*REDACTED FILING*

**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 Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan** | ) ) ) ) ) ) ) | **Case No. 14-1297-EL-SSO** |

## SIERRA CLUB'S MOTION TO COMPEL DISCOVERY RESPONSES AND REQUEST FOR EXPEDITED RULING

Pursuant to O.A.C. 4901-1-23, Sierra Club respectfully moves to compel responses to its ninth and tenth set of discovery requests, which it served on the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies") on March 27 and April 6, respectively. Sierra Club served these requests pursuant to the Attorney Examiner's March 23, 2015 Entry, which amended the procedural schedule so the parties could "address whether and how the Commission's findings in the AEP Ohio Order should be considered in evaluating FirstEnergy's application in this proceeding."[1] Under the amended schedule, the parties were given an opportunity to "conduct additional discovery and to evaluate and offer supplemental testimony addressing the AEP Ohio Order, as applied in this case."[2]

FirstEnergy's responses to the Sierra Club' ninth set of discovery requests were due on April 6, 2015, and FirstEnergy's responses to Sierra Club's tenth set were due on April 16.

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[11] Mar. 23 Entry ¶ 5.

[2] *Id.*

Rather than provide substantive responses, however, FirstEnergy objected entirely to most of the requests, and provided no new substantive information in response to any of them. Although FirstEnergy subsequently supplemented a handful of responses, it has refused to withdraw its objections to the large majority of Sierra Club's requests. FirstEnergy's failure to properly respond to these requests contravenes the March 23 Entry and the rules governing discovery. Accordingly, Sierra Club respectfully moves the Attorney Examiners to compel responses to the following discovery requests:

Sierra Club Set 9: SC-INT-159, -163, -164; SC-RPD-128, -132 to -134, [redacted];

Sierra Club Set 10: SC-INT-176 to -183, -185 to -193, -195 to -210, [redacted]; SC-RPD-139 to -141, [redacted].

As explained in the accompanying affidavit and in Part I.D of the accompanying Memorandum, Sierra Club has exhausted all other reasonable means for resolving this dispute. Because Sierra Club has been unable to resolve this dispute without the need for Attorney Examiner intervention, Sierra Club has been forced to file this motion.

For the reasons set forth in the accompanying Memorandum, Sierra Club respectfully requests that the Attorney Examiners direct FirstEnergy to provide the information and documents requested in Sierra Club's ninth and tenth sets of discovery requests; and, for any documents subject to a legitimate claim of privilege, identifying such documents in a privilege log and submitting those documents for *in camera* review. In addition, pursuant to O.A.C. 4901-1-12(C), Sierra Club requests an expedited ruling on this motion.

April 27, 2015

Respectfully submitted,

/s/ Christopher J. Allwein
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**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 Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of An Electric Security Plan** | ) ) ) ) ) ) ) | **Case No. 14-1297-EL-SSO** |

## MEMORANDUM IN SUPPORT OF SIERRA CLUB'S MOTION TO COMPEL DISCOVERY RESPONSES

On February 25, 2015, the Public Utilities Commission of Ohio issued an opinion and order in Case No. 13-2385-EL-SSO, the AEP Ohio ESP proceeding (the "AEP Ohio Order").[3] That proceeding involved a proposed purchase power agreement ("PPA") rider that bears many similarities to the Retail Rate Stability Rider ("Rider RRS") proposed in this case by the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or the "Companies"). Consequently, on March 23, 2015, the Attorney Examiner amended the procedural schedule to allow the parties "to address whether and how the Commission's findings in the AEP Ohio Order should be considered in evaluating FirstEnergy's application in this proceeding."[4] The amended procedural schedule allowed for both discovery and supplemental testimony addressing the impact of the AEP Ohio Order on FirstEnergy's ESP proposal.[5]

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[3] *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order (Feb. 25, 2015).

[4] Mar. 23 Entry ¶ 5.

[5] *Id.* ¶¶ 5, 5(b)-(d).

Pursuant to the March 23 Entry, Sierra Club served two sets of supplemental discovery requests on FirstEnergy.[6] These discovery requests sought information and documents that will enable the parties – and the Commission – to evaluate the impact of the AEP Ohio Order on Rider RRS. In other words, these requests effectuate the very purpose of the March 23 Entry, which was to give the parties an opportunity to explore the implications of the AEP Ohio Order to FirstEnergy's proposal.

FirstEnergy, however, has effectively eliminated the opportunity for additional discovery provided by the March 23 Entry by refusing, with only a few very minor exceptions, to produce any new substantive information or documents in response to any of the discovery requests submitted by Sierra Club.[7] Although it asserted a panoply of objections, FirstEnergy attempted to justify its refusal to provide substantive responses on three principal grounds: 1) that Sierra Club's requests purportedly "exceed[] the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding," 2) that FirstEnergy may provide a response through supplemental testimony, and 3) that the information requested is "protected by the attorney-client privilege and/or attorney work product doctrine."

These objections are without merit. First, Sierra Club's discovery requests are well within the scope of discovery contemplated by the March 23 Entry. Second, FirstEnergy's "supplemental response" objection is inconsistent with the 10-day discovery response established

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[6] *See* Attachment 1 (excerpts from Sierra Club's ninth set of discovery); Attachment 5 (excerpts from Sierra Club's tenth set).

[7] *See* Attachment 2 (partial responses to ninth set); Attachment 6 (partial responses to tenth set). Following Sierra Club's conferral efforts, FirstEnergy supplemented its responses to three Sierra Club requests to clarify that it had not analyzed the reliability issues inquired about in SC-INT-157, [redacted]. FirstEnergy has also agreed to supplement its responses to SC-INT-173 and 174, which sought updates on the scope of work and compensation for FirstEnergy's two outside witnesses, Judah Rose and Sarah Murley, after the deadline for supplemental testimony.

by the March 23 Entry. Third, FirstEnergy should not be allowed to use sweeping claims of privilege to shield relevant, factual information from discovery.

Because FirstEnergy's objections are without merit, and because FirstEnergy's intransigence has effectively thwarted the entire purpose of the supplemental discovery period established by the March 23 Entry,[8] FirstEnergy should be directed to expeditiously provide complete, substantive responses to the following discovery requests:

- Sierra Club Set 9: SC-INT-159, -163, -164; SC-RPD-128, -132 to -134, [redacted];
- Sierra Club Set 10: SC-INT-176 to -183, -185 to -193, -195 to -210, [redacted]; SC-RPD-139 to -141, [redacted].[9]

And, to the extent that FirstEnergy claims that any of the requested information and documents are privileged, FirstEnergy should be required to identify those items in a privilege log, and to provide them to the Attorney Examiners for an *in camera* review.

## I. Background

### A. Rider RRS

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

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[8] Mar. 23 Entry ¶ 5, 5(b).

[9] While FirstEnergy has failed to properly respond to several other requests included in Sierra Club's ninth and tenth sets of discovery, Sierra Club has focused this motion to compel on only a subset of requests for which Sierra Club's need for the information sought is the most time sensitive. Sierra Club's decision not to include other requests from the ninth and tenth sets of discovery in this motion does not mean that those requests have been withdrawn, and Sierra Club reserves the right to move to compel responses to those requests at a future date.

If Rider RRS is approved, the Companies would enter into a 15-year purchase power agreement ("PPA") with FirstEnergy Solutions Corp. ("FES"). Under this proposed PPA, the Companies would commit to paying all of FES's costs for these facilities, purchasing all of FES's output from these facilities, and selling all of that output into the market. The Companies would then pass any costs or savings on to their ratepayers for the term of the contract. The rates paid by the Companies' customers over the next 15 years would therefore be directly linked to the financial performance of these four power plants. In other words, if Rider RRS is approved, this proposed transaction would provide FES with guaranteed revenue, including a profit, for the plants while shifting all of the financial risk regarding those plants to the Companies' customers.

Although there is considerable uncertainty regarding the financial impact of this proposal,[10] the Companies' own projections estimate that customers would incur a net loss of $404 million in 2016-18 if Rider RRS were approved.[11] Meanwhile, under the terms of the proposed transaction, FES would be guaranteed an 11.15% return on equity for its Sammis and Davis-Besse plants, and full recovery of costs for its ownership share of the Clifty Creek and Kyger Creek plants.[12]

### B. The AEP Ohio Order

On February 25, 2015, the Commission issued its opinion and order on AEP Ohio's proposed electric security plan.[13] In the AEP Ohio Order, the Commission ruled on a PPA rider proposal that bears similarities to Rider RRS. Under both schemes, the utility proposed a nonbypassable rider that would require the utility's customers to bear the risks of ownership of

[10] *See, e.g.*, Direct Testimony of Tyler Comings (Dec. 22, 2014), at 8-11, 26-35, 52.

[11] *See* Direct Testimony of Jay A. Ruberto, Attachment JAR-1 Revised, Nov. 14, 2014 (projecting a net present cost to ratepayers of $155 million in 2016, $167 million in 2017, and $82 million in 2018).

[12] Ruberto Testimony at 3:3-11, Attachment JAR-1 Revised.

[13] *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order (Feb. 25, 2015).

generating facilities owned by either the utility (as in the AEP Ohio case), or the utility's deregulated corporate affiliate (as in this case). In particular, customers would be required to pay the capital, fixed, and variable costs of the generating assets, but would not receive energy from those facilities. Instead, the energy would be sold into the PJM market, and customers would receive either a credit (if revenues from sales exceed costs) or a charge (if costs exceed revenues). Although there are significant differences between AEP Ohio's proposal and FirstEnergy's proposed Rider RRS,[14] the fact remains that these proposals share many similarities.

In its Order, the Commission ruled that PPA riders are permissible under Ohio law,[15] but rejected AEP Ohio's specific proposal. In its decision, the Commission noted that "[a]lthough the magnitude of the impact of the proposed PPA rider cannot be known to any degree of certainty, the Commission agrees . . . that the evidence of record reflects that the rider may result in a net cost to customers, with little offsetting benefit from the rider's intended purpose as a hedge against market volatility."[16] The Commission also stressed the uncertainties associated with this proposal, stating:

> [W]e are not persuaded that the PPA rider proposal put forth by AEP Ohio in the present proceedings would, in fact, promote rate stability, as the Company claims, or that it is in the public interest. There is considerable uncertainty with respect to pending PJM market reform proposals, environmental regulations, and federal

[14] Among other things, the scale of FirstEnergy's proposal is much greater than AEP Ohio's. Whereas AEP Ohio's proposal only involved the company's 19.93% share of Clifty Creek and Kyger Creek plants (the "OVEC plants"), *see* AEP Ohio Order at 9, FirstEnergy's proposal included not only its OVEC share, but also FES's entire ownership of the Sammis and the Davis-Besse plants. There are also differences in terms of the financial impacts of these proposals. For example, whereas AEP Ohio estimated that its proposal would cost ratepayers, at most, $52 million during the term of the ESP, FirstEnergy has projected that its customers would incur a net loss of $404 million in 2016-18 if Rider RRS is approved. *Compare* AEP Ohio Order at 16 *with* Ruberto Testimony, Att. JAR-1 Revised.

[15] Sierra Club does not concede that PPA riders are permissible under Ohio law, or that the AEP Ohio Order identifies the appropriate criteria for evaluating FirstEnergy's proposed ESP and Rider RRS.

[16] AEP Ohio Order at 24.

> litigation, as AEP Ohio acknowledges, and, in light of this uncertainty, the Commission does not believe that it is appropriate to adopt the proposed PPA rider at this time.[17]

The Commission created a placeholder PPA rider (with an initial value of zero), and identified several factors that it stated it would balance, but not be bound by, in considering future PPA rider proposals: "financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state."[18] The Commission also identified several issues that a rider proposal must address, namely, that they "provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit; commit to full information sharing with the Commission and its Staff; and include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers."[19] The AEP Ohio Order thus indicates that the Commission plans to consider a broad range of information in evaluating future PPA rider proposals. And the Commission's focus on the financial picture, including both the financial need of the generating plants and potential costs to customers, underscores the relevance – and importance – of financial information in assessing a PPA rider proposal.

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[17] *Id.*

[18] *Id.* at 25.

[19] *Id.* Such proposals must also include a severability provision, and the Commission "reserves the right to require a study by an independent third party, selected by the Commission, of reliability and pricing issues as they relate to the application." *Id.* at 25-26.

### C. The March 23 Entry

On March 23, 2015, the Attorney Examiner amended the procedural schedule "[i]n order for the parties to address whether and how the Commission's findings in the AEP Ohio Order should be considered in evaluating FirstEnergy's application in this proceeding."[20] The Entry provided the parties with an opportunity to "conduct additional discovery and to evaluate and offer supplemental testimony addressing the AEP Ohio Order, as applied in this case."[21]

In reopening discovery "regarding the AEP Ohio Order factors,"[22] the March 23 Entry indicated that the permissible scope of discovery is broad. The March 23 Entry specifically references the Commission's ruling on the PPA rider proposal, and it cites to the Commission's Order, including the "factors it may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," and the additional issues that such proposals must address.[23] The March 23 Entry thus authorizes discovery requests related to the Commission's resolution of the PPA rider proposal, including requests that seek information pertaining to the factors and additional issues identified by the Commission.

Under the March 23 Entry, responses to discovery requests must generally be served within 10 days.[24] By establishing a 10-day discovery response time, the March 23 Entry ensured that any discovery requests served by the April 13, 2015 cut-off would be responded to well before the May 4 deadline for supplemental testimony.

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[20] *See* Mar. 23 Entry ¶¶ 4-5 (citing AEP Ohio Order).

[21] Mar. 23 Entry ¶ 5.

[22] *Id.* ¶ 5(b).

[23] *Id.* ¶ 4 (citing AEP Ohio Order at 25-26).

[24] Mar. 23 Entry ¶ 6. The Entry includes specific directions in case "a party has difficulty responding to a particular request within the 10-day period." In that circumstance, "counsel for the parties should discuss the problem and work out a mutually satisfactory solution." *Id.*

### D. Sierra Club's Discovery Requests

On March 27 and April 6, 2015, respectively, Sierra Club served its ninth and tenth sets of discovery requests on FirstEnergy.[25] Pursuant to the March 23 Entry, these requests sought information and documents on several topics regarding the AEP Ohio Order's application to this case. More specifically, Sierra Club's requests sought information and documents regarding:

- The current and projected financial status of the Rider RRS generating plants;
- Future market prices and other assumptions that affect the generating plants' profitability;
- The generating plants' environmental and operating performance; and
- The possibility and potential effects of a plant or unit retirement.

FirstEnergy served its responses on April 6 and April 16.[26] FirstEnergy objected entirely to the vast majority of Sierra Club's requests, and it provided no new substantive information or documents in response to any of them. In response to nearly every one of Sierra Club's discovery requests, FirstEnergy asserted at least one of two objections: 1) that the request purportedly "exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding"; or 2) that "the Companies would provide any response to this request through supplemental testimony." FirstEnergy often coupled the latter objection with a sweeping claim that the discovery request "seeks information protected by the attorney-client privilege and/or attorney work product doctrine."

Immediately after receiving FirstEnergy's responses to its ninth set, Sierra Club began working to resolve this discovery dispute. On April 8, 2015, Sierra Club's counsel sent a detailed letter to FirstEnergy's counsel explaining why FirstEnergy's objections were

[25] *See* Att. 1, 5.

[26] *See* Att. 2, 6.

misplaced.[27] In its letter, Sierra Club walked through each of its requests, explaining (i) why the requests were authorized by the March 23 Entry, (ii) why FirstEnergy could not delay responding to such requests, and (iii) why FirstEnergy's remaining objections were misplaced. Sierra Club notified FirstEnergy that it would move forward with a motion to compel if the deficiencies in FirstEnergy's discovery responses were not corrected. FirstEnergy's counsel responded on April 14, 2015.[28] In its response, FirstEnergy stood by its objections, refusing to provide the information requested in Sierra Club's ninth set of discovery. Meanwhile, FirstEnergy served its responses to Sierra Club's tenth set on April 16, refusing again to provide any new substantive information or documents.

On April 20, 2015, Sierra Club's counsel sent another lengthy letter to FirstEnergy, detailing why FirstEnergy's objections to the tenth set were misplaced, and providing further explanation for why FirstEnergy must provide substantive responses to the ninth set.[29] On April 22, 2015, FirstEnergy responded to Sierra Club's letter, again refusing to withdraw its objections to the vast majority of Sierra Club's requests.[30]

Through the conferral process, Sierra Club managed to obtain acceptable responses to five of its interrogatories: SC-INT-157, [redacted], 173, 174, and 184. FirstEnergy, however, has refused to withdraw its objections to the large majority of Sierra Club's requests and has refused to provide any new substantive information or documents in response to any of those requests. As such, Sierra Club's efforts to avoid the need for a motion to compel were unavailing.

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[27] *See* Attachment 3.

[28] *See* Attachment 4.

[29] *See* Attachment 7.

[30] *See* Attachment 8.

Accordingly, pursuant to O.A.C. 4901-1-23(C), Sierra Club has exhausted all reasonable means of resolving this dispute without the need for Attorney Examiner intervention.[31]

## II. Legal Standard

Ohio law provides that "all parties and intervenors shall be granted ample rights of discovery."[32] This broad standard is reflected in the Commission's rules, which state that "any party to a commission proceeding may obtain discovery of any matter, not privileged, which is relevant to the subject matter of the proceeding. It is not a ground for objection that the information sought would be inadmissible at the hearing, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[33] Under both Commission precedent and the Ohio civil rules, a party that asserts a privilege objection carries the burden of demonstrating that the privilege applies.[34]

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[31] *See also* Attachment 9 (affidavit of counsel).

[32] R.C. § 4903.082.

[33] O.A.C. 4901-1-16(B); *see also OCC v. PUCO*, 856 N.E.2d 213, 234, 2006-Ohio-5789 ¶ 83 (2006) ("The text of Ohio Adm. Code 4901–1–16(B), the commission's discovery rule, is similar to Civ.R. 26(B)(1), which governs the scope of discovery in civil cases. Civ.R. 26(B) has been liberally construed to allow for broad discovery to any unprivileged matter relevant to the subject matter of the pending proceeding.").

[34] *In the Matter of the Application of GTE North Incorporated for Authority to Adjust Its Rates and Charges and to Change Its Tariff*, Case No. 87-1307-TP-AIR, 1988 WL 1620808 at *1, Entry ¶ 9 (May 24, 1988) ("The burden of proving an entitlement to an attorney-client privilege must be met by the person asserting the privilege."); *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a New Rider and Revision of an Existing Rider*, 2011 WL 333217, Case No. No. 10-176-EL-ATA, Entry ¶ 21 (Jan. 27, 2011) (rejecting privilege claims where parties "failed to show how the attorney-client and/or work product privilege applies to any particular document"); *see also MA Equip. Leasing I, L.L.C. v. Tilton*, 980 N.E.2d 1072, 1080, 2012-Ohio-4668, ¶ 21 (Ohio App. 10th Dist.) ("[T]he burden of showing that evidence ought to be excluded under the attorney-client privilege rests upon the party asserting the privilege."); *Insulation Unlimited, Inc. v. Two J's Properties, Ltd.*, 95 Ohio Misc.2d 18, 22, 705 N.E.2d 754, 756 (Ohio Com. Pl. 1997) ("The burden is on the objecting party to clearly show that the information sought is privileged or not relevant.").

Under O.A.C. 4901-1-23(A), a party may move for an order compelling discovery where, *inter alia*, a party fails to answer an interrogatory, fails to produce a requested document, or otherwise fails to answer or respond to a discovery request. Under this rule, "an evasive or incomplete answer shall be treated as a failure to answer." O.A.C. 4901-1-23(B).

The Commission's discovery rules provide that a party must supplement its discovery responses if "[r]equests for the supplementation of responses are submitted prior to the commencement of the hearing." O.A.C. 4901-1-16(D)(5). Where such requests have been submitted, the recipient must supplement its discovery responses "with subsequently acquired information." O.A.C. 4901-1-16(D).

## III. Argument

In the AEP Ohio Order, the Commission identified a number of factors relevant to the evaluation of PPA riders. The March 23 Entry provided the parties the opportunity to carry out discovery regarding how those factors impact FirstEnergy's PPA rider application in this proceeding. Pursuant to the March 23 Entry, Sierra Club served two sets of discovery seeking information related to the AEP Ohio Order factors and the supplementation of FirstEnergy's responses to prior requests relevant to those factors. Contrary to the clear intent of the March 23 Entry and the rules of discovery, FirstEnergy has refused, with only a few very minor exceptions, to provide any new substantive information or documents in response to Sierra Club's discovery requests and, instead, has offered blanket and improper objections to these requests. Because the information sought in Sierra Club's ninth and tenth sets of discovery is well within the scope of discovery authorized by the March 23 Entry, and because the requests are otherwise proper, FirstEnergy should be compelled to promptly provide complete responses to SC Set 9-159, -163,

-164; SC-RPD-128, -132 to -134, [redacted]; SC Set 10-INT-176 to -183, -185 to -193, -195 to -210, [redacted]; SC-RPD-139 to -141, [redacted].

FirstEnergy offers three main justifications for refusing to respond to these requests, none of which have merit: First, FirstEnergy claims that many of these requests purportedly "exceed[] the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding." But as explained further below, all of Sierra Club's discovery requests relate to the AEP Ohio Order's resolution of the PPA rider proposal, including the factors and additional issues discussed on pp. 25-26 of the Order.[35] Second, FirstEnergy claims that the requested information may be provided in supplemental testimony. But this objection is inconsistent with the 10-day discovery response time established by the March 23 Entry, and it defeats a central purpose of that Entry, which was to allow the parties to conduct discovery relating to the AEP Ohio Order in order to inform their own supplemental testimony due on May 4.[36] Third, FirstEnergy repeatedly – and erroneously – claims that many of Sierra Club's requests seek "information protected by the attorney-client privilege and/or attorney work product doctrine," based on the mistaken assertion that Sierra Club was attempting to solicit FirstEnergy's supplemental testimony in advance of May 4. In reality, Sierra Club's requests seek factual information that cannot be shielded from discovery through claims of privilege.

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[35] Mar. 23 Entry ¶¶ 4, 5, 5(b).

[36] By delaying a response until it files supplemental testimony (most likely on May 4), FirstEnergy has also hindered Sierra Club's and other parties' ability to use the information obtained through discovery to inform their own supplemental testimony. This is particularly problematic given FirstEnergy's opposition to several parties' requests to stagger the deadlines for supplemental testimony. *See* Companies' Memorandum Contra Joint Applicants' Request for Certification of an Interlocutory Appeal, at 16-18 (Apr. 6, 2015).

The relevance and importance of Sierra Club's requests, and the lack of merit to FirstEnergy's objections, are addressed further below.

### A. Financial Information About the Generating Plants

In its ninth and tenth sets, Sierra Club served several discovery requests that seek information and documents associated with the costs and revenues of the generating plants that are the subject of Rider RRS.[37] These requests seek costs and revenues, as well as the underlying operational characteristics, of the generating units that FirstEnergy's ratepayers would be responsible for if Rider RRS is approved. Some of the requests seek historical financial information, while others seek projected future costs and revenues. Several of the requests are not new, but instead ask FirstEnergy to supplement its original responses to earlier discovery requests that sought such financial information.[38] FirstEnergy objected entirely to many of these requests, and failed to provide any new substantive information or documents in response to any of them. FirstEnergy's objections are without merit.

*First*, the Attorney Examiners should reject FirstEnergy's claim that many of these requests "exceed[] the scope" of discovery permitted by the March 23 Entry. These requests directly relate to "the financial need of the generating plant[s]," because they seek up-to-date factual information regarding the current and projected future costs of the generating units that would be included in Rider RRS. These discovery requests are also permitted under the March 23 Entry because they seek information that will provide insight into whether the plants are at risk of closure, an issue that bears directly on the retirement-related impacts listed in the AEP

[37] *See* SC Set 9-INT-163, 164; SC Set 9-RPD-128, 132, 133; SC Set 10-INT-176 to -183.

[38] *See* SC Set 10-INT-176, 178, 179, 180, 181.

Ohio Order.[39] And the historical and future pollutant information sought in SC-INT-176 to -178 plainly relate to whether the plants are "compliant with all pertinent environmental regulations and have "plan[s] for compliance with pending environmental regulations."[40] Accordingly, each of these requests falls squarely within the scope of discovery authorized by the March 23 Entry, and FirstEnergy's objections are without merit. Because these requests seek information and documents about factors that the Commission has found that it "may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," they fall within the scope of discovery permitted by the March 23 Entry.[41]

*Second*, FirstEnergy further objected to many of these requests by stating that it "would provide any response to this request through supplemental testimony."[42] This objection is also without merit, for at least two reasons. First, the March 23 Entry makes clear that responses to discovery requests generally must be served within 10 days.[43] FirstEnergy's responses to these discovery requests were due on April 6 and April 16, while the deadline for supplemental testimony is not until May 4. By claiming that it can delay a response until it files supplemental testimony, FirstEnergy has unilaterally granted itself a lengthy extension in responding to Sierra Club's discovery requests, thereby depriving the parties of the ability to address any responsive information or documents about the AEP Ohio Order factors in their own supplemental

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[39] Mar. 23 Entry ¶ 4 (citing AEP Ohio Order at 25) (noting "the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state").

[40] *Id.*

[41] Mar. 23 Entry ¶ 4, 5(b).

[42] Some responses state that FirstEnergy would provide "any response" through supplemental testimony, and others state that FirstEnergy would provide "any further response" through such testimony. Despite the different phrasing, these objections are all substantively identical and equally flawed.

[43] Mar. 23 Entry ¶ 6. The March 23 Entry includes specific directions in case "a party has difficulty responding to a particular discovery request within the 10-day period." Mar. 23 Entry ¶ 6. In that circumstance, "counsel for the parties should discuss the problem and work out a mutually satisfactory solution." *Id.*

testimony. This is inconsistent with the 10-day response time established by the March 23 Entry, and it undermines the very purpose of the supplemental discovery period.[44] Second, FirstEnergy has not actually committed to providing substantive responses at all, apparently believing that its supplemental testimony can substitute for actual discovery responses. FirstEnergy is mistaken. Even if its supplemental testimony happens to address an issue that was the subject of a discovery request, that does not discharge FirstEnergy's duty to respond to that request. Instead, FirstEnergy must provide complete substantive responses to the specific questions posed in Sierra Club's interrogatories, and documents responsive to Sierra Club's specific requests for production.[45] By flouting the 10-day response time, and taking the position that financial information about the generating plants is off-limits to discovery, FirstEnergy's actions contravene the procedural schedule set forth in the March 23 Entry.[46] FirstEnergy should be compelled to provide complete, substantive responses to these discovery requests.

*Third*, FirstEnergy makes the related argument that information sought in these discovery requests can be withheld under a claim of privilege. Here again, FirstEnergy's objection is misplaced. Although a party may withhold communications and documents that are legitimately

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[44] Mar. 23 Entry ¶¶ 5, 5(b), 6.

[45] Accordingly, FirstEnergy is simply wrong in claiming that Sierra Club is "attempting to obtain supplemental testimony through discovery." Apr. 22 Letter at 3; *see also* Apr. 14 Letter at 2. Sierra Club's discovery requests seek factual information and documents that are crucial to key issues in this case, and regardless of whether FirstEnergy files supplemental testimony on May 4, Sierra Club is still entitled to responses to these requests.

[46] In letters to Sierra Club, FirstEnergy's counsel repeatedly attempts to analogize its inadequate responses to Sierra Club's responses to two interrogatories that FirstEnergy served earlier in this case regarding expert witnesses. Apr. 14 Letter at 3; Apr. 22 Letter at 3-4. FirstEnergy's analogy is misplaced. In contrast to Sierra Club's discovery requests, which seek factual information and documents, FirstEnergy's interrogatories 1-1 and 1-2 were inquiring about the identity of witnesses that had not testified, and about the subjects of those witnesses' testimony. The fact that Sierra Club did not prematurely disclose such obviously privileged information does not excuse FirstEnergy's obligation to provide the *factual* information sought in Sierra Club's ninth and tenth sets. This includes the financial information sought in the specific requests discussed above.

protected by the attorney-client privilege or attorney work product doctrine, those privileges cannot be used to shield relevant, non-privileged, factual information from discovery. And that is precisely what FirstEnergy has done here.

Neither of these privileges applies to the financial information sought in Sierra Club's discovery requests. The attorney-client privilege does not apply because that "privilege does not prevent disclosure of the underlying fact, it only protects against compelled disclosure of the communications."[47] The work product doctrine also does not apply to Sierra Club's requests for *factual* financial information. "Work product, at its core, protects the mental thoughts and processes of the attorney," and the doctrine applies to "materials prepared in anticipation of trial," such as "notes, documents, or memoranda prepared by the attorney or his representatives in preparation of litigation."[48] The doctrine does not apply to the underlying factual information, such as the information being sought in Sierra Club's ninth and tenth sets of discovery.[49] And the doctrine cannot be used to avoid disclosing whether FirstEnergy has performed certain evaluations or taken other steps related to issues in this proceeding.[50]

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[47] *Ingram v. Adena Health Sys.*, 149 Ohio App.3d 447, 2002-Ohio-4878, ¶ 14 (4th Dist. 2002).

[48] *State v. Hoop*, 731 N.E.2d 1177, 1186 (Ohio App. 12th Dist. 1999).

[49] The fact that FirstEnergy's counsel may have viewed such information does not transform it into attorney work product. *See DeCuzzi v. Westlake*, 191 Ohio App.3d 816, 2010-Ohio-6169, ¶ 15 (8th Dist. 2010) (rejecting an overbroad reading of the work-product doctrine that would allow "opposing counsel [to] thwart every discovery request by merely reviewing evidence and turning previously discoverable evidence into privileged material").

[50] *See In the Matter of the 1990 Long-Term Forecast Report of Ohio Power Co. and Columbus Southern Power Co.*, Case Nos. 90-660-EL-FOR, 90-659-EL-FOR, 1990 WL 10654842, Entry at *3-*5 (Nov. 20, 1990) (rejecting utilities' claim that work product doctrine shielded them from answering questions about their strategy for complying with prospective environmental legislation); *In re East Ohio Gas Co.*, Case No. 05-219-GA-GCR, 2006 WL 2128827, Entry ¶ 17 (July 28, 2006) (compelling responses to discovery requests seeking information regarding actions taken by company employees to investigate and address events alleged in lawsuit, and contrasting such information from "conversations between Dominion and its legal counsel as to legal advise [sic] given and associated notes, correspondence, and email created in anticipation of litigation or for trial" that were found to be privileged).

The lack of merit to FirstEnergy's work product claims is demonstrated by considering the information being sought here. If FirstEnergy has updated data about the projected costs and revenues of the Sammis and Davis-Besse plants, FirstEnergy could produce that data without revealing how it might use that information in testimony, thereby protecting "the mental thoughts and processes of the attorney."[51] Likewise, to the extent FirstEnergy possesses updated historical or current data regarding the generating plants' costs and revenues, capacity factor, emission rates, and forced outages, the production of such factual information would not even remotely threaten to reveal attorney mental impressions. FirstEnergy's work product claims are without merit.[52]

In attempting to justify its refusal to provide the factual information sought in these discovery requests, FirstEnergy cites the Attorney Examiner's denial of a motion to compel in Case No. 12-426-EL-SSO, an ESP proceeding for The Dayton Power and Light Company ("DP&L").[53] FirstEnergy's reliance on that ruling is misplaced. In that proceeding, DP&L had performed a preliminary cost reduction analysis at its counsel's direction. Because DP&L had already produced other information through discovery, producing that analysis threatened to

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[51] *Hoop*, 731 N.E.2d at 1186.

[52] Even if any of the information sought in these discovery requests could be construed as "unprivileged fact" attorney work product – which it is not -- the information should still be produced here. Under Civ. R. 26(B)(3), such information can be provided if there is good cause, which is where the requesting party has a substantial need, such as where "the information is important in the preparation of the party's case, and . . . there is an inability or difficulty in obtaining the information without undue hardship." *Hoop*, 731 N.E.2d at 1187 (citations omitted). Those standards are satisfied here, where the financial information requested is relevant to key issues in this case and to a factor highlighted by the Commission in the AEP Ohio Order, and where FirstEnergy is the only party in this proceeding with access to the information requested in these discovery requests. The need for disclosure of such information would also outweigh any benefit of shielding it from discovery.

[53] Apr. 22 Letter at 4 (citing January 30, 2013 hearing transcript, filed on Feb. 13, 2013, at pp. 141-44).

reveal legal advice regarding the likely outcome of the litigation.[54] And the Attorney Examiner denied the motion to compel where it was "clear that the documents were prepared in anticipation of litigation and at the direction of their counsel," and there was "no way to extract out what's clearly their attorney's advice from these documents."[55]

The concerns stated in the DP&L ruling are simply not present here. Sierra Club's discovery requests do not seek analyses prepared at the direction of counsel, such as exhibits and workpapers underlying whatever supplemental testimony FirstEnergy intends to file on May 4. Instead, Sierra Club is seeking current and projected financial information related to the generating plants that is within FirstEnergy's possession, custody, or control. The discovery requests seeking past or current financial information, i.e., factual information about something that has already occurred, pose no risk of disclosing an attorney's legal advice. And the same holds true for projections of future costs and revenues: the only circumstance in which that information could be privileged is if it were generated specifically for purposes of this litigation. This means that any such information that FirstEnergy has generated, prepared for, reviewed, sent or received, in the ordinary course of business, or for any other purpose not tied specifically to its legal advocacy in this ESP proceeding, should be produced.

Finally, it is worth noting that in the DP&L case, the utility produced a privilege log and submitted the requested information for the Attorney Examiners' *in camera* review. Here, by contrast, FirstEnergy has made no suggestion that it will produce a privilege log or provide the requested information *in camera*. Even if it believes that some of the information requested is privileged, that does not excuse FirstEnergy from: (i) performing a thorough search for

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[54] Case No. 12-426-EL-SSO, et al., The Dayton Power and Light Company's Memorandum in Opposition to IEU's Motion to Compel Discovery Responses, at 5-6 (Jan. 11, 2013).

[55] Jan. 30 Tr. at 143:19-21, 144:3-5.

responsive documents and information, (ii) producing all non-privileged information and documents responsive to these requests, and (iii) preparing a thorough privilege log and submitting the underlying documents and information to the Attorney Examiners for *in camera* review. [56]

Apart from the issues discussed above, FirstEnergy should be directed to respond to several of these requests because they seek supplementation of prior discovery responses pursuant to O.A.C. 4901-1-16(D)(5).[57] Contrary to FirstEnergy's claim that these requests "exceed[] the scope" of discovery, O.A.C. 4901-1-16(D)(5) plainly requires a party to supplement its responses if "[r]equests for the supplementation of responses are submitted prior to the commencement of the hearing." Here, where Sierra Club has submitted these requests for supplementation well before the start of the evidentiary hearing, these supplementation requests are proper. FirstEnergy must provide timely, complete responses to these requests, and supplement its responses to the prior discovery requests "with subsequently acquired information."[58]

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[56] *See* Case No. 10-176-EL-ATA, Entry ¶ 18 (Jan. 27, 2011) (noting that "an *in camera* review of all documents claimed as privileged by appellants should be performed to determine if a privilege claim is valid"); *In the Matter of the Application of Columbus Southern Power Company and Ohio Power Company for Approval of an Electric Security Plan*, Case Nos. 08-917-EL-SSO, 08-918-EL-SSO, Entry ¶ 8 (June 30, 2011) (to the extent communications are privileged, the utility should provide a privilege log). In addition, if the *in camera* review occurs after the deadline for supplemental testimony, and the Attorney Examiners conclude that a document was protected by the work product doctrine at the time of the discovery request, Sierra Club respectfully requests that the Attorney Examiners consider whether the privilege was mooted by FirstEnergy's filing of supplemental testimony.

[57] *See* SC Set 10-INT-176, 178-181.

[58] O.A.C. 4901-1-16(D). FirstEnergy nevertheless maintains that these requests for supplementation are beyond the scope, suggesting that the Attorney Examiner superseded this rule pursuant to either OAC 4901-1-24(A) or OAC 4901-1-26(A)(l)(b). Apr. 22 Letter at 5. This argument lacks merit. For one thing, the Attorney Examiner did not issue a protective order precluding supplementation requests, so OAC 4901-1-24(A) does not apply. For another, nothing in the March 23 Entry suggests that the Attorney Examiner intended to supersede the regular discovery rules set forth in the Ohio Administrative Code. In the absence of an express statement that the supplementation rule has been suspended,

### B. Updated Market Prices and Related Assumptions

In its tenth set of discovery, Sierra Club served several requests that sought updated information regarding projected future market prices.[59] In addition to a request for such information from FirstEnergy generally, SC-RPD-141, these requests are focused on the price projections and related assumptions used by FirstEnergy witness Judah Rose. In his testimony and work papers, Mr. Rose provided projected future energy prices, capacity prices, natural gas prices, and carbon prices that FirstEnergy witness Jason Lisowski used in developing the cost and revenue forecasts attached to his direct testimony (Attachments JJL-1 to -3).[60] Mr. Lisowski's forecasts, in turn, are the basis for the Companies' claim that Rider RRS will provide customers with a $770 million net present value benefit over a 15-year period.

To the extent that Mr. Rose has developed, reviewed, or relied upon more recent projections or assumptions, that information would directly impact Mr. Lisowski's cost and revenue forecast. In other words, the price information sought in these requests bears directly on the future profitability of the Rider RRS generating plants. FirstEnergy nevertheless objected to these discovery requests on grounds that they "exceed[] the scope" of discovery. FirstEnergy's objections are misplaced, because the pricing-related information sought in these requests

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FirstEnergy is obligated to provide supplemental responses to O.A.C. 4901-1-16(D). In any event, as explained above, these requests are otherwise proper because they fall squarely within the scope of discovery permitted by the March 23 Entry. FirstEnergy is therefore incorrect in claiming that these supplementation requests "all go beyond [the AEP Ohio Order] factors." Apr. 22 Letter at 5.

[59] SC Set 10-INT-190 to -193, -195 to -209, [redacted]; SC Set 10-RPD-141, [redacted].

[60] Mr. Rose also provided an extensive set of assumptions underlying the market price projections.

directly affects "the financial need of the generating plant[s]."[61] These requests also seek information that will shed light on whether the plants are actually at risk of closure, which bears on the retirement-related impacts that are also listed in the Order.[62] Because these requests seek information about factors that the Commission has found that it "may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," they fall within the scope of discovery permitted by the March 23 Entry.[63]

FirstEnergy also objected to many of these requests based on privilege,[64] but those objections are without merit. These discovery requests seek factual information, namely, price projections and other assumptions that would affect the profitability of the plants. Such information is not protected by the either the attorney-client privilege or the work product doctrine.[65] If Mr. Rose had developed a price forecast specifically for FirstEnergy's supplemental testimony, the forecast may be privileged until the supplemental testimony is filed. But to the extent that Mr. Rose developed, reviewed, or relied upon price projections in other contexts – [redacted] – that information cannot be shielded from discovery through FirstEnergy's overbroad and unsupported privilege claims.[66]

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[61] Mar. 23 Entry ¶ 4 (citing AEP Ohio Order at 25).

[62] *Id.*

[63] Mar. 23 Entry ¶ 4, 5, 5(b).

[64] *See* FirstEnergy's Resps. to SC Set 10-INT-195 to -209.

[65] *Ingram*, 2002-Ohio-4878, ¶ 14 (attorney-client "privilege does not prevent disclosure of the underlying fact"); *Hoop*, 731 N.E.2d at 1186 (work product doctrine applies to "materials prepared in anticipation of trial").

[66] FirstEnergy also objected to SC-INT-196 to -209 as "vague and ambiguous." FirstEnergy does not elaborate on the basis of this objection, which regardless is without merit. Sierra Club's requests refer to specific portions of Mr. Rose's workpapers, and ask specific questions about those portions of the workpapers. There is nothing vague and ambiguous about such requests, and regardless cannot justify FirstEnergy's refusal to provide any substantive information in response to these requests.

### C. Environmental and Operating Performance of the Generating Plants

In both its ninth and tenth sets, Sierra Club served several requests that seek documents and information specifically relating to the environmental performance, physical condition, and operating performance of the Rider RRS generating plants.[67] FirstEnergy objected to these requests as "exceed[ing] the scope" the discovery. FirstEnergy's objections are misplaced.

SC-RPD-134 seeks information that relates to the condition and performance of the generating plants, which bears on the financial need of the plants, their ability to provide reliability and supply diversity to the grid, and their potential risk for retirement and the resulting impacts of a closure.[68] In addition, by seeking information about the plants' physical condition and operating performance, this request will shed light on whether these plants are "compliant with all pertinent environmental regulations" for coal and nuclear generating plants, and whether there is a need for capital improvements or other upgrades to ensure "compliance with pending environmental regulations."[69] Because this request is directly related to the AEP Ohio Order factors, and is authorized by the March 23 Entry, the Attorney Examiners should compel substantive responses to this request.[70]

Similarly, [redacted] fall well within the scope of discovery authorized by the March 23 Entry. In particular, those requests [redacted]

[67] SC Set 9-RPD-134, [redacted]

[68] *See* Mar. 23 Entry ¶ 4 (citing AEP Ohio Order at 25).

[69] Mar. 23 Entry ¶ 4 (citing AEP Ohio Order at 25).

[70] [redacted]

[redacted] These requests are also permissible because they are properly-submitted supplementation requests pursuant to O.A.C. 4901-1-16(D)(5). FirstEnergy therefore must supplement its responses to the earlier referenced discovery requests "with subsequently acquired information."[72]

FirstEnergy also objected to [redacted] on privilege grounds, and refused to provide responsive information except through supplemental testimony. Here again, FirstEnergy's objection are without merit. This request for supplementation seeks factual information [redacted] that cannot be shielded from discovery through overbroad privilege claims, and there is no legitimate basis for withholding this information until the deadline for supplemental testimony. Withholding this information is inconsistent with the March 23 Entry's 10-day response time, and it undermines the very purpose of the supplemental discovery period.[73] FirstEnergy must provide a timely, complete response to this request.

**D. Supply Diversity, Grid Reliability, and Impacts of Plant Retirement**

In its ninth and tenth set, Sierra Club served several discovery requests that sought information about supply diversity, grid reliability, and potential reliability impacts and transmission upgrades stemming from the retirement of generating plants or units.[74] These requests are well within the scope of discovery authorized by the March 23 Entry, and FirstEnergy's objections to these requests are without merit.

SC-INT-159 seeks information about transmission upgrades that FirstEnergy previously contended would be needed to allow for the retirement of either or both of the Sammis and

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[71] [redacted]

[72] O.A.C. 4901-1-16(D).

[73] Mar. 23 Entry ¶¶ 5, 5(b), 6.

[74] SC Set 9-INT-159; SC Set 10-INT-185 to -189.

Davis-Besse plants. FirstEnergy objected to subpart (b)-(d) on the ground that it exceeded the scope of discovery. Here again, FirstEnergy misses the mark, because these questions directly relate to several factors listed in the AEP Ohio Order, including the necessity of these generating units, in light of future reliability concerns, and retirement-related impacts.[75] FirstEnergy also objected to subpart (a), claiming that it "would provide any response to this request through supplemental testimony." This objection is also without merit. This request asks about whether the Companies "have" performed a calculation, as well as some follow-up questions. Because this interrogatory inquires about whether something has – or has not – happened, there is no basis for withholding an answer until FirstEnergy's supplemental testimony. FirstEnergy's response is inconsistent with the March 23 Entry's 10-day response time, and it undermines the very purpose of the supplemental discovery period.[76]

In SC-INT-185 to -188, Sierra Club seeks updated information about several supply diversity and grid reliability issues discussed in the direct testimony of FirstEnergy's witnesses. In their testimony, those witnesses cited to the January 2014 Polar Vortex, among other things, in raising concerns about the reliability of natural gas generation assets within the region. Given that testimony, these interrogatories inquired about how the natural gas infrastructure performed during the 2014-15 Winter, which experienced cold spells similar to the Polar Vortex. More generally, these requests ask about the reliability of that infrastructure. FirstEnergy objected to these requests as beyond the scope of discovery permitted by the March 23 Entry, but that

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[75] *See* Mar. 23 Entry ¶ 4 (citing AEP Ohio Order at 25).

[76] Mar. 23 Entry ¶¶ 5, 5(b), 6. In a subsequent letter from counsel, FirstEnergy provided a new rationale for its refusal to respond to this request. FirstEnergy claimed that SC-INT-159 was impermissible because it inquired about a document produced during the original discovery period. Apr. 14 Letter at 4. Even if this objection had been stated in FirstEnergy's discovery response (it was not), this argument is specious. The fact that a discovery request references an earlier response is irrelevant to whether that request is authorized by March 23 Entry, which this interrogatory plainly is.

objection is without merit. These requests are plainly related to the "necessity of the generating facility, in light of future reliability concerns, including supply diversity," and, by inquiring about the generation assets that would remain if one of the Rider RRS plants closed, these interrogatories are also seeking information about the potential energy price impacts that could result from a plant retirement. These requests are therefore well within the scope of the March 23 Entry.

FirstEnergy also objected to SC-INT-187 on privilege grounds, and refused to provide responsive information except through supplemental testimony. These objections are without merit. This request seeks factual information as to whether the gas infrastructure constraints during the 2014 Polar Vortex that Mr. Moul contends help justify FirstEnergy's proposal have continued through the present day, which is plainly relevant to whether those generating units are necessary for providing reliability and supply diversity to the grid. Such information cannot be shielded from discovery through overbroad privilege claims, and there is no legitimate basis for withholding this information until the deadline for supplemental testimony, as doing so is inconsistent with the March 23 Entry's 10-day response time, and undermines the very purpose of the supplemental discovery period.[77]

In SC-INT-189, Sierra Club requested information about whether FirstEnergy's customers had experienced volatility in retail pricing. FirstEnergy refused to answer this interrogatory, once again objecting that it "exceeds the scope" of discovery. Here again,

[77] Mar. 23 Entry ¶¶ 4, 5, 5(b). FirstEnergy's remaining objections to these requests is misplaced. Its relevance objection makes little sense, given that these requests seek information that is not only within the scope of the March 23 Entry, but also relates to issues raised by FirstEnergy witnesses in this proceeding. FirstEnergy's further claim, that these requests mischaracterize the witnesses' testimony, is also without merit. The interrogatories directly quote from the witnesses' testimony, and, in any event, are asking questions about the Winter of 2014-15 – after the date of these witnesses' testimony. Even if any of FirstEnergy's objections were valid – they are not – that would still not justify the Companies' complete refusal to provide a substantive response.

FirstEnergy's scope objection is misplaced, because the issue of retail price volatility was at the heart of the Commission's ruling on AEP Ohio's PPA rider. Although AEP Ohio had claimed that its rider would serve "as a hedge against future market volatility, in order to stabilize customer rates," the Commission rejected the rider because it was "not persuaded . . . that AEP Ohio's PPA rider proposal would provide customers with sufficient benefit from the rider's financial hedging mechanism."[78] Here, FirstEnergy has also proposed a PPA rider that would purportedly benefit customers through reduced retail price volatility.[79] Given the stated rationale for FirstEnergy's "Retail Rate Stability Rider," and the Commission's holding in the AEP Ohio Order, it is important to understand the degree to which customers currently experience such volatility, and whether a hedging mechanism is necessary at all.

SC-INT-189 also relates directly to the non-binding factors listed on page 25 of the AEP Ohio Order, including reliability concerns, supply diversity, and the electric price impacts that may result from closure of a generating unit.[80] According to Companies witness Judah Rose, the PJM region has experienced a rash of power plant retirements in recent years.[81] Understanding whether, in the face of these plant retirements, customers have experienced retail price volatility, will shed light on whether the closure of a Rider RRS generating unit could result in such volatility. This interrogatory is well within the scope of discovery authorized by the March 23 Entry, and FirstEnergy should be directed to provide a substantive response.

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[78] AEP Ohio Order at 8, 25.

[79] *See, e.g.*, Direct Testimony of Eileen Mikkelsen at 29:11-13 ("In addition, the Economic Stability Program will help provide stability for retail pricing by mitigating the impact of volatile retail market prices . . . ."); Direct Testimony of Steven Strah at 3:4-18, 4:4-21.

[80] Mar. 23 Entry ¶ 4 (citing AEP Ohio Order at 25).

[81] Direct Testimony of Judah Rose at 42:17-20 ("PJM retirements of all types of generation capacity between 2009 and 2016 are expected to total approximately 27,000 MW. Half of this large retirement has already occurred."); *see also* Rose Workpapers -- Public Version, "Recent PJM Retirements" (listing, as of May 2, 2014, the retirement of 12,007 MW of generation capacity in 2010-2014).

### E. Supplementation Request

In SC-INT-210, Sierra Club seeks the supplementation of several prior discovery responses pursuant to O.A.C. 4901-1-16(D)(5). Those earlier requests sought transcripts of testimony of FirstEnergy witness Rose. FirstEnergy's refusal to respond to this request on grounds that it "exceeds the scope" of discovery is without merit. O.A.C. 4901-1-16(D)(5) plainly requires a party to supplement its responses if "[r]equests for the supplementation of responses are submitted prior to the commencement of the hearing." Because Sierra Club has submitted this request for supplementation well before the start of the evidentiary hearing, this supplementation request is proper. In any event, the underlying discovery requests are permissible, because Mr. Rose's price projections and other assumptions were used by the Companies in generating their cost and revenue forecasts over the 15-year term of Rider RRS. Those forecasts, and Mr. Rose's underlying assumptions, bear directly on "the financial need of the generating plant[s]."[82] And because Mr. Rose is a key witness on a central issue in this case – discovery of which is authorized by the March 23 Entry – Sierra Club is entitled to discovery regarding the pricing assumptions and opinions that he has offered in other proceedings. Those opinions will allow the parties to assess the accuracy and consistency of Mr. Rose's testimony in other cases, thereby allowing a more thorough evaluation the assumptions underlying Rider RRS. FirstEnergy should be directed to supplement it earlier discovery responses.[83]

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[82] Mar. 23 Entry ¶ 4 (citing AEP Ohio Order at 25).

[83] FirstEnergy's responses to SC-RPD-139 and SC-RPD-140 are also deficient, because, as explained above, FirstEnergy's objections to the referenced interrogatories are invalid. If the Attorney Examiners compel FirstEnergy to provide substantive responses to those interrogatories, Sierra Club respectfully request that FirstEnergy also be directed to supplement its responses to SC-RPD-139 and SC-RPD-140 with the requested documents.

### F. Sierra Club Requests an Expedited Ruling on this Motion.

Pursuant to O.A.C. 4901-1-12(C), Sierra Club respectfully requests that the Attorney Examiners address this motion under the procedures for an expedited ruling. Sierra Club seeks expedited consideration because receiving this information expeditiously is important for this case. If the Attorney Examiners grant this motion, an expedited ruling will enable Sierra Club (and other parties) to review the information provided prior to depositions. An expedited ruling will also enable the parties to review, and properly assess, this information prior to the evidentiary hearing scheduled to commence on June 15. Accordingly, in order that this matter is resolved as soon as possible after the deadline supplemental testimony, and well before the start of the evidentiary hearing, Sierra Club requests that any party opposing this motion file its response within seven days of this motion. Sierra Club does not anticipate filing a reply brief and can instead address any additional issues if the Attorney Examiners schedule a conference to address this motion.

## IV. Conclusion

For the foregoing reasons, Sierra Club respectfully requests that the Attorney Examiners direct FirstEnergy to provide complete, substantive responses to Sierra Club's ninth and tenth set of discovery requests; produce all documents responsive to the requests; and, and for any documents subject to a legitimate claim of privilege, identify such documents in a privilege log and provide those documents to the Attorney Examiners for an *in camera* review.

April 27, 2015

Respectfully submitted,

/s/ Christopher J. Allwein

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing redacted version of the Motion to Compel Discovery Responses and Request for Expedited Ruling has been served upon FirstEnergy representatives and the following parties via electronic mail on April 27, 2015:

/s/ Christopher J. Allwein

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**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| **In the Matter of the Application of the 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** | ) ) ) ) ) ) | **Case No. 14-1297-EL-SSO** |

# SIERRA CLUB'S NINTH SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

***REDACTED VERSION***

Pursuant to Sections 4901-1-19, 4901-1-20, and 4901-1-22 of the Ohio Adm. Code, Sierra Club submits the following Interrogatories and Requests for Production of Documents, for response by the Cleveland Electric Illuminating Company, the Ohio Edison Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies") in the above-captioned proceeding. Sierra Club seeks the responses within the time period required by the Public Utilities Commission of Ohio or its authorized representative. Please produce the requested documents in electronic format to:

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## DEFINITIONS

As used in these discovery requests, these words and phrases have the following meanings:

A. The term "FirstEnergy," "Applicants," or "Companies" means the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, including any affiliated companies (such as, but not limited to, FirstEnergy Solutions Corp. ("FES"), American Transmission Service, Inc., and their affiliates), predecessors-in-interest, employees, and representatives.

B. "ESP Application" means the *Application for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, which was filed by the Companies on August 4, 2014, in the above-captioned proceeding, and including all witness testimony and attachments thereto, all work papers filed by the Companies, and all Errata filed by the Companies. This definition includes, without limitation, the proposed Retail Rate Stability Rider.

C. "Economic Stability Program" refers to the proposal, in the above-captioned proceeding, in which Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company would enter into a purchase power agreement with FirstEnergy Solutions Corp.; the costs and revenues would then be netted; and the outcome of the acquisition and sale of the generation (credit or cost) would be included in the proposed Retail Rate Stability Rider.

D. "ESP proposal" refers, without limitation, to both the ESP Application and the Economic Stability Program as defined above.

E. "AEP Ohio Order" refers to the Opinion and Order issued by the Public Utilities Commission of Ohio in Case Nos. 13-2385-EL-SSO, 13-2386-EL-AAM on February 25, 2015.

F. "Stipulation" refers to the Stipulation and Recommendation filed in Case No. 14-1297-EL-SSO on December 22, 2014.

G. "Document" refers to written matter of any kind, regardless of its form, and to information recorded on any storage medium, whether in electrical, optical, or electromagnetic form, and capable of reduction to writing by the use of computer hardware and software, and includes all copies, drafts, proofs, both originals and copies either (1) in the possession, custody, or control of the Companies regardless of where located, or (2) produced or generated by, known to or seen by the Companies, but now in their possession, custody, or control, regardless of where located whether or still in existence.

Such "documents" shall include, but are not limited to, applications, permits, monitoring reports, computer printouts, contracts, leases, agreements, papers, photographs, tape recordings, transcripts, letters or other forms of correspondence, folders or similar containers, programs, telex, TWX and other teletype communications, memoranda, reports, studies, summaries, minutes, minute books, circulars, notes (whether typewritten, handwritten or otherwise), agenda, bulletins, notices, announcements, instructions, charts, tables, manuals, brochures, magazines, pamphlets, lists, logs, telegrams, drawings, sketches, plans, specifications, diagrams, drafts, books and records, formal records, notebooks, diaries, registers, analyses, projections, email correspondence or communications and other data compilations from which information can be obtained (including matter used in data processing) or translated, and any other printed, written, recorded, stenographic, computer-generated, computer-stored, or electronically stored matter, however and by whomever produced, prepared, reproduced, disseminated or made.

Without limitation, the term "control" as used in the preceding paragraphs means that a document is deemed to be in your control if you have the right to secure the document or a copy thereof from another person or public or private entity having actual possession thereof. If a document is responsive to a request, but is not in your possession or custody, identify the person with possession or custody. If any document was in your possession or subject to your control, and is no longer, state what disposition was made of it, by whom, the date on which such disposition was made, and why such disposition was made.

For purposes of the production of "documents," the term shall include any copies of all documents being produced, to the extent the copies are not identical to the original, thus

requiring the production of copies that contain any markings, additions or deletions that make them different in any way from the original

H. To "identify" a document means to describe by reference to:

1. The title, heading, or caption of such document, if any;

2. The identifying number(s), letter(s), or combination thereof, if any, and the significance or meaning of such number(s), letter(s), or combination thereof;

3. The date appearing on such document and if no date appears thereon, the answer shall so state and shall give the date, or approximate date, on which each document was prepared;

4. The general nature or description of such document (*i.e.,* whether it is a letter, memorandum, minutes of a meeting, etc.) and the number of pages of which it consists;

5. The name of the person who signed such document and if it was not signed, the answer shall so state and shall give the name of the person or persons who prepared it;

6. The name of the person to whom such document was addressed and the name of each person, other than such addressee, to whom such document, or a copy thereof, was sent;

7. The name of the person who has custody of such document.

I. To "identify" a person means to state the person's name, address, and business relationship (e.g., "employee") to FirstEnergy.

J. "And" and "or" shall be construed either conjunctively or disjunctively as required by the context to bring within the scope of these interrogatories and requests for production of documents any information which might be deemed outside their scope by another construction.

K. "Any" means all or each and every example of the requested information.

L. "Communication" means any transmission or exchange of information between two or more persons, whether orally or in writing, and includes, without limitation, any conversation or discussion by means of letter, telephone, note, memorandum, telegraph, telex, telecopy, cable, email, or any other electronic or other medium.

M. To describe "in detail" means to describe by reference to the underlying specific facts rather than by reference to the ultimate facts or conclusions of law, and wherever possible to use quantitative descriptors in place of qualitative descriptors.

N. "Intervenor" means any party intervening in Case No. 14-1297-EL-SSO other than the Companies.

O. "Person" includes any firm, corporation, joint venture, association, entity, or group of natural individuals, unless the context clearly indicates that only a natural individual is referred to in the discovery request.

P. The terms "PUCO" and "Commission" refer to the Public Utilities Commission of Ohio, including its Commissioners, personnel (including persons working for the PUCO Staff as well as in the Public Utilities Section of the Ohio Attorney General's Office), and offices.

Q. The term "reconcile," when used with respect to two items, means to state whether the two items are the same.

R. "Relating to" or "concerning" means and includes pertaining to, referring to, or having as a subject matter, directly or indirectly, expressly or implied, the subject matter of the specific request.

S. The "testimony" of a witness means the witness's testimony in the above-captioned case, unless a different case number is specified.

T. "Work papers" are defined as original, electronic, machine-readable, unlocked, Excel format (where possible) with formulas intact.

U. "You," and "Your," or "Yourself" refer to the party requested to answer interrogatories or produce documents, including any present or former director, officer, agent, contractor, consultant, advisor, employee, partner, or joint venturer of such party.

V. Each singular shall be construed to include its plural, and vice versa, so as to make the request inclusive rather than exclusive.

W. Words expressing the masculine gender shall be deemed to express the feminine and neuter genders; those expressing the past tense shall be deemed to express the present tense; and vice versa.

## INSTRUCTIONS FOR ANSWERING

A. All information is to be divulged which is in your knowledge, possession, or control, or within the knowledge, possession, or control of your attorney, agents, or other representatives of yours or your attorney.

B. Where an interrogatory calls for an answer in more than one part, each part should be separate in the answer so that the answer is clearly understandable.

C. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them.

D. If any answer requires more space than provided, continue the answer on the reverse side of the page or on an added page.

E. Your organization(s) is requested to produce responsive materials and information within its physical control or custody, as well as that physically controlled or possessed by any other person acting or purporting to act on your behalf, whether as an officer, director, employee, agent, independent contractor, attorney, consultant, witness, or otherwise.

F. Where these requests seek quantitative or computational information (e.g., models, analyses, databases, and formulas) stored by your organization(s) or its consultants in computer-readable form, in addition to providing hard copy (if an electronic response is not otherwise provided as requested), you are requested to produce such computer-readable information, in order of preference:

   a. Microsoft Excel worksheet files on compact disk;

   b. other Microsoft Windows or Excel compatible worksheet or database diskette files;

   c. ASCII text diskette files; and

   d. such other magnetic media files as your organization(s) may use.

G. Conversion from the units of measurement used by your organization(s) in the ordinary course of business need not be made in your response; e.g., data requested in kWh may be provided in mWh or gWh as long as the unit measure is made clear.

H. Unless otherwise indicated, the following requests shall require you to furnish information and tangible materials pertaining to, in existence, or in effect for the whole or any part of the period from June 4, 2012, through and including the date of your response.

I. Responses must be complete when made, and must be supplemented with subsequently acquired information at the time such information is available.

J. In the event that a claim of privilege is invoked as the reason for not responding to discovery, the nature of the information with respect to which privilege is claimed shall be set forth in responses together with the type of privilege claimed and a statement of all circumstances upon which the respondent to discovery will rely to support such a claim of privilege (i.e. provide a privilege log). Respondent to the discovery must a) identify (see

definition) the individual, entity, act, communication, and/or document that is the subject of the withheld information based upon the privilege claim, b) identify all persons to whom the information has already been revealed, and c) provide the basis upon which the information is being withheld and the reason that the information is not provided in discovery.

K. Wherever the response to a request consists of a statement that the requested information is already available to Sierra Club, provide a detailed citation to the document that contains the information. This citation shall include the title of the document, relevant page number(s), and to the extent possible paragraph number(s) and/or chart/table/figure number(s).

L. In the event that any document referred to in response to any request for information has been destroyed, specify the date and the manner of such destruction, the reason for such destruction, the person authorizing the destruction, and the custodian of the document at the time of its destruction.

M. All references to the testimony of a witness includes both that witness's written testimony as well as any attachments to the testimony.

N. Sierra Club reserves the right to serve supplemental, revised, or additional discovery requests as permitted in this proceeding.

## INTERROGATORIES

153. State whether the Companies intend to modify the ESP proposal in any way in light of the AEP Ohio Order.
    a. If so:
        i. Identify and describe each way in which the Companies intend to modify the proposal.
        ii. Explain the reason for each such modification.
        iii. Identify and describe the form in which such proposed modification would be made.
    b. If not, explain why not.

**RESPONSE:**

154. Refer to page 26 of the AEP Ohio Order. With regards to the Commission's statement regarding the need for AEP's PPA rider proposal to provide for "rigorous Commission oversight":
    a. State whether the Companies' ESP proposal provides for "rigorous Commission oversight" of the Retail Rate Stability Rider ("Rider RRS"). If so:

c. State whether the transmission system upgrades identified as necessary to allow the Sammis plant to retire would be needed if FirstEnergy Solutions Corp. repowered Sammis as a natural gas plant, rather than retiring the plant.
   i. If so, explain why.
   ii. If not, explain why not.

**RESPONSE:**

[redacted]

**RESPONSE:**

159. Refer to page 4, lines 1 through 8 of the Testimony of Gavin L. Cunningham, and your response to SC Set 1-INT-6. With regards to the transmission upgrades that you contend would be needed to allow for the retirement of either or both of the Sammis and Davis-Besse plants:
   a. State whether the Companies have calculated what amount of the estimated costs of such transmission upgrades would be borne by the Companies' ratepayers.
      i. If so, identify the cost (in dollars) that would be borne by the Companies' ratepayers for transmission upgrades needed to allow for the retirement of:
         a) Davis-Besse
         b) Sammis
         c) Both Davis-Besse and Sammis
      ii. If not, explain why not.
   b. State whether the at least $442 million cost estimate for transmission upgrades for retiring both Davis-Besse and Sammis, the $213 million estimate for Sammis, and the $65 million estimate for Davis-Besse are expressed in real or nominal dollars, and identify in what year's dollars those figures are expressed.
   c. State whether the Companies have evaluated, or reviewed an evaluation of, the potential for the Companies to receive Reliability Must Run payments from PJM as a way to keep the Sammis and Davis-Besse plants operating until the transmission upgrades needed to allow those plants to retire could be completed?
      i. If so, explain the results of such evaluation.
      ii. If not, explain why not.

d. State whether receiving Reliability Must Run payments from PJM could reduce the total costs borne by the Companies' ratepayers while any transmission upgrades needed to allow the Sammis or Davis-Besse plants to retire were being completed.
   i. If so, explain why.
   ii. If not, explain why not.

**RESPONSE:**

160. State whether you have evaluated the impact that the retirement of any of the Sammis, Davis-Besse, Kyger Creek, and Clifty Creek plants (or any unit thereof) would have on electric prices.
   a. If so, explain the results of that evaluation.
   b. If not, explain why not.

**RESPONSE:**

161. State whether you have evaluated the impact that the retirement of any of the Sammis, Davis-Besse, Kyger Creek, and Clifty Creek plants (or any unit thereof) would have on economic development in the state.
   a. If so, explain the results of that evaluation.
   b. If not, explain why not.

**RESPONSE:**

162. State whether you have evaluated the necessity of any of the Sammis, Davis-Besse, Kyger Creek, and Clifty Creek plants (or any unit thereof) for electric supply diversity, or of the impact that the retirement of any of those plants or units would have on electric supply diversity.
   a. If so, explain the results of that evaluation.
   b. If not, explain why not.

**RESPONSE:**

163. For any of the years of 2015 through 2031, identify the most recent forecast prepared, received, sent, or reviewed by the Companies, any of the witnesses that have submitted testimony on behalf of the Companies in this proceeding, or any member of the EDU Team of any of the following for the Sammis, Davis-Besse, Kyger Creek, and/or Clifty Creek plants (or any unit thereof):
   a. energy market revenue;
   b. capacity market revenue;
   c. ancillary services revenue;
   d. fuel costs;

e. fixed operating costs;
f. variable operating costs;
g. capital costs;
h. capacity factors;
i. forced outage rate;
j. availability;
k. heat rate.

**RESPONSE:**

164. Refer to Attachment JAR-1. State whether the Companies, any of the witnesses that have submitted testimony on behalf of the Companies in this proceeding, or any member of the EDU Team has updated the estimated RRS Rider impact data set forth in Attachment JAR-1 in light of the [redacted]

a. If so, identify the results of such update.
b. If not, explain why not.

**RESPONSE:**

165. Refer to your response to OCC Set 1-INT-19(f).
a. On what date did the Companies approve the proposed transaction?
b. Did Charles E. Jones approve the proposed transaction on behalf of the Companies?
c. Identify any document or communication memorializing the Companies' approval of the proposal transaction.

**RESPONSE:**

166. Refer to page 2, lines 7-9 of the Supplemental Testimony of Eileen Mikkelsen ("Mikkelsen Supplemental Testimony"), in which Ms. Mikkelsen states that "[t]he Economic Stability Program will help stabilize retail rates and protect against increasing market prices and volatility over the longer term."
a. Did Ms. Mikkelsen review or otherwise rely on any documents, communications, data, or facts for this portion of her testimony?
i. If so:
a) Please identify all documents that Ms. Mikkelsen reviewed or otherwise relied on for this portion of her testimony.
b) Please identify all communications that Ms. Mikkelsen reviewed or otherwise relied on for this portion of her testimony.

a. Please supplement and update your responses to these requests with current information. This includes, but is not limited to, any additional contract, any contract revision or modification, any changes in compensation, and an updated figure for the number of hours that Applied Economics LLC and/or Ms. Murley has spent on this proceeding.

**RESPONSE:**

## REQUESTS FOR PRODUCTION OF DOCUMENTS

126. Produce any documents identified or referenced in response to any of the following interrogatories: SC-INT-153 through SC-INT-174.

127. Produce all documents that contain any information used, reviewed, or relied on in preparing your responses to any of the following interrogatories: SC-INT-153 through SC-INT-174.

128. Produce each and every profit and loss statement for any or all of the Sammis, Davis-Besse, Kyger Creek, and Clifty Creek plants that was prepared, received, sent, or reviewed between January 1, 2014 and the present by the Companies, any of the witnesses that have submitted testimony on behalf of the Companies in this proceeding, or any member of the EDU Team. This request seeks unit-level statements wherever available, as well as statements for each plant as a whole.

129. Produce each and every study, analysis, assessment, or other document regarding the impact that the retirement of any of the Sammis, Davis-Besse, Kyger Creek, and Clifty Creek plants (or any unit thereof) would have on electric prices that was prepared, received, sent, or reviewed between January 1, 2014, and the present by the Companies, any of the witnesses that have submitted testimony on behalf of the Companies in this proceeding, or any member of the EDU Team.

130. Produce each and every study, analysis, assessment, or other document regarding the impact that the retirement of any of the Sammis, Davis-Besse, Kyger Creek, and Clifty Creek plants (or any unit thereof) would have on economic development in the state that was prepared, sent, received, or reviewed between January 1, 2014 and the present by the Companies, any of the witnesses that have submitted testimony on behalf of the Companies in this proceeding, or any member of the EDU Team.

131. Produce each and every study, analysis, assessment, or other document regarding the necessity of any of the Sammis, Davis-Besse, Kyger Creek, and Clifty Creek plants (or any unit thereof) for electric supply diversity, or of the impact that the retirement of any of those plants or units would have on electric supply diversity, that was prepared, received, sent, or reviewed between January 1, 2014 and the present by the Companies, any of the witnesses that have submitted testimony on behalf of the Companies in this proceeding, or any member of the EDU Team.

132. For each of the values identified in response to SC-INT-163 above, produce:
    a. All modeling input and output files and work papers used in developing such forecasts;
    b. All reports, analyses, and other documents used in developing the forecasts.

133. Produce any modeling input and output files, work papers, reports, or other documentation for any updated estimate of the RRS Rider impact that has been completed to date since the creation of Attachment JAR-1.

134. With regards to the Sammis, Davis-Besse, Kyger Creek, and Clifty Creek plants:
    a. Produce all analyses, studies, or assessments of each unit's or plant's operational characteristics, physical condition, or operating performance. This request seeks any unit-level analyses, studies, or assessments wherever available, as well as any analyses, studies, or assessments for each plant as a whole.

135. Refer to OCC Set 11-RPD-74 Attachment 1-Competitively Sensitive Confidential, [redacted]

136. Refer to the confidential transcript of the January 16, 2015 Deposition of Paul A. Harden at page 283, lines 10-13.
[redacted]

137. Produce all communications and documents exchanges between FirstEnergy and its Boards of Directors, shareholders, current or potential investors, credit rating agencies, investment banks, or other financial institutions regarding:
    a. The ESP Application, Economic Stability Program and/or the Retail Rate Stability Rider;
    b. The financial status or profitability of any of the Sammis, Davis-Besse, Clifty Creek, or Kyger Creek plants;
    c. The possible retirement of the Sammis, Davis-Besse, Clifty Creek, or Kyger Creek plants, or any unit of those plants.

138. Refer to your response to OCC Set 1-INT-19(c).
    a. Produce all documents and communications concerning the formation of the EDU Team, including, but not limited to:
        i. All documents and communications describing the Team's responsibilities, duties, or scope of authority;
        ii. All documents and communications concerning the decision-making process involved in selecting the EDU Team members;
        iii. All documents and communications concerning the decision-making process involved in creating a team to represent the Companies.

March 27, 2015 Respectfully submitted,

*/s/ Michael C. Soules*
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**Attorneys for the Sierra Club**

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Ninth Set of Interrogatories and Requests for Production of Documents to Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company – Redacted Version* has been served upon FirstEnergy representatives and the following parties via electronic mail on March 27, 2015:

/s/ Michael C. Soules

**Service List**

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**Sierra Club Set 9**
**As to objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 9 – INT-159**

Refer to page 4, lines 1 through 8 of the Testimony of Gavin L. Cunningham, and your response to SC Set 1-INT-6. With regards to the transmission upgrades that you contend would be needed to allow for the retirement of either or both of the Sammis and Davis-Besse plants:

a. State whether the Companies have calculated what amount of the estimated costs of such transmission upgrades would be borne by the Companies' ratepayers.
    i. If so, identify the cost (in dollars) that would be borne by the Companies' ratepayers for transmission upgrades needed to allow for the retirement of:
        a) Davis-Besse
        b) Sammis
        c) Both Davis-Besse and Sammis
    ii. If not, explain why not.
b. State whether the at least $442 million cost estimate for transmission upgrades for retiring both Davis-Besse and Sammis, the $213 million estimate for Sammis, and the $65 million estimate for Davis-Besse are expressed in real or nominal dollars, and identify in what year's dollars those figures are expressed.
c. State whether the Companies have evaluated, or reviewed an evaluation of, the potential for the Companies to receive Reliability Must Run payments from PJM as a way to keep the Sammis and Davis-Besse plants operating until the transmission upgrades needed to allow those plants to retire could be completed?
    i. If so, explain the results of such evaluation.
    ii. If not, explain why not.
d. State whether receiving Reliability Must Run payments from PJM could reduce the total costs borne by the Companies' ratepayers while any transmission upgrades needed to allow the Sammis or Davis-Besse plants to retire were being completed.
    i. If so, explain why.
    ii. If not, explain why not.

**Response:**

Objection. This request seeks information that is protected by the attorney-client privilege and attorney work product doctrine. For part (a), the Companies are reviewing the AEP Ohio Order and would provide any response to this request through supplemental testimony. For the remaining portions, this request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding.

**Sierra Club Set 9**
**Witness: Legal**
**As to objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 9 – INT-163**

For any of the years of 2015 through 2031, identify the most recent forecast prepared, received, sent, or reviewed by the Companies, any of the witnesses that have submitted testimony on behalf of the Companies in this proceeding, or any member of the EDU Team of any of the following for the Sammis, Davis-Besse, Kyger Creek, and/or Clifty Creek plants (or any unit thereof):

a. energy market revenue;
b. capacity market revenue;
c. ancillary services revenue;
d. fuel costs;
e. fixed operating costs;
f. variable operating costs;
g. capital costs;
h. capacity factors;
i. forced outage rate;
j. availability;
k. heat rate.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. This request is also vague and ambiguous. In addition, this request is overly broad and seeks information which is not relevant and is not reasonably calculated to lead to the discovery of admissible evidence. Further, this request seeks information which is protected by the attorney client privilege and attorney work product doctrine. ***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and have been provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 9**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 9 – INT-164** ***This question is Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:** ***Subject to any objections, the requested information is Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 9**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 9 – RPD-128** Produce each and every profit and loss statement for any or all of the Sammis, Davis-Besse, Kyger Creek, and Clifty Creek plants that was prepared, received, sent, or reviewed between January 1, 2014 and the present by the Companies, any of the witnesses that have submitted testimony on behalf of the Companies in this proceeding, or any member of the EDU Team. This request seeks unit-level statements wherever available, as well as statements for each plant as a whole.

**Response:** Objection. This request is vague and ambiguous. It is also overly broad and seeks information which is not relevant and not reasonably calculated to lead to the discovery of admissible evidence. In addition, this request seeks information which is protected by the attorney client privilege and attorney work product doctrine. ***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and have been provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 9**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 9 – RPD-132**

For each of the values identified in response to SC-INT-163 above, produce:

a. All modeling input and output files and work papers used in developing such forecasts;
b. All reports, analyses, and other documents used in developing the forecasts.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding and seeks information that is protected by the attorney-client privilege and attorney work product doctrine. ***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and have been provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 9**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 9 – RPD-133** Produce any modeling input and output files, work papers, reports, or other documentation for any updated estimate of the RRS Rider impact that has been completed to date since the creation of Attachment JAR-1.

**Response:** Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding.

**Sierra Club Set 9**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 9 – RPD-134**

With regards to the Sammis, Davis-Besse, Kyger Creek, and Clifty Creek plants:

a. Produce all analyses, studies, or assessments of each unit's or plant's operational characteristics, physical condition, or operating performance. This request seeks
any unit-level analyses, studies, or assessments wherever available, as well as any analyses, studies, or assessments for each plant as a whole.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding.

**Sierra Club Set 9**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 9 – RPD-135** ***This question is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:** ***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 9**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 9 – RPD-136** ***This question is Competitively Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:** ***Subject to any objections, the requested information is Competitively Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

April 8, 2015

**BY ELECTRONIC MAIL**

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Re: Case No. 14-1297-EL-SSO (P.U.C.O.); FirstEnergy's Responses to Sierra Club's Ninth Set of Discovery

Dear Ms. Dunn and Mr. Alexander:

We have reviewed the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's (collectively, the "Companies" or "FirstEnergy") responses to Sierra Club's ninth set of discovery requests, which we served on March 27, 2015. Unfortunately, FirstEnergy's responses are completely deficient. Although Sierra Club's requests are well within the scope of the Attorney Examiner's March 23, 2015 Entry, FirstEnergy has refused to respond to most of these requests, and failed to provide any new substantive information in response to the others. FirstEnergy's improper responses are inconsistent with the March 23 Entry and have thwarted our ability to "conduct additional discovery and to evaluate and offer supplemental testimony addressing the AEP Ohio Order, as applied in this case." Mar. 23 Entry ¶ 5. To ensure that the parties have an opportunity to evaluate the AEP Ohio Order's ramifications for this case, and to bring itself into compliance with the March 23 Entry, FirstEnergy must promptly withdraw its objections and provide complete responses to Sierra Club's ninth set of discovery.

Sierra Club wishes to resolve this dispute amicably, without the need for a motion to compel. This letter is therefore being sent to satisfy our conferral obligations under O.A.C.

4901-1-23(C). If FirstEnergy does not promptly agree to correct its deficient discovery responses, we intend to file a motion to compel disclosure of the information being withheld.[1]

Given the little remaining time available for discovery, and the fact that FirstEnergy has failed to provide any new substantive information in response to any of these discovery requests, we require a prompt response to this letter. Please confirm in writing, by no later than 12 p.m. EDT on April 13, 2015, that FirstEnergy will withdraw its improper objections and promptly provide complete responses to Sierra Club's ninth set of discovery. If we do not receive FirstEnergy's written confirmation by that date, we will assume that FirstEnergy refuses to properly respond to these discovery requests, and that further conferral on these issues is futile. At that point, having exhausted all other reasonable means of resolving this issue, we will move forward with a motion to compel.

## I. Background

On March 23, 2015, the Attorney Examiner amended the procedural schedule in light of the Commission's order in Case No. 13-2385-EL-SSO (the "AEP Ohio Order"). *See* Mar. 23 Entry ¶¶ 4-5 (citing *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order (Feb. 25, 2015)). The Attorney Examiner did so "[i]n order for the parties to address whether and how the Commission's findings in the AEP Ohio Order should be considered in evaluating FirstEnergy's application in this proceeding," and he provided the parties with an opportunity to "conduct additional discovery and to evaluate and offer supplemental testimony addressing the AEP Ohio Order, as applied in this case." Mar. 23 Entry ¶ 5.

In reopening discovery "regarding the AEP Ohio Order factors," *id.* ¶ 5(b), the Attorney Examiner made clear that the permissible scope of discovery is broad. The March 23 Entry specifically cites to the Commission's discussion of the PPA rider proposal:

> The Commission declined to adopt the purchase power agreement (PPA) rider proposal, as put forth in the AEP Ohio proceeding; however, the Commission authorized the establishment of a placeholder PPA rider, at the initial rate of zero, with AEP Ohio being required to justify any requested cost recovery in future filings before the Commission. 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. Those factors were listed as follows: financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state. AEP Ohio Order at 25. In

[1] Given the fact that FirstEnergy's improper objections have prevented us from reviewing the discovery responses and serving follow-up requests prior to the April 13, 2015 cutoff, we may be forced to move for an extension of the discovery period.

addition, the Commission indicated that the rider proposal must address additional issues specified by the Commission. AEP Ohio Order at 25-26.

Mar. 23 Entry ¶ 4; *see also id.* ¶ 5 (amending schedule "[i]n order for the parties to address whether and how the Commission's findings in the AEP Ohio Order should be considered in evaluating FirstEnergy's application in this proceeding"). Accordingly, discovery requests related to the Commission's resolution of the PPA rider proposal, including requests that seek information pertaining to the factors and additional issues identified by the Commission, are authorized by the March 23 Entry.

The March 23 Entry also makes clear that responses to discovery requests generally must be served within 10 days. Mar. 23 Entry ¶ 6.[2] This means, of course, that if a party has information within its possession, custody, or control, or is otherwise capable of responding to a request, the party cannot postpone its response by claiming that the requested information will be provided in supplemental testimony. Because supplemental testimony is not due until May 4, 2015, invoking that excuse would circumvent the 10-day response time and effectively thwart the parties' ability to conduct meaningful discovery regarding the AEP Ohio Order's impact on this case.

## II. FirstEnergy's Discovery Responses are Improper.

In responding to Sierra Club's ninth set of discovery requests, FirstEnergy objected entirely to most of the requests, and it provided no new substantive information or documents in response to any of them. *See* Resps. to SC-INT-153 to -174, SC-RPD-126 to -138. FirstEnergy offers two main justifications for refusing to respond to these requests, neither of which have merit: *First*, FirstEnergy claims that many of these requests purportedly "exceed[] the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding." FirstEnergy is mistaken. As explained further below, all of Sierra Club's discovery requests relate to the AEP Ohio Order's resolution of the PPA rider proposal, including the factors and additional issues discussed on pp. 25-26 of the Order. Sierra Club's requests therefore fall squarely within the scope of discovery permitted by the March 23 Entry. Mar. 23 Entry ¶¶ 4-5.

*Second*, and in direct conflict with its first objection regarding the purported scope of the March 23 Entry, FirstEnergy claims that the requested information may be provided in supplemental testimony. This objection is also without merit. FirstEnergy's responses to these discovery requests were due on April 6, 2015, while the deadline for supplemental testimony is not until May 4. By refusing to provide substantive answers until it files supplemental testimony, FirstEnergy has unilaterally granted itself a 28-day extension in responding to Sierra Club's discovery requests. This tactic is inconsistent with the 10-day response time established

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[2] The March 23 Entry includes specific directions in case "a party has difficulty responding to a particular request within the 10-day period." Mar. 23 Entry ¶ 6. In that circumstance, "counsel for the parties should discuss the problem and work out a mutually satisfactory solution." *Id.*

by the March 23 Entry, and it also defeats a central purpose of that Entry, which was to allow the parties to conduct discovery relating to the AEP Ohio Order.[3]

Because FirstEnergy's objections are misplaced, FirstEnergy must promptly withdraw these objections and provide complete response to Sierra Club's discovery requests. The deficiencies in FirstEnergy's discovery responses are discussed further below:

SC-INT-154, -155, -156. These interrogatories seek information about whether FirstEnergy's ESP proposal (i) provides for "rigorous Commission oversight" of Rider RRS, (ii) includes a "proposed process for a periodic substantive review and audit," and (iii) provides for "an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers." In seeking this information, the interrogatories directly quote from page 25 of the AEP Ohio Order.[4] Because these interrogatories seek information about several of the "additional issues" that a PPA rider proposal "must address," Mar. 23 Entry ¶ 4, they fall within the scope of discovery permitted by the March 23 Entry. These interrogatories are also permissible given that the Entry sought to provide parties with an opportunity to "*conduct additional discovery* and to evaluate and offer supplemental testimony *addressing the AEP Ohio Order, as applied in this case*." *Id.* ¶ 5 (emphasis added). FirstEnergy's "exceeds the scope" objections are therefore without merit, and FirstEnergy must provide responses to these requests.[5]

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[3] By delaying its response until it files supplemental testimony (most likely on May 4), FirstEnergy is also hindering Sierra Club's and other parties' ability to use the information obtained through discovery to inform their own supplemental testimony. This is particularly problematic given FirstEnergy's strenuous opposition to several parties' requests to stagger the deadlines for supplemental testimony.

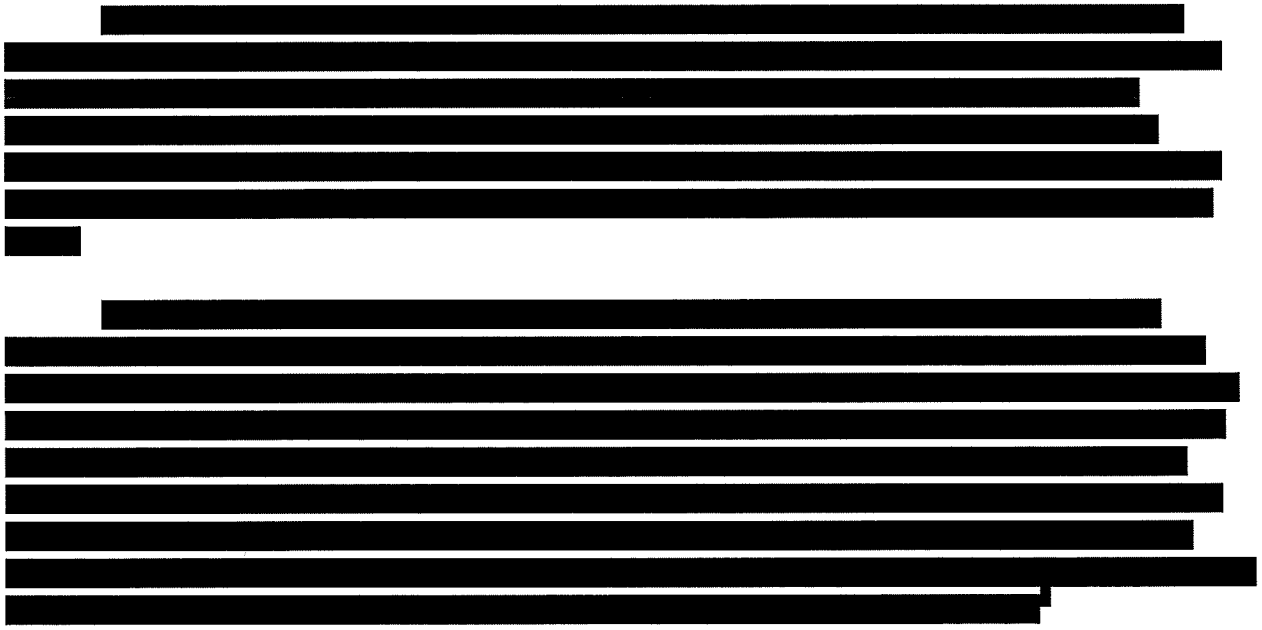
[4] SC-INT-154, -155, and -156 mistakenly cite to page 26 of the AEP Ohio Order; the language quoted in these interrogatories is near the bottom of page 25.

[5] In response to these requests (and others), FirstEnergy also asserts several boilerplate objections, none of which have merit. For each of these three requests, for example, FirstEnergy claims that "[t]his request is also overbroad and unduly burdensome because it would require the Companies to identify every single responsive fact, document, communication, professional experiences, testimony or data, which is not possible. This request also calls for an improper narrative response." These objections are meritless, and FirstEnergy cannot rely on them to avoid responding to Sierra Club's ninth set of discovery requests.

FirstEnergy's overbreadth objections are misplaced for multiple reasons. As an initial matter, it appears that FirstEnergy cut-and-pasted its objections to Sierra Club's eighth set of discovery without even checking to see if they apply here. These interrogatories do not ask FirstEnergy to "identify every single responsive fact, document, communication, professional experiences, testimony or data." (Indeed, they do not reference "professional experiences" at all.) For this reason alone, this objection is improper. More importantly, however, there is nothing impermissible about asking a party to provide full and complete responses on a narrow issue, particularly where that issue is of central importance to the case. And each of these requests seeks information about a narrowly-drawn topic that the Commission specifically emphasized in the AEP Ohio Order. FirstEnergy's undue burden objections ring especially hollow here, where it is seeking approval of a rider that would, according to the Companies' own projections, cost ratepayers more than $400 million between 2016-18. *See* Ruberto Testimony, Att. JAR-1 Revised.

FirstEnergy's "narrative response" objection is also misplaced. The 44-year-old *Penn Central* decision cannot be used to avoid the disclosure of relevant information on specific topics, particularly where, as

SC-INT-157. This interrogatory seeks information about the necessity and costs of transmission upgrades related to the potential retirement of the Sammis plant units. This request relates directly to several factors listed on page 25 of the AEP Ohio Order, including the necessity of these generating units, in light of future reliability concerns, and the potential impacts of retirement. Because this interrogatory seeks information about several factors that the Commission has found that it "may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," Mar. 23 Entry ¶ 4, it falls within the scope of discovery permitted by the March 23 Entry. *See also id.* ¶ 5(b) (permitting "[d]iscovery requests regarding the AEP Ohio Order factors"). FirstEnergy's "exceeds the scope" objection is therefore without merit, and FirstEnergy must provide a response to this request.[6]



here, those topics are important to core issues in this proceeding. Moreover, State and federal courts have rejected *Penn Central*'s narrow view of interrogatories, confirming that interrogatories may seek the disclosure of relevant factual information. *See, e.g.*, *Hudson v. United Services Auto. Ass'n Ins. Co.*, 902 N.E.2d 101, 110-11 (Com. Pl. 2008); *Babcock Swine, Inc. v. Shelbco, Inc.*, 126 F.R.D. 43, 44-45 (S.D. Ohio 1989). FirstEnergy's reliance on *Penn Central* is also inconsistent with the position it stated in its October 24, 2014 letter to Sierra Club's counsel. In that letter, FirstEnergy stated that "the Companies do not rely on *Armco* to contest all interrogatories which request a narrative response. Instead, *Armco* properly stands for the proposition that overly broad interrogatories which require a 'white paper' response are inappropriate." Oct. 24 Letter at 3. These interrogatories are not requesting a "white paper" response, but are instead asking FirstEnergy to identify where, in its own Application and testimony, the Companies addressed a specific issue raised in the AEP Ohio Order.

[6] In response to this and other requests, FirstEnergy also objects on relevance grounds. FirstEnergy's relevance objections are misplaced. The discovery requests in Sierra Club's ninth set are not only relevant to central issues in this proceeding; they directly relate to the Commission's ruling on the similar PPA rider proposal that was at issue in the AEP Ohio Order.

[7] In response to this and other requests, FirstEnergy also objects on privilege grounds. These privilege objections are also misplaced. FirstEnergy cannot baldly assert a privilege objection to avoid providing

SC-INT-159. This interrogatory seeks information about transmission upgrades that FirstEnergy previously contended would be needed to allow for the retirement of either or both of the Sammis and Davis-Besse plants. Here, too, this request relates directly to several factors listed on page 25 of the AEP Ohio Order, including the necessity of these generating units, in light of future reliability concerns, and retirement-related impacts. Because this interrogatory seek information about factors that the Commission has found that it "may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," Mar. 23 Entry ¶ 4, it falls within the scope of discovery permitted by the March 23 Entry. *See also id.* ¶ 5(b). FirstEnergy's "exceeds the scope" objection to parts (b)-(d) of this request is therefore without merit, and FirstEnergy must respond to those portions of the request.

FirstEnergy's objection to part (a), that it "would provide any response to this request through supplemental testimony," is also without merit. Part (a) asks about whether the Companies "have" performed a calculation, as well as some follow-up questions. Because this interrogatory inquires about whether something has – or has not – happened, there is no basis for withholding an answer until FirstEnergy's supplemental testimony. FirstEnergy's response is also inconsistent with the March 23 Entry's 10-day response time, and it undermines the very purpose of the supplemental discovery period. Mar. 23 Entry ¶¶ 5, 5(b), 6. FirstEnergy must provide a timely, complete response to each and every part of SC-INT-159.

SC-INT-160, -161, -162; SC-RPD-129, -130, -131. These discovery requests seek information and documents related to several factors listed on page 25 of the AEP Ohio Order. FirstEnergy refuses to provide information responsive to these requests by claiming that it "would provide any response to this request through supplemental testimony."[8] This objection is without merit. The interrogatories seek information about whether the Companies "have" performed certain evaluations, and the requests for production seek documents. Because FirstEnergy is capable of providing answers to these interrogatories now, and producing documents within its possession, custody, or control, there is no basis for delaying these responses until the May 4, 2015 deadline for supplemental testimony. Again, this is inconsistent with the March 23 Entry's 10-day response time, and it undermines the entire purpose of the supplemental discovery period. Mar. 23 Entry ¶¶ 5, 5(b), 6. FirstEnergy must provide timely, complete responses to these discovery requests.

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responses to legitimate discovery requests. Even if a subset of information and documents responsive to Sierra Club's ninth set were privileged, FirstEnergy has not followed the protocol for making a privilege claim. To the extent FirstEnergy objects to the production of any document based on privilege, it must provide a privilege log setting forth the information requested in ¶ J of the Instructions. *See, e.g.*, Case Nos. 08-917-EL-SSO, 08-918-EL-SSO, Entry ¶ 8 (June 30, 2011) (to the extent communications are privileged, the utility should provide a privilege log).

[8] FirstEnergy's response to SC-INT-162 provides a cursory reference to the Moul Testimony, and then states that it "would provide any further response to this request through supplemental testimony." Although the wording of this response is slightly different, it suffers from the same problem as the other responses: FirstEnergy has failed to provide any new substantive information in response to this request, and is withholding such information until it files supplemental testimony. This is not permitted by the March 23 Entry.

SC-INT-163, -164; SC-RPD-128, -132, -133. These requests seek information and documents associated with the costs and revenues of the generating plants that are the subject of Rider RRS. FirstEnergy objected to four of these requests on grounds that they "exceed[] the scope" of discovery permitted by the March 23 Entry, and FirstEnergy provided no new information in response to any of these five discovery requests. FirstEnergy's objections are without merit. Each of these discovery requests relates to the financial need of the generating plants, which is one of the factors listed on page 25 of the AEP Ohio Order. These requests also seek information that will shed light on whether the plants are actually at risk of closure, which bears directly on the retirement-related impacts that are also listed in the Order. Because these requests seek information and documents about several factors that the Commission has found that it "may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," Mar. 23 Entry ¶ 4, they fall within the scope of discovery permitted by the March 23 Entry. *See also id.* ¶ 5(b).

FirstEnergy's further objection to INT-163, RPD-128, and RPD-132, that it "would provide any further response to this request through supplemental testimony," is also without merit. These requests seek information and documents within the Companies' possession, custody, or control, and which the Companies are capable of answering now. There is no basis for withholding information responsive to these requests until FirstEnergy's supplemental testimony is due. This is inconsistent with the March 23 Entry's 10-day response time, and it undermines the very purpose of the supplemental discovery period. Mar. 23 Entry ¶¶ 5, 5(b), 6. FirstEnergy must provide timely, complete responses to these discovery requests.

SC-INT-165; SC-RPD-138. These discovery requests seek information and documents related to the proposed transaction underlying Rider RRS, including the Companies' assessment of that transaction. Discovery requests regarding the proposed transaction relate to an issue discussed in the AEP Ohio Order, namely, the possibility that the PPA rider could be terminated early. *See* AEP Ohio Order at 24 (noting that AEP Ohio "seeks to reserve the right to terminate the ESP after two years," and concluding "that the Company has made no offer to ensure that customers receive the alleged long-term benefits of the PPA rider or even a commitment or any type of proposal to continue the rider in subsequent ESP proceedings"). Here, INT-165 and RPD-138 seek discovery on the proposed transaction, which will assist in determining whether the Companies fully investigated the possibility that FES could terminate the agreement early. Given that this was an issue in the AEP Ohio Order, and given that the parties have been given an opportunity to "conduct additional discovery and to evaluate and offer supplemental testimony addressing the AEP Ohio Order, as applied in this case," Mar. 23 Entry ¶ 5, these discovery requests are permissible. FirstEnergy's "exceeds the scope" objections are without merit, and FirstEnergy must provide substantive responses to these requests.

SC-INT-166 to -172. These interrogatories seek information concerning Eileen Mikkelsen's supplemental testimony on the purported benefits of Rider RRS and the Economic Stability Program, including Ms. Mikkelsen's claims that:

- "The Economic Stability Program will help stabilize retail rates and protect against increasing market prices and volatility over the longer term."
- "[T]he Economic Stability Program as implemented through Rider RRS, is a term, condition or charge that relates to bypassibility and default service as would have the effect of stabilizing or providing certainty regarding retail electric service and also is an economic development and job retention program."
- "Customers will benefit from this Stipulation because it is designed to ensure the provision of adequate, safe, reliable and predictably priced electric service. The Stipulation supports economic development and job retention; continues the regulatory principle of gradualism to stabilize rates and helps transition customers to fully market based prices; supports competitive markets; encourages energy efficiency and peak demand reduction; protects at-risk populations through low income programs; and provides benefits to large industrial customers that will allow them to better compete in the global marketplace. The aforementioned provisions, in addition to other comprehensive components of the Application, will benefit customers and are in the public interest."
- The ESP, as modified by the Stipulation, produces various benefits that would not be available under a market-rate offer. *See* Supp. Testimony, page 9, line 14 to page 12, line 18, as well as the table on page 11. (SC-INT-172 inquires about whether these claimed benefits would be affected if the modified ESP proposal is not approved by April 8, 2015.)
- A projection of future rates and savings that certain customer classes would receive under the modified ESP proposal (Att. EMM-1).

Ms. Mikkelsen's broad testimony on these topics relates directly to "the Commission's findings in the AEP Ohio Order." Mar. 23 Entry ¶ 5; *see generally* AEP Ohio Order at 19-26. In particular, Ms. Mikkelsen's supplemental testimony – and Sierra Club's requests regarding such testimony – relate to the specific factors and additional issues listed on page 25 of the AEP Ohio Order, including the financial need of the generating plants, necessity of the plants in light of reliability concerns, economic impacts of a potential plant closure, and whether or not the ESP proposal includes "an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers." Because these interrogatories seek information relating to the Commission's ruling on the PPA rider proposal, they are authorized by the March 23 Entry. *See also* Mar. 23 Entry ¶ 5 (amending procedural schedule "[i]n order to provide the parties in this proceeding sufficient time conduct additional discovery and to evaluate and offer supplemental testimony *addressing the AEP Ohio Order, as applied in this case*") (emphasis added).

SC-INT-173, -174. These requests seek supplementation of several prior discovery responses pursuant to O.A.C. 4901-1-16(D)(5). FirstEnergy's refusal to respond to these requests on grounds that they "exceed[] the scope" of discovery is without merit. The underlying discovery requests – SC-INT-44, SC-RPD-40, SC-INT-135, and SC-RPD-109 – were all timely and properly served. And O.A.C. 4901-1-16(D)(5) plainly requires a party to supplement its responses if "[r]equests for the supplementation of responses are submitted prior to the

commencement of the hearing." Because Sierra Club has submitted these requests for supplementation well before the start of the evidentiary hearing, these supplementation requests are proper. The March 23 Entry makes no attempt to abrogate this provision, so there is no question that FirstEnergy has an obligation to supplement its responses to those prior discovery requests "with subsequently acquired information." O.A.C. 4901-1-16(D).

FirstEnergy's privilege objections are also without merit. As an initial matter, FirstEnergy likely waived any such objections by failing to claim privilege in response to any of the underlying discovery requests. But even if it had not, FirstEnergy has not followed the appropriate process for making a privilege claim. To the extent FirstEnergy objects to the production of any information or document based on privilege, FirstEnergy must provide a privilege log setting forth the information requested in ¶ J of the Instructions.

SC-RPD-134, [redacted]

SC-RPD-137. This request seeks documents and communications with investors and financial institutions regarding the ESP proposal and Rider RRS, the profitability of the generating plants, and possible retirement of those plants. FirstEnergy objected to this request on grounds that it "exceeds the scope" of discovery permitted by the March 23 Entry, and provided no new substantive information, pointing to a website link nearly identical to the one it previously cited in response to SC-RPD-49(c). FirstEnergy's objection to this request is without merit. This request seeks documents and communications relating to the financial need of the generating plants, as well as their possible risk of closure – issues directly related to the factors listed on page 25 of the AEP Ohio Order. Because this request seeks documents about factors that the Commission found that it "may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," Mar. 23 Entry ¶ 4, this request is well within the scope of discovery permitted by the March 23 Entry. *See also id.* ¶ 5(b).

SC-INT-153: This interrogatory seeks information about whether the Companies plan to modify the ESP proposal in light of the AEP Ohio Order. FirstEnergy objected to this request and refused to provide any responsive information. FirstEnergy's objections are without merit. To the extent that FirstEnergy currently intends to modify the ESP proposal, it must provide that

information now, and cannot postpone providing such information until it files supplemental testimony. FirstEnergy's refusal to answer is inconsistent with the March 23 Entry's 10-day response time, and it undermines the entire purpose of the supplemental discovery period. Mar. 23 Entry ¶¶ 5, 5(b), 6. FirstEnergy must provide a timely response to this request.[9]

* * * *

As always, Sierra Club has a strong interest in addressing these discovery deficiencies amicably, without the need for Commission intervention. Given the very short time period remaining for discovery, and the seriousness of the deficiencies in FirstEnergy's responses, it is crucial that these deficiencies be corrected without delay. To avoid the need for a motion to compel, FirstEnergy must promptly provide complete responses to these requests. Please provide written confirmation by no later than 12 p.m. on April 13, 2015, that FirstEnergy is withdrawing its objections and taking these necessary steps. If we do not receive FirstEnergy's written confirmation by that date and time, we intend to file a motion to compel pursuant to O.A.C. 4901-1-23.

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[9] FirstEnergy's further objection, that our use of the word "modify" is vague and ambiguous, is specious. "Modify" is a very commonly-used word in the English language, and FirstEnergy and its counsel are capable of understanding its use in the context of this interrogatory. Indeed, the meaning of this word is so unambiguous that FirstEnergy's attorneys and one of its principal witnesses used it repeatedly in describing how the Stipulation modified the Companies' original ESP Application. *See, e.g.*, Stipulation at 3 ("The undersigned parties recommend that the Commission approve Powering Ohio's Progress, as modified below."); *id.* at 4 (discussing the ESP Application as filed by the Companies "and modified by this Stipulation"); *see also, e.g.*, Mikkelsen Supplemental Testimony at 2:21-23 ("The Signatory Parties expressly agree and recommend that the Commission approve and adopt the ESP IV filing in its entirety as filed by the Companies except as modified in the Stipulation."); *id.* at 4:6-9 (discussing how Rider RRS's "rate design will be modified"). The conclusory "vague and ambiguous" objections asserted in FirstEnergy's other discovery responses are equally without merit.

Please let us know if you have any questions. We look forward to hearing from you soon.

Sincerely,

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April 14, 2015

VIA EMAIL ONLY
Michael Soules
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Re: Case No. 14-1297-EL-SSO

Dear Michael:

Please accept this letter as the Companies' response to your letter dated April 8, 2015 (the "Letter") addressing discovery issues. As explained below, the Companies do not believe their previous responses were deficient in any way, but are willing to address your concerns in an effort to amicably resolve this dispute. There are two substantive issues which address most of the discovery requests at issue, so the Companies will address those before addressing each discovery request at issue.

## I. SIERRA CLUB IS ATTEMPTING TO IMPROPERLY EXPAND THE SCOPE OF DISCOVERY BEYOND THAT PROVIDED IN THE MARCH 23, 2015 ENTRY (THE "ENTRY").

Sierra Club's 9th Set of Discovery Requests, as well as your letter, take the position that any discovery requests are appropriate under the Entry if they conceivably relate to the AEP Ohio Order. *See* Letter p. 3 ("discovery requests related to the Commission's resolution of the PPA proposal...are authorized by the March 23 Entry"). This reading is overbroad. The Entry actually only permitted "[d]iscovery requests regarding the AEP Ohio Order **factors**. . ." Entry, p. 3 (emphasis added). This is much more limited than suggested by Sierra Club, as the AEP Ohio Order only identified 4 "factors":

> "In its filing, AEP Ohio should, at a minimum, address the following **factors**, which the Commission will balance, but not be bound by, in deciding whether to approve the Company's request for cost recovery: financial need of the generating plant; necessity

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

While the AEP Ohio Order identified additional issues the Commission *may* consider regarding AEP Ohio's specific application, none of those issues were identified as "factors" subject to additional discovery or would be necessarily applicable to the Companies proposal.

Unless a topic is specifically identified as one of these four factors it is beyond the permissible scope of discovery under the terms of the Entry. The Companies have properly raised this objection where appropriate in response to Sierra Club's discovery requests, as discussed in detail below.

## II. SIERRA CLUB'S REQUESTS INAPPROPRIATELY ASK THE COMPANIES TO PRESENT THEIR SUPPLEMENTAL TESTIMONY IN RESPONSE TO DISCOVERY REQUESTS INSTEAD OF THROUGH SUPPLEMENTAL TESTIMONY.

Sierra Club repeatedly requests that the Companies essentially provide their supplemental testimony, or information which may be eventually used to support their supplemental testimony, in response to discovery requests rather than through their supplemental testimony. This is inappropriate under the terms of the Entry, seeks the discovery of attorney client privileged or attorney work product information, and is not consistent with Ohio practice.

Under the terms of the Entry, the Companies file their supplemental testimony by May 4, 2015. Entry, p. 3. Despite this clear direction from the Attorney Examiner, Sierra Club's discovery requests seek what amounts to supplemental testimony from the Companies in response to discovery requests. These requests go well beyond seeking simple factual information, and instead ask the Companies to provide a "white paper" narrative response that would amount to new testimony. These requests are therefore an inappropriate attempt to accelerate the deadlines for testimony in the Entry and prejudice the Companies.

In addition to being inconsistent with the terms of the Entry, Sierra Club's requests seek discovery of attorney client privileged or attorney work product information. Simply because Sierra Club has been given the opportunity to conduct discovery on the limited AEP Ohio Order factors does not give Sierra Club a blank check to inquire as to the Companies current and future legal strategy. *See, e.g.*, SC Set 9-INT-153 (asking whether the Companies intend to modify the Application, and if so to explain why or why not the Companies have decided on each modification); SC Set 9-INT-173 and 174 (asking for hours to date for witnesses Rose and

Murley which would show whether the Companies intend these witnesses to file supplemental testimony). These requests are obviously improper attempts to obtain privileged information through discovery rather than simply waiting to see what supplemental testimony is filed by the Companies once those decisions have been made.

Sierra Club's requests for "preliminary" supplemental testimony are also not consistent with Ohio practice. In Ohio cases the applicant may issue discovery requests to intervenors before intervenor testimony has been filed. Even if those requests are otherwise appropriate, the intervenor will object because the request seeks privileged or work product information since the intervenor testimony has not yet been filed. The intervenor will then offer to provide the requested information either in their testimony or in a supplemental response to the discovery request after testimony is filed. Indeed, this was the practice used by several intervenors in this proceeding, including Sierra Club. For example, the Sierra Club responses to Company Interrogatories No. 1-1 and No. 1-2 ironically refuse to identify the subject matter of the testimony to be offered by Sierra Club's unidentified witnesses and states that responsive information would be included in the written testimony to be later filed by Sierra Club. Both these requests and Sierra Club's responses thereto are almost identical to Sierra Club's requests in this proceeding. *See, e.g.*, SC Set 9-INT-153 (seeking subjects of potential future ESP proposals). As the Companies are merely acting in accordance with well-established Ohio practice, which Sierra Club itself has used in this proceeding, the objections raised in your letter lack merit.

Finally, Sierra Club argues that it would be inappropriate to wait until supplemental testimony is filed because this would "circumvent the 10-day response time and effectively thwart the parties' ability to conduct meaningful discovery. . ." Letter, p. 3. Sierra Club also objects because it will not have the ability to use the information obtained through discovery to inform their own supplemental testimony. Letter, p. 4. Not surprisingly, Sierra Club is attempting to impose a burden on the Companies that it would not accept for itself. Sierra Club originally responded to the Companies discovery requests on December 10, 2014. As you may recall, under the procedural schedule in effect at the time, intervenor testimony was not due until December 22, 2014. *See* Entry, October 6, 2014. Sierra Club's response refused to provide any information until intervenor testimony was filed, effectively "thwarting" the Companies opportunity to conduct discovery within the time limits established by the Attorney Examiner. Sierra Club's response strategy also prevented the Companies from conducting any discovery about the substance of Sierra Club's position to be used in depositions or cross examination. Once again, Sierra Club is accusing the Companies of impropriety for doing the exact same things that Sierra Club did.

## III. THE COMPANIES HAVE RESPONDED APPROPRIATELY TO ALL OF THE DISCOVERY REQUESTS.

### A. SC Set 9- INT-153

As stated in your letter, this request "seeks information about whether the Companies plan to modify the ESP proposal in light of the AEP Ohio Order." Letter, p. 9. As discussed in Section II above, there can be no clearer example of a request which seeks the legal strategy of an opposing party. The Companies stand by their objections.

**B. SC Set 9- INT-154 to INT-156**

Each of these interrogatories address issues from the AEP Ohio Order which are beyond the scope of supplemental discovery. *See* Section I above. Therefore, the Companies stand by their objections.

In addition, each of these interrogatories follow an improper format. They each assert an out of context quotation from the AEP Ohio Order. They then ask whether the Application meets this standard through a series of improper and overbroad narrative requests. This is well beyond the appropriate scope of an interrogatory, and therefore the Companies stand by their objections to these requests.

**C. SC Set 9- INT-157**

As discussed above, discovery is limited to the four AEP Ohio Order factors contained on page 25 of the AEP Ohio Order, and therefore this interrogatory is inappropriate. *See* Section I above. This interrogatory is also flawed because it mischaracterizes the Companies response to SC Set 1-INT-6. The Companies are not making contentions in this proceeding that Sammis alone is at risk, or that only Sammis units are at risk. The Companies' only proposal involves all 7 Sammis units. Therefore, the Companies stand by their objections, including without limitation that some of the information sought is irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. In addition to their objections, the Companies further state that they have not conducted the analyses requested in this interrogatory.

[redacted]

**E. SC Set 9- INT-159**

This requests seeks additional information regarding a response to Sierra Club Set 1, which was originally produced on September 30, 2014. The Entry did not permit Sierra Club to conduct a "re-do" of the entire discovery process. Instead, the Entry was specifically limited to information relating to the four AEP factors. *See* Section I. The Companies already have answered discovery requests relating to the allocation of costs and how the costs were determined. *See, e.g.*, IEU Set 1-INT-12, SC Set 1-INT-4. Accordingly, the Companies stand by their objections to this request.

This request is also inappropriate because revealing whether or not the Companies have conducted these analyses would have the effect of revealing privileged and work product communications. For example, subpart (a) asks whether the Companies have evaluated what amount of the costs would be borne by ratepayers. The fact that the calculations have been done, or have not been done, or that RMR has been recently evaluated (subparts (c) and (d)), would shed light on the Companies' legal strategy. Therefore, the information sought in this request includes privilege and work-product information and the Companies' objections are appropriate. *See* Section II.

**F. SC Set 9- INT-160-62; RPD-129-31**

Each of these requests ask whether the Companies have "evaluated" portions of the AEP four factor analysis. If so, Sierra Club asks to be provided with the results of that analysis. If the Companies have not conducted the requested analysis, the requests ask the Companies to explain why they have not conducted this analysis.

This is precisely the type of information which the Attorney Examiner asked be addressed through supplemental testimony. These discovery requests seek to improperly force the Companies to provide incomplete responses rather than fully considered and drafted supplemental testimony addressing these points. For example, suppose the Companies were intending to file supplemental testimony addressing the impact that retirement of Sammis would have on electric prices. Producing the results of this analysis and "explaining the results of that evaluation" as requested in the interrogatory would require the creation of complete supplemental testimony in response to a discovery request. This is improper for the reasons described in Section II above, the Companies stand by their objections to these requests.

In your letter, you attempt to avoid this inescapable conclusion by pointing out that each of these requests first ask whether the analysis has been conducted before asking the Companies to explain the results of the analysis. This does not remedy the problem, because in addition to being properly the subject of supplemental testimony, these requests are also subject to privilege and work-product objections. How the Companies intend to supplement their testimony is well beyond the scope of permissible discovery. By disclosing whether the Companies have or have not conducted certain analysis the Companies would be disclosing their litigation strategy. This is not required under the Commission's rules, and therefore the Companies stand by their objections.

**G. SC Set 9- INT-163-64; RPD-128, -32-33**

These requests seek copies of the most recent forecasts for the Plants. Once again, this is beyond the scope of additional discovery. *See* Section I. These requests are also improper because they are vague and ambiguous. The requests seek a wide array of "forecasts" for the Plants. It is unclear what is meant by the term "forecasts" in these requests, which is an essential

omission. For example, does Sierra Club interpret the term to refer to fully formed long term forecasts as shown in the Lisowski Exhibits, or does Sierra Club interpret the term to mean any forecast provided for any of the years at issue for any of the factors at issue from any source, no matter how credible.

Assuming Sierra Club gives the word "forecasts" the broader meaning, the requests are overbroad and seek information not reasonably calculated to lead to the discovery of admissible evidence. This broader definition would include substantial numbers of documents the Companies do not find credible. For example, some intervenors in this case, including Sierra Club, have arguably provided "forecasts" responsive to these requests. The Companies do not necessarily believe every forecast they have "received" or "reviewed" is credible, and requiring the Companies to disclose this information would be inappropriate. Moreover, it is overbroad to request that any document "reviewed" by "any of the witnesses that have submitted testimony" be produced.

As you know, the Companies' forecasts in this proceeding were conducted using the inputs provided by Company witness Rose through the modeling of Company witness Lisowski. Whether or not the Companies intend to supplement the testimony of these individuals or whether or not any forecasts were prepared in furtherance of litigation is protected by the attorney client privilege and work product doctrines. If the Companies do decide to supplement this testimony then it will be included in their supplemental testimony.

**H. SC Set 9- INT-165; RPD-138**

This request seeks additional information regarding OCC Set 1, which was also provided in September of 2014. It also does not address any of the four AEP factors identified by the Commission, and focuses on the alleged "due diligence" for the transaction already examined in detail in several depositions. Therefore, this request is another improper attempt to completely reopen discovery in contravention of the Entry. Accordingly, the Companies stand by their objections to this request. *See* Section I.

**I. SC Set 9- INT-166-72**

As discussed at length above, Sierra Club has previously been given the opportunity to conduct discovery of Ms. Mikkelsen. This included the opportunity for both written discovery and deposition testimony on the supplemental testimony portions identified in these requests. These requests are therefore beyond the scope of supplemental discovery. *See* Section I.

**J. SC Set 9- INT-173-74**

These two requests seek updated information regarding the retention of Mr. Rose and Ms. Murley. The Companies originally interpreted these as new requests rather than requests for supplementation and therefore appropriately objected to them as beyond the scope of the Entry. However, as your letter has now clarified that these were intended to be requests for

supplementation pursuant to O.A.C. 4901-1-16(D)(5), the Companies will interpret the requests on that basis and will respond accordingly.

Your letter claims that the privilege objections to these requests are inappropriate because the Companies failed to make such an objection to the original request. This argument ignores the timing issue created through the Entry. When these requests were originally issued both Mr. Rose and Ms. Murley had been disclosed as testifying experts. The Companies treated the requests accordingly and disclosed the appropriate information. Sierra Club's current request for updated compensation and hours information seeks an update before the Companies have determined whether or not either witness will be filing supplemental testimony. For example, disclosing Ms. Murley's hours could disclose, one way or another, whether the Companies are currently contemplating supplemental testimony from Ms. Murley. Accordingly, at this time, the requests seek privileged information when they may not have in the past.

Finally, your letter claims that the Companies have not followed the proper process for making a privilege claim through a privilege log. As discussed in our previous correspondence, and shown through Sierra Club's own discovery responses, there is no requirement under Commission practice that a privilege log be provided at the same time as the responses. This can be seen through Sierra Club's own discovery practices where privilege was asserted but no log was provided. *See* Sierra Club responses to Company INT-1-2, 1-4, 1-5, 1-6, etc.

[redacted]

**L. SC Set 9- RPD-137**

The Companies stand by their response to this request. *See* Section I.

Very truly yours,

N. Trevor Alexander

N. Trevor Alexander

**BEFORE**
**THE PUBLIC UTILITIES COMMISSION OF OHIO**

| | | |
|---|---|---|
| **In the Matter of the Application of the 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** | ) ) ) ) ) ) | **Case No. 14-1297-EL-SSO** |

# SIERRA CLUB'S TENTH SET OF INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS TO OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

***REDACTED VERSION***

Pursuant to Sections 4901-1-19, 4901-1-20, and 4901-1-22 of the Ohio Adm. Code, Sierra Club submits the following Interrogatories and Requests for Production of Documents, for response by the Cleveland Electric Illuminating Company, the Ohio Edison Company, and the Toledo Edison Company (collectively, "FirstEnergy" or "Companies") in the above-captioned proceeding. Sierra Club seeks the responses within the time period required by the Public Utilities Commission of Ohio or its authorized representative. Please produce the requested documents in electronic format to:

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## DEFINITIONS

As used in these discovery requests, these words and phrases have the following meanings:

A. The term "FirstEnergy," "Applicants," or "Companies" means the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company, including any affiliated companies (such as, but not limited to, FirstEnergy Solutions Corp. ("FES"), American Transmission Service, Inc., and their affiliates), predecessors-in-interest, employees, and representatives.

B. "ESP Application" means the *Application for Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, which was filed by the Companies on August 4, 2014, in the above-captioned proceeding, and including all witness testimony and attachments thereto, all work papers filed by the Companies, and all Errata filed by the Companies. This definition includes, without limitation, the proposed Retail Rate Stability Rider.

C. "Economic Stability Program" refers to the proposal, in the above-captioned proceeding, in which Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company would enter into a purchase power agreement with FirstEnergy Solutions Corp.; the costs and revenues would then be netted; and the outcome of the acquisition and sale of the generation (credit or cost) would be included in the proposed Retail Rate Stability Rider.

D. "ESP proposal" refers, without limitation, to both the ESP Application and the Economic Stability Program as defined above.

E. "AEP Ohio Order" refers to the Opinion and Order issued by the Public Utilities Commission of Ohio in Case Nos. 13-2385-EL-SSO, 13-2386-EL-AAM on February 25, 2015.

F. "Stipulation" refers to the Stipulation and Recommendation filed in Case No. 14-1297-EL-SSO on December 22, 2014.

G. "Document" refers to written matter of any kind, regardless of its form, and to information recorded on any storage medium, whether in electrical, optical, or electromagnetic form, and capable of reduction to writing by the use of computer hardware and software, and includes all copies, drafts, proofs, both originals and copies either (1) in the possession, custody, or control of the Companies regardless of where located, or (2) produced or generated by, known to or seen by the Companies, but now in their possession, custody, or control, regardless of where located whether or still in existence.

Such "documents" shall include, but are not limited to, applications, permits, monitoring reports, computer printouts, contracts, leases, agreements, papers, photographs, tape recordings, transcripts, letters or other forms of correspondence, folders or similar containers, programs, telex, TWX and other teletype communications, memoranda, reports, studies, summaries, minutes, minute books, circulars, notes (whether typewritten, handwritten or otherwise), agenda, bulletins, notices, announcements, instructions, charts, tables, manuals, brochures, magazines, pamphlets, lists, logs, telegrams, drawings, sketches, plans, specifications, diagrams, drafts, books and records, formal records, notebooks, diaries, registers, analyses, projections, email correspondence or communications and other data compilations from which information can be obtained (including matter used in data processing) or translated, and any other printed, written, recorded, stenographic, computer-generated, computer-stored, or electronically stored matter, however and by whomever produced, prepared, reproduced, disseminated or made.

Without limitation, the term "control" as used in the preceding paragraphs means that a document is deemed to be in your control if you have the right to secure the document or a copy thereof from another person or public or private entity having actual possession thereof. If a document is responsive to a request, but is not in your possession or custody, identify the person with possession or custody. If any document was in your possession or subject to your control, and is no longer, state what disposition was made of it, by whom, the date on which such disposition was made, and why such disposition was made.

For purposes of the production of "documents," the term shall include any copies of all documents being produced, to the extent the copies are not identical to the original, thus

requiring the production of copies that contain any markings, additions or deletions that make them different in any way from the original

H. To "identify" a document means to describe by reference to:

1. The title, heading, or caption of such document, if any;

2. The identifying number(s), letter(s), or combination thereof, if any, and the significance or meaning of such number(s), letter(s), or combination thereof;

3. The date appearing on such document and if no date appears thereon, the answer shall so state and shall give the date, or approximate date, on which each document was prepared;

4. The general nature or description of such document (*i.e.,* whether it is a letter, memorandum, minutes of a meeting, etc.) and the number of pages of which it consists;

5. The name of the person who signed such document and if it was not signed, the answer shall so state and shall give the name of the person or persons who prepared it;

6. The name of the person to whom such document was addressed and the name of each person, other than such addressee, to whom such document, or a copy thereof, was sent;

7. The name of the person who has custody of such document.

I. To "identify" a person means to state the person's name, address, and business relationship (e.g., "employee") to FirstEnergy.

J. "And" and "or" shall be construed either conjunctively or disjunctively as required by the context to bring within the scope of these interrogatories and requests for production of documents any information which might be deemed outside their scope by another construction.

K. "Any" means all or each and every example of the requested information.

L. "Communication" means any transmission or exchange of information between two or more persons, whether orally or in writing, and includes, without limitation, any conversation or discussion by means of letter, telephone, note, memorandum, telegraph, telex, telecopy, cable, email, or any other electronic or other medium.

M. To describe "in detail" means to describe by reference to the underlying specific facts rather than by reference to the ultimate facts or conclusions of law, and wherever possible to use quantitative descriptors in place of qualitative descriptors.

N. "Intervenor" means any party intervening in Case No. 14-1297-EL-SSO other than the Companies.

O. "Person" includes any firm, corporation, joint venture, association, entity, or group of natural individuals, unless the context clearly indicates that only a natural individual is referred to in the discovery request.

P. The terms "PUCO" and "Commission" refer to the Public Utilities Commission of Ohio, including its Commissioners, personnel (including persons working for the PUCO Staff as well as in the Public Utilities Section of the Ohio Attorney General's Office), and offices.

Q. The term "reconcile," when used with respect to two items, means to state whether the two items are the same.

R. "Relating to" or "concerning" means and includes pertaining to, referring to, or having as a subject matter, directly or indirectly, expressly or implied, the subject matter of the specific request.

S. The "testimony" of a witness means the witness's testimony in the above-captioned case, unless a different case number is specified.

T. "Work papers" are defined as original, electronic, machine-readable, unlocked, Excel format (where possible) with formulas intact.

U. "You," and "Your," or "Yourself" refer to the party requested to answer interrogatories or produce documents, including any present or former director, officer, agent, contractor, consultant, advisor, employee, partner, or joint venturer of such party.

V. Each singular shall be construed to include its plural, and vice versa, so as to make the request inclusive rather than exclusive.

W. Words expressing the masculine gender shall be deemed to express the feminine and neuter genders; those expressing the past tense shall be deemed to express the present tense; and vice versa.

## INSTRUCTIONS FOR ANSWERING

A. All information is to be divulged which is in your knowledge, possession, or control, or within the knowledge, possession, or control of your attorney, agents, or other representatives of yours or your attorney.

B. Where an interrogatory calls for an answer in more than one part, each part should be separate in the answer so that the answer is clearly understandable.

C. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them.

D. If any answer requires more space than provided, continue the answer on the reverse side of the page or on an added page.

E. Your organization(s) is requested to produce responsive materials and information within its physical control or custody, as well as that physically controlled or possessed by any other person acting or purporting to act on your behalf, whether as an officer, director, employee, agent, independent contractor, attorney, consultant, witness, or otherwise.

F. Where these requests seek quantitative or computational information (e.g., models, analyses, databases, and formulas) stored by your organization(s) or its consultants in computer-readable form, in addition to providing hard copy (if an electronic response is not otherwise provided as requested), you are requested to produce such computer-readable information, in order of preference:

   a. Microsoft Excel worksheet files on compact disk;

   b. other Microsoft Windows or Excel compatible worksheet or database diskette files;

   c. ASCII text diskette files; and

   d. such other magnetic media files as your organization(s) may use.

G. Conversion from the units of measurement used by your organization(s) in the ordinary course of business need not be made in your response; e.g., data requested in kWh may be provided in mWh or gWh as long as the unit measure is made clear.

H. Unless otherwise indicated, the following requests shall require you to furnish information and tangible materials pertaining to, in existence, or in effect for the whole or any part of the period from June 4, 2012, through and including the date of your response.

I. Responses must be complete when made, and must be supplemented with subsequently acquired information at the time such information is available.

J. In the event that a claim of privilege is invoked as the reason for not responding to discovery, the nature of the information with respect to which privilege is claimed shall be set forth in responses together with the type of privilege claimed and a statement of all circumstances upon which the respondent to discovery will rely to support such a claim of privilege (i.e. provide a privilege log). Respondent to the discovery must a) identify (see

definition) the individual, entity, act, communication, and/or document that is the subject of the withheld information based upon the privilege claim, b) identify all persons to whom the information has already been revealed, and c) provide the basis upon which the information is being withheld and the reason that the information is not provided in discovery.

K. Wherever the response to a request consists of a statement that the requested information is already available to Sierra Club, provide a detailed citation to the document that contains the information. This citation shall include the title of the document, relevant page number(s), and to the extent possible paragraph number(s) and/or chart/table/figure number(s).

L. In the event that any document referred to in response to any request for information has been destroyed, specify the date and the manner of such destruction, the reason for such destruction, the person authorizing the destruction, and the custodian of the document at the time of its destruction.

M. All references to the testimony of a witness includes both that witness's written testimony as well as any attachments to the testimony.

N. Sierra Club reserves the right to serve supplemental, revised, or additional discovery requests as permitted in this proceeding.

## INTERROGATORIES

175. For each of the Sammis, Kyger Creek, and Clifty Creek coal-fired electric generating units, as well as for the Davis-Besse plant:
    a. Identify the estimated retirement date for the plant and/or unit.

**RESPONSE:**

176. Refer to your response to SC-INT-9.
    a. Pursuant to O.A.C. 4901-1-16(D)(5), please supplement your responses to this request, including all attachments, with the most current, up-to-date information available. This includes, but is not limited to, actual data and information for each month of 2014, as well as any updates, corrections, or other modifications to the previously-provided information.

**RESPONSE:**

177. For each month in 2015 (where data is available), and each unit of the units at the Sammis, Kyger Creek, and Clifty Creek plants, identify the:
    a. Capacity factor

b. Availability
c. Heat rate
d. Forced or random outage rate
e. Fixed operating and maintenance ("O&M ") cost
f. Variable O&M cost
g. Fuel cost
h. Environmental capital cost
i. Non-environmental capital cost
j. SO2 emission rate
k. NOx emission rate
l. Mercury emission rate
m. Particulate matter emission rate
n. Hydrochloric acid emission rate

**RESPONSE:**

178. Refer to your response to SC-INT-10.
a. Pursuant to O.A.C. 4901-1-16(D)(5), please supplement your responses to this request, including all attachments, with the most current, up-to-date information available. This includes, but is not limited to, any updates, corrections, or other modifications to the previously-provided projections.

**RESPONSE:**

179. Refer to your response to SC-INT-11.
a. Pursuant to O.A.C. 4901-1-16(D)(5), please supplement your responses to this request, including any attachments, with the most current, up-to-date information available. This includes, but is not limited to, any updates, corrections, or other modifications to the previously-provided information. This also specifically includes, without limitation, any updated information about unplanned outages, as well as Davis-Besse's capacity factor for 2014.
b. Describe the annual cost of fuel at Davis-Besse for 2014.

**RESPONSE:**

180. Refer to your response to SC-INT-13.
a. Pursuant to O.A.C. 4901-1-16(D)(5), please supplement your responses to this request, including all attachments, with the most current, up-to-date information available. This includes, but is not limited to, any updates, corrections, or other modifications to the previously-provided information.

**RESPONSE:**

181. Refer to your response to SC-INT-16.
   a. Pursuant to O.A.C. 4901-1-16(D)(5), please supplement your responses to these requests, including all attachments, with the most current, up-to-date information available. This includes, but is not limited to, actual data and information for each month of 2014, as well as any updates, corrections, or other modifications to the previously-provided information.

**RESPONSE:**

182. For each month in 2014, and each month in 2015 (where available), identify the:
   a. Energy market revenue earned through operation of the Sammis plant;
   b. Energy market revenue earned through operation of the Davis-Besse plant;
   c. Capacity market revenue earned through operation of the Sammis plant;
   d. Capacity market revenue earned through operation of the Davis-Besse plant;
   e. Ancillary services market revenue earned through operation of the Sammis plant;
   f. Ancillary services market revenue earned through operation of the Davis-Besse plant;
   g. Other revenue earned through operation of the Sammis plant;
   h. Other revenue earned through operation of the Davis-Besse plant;
   i. cost of the Sammis plant;
   j. cost of the Davis-Besse plant.

   Note: the 2014 cost and revenue information specifically requested here is being sought to the extent that FirstEnergy does not provide this level of detail in response to SC-INT-181.

**RESPONSE:**

183. For each year of 2008 through 2013, each month in 2014, and each month in 2015 (where available), identify the:
   a. Energy market revenue earned through operation of the Kyger Creek and Clifty Creek plants;
   b. Capacity market revenue earned through operation of the Kyger Creek and Clifty Creek plants ;
   c. Ancillary services market revenue earned through operation of the Kyger Creek and Clifty Creek plants;
   d. Other revenue earned through operation of the Kyger Creek and Clifty Creek plants; and
   e. cost of the Kyger Creek and Clifty Creek plants.

**RESPONSE:**

184. Refer to your response to SC-INT-17.
   a. Pursuant to O.A.C. 4901-1-16(D)(5), please supplement your responses to this request, including all attachments, with the most current, up-to-date information

available. This includes, but is not limited to, any updates, corrections, or other modifications to the previously-provided projections.

**RESPONSE:**

185. Refer to page 8, lines 7-9 of the Moul Testimony.
   a. Identify and describe any "interruptions in each type of major generation resource" in PJM that occurred between November 1, 2014, and March 31, 2015.
   b. Identify and describe any instances between November 1, 2014, and March 31, 2015, in which "[s]peculation in natural gas increased the price of gas-fired generation to phenomenal levels" within PJM.

**RESPONSE:**

186. Refer to page 7, lines 12-13 of the Moul Testimony.
   a. State whether gas resources were constrained between November 1, 2014, and March 31, 2015.
      i. If so, identify the time period of each such constraint, and describe the nature or characteristics of each such constraint.

**RESPONSE:**

187. Refer to page 10, lines 4-7 of the Moul Testimony and your response to SC-INT-21.
   a. State whether Mr. Moul still asserts that "the current gas infrastructure is stressed."
      i. If so, describe the factual basis for that assertion.
      ii. If not, explain why not.
   b. Referring to your response to SC-INT-21(a), state whether transmission constraints caused impacts on deliverability of gas in PJM between November 1, 2014, and March 31, 2015.
   c. Referring to your response to SC-INT-21(c), state whether high demand, extreme cold weather, or gas transportation system equipment unavailability caused a constraint on the gas transportation system, or limited the capability of gas-fired units to generate within PJM, between November 1, 2014, and March 31, 2015.

**RESPONSE:**

188. Refer to page 8, lines 16-20 of the Strah Testimony.
   a. Identify the total capacity within PJM of "interruptible gas generation assets [that] were unable to operate" between November 1, 2014, and March 31, 2015, and the duration of time during which such assets were unable to operate.

b. State whether, between November 1, 2014, and March 31, 2015, gas generation assets were unable to operate due to:
   i. Inconsistencies in scheduling protocols between the natural gas and electricity industries;
   ii. A lack of pipeline infrastructure to support increasing demand for gas; or
   iii. Priority questions between gas used for heating and gas used to create electricity.

**RESPONSE:**

189. Refer to pages 21-28 of the Rose Testimony.
   a. Over the past two years, have FirstEnergy's customers faced any volatility in retail pricing? If so,
      i. Please identify the time periods in which such volatility occurred;
      ii. Please describe the customer class(es) subjected to retail price volatility;
      iii. Please describe the cause of each such instance of volatility;
      iv. Please describe the extent of such volatility, including a quantification (in percent or cents per kWh) by which retail electricity rates changed over the period of volatility.

**RESPONSE:**

190. Refer to pages 33, line 10 through page 34, line 3, and Table 7 of the Rose Testimony.
   a. State whether Mr. Rose has developed, reviewed, or relied upon forward electrical energy prices for the AEP-Dayton Hub or ATSI Zone that are more recent than the prices set forth in the referenced portion of the Rose Testimony. If so:
      i. Identify the most recent of such forward prices for each of the years 2015 through 2019.
      ii. Identify and explain the basis for any change in the forward electrical energy prices identified in response to INT-190(a)(i) as compared to the prices identified in the referenced portion of the Rose Testimony.

**RESPONSE:**

191. Refer to page 34, lines 4 through page 36, line 10 and Attachment II of the Rose Testimony.
   a. State whether Mr. Rose has developed, reviewed, or relied upon any market electrical energy price projections for the AEP-Dayton Hub or ATSI Zone that are more recent than the price projection set forth in the referenced portions of the Rose Testimony. If so:

i. Identify the most recent such price projection for each of the years 2015 through 2034.
ii. Identify any differences between the inputs or assumptions underlying the energy price projection identified in response to INT-191(a)(i), and the inputs and assumptions underlying the projection set forth in the referenced portions of the Rose Testimony.
iii. Explain any changes to the market price projection provided in response to INT-191(a)(i) as compared to the projection set forth in the referenced portions of the Rose Testimony.

**RESPONSE:**

192. Refer to page 38, lines 4 through page 40, line 11 and Attachment III of the Rose Testimony.
a. State whether Mr. Rose has developed, reviewed, or relied upon any projected PJM capacity prices that are more recent than the capacity prices set forth in the referenced portions of the Rose Testimony. If so:
i. Identify the most recent such projected capacity prices for each of the years 2015 through 2034
ii. Identify any differences between the inputs or assumptions underlying the capacity price projection identified in response to INT-192(a)(i), and the inputs and assumptions underlying the projection set forth in the referenced portions of the Rose Testimony.
iii. Explain any changes to the capacity price projection provided in response to INT-192(a)(i) as compared to the projection set forth in the referenced portions of the Rose Testimony.

**RESPONSE:**

193. Refer to page 46, lines 9 through page 50, line 5 of the Rose Testimony, as well as the confidential version of the Rose workpapers.
a. State whether Mr. Rose has developed, reviewed, or relied upon any natural gas price projections that are more recent than the projections set forth in the referenced portions of the Rose Testimony and workpapers. If so:
i. Identify the most recent such projected natural gas prices for each of the years 2015 through 2034.
ii. Identify any differences between the inputs or assumptions underlying the natural gas price projections identified in response to INT-193(a)(i), and the inputs and assumptions underlying the projections set forth in the referenced portions of the Rose Testimony and workpapers.

iii. Explain any changes to the natural gas price projections provided in response to INT-193(a)(i) as compared to the projections set forth in the referenced portions of the Rose Testimony and workpapers.

**RESPONSE:**

[redacted]

**RESPONSE:**

195. Refer to page 55, line 10 through page 56, line 6 and Table 12 of the Rose Testimony, as well as your response to SC-INT-39.

a. State whether Mr. Rose has developed, reviewed, or relied upon projected CO2 prices that are more recent than the CO2 prices set forth in the referenced portions of the Rose Testimony. If so:

i. Identify the most recent such projected CO2 prices for each of the years 2015 through 2034.

ii. Identify any differences between the inputs or assumptions underlying the CO2 price projection identified in response to INT-195(a)(i), and the inputs and assumptions underlying the projection set forth in the referenced portions of the Rose Testimony.

iii. Explain any changes to the CO2 price projection provided in response to INT-195(a)(i) as compared to the projection set forth in the referenced portions of the Rose Testimony.

b. State whether Mr. Rose has developed, reviewed, or relied upon probabilities of CO2 price projections that are more recent than the probabilities set forth in the response to SC-INT-39(b) and the referenced portions of the Rose Testimony. If so:

i. Identify the most recent probabilities of each CO2 price forecast for each of the years 2015 through 2034.

ii. Identify any differences between the inputs or assumptions underlying the probabilities identified in response to INT-195(b)(i), and the inputs and assumptions underlying the probabilities set forth in the response to SC-INT-39(b) and the referenced portions of the Rose Testimony.

iii. Explain any changes to the probabilities provided in response to INT-195(b)(i) as compared to the probabilities set forth in the response to SC-INT-39(b) and the referenced portions of the Rose Testimony.

**RESPONSE:**

196. Refer to the Rose workpapers.
   a. State whether Mr. Rose has developed, reviewed, or relied upon Zonal Coincident Peak Demand and Energy Assumptions projections that are more recent than the projections set forth in the Rose workpapers. If so:
      i. Identify the most recent such projections for each of the years 2015 through 2035.
      ii. Identify any differences between the inputs or assumptions underlying the projections identified in response to INT-196(a)(i), and the inputs and assumptions underlying the projections set forth in the Rose workpapers.
      iii. Explain any changes to the projections provided in response to INT-196(a)(i) as compared to the projections set forth in the Rose workpapers.
      iv. State whether the Zonal Coincident Peak Demand and Energy Assumptions projections provided in response to INT-196(a)(i) reflect the 2015 PJM load forecast report.
         a) If not, please explain why not.

**RESPONSE:**

197. Refer to the Rose workpapers.
   a. State whether Mr. Rose has developed, reviewed, or relied upon Zonal Demand Response and Energy Efficiency projections that are more recent than the projections set forth in the Rose workpapers. If so:
      i. Identify the most recent such projections for each of the years 2015 through 2035.
      ii. Identify any differences between the inputs or assumptions underlying the projections identified in response to INT-197(a)(i), and the inputs and assumptions underlying the projections set forth in the Rose workpapers.
      iii. Explain any changes to the projections provided in response to INT-197(a)(i) as compared to the projections set forth in the Rose workpapers.
      iv. State whether the Zonal Demand Response and Energy Efficiency projections provided in response to INT-197(a)(i) reflect the 2015 PJM load forecast report.
         a) If not, please explain why not.

**RESPONSE:**

198. Refer to the confidential version of the Rose workpapers.
   a. State whether Mr. Rose has developed, reviewed, or relied upon Representative Minemouth Coal Prices projections that are more recent than the projections set forth in the Rose workpapers. If so:

i. Identify the most recent such projections for each of the years 2015 through 2034.
ii. Identify any differences between the inputs or assumptions underlying the projections identified in response to INT-198(a)(i), and the inputs and assumptions underlying the projections set forth in the Rose workpapers.
iii. Explain any changes to the projections provided in response to INT-198(a)(i) as compared to the projections set forth in the Rose workpapers.

**RESPONSE:**

199. Refer to the confidential version of the Rose workpapers.
a. State whether Mr. Rose has developed, reviewed, or relied upon Representative Coal Transportation Rates assumptions that are more recent than the assumptions set forth in the Rose workpapers. If so:
i. Identify the most recent such assumptions.
ii. Identify any differences between the inputs or assumptions underlying the Representative Coal Transportation Rates assumptions identified in response to INT-199(a)(i), and the inputs and assumptions underlying the Representative Coal Transportation Rates assumptions set forth in the Rose workpapers.
iii. Explain any changes to the assumptions provided in response to INT-199(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**RESPONSE:**

200. Refer to the Rose workpapers.
a. State whether Mr. Rose has developed, reviewed, or relied upon PJM Firm Builds assumptions that are more recent than those set forth in the Rose workpapers. If so:
i. Identify the most recent such assumptions.
ii. Identify any differences between the inputs or assumptions underlying the PJM Firm Builds assumptions identified in response to INT-200(a)(i), and the inputs and assumptions underlying the PJM Firm Build assumptions set forth in the Rose workpapers.
iii. Explain any changes to the assumptions provided in response to INT-200(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**RESPONSE:**

201. Refer to the Rose workpapers.
   a. State whether Mr. Rose has developed, reviewed, or relied upon PJM Firm Retirements assumptions that are more recent than those set forth in the Rose workpapers. If so:
      i. Identify the most recent such assumptions.
      ii. Identify any differences between the inputs or assumptions underlying the PJM Firm Retirements assumptions identified in response to INT-201(a)(i), and the inputs and assumptions underlying the PJM Firm Retirements assumptions set forth in the Rose workpapers.
      iii. Explain any changes to the assumptions provided in response to INT-201(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**RESPONSE:**

202. Refer to the Rose workpapers.
   a. State whether Mr. Rose has developed, reviewed, or relied upon Recent PJM Retirements information that is more recent than the information set forth in the Rose workpapers. If so:
      i. Identify the most recent such information.
      ii. Explain any changes to the information provided in response to INT-202(a)(i) as compared to the information set forth in the Rose workpapers.

**RESPONSE:**

203. Refer to the Rose workpapers.
   a. State whether Mr. Rose has developed, reviewed, or relied upon projections of New Plant Capital Costs for either ATSI or AEP-Dayton that are more recent than the "ICF Base Case New Plant Capital Costs (2013$/summer kW-yr) - ATSI & AEP/Dayton" projections set forth in the Rose workpapers. If so:
      i. Identify the most recent such projections for each of the years 2015 through 2037.
      ii. Identify any differences between the inputs or assumptions underlying the projections identified in response to INT-203(a)(i), and the inputs and assumptions underlying the projections set forth in the Rose workpapers.
      iii. Explain any changes to the projections provided in response to INT-203(a)(i) as compared to the projections set forth in the Rose workpapers.

**RESPONSE:**

204. Refer to the Rose workpapers.
   a. State whether Mr. Rose has developed, reviewed, or relied upon New Plant Heat Rates projections that are more recent than the projections set forth in the Rose workpapers. If so:
      i. Identify the most recent such projections for each of the years 2015 through 2035.
      ii. Identify any differences between the inputs or assumptions underlying the projections identified in response to INT-204(a)(i), and the inputs and assumptions underlying the projections set forth in the Rose workpapers.
      iii. Explain any changes to the projections provided in response to INT-204(a)(i) as compared to the projections set forth in the Rose workpapers.

**RESPONSE:**

205. Refer to the Rose workpapers.
   a. State whether Mr. Rose has developed, reviewed, or relied upon assumptions of New Plant Proxy Financing for PJM and/or AEP-Dayton that are more recent than the "ICF New Plant Proxy Financing Assumptions for PJM - AEP/Dayton" projections set forth in the Rose workpapers. If so:
      i. Identify the most recent such assumptions.
      ii. Identify any differences between the inputs or assumptions underlying the New Plant Proxy Financing assumptions identified in response to INT-205(a)(i), and the inputs and assumptions underlying the New Plant Proxy Financing Assumptions assumptions set forth in the Rose workpapers.
      iii. Explain any changes to the projections provided in response to INT-205(a)(i) as compared to the projections set forth in the Rose workpapers.

**RESPONSE:**

206. Refer to the confidential version of the Rose workpapers.
   a. State whether Mr. Rose has developed, reviewed, or relied upon Environmental Regulations assumptions that are more recent than those set forth in the Rose workpapers. If so:
      i. Identify the most recent such assumptions.
      ii. Identify any differences between the inputs or assumptions underlying the Environmental Regulations assumptions identified in response to INT-206(a)(i), and the inputs and assumptions underlying the Environmental Regulations assumptions set forth in the Rose workpapers.
      iii. Explain any changes to the assumptions provided in response to INT-206(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**RESPONSE:**

207. Refer to the Rose workpapers.
   a. State whether Mr. Rose has developed, reviewed, or relied upon Renewable Portfolio Standards assumptions that are more recent than those set forth in the Rose workpapers. If so:
      i. Identify the most recent such assumptions.
      ii. Identify any differences between the inputs or assumptions underlying the Renewable Portfolio Standards assumptions identified in response to INT-207(a)(i), and the inputs and assumptions underlying the Renewable Portfolio Standards assumptions set forth in the Rose workpapers.
      iii. Explain any changes to the assumptions provided in response to INT-207(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**RESPONSE:**

208. Refer to the Rose workpapers.
   a. State whether Mr. Rose has developed, reviewed, or relied upon assumptions regarding PJM Inter-Regional Transmission Expansion or Key High Voltage ATSI Transmission Projects that are more recent than those set forth in the Rose workpapers. If so:
      i. Identify the most recent such assumptions.
      ii. Identify any differences between the inputs or assumptions underlying the PJM Inter-Regional Transmission Expansion and Key High Voltage ATSI Transmission Projects assumptions identified in response to INT-208(a)(i), and the inputs and assumptions underlying the PJM Inter-Regional Transmission Expansion and Key High Voltage ATSI Transmission Projects assumptions set forth in the Rose workpapers.
      iii. Explain any changes to the assumptions provided in response to INT-208(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**RESPONSE:**

209. Refer to page 37, lines 13-14 of the Rose Testimony, your response to SC-INT-32, and the "PJM Firm Builds" table in the Rose workpapers. With regards to the contention that "few new power plants are forecast to be built in western PJM. Most are built in eastern PJM.":

a. State whether the opinion offered in this portion of Mr. Rose's testimony is still accurate.
   i. If not, explain how Mr. Rose's opinion would change, and identify each reason why it would change.
b. State whether the opinion offered in this portion of Mr. Rose's testimony factored in or assumed the planned construction of the Lordstown, Carroll County Energy Generation Facility, and/or Oregon Clean Energy Center natural gas plants.
   i. If so, explain what impact those natural gas plants had on Mr. Rose's testimony.
   ii. If not:
      a. Explain why not.
      b. State whether the planned construction of these natural gas plants would affect the opinion offered in this portion of Mr. Rose's testimony.

**RESPONSE:**

210. Refer to your responses to SC-INT-130, SC-RPD-111, and SC-RPD-116. With regards to FirstEnergy witness Judah Rose:
   a. Pursuant to O.A.C. 4901-1-16(D)(5), please supplement your responses to these requests, including all attachments, with the most current, up-to-date information and documents available. This includes, but is not limited to, the identification and production of any testimony or other evidence that Mr. Rose has presented or offered since FirstEnergy's original responses to these requests. This also includes, but is not limited to, any updates, corrections, or other modifications to the previously-provided information.

   Note: this request does not seek the identification or production of either Mr. Rose's August, 4, 2014 pre-filed testimony in this proceeding, or the deposition testimony that Mr. Rose provided in this proceeding on January 7, 2015.

**RESPONSE:**

211. Refer to your responses to SC-INT-61, SC-INT-68, SC-INT-72, SC-INT-95, SC-INT-103, SC-INT-119, SC-INT-121, SC-INT-128, and SC-INT-137.
   a. Pursuant to O.A.C. 4901-1-16(D)(5), please supplement your responses to each of these requests, including all attachments, with the most current, up-to-date information and documents available. This includes, but is not limited to, any updates, corrections, or other modifications to the previously-provided information and documents.

**RESPONSE:**

## REQUESTS FOR PRODUCTION OF DOCUMENTS

139. Produce any documents identified or referenced in response to any of the following interrogatories: SC-INT-175 through SC-INT-211.

140. Produce all documents that contain any information used, reviewed, or relied on in preparing your responses to any of the following interrogatories: SC-INT-175 through SC-INT-211.

141. Produce all forecasts prepared by, prepared on behalf of, sent or received by, or reviewed by the Companies (including any witnesses appearing on behalf of the Companies in this proceeding, or any member of the EDU Team) between August 4, 2014, and the present of the following:
    a. Natural gas prices;
    b. Coal prices;
    c. Market energy prices, including, without limitation:
        i. On-peak, off-peak, and all-hours energy prices for the AEP Dayton Hub;
        ii. On-peak, off-peak, and all-hours energy prices for the ATSI Zone;
        iii. On-peak, off-peak, and all-hours energy prices for the PJM Western Hub.
    d. Capacity prices;
    e. Carbon prices.

142. Refer to your response to SC-RPD-23. [redacted]

143. Refer to your responses to SC-RPD-12, SC-RPD-90, SC-RPD-94, and SC-RPD-101.
    a. Pursuant to O.A.C. 4901-1-16(D)(5), please supplement your responses to each of these requests, including all attachments, with the most current, up-to-date documents and information available. This includes, but is not limited to, any updates, corrections, or other modifications to the previously-provided documents and information.

April 6, 2015 Respectfully submitted,

*/s/ Michael C. Soules*
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**Attorneys for the Sierra Club**

## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Tenth Set of Interrogatories and Requests for Production of Documents to Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company – Redacted Version* has been served upon FirstEnergy representatives and the following parties via electronic mail on April 6, 2015:

/s/ Michael C. Soules

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**Sierra Club Set 10**
**Witness: Paul A. Harden**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-176**

***This question is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:**

***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 10**
**Witness: Paul A. Harden**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-177**

For each month in 2015 (where data is available), and each unit of the units at the Sammis, Kyger Creek, and Clifty Creek plants, identify the:

a. Capacity factor
b. Availability
c. Heat rate
d. Forced or random outage rate
e. Fixed operating and maintenance ("O&M ") cost
f. Variable O&M cost
g. Fuel cost
h. Environmental capital cost
i. Non-environmental capital cost
j. SO2 emission rate
k. NOx emission rate
l. Mercury emission rate
m. Particulate matter emission rate
n. Hydrochloric acid emission rate

**Response:** Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. This request in part is unduly burdensome, vague and ambiguous, seeks information not in the possession, custody or control of the Companies, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine. ***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 10**
**Witness: Paul A. Harden**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-178**

***This question is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. This request in part is unduly burdensome, vague and ambiguous, seeks information not in the possession, custody or control of the Companies, and seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine. In addition, this request for updates of recent projections is redundant and unduly burdensome and designed to harass and annoy. ***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 10**
**Witness: Paul A. Harden**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-179**

***This question is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrines. ***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 10**
**Witness: Paul A. Harden**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-180**

***This question is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. This request also seeks information not in the Companies' possession, custody or control. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine. ***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 10**
**Witness: Jason Lisowski**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-181**

***This question is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. This request is also vague and ambiguous. This request seeks information protected by the attorney-client privilege and/or attorney work product doctrine. ***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 10**
**Witness: Jason Lisowski**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-182**

***This question is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:**

Objection. As this request indicates in its "note," it is by design redundant and unduly burdensome and designed to harass and annoy. This request is also vague and ambiguous at least relative to parts (i) and (j). This request also seeks information protected by the attorney-client privilege and/or attorney work product doctrine. ***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
Ohio Edison Company, The Cleveland Electric Illuminating Company and
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RESPONSES TO REQUEST

**SC Set 10 – INT-183**

For each year of 2008 through 2013, each month in 2014, and each month in 2015 (where available), identify the:

a. Energy market revenue earned through operation of the Kyger Creek and Clifty Creek plants;
b. Capacity market revenue earned through operation of the Kyger Creek and Clifty Creek plants ;
c. Ancillary services market revenue earned through operation of the Kyger Creek and Clifty Creek plants;
d. Other revenue earned through operation of the Kyger Creek and Clifty Creek plants; and
e. cost of the Kyger Creek and Clifty Creek plants.

**Response:**

Objection. This request seeks information protected by the attorney-client privilege and/or attorney work product doctrine. Subject to and without waiving the foregoing objections, the Companies would provide any response to this request through supplemental testimony.

**Sierra Club Set 10**
**Witness: Donald Moul**
**As to objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
Ohio Edison Company, The Cleveland Electric Illuminating Company and
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Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan

RESPONSES TO REQUEST

**SC Set 10 – INT-185**

Refer to page 8, lines 7-9 of the Moul Testimony.

a. Identify and describe any "interruptions in each type of major generation resource" in PJM that occurred between November 1, 2014, and March 31, 2015.

b. Identify and describe any instances between November 1, 2014, and March 31, 2015, in which "[s]peculation in natural gas increased the price of gas-fired generation to phenomenal levels" within PJM.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. Also, this request seeks information which is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. In addition, this request misstates and mischaracterizes the Companies' testimony in this proceeding. Subject to and without waiving the foregoing objections, the Companies incorporate their response to SC Set 1-INT-19.

**Sierra Club Set 10**
**As to objections: Carrie M. Dunn**

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Ohio Edison Company, The Cleveland Electric Illuminating Company and
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Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan

RESPONSES TO REQUEST

**SC Set 10 – INT-186**

Refer to page 7, lines 12-13 of the Moul Testimony.

a. State whether gas resources were constrained between November 1, 2014, and March 31, 2015.

i. If so, identify the time period of each such constraint, and describe the nature or characteristics of each such constraint.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. Also, this request seeks information which is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. In addition, this request misstates and mischaracterizes the Companies' testimony in this proceeding.

**Sierra Club Set 10**
**Witness: Donald Moul**
**As to objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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RESPONSES TO REQUEST

**SC Set 10 – INT-187**

Refer to page 10, lines 4-7 of the Moul Testimony and your response to SC-INT-21.

a. State whether Mr. Moul still asserts that "the current gas infrastructure is stressed."
   i. If so, describe the factual basis for that assertion.
   ii. If not, explain why not.
b. Referring to your response to SC-INT-21(a), state whether transmission constraints caused impacts on deliverability of gas in PJM between November 1, 2014, and March 31, 2015.
c. Referring to your response to SC-INT-21(c), state whether high demand, extreme cold weather, or gas transportation system equipment unavailability caused a constraint on the gas transportation system, or limited the capability of gas-fired units to generate within PJM, between November 1, 2014, and March 31, 2015.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. Also, this request seeks information which is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. In addition, this request misstates and mischaracterizes the Companies' testimony in this proceeding. Further, this request seeks information protected by the attorney-client privilege and/or attorney work product doctrine. Subject to and without waiving the foregoing objections, the Companies respond as follows: see the direct testimony of Donald Moul. The Companies also incorporate their response to SC Set 1-INT-21. The Companies would provide any further response through supplemental testimony.

**Sierra Club Set 10**
**As to objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
Ohio Edison Company, The Cleveland Electric Illuminating Company and
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RESPONSES TO REQUEST

**SC Set 10 – INT-188**

Refer to page 8, lines 16-20 of the Strah Testimony.

a. Identify the total capacity within PJM of "interruptible gas generation assets [that] were unable to operate" between November 1, 2014, and March 31, 2015, and the duration of time during which such assets were unable to operate.
b. State whether, between November 1, 2014, and March 31, 2015, gas generation assets were unable to operate due to:
    i. Inconsistencies in scheduling protocols between the natural gas and electricity industries;
    ii. A lack of pipeline infrastructure to support increasing demand for gas; or
    iii. Priority questions between gas used for heating and gas used to create electricity.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. Also, this request seeks information which is irrelevant and is not reasonably calculated to lead to the discovery of admissible evidence. In addition, this request misstates and mischaracterizes the Companies' testimony in this proceeding.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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RESPONSES TO REQUEST

**SC Set 10 – INT-189**

Refer to pages 21-28 of the Rose Testimony.

a. Over the past two years, have FirstEnergy's customers faced any volatility in retail pricing? If so,
   i. Please identify the time periods in which such volatility occurred;
   ii. Please describe the customer class(es) subjected to retail price volatility;
   iii. Please describe the cause of each such instance of volatility;
   iv. Please describe the extent of such volatility, including a quantification (in percent or cents per kWh) by which retail electricity rates changed over the period of volatility.

**Response:** Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-190**

Refer to pages 33, line 10 through page 34, line 3, and Table 7 of the Rose Testimony.

a. State whether Mr. Rose has developed, reviewed, or relied upon forward electrical energy prices for the AEP-Dayton Hub or ATSI Zone that are more recent than the prices set forth in the referenced portion of the Rose Testimony. If so:
   i. Identify the most recent of such forward prices for each of the years 2015 through 2019.
   ii. Identify and explain the basis for any change in the forward electrical energy prices identified in response to INT-190(a)(i) as compared to the prices identified in the referenced portion of the Rose Testimony.

**Response:** Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-191**

Refer to page 34, lines 4 through page 36, line 10 and Attachment II of the Rose Testimony.

a. State whether Mr. Rose has developed, reviewed, or relied upon any market electrical energy price projections for the AEP-Dayton Hub or ATSI Zone that are more recent than the price projection set forth in the referenced portions of the Rose Testimony. If so:
   i. Identify the most recent such price projection for each of the years 2015 through 2034.
   ii. Identify any differences between the inputs or assumptions underlying the energy price projection identified in response to INT-191(a)(i), and the inputs and assumptions underlying the projection set forth in the referenced portions of the Rose Testimony.
   iii. Explain any changes to the market price projection provided in response to INT-191(a)(i) as compared to the projection set forth in the referenced portions of the Rose Testimony.

**Response:** Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-192**

Refer to page 38, lines 4 through page 40, line 11 and Attachment III of the Rose Testimony.

a. State whether Mr. Rose has developed, reviewed, or relied upon any projected PJM capacity prices that are more recent than the capacity prices set forth in the referenced portions of the Rose Testimony. If so:
   i. Identify the most recent such projected capacity prices for each of the years 2015 through 2034
   ii. Identify any differences between the inputs or assumptions underlying the capacity price projection identified in response to INT-192(a)(i), and the inputs and assumptions underlying the projection set forth in the referenced portions of the Rose Testimony.
   iii. Explain any changes to the capacity price projection provided in response to INT-192(a)(i) as compared to the projection set forth in the referenced portions of the Rose Testimony.

**Response:** Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-193**

Refer to page 46, lines 9 through page 50, line 5 of the Rose Testimony, as well as the confidential version of the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon any natural gas price projections that are more recent than the projections set forth in the referenced portions of the Rose Testimony and workpapers. If so:
   i. Identify the most recent such projected natural gas prices for each of the years 2015 through 2034.
   ii. Identify any differences between the inputs or assumptions underlying the natural gas price projections identified in response to INT-193(a)(i), and the inputs and assumptions underlying the projections set forth in the referenced portions of the Rose Testimony and workpapers.
   iii. Explain any changes to the natural gas price projections provided in response to INT-193(a)(i) as compared to the projections set forth in the referenced portions of the Rose Testimony and workpapers.

**Response:** Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding.

**Sierra Club Set 10**

Case No. 14-1297-EL-SSO
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RESPONSES TO REQUEST

**SC Set 10 – INT-194**

***This question is Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:**

***Subject to any objections, the requested information is Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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RESPONSES TO REQUEST

**SC Set 10 – INT-195**

Refer to page 55, line 10 through page 56, line 6 and Table 12 of the Rose Testimony, as well as your response to SC-INT-39.

a. State whether Mr. Rose has developed, reviewed, or relied upon projected CO2 prices that are more recent than the CO2 prices set forth in the referenced portions of the Rose Testimony. If so:
   i. Identify the most recent such projected CO2 prices for each of the years 2015 through 2034.
   ii. Identify any differences between the inputs or assumptions underlying the CO2 price projection identified in response to INT-195(a)(i), and the inputs and assumptions underlying the projection set forth in the referenced portions of the Rose Testimony.
   iii. Explain any changes to the CO2 price projection provided in response to INT-195(a)(i) as compared to the projection set forth in the referenced portions of the Rose Testimony.

b. State whether Mr. Rose has developed, reviewed, or relied upon probabilities of CO2 price projections that are more recent than the probabilities set forth in the response to SC-INT-39(b) and the referenced portions of the Rose Testimony. If so:
   i. Identify the most recent probabilities of each CO2 price forecast for each of the years 2015 through 2034.
   ii. Identify any differences between the inputs or assumptions underlying the probabilities identified in response to INT-195(b)(i), and the inputs and assumptions underlying the probabilities set forth in the response to SC-INT-39(b) and the referenced portions of the Rose Testimony.
   iii. Explain any changes to the probabilities provided in response to INT-195(b)(i) as compared to the probabilities set forth in the response to SC-INT-39(b) and the referenced portions of the Rose Testimony.

**Response:**

Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks legal analysis and strategy and other information that is protected by the attorney-client privilege and attorney work product doctrines.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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RESPONSES TO REQUEST

**SC Set 10 – INT-196**

Refer to the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon Zonal Coincident Peak Demand and Energy Assumptions projections that are more recent than the projections set forth in the Rose workpapers. If so:
   i. Identify the most recent such projections for each of the years 2015 through 2035.
   ii. Identify any differences between the inputs or assumptions underlying the projections identified in response to INT-196(a)(i), and the inputs and assumptions underlying the projections set forth in the Rose workpapers.
   iii. Explain any changes to the projections provided in response to INT-196(a)(i) as compared to the projections set forth in the Rose workpapers.
   iv. State whether the Zonal Coincident Peak Demand and Energy Assumptions projections provided in response to INT-196(a)(i) reflect the 2015 PJM load forecast report.
      a) If not, please explain why not.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-197**

Refer to the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon Zonal Demand Response and Energy Efficiency projections that are more recent than the projections set forth in the Rose workpapers. If so:
   i. Identify the most recent such projections for each of the years 2015 through 2035.
   ii. Identify any differences between the inputs or assumptions underlying the projections identified in response to INT-197(a)(i), and the inputs and assumptions underlying the projections set forth in the Rose workpapers.
   iii. Explain any changes to the projections provided in response to INT-197(a)(i) as compared to the projections set forth in the Rose workpapers.
   iv. State whether the Zonal Demand Response and Energy Efficiency projections provided in response to INT-197(a)(i) reflect the 2015 PJM load forecast report.
      a) If not, please explain why not.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrines.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-198**

Refer to the confidential version of the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon Representative Minemouth Coal Prices projections that are more recent than the projections set forth in the Rose workpapers. If so:
   i. Identify the most recent such projections for each of the years 2015 through 2034.
   ii. Identify any differences between the inputs or assumptions underlying the projections identified in response to INT-198(a)(i), and the inputs and assumptions underlying the projections set forth in the Rose workpapers.
   iii. Explain any changes to the projections provided in response to INT-198(a)(i) as compared to the projections set forth in the Rose workpapers.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-199**

Refer to the confidential version of the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon Representative Coal Transportation Rates assumptions that are more recent than the assumptions set forth in the Rose workpapers. If so:
   i. Identify the most recent such assumptions.
   ii. Identify any differences between the inputs or assumptions underlying the Representative Coal Transportation Rates assumptions identified in response to INT-199(a)(i), and the inputs and assumptions underlying the Representative Coal Transportation Rates assumptions set forth in the Rose workpapers.
   iii. Explain any changes to the assumptions provided in response to INT-199(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-200**

Refer to the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon PJM Firm Builds assumptions that are more recent than those set forth in the Rose workpapers. If so:
   i. Identify the most recent such assumptions.
   ii. Identify any differences between the inputs or assumptions underlying the PJM Firm Builds assumptions identified in response to INT-200(a)(i), and the inputs and assumptions underlying the PJM Firm Build assumptions set forth in the Rose workpapers.
   iii. Explain any changes to the assumptions provided in response to INT-200(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-201**

Refer to the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon PJM Firm Retirements assumptions that are more recent than those set forth in the Rose workpapers. If so:
   i. Identify the most recent such assumptions.
   ii. Identify any differences between the inputs or assumptions underlying the PJM Firm Retirements assumptions identified in response to INT-201(a)(i), and the inputs and assumptions underlying the PJM Firm Retirements assumptions set forth in the Rose workpapers.
   iii. Explain any changes to the assumptions provided in response to INT-201(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-202**

Refer to the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon Recent PJM Retirements information that is more recent than the information set forth in the Rose workpapers. If so:
   i. Identify the most recent such information.
   ii. Explain any changes to the information provided in response to INT-202(a)(i) as compared to the information set forth in the Rose workpapers.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-203**

Refer to the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon projections of New Plant Capital Costs for either ATSI or AEP-Dayton that are more recent than the "ICF Base Case New Plant Capital Costs (2013$/summer kW-yr) - ATSI & AEP/Dayton" projections set forth in the Rose workpapers. If so:
   i. Identify the most recent such projections for each of the years 2015 through 2037.
   ii. Identify any differences between the inputs or assumptions underlying the projections identified in response to INT-203(a)(i), and the inputs and assumptions underlying the projections set forth in the Rose workpapers.
   iii. Explain any changes to the projections provided in response to INT-203(a)(i) as compared to the projections set forth in the Rose workpapers.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-204**

Refer to the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon New Plant Heat Rates projections that are more recent than the projections set forth in the Rose workpapers. If so:
   i. Identify the most recent such projections for each of the years 2015 through 2035.
   ii. Identify any differences between the inputs or assumptions underlying the projections identified in response to INT-204(a)(i), and the inputs and assumptions underlying the projections set forth in the Rose workpapers.
   iii. Explain any changes to the projections provided in response to INT-204(a)(i) as compared to the projections set forth in the Rose workpapers.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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RESPONSES TO REQUEST

**SC Set 10 – INT-205**

Refer to the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon assumptions of New Plant Proxy Financing for PJM and/or AEP-Dayton that are more recent than the "ICF New Plant Proxy Financing Assumptions for PJM - AEP/Dayton" projections set forth in the Rose workpapers. If so:
   i. Identify the most recent such assumptions.
   ii. Identify any differences between the inputs or assumptions underlying the New Plant Proxy Financing assumptions identified in response to INT-205(a)(i), and the inputs and assumptions underlying the New Plant Proxy Financing Assumptions assumptions set forth in the Rose workpapers.
   iii. Explain any changes to the projections provided in response to INT-205(a)(i) as compared to the projections set forth in the Rose workpapers.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

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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

RESPONSES TO REQUEST

**SC Set 10 – INT-206**

Refer to the confidential version of the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon Environmental Regulations assumptions that are more recent than those set forth in the Rose workpapers. If so:
   i. Identify the most recent such assumptions.
   ii. Identify any differences between the inputs or assumptions underlying the Environmental Regulations assumptions identified in response to INT-206(a)(i), and the inputs and assumptions underlying the Environmental Regulations assumptions set forth in the Rose workpapers.
   iii. Explain any changes to the assumptions provided in response to INT-206(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-207**

Refer to the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon Renewable Portfolio Standards assumptions that are more recent than those set forth in the Rose workpapers. If so:
   i. Identify the most recent such assumptions.
   ii. Identify any differences between the inputs or assumptions underlying the Renewable Portfolio Standards assumptions identified in response to INT-207(a)(i), and the inputs and assumptions underlying the Renewable Portfolio Standards assumptions set forth in the Rose workpapers.
   iii. Explain any changes to the assumptions provided in response to INT-207(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-208**

Refer to the Rose workpapers.

a. State whether Mr. Rose has developed, reviewed, or relied upon assumptions regarding PJM Inter-Regional Transmission Expansion or Key High Voltage ATSI Transmission Projects that are more recent than those set forth in the Rose workpapers. If so:
   i. Identify the most recent such assumptions.
   ii. Identify any differences between the inputs or assumptions underlying the PJM Inter-Regional Transmission Expansion and Key High Voltage ATSI Transmission Projects assumptions identified in response to INT-208(a)(i), and the inputs and assumptions underlying the PJM Inter-Regional Transmission Expansion and Key High Voltage ATSI Transmission Projects assumptions set forth in the Rose workpapers.
   iii. Explain any changes to the assumptions provided in response to INT-208(a)(i) as compared to the assumptions set forth in the Rose workpapers.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-209**

Refer to page 37, lines 13-14 of the Rose Testimony, your response to SC-INT-32, and the "PJM Firm Builds" table in the Rose workpapers. With regards to the contention that "few new power plants are forecast to be built in western PJM. Most are built in eastern PJM.":

a. State whether the opinion offered in this portion of Mr. Rose's testimony is still accurate.
    i. If not, explain how Mr. Rose's opinion would change, and identify each reason why it would change.
b. State whether the opinion offered in this portion of Mr. Rose's testimony factored in or assumed the planned construction of the Lordstown, Carroll County Energy Generation Facility, and/or Oregon Clean Energy Center natural gas plants.
    i. If so, explain what impact those natural gas plants had on Mr. Rose's testimony.
    ii. If not:
        a. Explain why not.
        b. State whether the planned construction of these natural gas plants would affect the opinion offered in this portion of Mr. Rose's testimony.

**Response:**

Objection. This request is vague and ambiguous and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks legal analysis and strategy and other information that is protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-210** Refer to your responses to SC-INT-130, SC-RPD-111, and SC-RPD-116. With regards to FirstEnergy witness Judah Rose:

a. Pursuant to O.A.C. 4901-1-16(D)(5), please supplement your responses to these requests, including all attachments, with the most current, up-to-date information and documents available. This includes, but is not limited to, the identification and production of any testimony or other evidence that Mr. Rose has presented or offered since FirstEnergy's original responses to these requests. This also includes, but is not limited to, any updates, corrections, or other modifications to the previously-provided information.

Note: this request does not seek the identification or production of either Mr. Rose's August, 4, 2014 pre-filed testimony in this proceeding, or the deposition testimony that Mr. Rose provided in this proceeding on January 7, 2015.

**Response:** Objection. This request exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding.

**Sierra Club Set 10**
**Witness: Paul Harden, Jason Lisowski, Jay Ruberto**
**As to Objections: Carrie M. Dunn**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – INT-211**

***This question is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:**

***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 10**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – RPD-139** Produce any documents identified or referenced in response to any of the following interrogatories: SC-INT-175 through SC-INT-211.

**Response:** See the Companies' responses to SC-Set 10-INTs 175 through 211.

**Sierra Club Set 10**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – RPD-140** Produce all documents that contain any information used, reviewed, or relied on in preparing your responses to any of the following interrogatories: SC-INT-175 through SC-INT-211.

**Response:** See the Companies' responses to SC-Set 10-INTs 175 through 211.

**Sierra Club Set 10**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – RPD-141** Produce all forecasts prepared by, prepared on behalf of, sent or received by, or reviewed by the Companies (including any witnesses appearing on behalf of the Companies in this proceeding, or any member of the EDU Team) between August 4, 2014, and the present of the following:

a. Natural gas prices;
b. Coal prices;
c. Market energy prices, including, without limitation:
    i. On-peak, off-peak, and all-hours energy prices for the AEP Dayton Hub;
    ii. On-peak, off-peak, and all-hours energy prices for the ATSI Zone;
    iii. On-peak, off-peak, and all-hours energy prices for the PJM Western Hub.
d. Capacity prices;
e. Carbon prices.

**Response:** Objection. This request is vague and ambiguous, overly broad and unduly burdensome, and exceeds the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding. It also seeks information protected by the attorney-client privilege and/or attorney work product doctrine.

**Sierra Club Set 10**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – RPD-142** ***This question is Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:** ***Subject to any objections, the requested information is Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Sierra Club Set 10**

Case No. 14-1297-EL-SSO
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

RESPONSES TO REQUEST

**SC Set 10 – RPD-143** ***This question is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

**Response:** ***Subject to any objections, the requested information is Competitively-Sensitive Confidential*** and will be provided to the requesting party, provided that said party has executed a mutually agreeable protective agreement.

EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

April 20, 2015

**BY ELECTRONIC MAIL**

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Re: Case No. 14-1297-EL-SSO (P.U.C.O.); FirstEnergy's Responses to Sierra Club's Ninth and Tenth Sets of Discovery

Dear Mr. Alexander and Ms. Dunn:

We are in receipt of your letter dated April 14, 2015 responding to our April 8, 2015 letter, which identified deficiencies in FirstEnergy's responses to Sierra Club's ninth set of discovery requests. We have also reviewed FirstEnergy's responses to Sierra Club's tenth set of discovery requests, which we served on April 6, 2015. We address below FirstEnergy's improper responses to these two sets of discovery requests.

## I. FirstEnergy's Failure to Respond to Sierra Club's Ninth Set of Discovery

We are disappointed to learn that FirstEnergy has not withdrawn its improper objections, and that it refuses to provide information responsive to these discovery requests.

Before addressing our differences, it appears that we may be near an amicable resolution with respect to two requests, [redacted] and SC-INT-157. If, by the close of business on April 23, 2015, [redacted] and supplements its response to SC-INT-157 with the representation made in the April 14 letter, we will not move to compel responses to those requests. Please confirm no later than 5 p.m. on April 22, 2015, that FirstEnergy will supplement its responses to these two discovery requests.

Apart from this limited area of agreement, it appears that the parties have reached an impasse. Because FirstEnergy refuses to withdraw its objections, and has failed to correct the vast majority of the deficiencies in its responses, Sierra Club's efforts to avoid the need for a

motion to compel are unavailing. Having satisfied our conferral obligations pursuant to O.A.C. 4901-1-23(C), we intend to move forward with a motion to compel responses to many of these requests.

We briefly respond to FirstEnergy's April 14 letter, however, both because that letter mischaracterizes the AEP Ohio Order and the March 23 Entry, and to clarify several legal and factual points. If, upon receiving this letter, FirstEnergy reconsiders its position and agrees to withdraw its objections, please notify us in writing no later than 5 p.m. on April 22, 2015. If, at that time, we do not have written confirmation that FirstEnergy will withdraw its objections and provide complete substantive responses to these requests, we will assume that FirstEnergy is unwilling to do so, and will move to compel those responses.

**A. Scope of Discovery**

In its April 14 letter, FirstEnergy claims that the scope of discovery under the March 23 Entry "is much more limited than suggested by Sierra Club, as the AEP Ohio Order only identified 4 'factors.'" Apr. 14 Letter at 1.[1] FirstEnergy further asserts that "[w]hile the AEP Ohio Order identified additional issues the Commission *may* consider regarding AEP Ohio's specific application, none of those issues were identified as 'factors' subject to additional discovery or would be necessarily applicable to the Companies proposal." *Id.* at 2. FirstEnergy's position misreads both the AEP Ohio Order and the March 23 Entry.

First, FirstEnergy is wrong in claiming that the additional issues identified in the AEP Ohio Order were intended to be discretionary, or that they are specific to AEP Ohio. The Commission made clear that a future PPA rider proposal "must . . . provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit; commit to full information sharing with the Commission and its Staff; and include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers." AEP Ohio Order at 24. Although the AEP Ohio Order references the specific utility whose application is pending, properly read in context the Order indicates that these issues are to be addressed in other PPA rider proposals as well – including FirstEnergy's. Were there any doubt on that score (and there is not), that doubt was erased by the Commission's use of identical language in ruling on Duke Energy Ohio's PPA rider proposal. *See* Opinion and Order, Case Nos. 14-841-EL-SSO, 14-842-EL-ATA, at 47. The March 23 Entry also recognizes that these additional issues are not discretionary, as FirstEnergy claims, but rather are something that a PPA rider proposal "must address." Mar. 23 Entry ¶ 4 (citing AEP Ohio Order at 25-26).

Second, FirstEnergy incorrectly asserts that the March 23 Entry limits the scope of discovery to what FirstEnergy characterizes as "4 factors." Here again, when read in context, it is clear that the March 23 Entry established a much broader scope of discovery than FirstEnergy asserts. We previously explained this on pages 2-3 of our April 8, 2015 letter, and we need not repeat that discussion in full. We note, however, that the Attorney Examiner amended the procedural schedule "[i]n order for the parties to address whether and how the Commission's

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[1] Because FirstEnergy's April 14 letter lacks page numbers, we cite to the letter according to the pagination of the PDF.

findings in the AEP Ohio Order should be considered in evaluating FirstEnergy's application in this proceeding," and he provided the parties with an opportunity to "*conduct additional discovery* and to evaluate and offer supplemental testimony *addressing the AEP Ohio Order, as applied in this case.*" Mar. 23 Entry ¶ 5 (emphasis added). Accordingly, discovery requests concerning the Commission's resolution of the PPA rider proposal, including requests that seek information pertaining to the factors and additional issues identified by the Commission, are authorized by the March 23 Entry.

Third, even assuming, arguendo, that the scope of discovery were limited to the factors presented on page 25 of the AEP Ohio Order, FirstEnergy's characterization of those factors is unreasonably narrow. FirstEnergy ignores the fact that these factors include important sub-issues, such as the generating plants' impact on grid reliability and the potential price and economic development impacts of a retirement. FirstEnergy also fails to recognize that a discovery request may fall within the scope of these factors even if it does not parrot the precise language of the AEP Ohio Order. For example, SC-INT-163, SC-INT-164, SC-RPD-132, and SC-RPD-133 plainly relate to the financial need of the generating plants (among other factors). Despite this, FirstEnergy objected to these requests as beyond the scope of discovery. FirstEnergy's cramped reading of the March 23 Entry is incorrect, and its objections are unreasonable.

**B. 10-Day Response Time**

As explained in our April 8 letter, the March 23 Entry generally requires that responses to discovery requests be served within 10 days. Mar. 23 Entry ¶ 6. We further explained that, consistent with this Entry, if a party has information within its possession, custody, or control, or is otherwise capable of responding to a request, the party cannot postpone its response by claiming that the requested information will be provided in supplemental testimony. Delaying the disclosure of responsive information circumvents the Entry's 10-day response time and thwarts the parties' ability to conduct meaningful discovery regarding the AEP Ohio Order's impact on this case. Yet, that is precisely what FirstEnergy has done throughout its responses to the ninth set of discovery.

The April 14 letter attempts to justify FirstEnergy's repeated breach of the 10-day response time by claiming that the information requested is privileged, and that Sierra Club is seeking "what amounts to supplemental testimony," or "'white paper' narrative response[s]." Apr. 14 Letter at 2. These accusations are simply not accurate. Sierra Club's discovery responses seek factual information and documents that are crucial to key issues in this case, and which fall well within the scope of discovery authorized by the March 23 Entry. By flouting the 10-day response time, and effectively taking the position that *any* discoverable information need not be provided until supplemental testimony is due on May 4, FirstEnergy is the one whose actions are "inconsistent with the terms of the Entry." *Id.*[2]

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[2] FirstEnergy's attempted analogy to Sierra Club's discovery responses misses the mark. Apr. 14 Letter at 3. In contrast to Sierra Club's ninth set of discovery requests, which seek factual information and documents, FirstEnergy's interrogatories 1-1 and 1-2 were inquiring about the identity of witnesses that had not testified, and about the subjects of those witnesses' testimony. The fact that Sierra Club did not

FirstEnergy's privilege arguments are equally unavailing. Although a party may withhold communications and documents that are legitimately protected by the attorney-client privilege or attorney work product doctrine, these privileges cannot be used to shield relevant, factual information from discovery. And yet that is precisely what FirstEnergy is attempting to do here.

Neither privilege applies to Sierra Club's discovery requests. The attorney-client privilege does not apply because that "privilege does not prevent disclosure of the underlying fact, it only protects against compelled disclosure of the communications." *Ingram v. Adena Health Sys.*, 149 Ohio App.3d 477, 2002-Ohio-4878, ¶ 14 (4th Dist. 2002). Nor can FirstEnergy use the attorney work product doctrine to insulate itself from Sierra Club's requests. The work product doctrine applies to "materials prepared in anticipation of trial," such as "notes, documents, or memoranda prepared by the attorney or his representatives in preparation of litigation." *State v. Hoop*, 731 N.E.2d 1177, 1186 (Ohio App. 12th Dist. 1999). The doctrine does not apply to the underlying factual information, such as the information being sought in Sierra Club's ninth and tenth sets of discovery.[3] And the doctrine cannot be used to avoid disclosing whether FirstEnergy has performed certain evaluations or taken other steps related to issues in this proceeding. *See, e.g.*, Entry, *In the Matter of the 1990 Long-Term Forecast Report of Ohio Power Co. and Columbus Southern Power Co.*, Case Nos. 90-660-EL-FOR, 90-659-EL-FOR, 1990 WL 10654842, at *3-*5 (Nov. 20, 1990) (rejecting utilities' claim that work product doctrine shielded them from answering questions about their strategy for complying with prospective environmental legislation); Entry, *In re East Ohio Gas Co.*, Case No. 05-219-GA-GCR, 2006 WL 2128827, ¶ 17 (July 28, 2006) (compelling responses to discovery requests seeking information regarding actions taken by company employees to investigate and address events alleged in lawsuit, and contrasting such information from "conversations between Dominion and its legal counsel as to legal advise [sic] given and associated notes, correspondence, and email created in anticipation of litigation or for trial" that were found to be privileged). FirstEnergy's repeated invocation of privilege, both in its discovery responses and the April 14 letter, is improper.

Despite the lack of merit in FirstEnergy's "supplemental testimony" and privilege claims, we are willing to make several concessions in the interest of reaching an amicable resolution of this dispute. We note that FirstEnergy's arguments focus on three particular discovery requests: SC-INT-153, -173, and -174. Apr. 14 Letter at 2-3. Although we continue to believe that FirstEnergy's objections are misplaced, in the interests of comity we will not move to compel a response to SC-INT-153. In addition, if FirstEnergy agrees to supplement its responses to SC-INT-173 and -174 on May 4, 2015 – at which point FirstEnergy's privilege concern would be

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prematurely disclose such obviously privileged information does not excuse FirstEnergy's obligation to provide the factual information sought in Sierra Club's ninth set of discovery.

[3] The fact that FirstEnergy's counsel may have viewed such information does not transform it into attorney work product. *See DeCuzzi v. Westlake*, 191 Ohio App.3d 816, 2010-Ohio-6169, ¶ 15 (8th Dist. 2010) (rejecting an overbroad reading of the work-product doctrine that would allow "opposing counsel [to] thwart every discovery request by merely reviewing evidence and turning previously discoverable evidence into privileged material").

moot – we will agree not to move forward with a motion to compel on those requests at this time.[4]

### C. Specific Requests

Below we provide a few additional comments regarding specific requests. Unless otherwise noted, we stand by the points made in our April 8 letter, disagree with your objections, and reserve the right to move forward with a motion to compel responses to Sierra Club's ninth set of discovery requests.

SC-INT-154, -155, -156. As explained in our April 8 letter, these requests are authorized by the March 23 Entry. And, as we have explained, there is nothing overbroad or otherwise improper about these interrogatories are framed. FirstEnergy's objections are without merit, and we reserve the right to move to compel responses to these requests.

SC-INT-157. This interrogatory is authorized by the March 23 Entry, and FirstEnergy's objections are without merit. Nonetheless, FirstEnergy's April 14 letter concedes that the Companies "have not conducted the analyses requested in this interrogatory." Apr. 14 Letter at 4. As noted above, if, by the close of business on April 23, 2015, FirstEnergy supplements its response to this request with the representation made in its April 14 letter, we will not move to compel a response to this request.

[redacted]

SC-INT-159. This interrogatory is well within the scope of discovery authorized by the March 23 Entry. Moreover, FirstEnergy's delayed response to this request, and the privilege argument asserted in the April 14 letter, are without merit. This request seeks factual information about events that have already occurred, and there is no legitimate basis for delaying a response. Likewise, FirstEnergy's "re-do" accusation is specious. The fact that a discovery request references an earlier response is irrelevant to whether that request is authorized by March 23 Entry, which this interrogatory plainly is. Accordingly, we reserve the right to move to compel a response to this request.

SC-INT-160, -161, -162; SC-RPD-129, -130, -131. These discovery requests are also authorized by the March 23 Entry, and here again, there is no basis for delaying the disclosure of the requested factual information based on claims of privilege. We therefore reserve the right to move to compel responses to these requests. Nevertheless, if FirstEnergy commits to providing complete substantive responses to these requests by May 4, 2015, we will agree not to move forward with a motion to compel responses to these specific requests at this time.

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[4] To be clear, supplementation of FirstEnergy's responses to SC-INT-173 and SC-INT-174 would require FirstEnergy to update its responses to SC-INT-44, SC-RPD-40, SC-INT-135, and SC-RPD-109.

SC-INT-163, -164; SC-RPD-128, -132, -133. These discovery requests are authorized by the March 23 Entry, and there is no basis for withholding these documents and information based on a claim of privilege. These requests seek factual information that cannot be shielded from discovery through sweeping, and unsupported, claims of privilege.

FirstEnergy's remaining objections are also without merit, including its specious suggestion that the word "forecast" is vague and ambiguous. Apr. 14 Letter at 5-6. "Forecast" is a commonly-used word in the English language, and it meaning is clear in the context of INT-163 and RPD-132.[5] Moreover, the temporal scope of forecasted information sought in these requests is clearly defined within the requests themselves; the requests make clear that they seek the most recent forecast of any of the factors identified in INT-163 for any of the years of 2015 through 2031.[6] We reserve the right to move to compel responses to these requests.

SC-INT-173, -174. These requests are authorized by O.A.C. 4901-1-16(D)(5), and FirstEnergy's objections – including the privilege claim asserted on pages 2-3 and 7 of the April 14 letter – are without merit. The factual information requested here is protected by neither attorney-client privilege nor the attorney work product doctrine. Nevertheless, if FirstEnergy commits to supplementing its responses to SC-INT-44, SC-RPD-40, SC-INT-135, and SC-RPD-109 on May 4, 2015, we will agree not to move forward with a motion to compel responses to SC-INT-173 and -174 at this time.

SC-RPD-134, [redacted]

SC-RPD-137. We have already explained that this discovery request is authorized by the March 23 Entry, and FirstEnergy's objections are without merit. We reserve the right to move to compel responses to this request.

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[5] Not surprisingly, many of FirstEnergy's own witnesses repeatedly use this easily-understood word in their testimony.

[6] If FirstEnergy were genuinely concerned that this request would require it to produce a forecast that has already been filed in this case (like those provided by Sierra Club's witness), it could simply reference those forecasts in its response. In other words, FirstEnergy need not produce a document that has been filed in this case. That concern does not, however, excuse FirstEnergy from providing information and documents responsive to these requests that are within its possession, custody, or control.

SC-INT-153: FirstEnergy's objections to this request, including its failure to provide a substantive response within the 10-day response time, are without merit. Nevertheless, in the interests of comity, we will not move to compel a response to this specific request.[7]

## II. FirstEnergy's Failure to Respond to Sierra Club's Tenth Set of Discovery

As noted above, we have also reviewed FirstEnergy's responses to Sierra Club's tenth set of discovery requests. Here, too, FirstEnergy's responses are completely deficient. Although Sierra Club's requests are well within the scope of the Attorney Examiner's March 23, 2015 Entry, FirstEnergy has objected entirely to most of these requests, and failed to provide any new substantive information in response any of the requests. FirstEnergy's improper responses are inconsistent with the March 23 Entry and have thwarted our ability to "conduct additional discovery and to evaluate and offer supplemental testimony addressing the AEP Ohio Order, as applied in this case." Mar. 23 Entry ¶ 5. To ensure that the parties have an opportunity to evaluate the AEP Ohio Order's ramifications for this case, and to bring itself into compliance with the March 23 Entry, FirstEnergy must promptly withdraw its objections and provide complete responses to Sierra Club's tenth set of discovery.

Although Sierra Club's efforts to avoid a motion to compel have been unsuccessful with respect to its ninth set of discovery, we remain hopeful that we can avoid moving to compel responses to the tenth set. As always, we wish to resolve this discovery dispute amicably, without the need for Attorney Examiner intervention. Part II of this letter is therefore being sent to satisfy our conferral obligations under O.A.C. 4901-1-23(C). If FirstEnergy does not promptly agree to correct its deficient responses to Sierra Club's tenth set of discovery, we intend to file a motion to compel disclosure of the information being withheld.

Given the fast-approaching deadline for supplemental testimony, and the fact that FirstEnergy has failed to provide any new substantive information in response to any of these discovery requests, we require a prompt response to this letter. Please confirm in writing, by no later than 5 p.m. EDT on April 22, 2015, that FirstEnergy will withdraw its improper objections and promptly provide complete responses to Sierra Club's tenth set of discovery. If we do not receive FirstEnergy's written confirmation by that date, we will assume that FirstEnergy refuses to properly respond to these discovery requests, and that further conferral on these issues is futile. At that point, having exhausted all other reasonable means of resolving this issue, we will move forward with a motion to compel.

In responding to Sierra Club's tenth set of discovery requests, FirstEnergy objected entirely to most of the requests, and it provided no new substantive information or documents in

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[7] As Sierra Club explained in its Response to Suppliers' Request to Amend the Procedural Schedule and the Joint Motion for Interlocutory Appeal (Apr. 3, 2015), if FirstEnergy attempts to modify its ESP proposal in its May 4 filings, Sierra Club may be forced to move to amend the procedural schedule. An amended procedural schedule would be necessary to permit the parties an opportunity for discovery and supplemental testimony on FirstEnergy's modified proposal.

response to any of them. *See* Resps. to SC-INT-175 to -211, SC-RPD-139 to -143.[8] FirstEnergy offers three main justifications for refusing to respond to these requests, none of which have merit: *First*, FirstEnergy claims that many of these requests purportedly "exceed[] the scope of additional discovery as described in the March 23, 2015 Entry in this proceeding." FirstEnergy is mistaken. As explained further below, all of Sierra Club's discovery requests relate to the AEP Ohio Order's resolution of the PPA rider proposal, including the factors and additional issues discussed on pp. 25-26 of the Order. Sierra Club's requests therefore fall squarely within the scope of discovery permitted by the March 23 Entry. Mar. 23 Entry ¶¶ 4-5.

*Second*, FirstEnergy claims that the requested information may be provided in supplemental testimony. This objection is also without merit. FirstEnergy's responses to these discovery requests were due on April 16, 2015, while the deadline for supplemental testimony is not until May 4. As we have previously explained, this tactic is inconsistent with the 10-day response time established by the March 23 Entry, and it defeats the Entry's goal of allowing the parties to conduct discovery relating to the AEP Ohio Order.

*Third*, FirstEnergy repeatedly – and erroneously – claims that many of Sierra Club's requests seek "information protected by the attorney-client privilege and/or attorney work product doctrine." These objections are misplaced. As explained above, those privileges cannot be used to shield factual information from discovery, as FirstEnergy attempts to do here. To take but one example, in SC-INT-183, Sierra Club requested revenue and cost information regarding the OVEC plants. Despite the plainly factual nature of the information requested, FirstEnergy nevertheless objected to this request as seeking "information protected by the attorney-client privilege and/or attorney work product doctrine." This is simply not true, and FirstEnergy's assertion of this objection demonstrates that it is using improper privilege objections to withhold relevant, non-privileged information.

Because FirstEnergy's objections are misplaced, FirstEnergy must promptly withdraw its objections and provide complete response to Sierra Club's discovery requests. The deficiencies in FirstEnergy's discovery responses are discussed further below:

SC-INT-175. This interrogatory seeks information that relates to the financial need of the generating plants, which is one of the factors listed on page 25 of the AEP Ohio Order. This request also seeks information that will shed light on whether the plants are actually at risk of closure, which bears directly on the retirement-related impacts that are also listed in the Order. FirstEnergy must provide a timely, complete response to this request.

SC-INT-176, 178, 179, 180, 181. These requests seek supplementation of prior discovery responses pursuant to O.A.C. 4901-1-16(D)(5). FirstEnergy's refusal to respond to these requests on grounds that they "exceed[] the scope" of discovery is without merit. O.A.C.

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[8] For purposes of the discussion in Part II of this letter, we incorporate by reference, as if fully set forth herein, Parts I.A and I.B of this letter, as well as our entire April 8, 2015 letter. We have done so in the interests of efficiency, as there is significant overlap between the objections asserted in response to Sierra Club's ninth set of discovery and those asserted in response to Sierra Club's tenth set.

4901-1-16(D)(5) plainly requires a party to supplement its responses if "[r]equests for the supplementation of responses are submitted prior to the commencement of the hearing." Because Sierra Club has submitted these requests for supplementation well before the start of the evidentiary hearing, these supplementation requests are proper. FirstEnergy must provide timely, complete responses to these requests, and supplement its responses to the prior discovery requests "with subsequently acquired information." O.A.C. 4901-1-16(D).

In any event, these interrogatories are well within the scope of discovery authorized by the March 23 Entry, because they seek up-to-date factual information regarding the past and projected future costs and operating characteristics of the generating units that FirstEnergy is seeking to require its ratepayers to pay for. Such information plainly relates to the financial need of the generating plants; whether the plants are compliant with all pertinent environmental regulations and have plans for compliance with pending environmental regulations; and whether the plants are actually at risk of closure, which bears directly on the retirement-related impacts that are also listed in the Order. These requests also seek information that relates to the condition and performance of the generating plants, which likewise bears on the financial need of the plants, their ability to provide reliability and supply diversity to the grid, and their potential risk for retirement and the resulting impacts of a closure. Because these requests seek information and documents about factors that the Commission has found that it "may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," Mar. 23 Entry ¶ 4, they fall within the scope of discovery permitted by the March 23 Entry. *See also id.* ¶ 5(b).

FirstEnergy's privilege objections, and its refusal to provide responsive information except through supplemental testimony, are also without merit. These requests seek factual information that cannot be shielded from discovery through overbroad privilege claims, and there is no legitimate basis for withholding this information until the deadline for supplemental testimony. Withholding this information is inconsistent with the March 23 Entry's 10-day response time, and it undermines the very purpose of the supplemental discovery period. Mar. 23 Entry ¶¶ 5, 5(b), 6. Finally, FirstEnergy's other objections are also without merit, and regardless cannot justify FirstEnergy's refusal to provide any new substantive information in response to these requests. FirstEnergy must provide timely, complete responses to these requests.

SC-INT-177. FirstEnergy's "exceeds the scope" objection is without merit. This interrogatory is authorized by the March 23 Entry, because it seeks up-to-date factual information regarding the current costs and operating characteristics of the generating units that FirstEnergy is seeking to require its ratepayers to pay for. Such information plainly relates to the financial need of the generating plants; whether the plants are compliant with all pertinent environmental regulations and have plans for compliance with pending environmental regulations; and whether the plants are actually at risk of closure, which bears directly on the retirement-related impacts that are also listed in the Order. This request also seeks information that relates to the condition and performance of the generating plants, which likewise bears on the financial need of the plants, their ability to provide reliability and supply diversity to the grid, and their potential risk for retirement and the resulting impacts of a closure. Because this request seeks information about several factors that the Commission has found that it "may balance, but

not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," Mar. 23 Entry ¶ 4, it falls within the scope of discovery permitted by the March 23 Entry. *See also id.* ¶ 5(b).

FirstEnergy's privilege objections, and its refusal to provide responsive information except through supplemental testimony, are also without merit. This request seeks factual information that cannot be shielded from discovery through overbroad privilege claims, and there is no legitimate basis for withholding this information until the deadline for supplemental testimony. Withholding this information is inconsistent with the March 23 Entry's 10-day response time, and it undermines the very purpose of the supplemental discovery period. Mar. 23 Entry ¶¶ 5, 5(b), 6. Finally, FirstEnergy's other objections are also without merit, and regardless cannot justify FirstEnergy's refusal to provide any new substantive information in response to this request. FirstEnergy must provide a timely, complete response to this request.

SC-INT-182, 183. FirstEnergy's privilege objections, and its refusal to provide responsive information except through supplemental testimony, are without merit. These requests seek factual information that cannot be shielded from discovery through overbroad privilege claims, and there is no legitimate basis for withholding this information until the deadline for supplemental testimony. Withholding this information is inconsistent with the March 23 Entry's 10-day response time, and it undermines the very purpose of the supplemental discovery period. Mar. 23 Entry ¶¶ 5, 5(b), 6. Finally, FirstEnergy's other objections are also without merit, and regardless cannot justify FirstEnergy's refusal to provide any new substantive information in response to these requests.[9] FirstEnergy must provide timely, complete responses to these requests.

SC-INT-184. This request seeks supplementation of a prior discovery response pursuant to O.A.C. 4901-1-16(D)(5). FirstEnergy's refusal to supplement its responses to SC-INT-17 is improper. O.A.C. 4901-1-16(D)(5) plainly requires a party to supplement its responses if "[r]equests for the supplementation of responses are submitted prior to the commencement of the hearing." Because Sierra Club submitted this request for supplementation well before the start of the evidentiary hearing, this supplementation request are proper. FirstEnergy must supplement its responses to the prior request "with subsequently acquired information." O.A.C. 4901-1-16(D).

FirstEnergy's privilege objections, and its refusal to provide responsive information except through supplemental testimony, are also without merit. This request seeks factual information that cannot be shielded from discovery through overbroad privilege claims, and there is no legitimate basis for withholding this information until the deadline for supplemental testimony. If FirstEnergy has updated projections of the revenues and costs that it expects from the Sammis and Davis-Besse plants that it is seeking to require its ratepayers to pay for, such factual information must be provided to the parties now so that the information can be addressed in the parties' supplemental testimony. Withholding this information is inconsistent with the

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[9] SC-INT-182 includes a clarifying note whose express purpose is to limit the scope of the request, and to avoid the possibility of unnecessary duplication in responding to SC-INT-181 and SC-INT-182. The characterization of this note in FirstEnergy's response is both untrue and unnecessarily argumentative.

March 23 Entry's 10-day response time, and it undermines the very purpose of the supplemental discovery period. Mar. 23 Entry ¶¶ 5, 5(b), 6. Finally, FirstEnergy's remaining objections are also without merit, and regardless cannot justify FirstEnergy's refusal to provide any new substantive information in response to these requests. FirstEnergy must provide a timely, complete response to this request.

SC-INT-185, 186, 188. FirstEnergy's "exceeds the scope" objections are without merit. These interrogatories are well within the scope of discovery authorized by the March 23 Entry, because they seek information relating to the necessity of the generating plants, in light of future reliability concerns, and to issues of supply diversity. These requests also seek information important for assessing the potential impacts of a retirement, including impacts to electric prices. FirstEnergy's relevance objection is also unavailing, as these requests seek information regarding whether the reliability and cost impacts of the Polar Vortex during the winter of 2014 that Donald Moul contends help justify FirstEnergy's proposal occurred again during the winter of 2015, which is relevant to whether the Davis-Besse and Sammis plants are necessary for providing reliability and supply diversity to the grid. FirstEnergy's other objections are also without merit, and regardless cannot justify FirstEnergy's refusal to provide any new substantive information in response to these requests. FirstEnergy must provide timely, complete responses to these requests.

SC-INT-187. FirstEnergy's "exceeds the scope" objection is without merit. This interrogatory is well within the scope of discovery authorized by the March 23 Entry, because it seeks information relating to the necessity of the generating plants, in light of future reliability concerns, and to issues of supply diversity. This request also seeks information important for assessing the potential impacts of a retirement of the generating plants, including impacts to electric prices.

FirstEnergy's privilege objections, and its refusal to provide responsive information except through supplemental testimony, are also without merit. This request seeks factual information as to whether the gas infrastructure constraints during the 2014 Polar Vortex that Mr. Moul contends help justify FirstEnergy's proposal have continued through the present day, which is plainly relevant to whether those generating units are necessary for providing reliability and supply diversity to the grid. Such information cannot be shielded from discovery through overbroad privilege claims, and there is no legitimate basis for withholding this information until the deadline for supplemental testimony, as doing so is inconsistent with the March 23 Entry's 10-day response time, and undermines the very purpose of the supplemental discovery period. Mar. 23 Entry ¶¶ 5, 5(b), 6. Finally, FirstEnergy's other objections are also without merit, and regardless cannot justify FirstEnergy's refusal to provide any new substantive information in response to this request. FirstEnergy must provide a timely, complete response to this request.

SC-INT-189. FirstEnergy's "exceeds the scope" objection is without merit. This interrogatory is well within the scope of discovery authorized by the March 23 Entry, because it seeks information related to reliability concerns, supply diversity, and electric price impacts that may result from closure of a generating unit. FirstEnergy must provide a timely, complete response to this request.

SC-INT-190 to [redacted] FirstEnergy's "exceeds the scope" objections are without merit. These requests are authorized by the March 23 Entry, because they seek information and documents that directly affect the financial need of the generating plants, and information that will shed light on whether the plants are actually at risk of closure, which bears on the retirement-related impacts that are also listed in the Order.

As FirstEnergy is aware, Mr. Rose's testimony provided projections and other assumptions that were used by Mr. Lisowski in developing the cost and revenue forecasts attached to his direct testimony (Attachments JJL-1 to -3). To the extent that Mr. Rose has developed, reviewed, or relied upon more recent projections or assumptions, that information would directly impact Mr. Lisowski's forecasts – and thus the "financial need" of the plants. Because these requests seek information about factors that the Commission has found that it "may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," Mar. 23 Entry ¶ 4, they fall within the scope of discovery permitted by the March 23 Entry. *See also id.* ¶ 5(b). FirstEnergy must provide timely, complete responses to these requests.

SC-INT-195 to -209. FirstEnergy's "exceeds the scope" objections are without merit. These interrogatories are authorized by the March 23 Entry, because they seek information that directly affects the financial need of the generating plants, as well as information that will shed light on whether the plants are actually at risk of closure, which bears on the retirement-related impacts that are also listed in the Order. As FirstEnergy is aware, Mr. Rose's testimony provided projections and other assumptions that were used by Mr. Lisowski in developing the cost and revenue forecasts attached to his direct testimony (Att. JJL-1 to -3). To the extent that Mr. Rose has developed, reviewed, or relied upon more recent projections or assumptions, that information would directly impact Mr. Lisowski's forecasts – and thus the "financial need" of the plants. Because these requests seek information about factors that the Commission has found that it "may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," Mar. 23 Entry ¶ 4, they fall within the scope of discovery permitted by the March 23 Entry. *See also id.* ¶ 5(b).

FirstEnergy's privilege objections are also without merit. These requests seek factual information that cannot be shielded from discovery through FirstEnergy's overbroad and unsupported privilege claims. Finally, FirstEnergy's other objections are also without merit, and regardless cannot justify FirstEnergy's refusal to provide any substantive information in response to these requests. FirstEnergy must provide timely, complete responses to these requests.

SC-INT-210. This request seeks supplementation of prior discovery responses pursuant to O.A.C. 4901-1-16(D)(5). FirstEnergy's refusal to respond to this request on grounds that it "exceeds the scope" of discovery is without merit. O.A.C. 4901-1-16(D)(5) plainly requires a party to supplement its responses if "[r]equests for the supplementation of responses are submitted prior to the commencement of the hearing." Because Sierra Club has submitted this request for supplementation well before the start of the evidentiary hearing, this supplementation request is proper. FirstEnergy must provide a timely, complete response to this request, and must supplement its responses to those prior discovery requests "with subsequently acquired information." O.A.C. 4901-1-16(D).

[redacted]

SC-RPD-141. FirstEnergy's "exceeds the scope" objections are without merit. This request is authorized by the March 23 Entry, because it seeks price forecasts that directly affect the financial need of the generating plants, as well as information that will shed light on whether the plants are actually at risk of closure. As FirstEnergy is aware, Mr. Lisowski's cost and revenue projections for the generating plants (Att. JJL-1 to -3) rely on specific price forecasts. To the extent that the Companies or their witnesses have prepared, sent or received, or reviewed more recent price forecasts, that information would directly impact the plants' projected costs and revenues – and thus their "financial need." Because this request seeks information about factors that the Commission has found that it "may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," Mar. 23 Entry ¶ 4, it falls within the scope of discovery permitted by the March 23 Entry. *See also id.* ¶ 5(b).

FirstEnergy's privilege objections are without merit. This request seeks factual information (*i.e.*, forecasts) that cannot be shielded from discovery through overbroad privilege claims, and there is no legitimate basis for withholding this information. Such forecasts cannot be credibly characterized as an attorney-client communication, or as attorney work product. And even if a subset of the forecasts were subject to privilege, that does not excuse FirstEnergy from the duty to (i) search for responsive documents, (ii) produce all non-privileged information responsive to this request, and (iii) provide a privilege log that identifies any forecasts that FirstEnergy claims is privileged. Put simply, FirstEnergy's attempt to use privilege to short-circuit its discovery obligations is improper. Finally, FirstEnergy's other objections are also without merit, and regardless cannot justify FirstEnergy's failure to provide *any* substantive

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[10] FirstEnergy's responses to SC-RPD-139 and SC-RPD-140 are also deficient, because FirstEnergy's responses to SC-INT-175 through SC-INT-211 are improper. When it corrects the deficiencies in its responses to those interrogatories, FirstEnergy must also supplement its responses to RPD-139 and RPD-140 with the requested documents.

information in response to this request. FirstEnergy must provide a timely, complete response to this request.

[redacted]

* * * *

As always, Sierra Club has a strong interest in addressing these discovery deficiencies amicably, without the need for Commission intervention. Given that the deadline for supplemental testimony is only 14 days away, and given the seriousness of the deficiencies in FirstEnergy's responses, it is crucial that these deficiencies be corrected without delay. To avoid the need for a motion to compel, FirstEnergy must promptly provide complete responses to these requests. Please provide written confirmation by no later than 5 p.m. on April 22, 2015, that FirstEnergy is withdrawing its objections and taking these necessary steps. If we do not receive FirstEnergy's written confirmation by that date and time, we intend to file a motion to compel pursuant to O.A.C. 4901-1-23.

Please let us know if you have any questions. We look forward to hearing from you soon.

Sincerely,

Michael C. Soules

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April 22, 2015

VIA EMAIL ONLY
Michael Soules
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1625 Massachusetts Ave. NW
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Washington, DC 20036
msoules@earthjustice.org

Re: Case No. 14-1297-EL-SSO

Dear Michael:

Please accept this letter as the Companies' response to your letter dated April 20, 2015 (the "Letter") addressing discovery issues. As explained below, the Companies do not believe their previous responses were deficient in any way, but are willing to address your concerns in an effort to amicably resolve this dispute. The Companies have previously explained their position at length, so this letter will only address areas of agreement and the new issues raised in the Letter.

## I. SIERRA CLUB NINTH SET OF DISCOVERY

### A. Issues Potentially Resolved.

#### 1. SC Set 9-INT-153,

Your Letter indicates that Sierra Club does not intend to pursue a motion to compel regarding SC Set 9-INT-153.[1]

#### 2. SC Set 9-INT-157

Your Letter also states that Sierra Club will not be filing a motion to compel regarding SC Set 9-INT-157 if the Companies issue a formal supplementation of this response in

[1] Letter, p. 7.

accordance with our discussions by April 23, 2015.[2] The Companies will supplement those responses.

### 3. SC Set 9-INT-160-62, RPD 129-31

SC Set 9-INT-160-62 and RPD-129-31 ask whether the Companies have "evaluated" portions of the AEP four factor analysis and requests either the results of that "evaluation" or an explanation for why that "evaluation" was not performed. Your Letter indicates that if the Companies commit to providing complete substantive responses to these requests by May 4, 2015, Sierra Club will not move forward with a motion to compel "at this time."[3] It is unclear what Sierra Club is proposing with regard to these requests. In their initial responses the Companies objected to providing privileged information and indicated that they would be providing "any response to this request through supplemental testimony." If Sierra Club is now accepting that responses to these requests, if any, will be provided through supplemental testimony then the parties may be able to reach agreement on these requests. However, if Sierra Club is demanding supplemental responses by May 4, 2015 even if the supplemental testimony date changes, or if Sierra Club is demanding some sort of narrative "white paper" response in addition to supplemental testimony on these points, then the parties have not reached agreement.

To be clear, the Companies anticipate providing any supplemental information through supplemental testimony, not through "whitepaper" narrative responses to these requests. Supplemental responses would reference that supplemental testimony. Please let me know if this is acceptable.

### 4. SC Set 9-INT-173-74

These requests seek updated information for witnesses Rose and Murley pursuant to O.A.C. 4901-1-16(D)(5) for requests SC Set 9-INT-173-74 (referencing SC-INT-44, INT-135, RPD-40, and RPD-109). Your Letter indicates that this dispute will be resolved if these requests are supplemented by May 4, 2015.[4] Similar to the requests above, the Companies are willing to accept this resolution if Sierra Club agrees to change the "May 4, 2015" due date to a date within 2 business days of the date the Companies file supplemental testimony.

## B. Areas Of Dispute

### 1. Sierra Club Is Attempting To Expand The Scope Of Discovery

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[2] Letter, p. 5.
[3] Letter, pp. 5-6.
[4] Letter, p. 6.

As previously explained in detail by the Companies in their April 14, 2015 letter, Sierra Club is attempting to expand the scope of discovery beyond that ordered in the Entry. The Companies have previously explained their position at length and disagree with Sierra Club's analysis in the Letter.[5]

**2. Sierra Club Is Attempting To Obtain Supplemental Testimony Through Discovery.**

In their responses to Sierra Club's 9th Set of Discovery Requests, the Companies objected to requests which sought supplemental testimony through discovery rather than under the procedural schedule established by the Attorney Examiner. In your Letter, you claim that Sierra Club's requests do not seek this information, and instead seek "factual information and documents" only.[6] This is not accurate. Even leaving aside the requests which were either withdrawn or resolved thus far, the remaining requests still seek lengthy narrative testimony rather than "factual information." For example, SC Set 9-INT-154 provides an out of context citation to the AEP Ohio Order. The interrogatory then asks whether the proposal meets this standard, how the proposal meets this standard, to identify each provision in the proposal which meets this standard, each change to the proposal which would be needed to meet this standard, and how and when the Companies plan to change the ESP Application to meet the standard. Sierra Club is not seeking narrow "factual information" about the case. It is asking for white paper narrative responses, which is why the Companies have appropriately objected to these requests and stand by their objections.

Sierra Club then claims the Companies have taken the position that no discoverable information needs to be provided prior to the due date for supplemental testimony.[7] That is not correct. The Companies are willing to provide responses to appropriate discovery requests within the scope of discovery prior to the due date for supplemental testimony in accordance with the Attorney Examiner's order.

**3. Sierra Club Is Not Entitled To Privilege And Work Product Information.**

The Companies have objected on privilege grounds because these requests seek attorney work product information prepared in preparation for trial. Sierra Club takes issue with this objection by claiming once again that its requests seek "factual information." As discussed above, this characterization is simply not accurate. Moreover, Sierra Club is objecting to the Companies use of the exact same response format as was used by Sierra Club in response to Companies Interrogatories 1-1 and 1-2. There is no substantive difference between the requests

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[5] Letter, pp. 2-3.
[6] Letter, p. 3.
[7] Letter, p. 3.

at issue here and those requests. If it was appropriate for Sierra Club to assert privilege there without providing a log it is appropriate for the Companies to do the same here. Both sets of requests sought information to be used in later filed testimony, and both responding parties asserted privilege and work product objections. Sierra Club cannot ask the Companies to do something it was not willing to do itself.

Even if Sierra Club were seeking narrow factual information (which it is not), the Letter misstates the Companies position and arguments on privilege and work product. The Companies are not asserting attorney client privilege "to prevent disclosure of the underlying fact[s]" of this case.[8] Instead, the Companies are asserting privilege with regard to documents and information which constitute or reveal attorney-client communications. Similarly, the Companies are not arguing that any document is protected by the work-product doctrine merely because "counsel may have viewed such information."[9] Instead, the Companies are asserting work-product objections for documents and information prepared in anticipation of litigation by or for counsel, as well as documents or information which would reveal attorney mental impressions. *Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 154, 161 (D.D.C. 1999)(holding that documents are protected by work product doctrine when they reveal attorney's advice); *GE Capital Corp. v. DirecTV, Inc.*, 184 F.R.D. 32 (D. Conn. 1998)(denying motion to compel as to a majority of the documents in dispute, holding that although they were relevant they were privileged under the work-product doctrine and/or attorney-client privilege); *Kelly v. Ford Motor Co. (In re Ford Motor Co.)*, 110 F.3d 954 (3d Cir. Pa. 1997)(reversing the district court's order calling for the disclosure of certain documents and holding that appellants agenda documents were work product under Fed. R. Civ. P. 26(b)(3)). It is well established in Ohio law, including in decisions by Attorney Examiner Price, that such information is protected from disclosure in discovery. *See* Case No. 12-426-EL-SSO, January 30, 2013 hearing transcript (filed February 13, 2013), pp. 141-44 (ruling that DP&L was not required to produce financial forecast based on counsel's expectations of results of ESP proceeding).

### 4. Remaining Requests.

The Companies have explained their position on all other requests at length. As Sierra Club has not offered any new arguments regarding those requests, the Companies stand by their prior responses.

## II. SIERRA CLUB'S TENTH SET OF DISCOVERY REQUESTS

As acknowledged at pages 7-8 of your Letter, the issues with the 10th set of discovery requests largely mirror those of the 9th set of discovery. Therefore, as you did in your Letter, the

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[8] Letter, p. 4.
[9] Letter, p. 4.

Companies hereby incorporate all of our prior correspondence on these topics by reference.[10] This includes, without limitation, our communications on the appropriate scope of discovery, attorney client privilege and work product, requests for overbroad narrative "white paper" responses, and requests which seek supplemental testimony via interrogatory instead of pursuant to the case schedule. As the parties have already addressed these issues at length, the Companies will only address new issues in the remainder of this letter.

**A. SC Set 10-INT-175**

It is unclear why Sierra Club has objected to this response. While Sierra Club may not agree with the objection asserted by the Companies, there can be no dispute that the Companies have provided a substantive response to this request by reference to OCC Set 9-INT-199. In light of the simplicity of this response, it appears that Sierra Club's inclusion of this response in the Letter may have been an error.

**B. SC Set 10-INT-176-81.**

These requests seek information protected by the attorney client privilege and work product doctrines. Accordingly, discovery is inappropriate on these topics at this point. Some of these requests are also beyond the scope of additional discovery as described in the Entry. As discussed above, the Entry limits additional discovery to the four AEP Ohio Order factors. For the portions of these requests which go beyond those four factors the Companies have properly objected as they are beyond the scope of permitted discovery at this point.

For SC Set 10-INT-176, 178-81, your Letter claims that Sierra Club is merely requesting supplementation of prior discovery responses in these requests. However, this assumes that the general rule provided in O.A.C. 4901-1-16(D)(5) was not superseded by the terms of the Entry. OAC 4901-1-24(A) and OAC 4901-1-26(A)(1)(b) give the Attorney Examiner the right to regulate discovery before the Commission. Paragraph 5(b) of the Entry permits only discovery requests "regarding the AEP Ohio Order factors." The Entry does not permit requests for supplemented prior discovery responses unrelated to these factors, and these requests all go beyond those factors. SC Set 10-177 seeks 2015 information similar to that requested in SC Set 10-176 for 2013 and 2014. The information sought in this request is also beyond the scope of additional discovery.

Finally, some of the subparts of these requests seek information which is unduly burdensome, vague, and ambiguous. The Companies stand by their objections on those portions of Sierra Club's requests.

**C. SC Set 10-INT-182-83**

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[10] Letter, p. 8.

*See* response to SC Set 10-INT-176-81.

**D. SC Set 10-INT-184**

The Companies have previously provided their projections for the Plants. These projections were also identified in this response. The Companies have asserted privilege and work product objections to reflect that to the extent additional forecasts were created for supplemental testimony then they would not be appropriate for discovery at this time. [redacted]

**E. SC Set 10-INT-185-209** [redacted]

These requests all seek information completely unrelated to the four AEP Ohio factors, or even any of the other issues discussed in the AEP Ohio Order. For example, SC Set 10-INT-189 discusses price volatility. This is well beyond the appropriate scope of discovery and the Companies have appropriately objected on that basis. The Companies stand by their objections to these requests.

**F. SC Set 10-INT-210** [redacted]

As discussed above, the Entry limited the obligation to supplement responses to those issues identified in the Entry. The Companies are also not required to disclose attorney client privilege or work product information. The Companies therefore stand by their objections to these requests.

**G. SC Set 10-RPD-141**

*See* prior communications regarding SC-INT-163.

## III. CONCLUSION

If you have any questions or concerns about this letter please feel free to contact me.

Very truly yours,

N. Trevor Alexander

**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** | ) ) ) ) ) ) ) | **Case No. 14-1297-EL-SSO** |

## AFFIDAVIT OF MICHAEL SOULES

I, Michael Soules, declare under penalty of perjury that the following statements are true and correct to the best of my knowledge, information, and belief:

1. I represent Sierra Club in the above-captioned proceeding.

2. On March 27, 2015, Sierra Club served its ninth set of discovery requests on the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "Companies").

3. On April 6, 2015, FirstEnergy served its objections and responses to Sierra Club's ninth set of discovery requests.

4. On April 8, 2015, we sent a letter to FirstEnergy's counsel explaining why FirstEnergy's objections were misplaced, and requesting that the Companies withdraw their improper objections and provide complete responses to Sierra Club's ninth set of discovery.

5. Counsel for FirstEnergy responded to that letter in a letter dated April 14, 2015. Although FirstEnergy agreed to supplement a few of its responses, it disagreed with the points raised in our letter and stood by its objections to the vast majority of Sierra Club's requests.

6. Meanwhile, on April 6, 2015, Sierra Club served its tenth set of discovery requests on FirstEnergy.

7. On April 16, 2015, FirstEnergy served its objections and responses to Sierra Club's tenth set of discovery requests.

8. On April 20, 2015, we sent a letter to FirstEnergy's counsel responding to the points raised in FirstEnergy's April 14 letter, and explaining why FirstEnergy's continued objections to our ninth set of requests were misplaced. We also explained that FirstEnergy's objections to our tenth set of discovery were misplaced, and requested that the Companies withdraw their improper objections and provide complete responses to Sierra Club's tenth set of discovery.

9. Counsel for FirstEnergy responded to our letter in a letter dated April 22, 2015. Again, FirstEnergy disagreed with the points raised in our letter and stood by its objections to the vast majority of Sierra Club's requests.

10. Through the conferral process, Sierra Club and FirstEnergy managed to reach an amicable resolution of their initial disagreement with respect to five interrogatories: SC-INT-157, 158, 173, 174, and 184. However, FirstEnergy has refused to withdraw its objections to the large majority of Sierra Club's requests and has refused to provide any new substantive information in response those requests.

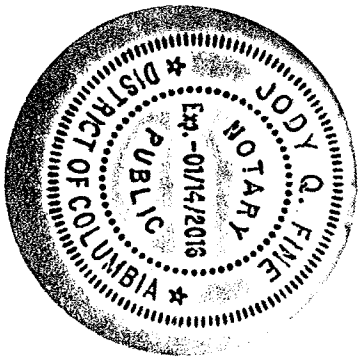
11. Based on FirstEnergy's objections to our discovery requests, and its responses to our April 8 and April 20 letters, I believe that FirstEnergy will not withdraw its objections and provide complete, substantive responses to our discovery requests without an order from the Attorney Examiners compelling such responses.

Michael C. Soules

Sworn to or affirmed before me and subscribed in my presence this 27th day of April, 2015, in Washington, D.C.

Notary Public

JODY Q. FINE
Notary Public, District of Columbia
My Commission Expires January 14, 2016



Summary: Motion to Compel Discovery (Redacted)and Exhibits electronically filed by Mr. Christopher J. Allwein on behalf of SIERRA CLUB