpoena submitted by Sierra Club, and in particular
25 we are talking about the issues related to what's

1 been commonly described as topic 5. FirstEnergy
2 has -- Solutions has given everybody a copy of their
3 privilege log, so we will go ahead and take arguments
4 as to the privilege log at this time.

5 Mr. Allwein.

6 MR. ALLWEIN: Yes, thank you, your
7 Honors. Your Honors, Sierra Club has concern with
8 the privilege log that has been produced by
9 FirstEnergy Solutions. We believe that FirstEnergy
10 Solutions appears to have performed an inadequate
11 search of their records for documents responsive to
12 our subpoena topic 5. We weren't just asking for
13 draft term agreements. We were seeking FirstEnergy
14 Solutions' evaluation of their proposed power
15 purchase agreement which according to discovery
16 responses was developed in late April, early May and
17 proposed to FirstEnergy in writing on May 13.

18 The fact that FirstEnergy Solutions'
19 privilege log does not identify any documents prior
20 to June 1, 2014, strongly suggests an inadequate
21 search. It's hard to believe that FirstEnergy
22 Solutions developed its initial proposal for the PPA,
23 evaluated the potential costs and the benefits for
24 that proposal and negotiated that proposal while
25 creating only a limited number of e-mails, those

1 listed in FirstEnergy Solutions' privilege log.

2 It appears they have not done a thorough
3 search regarding this topic or that they have limited
4 the search to only documents specifically regarding
5 the draft term sheet itself. Our topic 5, as I
6 stated, is broader than that, and we would ask for
7 additional e-mails that are responsive to our request
8 for topic 5.

9 EXAMINER PRICE: Anyone else?

10 Mr. Hayden.

11 MR. HAYDEN: Thank you, your Honor. As I
12 indicated previously, FES has responded to Sierra
13 Club's subpoena request with respect to topic 5 as
14 it's described in their subpoena. And as it's
15 further described in other documents, including
16 letters in their memo contra, they indicated is a
17 narrow set of documents reflecting FES's evaluation
18 of the proposed transaction.

19 We've done an exhaustive search for
20 documents responsive to that request, provided a log
21 to Sierra Club on December 23 that is responsive. In
22 our view that log contains communications, e-mails,
23 and term sheets which are not relevant to the case
24 and which are further privileged under the Work
25 Product Doctrine because they were communications and

1 information produced in anticipation of litigation.

2 It further contains information that
3 falls under attorney-client privilege and, therefore,
4 should not be produced. In the time that we've had
5 to produce the information and the log, this is an
6 exhaustive set of information. We've asked folks to
7 supplement as they have time. We have not received
8 additional information, but we certainly would
9 produce that as we receive it. As I indicated, this
10 is an exhaustive list of information.

11 With respect to the privilege, these
12 documents were prepared in anticipation of
13 litigation. They are clearly not information that
14 was produced in the normal course of business. If
15 you look at why these documents were created and the
16 information was created, the mere existence of them
17 is predicated on the fact there was going to be a
18 case filed. So, again, they are clearly work
19 product, and I think the existence of the joint
20 defense agreement is further indication there was a
21 reasonable anticipation of litigation.

22 They also represent communication to or
23 from counsel or the exchange of legal advice relevant
24 to the issues at hand, so they are further privileged
25 in that regard.

1 And as I indicated previously, this
2 information is not relevant. What FES thought of the
3 transaction is wholly irrelevant to whether the
4 companies' request for the Commission to approve RS
5 is reasonable and what effect that would have on the
6 companies and the customers alike.

7 So the companies have asked for approval
8 of the rider. They have not asked for approval of
9 the contract between FES and the utilities so what
10 FES thought of that is not relevant to this
11 proceeding.

12 That's all I have, your Honor.

13 EXAMINER PRICE: Mr. Hayden, just so the
14 record is clear, this is a comprehensive list of
15 documents that would be responsive to Sierra Club's
16 request. There is no other documents that exist in
17 your opinion that are not relevant but will be
18 responsive?

19 MR. HAYDEN: That's correct, your Honor.
20 Subject to somebody's supplementing that, which is a
21 standing request at this point, this is all we have.

22 EXAMINER PRICE: Can I ask you, just so
23 the record is clear, three dates? What was the date
24 that the purchase power agreement was first proposed
25 by the companies to FirstEnergy Solutions?

1 MR. HAYDEN: I don't have that timeline.

2 MR. BURK: I'm sorry, your Honor. Did
3 you mean when did FES first propose it to the
4 companies?

5 EXAMINER PRICE: I don't know who
6 proposed it first.

7 MR. HAYDEN: FES proposed that to the
8 companies, but I don't have that date at hand.

9 EXAMINER PRICE: Mr. Burk, do you have
10 that date? Or Ms. Dunn?

11 MR. BURK: No, your Honor, I don't.

12 EXAMINER PRICE: Could we have a
13 ballpark?

14 MR. ALLWEIN: Your Honor, the letter that
15 was responsive to discovery was dated May 13.

16 MR. OLIKER: That's FirstEnergy's
17 response, isn't it?

18 MR. ALLWEIN: I'm not sure. I know that
19 other discovery without a specific date stated that
20 this was developed in late April or early May.

21 MR. OLIKER: I agree with that.

22 MR. HAYDEN: Your Honor, my recollection
23 is we are talking about the mid to late May
24 timeframe.

25 EXAMINER PRICE: Okay. And then what

1 date was the proposal agreed to by the companies and
2 FES?

3 MR. HAYDEN: There was a finalized term
4 sheet that was also produced in discovery which in
5 our view is the only relevant information at hand. I
6 don't have that date handy, but I certainly can
7 follow up with you and the rest of the parties on
8 that date.

9 EXAMINER PRICE: And I guess last what
10 date was the joint defense agreement executed?

11 MR. HAYDEN: It is effective as of May 1.
12 I want to say it was executed in mid to late May.

13 MR. ALLWEIN: Your Honor, I have a copy
14 of the joint defense agreement here, and it was
15 executed on July 23 by what appears to be Jim Burk
16 and Mark Hayden. If you would like a copy, you can
17 have this copy.

18 EXAMINER PRICE: That's okay. I am just
19 trying to get when we -- so we can do the in camera
20 review some context of a timeline as to when things
21 were being discussed.

22 Mr. Allwein, do you have a response to
23 Mr. Hayden's arguments as to work product and
24 attorney-client?

25 MR. ALLWEIN: Yes, your Honor. First of

1 all, there are a couple of documents in the privilege
2 log, namely, documents 14 and 25, that include at
3 least one person from the electric distribution
4 utilities and so, therefore, those documents should
5 not be considered privileged. That is prior to the
6 execution of the joint defense agreement on July 23.

7 And, in addition, if you look at the
8 recipients for some of these e-mails, there are
9 attorneys but merely ccing an attorney on an e-mail
10 doesn't constitute or automatically invoke privilege.

11 And, in addition, I believe it's Black Letter Law
12 that if this is mainly business advice rather than
13 legal advice, that is not privileged. There are
14 specific factors with regard to privilege and we
15 haven't seen these e-mails but if they mostly have to
16 do with a business transaction, we don't believe that
17 the attorney-client privilege or work product
18 privilege is going to apply.

19 And, in addition, you know, I think we
20 need to keep in mind that these -- that these e-mails
21 represent a proposed transaction between two
22 companies that by state law are supposed to be
23 corporately separated and they are supposed to
24 bargain at arm's length, so I'm not sure why these
25 would be attorney-client privilege or work product

1 privilege.

2 EXAMINER PRICE: So are you saying that
3 if there is a transaction between a utility and an
4 affiliate, the affiliate can never claim work product
5 privilege because they are supposed to be corporately
6 separated?

7 MR. ALLWEIN: I am not saying that, but I
8 am saying with regard to the documents that are
9 between FirstEnergy and FirstEnergy Solutions that is
10 the product of arm's length bargaining and,
11 therefore, privilege should not apply.

12 MR. OLIKER: I would make your argument,
13 your Honor.

14 EXAMINER PRICE: Care to expand on that
15 or you are just affirming what I said?

16 MR. OLIKER: I think Ohio law favors
17 competition and we have statutes that prevent
18 affiliated entities from colluding on transactions
19 regarding markets and I think that that policy would
20 disfavor a common interest. And if you did classify
21 it as a common interest, we would have other problems
22 with antitrust statutes.

23 EXAMINER PRICE: So you are arguing the
24 joint defense agreement should not apply at all?

25 MR. OLIKER: I would agree, yes.

1 EXAMINER PRICE: Okay. Mr. Hayden, final
2 word?

3 MR. HAYDEN: Your Honor, I guess what I
4 will -- I will try to avoid arguing the baseless
5 allegations of violations of corporate separation
6 because there is absolutely no evidence of any of
7 that. But notwithstanding that work product,
8 attorney-client privilege, as I stated before, can
9 exist even in the presence of corporate separation.
10 That's not the issue.

11 Two teams were created, one for FES, one
12 for the utilities, each represented by counsel.
13 That -- those meetings, those discussions, those
14 documents that were exchanged were done so in
15 anticipation of litigation and thereby are work
16 product. Those people that were involved in those
17 communications either communicated to an attorney or
18 there was a communication from the attorney to the
19 client or there was a communication by direction of
20 counsel. That's attorney-client privilege. I don't
21 know if I understand these issues about corporate
22 separation but that's really the relevant issue at
23 hand.

24 As for the JDA, that was effective May 1,
25 2014. So notwithstanding when it was executed, it's

1 retroactive and that's really not the issue at hand.
2 We are talking about communications among the FES
3 team, not things that were exchanged between FES and
4 the utilities. We talked about the JDA issue the
5 last time we met. We're talking about work product
6 here in anticipation of litigation and
7 attorney-client privilege.

8 EXAMINER PRICE: Mr. Allwein is claiming
9 there are two documents that a company attorney is
10 on.

11 MR. HAYDEN: To the extent those exist,
12 they -- the privilege is not waived simply because
13 somebody else was copied on the e-mail. But if it
14 was, the joint defense agreement does exist and there
15 is a common interest privilege associated with FES
16 and the utilities filing the application. Just
17 because two parties were negotiating at an arm's
18 length transaction, that does not waive the common
19 interest privilege for purposes of the JDA, so I
20 would disagree with that assertion, your Honor.

21 EXAMINER PRICE: Your response to
22 Mr. Allwein's claim that work product privilege
23 doesn't apply to ordinary business discussions?

24 MR. HAYDEN: I don't think the existence
25 of ordinary business discussions is dispositive of

1 work product. In other words, you can have a dual
2 purpose for purposes of work product privilege. That
3 can exist. For purposes of this what I indicated
4 previously is that clearly there was an anticipation
5 of litigation with respect to these discussions, that
6 that can be borne out in the documents. The fact
7 that two parties met and had discussions with the
8 other does not eliminate that privilege.

9 MR. ALLWEIN: Your Honor, one other thing
10 and that is that in --

11 EXAMINER PRICE: I told him he could have
12 the final word.

13 MR. ALLWEIN: What's that?

14 EXAMINER PRICE: I told him he could have
15 the final word.

16 Go ahead. He can respond.

17 MR. ALLWEIN: First of all, on the JDA
18 there is recent precedent in the all-electric case
19 that prior to the execution of a JDA the
20 communications are not privileged and I believe the
21 full Commission agreed with that Attorney Examiner
22 ruling and I would say that just because an attorney
23 attends a business meeting or is cced on a business
24 transaction e-mail, that does not necessarily invoke
25 the attorney-client privilege.

1 EXAMINER PRICE: Now, Mr. Hayden.

2 MS. BOJKO: Your Honor, are you taking
3 arguments from other parties?

4 EXAMINER PRICE: Mr. Olikier has weighed
5 in. If you would like to weigh in.

6 MS. BOJKO: I would on three points, your
7 Honor. Actually, in fact, there is a waiver of the
8 attorney-client privilege when an outside person is
9 copied on e-mails. If -- the attorney-client
10 privilege only applies to the client and the
11 attorney. Once you cc an outside person, whether it
12 be an attorney, a mother, that attorney-client
13 privilege is waived. The Supreme Court has set
14 precedent on that. I don't have it in front of me,
15 but I could pull that up probably pretty quickly.

16 EXAMINER PRICE: Actually the Supreme
17 Court case really -- as OCC has pointed out numerous
18 times to the Bench, the Supreme Court case really
19 stresses that it has to be a knowing and intentional
20 waiver providing testimony, not something that might
21 be inadvertent; isn't that correct, Mr. Sauer?

22 MR. SAUER: I think we made that
23 argument, your Honor.

24 MS. BOJKO: In this case --

25 EXAMINER PRICE: Persuasively.

1 MS. BOJKO: In this case it wasn't
2 inadvertent because these parties were included for a
3 reason. And also I would point out that I guess we
4 would need more information on the team concept and
5 the attorney representing the team because in both
6 cases of a subpoena in this proceeding, it's been the
7 same person. So I'm not sure how you can claim that
8 the same member of a team -- same person can be on
9 different teams and still have that knowledge
10 separated in their mind that would form a claim for
11 privilege.

12 My third point was going to be exactly
13 what Mr. Allwein just talked about, was the case that
14 it's only upon execution, does not regard to what
15 date you may or may not have put in a document. The
16 execution is what your Honor ruled upon actually I
17 believe in the all-electric case which was confirmed
18 by the Commission.

19 EXAMINER PRICE: That is correct,
20 although we have also respected joint pleadings and
21 joint -- I want to say ad hoc joint defense
22 agreements when intervenors have been working
23 together on joint pleadings so, I mean, there is
24 precedence on both sides.

25 Mr. Allwein, can you identify again for

1 the Bench the two e-mails where you thought there was
2 a FirstEnergy electric utility attorney on the
3 communication?

4 MR. ALLWEIN: Yes, your Honor.

5 EXAMINER PRICE: Could you tell me who it
6 is?

7 MR. ALLWEIN: I'm sorry if I don't say
8 her name right. It's Anne Rericha.

9 EXAMINER PRICE: Which document is it?

10 MR. ALLWEIN: That's No. 14.

11 EXAMINER PRICE: Okay.

12 MR. ALLWEIN: And No. 25 Tracy Ashton is
13 a member of the EDU team according to discovery
14 responses. And there are some other names on here
15 that I don't recognize so I don't know whose team
16 they belong to or to Ms. Bojko's point if some of
17 these folks are playing both sides of the fence.

18 EXAMINER PRICE: Tracy Ashton is not a
19 FirstEnergy attorney; is that correct?

20 MR. BURK: That's correct, your Honor.

21 EXAMINER PRICE: What does Tracy Ashton
22 do?

23 MR. BURK: Generally speaking I think
24 she's in the accounting area.

25 MS. BOJKO: I didn't hear what you said.

1 MR. BURK: I believe she is in the
2 accounting area.

3 EXAMINER PRICE: Is anybody, either the
4 companies or FirstEnergy Solutions, disputing that
5 those two employees are company employees?

6 MR. BURK: I'm sorry, what? Tracy Ashton
7 and?

8 MR. HAYDEN: Your Honor, Anne Rericha is
9 an attorney, a service company employee at
10 FirstEnergy. Tracy Ashton is also a service company
11 employee who is in, as Mr. Burk indicated, the
12 accounting area.

13 EXAMINER PRICE: Okay. For purposes of
14 these two e-mails who were those employees working
15 for at the time?

16 MR. HAYDEN: They are representatives of
17 the EDU team. This was information that was sent, at
18 least with respect to No. 14, from the EDU team, a
19 draft term sheet, to the FES team. If I am not
20 mistaken, that's actually represented -- well, I
21 don't know if it's on the EDU log or not.

22 EXAMINER PRICE: Mr. Burk, do you know if
23 it's on the EDU log?

24 MR. BURK: I am not sure which ones we
25 are looking at. I am having some difficulty hearing

1 Mr. Allwein.

2 MR. ALLWEIN: My apologies. It's
3 document 14 which is an attachment to the June 25,
4 2014, e-mail and it's also what's listed here at 25
5 which is June 30 and it was sent by Jason Lisowski
6 and the recipients included Tracy Ashton.

7 And, again, another point to make is both
8 of those are prior to the execution of the joint
9 defense agreement.

10 MR. HAYDEN: Your Honor, I would just say
11 in response to this while there might be a case which
12 talks about the day-to-day execution, I can assure
13 you there is plenty of case law out there which
14 discusses the retroactive nature of a JDA if the
15 parties are collaborating as if they were under the
16 agreement. So the execution date in my mind is a red
17 herring, but the document itself indicates an
18 agreement between the parties, that the agreement is
19 retroactive to May 1.

20 MR. BURK: Since everybody else is
21 jumping in, your Honor.

22 EXAMINER PRICE: Feel free, Mr. Burk.

23 MR. BURK: I haven't reviewed the entries
24 from the all-electric case for some time, but my
25 recollection that did tie back to the effective date

1 and not the execution date. But, again, that's not
2 something I've prepared in anticipation of today's
3 prehearing conference.

4 EXAMINER PRICE: I guess the qualm I have
5 is the seeming unlimited nature of the retroactivity
6 in the all-electric case was rolled back to some, you
7 know, effective date. It wasn't two months prior. I
8 mean, it would have been when they started discussing
9 the JDA versus when they actually executed it. I
10 think if the shoe were on the other foot and
11 intervenors had entered into a JDA and said we would
12 like to make this retroactive to 2011, the companies
13 might have some qualms about that, or even if they
14 made it retroactive to the filing of your
15 application, I think the companies might have some
16 concerns about that.

17 MR. BURK: Again, your Honor, we will
18 have to take a look at the entry. I have not
19 reviewed but that was just my recollection.

20 EXAMINER PRICE: Yeah. I guess we are
21 going -- at this point I guess we are going to have
22 to do the in camera review because I have some
23 questions about -- maybe Mr. Hayden can answer this
24 question without disclosing anything. That document
25 14 that Mr. Allwein has addressed, that's an

1 attachment to another e-mail, so it was e-mailed from
2 the company attorney to somebody but then was
3 forwarded out; is that correct?

4 MR. HAYDEN: That's an attachment --
5 pardon me, No. 14 is a draft term sheet from the
6 utility side, from the attorney representing the
7 utility side, to the FES team.

8 EXAMINER PRICE: And then that document
9 was then forwarded to everybody else by some -- in
10 another document; is that right?

11 MR. HAYDEN: That document was sent to
12 Karen Sealy who was representing the FES team who
13 then provided that information to the remainder of
14 the FES team.

15 EXAMINER PRICE: Okay. So it's not the
16 case, as Mr. Allwein seemed to be saying, where you
17 had 10 people on the mailing list, and 1 was an
18 FES -- 1 was a company attorney.

19 MR. HAYDEN: That's correct.

20 MR. ALLWEIN: I am not sure I said it for
21 that one, but I was referring to No. 25 has
22 multiple -- multiple folks receiving.

23 EXAMINER PRICE: I understand. I am
24 trying to get some clarity here for my own view and
25 what the record says and my own understanding what

1 these documents are.

2 MR. ALLWEIN: Thank you, your Honor.

3 MR. OLIKER: Your Honor, you had
4 previously mentioned dates for when transactions
5 applied. If that information is relevant to you, I
6 have located the discovery responses, though the
7 information is confidential.

8 EXAMINER PRICE: Yes, that would be
9 great. It's what?

10 MR. OLIKER: The information of the dates
11 of the transactions, when they started and finished,
12 are confidential, so I would need permission of the
13 parties to actually mention those dates of
14 FirstEnergy unless your Honor believes it is not
15 confidential.

16 EXAMINER PRICE: No, no. Then we would
17 have to go on closed record. That is going to be
18 more hassle than the value of the information, but I
19 appreciate you looking it up.

20 MR. OLIKER: Okay.

21 EXAMINER PRICE: At this time we are
22 going to go ahead and do the in camera review. So,
23 Mr. Hayden, if you can produce the 20 some
24 documents -- 31 documents and we will go off the
25 record and the parties can discuss any procedural

1 issues they want to discuss.

2 Let's go off the record.

3 (Recess taken.)

4 EXAMINER PRICE: Let's go back on the
5 record.

6 The Attorney Examiners have reviewed the
7 documents identified in the privilege log as numbers
8 1 through 32 -- or 31 in camera. And at this time we
9 find that the motion to quash to be granted as to the
10 items in topic 5. All of the documents numbered 1
11 through 31 the Examiners find to be privileged under
12 attorney-client and work product except for documents
13 25 and 26 which are dated June 30, 2014. We do find
14 the documents 25 and 26 are covered by the joint
15 defense agreement entered into between FirstEnergy
16 Solutions and the electric utilities.

17 We are reluctant to give an unlimited
18 retroactive application of the joint defense
19 agreement, but we do note the joint defense agreement
20 was filed on or about July 24. These communications
21 were on June 30. It's clear that the parties were
22 working towards a final document at this point and
23 that the -- had a common interest in defending that
24 common document.

25 Any questions?

1 MR. ALLWEIN: And so that includes you're
2 quashing a witness for topic 5 as well?

3 EXAMINER PRICE: I'm not sure what you
4 would -- we don't have any documents to ask the
5 witness about. There's -- what would be -- what
6 would you ask this witness?

7 MR. ALLWEIN: Well, I mean, we could use
8 the version of the agreement that was provided to us
9 in discovery and start with that.

10 EXAMINER PRICE: Mr. Hayden?

11 MR. HAYDEN: Your Honor, there are
12 several witnesses who are involved in the proceeding
13 that are being offered up as witnesses in the case.
14 Sierra Club and any other party is welcome to ask
15 questions on anything that was produced in discovery.

16 EXAMINER PRICE: But if there are no
17 other FirstEnergy Solution witnesses that you -- they
18 could ask questions as to the final term sheet, are
19 there?

20 MR. HAYDEN: Mr. Lisowski given the
21 identification in the log. If you will bear with me
22 for one moment, please.

23 EXAMINER PRICE: Sure.

24 MR. PRITCHARD: While Mr. Hayden is
25 looking through the privilege log, I did not receive

1 a copy of the privilege log, so I'm not quite certain
2 what documents 25 and 26 would be, but I think it
3 would be helpful for my sake to either get a copy of
4 the privilege log or --

5 EXAMINER PRICE: We will get you a copy.
6 Let's go off the record.

7 (Discussion off the record.)

8 EXAMINER PRICE: While we were off the
9 record Mr. Hayden agreed he would provide copies of
10 the privilege log to all the parties in the room. It
11 would also be my preference you provide it to the
12 other parties in the proceeding but at a minimum the
13 parties in the room.

14 Somebody had a question as to the ruling.

15 MR. OLIKER: I have a clarification on
16 the ruling, and is it the ruling that FirstEnergy
17 Solutions and FirstEnergy have demonstrated that they
18 have a common interest during the time when they were
19 bargaining at arm's length for the transaction that
20 is the subject of this case?

21 EXAMINER PRICE: I believe what they
22 demonstrated was that on or about June 30, they had
23 enough of a common interest in the document that they
24 were negotiating towards that they could enter into
25 the joint defense agreement.

1 MR. OLIKER: And that joint defense
2 agreement is then postdated to the time during the
3 negotiations.

4 EXAMINER PRICE: I'm saying it extends
5 through June 30 at least.

6 MR. OLIKER: Going back to May.

7 EXAMINER PRICE: I am not making any
8 ruling on anything before June 30.

9 MR. OLIKER: And I guess now I'm
10 confused.

11 EXAMINER PRICE: I think the point is,
12 Mr. Oliker, there are cases saying this can be
13 retroactive. June 30 this document in question,
14 which we reviewed in camera, you don't have the
15 advantage of having looked at it in camera, was
16 clearly something that was given by a common interest
17 at that point.

18 I am not saying we are -- we're going all
19 the way back to May 1, which is what they are
20 arguing. Their argument is May 1. I am only ruling
21 on June 30.

22 MR. OLIKER: Are there going to be some
23 other documents? I see some dates in here June 2.

24 EXAMINER PRICE: All the other documents
25 other than the two we mentioned, 25 and 26, set those

1 aside. Those are the two covered by the joint
2 defense agreement.

3 MR. OLIKER: Okay.

4 EXAMINER PRICE: All the other documents
5 are attorney-client or attorney work product.

6 MR. OLIKER: Those are FirstEnergy
7 documents?

8 EXAMINER PRICE: FirstEnergy Solutions.

9 MR. OLIKER: FirstEnergy Solutions, not
10 disclosed externally.

11 EXAMINER PRICE: That's correct, that's
12 correct.

13 MR. OLIKER: Great. I think that helps
14 my understanding.

15 EXAMINER PRICE: And for the record in 25
16 and 26, as Mr. Allwein pointed out, there was a
17 FirstEnergy utility employee included on the e-mail
18 and that's why attorney-client and attorney work
19 product wouldn't apply.

20 MR. OLIKER: Okay. And all the other
21 documents were only within the silo of FirstEnergy
22 Solutions or FirstEnergy and, therefore, would not be
23 subject to common interest or?

24 EXAMINER PRICE: All the other documents
25 were in the silo of FirstEnergy Solutions.

1 MR. OLIKER: Okay. Thank you. I
2 understand the ruling.

3 MS. BOJKO: Your Honor, I have a
4 clarification on the ruling referring to just items
5 25 and 26 with your -- your statement off the record
6 that those documents were pertinent to the term sheet
7 between FirstEnergy and FirstEnergy Solutions, that
8 my question is is your ruling finding that a common
9 interest actually existed when two separate parties
10 are on two different sides of a transaction? You are
11 stating --

12 EXAMINER PRICE: I am saying at that
13 point they were close enough to a final -- to a final
14 agreement that they can jointly defend that final
15 agreement, yes. I am not saying they weren't
16 negotiating at arm's length. I am just saying at
17 that point they were approaching a final document.
18 It's clear from looking at the documents in camera
19 that they were approaching a final document and were
20 down to the last details, and obviously in this case
21 they inadvertently included an electric utility
22 employee on an e-mail, but at that point it was clear
23 that their joint defense agreement, that they had a
24 common interest in this transaction.

25 MS. BOJKO: In the totality of the

1 transaction after the agreement was finalized.

2 EXAMINER PRICE: Yes.

3 MS. BOJKO: Thank you.

4 MR. ALLWEIN: And, your Honor, just one
5 more clarification, we would still like a witness for
6 topic 5, and I think FirstEnergy Solutions' counsel
7 mentioned Mr. Lisowski, who has already been deposed,
8 and he stated that he could not speak to the
9 agreement so we would like somebody else.

10 MR. HAYDEN: Well, I don't think I am
11 obligated to produce a witness for their topic 5.
12 However, for the final term sheet I would suggest
13 questioning Mr. Ruberto, Mr. Harden, and Mr. Moul.

14 MS. BOJKO: I didn't hear the last one.

15 MR. HAYDEN: Mr. Ruberto, Mr. Harden, and
16 Mr. Moul.

17 EXAMINER PRICE: Of those three
18 employees, are they all shared service or any of them
19 unique to FES?

20 MR. HAYDEN: Mr. Lisowski is shared
21 service.

22 EXAMINER PRICE: His deposition has
23 passed.

24 MR. HAYDEN: That's true. Mr. Ruberto
25 is. Mr. Harden is. Mr. Moul is an FES employee, but

1 he is a shared executive.

2 MS. BOJKO: What was your question, your
3 Honor?

4 EXAMINER PRICE: The three employees that
5 Mr. Hayden mentioned, I asked if they were shared
6 service employees or if they were unique to FES.

7 MS. BOJKO: Thank you.

8 EXAMINER PRICE: You've got three
9 witnesses you can ask questions on the term sheet,
10 Mr. Allwein. Unless you can come up with a specific
11 need for a specific individual other than those
12 three, I think that's going to have to do for now.

13 MS. BOJKO: But those witnesses are able
14 to speak to the term sheet?

15 MR. HAYDEN: Your Honor, I don't know
16 that they can answer every single question that might
17 be asked of them, but they are certainly familiar
18 with it.

19 MS. BOJKO: Because Lisowski was not.

20 MR. HAYDEN: I don't think that's
21 accurate. He probably didn't answer as many
22 questions as counsel wanted, but he's also familiar
23 with it.

24 MR. ALLWEIN: We'll have to agree to
25 disagree on that because he basically stated he

1 couldn't speak to that agreement so.

2 EXAMINER PRICE: Why don't you ask your
3 questions of Mr. Harden, Mr. Ruberto...

4 MR. HAYDEN: Mr. Moul.

5 EXAMINER PRICE: And Mr. Moul and if you
6 feel a need to recall Mr. Lisowski, you can take it
7 up with the Bench at that point.

8 MR. ALLWEIN: Okay. Can we also take up
9 with the Bench at that point calling another witness
10 if none of these witnesses were able to speak to it?

11 EXAMINER PRICE: If you have a specific
12 need for a specific witness, I mean, I am not sure
13 who you are asking for. They are offering up three
14 people. I am not sure who else you are looking for,
15 and I don't think -- I mean, do you have a name? Is
16 there somebody you are looking for?

17 MR. ALLWEIN: No, not at this time. We
18 asked the question to identify someone who could
19 speak specifically to the agreement between
20 FirstEnergy and FirstEnergy Solutions.

21 EXAMINER PRICE: And he's identified
22 three individuals.

23 MR. ALLWEIN: Okay. Thank you, your
24 Honor. We will depose them and see what happens.

25 EXAMINER PRICE: Yes, we will.

1 Anything else for the Bench? Any other
2 clarifications? Questions?

3 MS. BOJKO: I guess we can file
4 another -- we'll have to file another subpoena
5 because I guess the question next will be a witness
6 and whether counsel can say these three can have a
7 dual role, then a witness that can speak to the joint
8 stipulation on behalf of FES, not -- I understand
9 Miss Mikkelsen will be speaking on behalf of
10 FirstEnergy, but we would need a witness that would
11 speak on behalf of FES, so I don't know if we can
12 make an oral without all the paperwork. That would
13 be nice but.

14 EXAMINER PRICE: I think you will
15 probably want to go with the paperwork. I don't
16 think there is an easy or uncontested request for
17 subpoena so.

18 MR. HAYDEN: Again, your Honor, FES is
19 not a party to this case, and Mr. Burk has indicated
20 that Ms. Mikkelsen can speak on issues with respect
21 to the stipulation as filed.

22 EXAMINER PRICE: We are getting way ahead
23 of ourselves. They are going to make -- they are
24 going to decide if they need one to file a subpoena.
25 You will have a chance to file a motion to quash if

1 you think it's improper.

2 MR. PRITCHARD: And as we discussed off
3 the record, your Honor, the parties are going to work
4 to try to reach a mutually agreeable procedural
5 schedule including discovery response time and hope
6 to get back with you early next week with the results
7 of whether we have reached that or not.

8 EXAMINER PRICE: That would be great if
9 the parties were able to reach a mutually acceptable
10 procedural schedule but that doesn't change my
11 previous ruling the staff's testimony is in abeyance
12 on January 9, and the parties can begin discovery on
13 the stipulation but not necessarily on an expedited
14 basis.

15 Anything else?

16 MR. ALLWEIN: One other question and that
17 is earlier Mr. Hayden stated that given the time that
18 they had, these 31 e-mails were all that they were
19 able to find, and you questioned as to whether there
20 were other e-mails that weren't privileged but that
21 they -- that FES was just declaring to be not
22 relevant, and Mr. Hayden stated that if anything else
23 was found, they would turn it over, so I just want to
24 make sure that that duty to supplement is official if
25 anything else is found.

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MR. HAYDEN: I --

EXAMINER PRICE: FirstEnergy Solutions is directed to supplement as appropriate. If they find anything new, they should supplement their responses.

MR. ALLWEIN: Thank you, your Honor.

EXAMINER PRICE: Okay. Let's go off the record.

(Thereupon, the hearing was adjourned at 12:43 p.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Tuesday, December 30, 2014, and carefully compared with my original stenographic notes.

Karen Sue Gibson, Registered
Merit Reporter.

(KSG-5979)

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Summary: Transcript in the matter of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company hearing held on 12/30/14 electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.