

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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**MOTION OF FIRSTENERGY SOLUTIONS CORP. TO QUASH THE SUBPOENA  
DUCES TECUM OF SIERRA CLUB**

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Pursuant to Rule 4901-1-25(C), O.A.C., FirstEnergy Solutions Corp. (“FES”) respectfully moves the Commission to quash Sierra Club’s Subpoena Duces Tecum Directed to FirstEnergy Solutions Corp., dated March 31, 2015 (the “Subpoena”). As demonstrated in the attached Memorandum in Support, the requests contained in the Subpoena are duplicative of the discovery which Sierra Club has already received or otherwise had the opportunity to obtain in this proceeding. Several of the requests are also beyond the scope of permissible discovery under the March 23, 2015 Entry in this proceeding (the “March 23 Entry”). That Entry only permitted limited discovery related to certain factors discussed in the Commission’s recent Opinion and Order in *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO. As such, the Subpoena should be quashed. In the alternative, should the Commission decide to grant the Subpoena, in whole or in part, FES

respectfully requests at least seven business days from the date of the Commission's order to comply with the Subpoena.<sup>1</sup>

Date: April 14, 2015

Respectfully submitted,

/s/ Brian J. Knipe

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<sup>1</sup> Further, in the event that the Commission requires FES to produce documents related to the Subpoena or to make one of its employees available for deposition, pursuant to Rule 4901-1-24(D), FES respectfully moves for a protective order to safeguard any highly competitively sensitive nature that might be produced as a result of the Subpoena.

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

**In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan** )  
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) **Case No. 14-1297-EL-SSO**  
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**MEMORANDUM IN SUPPORT OF MOTION TO QUASH AND MOTION FOR PROTECTIVE ORDER**

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**I. INTRODUCTION**

On March 31, 2015, Sierra Club moved for the Subpoena at issue. The Subpoena contains a series of broad-ranging requests directed to FirstEnergy Solutions Corp. (“FES”), a nonparty to this proceeding. In its Motion for the Subpoena, Sierra Club alleged that the Subpoena’s requests were purportedly related to the March 23 Entry permitting parties in this proceeding to engage in additional limited discovery. That Entry permitted such discovery to certain “factors” discussed in the February 25, 2015 Opinion and Order in *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO (“AEP ESP III Order”). Those factors relate to certain specific criteria that the Commission indicated it could consider when reviewing for approval a proposed rider associated with a possible purchased power agreement between Ohio Power Company (“AEP Ohio”) and the Ohio Valley Electric Corporation (“OVEC”).

The Subpoena should be quashed for several reasons. First, it requests information which Sierra Club has already been provided in response to written discovery requests. Sierra Club and other parties also questioned Company witnesses about several of these topics in depositions. Needless to say, Sierra Club could have asked witnesses about the topics in the Subpoena when it had the opportunity to do so. Under settled Ohio law and Commission precedent, FES has no obligation to respond to duplicative discovery requests. To force FES, a nonparty, to compile vast quantities of information with which Sierra Club has already been provided is not only a waste of time and resources, but also poses an undue burden on FES – especially when Sierra Club has made no showing of substantial need. So too, FES need not produce witnesses for deposition again on topics already addressed or within the scope of potential inquiry in prior depositions.

Second, several of the requests exceed the scope of the March 23 Entry. Indeed, given the limited scope of permissible additional discovery and the near total duplication of the information and depositions sought by Sierra Club, the Subpoena can only be viewed as an improper attempt to get a second bite at the discovery apple and harass a nonparty. The Subpoena is thus meritless and should be quashed.

## **II. OVERVIEW AND RELEVANT FACTS**

On August 4, 2014, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, “the Companies”) filed their Application for their fourth electric security plan, Powering Ohio’s Progress (“ESP IV”). One component of ESP IV is the Economic Stability Program. Application at 9. As shown in the Companies’ Application, the Economic Stability Program “will act as a retail rate stability mechanism against increasing market prices and price volatility for all retail customers over the longer term.” *Id.*

A key feature of the Economic Stability Program is proposed Rider RRS, the mechanism that will act to stabilize retail rates. Rider RRS will distribute credits to or recover charges from retail customers. The credits or charges will arise, in part, from a proposed purchased power transaction between the Companies and FES whereby the Companies would purchase all of the generation output of certain generating facilities. Direct Testimony of Jay A. Ruberto (“Ruberto Dir.”) at 3 (Aug. 4, 2014). In turn, the Companies would “offer this output into the PJM markets, and net 100% of the revenues against costs, with the differences being passed along to customers through [proposed] Rider RRS.” *Id.* Notably, the proposed purchased power transaction would be a FERC jurisdictional contract and is not under review here. *Id.* at 3. As part of ESP IV, the Companies are seeking Commission approval of only Rider RRS, which will operate as a rate stabilization mechanism and a financial hedge to help protect customers from price increases and volatility over the long term. *See* Application at 9; Supplemental Testimony of Stephen J. Baron at 6-8 (March 2, 2015); AEP ESP III Order at 25-26); *In the Matter of the Application of Duke Energy Ohio, Inc. for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of An Electric Security Plan, Accounting Modifications and Tariffs for Generation Service*, Case No. 14-841-EL-SSO, Opinion and Order at 44 (April 2, 2015).

On February 25, 2015, the Commission issued its AEP ESP III Order. As part of its Application, AEP Ohio sought the approval of a rider to recover costs related to a proposed purchased power agreement between the utility and the OVEC. As noted in the March 23 Entry, “the Commission declined to adopt the purchase power agreement (PPA) rider proposal as put forth in the AEP ESP III proceeding; however, the Commission authorized the establishment of a placeholder PPA rider, at the initial rate of zero.” March 23 Entry at 2. Further, “the Commission also presented several factors it may balance, but not be bound by, in deciding

whether to approve future cost recovery requests associated with PPAs.” *Id.* Those factors included:

[a] Financial need of the generating plant; [b] necessity of the generating facility, in light of future reliability concerns, including supply diversity; [c] description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and [d] the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state.

*Id.* (citing AEP ESP III Order at 25). In response to the AEP ESP III Order, the Attorney Examiner here modified the procedural schedule for the limited purpose of permitting the parties to file additional testimony and serve additional discovery “regarding the AEP Ohio Order factors.” March 23 Entry at 3.

Notwithstanding the limited scope of discovery outlined by the March 23 Entry, and notwithstanding the voluminous discovery already provided to Sierra Club, on March 31, 2015, Sierra Club moved for the Subpoena. The Subpoena seeks to have FES provide an unnamed employee to be deposed, on April 21, 2015, regarding over ten broad-ranging topics that on their face are duplicative of previous discovery requests in this proceeding, as well as directly related direct and deposition testimony. These topics include:

1. All projections for any years 2014 through 2031 prepared by, sent or received by, or reviewed by FES between August 4, 2013, and the present of any of the following for the W.H. Sammis, Davis-Besse, Kyger Creek, and/or Clifty Creek plants (collectively, the "Plants"):
  - a. Annual energy market revenue;
  - b. annual capacity market revenue;
  - c. annual ancillary services revenue;
  - d. outage schedules and forecasts;
  - e. capacity factor;

- f. forced outage rate;
- g. availability;
- h. heat rate;
- i. all modeling input and output files, work papers, and other documents used in developing the projections set forth in (a)-(h) above; and
- j. all other documents that were reviewed or otherwise relied on in developing the projections set forth in (a)-(h) above.

This topic seeks unit-level information, forecasts, and projections wherever available, as well as information, forecasts, and projections for each plant as a whole. The information being sought in this request includes both short-term and long-term projections and forecasts.

- 2. All projections for any years 2014 through 2031 prepared by, sent or received by, or reviewed by FES between August 4, 2013, and the present, of any of the following for any of the Plants:

- a. Annual capital expenditures;
- b. non-fuel variable costs;
- c. fixed costs;
- d. operation and maintenance costs;
- e. fuel costs;
- f. labor costs;
- g. all modeling input and output files, work papers, and other documents used in developing the projected costs set forth in (a)-(f) above; and
- h. all other documents that were reviewed or otherwise relied on in developing the projected costs set forth in (a)-(f) above.

This topic seeks unit-level information, forecasts, and projections wherever available, as well as information, forecasts, and projections for each plant as a whole. The information being sought in this request includes both short-term and long-term projections and forecasts.

- 3. All profit and loss statements for any or all of the Plants (or units thereof) that were prepared by, sent or received by, or reviewed by FES between January 1, 2014 and the present.

This topic seeks unit-level statements wherever available, as well as statements for each plant as a whole.

4. All projections prepared by, sent or received by, or reviewed by FES between August 4, 2013, and the present of the following:
  - a. Natural gas prices;
  - b. Coal prices;
  - c. Market energy prices;
  - d. Capacity prices; or
  - e. Carbon prices.
5. All communications with shareholders, current or potential investors, ratings agencies, investment banks, or financial institutions regarding any of the following:
  - a. The current financial condition and/or profitability of the Plants;
  - b. The future financial condition and/or profitability of the Plants;
  - c. Projected future costs and revenues at the Plants;
  - d. Possible retirement of any of the Plants, or any unit thereof; and
  - e. Market price projections or forecasts.
6. All studies, analyses, or assessments that were prepared by, sent or received by, or reviewed by FES concerning the possible retirement of any of the Plants (or any unit of a plant). This request includes, but is not limited to,
  - a. Any studies, analyses, or assessments concerning the impact that any retirement would have on electric prices;
  - b. Any studies, analyses, or assessments concerning the economic impact of any retirement;
  - c. Any studies, analyses, or assessments concerning the impact that any retirement would have on electric supply diversity; and
  - d. Any studies, analyses, or assessments concerning the need for any Plant (or any unit of a plant), in light of reliability concerns.
7. Any FES communications, analyses, or other documents regarding whether any of the Plants (or units thereof) would be retired if the proposed purchase power agreement between FES and the Companies is not executed.

8. Any FES communications, analyses, or other documents regarding the length of the proposed purchase power agreement between FES and the Companies, including whether FES would be able to terminate such agreement before the proposed 15-year term expires and what penalties or liabilities, if any, FES would incur if it were to terminate the agreement before the proposed 15-year term expires.
9. Any internal FES communications regarding the Commission's authority, ability, or permission to review and audit the proposed purchase power agreement between FES and the Companies. This topic includes, but is not limited to, any communications about the Commission's potential review and audit of the Plants' costs and revenues, and the impacts to FES or its shareholders of any finding by the Commission that particular costs are imprudent.
10. Any plans that were prepared by, sent or received by, or reviewed by FES concerning the Plants' compliance with pending or proposed environmental regulations. This topic seeks unit-level information wherever available, as well as information for each plant as a whole.

### III. APPLICABLE LAW

Under Ohio law, a subpoenaed party or a party to a legal proceeding has no obligation to respond to discovery requests that are duplicative of prior requests to which responses have been provided. *See In re Gerber Children*, 2008-Ohio-1044 (Stark Cty. Mar. 10, 2008), (finding no “error in the trial court’s quashing of [a] subpoena which would have been duplicative of the discovery [previously] provided.”). *Id.* at ¶44. *See also Carrier v. Weisheimer Cos.*, 1996 Ohio App. LEXIS 617, \*4-8 (Franklin Cty. Feb. 22, 1996) (affirming trial court’s denial of motion to compel discovery because several of the discovery requests at issue “were duplicative of prior requests” and appellants had already “completed considerable discovery”); *State ex rel Doe v. Register*, 2009-Ohio-2448, ¶41 (Clermont Cty. May 26, 2009) (“The trial court did not abuse its discretion by denying Relator’s motion to compel discovery....The court’s decision to not compel these duplicate discovery requests was not unreasonable, arbitrary, or capricious.”).

Moreover, in the case of a subpoena, the party seeking discovery through a subpoena must make a showing of “substantial need” for the information sought. For example, in *Lambda*

*Research v. Jacobs*, 170 Ohio App. 3d 750, 756 (Hamilton Cty. 2007), the appellate court reversed a trial court's denial of a motion to quash a subpoena that sought information from a nonparty to a lawsuit involving a breach of a supplier agreement. The appellate court held that "the trial court's laissez-faire approach to discovery was at direct odds with...Civ.R. 45(C)...which provide[s] protection for nonparties." *Id.* at 756-757. Specifically, "Civ.R. 45 provides that when a nonparty moves to quash a subpoena on the ground that that it imposes an undue burden, the party seeking the discovery must demonstrate a substantial need for the materials that cannot be met through alternate means." *Id.* at 756. Additionally: "The rule further provides that the court shall quash the subpoena unless the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship." *Id.* See also, *Martin v. Budd*, 128 Ohio App. 3d 115, 120 (Summit Cty. 1998) (holding that trial court's failure to grant a motion to quash a subpoena duces tecum was an abuse of discretion because the subpoena created an undue burden and the subpoenaing party failed to show a substantial need for the requested information); *Eitel v. Eitel*, 1996 Ohio App. LEXIS 3821, 12-13 (Pickaway Cty. Aug. 23, 1996) (affirming trial court's decision to quash subpoenas that were unreasonable, oppressive, and unduly burdensome, and for failure of subpoenaing party to show substantial need).

Ohio courts also look with disfavor on discovery requests that amount to mere "fishing expeditions" that go beyond the scope of reasonable or otherwise limited discovery. See, e.g., *Martin*, 128 Ohio App. 3d at 119 ("[D]iscovery proceedings may not be used to conduct a mere fishing expedition."); *Bland v. Graves*, 85 Ohio App. 3d 644, 659 (Summit Cty. 1993) ("The court may permissibly limit discovery so as to prevent mere 'fishing expeditions' in an effort to locate incriminating evidence.").

Well-settled Commission precedent is consistent with Ohio case law. In the context of denying motions to compel, the Commission has recognized that a party has no obligation to respond to discovery requests that are duplicative of prior discovery or in instances where the requested information has already been provided to the propounding party. *See, e.g., In the Matter of the Complaint of Brenda Fitzgerald v. Duke Energy Ohio*, Case No. 10-791-EL-CSS, 2011 Ohio PUC LEXIS 415 at \*5-13 (April 4, 2011) (denying in part motion to compel where respondent had already provided responses to several discovery requests at issue and the requests otherwise sought irrelevant information); *In the Matter of the Complaint of Ruth L. Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, 2002 Ohio PUC LEXIS 554 at \*2-19 (June 21, 2002) (denying motion to compel where discovery requested was vague, “not imperative to a final in a final determination of [the] matter,” overly broad, and because the respondent had already responded to several of the discovery requests at issue).

Further, the Commission quashes subpoenas that are overbroad, unduly burdensome or otherwise unreasonable. *See, e.g., In the Matter of the Application of Champaign Wind, LLC, for a Certificate to Construct a Wind-Powered Electric Generating Facility in Champaign County, Ohio*, Case No. 12-160-EL-BGN, 2013 Ohio PUC LEXIS 110 at \*19-20 (May 28, 2013) (quashing subpoenas directed at nonparties because the subpoenas were “extraordinarily overbroad...it would be unreasonable to force a nonparty to expend its time and resources toward a request that is unlimited in scope” and there was no showing by the subpoenaing party as to how it would suffer an “undue hardship” in the absence of the subpoenaed information);<sup>2</sup> *In the Matter of the Complaint of the Ohio Consumers’ Counsel, Stand Energy Corporation*,

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<sup>2</sup> While *Buckeye Wind* is a decision from the Power Siting Board, the Board follows the same procedures as the Commission. *See* R.C. 4906.12 (“Procedures of the public utilities commission to be followed: Sections 4903.02 to 4903.16 and 4903.20 to 4903.23 of the Revised Code shall apply to any proceeding or order of the power siting board under Chapter 4906 of the Revised Code, in the same manner as if the board were the public utilities commission under such sections.”).

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

#### **IV. ARGUMENT**

##### **A. The Subpoena Requests Information That Has Already Been Provided, That Was or Could Have Been Discussed In Prior Depositions Or That is Beyond The Scope of Discovery Under The March 23 Entry.**

The Subpoena seeks information that is duplicative of information that Sierra Club has already been provided. Further, Sierra Club had an opportunity to obtain deposition testimony on the Subpoena's topics during the numerous depositions of various witnesses in which Sierra Club actively participated. These include three witnesses identified and provided in response to Sierra Club's first Subpoena. FES has no obligation to respond to duplicative discovery requests or provide witnesses for deposition again, especially in light of the voluminous amount of information requested and lengthy depositions already taken. Forcing nonparty FES to do so would constitute an undue burden without any showing of substantial need by Sierra Club. Indeed, Sierra Club could not make such a showing, given that it has already been provided with, or had the opportunity to acquire, the information that it seeks. Further, several of these requests go beyond the scope of the limited discovery permitted by the March 23 Entry. Pursuant to Ohio law and Commission precedent, the Subpoena should be quashed. Each Subpoena topic is treated in turn below.

**Topic 1: Projections and forecasts from 2014 to 2031 related to expected revenues for the W.H. Sammis, Davis-Besse, Kyger Creek and/or Clifty Creek plants (collectively, the “Plants”).**

In this request, Sierra Club seeks information related to energy, capacity and ancillary services revenues, as well as anticipated outage schedules and forecasts, capacity factor, forced outage rate, heat rate, availability and modeling input and output files. *See* Mot. for Subpoena at 2. In its Memorandum in Support, Sierra Club claims that “Topics 1-7 seek information about the financial status of the generating plants, which is critical to understanding the potential costs and benefits for ratepayers and the reasonableness of the revenue projections presented in the Companies’ Application.” Memo. in Support at 2. Indeed, this is the sole justification Sierra Club provides for Topics 1 through 7.

Sierra Club neglects to mention, however, that the information sought under Topic 1 (as well as the other Topics) has been provided to Sierra Club already. Topic 1 is thus duplicative discovery to which a nonparty such as FES is under no obligation to respond.

For instance, attached to the testimony of Company witness Jason Lisowski are Attachments JLL-1: Sammis Projections 2016-2031, JLL-2: Davis Besse Projections 2016-2031, and JLL-3: OVEC Projections 2016-2031. The Companies also provided Mr. Lisowski’s confidential workpapers. These documents provide information directly related to forecasts and projections of capacity, energy and ancillary revenues for the Plants. This is the same information sought under Topic 1 of the Subpoena.

Sierra Club also already has received fulsome written discovery responses on these very same subtopics. *See, e.g.*, OCC Set 11-RPD-74 (all studies conducted in the past five years related to the economic viability of the Plants); SC Set-1-INT-9 (capacity factor, availability, heat rate, forced or random outage rate for the Plants from 2010 through 2014); SC Set 1-INT-10 (projected capacity factor, availability, heat rate, forced or random outage rate for the Plants

from 2015 through 2034); SC Set 1-INT-11 (planned outages and capacity factor for Davis-Besse); SC Set 1-INT-13 (planned outages for Sammis, Kyger Creek and Clifty Creek); SC Set 1-INT-17 (projected revenues for Sammis and Davis-Besse for 2015 through 2034); SC Set 1-INT-58 (proprietary dispatch modeling software); SC Set 1-RPD-4 (copies of all workpapers for all of the Companies' witnesses); SC Set 1-RPD-54 (copies of all modeling files, including input and output files, sensitivity analyses of any dispatching, costs or revenues of the Plants); SC Set 2-RPD-61 (inputs and workpapers for revenue and costs calculations); SC Set 4-RPD-86 (calculation of capacity factor for W.H. Sammis and OVEC plants); SC Set 4-RPD-87 (calculation of capacity factor for all Plants).<sup>3</sup>

Moreover, Sierra Club has already had extensive access to the information sought under Topic 1 by noticing and actively participating in the depositions of several witnesses. *See, e.g.*, Dep. Tr. of Paul Harden (Jan. 16, 2015) at 154-155 ((Appx. A at 1) (W.H. Sammis plant revenue projections and modeling)),<sup>4</sup> 239-252 (Appx. B at 1-4) (modeling of capacity, heat factors and energy revenues related to W.H. Sammis plant)); Dep. Tr. of Donald Moul at 36-47 (Jan. 15, 2015) (Appx. A at 2-5) (asset valuation of Plants, gas and energy market modeling, price projections for coal, revenue analyses), 99-102 ((Appx. A. at 6-7) (projected profitability of W.H. Sammis plant), 225-230 (Appx. B at 5-6) (energy and capacity projections); Dep. Tr. of Jason Lisowski at 65-68 (Dec. 19, 2014) (Appx. A at 8) (dispatch modeling for the Plants), 100-101 (Appx. A at 9-10) (capacity compensation), 104-106 (Appx. A at 10-11) (forced outages),

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<sup>3</sup> Attached to this Memorandum are FES Tables No. 1 and No. 2, respectively. These tables list many of the discovery requests duplicated by the Subpoena. The tables show the requesting party, discovery number and the text of the request. The discovery requests are listed alphabetically by requesting party and then by number of the request. Table 2 contains competitively sensitive confidential requests, for which FES seeks a protective order. *See* Motion of FirstEnergy Solutions Corp. for a Protective Order, filed concurrently with this Memorandum.

<sup>4</sup> Filed concurrently herewith are two Appendices containing excerpts of deposition testimony cited in this Memorandum. Appendix A contains information from the public portions of the deposition transcripts cited. Appendix B contains certain competitively sensitive confidential information for which FES seeks a protective order. *See* Motion of FirstEnergy Solutions Corp. for a Protective Order, filed concurrently with this Memorandum.

107-108 (Appx. A at 10-11) (cash flow projections for the Plants), 110 (Appx. A at 12) (unforced outage rates), 156-157 (Appx. A at 13-14) (energy price forecasts), 255-258 (Appx. B at 7) (forecasted capacity), 271 (Appx. B. at 8) (forced outage rates for the Plants).

Further, Sierra Club requested essentially the same information from FES in a prior subpoena. *See* Subpoena Duces Tecum Directed to FirstEnergy Solutions Corp. at Topic 1 (Nov. 25, 2014). In Topic 1 of that subpoena, Sierra Club sought information related to the following: energy, capacity and ancillary service revenue forecasts, outage schedules, load forecasts and all supporting input. *See* FES Table No. 3. To resolve that request, FES produced to Sierra Club “its forecasts and revenues for the plants at issue in this case as requested by Sierra Club, along with electronic inputs used for these forecasts from its model run.” Motion of FirstEnergy Solutions Corp. to Quash the Subpoena Duces Tecum of Sierra Club and Motion of FirstEnergy Solutions Corp. for a Protective Order at 4 (Dec. 8, 2014).

Given the above, Topic 1 in the Subpoena is duplicative of voluminous discovery to which Sierra Club has already enjoyed access for some time. FES is simply under no obligation to respond to this duplicative request or produce a witness again on this Topic. The Commission should rule accordingly. *See In re Gerber Children* at ¶44; *Carrier* at \*4-8; *State ex rel Doe* at ¶44; *Fitzgerald* at \*5-13; *Wellman* at \*2-19.

**Topic 2: Projections and forecasts from 2014 to 2031 related to expected costs for the Plants.**

Topic 2 is no less duplicative of prior discovery. Topic 2 seeks information about the Plants regarding the following projected costs: annual capital expenditures; non-fuel variable costs; fixed costs; O & M expenses; fuel costs; and labor costs; as well as the related modeling inputs. *See* Mot. for Subpoena at 2. Sierra Club provides no specific justification for making this request again because it has none. As in the case of the projected revenues sought in Topic

1, Sierra Club already has had access to all of the projected cost information it seeks under Topic 2.

Again, Mr. Lisowski's Attachments JJL-1, JJL-2, and JJL-3 provide a wealth of information regarding cost projections for the Plants. Attachments JJL-1 and JJL-2 include costs projections for the W.H. Sammis and Davis-Besse plants for the years 2016 through 2031 and include the following costs: fuel; labor; fees & licenses; lease/rental costs; general business & travel; materials & equipment; professional & contractor; pension & OPEB; service company expense; property taxes; insurance; general taxes; depreciation; accretion expense; interest expense; equity return; and income taxes. *See* Attachments JJL-1 and JJL-2. Attachment JJL-3 includes projected fuel and operating expense costs for the years 2016 to 2031 for the Kyger Creek and Clifty Creek plants. *See* Attachment JJL-3.

Sierra Club has also been provided with numerous responses to interrogatories and document requests that directly overlap with the cost information requested under Topic 2. For example, SC Set 1-INT-10 covers, among other information, projected costs from 2015 to 2034, including fixed and variable O & M costs, fuel costs, as well as environmental and non-environmental costs for the W.H. Sammis, Kyger Creek and Clifty Creek plants. *See* FES Table No. 1. *See also*, SC Set 1-INT-17 (projected costs for Sammis and Davis-Besse for 2015 through 2034); SC Set 1-RPD-49 (materials related to the proposed purchased power agreement between the Companies and FES); SC Set 2-INT-72 (projections of costs for capital investment (both environmental and non-environmental) related to the W.H. Sammis plant); P3-EPSCA Set 4-INT-62 (capital costs included in Attachment JJL-1); P3-EPSCA Set 4-INT-62 (environmental and non-environmental capital costs for the Davis-Besse plant from 2014 through 2031); OCC Set 11-INT-245 (all projected capital projects in excess of \$25 million at Davis-Besse plant); OCC

Set 11-RPD-74 (all studies conducted in the past five years related to the economic viability of the Plants); SC Set 1-RPD-54 (copies of all modeling files, including input and output files, sensitivity analyses of any dispatching, costs or revenues of the Plants). See FES Table No. 1.

Sierra Club was also provided with extensive cost projection data by FES related to Sierra Club's prior subpoena. See FES Table No. 3; Motion of FirstEnergy Solutions Corp. to Quash the Subpoena Duces Tecum of Sierra Club at 4.

Witnesses also have provided deposition testimony on projected cost information for the Plants. See, e.g., Harden Dep. Tr. at 95-96 ((Appx. A at 15 (capital plans for W.H. Sammis plant)) 159 ((Appx. A at 16) (potential variable costs associated with carbon)), 279-282 (Appx. B at 9) (projected capital expenditures for W.H. Sammis plant) 174-181 (Appx. A at 17-19) (labor and O & M cost projections for W.H. Sammis and Davis-Besse plants), 213 (Appx. A at 20) (employees at Davis-Besse plant), 214-215 (Appx. A at 20) (fuel costs for Davis-Besse), 217-219 (Appx. A at 21) (employees at W.H. Sammis plant)); Lisowski Dep. Tr. at 37-40 (Appx. A at 22) (fuel and fuel-related expenses), 65-69 (Appx. A at 23-24) (modeling and cost forecasting)), 118 (Appx. A at 25) (long-term forecasting)), 177-191 (Appx. B at 10-14) (dispatch modeling and cost projections), 234-240 (Appx. B at 15-17) (capital expenditures related to environmental and non-environmental projects), 246, 251-252 (Appx. B at 18-19) (anticipated fuel cost increases); Dep. Tr. of Jay Ruberto (Jan. 8, 2015) at 243-253 (Appx. B at 20-22) (cost information for the Plants available to EDU team).

Because Topic 2 is duplicative of prior discovery and testimony in this proceeding, nonparty FES should be under no obligation to respond to such duplicative requests. See *In re Gerber Children* at ¶44; *Carrier* at \*4-8; *State ex rel Doe* at ¶44; *Fitzgerald* at \*5-13; *Wellman* at \*2-19.

**Topic 3: Profit and loss statements prepared for any of the Plants since January 1, 2014 to the present.**

Topic 3 seeks any profit and loss statements prepared or reviewed by FES for the time period from January 1, 2014 to the present. This information has also already been provided. *See* Attachments JIL-1, JIL-2, and JIL-3 (providing projected total revenue and cost data for the Plants for the years 2016 to 2031); SC Set 1-RPD-49 (materials related to the proposed purchased power agreement between the Companies and FES, including non-privileged communications between the respective negotiating teams). *See* FES Table No. 1.

The subject matter of this Topic has been specifically addressed in the deposition of Company witness Lisowski. Lisowski Dep. Tr. at 172-175 (Appx. B at 23-24 (comparing plants' costs and revenues on profit and loss statements). Sierra Club also deposed Company witness Harden; notwithstanding his familiarity with profit and loss statements, Sierra Club elected not to question him further about them. Harden Dep. Tr. at 146:5-147:16 (Appx. A at 52). In line with the case law cited above, FES should not be required to respond to this duplicative request or produce more witnesses.

**Topic 4: All projections related to natural gas and coal prices, market energy prices, capacity prices or carbon prices between August 4, 2014 and the present.**

Topic 4 similarly seeks duplicative information to which Sierra Club already has access. For instance, projections of natural gas prices were provided to Sierra Club in the workpapers of Company witness Judah Rose. Similarly, the response to IGS Set-1-INT-3 involved detailed information regarding the anticipated impact of proposed carbon emission limits on projected market revenues and projected costs for the Plants. *See* FES Table No. 1. Company witnesses Moul and Ruberto have also provided extensive deposition testimony on the subject matter of Topic 4. *See, e.g.*, Moul Dep. Tr. at 28 (Appx. A at 26) (bidding for capacity auction and retail

pricing), 36-47 (Appx. A at 27-30) (modeling for long-term capacity pricing, commodity pricing, and CO-2 pricing), 99-102 (Appx. A at 31-32) (forecasting of energy prices and CO<sub>2</sub> prices), 224-230 (Appx. B at 25-26) (projections of energy prices and Company witness Rose's projections of coal and CO<sub>2</sub> prices); Ruberto Dep. Tr. at 56-58 ((Appx. A at 33-34) (market energy and capacity prices and carbon prices)), 295-300, 314-316 (Appx. B at 27-29) (review of Company witness Rose's forecasts including CO-2 price forecasts). Hence, given the duplicative nature of the subject matter contained under Topic 4, FES should not have to provide a response to this Topic or provide further witnesses. *See In re Gerber Children* at ¶44; *Carrier* at \*4-8; *State ex rel Doe* at ¶44; *Fitzgerald* at \*5-13; *Wellman* at \*2-19.

**Topic 5: All communications with shareholders, investors, ratings agencies, etc. regarding the current/future financial condition of the Plants, projected costs and revenues, market price projections or forecasts, and the possible retirement of any of the Plants.**

Topic 5 amounts to little more than an overbroad, impermissible “fishing expedition.” *See Martin* at 319; *Bland* at 659. In any event, any extant communications between FirstEnergy Corp. with shareholders and financial institutions are made publicly and may be found on FirstEnergy Corp.'s website. *See* Rule 4901-1-20, O.A.C.<sup>5</sup>; *see also* Rule 4901-1-16(G), O.A.C.<sup>6</sup>

Further, Sierra Club made a request virtually identical to Topic 5 in its prior subpoena. See FES Table No. 3. As part of a compromise related to that prior subpoena, Sierra Club agreed to withdraw its request regarding the types of alleged communications that comprise the

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<sup>5</sup> Rule 4901-1-20 (D) provides: “Where a request calls for the production of a public document on file in this state, or a document which the party upon whom the request is served has furnished to the party submitting the request within the preceding twelve months, it is a sufficient response to such request to specify the location of the document or the circumstances under which the document was furnished to the party submitting the request.”

<sup>6</sup> Rule 4901-1-16(G) provides: “A discovery request under rules 4901-1-19 to 4901-1-22 of the Administrative Code may not seek information from any party which is available in prefiled testimony, prehearing data submissions, or other documents which that party has filed with the commission in the pending proceeding. Before serving any discovery request, a party must first make a reasonable effort to determine whether the information sought is available from such sources.”

subject matter of Topic 5. *See* December 5, 2014 Letter from Tony Mendoza to Mark Hayden at 2-3 (attached as Ex. 2 to Motion of FirstEnergy Solutions Corp. to Quash Subpoena Duces Tecum of Sierra Club and Motion of FirstEnergy Solutions Corp. for a Protective Order (Dec. 8, 2014)). In renewing this duplicative request, Sierra Club is improperly renegeing on its prior agreement. Sierra Club should not be allowed to do so. No further discovery on this topic should be required.

**Topic 6: All studies related to the economic impact of, or reliability concerns created by, the potential retirement of any of the Plants.**

This Topic has already been covered extensively in the direct testimony of Company witnesses Moul, Cunningham and Murley as well as in discovery responses to which Sierra Club has access. For example, regarding the consequences of retiring the Plants, Mr. Moul stated:

Once these plants are retired, they are very costly and difficult (if not impossible) to restart. They likely would be gone forever. The Plants, like other baseload facilities, are critical to a strong, reliable system that provides plentiful and affordable power to Ohio families and businesses when needed. Retirement of the Plants could also mean that customers are forced to pay significantly more for energy, for transmission upgrades (as shown by Company witness Cunningham), and eventually for the construction of new baseload plants through higher capacity costs. If new plants are not constructed in Ohio to replace this baseload generation, customers also could see higher congestion costs resulting from capacity imports from other states. Ohio's customers are better off through continued operation of these existing resources.

Direct Testimony of Donald Moul at 5 (Aug, 4, 2014).

In his direct testimony, Mr. Moul further opined about the many benefits of generation resource diversity to ensure reliable electric service including: (a) “resources diversity is an important way to avoid potential catastrophic issues with a single class of generation”; (b) “resource diversity protects against interruption in fuel supply for a given class of generating assets”; (c) “the Plants promote resource diversity by having sufficient on-site fuel resources to withstand extreme events”; and (d) “the Plants play a critical role in providing ancillary services

need to maintain grid reliability and integrate variable resources.” *Id.* at 7-8. Mr. Moul also specifically addressed the potential negative impact the retirement of coal and nuclear plants could have, by making Ohio excessively “reliant on natural gas as a power source.” *Id.* at 9. *See also* Direct Testimony of Gavin L. Cunningham at 4-6 (Aug. 4, 2014) (discussing study demonstrating the likelihood of conservatively estimated transmission upgrade costs of \$442 million if the Plants were to be retired).

Likewise, in her direct testimony, Company witness Murley demonstrates the local and statewide economic impacts of the W.H. Sammis and Davis-Besse plants, including their possible retirements. *See generally* Direct Testimony of Sarah Murley, including Attachment SM-1: Economic and Revenue Impacts of FirstEnergy W.H. Sammis Plant, Attachment SM-2: Economic and Revenue Impacts of Davis-Besse Nuclear Power Station on Ottawa County and the State of Ohio (Aug. 4, 2014). The Companies also responded to discovery on this topic. *See, e.g.*, OCC Set 11-RPD-74 (all studies conducted in the past five years related to the economic viability of the Plants). *See* FES Table No. 1.

Further, Company witnesses Moul and Murley already have been deposed for several hours by the intervenors to this proceeding, including Sierra Club. The fact that Sierra Club did not pursue such lines of questioning when it had the opportunity to do so is nobody’s fault but its own. Thus, Topic 6 is not only duplicative, but also an attempt to get a second bite at the apple. In line with the well-settled Ohio case law and Commission precedent cited above, FES should not be required to provide a response to Topic 6.

**Topic 7: Any information regarding the likelihood of retiring any of the Plants if the proposed purchased power agreement between FES and the Companies is not executed.**

First, the likelihood that the Plants will retire is beyond the scope of proper discovery under the March 23 Entry. To recall, those factors included information related to (a) the

financial need of the plant(s) at issue; (b) the necessity of continued plant operation to ensure reliability and supply diversity; (c) the potential for compliance with pending environmental regulations by the plant(s); and (d) the economic impact of closing the plant(s). *See id.*

Moreover, this Topic is also duplicative of prior deposition testimony of the Company's witnesses, as well as written discovery responses and direct testimony. Indeed, as excerpts from the depositions of Company witnesses Harden and Ruberto make clear, the subject matter of Topic 7 is well-traversed terrain. For example, from Mr. Harden's deposition:

Q. Okay. Is it your testimony that if the economic stability program is not implemented, the plants won't be able to continue operating over the long term?

\* \* \*

A. I don't know. I don't know if they will be able to continue to operate.

Q. Okay. Do you have any opinion on that question as to whether they will be able to continue operating if this proposed transaction is not approved?

A. I guess I have the opinion that it is very questionable.

Q. Okay. What's your basis for that opinion?

A. My basis for that opinion is their profit and loss statement with the way -- with the levels of capacity and energy prices in the last, I don't know, year or so.

Harden Dep. Tr. at 145:7-146:4.

Similarly, he testified:

Q. Does it seem likely to you that FirstEnergy would retire generating units that are projected to earn approximately \$2 billion over the next 15 years?

A. My opinion is it is very possible.

*Id.* at 148:23-149:3.

Company witness Ruberto's deposition testimony also covered this Topic:

Q. Okay. What is your personal understanding as to why FES offered to enter into the proposed transaction with the companies?

A. Realizing my understanding is based upon what FES has -- has said, they indicate that these units are at risk in the near term, and that's their motivation. Beyond that, I -- I can't speak to their motivation beyond that.

Q. Okay. What do you mean by "at risk"?

A. It's more what they mean by at risk.

Q. Oh, okay.

A. They -- they indicate they're at risk of not continuing to operate based upon the near-term market conditions.

Ruberto Dep. Tr. at 30:22-31:11.

Moreover, the direct testimony of Company witness Moul has also previously addressed this Topic at length. For example:

Q. How have market prices affected plant operations?

A. Markets have not, and are not, providing sufficient revenues to ensure continued operation of the Plants. Since 2008, FES has managed the Plants in the face of significant revenue decline and uncertainty, price volatility and ever-changing environmental mandates.

Q. Will the Plants continue to operate if the Economic Stability Program...is not approved?

A. The only thing that can be said with certainty is that the future of the Plants is in doubt.

Moul Direct Test. at 3. Mr. Moul was also deposed by Sierra Club and other intervenors for several hours and was available for questioning on this Topic. Again, Sierra Club is doing nothing more than seeking another attempt to depose witnesses already made available in the guise of supplemental discovery arising from the March 23 Entry. *See also*, SC Set 3-INT-83 (detailed requests regarding direct testimony of Company witness Murley related to possible closures of any of the Plants should the Commission not approve the Economic Stability

Program). *See* FES Table No. 1. FES has no duty to respond to this duplicative request. *See Fitzgerald at \*5-13; Wellman at \*2-19.*

**Topic 8: All information regarding early termination rights held by FES under the proposed purchased power agreement.**

Sierra Club seeks to justify this Topic by claiming, “Topic 8 seeks information about whether FES could terminate the proposed PPA early, and if so, what damages it would owe the Companies and their customers.” Memo. in Support at 3. Topic 8 is beyond the scope of the March 23 Entry which limited additional discovery to the “AEP Ohio Order factors.” March 23 Entry at 3. Putative early termination rights do not fall anywhere under those factors. Topic 8 is beyond the permissible scope of the March 23 Entry. *See Martin at 319; Bland at 659; Champaign Wind at \*19-20.*

In any event, the subject matter of Topic 8 also already has been addressed in written discovery responses to which Sierra Club has access. *See, e.g.,* IEU Set 1-INT-25 (attachment to interrogatory response includes draft term sheet for proposed purchased power agreement between the Companies and FES); SC Set 6-INT-127 (contractual remedies regarding early termination of proposed purchased power transaction). *See* FES Table No. 1.

Further, Topic 8 is duplicative of extensive deposition testimony. For instance, during the deposition of Mr. Harden, who also appeared not only as a Company witness, but also in response to Sierra Club’s first subpoena:

Q. Okay. Do you recall any discussions about whether FES could terminate the proposed transaction before the 15-year period runs?

A. I remember some general discussions, and then I remember one specific area in the term sheet that addressed.

Q. And what were the general discussions?

A. The general discussions were that if the agreement were going to be entered into, that it needed to be such that neither party had the right to walk away or terminate the agreement at any point.

Q. Okay. And that was the position of FES?

A. Yes, it was.

Q. And who -- who communicated that position?

A. It was the opinion of most of the team that -- that -- maybe all, I can't remember every single person's opinion, that for this to be a fair transaction for both parties that the only way it could be fair is if neither party had the right to terminate.

Harden Dep. Tr. at 132:18-133:14.

Q. Okay. And then you said that this was a reflection, I guess, of that discussion in specific terms in the agreement; is that right?

A. No. There's one specific area in here that I do remember being discussed that did have I will call it a caveat relative to termination.

Q. Okay. And what is that?

A. That's Section 20 --

Q. Okay.

A. -- conditions.

Q. Okay. And what's your understanding of Section 20?

A. My understanding of Section 20 was that that section basically states that if -- before or after the transaction is consummated, it is recognized that some approval that's needed has not been required -- that's required has not been attained, then the FES could terminate it.

*Id.* at 133:18-134:11.

Q. In the term sheet is there any other provision you can point to that prohibits FES from terminating the agreement early?

A. I believe there is. My understanding is Section 10, the delivery period obligates both parties for the entire duration of June 1, 2016, to May 31, 2031, and that that obligation explicitly would not allow termination.

*Id.* at 133:20-135:3.

Mr. Moul's deposition testimony also addressed the subject matter of Topic 8. For example:

Q. Okay. Now, over the course of the negotiations FES and the companies ultimately settled on a 15-year term for the proposed transaction; is that correct?

A. Yes.

Q. Do you recall FES having any internal discussions about whether the 15-year period was appropriate?

A. Yes.

Q. And what were those discussions?

A. We looked at a term that was long enough to get an adequate protection for customers and give us certainty for our plants.

Moul Dep. Tr. at 81:2-14.

Q. Are you aware of anything that would prevent FirstEnergy Solutions from terminating before 2031?

A. Well, I think if I look at it, it's got a delivery period that's 15 years. So once you are in this contract, this PPA, it's a 15-year PPA.

Q. Okay. And you are looking at section 10?

A. Section 10.

Q. Okay. Are you aware of anything else that would prevent -- apart from this section of the term sheet, are you aware of anything else that would prevent FES from terminating prior to May 31, 2031?

A. It's a contract for 15 years. I mean, there's some guidance on unit contingency for large capital but that's a joint agreement so, no, I am not aware of anything.

*Id.* at 83:20-84:11.

Further, Mr. Ruberto also testified on the subject matter of Topic 8:

Q. Right, okay. And if we could -- if we could go back to Exhibit 1, which is that term sheet, for a minute. Where did I put my copy? Oh, all right. Could we look at Section 20 for a minute?

A. Sure.

\* \* \*

Q. And this is a -- this section is addressed to a situation where FES would not be able to consummate the transaction because it couldn't get a certain government approval, correct?

A. Correct.

Ruberto Dep. Tr. at 88:13-17; 86:24-87:4.

Q. Okay. If the NRC were to renew the Davis-Besse license, but then in 2025 they yanked the license for some reason, would this -- would Section 20 apply in that circumstance?

A. I don't believe so.

Q. Okay. In this section -- so this section discusses certain circumstances in which FES would have the right to terminate the agreement, right?

A. Very limited, but, yes, yes.

Q. Right, okay. Is there any other language in the term sheet explicitly prohibiting FES from terminating the agreement?

A. Well, the delivery period is defined in the term sheet; so they would not have the unilateral right to void that period.

Q. You're referring to Section 10?

A. Correct.

Q. But there's no explicit language stating that they can't terminate, correct?

A. But that would violate Section 10; so in my view Section 10 says this is the delivery period.

*Id.* at 88:20-89:17.

Q. And when were you -- when you were considering whether a 15-year term was appropriate, did you consider the fact that the longer the term, the more unknown risk there might be?

A. Yes.

Q. And why did you conclude that a 15-year term was still appropriate?

A. We felt that it was an appropriate balance with -- with future risk, while keeping the term long enough to -- to harvest the gains that are on the back half of the agreement.

*Id.* at 125:14-24.

Q. What would happen under this agreement, assuming a PPA is signed, if the PUCO terminates the rider prior to the 15-year period?

A. That -- that termination has no bearing on the PPA.

Q. So in your opinion, the PPA would continue regardless of whether the PUCO terminates the rider in a subsequent proceeding?

MR. LANG: Objection.

THE WITNESS: I mean, as I said before, that -- that termination doesn't automatically terminate the PPA.

*Id.* at 218:11-22.

Topic 8 is thus not only beyond the scope of the additional discovery permitted pursuant to the March 23 Entry; it is also duplicative of previous discovery conducted by Sierra Club and other intervenors. As Commission precedent demonstrates, FES should not be obligated to respond to this Topic. *See Fitzgerald* at \*5-13; *Wellman* at \*2-19.

**Topic 9: All internal FES communications regarding the Commission's authority to audit the proposed purchased power agreement between FES and the Companies.**

Topic 9 is also well beyond the limited scope of the additional discovery permitted pursuant to the March 23 Entry. Whether the Commission has the authority to review or audit the proposed purchased power agreement has nothing to do with the four factors set forth in the AEP ESP III Order. The Topic is further misguided as it appears to assume that the proposed

purchased power agreement between the Companies and FES is under review here. This is simply false. The proposed purchased power agreement is a FERC-jurisdictional contract not subject to the approval of the Commission. Ms. Mikkelsen's direct testimony discusses the nature and scope of the proposed audit:

[T]he Staff will have the opportunity to audit the reasonableness of the actual costs or review . . . contained in Rider RRS and the actual market revenues contained in Rider RRS. The audit shall include a review to confirm that the actual costs and actual market revenue included in Rider RRS are not unreasonable.

Direct Testimony of Eileen M. Mikkelsen at 15 (Aug. 4, 2014).

Nevertheless, and overlooking the Topic's mischaracterization of the nature and scope of the proposed audit, the proposed audit was extensively addressed during the two-day deposition of Ms. Mikkelsen in which Sierra Club actively participated. *See* Dep. Tr. of Eileen Mikkelsen (Jan. 29, 2015) at 36-62 (Appx. A at 35-42) (authority and mechanics of Staff and Commission review of cost-recovery under proposed Rider RRS); Dep. Tr. of Eileen Mikkelsen (Mar. 11, 2015) at 398-399, 437-439 (Appx. A at 43-47) (Commission authority to audit proposed Rider RRS). Pursuant to the Companies' supplemental response to SC Set 1-RDP-49, Sierra Club was also provided with all non-privileged communications between the negotiating teams for the Companies and FES, which address various aspects of the proposed purchase power agreement. Given that Topic 9 is beyond the scope of proper discovery at this stage of the case and that Sierra Club has already conducted discovery on this Topic, FES should not be required to respond any further.

**Topic 10: Information regarding the compliance of the Plants with pending or proposed environmental regulations.**

The subject matter of Topic 10 has been the focus of considerable discovery in this proceeding. The impact of complying with pending and proposed environmental regulations on

the Plants has been extensively addressed in written discovery. *See, e.g.*, SC Set 1-RPD-12 (compliance costs for coal-fired Plants regarding Sections 316(a) and (b) of the Clean Water Act, Clean Water Act effluent limitation guidelines, Clean Air Interstate Rule, Cross State Air Pollution Rule, Ozone NAAQS, PM2.5 NAAQS, Coal Combustion Waste rules, and Section 111(d) greenhouse gas regulations); SC Set 2-INT-72 (projected environmental capital investment costs for W.H. Sammis plant); SC Set 4-INT-109 (analysis of environmental compliance costs at W.H. Sammis and OVEC plants prior to Rider RRS proposal); SC Set 5-INT-116 (modeling for costs of projected compliance with Sections 316(a) and (b) of the Clean Water Act and the Coal Combustion Waste rules for the years 2016 through 2031). *See* FES Table No. 1. *See also* SC Set 2-INT-61 (capital cost estimates related to Clean Water Act effluent limitation guidelines, Clean Air Interstate Rule, Cross State Air Pollution Rule, Ozone NAAQS, PM2.5 NAAQS, Coal Combustion Waste rules, and Section 111(d) greenhouse gas regulations); SC Set 2-INT-67 (entrainment for the W.H. Sammis plant); SC Set 4-INT-95 (modeling related to Clean Water Act effluent limitation guidelines, Clean Air Interstate Rule, Cross State Air Pollution Rule, Ozone NAAQS, PM2.5 NAAQS, Coal Combustion Waste rules, and Section 111(d) greenhouse gas regulations); SC Set 4-RPD-90 (studies or analyses related to SC Set 1 RPD-12 and SC Set 2-INT-61). *See* FES Table No. 2.

Further, Sierra Club has had the opportunity to obtain information on this subject through deposition testimony. For instance, during his deposition, Mr. Harden was asked about pending or proposed environmental regulations as they relate to the Plants. For example:

Q. So you have had conversations with the environmental department at FirstEnergy Generation.

A. Yes, I have.

Q. With regards to whether FES has analyzed compliance with any of the regulatory standards listed there?

A. With regards to any evaluation that may have been done to those standards, not specific FES, with regard to any evaluation that may have been done at anyone's request.

\* \* \*

Q. Okay. And who did you speak with at the environmental department?

A. One of the managers in the environmental department.

Q. Who?

A. Mike Jurusik.

Q. How do you spell that last name?

A. I can't remember the exact spelling.

Q. Jurusik.

A. And, again, my discussions with Mike were relative to these topics. I don't remember if it was specific to this subpoena or other discovery requests as far as the timing of each of the times I've had discussions with Mike.

\* \* \*

Q. Okay. And what were the substance of those conversations?

A. Is how they -- what they had done, how they had looked at these, whether or not they had conducted any formal written analyses or whether or not they had just done, you know, mental assessment of -- of these to understand what work may have been done associated with any of these proposed regulations.

Harden Dep. Tr. at 66:1-10; 67:6-19; 67:24-68:8.

Q. Okay, okay. Do you have any understanding as to whether the environmental regulations identified in subpoena topic 6 have the potential to create significant requirements for, say, the Sammis plant?

\* \* \*

A. Not that I would consider significant.

Q. Okay. Why not?

A. Significant is a matter of opinion.

Q. Okay.

A. And my opinion would be that they would not.

Q. So, for example, the potential 111(d) greenhouse gas regulations you don't think would have significant requirements for Sammis?

A. It may or may not.

Q. Okay. All right. Outside of talking with Mike Jurusik I believe you said four or five times, is there anything you've done to determine whether FES has analyzed or asked anyone to analyze compliance with any of the regulations identified in topic 6?

A. As I stated previously, you know, as part of discovery in this particular topical area, I've requested Mr. Pezze to try to search and to talk to appropriate personnel within the organization to be responsive to this as well.

*Id.* at 69:14-18; 69:24-70:20. *See also id.* at 101-110 ((Appx. A at 46-48) (compliance with CSAPR and impact on CO-2 pricing), 171-172 (Appx. A at 49) (WFGD retrofit), 181-188 (Appx. A at 50-51) (compliance with CSAPR).

The subject matter under Topic 10 has thus already received exhaustive treatment and any further response would be duplicative. *See In re Gerber Children* at ¶44; *Carrier* at \*4-8; *State ex rel Doe* at ¶44; *Fitzgerald* at \*5-13; *Wellman* at \*2-19.

\* \* \* \* \*

To require FES, a nonparty, to compile and produce the voluminous duplicative materials requested in the Subpoena would be oppressive and impose an undue burden on FES. Sierra Club blithely attempts to tie the Topics contained in the Subpoena to the AEP ESP III Order factors in order to circumvent the limits on the scope of additional discovery imposed by the March 23 Entry. Sierra Club offers no further justification, conveniently neglecting the fact that FES is a nonparty to this proceeding. Indeed, in neither its Motion for a Subpoena nor in its

Memorandum in Support does Sierra Club even attempt to make any showing that it has a substantial need for the requested information. Nor could it.

Given the duplicative nature of the Topics in the Subpoena, Sierra Club simply has no substantial need for such information; it already has it at hand. Thus, the Commission should grant FES's Motion to Quash. *See In re Gerber Children* at ¶44; *Lambda Research* at 756; *Martin* at 120; *Eitel* at \*12-13; *Champaign Wind* at \*19-20.

**B. To The Extent That FES Creates, As Part of The Companies' Efforts To Submit Supplemental Testimony, Any New Information Responsive To The Subpoena, FES Will Supplement Its Responsive At Or Around The Time That Supplemental Testimony Is Final.**

As demonstrated above, FES and the Companies have already provided extensive information responsive to the Subpoena. FES should not have to produce the same information again.

The March 23 Entry invited the parties to submit supplemental testimony regarding the applicability of the AEP ESP III Order factors. To the extent that FES creates any new information, FES will supplement its responses to the subpoenas served on it when such supplemental testimony is finalized.

Any new information potentially created as a result of the March 23 Entry (*i.e.*, for possible use in supplemental testimony) would be either attorney-related privileged information or work product. *See, e.g., State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, 121 Ohio St. 3d 537, 542 (2009) (holding that investigative report was immune from disclosure on the basis of attorney-client privilege and rejecting "cramped view" of attorney-client privilege that "narrowly confined" the privilege to the "repetition of confidences"); *Estate of Hohler v. Hohler*, 185 Ohio App. 3d 420, 430 (Carroll Cty. 2009) (holding "the documents surrounding the

preparation of the prenuptial agreement would be initially protected by work product as they were created ‘because of’ the prospect of litigation in a future divorce or will contest.”)

Thus, it would be improper to require FES to provide any new possibly responsive material until the Companies filed any supplemental testimony. Such new material would retain its privileged and work product status until the Companies disclosed such information in any supplemental testimony. *See Leonchyk v. FCI USA, Inc.*, 2008-Ohio-3796, ¶13 (Cuyahoga Cty. July 31, 2008) (holding that filing of letter with public agency eliminated any work-product protection for letter but documents related to creation of letter and not publicly disclosed remained protected).

**V. CONCLUSION**

For the foregoing reasons, Sierra Club's Subpoena Duces Tecum Directed to FirstEnergy Solutions Corp. should be quashed.

Date: April 14, 2015

Respectfully submitted,

/s/ Brian J. Knipe

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on April 14, 2015.

/s/ Brian J. Knipe

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# **EXHIBIT 1**

## FES TABLE NO. 1

REQUEST	TOPIC
<b>IEU Set 1-INT-25</b>	On page 9, lines 4-5, of the Direct Testimony of Jay A. Ruberto, he states, "the Companies have the right to audit the costs charged to the Companies." Identify the agreement or contracts that define or provide these audit rights to the Companies.
<b>IGS Set 1 – INT-3</b>	Identify whether the generation unit cost and energy revenue projections provided by FirstEnergy Solutions (“FES”) witness Lisowski assumes an impact for the Environmental Protection Agency’s (“EPA”) proposed carbon emission limits for existing power plants (111(d)) on the following: a. Projected Market Revenue b. If the answer to (a) is yes, identify the impact (in total dollars) for each year of the projection. c. If the answer to (a) is yes, identify the impact (in total dollars) for each generation unit for each year of the projection. d. Projected costs. e. If the answer to (d) is yes, identify the impact (in total dollars) for each generation unit for year of the projection f. If the answer to (d) is yes, identify the impact (in total dollars) for each generation unit for each year of the projection.
<b>OCC Set 11-INT-245</b>	Please identify all capital projects estimated to cost in excess of \$25 million, which are expected to be initiated during the next ten years at the Davis-Besse nuclear plant. For purposes of answering this Interrogatory, please provide: a. The estimated cost; b. The reason for the project (e.g., replacing a worn out component, environmental compliance, etc.); and c. Whether the project is discretionary or required if the plant is to continue in operation.
<b>OCC Set 11-RPD-074</b>	Please provide a copy of all studies conducted by or for FirstEnergy within the past five years pertaining to the economic viability (i.e., ability to continue in operation economically on a long-term basis) or retirement for: a. The OVEC power plants; b. The W.H. Sammis power plant; and c. Davis-Besse nuclear plant.
<b>P3-EPSA Set 4- INT-62</b>	With respect to Sierra Club Set 2-INT-72(b), Attachment 1, have these capital costs been included in the data presented in Mr. Lisowski's Attachment J JL-1? If so, please explain exactly, using an example, how the costs are included in Attachment J JL-1.
<b>P3-EPSA Set 4-INT-64</b>	Identify each environmental and non-environmental capital investment or expense projected for the Davis-Besse Nuclear Power Station for each of the years 2014 through 2031, and the cost of each

REQUEST	TOPIC
	such investment or expense.
<p><b>SC Set 1-INT-9</b> <b>(Lisowski Dep. EX. No. 5)</b></p>	<p>For each of the years 2010 through 2013, and each month in 2014, and each unit of the units at the Sammis, Kyger Creek, and Clifty Creek plants, identify the:</p> <ol style="list-style-type: none"> <li>a. Capacity factor</li> <li>b. Availability</li> <li>c. Heat rate</li> <li>d. Forced or random outage rate</li> <li>e. Fixed operating and maintenance ("O&amp;M ") cost</li> <li>f. Variable O&amp;M cost</li> <li>g. Fuel cost</li> <li>h. Environmental capital cost</li> <li>i. Non-Environmental capital cost</li> <li>j. SO<sub>2</sub> emission rate</li> <li>k. NO<sub>x</sub> emission rate</li> <li>l. Mercury emission rate</li> <li>m. Particulate matter emission rate</li> <li>n. Hydrochloric acid emission rate</li> </ol> <p><u>Note:</u> The Confidential Attachment to the SC Set 1-INT-9 contains quantitative data related to capacity factor, availability, heat rates, and forced outage rates for all of the Sammis Units and capacity factor, availability and forced outage rates for all of the Kyger Creek and Clifty Creek Units.</p>
<p><b>SC Set 1 – INT-10</b></p>	<p>For each of the years 2015 through 2034 and each unit of the units at the Sammis, Kyger Creek, and Clifty Creek plants, identify the projected:</p> <ol style="list-style-type: none"> <li>a. Capacity factor</li> <li>b. Availability</li> <li>c. Heat rate</li> <li>d. Forced or random outage rate</li> <li>e. Fixed O&amp;M cost</li> <li>f. Variable O&amp;M cost</li> <li>g. Fuel cost</li> <li>h. Environmental capital cost</li> <li>i. Non-environmental capital cost</li> <li>j. S<sub>02</sub> emission rate</li> <li>k. NO<sub>x</sub> emission rate</li> <li>l. Mercury emission rate</li> <li>m. Particulate matter emission rate</li> <li>n. Hydrochloric acid emission rate</li> </ol>
<p><b>SC Set 1-INT-11</b></p>	<p>Refer to page 2, line 15 through page 4, line 14 of the Direct Testimony of Paul A. Harden ("Harden Testimony").</p>

REQUEST	TOPIC
	<p>a. Describe the annual cost of fuel at Davis-Besse for each year from 2010-13.</p> <p>b. Describe in detail any planned outages at Davis-Besse for maintenance or repair scheduled between January 1, 2014, and May 31, 2019, including the estimated cost of such maintenance or repairs.</p> <p>c. Describe in detail any unplanned outages that have occurred at Davis-Besse since January 1, 2010.</p> <p>d. Identify the capacity factor at Davis-Besse for each year since 2009.</p>
<p><b>SC Set 1-INT-13</b></p>	<p>With regards to each of the Sammis, Kyger Creek, and Clifty Creek plants:</p> <p>a. Describe in detail any planned outages for maintenance or repair scheduled between January 1, 2014, and May 31, 2019, including the duration of each such outage and the estimated cost of such maintenance or repairs.</p> <p>b. Describe in detail any unplanned outages that have occurred since January 1, 2010, including the duration of each such outage, steps taken to address the cause of each such outage, and the cost of such steps.</p>
<p><b>SC Set 1-INT-17</b></p>	<p>For each year of 2015 through 2034, identify the projected:</p> <p>a. revenue earned through operation of the Sammis plant;</p> <p>b. revenue earned through operation of the Davis-Besse plant;</p> <p>c. cost of the Sammis plant;</p> <p>d. cost of the Davis-Besse plant.</p>
<p><b>SC Set 1-INT-58</b></p>	<p>Refer to the testimony of Jason Lisowski ("Lisowski Testimony").</p> <p>a. Identify the "proprietary dispatch modeling software" referenced on page 2, lines 11-12 of the Lisowski Testimony.</p> <p>b. Identify the "dispatch modeling system" referenced on page 4, line 12 of the Lisowski Testimony.</p> <p>c. Identify the "proprietary monthly dispatch model" referenced on page 5, line 12 of the Lisowski Testimony.</p> <p>d. For each model referenced in subsections a through c, state whether a license is needed to access and/or use the model.</p> <p>i. If so, identify who at the model vendor company should be contacted to inquire about obtaining such license.</p>
<p><b>SC Set 1-INT-59</b></p>	<p>Refer to page 4, lines 12-18 and page 5, lines 16-20 of the Lisowski Testimony. With regards to the modeling referenced therein:</p> <p>a. Identify the results of all such modeling, including for each year and each of the Sammis plant, OVEC plants, and Davis-Besse plant, your projection of:</p> <p>i. When the Plants will be operating;</p> <p>ii. At what capacity the Plants will be operating;</p> <p>iii. The amount of energy revenue each Plant will earn; and</p>

REQUEST	TOPIC
	<ul style="list-style-type: none"> <li>iv. The costs incurred as a result of generating those revenues.</li> <li>b. State whether Mr. Lisowski carried out any sensitivity analyses of the dispatching, costs, or revenues of any of the Plants.               <ul style="list-style-type: none"> <li>i. If so:                   <ul style="list-style-type: none"> <li>1. Identify and describe each such sensitivity analysis that was run.</li> <li>2. Identify the same results requested in subsection a above for each sensitivity analysis.</li> </ul> </li> <li>ii. If not, explain why not</li> </ul> </li> </ul>
<b>SC Set 1– RPD-4</b>	Please produce copies of all work papers for each of FirstEnergy's witnesses in Excel spreadsheet format with formulas intact. This request is inclusive of, but not limited to, the Fanelli, Strah, Lisowski, Staub, and Rose work papers that were filed with the Commission on August 4, 2014.
<b>SC Set 1-RPD-12</b>	<p>For each of the following existing, proposed, or potential regulatory requirements, produce any evaluation of the pollution controls that would be needed, or the estimated costs that would be incurred, to bring each of the Sammis, Kyger Creek, and Clifty Creek coal-fired electric generating units into compliance with the requirement:</p> <ul style="list-style-type: none"> <li>a. Section 316(b) of the Clean Water Act</li> <li>b. Section 316(a) of the Clean Water Act</li> <li>c. Clean Water Act effluent limitation guidelines</li> <li>d. Clean Air Interstate Rule</li> <li>e. Cross State Air Pollution Rule</li> <li>f. Ozone NAAQS</li> <li>g. PM2.5 NAAQS</li> <li>h. Coal Combustion Waste rules</li> <li>i. Section 111(d) greenhouse gas regulations for existing sources</li> </ul> <p>The timeframe for this request is January 1, 2010, up through and including the date of your response.</p>
<b>SC Set 1-RPD-49</b>	<p>Refer to page 4, lines 3-12 of the Ruberto Testimony.</p> <ul style="list-style-type: none"> <li>a. Produce any notes, minutes, communications, or other documents regarding the EDU Team's evaluation or negotiation of the proposed transaction.</li> <li>b. Produce any communications between any representative of the Companies and any representative of FES regarding the proposed transaction.</li> <li>c. Produce any communications between FES and its Board of Directors, shareholders, investors, or credit rating agencies regarding the proposed transaction.</li> <li>d. Produce any notes, minutes, communications, or other documents regarding the EDU Team's assessment of the condition of the plants at issue in the proposed transaction.</li> </ul>

REQUEST	TOPIC
SC Set 1– RPD-54	<p>Refer to page 4, lines 12-18 and page 5, lines 16-20 of the Lisowski Testimony. With regards to the modeling referenced therein:</p> <ul style="list-style-type: none"> <li>a. Produce, in machine readable electronic format with all formulas intact, all modeling files, including input and output files, and workpapers used in such modeling.</li> <li>b. If Mr. Lisowski carried out any sensitivity analyses of the dispatching, costs, or revenues of any of the Plants, produce, in machine readable electronic format with formulas intact, all modeling files, including input and output files, and workpapers used in carrying out such analysis.</li> </ul>
SC Set-2-INT-72	<p>Refer to your response to SC-INT-10(h)-(i).</p> <ul style="list-style-type: none"> <li>a. Describe how costs for environmental and non-environmental capital investments are projected for the Sammis plant.</li> <li>b. Identify each environmental and non-environmental capital investment or expense projected for the Sammis plant for each of the years 2014 through 2031, and the cost of each such investment or expense.</li> </ul>
SC Set 2–INT-76	<p>Under the proposed transaction upon which the proposed ESP IV is based, are there any circumstances in which FES and/or the Companies could terminate the agreement prior to its May 31, 2031 expiration?</p> <ul style="list-style-type: none"> <li>a. If so: <ul style="list-style-type: none"> <li>i. Identify each and every circumstance in which the Companies could terminate the agreement before its expiration, including any transactional provision permitting such termination.</li> <li>ii. Identify each and every circumstance in which FES could terminate the agreement before its expiration date, including any transactional provision permitting such termination.</li> </ul> </li> </ul>
SC Set 2–INT-81	<p>Refer to the Testimony of Jason Lisowski, page 3, lines 17-20, and SC-RPD-68.</p> <ul style="list-style-type: none"> <li>a. If the "cost forecasts" did not include a breakdown of new capital costs associated with environmental compliance by unit (or by plant if by unit is not available), please explain why not.</li> <li>b. If the "cost forecasts" did not include a breakdown of new variable costs associated with environmental compliance by unit (or by plant if by unit is not available), please explain why not.</li> <li>c. If the "cost forecasts" did not apply an assumed carbon price to variable costs by unit (or by plant if by unit is not available), please explain why not.</li> </ul>
SC Set 2–INT-82	<p>Refer to the Testimony of Jason Lisowski, page 4, line 3, and SC-RPD-69.</p> <ul style="list-style-type: none"> <li>a. If the OVEC forecasts did not include a breakdown of new capital costs associated with environmental compliance by unit (or by plant if by unit is not available), please explain why not.</li> <li>b. If the OVEC forecasts did not include a breakdown of new</li> </ul>

REQUEST	TOPIC
	<p>variable costs associated with environmental compliance by unit (or by plant if by unit is not available), please explain why not.</p> <p>c. If the OVEC forecasts did not apply an assumed carbon price to variable costs by unit (or by plant if by unit is not available), please explain why not.</p>
<b>SC Set 2-RPD-69</b>	<p>Refer to Testimony of Jason Lisowski, page 4, line 3. Please provide the following information from OVEC for Kyger Creek and Clifty Creek.</p> <p>a. Please provide a breakdown of new capital costs associated with environmental compliance by unit (or by plant if by unit is not available) that were included in the OVEC forecasts.</p> <p>b. Please provide a breakdown of new variable costs associated with environmental compliance by unit (or by plant if by unit is not available) that were included in the OVEC forecasts.</p> <p>c. Please provide the assumed carbon price applied to variable costs by unit (or by plant if by unit is not available) that were included in the OVEC forecasts.</p>
<b>SC Set 3-INT-83</b>	<p>Refer to the Direct Testimony of Sarah Murley ("Murley Testimony"), page 10, line 15.</p> <p>a. State whether it is the position of Ms. Murley or any other FirstEnergy witness that the Sammis and/or Davis-Besse plant would close if the Commission does not approve the Economic Stability Program proposed in this proceeding.</p> <p>i. If so, identify which witness or witnesses take that position and explain why either or both of the plants would close.</p> <p>ii. If not, explain why not.</p> <p>b. Would the economic impacts of the plants only continue to occur if the proposed ESP is approved?</p> <p>i. If so, please explain why.</p> <p>ii. If not, explain why not.</p> <p>c. Does Ms. Murley believe that if the plants were to retire that no generation or demand-side resources would replace them?</p> <p>i. If not, could there be economic impacts of replacement resources in Ohio?</p> <p>d. Did Ms. Murley perform any analysis of the economic impacts of alternatives to the ESP, such as pursuing replacement resources for Sammis or Davis-Besse?</p> <p>i. If so, explain the results of such analysis.</p> <p>ii. If not, explain why not.</p>
<b>SC Set 4-INT-109</b>	<p>Refer to your responses to SC-INT-81, -82, SC-RPD-68, and -69.</p> <p>a. Confirm that the Companies did not evaluate potential future environmental compliance costs at Sammis before proposing Rider RRS.</p> <p>i. If not confirmed, explain what analysis of potential future environmental compliance costs at Sammis was carried out and by</p>

REQUEST	TOPIC
	<p>whom.</p> <p>b. Confirm that the Companies did not evaluate potential future environmental compliance costs at the OVEC plants before proposing Rider RRS.</p> <p>i. If not confirmed, explain what analysis of potential future environmental compliance costs at the OVEC plants was carried out and by whom.</p>
<p><b>SC Set 6–INT-127</b></p>	<p>Refer to your response to SC-INT-76.</p> <p>a. Please describe with specificity what you mean by “typical contract remedies.”</p> <p>b. Please identify each and every “typical contract remedy” that the Companies anticipate would be available to the parties under the proposed transaction. This list should include, but is not limited to, any remedies \that would permit a party to terminate, cancel, or rescind the agreement prior to its May 31, 2031 expiration date.</p> <p>c. Please confirm that, under the terms of proposed transaction, FES would be able to terminate the agreement at any time prior to its expiration on May 31, 2031.</p> <p>If denied, please amend your response to SC-INT-76(a)(ii) by describing each and every circumstance in which FES could terminate the agreement before May 31, 2031.</p>

**EXHIBIT 2**

**(FILED UNDER SEAL)**

# **EXHIBIT 3**

### FES TABLE NO. 3

REQUEST	TOPIC
<p><b>November 25, 2014 Sierra Club Subpoena REQUEST NO. 1</b></p>	<p>Total projected revenues for the June 1, 2016 to May 31, 2031 period for each unit of the W.H. Sammis plant, to the extent available, and the plant as a whole, including, without limitation:</p> <ul style="list-style-type: none"> <li>a. energy market revenue forecasts;</li> <li>b. capacity market revenue forecasts;</li> <li>c. ancillary services revenue forecasts;</li> <li>d. outage schedules and forecasts;</li> <li>e. load forecasts;</li> <li>f. all supporting inputs, work papers, and other documents used in developing the forecasts set forth in (a)-(e) above; and</li> <li>g. all other information relevant to projected revenues.</li> </ul>
<p><b>November 25, 2014 Sierra Club Subpoena REQUEST NO. 2</b></p>	<p>Total projected costs for the June 1, 2016 to May 31, 2031 period for each unit of the W.H. Sammis plant, to the extent available, and the plant as a whole, including, without limitation:</p> <ul style="list-style-type: none"> <li>a. projected capital expenditures;</li> <li>b. projected non-fuel variable costs;</li> <li>c. projected fixed costs;</li> <li>d. projected operation and maintenance costs;</li> <li>e. projected fuel costs;</li> <li>f. projected labor costs;</li> <li>g. all supporting inputs, work papers, and other documents used in developing the projected costs set forth in (a)-(f) above;</li> <li>h. a listing of each and every capital project currently planned for the Sammis plant, including (1) the scheduled timeframe for the project, (2) the predicted cost of the project, and (3) a description of the scope of work being planned;</li> <li>and i. all other information relevant to projected costs.</li> </ul>
<p><b>November 25, 2014 Sierra Club Subpoena REQUEST NO. 4</b></p>	<p>Communications with shareholders and/or financial institutions regarding the proposed 'power purchase agreement' between FES and Ohio Edison Company, Cleveland Electric Company, and Toledo Edison Company.</p>

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

**4/14/2015 5:06:32 PM**

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

Summary: Motion to Quash (Public Version) electronically filed by Mr. Scott J Casto on behalf of FirstEnergy Solutions Corp.