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**

REPLY MEMORANDUM OF FIRSTENERGY SOLUTIONS CORP. TO SIERRA CLUB'S MEMORANDUM CONTRA MOTION TO QUASH SUBPOENA DUCES TECUM

I. INTRODUCTION

Sierra Club's memorandum contra FirstEnergy Solution Corp.'s ("FES") motion to quash Sierra Club's subpoena suffers from a disappointing lack of candor to the tribunal. Reading Sierra Club's memorandum contra, one would think that: (1) FES has produced only four documents; (2) in combination with the Companies, FES has wholly stifled Sierra Club from getting any information about this case; and (3) FES is hiding documents (indeed, Sierra Club contends, there is "strong evidence" that is so). None of this is true – indeed, as the ***facts*** of record show, it is not even close to being true.

Sierra Club would have the Attorney Examiner and the Commission ignore ***facts*** demonstrated in FES's motion, ***facts*** that Sierra Club does not even bother to deny. To wit:

- Sierra Club has received discovery (via interrogatory answers and documents) on every topic presented by the subpoena.
- The discovery that Sierra Club has received is voluminous.

- Practically all of the discovery that Sierra Club has received on the subpoena topics originated from FES.
- Sierra Club has deposed or had the opportunity to depose witnesses on all of the topics.

Not content to misrepresent the record on discovery, Sierra Club compounds its dubious position by misreading case law, the Attorney Examiner's March 23 Entry in this case and the deposition testimony. Sierra Club thus fabricates an argument that says, in essence, there really should not be any limit on what Sierra Club can request. And further, Sierra Club contends, it is entitled to more discovery, notwithstanding what has been produced already, because there "most likely" is more to discover.

But again, the ***facts*** militate against Sierra Club. As FES previously demonstrated, Sierra Club has everything responsive to the subpoena with one exception: materials that FES and the Companies have developed and may develop as part of the Companies' efforts to prepare supplemental testimony pursuant to the March 23 Entry. This "new" material is work product, if not privileged as attorney-client communications.

Sierra Club offers irrelevant and wrong arguments in response. For example, Sierra Club contends that it is only seeking "information" that cannot be work product. But the ***fact*** is Sierra Club's subpoena is a subpoena "duces tecum" that seeks documents. Further, Sierra Club acknowledged in other pleadings in this case that the very type of "new" materials that may be responsive to the subpoena are work product and are entitled to protection until testimony is filed.

In sum, when one gets past the half-truths, misrepresentations and unsupported argument, there is only one conclusion that can be made: Sierra Club's subpoena and its attempt to enforce it have been a giant waste of time. FES's motion to quash should be granted.

II. THE APPLICABLE LEGAL STANDARDS

As previously demonstrated, "under Rule 45(C)(3) of the Ohio Rules of Civil Procedure, a court may quash a subpoena if it subjects a party to an undue burden." *Perry v. Whitaker*, Case No. WD-00-065, 2001 Ohio App. LEXIS 2745 at *13. Further, Rule 45 "provides that when a party moves the court to quash a subpoena, the court shall do so unless the party requesting the subpoena shows a substantial need for the material that cannot be met otherwise without undue hardship." *Id*. at *14. *See also, Martin v. The Budd Company*, 128 Ohio App. 3d 115, 120 (Summit Cty. 1998) (reversing failure to grant motion to quash due to subpoenaed party's "nonparty status" and failure by subpoenaing party to demonstrate that information sought was not available "from other sources"); *Perry* at *13-14 (affirming grant of motion to quash, in part, because subpoenaing party "failed to show that their need for the material could not be met through other less burdensome means."); *Wright v. Perioperative Med. Consultants*, Case No. C-060586, 2007-Ohio-3090, ¶¶ 11, 18 (Hamilton Cty. 2007) (reversing trial court's failure to grant motion to quash and holding that requiring "nonparty" to produce reports that were "available elsewhere…would be unduly burdensome").

It cannot be seriously disputed that subpoenas that seek duplicative material are, by definition, burdensome and therefore should be quashed. Under Ohio law, there is no obligation to respond to duplicative discovery requests contained in a subpoena. *See, e.g.*, *In re Gerber Children*, 2008-Ohio-1044 at ¶44 (Stark Cty. Mar. 10, 2008), (finding no "error in the trial court's quashing of [a] subpoena which would have been duplicative of the discovery [previously] provided."); *Perry* at *14 (Wood Cty. June 22, 2001) (affirming grant of motion to quash, in part, because subpoenaed witness had already been deposed on same topics contained in subpoena).

For support regarding the alleged reasonableness of the subpoena, Sierra Club cites three Commission decisions: *In re the Complaint of Westside Cellular v. GTE Mobilnet Inc.*, Case No. 93-1758-RC-CSS, Entry (Dec. 18, 1998); *In the Matter of the Application of Duke Energy Ohio, Inc. to Establish and Adjust the Initial Level of its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR (June 2, 2010); and *Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases*, Case No. 03-93-EL-ATA, Entry (Jan. 2, 2007). Sierra Club also cites one Ohio decision, *Future Communications, Inc. v. Hightower*, 2002-Ohio-2245 (Franklin Cty. May 9, 202). All of these cases are easily distinguishable.

Westside Cellular can be readily dispensed with. It involved the perfunctory denial of a motion to quash by an Attorney Examiner in a complaint case. The ruling came during the course of a "telephone conference call," the contents of which are not disclosed by the entry. *Westside Cellular* at 2. No reasoning or analysis regarding the decision to quash the subpoena at issue was provided. As such, *Westside Cellular* can hardly be relied upon here as a precedential guide.

In *Duke Reliability Rider*, Duke Energy Ohio ("DEO") sought to justify its cost recovery for storm restoration damages related to Hurricane Ike. An intervenor subpoenaed DEO's Indiana affiliate to produce documents to determine the extent to which Ohio ratepayers were being charged to recover the Indiana affiliate's costs. *Duke Reliability Rider* at 2-3. Indeed, Staff had uncovered evidence of expenses related to storm damage outside of Ohio being charged to Ohio ratepayers. *Id.* at 5. As such, the Commission upheld the subpoena.

This decision has little applicability here. Neither Staff nor any other intervenor, including Sierra Club, has produced *any* evidence whatsoever that FES or the Companies have been anything less than forthright in their production of responsive, nonprivileged documents.

As demonstrated further below, the alleged "inconsistencies" and "evidence" cited to support the speculation that non-privileged responsive documents exist is based on nothing.

In *Consolidated Duke Energy Ohio*, an intervenor subpoenaed a competitive affiliate of DEO to obtain information related to cost-recovery under the utility's rate stabilization plan. *Consolidated Duke Energy Ohio* at 1. But *Consolidated Duke Energy Ohio* actually supports FES's position. In that decision, the Attorney Examiner narrowed a subpoena because "it should have been drafted to request only documents that are in the possession and control" of the affiliate. *Id.* at 4. Thus, the subpoena at issue in *Consolidated Duke Energy Ohio* was, as here, beyond the scope of permissible discovery. Further, in *Consolidated Duke Energy Ohio* no one disputed that there were actually responsive documents in the affiliate's possession or control that had not been produced or could not be produced by DEO. As FES has shown on two separate occasions (both here and in its Motion to Quash), that is not the case here. Sierra Club has already been provided with all responsive, nonprivileged documents. *Consolidated Duke Energy Ohio* thus does nothing to aid Sierra Club's cause.

In *Future Communications*, a judgment creditor attempted to enforce a judgment against the owners of a company. A third party related to the owners (their father) sought to quash the judgment creditor's subpoena because it allegedly imposed an undue burden. *Id.* at ¶17. The denial of the motion to quash was upheld because "given the many attempts [the judgment creditor] had already made at obtaining such information from the [owners], and the finding by the trial court that the [owners] had been less than truthful in those previous attempts" a finding of "substantial need" made sense. *Id.* at ¶18.

Here, unlike *Future Communications*, neither the Companies nor FES have any way shirked their discovery obligations vis-a-vis Sierra Club or any other intervenor. A vast amount

of information has been provided to Sierra Club and other intervenors. FES has no other responsive, non-privileged documents to provide to Sierra Club. Sierra Club cannot make a showing of substantial need for documents which do not exist (Sierra Club's unfounded assumptions aside).

Sierra Club's attempt to distinguish the authorities cited by FES in FES's Memorandum in Support of its Motion to Quash fails. As Sierra Club admits, those cases stand for the proposition that there is no obligation under Ohio law or Commission precedent to respond to duplicative discovery requests. Memo Contra at 19. Sierra Club states that *In re Gerber Children* involved special "procedures" related to domestic abuse cases. Memo Contra at 20, n. 57. This is a distinction without a difference given that *In re Gerber Children* holds that there was no "error in the trial court's quashing of [a] subpoena which would have been duplicative of the discovery…. provided." *In re Gerber Children* at ¶44 (emphasis added). Similarly, Sierra Club attempts to portray a "very different procedural posture" present in *Carrier v. Weisheimer*, 1996 Ohio App. LEXIS 617 (Feb. 22, 1996), go awry. Memo Contra at 20, n. 61. In *Carrier*, the appellate court affirmed a denial of a motion to compel because "many of the current requests were duplicative of prior requests" and that the movants never established, beyond "innuendo," that they had been provided with "false information" or that information had been "withheld." *Carrier* at *5; *9 (emphasis added). [1]

Nor is Sierra Club even close to the mark regarding the law relating to work product. For example, Sierra Club reads *Ingram v. Adena Health Sys*., 149 Ohio App.3d 477, 2002-Ohio-

[1] Sierra Club also has no choice but to admit that *In the Matter of the Complaint of Brenda Fitzgerald v. Duke Energy Ohio, Case No. 10-791-EL-CSS, 2011 WL 1428223, at ¶ 7 (Apr. 4, 2011)* and *In the Matter of the Complaint of Ruth L. Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, 2002 Ohio PUC LEXIS 554 at *2-19 (June 21, 2002), continue to apply here. Both of those decisions involved the denial of a motion to compel because, among other reasons, the requested discovery had already been provided, as is the case here. *See Fitzgerald* at *4-12; *Wellman* *2-19.

4878, ¶14 (4th Dist. 2002), to stand for the proposition that "privilege does not prevent disclosure of the underlying fact, it only protects against compelled disclosure of the communications." Memo Contra at 25. This is inapposite for at least two reasons. First, as noted, the subpoena seeks *documents*, not merely "underlying facts." Second, the privilege at issue in *Ingram* involved physician-patient confidentiality and a statutorily-defined communication related to medical and dental diagnoses. *See Ingram* at ¶15.

Sierra Club also cites *State v. Hoop*, 731 N.E.2d 1177, 1186 (12th Dist. 1999), in an apparent attempt to undercut any protection that the work-product doctrine might provide for information currently being generated by FES in anticipation of supplemental testimony. *See* Memo Contra at 26. But *Hoop* involved the appeal of an aggravated murder conviction. In that case, the appellate court was tasked with considering whether a defendant's Sixth Amendment right to present the best available defense could trump attorney work-product protection. *See Hoop* at 1186. It obviously has no applicability here.[2]

The simple fact is that the Commission, consistent with Ohio case law, has long held that material prepared at the direction of counsel in anticipation of litigation is entitled to be protected, at least until such time as the protection is waived. *See In the Matter of the Complaint of Brenda Fitzgerald v. Duke Energy Ohio*, Case No. 10-791-EL-CSS, 2011 WL 1428223, at ¶ 7 (Apr. 4, 2011) (denying a motion to compel with respect to a request for "copies of all respondent's correspondence, both internal and external" related to the proceeding because the request sought documents "protected by the attorney-client privilege and/or Work Product Doctrine."); *In the Matter of the Application of The Dayton Power and Light Company for*

[2] Inexplicably, Sierra Club also cites to *DeCuzzi v. Westlake*, 947 N.E.2d 1229 (8th Dist. 2010). In that case, the appellate court *reversed* a trial court's grant of a motion to compel because the trial court order would have required the production of information protected by the work-product doctrine. *See id* at 1233.

Approval of its Electric Security Plan, Case No. 12-426-EL-SSO, Opinion and Order at 8-9 (Sept. 4, 2013) (denying motion to compel information related to potential increases in revenue related to increases in distribution and transmission rates because the information was protected by attorney-client privilege as well as the work-product doctrine). Given the extensive materials Sierra Club already has and given that the Companies will disclose any further responsive information as part of the Companies' supplemental testimony, Sierra Club cannot show that there is any need (much less a substantial one) to obtain any additional information before the filing of supplemental testimony by the Companies. *See Perry* at *13; *Martin* at 120.

III. ARGUMENT

A. The Subpoena Is Duplicative And Therefore Is Burdensome and Should Be Quashed.

Sierra Club baldly claims, "the subpoena seeks documents and information that have not been produced through discovery." Memo Contra at 14. That is demonstrably false. There is no such limitation in the subpoena. Further, this statement directly contradicts another Sierra Club claim, i.e., that the information produced by the Companies is somehow different from the information that FES should have to produce. This, too is false because, as demonstrated below, information relating to the Sammis, Davis Besse and OVEC plants all originated from FES. Indeed, there could be no other source for that information.

Given FES's overwhelming and undisputed showing that Sierra Club has already received an enormous amount of information that it again seeks in the subpoena, Sierra Club is forced to argue (in an epic understatement) that its subpoena is not burdensome simply because "some" documents relating to "some" subpoena topics have already been produced. Memo Contra at 19. Not surprisingly, Sierra Club cites no authority for this proposition. To the contrary, where a subpoena seeks duplicative information, it should be quashed. *In re Gerber*

Children at ¶44; *Perry* at *14. In any event, this argument assumes that there are "some" nonprivileged responsive documents to be produced. That is not the case, as the record (discussed below) shows.

Sierra Club then contends that the subpoena could not be burdensome because there is a difference between searching for documents and having to produce them. Memo Contra at 15, n. 39. Putting aside the non sequitur nature of this argument, Sierra Club would have all pretend that to comply with the subpoena, FES would not have to provide Sierra Club what Sierra Club already has. But Sierra Club cannot avoid this fact: searching, compiling and producing documents that have already been produced is inherently burdensome. Put plainly, it would be an exercise in needless busywork.

For the large part of its memorandum, Sierra Club tries to argue that there must be more that FES should be required to produce. But each attempt to cobble an argument to support this claim founders on facts. These false arguments are addressed in turn below.

1. **Contrary to Sierra Club's claims, a vast majority of the documents already produced and responsive to the subpoena originated from FES.**

Perhaps the most blatant falsehood in Sierra Club's memorandum is the claim that FES has only produced four documents. Memo Contra at 8. As demonstrated in FES's moving papers, Sierra Club has received a voluminous amount of information and has received information and documents responsive to each topic of the subpoena. *See* Mem. in Support of Motion to Quash, Exs. 1 to 3 and Appendices A and B. Even a cursory review of this information shows that the overwhelming majority of this information could have only come from FES. Apparently, Sierra Club does not realize that the Companies don't own the generation facilities under discussion in this case. Given that the Companies do not own the facilities, the only place that information about the facilities could come from is FES. Thus, the

information provided by the Companies came from FES either: (1) as a result of the due diligence by the team responsible for negotiating the term sheet for the proposed purchase power agreement; or (2) at the Companies' request subsequently in order to respond to discovery.

Nor does Sierra Club make any headway when it argues that the information it seeks must come from FES because the Companies do not have it or have refused to provide it. Memo Contra at 14. Sierra Club fails to show a single topic in the subpoena where Sierra Club did not previously receive responsive materials.[3] Indeed, as FES has previously shown, Sierra Club has received discovery regarding every topic.

2. Sierra Club's speculation that other nonprivileged documents must exist is unsupported and contrary to the record.

Sierra Club wildly claims that there is "strong evidence" that FES must have other responsive documents. *Id.* at 20, n. 61. Sierra Club's "evidence," however, is simply its speculation based on a misreading of the record that is so erroneous as to support the notion that Sierra Club doesn't care whether its statements are true.

Indeed, Sierra Club's attempts to show that FES must have "different" documents don't hold up under even minimal scrutiny. For example, Sierra Club complains that the projections that it received from FES are "inconsistent" with the projections that the Companies provided and used in their direct testimony. *Id.* at 10, n. 21. This argument sinks in light of the fact that Sierra Club ***received*** FES's projection. Given that, it is hard to understand what Sierra Club is complaining about.

[3] Sierra Club complains that it hasn't received "analyses or other documents from FES regarding environmental compliance costs at the Sammis Plant." Memo Contra at 24. As further discussed below, *see* p. 15, *infra*, Sierra Club has received a wealth of information on FES's environmental compliance.

Moreover, the alleged "inconsistency" does not prove that there are other projections that have not been produced. As the portion of the deposition transcript of Mr. Lisowski cited by Sierra Club makes clear (*Id.* at 12, n. 27 and n. 28), FES's forecasts were constructed for a different purpose than the forecast presented by the Companies' testimony in this case:

> Q. Do you recall the last time you were asked to project revenues from FES's generating units?
>
> A. Project for this PPA, the proposed PPA?
>
> Q. Outside of this PPA.
>
> A. For FES's internal management.
>
> Q. Yes.
>
> * * * * *
>
> A. Make sure I clarify, your question was when – *what kind of forecasts has FES done since the PPA*?
>
> Q. Yeah.
>
> A. *What the forecast is going to be for is the competitive business of the FirstEnergy Solutions for over the next couple of years.*
>
> Q. Okay. *Any other projections?*
>
> A. *No.*

Dep. Tr. of Jason Lisowski at 64: 1-8; 65:13-21 (Dec. 19, 2014) (Memo Contra, Ex. 3) (emphasis added). Mr. Lisowski only identified one projection undertaken by FES since mid-2014. That projection was provided to Sierra Club. *See* Mem. in Support of Motion to Quash, Ex. 3. Thus, regardless of any "material differences" between the forecasts provided to Sierra Club, Sierra Club already has all of the responsive, nonprivileged forecasts that there are.

Similarly, Sierra Club gets it wrong when it contends that there "most likely" are other projections because the projections that it has are "at least six months old." Memo Contra at 12. It cites the deposition testimony of Company witness Lisowski purportedly to show that FES's projections are updated "on a regular basis" (whatever that may mean). *Id.* at 12, n. 28. But a review of the subsequent questions and answers shows that the assumption that there "most likely" are updated forecasts is without basis:

> Q. Okay. Do you – so does FES produce forecasts of, say, the revenue from its generating units on a regular basis or?
>
> A. Yes.
>
> Q. And what – how often?
>
> A. *It can vary greatly from year to year*.
>
> Q. Okay. So it's not – like on a consistent schedule; *it's not like every six months they do it.*
>
> A. *No, not necessarily.*

Dep. Tr. of Jason Lisowski at 63:13-20 (Memo Contra, Ex. 3) (emphasis added). Thus, Mr. Lisowski expressly disclaimed that there could be forecasts done within a six month period or any particular period of time.[4]

[4] Sierra Club's plea in a footnote that it needs FES's projections in light of the alleged "inherent inconsistency" between the fact that the Davis Besse and Sammis plants might retire and the demonstrated benefit of Rider RRS over its proposed term (Memo Contra at 10, n. 21) is as irrelevant as it is wrong. Apparently, it is beyond Sierra Club's comprehension that FES could want to avoid sustaining losses running in the short term in return for foregoing gains in the long term. Similarly, Sierra Club seems not to appreciate that FES could reasonably want to seek to hedge a certain part of its fleet. Nevertheless, for purposes of the instant motion, all of this is beside the point given that Sierra Club has received all projections prepared by FES except for those that may be subsequently prepared at the request of counsel in anticipation of the preparation of supplemental testimony in this case.

Sierra Club's complaints about profit and loss statements also go astray. To be sure, Company witness Moul testified in his deposition about statements that he reviewed in early 2014 as he was preparing to approach representatives of the Companies regarding a possible purchased power agreement. *Id.* at Ex. 4. The Companies produced subsequent statements that were received from FES during the negotiations over the term sheet relating to that proposed transaction. *See* Mem. in Support of Motion to Quash, Ex. 1 (SC Set 1 RPD 49). Further, FES provided an additional set of statements in response to Topics 1 and 2 in the prior subpoena from Sierra Club. *See id,* Ex. 3. Thus, Sierra Club has all of the most current statements that the Companies or FES had when it made its prior requests.

Sierra Club's claim that it needs to see what Mr. Moul reviewed misunderstands Mr. Moul's testimony and what Sierra Club asked for. Sierra Club has asked for all profit and loss statements relating to the generation units at issue. In early 2014, Mr. Moul reviewed a document that contained some information relating to the revenues and costs of these units, but also information relating to the rest of FES's fleet. This document would not be responsive to Sierra Club's subpoena. Nevertheless, as an accommodation to Sierra Club, FES will produce that document.[5] Please note that FES is providing this information solely for the purposes of resolving this dispute, and that FES does not waive any of the objections asserted in its Motion to Quash.

Any other profit and loss statements relating to the plants in question would have been prepared at the request of counsel in preparation for supplemental testimony. Thus, these documents are work product.

[5] For the same reason, FES will produce a similar document created in early 2015.

3. Sierra Club's assertion that it has not received sufficient information about the subpoena's topics is false.

Sierra Club makes a series of claims that the information that it has received relating to the topics listed in the subpoena is somehow not enough. Each of these claims is flat out false. For example, as noted, Sierra Club claims that it only received four documents from FES. Memo Contra at 8. As also noted, that is simply not true. *See* p. 10, *supra*.

Sierra Club refers to the deposition testimony by Company witness Harden cited by FES that refers to Mr. Harden's discussions about the efforts to have the Sammis and Davis Besse plants comply with environmental regulations. Memo Contra at 24. Sierra Club ostensibly wants the Attorney Examiner and the Commission to believe that this testimony is all that Sierra Club has received on this topic. As FES has shown previously, this is at odds with the facts. *See* Mem. in Support of Motion to Quash, Ex. 2 and Appendices A and B.

Similarly, Sierra Club complains that it has not received information about the possible termination of the proposed transaction. Memo Contra at 21-22. Not true. Putting aside questions about whether such discovery is proper under the March 23 Entry,[6] Sierra Club has received the term sheet relating to the proposed transaction and all nonprivileged communications among the negotiators of that term sheet. *See* Mem. in Support of Motion to Quash, Ex. 1. Sierra Club also deposed members from both teams of negotiators (i.e., representing the Companies and representing FES, respectively) and asked questions regarding whether and how the proposed transaction could be terminated. *See* Deposition Transcript of Jay Ruberto at 84-86 (Jan. 8, 2015).[7] There is nothing more to be discovered.

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[6] *See* pp. 17-18, *infra*.

[7] Specifically:

Sierra Club tries a similar argument about the audit of Rider RRS or of FES's costs. Sierra Club complains that only Company witness Mikkelsen addressed this issue in her deposition. Memo Contra at 23. A similar response applies, including whether this issue is a proper subject for discovery under the March 23 Entry. Sierra Club has received information relating to the term sheet negotiation noted above. It also had the opportunity to depose negotiation team members. It further took the opportunity to discuss the audit process with Ms. Mikkelsen (*see* Mem. in Support of Motion to Quash, Appendix A at 36-42), the Company witness who expressly addressed this issue in her direct testimony. *See* Direct Testimony of Eileen Mikkelsen at 14-15 (Aug. 4, 2014). It is hard to understand what else Sierra Club could obtain on this topic.

Incredibly, despite the fact that the Companies have produced ten witnesses (including one witness twice) for depositions, including two FES officers and a third witness who supports FES plants, Sierra Club complains that more witnesses need to be produced. Specifically, Sierra Club states:

> FES allowed two witnesses, Jason Lisowski and Paul Harden to specifically provide testimony related to its subpoena, and both of those witnesses were going to be deposed anyway because they are also witnesses for the Companies. And FES did not provide a single *unique* witness in response to the first subpoena. [Memo Contra at 18, n. 52; original emphasis.]

(continued…)

> Q. Okay. Let's assume that the companies were to enter into the proposed transaction with FES, and that a few years from now the plants start producing money – or, start producing revenues in excess of costs. In that circumstance, are you aware of any provision in the agreement that would prevent FES from terminating the agreement prior to May 2031?
>
> A. The only thing in the term sheet that has any termination provisions is in Section 20, and that – that is strictly limited to lack of government approvals. *Otherwise, FES does not have the option of terminating the contract regardless.*

Dep. Tr. Of Jay Ruberto at 85:5-16 (emphasis added).

Sierra Club seems to believe that special designated witnesses need to be produced even though witnesses with knowledge of the topics sought in Sierra Club's last subpoena were already going to be (and were) produced. Again, Sierra Club cites no authority for this unique position of entitlement. This omission is not surprising given that it contradicts long standing practice, not to mention common sense. In fact, this position says less about FES's discovery responses and more about Sierra Club's true goals in discovery: rather than legitimately seek information to forward its positions in this case, Sierra Club merely wants to waste everyone's time on needless discovery, pointless letters relating to the discovery and motion practice proving nothing.

B. Certain Topics Requested By The Subpoena Are Beyond The Scope Of The March 23 Entry.

The March 23 Entry limited the scope for additional discovery. At the time of that entry, the written discovery cutoff had passed. In its ordering paragraphs, the March 23 Entry specifically limited the scope of additional discovery to "[d]iscovery requests regarding the AEP Ohio Order factors." March 23 Entry at 3. As the March 23 Entry expressly delineated, those four factors included: (1) financial need of the generating asset; (2) reliability and supply diversity provided by the generating asset; (3) the impact on the generating asset of compliance with current and pending environmental regulations; and (4) the impact that closure of the generating asset might have on electricity prices and economic development. *See id.* (citing AEP ESP III Order at 25). Any discovery requests outside of these four factors are out-of-bounds and beyond the scope of the March 23 Entry.

In contrast, Sierra Club apparently believes that almost any subject involving Powering Ohio's Progress is now fair game for discovery. According to Sierra Club, the subpoena topics are permissible for discovery now "because they seek information that is relevant to a central

issue in this proceeding, namely the reasonableness of the Companies' Rider RRS proposal." Memo Contra at 9-10. To be sure, one can legitimately argue that the reasonableness of the Companies' proposal is an issue in this case. But that issue does not establish the boundaries for permissible discovery under the March 23 Entry. Sierra Club reads any meaning out of the ordering paragraphs of the March 23 Entry.

Two examples suffice to show the inappropriate wide-ranging approach to discovery sought by Sierra Club in the subpoena. "Topic 8" seeks information regarding the possible rights or abilities of the parties to the proposed transaction to terminate it. Sierra Club's justification for this request is that "it seeks information about potential risks to the Companies' customers." Memo Contra at 21. Such alleged "risks" are not listed in the four factors noted in the March 23 Entry.

"Topic 9" is likewise improper. That topic seeks information regarding the audit or review of the costs subject to recovery under Rider RRS. Notably, Sierra Club does not even bother to justify that request. Regardless, this has nothing to do with the AEP Ohio Order factors listed in the March 23 Entry.

C. Any New Information Generated At The Request of Counsel For the Purpose of Preparing Supplemental Testimony Is Protected By The Work-Product Doctrine.

As FES showed in its Motion to Quash, any documents currently being generated in relation to the filing of the supplemental testimony permitted by the March 23 Entry are protected by the work-product doctrine and communications contained within those documents are protected by the attorney-client privilege. *See, e.g., State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, 121 Ohio St. 3d 537, 542 (2009) (holding that investigative report was immune from disclosure on the basis of attorney-client privilege and rejecting "cramped view" of attorney-client privilege that "narrowly confined" the privilege to the "repetition of

confidences"); *Estate of Hohler v. Hohler*, 185 Ohio App. 3d 420, 430 (Carroll Cty. 2009) (holding "the documents surrounding the preparation of [a] prenuptial agreement would be initially protected by work product as they were created 'because of' the prospect of litigation in a future divorce or will contest.")

These protections will remain in effect if, and until, any such information is disclosed in supplemental testimony, thereby correspondingly waiving any attorney-client privilege or work-product protection. If and when such a waiver transpires, a supplemental response will be provided to Sierra Club in timely fashion.

In response, Sierra Club claims that FES is somehow under an obligation via the subpoena to produce "underlying facts, such as FES's latest projection of various plant or market costs." Memo Contra at 25. But the subpoena is *duces tecum*, i.e., it is requesting *documents*, not "underlying facts" (whatever these may be). And, to the extent any such documents are being created in connection with supplemental testimony, they are, under settled Ohio law, to be afforded work-product protection**.** *Jackson v. Greger*, 110 Ohio St. 3d 488, 489 (2006) (holding that attorney's file was not discoverable in legal malpractice action under work-product doctrine); *Estate of Hohler v. Hohler*, 185 Ohio App. 3d 420, 430 (Carroll Cty. 2009) (holding that documents surrounding the preparation of prenuptial agreement constituted protected work product as documents were created "because of" the prospect of litigation); *see also In re Application of The Dayton Power and Light Company* at 8-9. Such protection renders them immune to discovery as long as such protection lasts. As such, Sierra Club is simply incorrect when it claims that FES's "reliance on this doctrine is…misplaced." Memo Contra at 26.[8] This

[8] Again, Sierra Club, in direct contradiction to the deposition testimony of Mr. Lisowski, claims that FES "regularly updates," e.g., its revenue and cost forecasts. *See* Memo Contra at 26.

is especially the case where, as here, Sierra Club already has been provided with all responsive documents in FES's possession save for those documents generated in connection with supplemental testimony.

Notably, the position taken by Sierra Club for the instant motion directly contradicts statements that it has previously made in this case. For example, in response to the Companies' discovery relating to subjects potentially to be covered in any testimony that Sierra Club might offer, Sierra Club asserted the very work product protection that FES relies on here. *See* Sierra Club's Responses and Objections to First Set of Discovery Requests of Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Sierra Club at 3 (Dec. 10, 2015).[9] Apparently Sierra Club believes that work product protection works only one way – to protect Sierra Club, but not the Companies or FES.

Further and more ironically, as recently as this week, in its motion to compel discovery against the Companies, Sierra Club expressly recognized the work product protection afforded materials developed during the preparation of not yet filed testimony. Specifically addressing the possibility of updated forecasts from Company witness Rose, Sierra Club stated, "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." Memorandum in Support of Sierra Club's Motion to Compel Discovery Responses at 21.

[9] In that response, Sierra Club objects as follows:

> Sierra Club objects to this Interrogatory as it seeks information that is protected by attorney-client privilege, work-product doctrine, or both. Subject to and without waiving such objections, Sierra Club states that it will file its written witness testimony, if any, on the date established by the scheduling order for this proceeding. The information sought by this Interrogatory for any Sierra Club witness(es) who present written testimony will be reflected in such testimony.

Here, Sierra Club has everything that FES has that is responsive to the subpoenas except for materials that have been or may be developed specifically for the Companies' supplemental testimony. As even Sierra Club recognizes, such "new" material is subject to protection as work product until such time as it is disclosed in supplemental testimony.

IV. CONCLUSION

For the foregoing reasons and for the reasons demonstrated in the memorandum in support, the Commission should grant FirstEnergy Solutions Corp.'s Motion to Quash Sierra Club's Subpoena Duces Tecum.

Date: May 1, 2015

Respectfully submitted,

/s/ Brian J. Knipe

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been filed with the Public Utilities Commission of Ohio and has been served upon the following parties via electronic mail on May 1, 2015.

/s/ Brian J. Knipe
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Summary: Reply Memorandum of FirstEnergy Solutions Corp. to Sierra Club's Memorandum Contra Motion to Quash Subpoena Duces Tecum electronically filed by Mr. Scott J Casto on behalf of FirstEnergy Solutions Corp. and Mr. Brian Knipe