

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 : Case No. 10-388-EL-SSO
Authority to Establish :
a Standard Service Offer :
Pursuant to Section :
4928.143, Revised Code, in:
the Form of an Electric :
Security Plan. :

- - -

PROCEEDINGS

before Mr. Gregory Price and Ms. Kimberly Bojko,
Attorney Examiners, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 11-A,
Columbus, Ohio, called at 9:00 a.m. on Wednesday,
April 21, 2010.

- - -

VOLUME II

- - -

ARMSTRONG & OKEY, INC.
222 East Town Street, Second Floor
Columbus, Ohio 43215-5201
(614) 224-9481 - (800) 223-9481
Fax - (614) 224-5724

- - -

1 APPEARANCES:

2 FirstEnergy Companies
3 By Mr. Arthur Korkosz,
4 Mr. Mark A. Hayden,
5 Ms. Ebony L. Miller,
6 and Mr. James W. Burk
7 76 South Main Street
8 Akron, Ohio 44308
9
10 Jones Day
11 By Mr. David A. Kutik
12 901 Lakeside Avenue
13 Cleveland, Ohio 44114-1190

14 and

15 Calfee, Halter & Griswold LLP
16 By Ms. Laura C. McBride
17 and Mr. James F. Lang
18 1400 KeyBank Center, 800 Superior Avenue
19 Cleveland, Ohio 44114

20 On behalf of the Applicants.

21 FirstEnergy Solutions
22 By Mr. Michael R. Beiting
23 and Mr. Morgan E. Parke
24 76 South Main Street
25 Akron, Ohio 44308

and

Porter, Wright, Morris & Arthur
By Mr. Daniel R. Conway
and Mr. Eric B. Gallon
41 South High Street, 30th Floor
Columbus, Ohio 43215

On behalf of FirstEnergy Solutions.

McNees, Wallace & Nurick
By Mr. Samuel C. Randazzo,
and Ms. Lisa McAlister
Fifth Third Center, Suite 1700
21 East State Street
Columbus, Ohio 43215

On behalf of the Industrial Energy

1 APPEARANCES: (Continued)

2 Vorys, Sater, Seymour and Pease, LLP
3 By Mr. M. Howard Petricoff,
4 Mr. Michael J. Settineri,
5 and Mr. Stephen Howard
6 52 East Gay Street
7 P.O. Box 1008
8 Columbus, Ohio 43216-1008

9 and

10 Constellation Energy Resources
11 By Ms. Cynthia Fonner Brady
12 550 West Washington Boulevard, Suite 300
13 Chicago, Illinois 60661

14 On behalf of Constellation Energy
15 Commodities Group, Inc. and Constellation
16 NewEnergy, Inc.

17 Bricker & Eckler, LLP
18 By Mr. Matthew W. Warnock
19 and Mr. Glenn S. Krassen
20 100 South Third Street
21 Columbus, Ohio 43215-4291

22 On behalf of Northeast Ohio Public Energy
23 Council and Ohio Schools Council.

24 Chester, Willcox & Saxbe, LLP
25 By Mr. John Bentine,
Mr. Mark Yurick,
and Mr. Matthew S. White
65 East State Street, Suite 1000
Columbus, Ohio 43215

On behalf of the Kroger Company.

Mr. Craig Smith
2824 Coventry Road
Cleveland, Ohio 44120

On behalf of Materials Science
Corporation.

1 APPEARANCES: (Continued)

2 Janine L. Migden-Ostrander,
3 Ohio Consumers' Counsel
4 By Mr. Jeffrey L. Small,
5 Ms. Ann Hotz,
6 and Mr. Gregory J. Poulos
7 10 West Broad Street, Suite 1800
8 Columbus, Ohio 43215-3485

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

13 Richard Cordray,
14 Ohio Attorney General
15 Duane W. Luckey,
16 Senior Deputy Attorney General
17 Public Utilities Section
18 Mr. Thomas W. McNamee
19 Assistant Attorney General
20 180 East Broad Street, 6th Floor
21 Columbus, Ohio 43215-3793

22 On behalf of the Staff of the Public
23 Utilities Commission.

24 Mr. Richard L. Sites
25 155 East Broad Street, 15th Floor
Columbus, Ohio 43215

and

Bricker & Eckler, LLP
By Mr. Thomas J. O'Brien
100 South Third Street
Columbus, Ohio 43215-4291

On behalf of the Ohio Hospital
Association.

Bricker & Eckler, LLP
By Mr. Thomas J. O'Brien
100 South Third Street
Columbus, Ohio 43215-4291

On behalf of the Ohio Manufacturers
Association.

1 APPEARANCES: (Continued)

2 Ohio Partners for Affordable Energy
3 By Ms. Colleen L. Mooney
4 and Mr. David C. Rinebolt
231 West Lima Street
Findlay, Ohio 45839-1793

5 On behalf of the Ohio Partners for
6 Affordable Energy.

7 The Ohio Environmental Council
8 By Ms. Megan De Lisi,
Mr. Will Reisinger,
9 Mr. Nolan M. Moser,
and Mr. Trent Dougherty
10 1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212

11 On behalf of the Ohio Environmental
12 Council.

13 Mr. Henry Eckhart
50 West Broad Street, Suite 2117
Columbus, Ohio 43215

14 On behalf of the Natural Resources
15 Defense Council.

16 EnerNOC, Inc.
By Ms. Jacqueline Lake Roberts
75 Federal Street, Suite 300
17 Boston, Massachusetts 02110

18 and

19 Faruki, Ireland & Cox, PLL
20 By Mr. D. Jeffrey Ireland
and Mr. Stephen A. Weigand
500 Courthouse Plaza, SW
21 10 North Ludlow Street
Dayton, Ohio 45402-1818

22 On behalf of the EnerNOC, Inc.
23
24
25

1 APPEARANCES: (Continued)

2 Association of Independent Colleges
and Universities of Ohio
3 By Ms. Christine Todd Jones
41 South High Street, Suite 2720
4 Columbus, Ohio 43215

5 and

6 Schottenstein, Zox & Dunn Co., LPA
By Mr. Christopher L. Miller,
7 Ms. Andre T. Porter,
and Mr. Gregory Dunn
8 250 West Street
Columbus, Ohio 43215

9
10 On behalf of the Association of
Independent Colleges and Universities of
11 Ohio.

12 Tucker, Ellis & West, LLP
By Eric D. Weldele
13 1225 Huntington Center
41 South High Street
14 Columbus, Ohio 43215

15 On behalf of the Council of Smaller
16 Enterprises.

Barnes & Thornburg LLP
17 By Mr. Charles R. Dyas, Jr.,
Mr. Matthew D. Austin,
18 and Mr. C. David Paragas
21 East State Street, Suite 1850
19 Columbus, Ohio 43215

20 On behalf of the Direct Energy Services,
21 LLC.

Brickfield, Burchette, Ritts & Stone, PC
22 By Mr. Michael K. Lavanga
and Mr. Garrett A. Stone
23 1025 Thomas Jefferson Street N.W., 8th Floor
Washington, D.C. 20007

24 On behalf of the Nucor Steel Marion, Inc.
25

1 APPEARANCES: (Continued)

2 Boehm, Kurtz & Lowry
3 By Mr. David Boehm
4 and Mr. Michael Kurtz
5 36 East Seventh Street
6 Suite 1510
7 Cincinnati, Ohio 45202-4454

8 On behalf of the Ohio Energy Group.

9 City of Akron
10 By Ms. Cherie B. Cunningham
11 Director of Law
12 161 South High Street, Suite 202
13 Akron, Ohio 43208

14 and

15 McNees, Wallace & Nurick
16 By Mr. Joseph M. Clark
17 21 East State Street, Suite 17th Floor
18 Columbus, Ohio 43215

19 On behalf the City of Akron.

20 Environmental Law and Policy Center
21 By Mr. Michael D. Heintz
22 1207 Grandview Avenue
23 Columbus, Ohio 43212

24 On behalf of the Environmental Law and
25 Policy Center.

- - -

INDEX

- - -

WITNESS PAGE

Kenneth D. Schisler	
Direct Examination by Ms. Roberts	265
Cross-Examination by Mr. Kutik	268
Cross-Examination by Mr. Lavanga	330
Cross-Examination by Mr. Kurtz	338
Cross-Examination by Mr. Smith	362
Cross-Examination by Mr. Randazzo	365
Examination by Examiner Bojko	401
Redirect Examination by Ms. Roberts	418
Recross-Examination by Mr. Randazzo	421
Further Redirect Examination by Ms. Roberts	427
Further Recross-Examination by Mr. Kutik	432
Further Examination by Examiner Bojko	437
Examination by Examiner Price	452
Further Examination by Examiner Bojko	454
Dylan Sullivan	
Direct Examination by Mr. Eckhart	464
Cross-Examination by Mr. McNamee	470
Cross-Examination by Mr. Lang	470
Redirect Examination by Mr. Eckhart	489
Examination by Examiner Price	491
Examination by Examiner Bojko	496
John D'Angelo	
Direct Examination by Mr. Randazzo	500
Cross-Examination by Mr. O'Brien	503
Cross-Examination by Mr. Poulos	506
Carrie Cullen Hitt	
Direct Examination by Ms. De Lisi	534
Cross-Examination by Mr. Randazzo	537
Cross-Examination by Ms. Miller	541
Examination by Examiner Bojko	5555

- - -

COMPANY EXHIBITS

IDFD ADMTD

5 Responses to Request EnerNOC	
Set 1-7	307 462
6 Auction Rules 2011-2012 and	

INDEX (Continued)

- - -

ENERNOC EXHIBITS

IDFD ADMTD

4	1	Direct Testimony of Kenneth D. Schisler - Public	264	462
---	---	---	-----	-----

5	2	Direct Testimony of Kenneth D. Schliser - Confidential	264	462
---	---	---	-----	-----

- - -

IEU EXHIBITS

IDFD ADMTD

9	1	PJM 2011/2012 & 2012/2013 ATSI FRR Integration Auction Results	388	463
---	---	---	-----	-----

10	2	Prepared Testimony of John D'Angelo	499	533
----	---	-------------------------------------	-----	-----

- - -

NRDC EXHIBIT

IDFD ADMTD

13	1	Direct Testimony of Dylan Sullivan	465	499
----	---	------------------------------------	-----	-----

- - -

OEC EXHIBIT

IDFD ADMTD

16	1	Direct Testimony of Carrie Cullen Hitt	534	558
----	---	---	-----	-----

- - -

1 Wednesday Morning Session,

2 April 21, 2010.

3 - - -

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

5 Good morning, the Public Utilities Commission has set

6 for hearing at this time and this place Case No.

7 10-388-EL-SSO, in the Matter of the Application of

8 Ohio Edison Company, The Cleveland Electric

9 Illuminating Company, and The Toledo Edison Company

10 for Authority to Establish a Standard Service Offer

11 Pursuant to Section 4928.143, Revised Code, in the

12 Form of an Electric Security Plan.

13 My name is Gregory Price, with me is

14 Kimberly Bojko, we're the attorney examiners assigned

15 to preside over today's hearing, this is our second

16 day of hearing in this proceeding. We will dispense

17 with taking abbreviated appearances.

18 Are there any preliminary matters we must

19 address before we take our first witness?

20 Seeing none, EnerNOC, please call your

21 witness.

22 MS. ROBERTS: Thank you. EnerNOC calls

23 Kenneth D. Schisler to the stand.

24 EXAMINER PRICE: Mr. Schisler.

25 (Witness sworn.)

1 EXAMINER PRICE: Please be seated and
2 state your name and business address for the record.

3 THE WITNESS: My name is Kenneth David
4 Schisler. My business address is 101 Federal Street,
5 Suite 1100, Boston, Massachusetts 02110.

6 EXAMINER PRICE: One second, Ms. Roberts.
7 Please proceed, Ms. Roberts.

8 MS. ROBERTS: Your Honors, I have
9 distributed to the Bench and the court reporter the
10 Direct Testimony of Kenneth D. Schisler on behalf of
11 EnerNOC. The public version, I would like that
12 marked as EnerNOC 1, please.

13 EXAMINER PRICE: So marked.

14 (EXHIBIT MARKED FOR IDENTIFICATION.)

15 MS. ROBERTS: And I would also ask that
16 the confidential direct prefiled testimony of Kenneth
17 Schisler which has also been provided to the Bench
18 and the court reporter be marked as EnerNOC 2.

19 EXAMINER PRICE: So marked.

20 (EXHIBIT MARKED FOR IDENTIFICATION.)

21 - - -
22
23
24
25

1 KENNETH D. SCHLISER

2 being first duly sworn, as prescribed by law, was
3 examined and testified as follows:

4 DIRECT EXAMINATION

5 By Ms. Roberts:

6 Q. Mr. Schisler, did you prepare prefiled
7 testimony in this case?

8 A. I did.

9 Q. Is that the testimony, are those the
10 documents that are marked EnerNOC 1 and EnerNOC 2?

11 A. They are.

12 Q. Do you have them before you?

13 A. I do not.

14 Q. Okay. Do you recognize the documents
15 marked as EnerNOC 1 and EnerNOC 2?

16 A. Yes.

17 Q. Were these prepared by you or under your
18 direct supervision and control?

19 A. Yes, they were.

20 Q. Do you have any additions or corrections
21 to your testimony?

22 A. There are a couple of typos but I won't
23 trouble the hearing to go through them all but
24 there's one or two that I would like to just correct
25 so there's no misunderstandings.

1 On page 7 of my testimony in line 3
2 there's an underlined, one would think I would have
3 been more clear in the underlined phrase but that
4 should be 2011 and not 2010. And that would be the
5 same reference in both my public testimony and my
6 confidential testimony.

7 I think in another instance I may have
8 used "ELO" instead of "ELR," but I think that's
9 fairly clear from the context.

10 EXAMINER PRICE: I'm sure we'll
11 understand.

12 Q. With those corrections is your testimony
13 true and accurate to the best of your knowledge,
14 information, and belief?

15 A. Yes, it is.

16 Q. And if offered today would you offer the
17 same testimony under oath to the Commission?

18 A. Yes, I would.

19 MS. ROBERTS: Mr. Schisler is available
20 for examination.

21 EXAMINER PRICE: Thank you.

22 Mr. Dyas.

23 MR. DYAS: Nothing, your Honor.

24 EXAMINER PRICE: Mr. Small?

25 MR. SMALL: No questions, your Honor.

1 EXAMINER PRICE: Ms. De Lisi?

2 MS. De LISI: No questions, your Honor.

3 EXAMINER PRICE: Mr. Warnock?

4 MR. WARNOCK: No questions.

5 EXAMINER PRICE: Mr. Yurick?

6 MR. YURICK: Thank you, your Honor, no
7 questions.

8 EXAMINER PRICE: Mr. Warnock, on behalf
9 of Schools?

10 MR. WARNOCK: No questions.

11 EXAMINER PRICE: Mr. Kurtz?

12 MR. KURTZ: Thank you, your Honor. I
13 think the company was going to cross first.

14 EXAMINER PRICE: Oh, you're right. I'm
15 sorry, you're right. That was my understanding as
16 well.

17 MR. RANDAZZO: Well, can we see who else
18 doesn't have any cross?

19 EXAMINER PRICE: I think that we've asked
20 everybody who's a nonopposing -- or who's opposing
21 the stipulation and who's not opposing, I just wanted
22 to get those people out of the way to deal with the
23 friendly cross.

24 MR. RANDAZZO: Thank you.

25 EXAMINER PRICE: The opposing parties can

1 go.

2 Mr. Kutik.

3 MR. KUTIK: Thank you, your Honor.

4 - - -

5 CROSS-EXAMINATION

6 By Mr. Kutik:

7 Q. Good morning.

8 A. Good morning.

9 Q. Mr. Schisler, you've never testified
10 before as an expert, correct?

11 A. No.

12 Q. What I said was correct?

13 A. What you said was correct.

14 Q. But you consider yourself an expert in
15 this case, correct?

16 A. I consider myself an expert around the
17 policy issues that I testified to.

18 Q. And you consider yourself an expert in
19 wholesale markets and demand-side management?

20 A. I have great expertise in those and so,
21 yes, I would consider myself an expert.

22 Q. And you're familiar with the rules and
23 regulations of the PJM capacity market.

24 A. I am.

25 Q. And you consider yourself an expert on

1 the PJM market rules, correct?

2 A. I do.

3 EXAMINER PRICE: Mr. Kutik, one second,
4 please.

5 Mr. Schisler, if you could line the
6 microphone up with Mr. Kutik, then it will do a
7 better job of picking it up when you're responding.
8 Line it up with him. There you go, that way it will
9 pick up your answers.

10 Q. In other words, put the microphone
11 between you and me.

12 Now, there are rules either arising from
13 the PJM tariff or from FERC that deal with market
14 manipulation, correct?

15 A. Yes, there are.

16 Q. And the people in charge of dealing with
17 market manipulation work at FERC in the office of
18 enforcement, for example, and also the PJM market
19 monitor.

20 A. There are.

21 Q. And you're a licensed attorney in the
22 state of Maryland, correct?

23 A. Yes.

24 Q. And you're familiar with some of the
25 rules relating to providing generation service in

1 Ohio.

2 A. Yes.

3 Q. And you've read Senate Bill 221.

4 A. I can't say I've read it cover to cover
5 but I've read the statute.

6 Q. You've read the statutes and regulations
7 relating to ESPs and MROs.

8 A. I haven't studied them but I agree.

9 Q. And you have general familiarity with
10 them.

11 A. Yes.

12 Q. And it's your view that if an electric
13 distribution utility files an MRO application and the
14 Commission in deciding that application makes changes
15 to that application, that the EDU would have to
16 approve those changes, correct?

17 A. The EDU -- by "EDU" you're referring to
18 electric distribution utility?

19 Q. Yes, I am.

20 A. In a manner of speaking, yes.

21 Q. Now, I want to talk to you a little bit
22 about EnerNOC. You are the senior director of
23 regulatory affairs.

24 A. Yes.

25 Q. You have responsibility for EnerNOC's

1 regulatory activities primarily in eastern North
2 America.

3 A. That's correct.

4 Q. And EnerNOC is a demand response provider
5 in the United States for commercial, institutional,
6 and industrial customers.

7 A. Among other things, yes.

8 Q. And it receives substantially all of its
9 revenues from grid operators and utilities.

10 A. Subject to verification of what might be
11 in our financial statements, yes. I don't track that
12 information, but I would believe that to be the case.

13 Q. Okay. Now, these entities, these grid
14 operators and utilities, make recurring payments for
15 managing demand response capability that you share
16 with end-users of electricity in exchange for the
17 end-users reducing their power consumption when
18 called upon.

19 A. In many cases that is correct.

20 Q. Okay.

21 A. But not all.

22 Q. All right. Now, EnerNOC has incurred
23 losses in every year since its inception.

24 A. Yes.

25 Q. And it has an accumulated debt of

1 \$77.3 million.

2 A. I don't know that.

3 MR. KUTIK: May I approach the witness,
4 your Honor?

5 EXAMINER PRICE: You may.

6 Q. Mr. Schisler, I'd like to show you a
7 document that is entitled, "EnerNOC, Inc. Form 10-K."
8 Are you familiar with that document?

9 A. I know EnerNOC is a publicly-traded
10 company and we have to file documents with the
11 Securities & Exchange Commission and I'm familiar
12 that a 10-K is an annual report, I don't claim to
13 know much about the specifics in EnerNOC's filing but
14 I am aware of what 10-Ks are, et cetera.

15 Q. You recognize that as a 10-K?

16 A. I'll accept your representation that it's
17 EnerNOC's 10-K.

18 Q. Okay. And could you refer to page 23 of
19 the document, please.

20 A. Yes.

21 Q. And on the paragraph that says -- is
22 entitled, "We have incurred net losses since our
23 inception and we may continue to incur net losses in
24 the future and may never reach profitability," do you
25 see that?

1 A. Yeah.

2 MS. ROBERTS: Your Honors, I would object
3 to this. Mr. Schisler has said he understands that
4 this is the company's 10-K because Mr. Kutik
5 represented that it was. He's testified that he has
6 no familiarity with this document, and now he's being
7 asked to testify about it. It's a -- no foundation
8 has been made he has any personal knowledge of this
9 information other than the document being placed
10 before him.

11 EXAMINER BOJKO: Would you like to
12 respond?

13 MR. KUTIK: Sure, if I need to. The
14 witness has identified the document as a 10-K. It's
15 a company document. I think I'm allowed to cross him
16 on a company document.

17 EXAMINER PRICE: Overruled.

18 Q. Do you see that paragraph, sir?

19 A. You're at page 23?

20 Q. Yes, I was. I'll read the heading again
21 if you like.

22 A. Just the first couple words of the
23 paragraph.

24 Q. Well, the heading of the paragraph is "We
25 have incurred net losses since our inception and we

1 may continue to incur net losses in the future and
2 may never reach profitability." That's a statement
3 from the 10-K, correct?

4 A. Yes.

5 Q. And it refers on the third line of that
6 paragraph to an accumulated deficit of \$77.3 million.

7 A. Right.

8 Q. And that's a statement that EnerNOC made
9 to the Securities & Exchange Commission, correct?

10 A. Yes. It relates to the risks associated
11 with the company which you have to disclose to
12 securities holders.

13 Q. Now, my understanding, sir, is that
14 EnerNOC is now registered to do business in the state
15 of Ohio, correct?

16 A. Yes.

17 Q. And that happened yesterday?

18 A. Yes.

19 Q. To the best of your knowledge, would it
20 be fair to say that EnerNOC is not certified as a
21 CRES provider in the state of Ohio?

22 A. To the best of my knowledge, no.

23 Q. And would it be fair to say that as
24 senior director of regulatory affairs you're not
25 familiar with the specifics of how one would even

1 apply to be a CRES provider in the state of Ohio?

2 A. No.

3 Q. It would not be fair to say?

4 A. It would not be fair to say.

5 Q. Okay. Well, isn't it true that you are
6 not familiar with specifics of how one would apply to
7 be a CRES provider?

8 A. I am familiar with applying to obtain
9 necessary authority to operate in a business before a
10 federal agency or a state commission within my
11 purview. So there are -- if the statutes require it,
12 I may be involved with applying for the necessary
13 authorizations from a state commission or federal
14 commission.

15 Q. I'm sorry, sir, you haven't answered my
16 question, which is isn't it true that you are not
17 familiar with the specifics of how one would apply to
18 be a CRES supplier -- CRES provider in the state of
19 Ohio?

20 A. No. I am familiar that there are CRES --
21 there is a CRES requirement for certain business
22 activities. I would know where to go to apply for
23 that and, like any practitioner, if necessary, would
24 take the steps to make necessary application.

25 Q. I'm not sure you answered my question

1 still. Is it a fact, "yes" or "no," that you are not
2 familiar with the specifics of how to apply to be a
3 CRES provider in the state of Ohio?

4 A. It is not a fact, no.

5 MR. KUTIK: May I approach the witness,
6 your Honor?

7 EXAMINER BOJKO: You may.

8 Q. Mr. Schisler, do you have a copy of your
9 deposition?

10 A. I do. No, I do not. Excuse me.

11 MS. ROBERTS: Your Honor, we were never
12 provided a copy nor given an opportunity until after
13 close of business yesterday to even review it for
14 signature which wasn't waived.

15 MR. KUTIK: May I approach the witness,
16 your Honor?

17 EXAMINER BOJKO: You may.

18 MS. ROBERTS: And to the extent there's
19 information in this deposition that would be modified
20 based on a review of it by the witness, which has not
21 been -- the opportunity has not been provided, he's
22 not waived his signature, I would state a continuing
23 objection to any information that might relate to or
24 any questions --

25 EXAMINER BOJKO: Well, there's no pending

1 request to have this admitted into the record so we
2 would take that up --

3 MS. ROBERTS: It's clear that he's going
4 to refer to statements --

5 EXAMINER BOJKO: Well, if he refers to a
6 particular statement, Ms. Roberts, he can say it's
7 wrong, correct, or not correct on the stand. He's
8 here to testify.

9 MS. ROBERTS: I understand, I'm just
10 trying to preserve the issue.

11 MR. KUTIK: May I proceed?

12 EXAMINER BOJKO: Please proceed.

13 MR. KUTIK: Thank you.

14 Q. (By Mr. Kutik) Mr. Schisler, turn to page
15 36 of your deposition.

16 A. I will.

17 THE WITNESS: Your Honors, my deposition
18 transcript before me is marked Confidential and I
19 would want to make sure that we're, to the extent
20 it's maintained for purposes of the record in this
21 case, that it's maintained as confidential. It
22 hasn't been admitted, but I'm sure because it's being
23 referred to it will be part of the record, I just
24 wanted to make sure it doesn't appear in the public
25 part of the record.

1 MR. KUTIK: Your Honor, just to be clear,
2 if I may, it is not my intent to mark it as an
3 exhibit. Nor is it my intent to file the document.
4 My intent is, if necessary, for this witness to
5 impeach him with his own testimony and, unless -- I
6 believe unless I get instruction from the Bench
7 differently, and I may need instruction, I do not
8 intend to refer to any confidential portions of the
9 deposition unless I get the approval of the Bench to
10 do so.

11 EXAMINER BOJKO: That is correct. I know
12 that it's marked confidential in its totality. I
13 don't think the question that's pending will encroach
14 into confidential information but if it does, we will
15 deal with that as it comes, and hopefully Mr. Kutik
16 will save his confidential type questions till the
17 end, if at all possible, so we can close the record
18 just in part.

19 THE WITNESS: Okay.

20 EXAMINER BOJKO: Thank you. But please
21 let us know if he refers to a page number or a line
22 number that you believe to contain confidential
23 information so that we can do that at that time.

24 Please proceed.

25 MR. KUTIK: Thank you, your Honor.

1 Q. (By Mr. Kutik) Mr. Schisler, I've
2 referred you to page 36 of your deposition.

3 A. Yes, sir.

4 Q. Starting at line 4, did you not testify
5 as follows: "Question: Okay. And sitting here
6 today, would it be fair to say that you don't know
7 what one has to do to be a CRES provider or to be
8 associated as a CRES provider?

9 "Answer: Well, in Ohio, no. However,
10 Ohio, like a number of other states, passed
11 restructuring statutes in 1990, 2000, 2001 time
12 frame; and many of them have sort of similar supplier
13 licensing requirements. So generally I know that
14 states that are engaged in the sale to -- on a
15 competitive basis get a retail license."

16 I said, "Okay.

17 "To do that" --

18 A. Mr. Kutik, I just want to make sure the
19 record reflects that I was interrupted at that
20 question so I didn't get a chance to --

21 Q. And I'm being interrupted now.

22 A. Point well-taken, Mr. Kutik.

23 Q. So let me finish reading, sir.

24 "To do that, to provide the commodity
25 service to retail customers.

1 "Question: So you may have some
2 familiarity, but again, for specifics, you don't
3 know?

4 "Answer: For specifics in Ohio, I would
5 have to refer to Ohio statutes and regulations."

6 That was your testimony, wasn't it, sir?

7 A. You read that well.

8 Q. And is it also true that you don't know
9 whether to be a curtailment service provider in Ohio
10 you have to be a CRES provider?

11 A. I don't know specifically, but I don't
12 believe so.

13 Q. Now, even though you were registered as
14 of yesterday, that is, you being EnerNOC, registered
15 to do business in Ohio as of yesterday, before
16 yesterday EnerNOC had customers in the state,
17 correct?

18 A. Yes.

19 Q. And you don't know if any of those
20 customers are in the ATSI footprint. Fair to say?

21 A. I believe we do not have customers, to be
22 clear, you know, customers have many facilities so we
23 may have some of their load at one facility and not
24 at another facility. I don't believe we are
25 currently operating in the ATSI footprint, so in that

1 sense we don't have customers there, but we may have
2 customers in the AEP or Dayton territory.

3 Q. Okay. Now, as part of your
4 responsibilities as senior director of regulatory
5 affairs you monitor the developments in various
6 regulatory arenas that EnerNOC may be interested in
7 doing business, correct?

8 A. Yes.

9 Q. Including the PUCO.

10 A. Yes.

11 Q. And you or someone on your behalf
12 monitors the developments in cases before the PUCO.

13 A. Yes.

14 Q. And you or someone on your behalf reviews
15 the dockets of the PUCO to determine whether there
16 might be anything of interest to EnerNOC.

17 A. Yes.

18 Q. Sometimes you or someone on your behalf
19 for EnerNOC talks to the staff and to commissioners.

20 A. Yes.

21 Q. Now let's talk about your monitoring of
22 what was going on with respect to the FirstEnergy
23 operating companies. You're aware that the
24 FirstEnergy operating companies are currently
25 under -- currently offering what I'll call SSO

1 service under an ESP, correct?

2 A. Yes.

3 Q. And you don't recall whether you've
4 actually ever reviewed the ESP, correct?

5 A. I do not recall, but I'm familiar with,
6 generally familiar that there was one. In the past
7 I'm sure I knew more about its terms.

8 Q. But you don't recall if you ever reviewed
9 it, correct?

10 A. The actual document or reports of it or
11 testimony about it, I probably did review it, or
12 trade, press reports, but actual document, I don't
13 recall.

14 Q. Now, you are familiar with Riders ELR and
15 OLR.

16 A. I am.

17 Q. And those riders you believe are part of
18 the existing ESP.

19 A. They are part of the -- they are
20 certainly part of the FirstEnergy operating
21 companies' tariffs and I believe them to be part of
22 the ESP, but I'm not certain.

23 Q. So you're not certain whether they're
24 part of the ESP.

25 A. I believe them to be part of the ESP but

1 I am not certain.

2 Q. Okay. Now, you're also aware that the
3 FirstEnergy operating companies had filed an
4 application for an MRO in 2009, correct?

5 A. I am.

6 Q. And you're aware, even, the case number
7 of that case is 09-906.

8 A. That is correct.

9 Q. And you have someone monitoring that
10 docket, correct?

11 A. Yes.

12 Q. And that someone would be you and
13 Ms. Roberts and perhaps others.

14 A. Yes.

15 Q. And you've had the pleadings and filings
16 in that case, you've reviewed them or had others
17 review them from time to time.

18 A. Yes.

19 Q. And you've had discussions with the
20 parties in this case about this case, correct?

21 EXAMINER BOJKO: About the 906 case?

22 MR. KUTIK: Yes.

23 A. About, just to be clear to her Honor's
24 question, are you referring to the current case I'm
25 testifying?

1 Q. No. You have had discussions about the
2 09-906 case with the parties in that case.

3 A. I don't -- yes.

4 Q. Okay. Is it true although you've had
5 discussions, you couldn't tell what those discussions
6 were, when you've had them, and any other details
7 about them? Correct?

8 A. No; I can recall some very specific
9 conversations.

10 Q. In your review of that case you are, of
11 course, familiar with who Stephen Baron is, correct?

12 A. I have seen the name but I don't recall
13 in connection with what.

14 Q. Would your answer be the same with
15 respect to who Dennis Goins is?

16 A. It would be the same answer.

17 Q. And would you have the same answer with
18 respect to who Kevin Murray is?

19 A. I know Kevin Murray.

20 Q. Do you know whether Kevin Murray
21 submitted testimony in the 09-906 case?

22 A. I do not recall.

23 Q. Do you know whether Mr. Goins -- or
24 Dr. Goins did?

25 A. It might help me if you sort of refer to

1 them by the name of the party that they were
2 testifying on behalf of, I might have a better
3 recollection.

4 Q. All right. Well, do you know whether an
5 individual by the name of Dennis Goins submitted
6 testimony in the 09-906 case?

7 A. No.

8 Q. Do you know whether an individual by the
9 name of Stephen Baron submitted testimony in the
10 09-906 case?

11 A. Not specifically. That may be where I
12 came across his name.

13 Q. Okay. And if those individuals did
14 submit testimony, you certainly don't know for whom
15 that testimony was submitted, correct?

16 A. I'm not saying that. I'm saying that,
17 you know, the way my mind works I just want to have a
18 frame of reference and I may know them better by the
19 party that they were sponsoring.

20 Q. Today you can't identify any of those
21 potential witnesses with any parties, correct?

22 A. No. With the -- I do know Mr. Murray
23 works for McNees, Wallace & Nurick law firm and I
24 think they are representing some industrial customers
25 so if he submitted testimony, it would probably be

1 through one of those, but that would be a leap of
2 faith on my part.

3 Q. Would you expect Ms. Roberts to know if
4 those individuals submitted testimony in that case?

5 A. Perhaps.

6 Q. Now, would it be fair to say that the
7 status of Riders ELR and OLR was an important thing
8 for you to understand for your business?

9 A. Yes.

10 Q. And you don't recall, in reviewing the
11 dockets, whether -- or, you don't recall reviewing
12 the dockets to see what customers may have been
13 proposing relative to those riders, correct?

14 A. It's one of those things -- no, not
15 specifically. It's one of those things that I might
16 have known, that they were asking for them to be in
17 the case. But I don't have specific recollection of
18 noting those facts.

19 Q. Okay. So you don't recall reviewing the
20 docket to see what customers may have been proposing
21 relative to the ELR and OLR riders, correct?

22 A. Correct.

23 Q. And you have no specific knowledge that
24 there were customer representatives participating in
25 the MRO proceeding who were advocating the

1 continuation of the ELR and OLR riders.

2 A. Specific knowledge, no. General
3 awareness, I would have to say more or less yes.

4 Q. All right. So you now say that you were
5 aware that customers wanted an extension of those or
6 some customers did.

7 A. I've been in the business a significant
8 amount of time and I generally understand what
9 industrials are going to advocate for and I probably
10 knew that they were asking for this rider in their
11 testimony, but I don't have the specific knowledge in
12 response to your last question.

13 Q. Now, is it fair to say that you don't
14 believe that a fair review of the docket in the
15 09-906 case would have revealed the existence of
16 settlement discussions?

17 A. I am not aware that the docket revealed
18 the existence of settlement discussions.

19 Q. So the answer to my question is yes.

20 A. I think so.

21 Q. Okay. Now, in reviewing the docket it
22 would it be fair to say that you or someone on
23 EnerNOC's behalf would have reviewed the Commission's
24 opinions, correct?

25 A. Yes.

1 Q. And were you aware that one of the
2 Commission's opinions is the Commission ordered the
3 staff to file comments by November 24, 2009?

4 A. I don't specifically recall that.

5 Q. You would expect that someone would have
6 reviewed filings made by the staff, correct?

7 A. Yes.

8 Q. And would it be fair to say that in the
9 staff's comments they indicated that they favored an
10 ESP and would circulate a draft settlement proposal?

11 A. I did not see that comment.

12 Q. Okay.

13 MR. KUTIK: Can I approach the witness,
14 your Honor?

15 EXAMINER BOJKO: You may.

16 Q. Mr. Schisler, I've shown you a document
17 that's labeled "Comments Submitted on Behalf of the
18 Staff of the Public Utilities Commission of Ohio."
19 Do you see that?

20 A. Yes.

21 Q. And it is a document that bears a time
22 stamp number, a time stamp, correct? A date stamp.

23 A. Yes.

24 Q. And that shows it was filed on
25 November 24 at 2:23 p.m., correct?

1 A. Yes.

2 Q. And it was filed in Case No. 09-906,
3 correct?

4 A. Yes.

5 Q. And I want you to refer to page 21 of
6 that document under the heading number 2, FirstEnergy
7 should consider an electric security plan SSO option.

8 MS. ROBERTS: Your Honors, I believe this
9 section 2 was not in the docket in that case and that
10 this is -- if you can just give me a second to look
11 at it.

12 I believe this part of the filing is in
13 the docket by virtue of filing but that this
14 information is nowhere in the breadth of that case.

15 MR. KUTIK: That's an incredibly bizarre
16 comment because we pulled it off this last night.

17 EXAMINER PRICE: I believe the reality
18 was, subject to check, that we introduced into the
19 record as evidence the first part of this document,
20 however, section 2 was not admitted into evidence.
21 But, the document in its entirety was, in fact, filed
22 on November 24th.

23 MR. KUTIK: Right.

24 EXAMINER PRICE: Which I believe is the
25 issue that Mr. Kutik is getting into.

1 MR. KUTIK: It is, your Honor.

2 EXAMINER BOJKO: I mean, do you have an
3 objection pending? We recognize the issue that you
4 stated, but I don't think that was the question. So
5 I don't know if it was an objection but it's
6 overruled and we'll allow Mr. Kutik to continue.

7 Q. (By Mr. Kutik) During the colloquy,
8 Mr. Schisler, have you had a chance to review the
9 essentially the one page or so under heading number 2
10 in the comments section?

11 A. I didn't hear what page you said but I
12 was trying to think about it, you said 21, page 21?

13 Q. Yes, I did.

14 A. All right, I'm at page 21.

15 EXAMINER BOJKO: I'm sorry, Mr. Kutik, I
16 don't think you got an answer to your last question.

17 MR. KUTIK: I think I just asked him
18 whether he's at that page.

19 EXAMINER BOJKO: Please proceed. I
20 apologize, I wanted to make sure the document was in
21 the record.

22 MR. KUTIK: I appreciate that, your
23 Honor. I think we have identified the document.

24 EXAMINER BOJKO: We did.

25 Q. (By Mr. Kutik) Now, Mr. Schisler, what

1 I'd like you to do is to read to yourself that one
2 page or so that's under the heading number 2,
3 FirstEnergy should consider an electric security plan
4 SSO option.

5 A. I have read that.

6 Q. And does this refresh any recollection
7 you might have that the staff would distribute or
8 intended to distribute to the parties a strawman
9 proposal to facilitate discussions at the December 1,
10 2009, prehearing?

11 A. I read that here, yes.

12 Q. Does that refresh your recollection that
13 there was a proposal?

14 A. Not specifically, but I accept what it
15 says as -- it doesn't surprise me anyway.

16 Q. Now, it is the case, is it not, sir, that
17 if that proposal had indeed come to your attention,
18 you would not have asked to see it?

19 A. Perhaps we would, perhaps we wouldn't.

20 Q. Let me refer you to your testimony, page
21 74, please.

22 EXAMINER BOJKO: Deposition, is that what
23 you're referencing?

24 MR. KUTIK: Yes.

25 MS. ROBERTS: Which page? I'm sorry.

1 MR. KUTIK: Page 74.

2 Q. Are you there, sir?

3 A. Uh-huh.

4 Q. You said, starting at line 14 "I know you
5 keep saying that, my question's are very simple. Do
6 you know whether the staff, based upon the review of
7 the MRO docket, circulated a proposal or proposed to?
8 Is the answer you don't know?"

9 "Answer: I don't know.

10 "Question: Okay, if that had come to
11 your attention, would you have asked to see the
12 settlement proposal?

13 "Answer: In the settlement docket?

14 "Question: Yes.

15 "Answer: Not necessarily.

16 And then I said, "Okay" over on page 75,
17 and then you say, "No. I would not have." And then
18 you go on to say "Because the company had made its
19 filings on the MRO case and what it intended to do,
20 was entirely in control of what it would ultimately
21 do because it had a veto at the end. And it made
22 affirmative statements" --

23 MS. ROBERTS: Your Honor, I object to
24 this.

25 MR. KUTIK: I'm not finished reading.

1 MS. ROBERTS: But you've read enough that
2 I have a basis for an objection.

3 MR. KUTIK: That's not proper.

4 EXAMINER BOJKO: Ms. Roberts, you need to
5 address any objection to the Bench, first of all.

6 MS. ROBERTS: Yes.

7 EXAMINER BOJKO: Second of all, you need
8 to let counsel finish the question, then you can
9 state an objection.

10 Please proceed, Mr. Kutik.

11 MR. KUTIK: Let me start again where he
12 continued his answer.

13 Q. "Because the company had made its filings
14 on the MRO case and what it intended to do, was
15 entirely in control of what it would ultimately do
16 because it had a veto at the end, and it made
17 affirmative representations on the matters I cared
18 about in the ATSI auction. So the company was --
19 the -- someone who could propose anything they want.
20 The company had the ability to decide whether it was
21 subject of negotiation or not." Was that your
22 testimony?

23 MS. ROBERTS: Objection.

24 EXAMINER BOJKO: Grounds?

25 MS. ROBERTS: Mr. Kutik is allowed to

1 impeach the witness for prior inconsistent
2 statements. This question goes way beyond any
3 statements Mr. Schisler has made in the record so far
4 and, in fact, he has not shown it's inconsistent with
5 his live testimony in the questions he just answered.
6 This is an attempt of Mr. Kutik to testify -- to
7 admit Mr. Schisler's deposition as evidence on its
8 own merit.

9 MR. KUTIK: Well, your Honor --

10 EXAMINER BOJKO: Actually, I think that
11 this is a continuation of an answer and Mr. Kutik is
12 actually just finishing the witness's response from
13 the deposition and it does go exactly to the question
14 that Mr. Kutik asked him on the stand. So overruled.

15 Q. That was your testimony, sir, was it not?

16 A. That is my testimony.

17 Q. Okay. Now, at some point, regardless of
18 whether you knew about the staff comments or not, you
19 became aware that there were settlement discussions
20 going on, correct?

21 A. Yes.

22 Q. You were aware that there were settlement
23 negotiations going on because of things you had heard
24 in the trade and so forth, correct?

25 A. Yes. But to be clear, the time frame

1 really matters here and it mattered in the testimony
2 that I just gave. You have to consider when the
3 sequence of events was. But yes, I was and would
4 have expected that in state proceedings there are
5 settlement talks.

6 Q. You're aware that settlement discussions
7 happen in almost all of these types of cases.

8 A. In many they do. Maybe they do.

9 Q. Okay. Now, you did not make any inquiry
10 to FirstEnergy or any other party in the 09-906
11 docket as to what -- as to the nature of what was
12 going on with respect to settlement, correct?

13 A. I was not allowed to.

14 Q. You did not, correct?

15 A. I was not allowed to.

16 Q. Did you or did you not?

17 A. FirstEnergy made comments to me, but I
18 was not allowed to ask them questions about anything
19 in the ATSI auction.

20 Q. My question to you, sir, is did you make
21 any inquiry into FirstEnergy or any other party
22 included in the 09-906 docket as to the nature of
23 what was going on with respect to settlement?

24 A. No.

25 Q. Now, is it true that one of the reasons

1 that you knew -- that you did not is because you knew
2 that settlement discussions are confidential?

3 A. No.

4 Q. Well, isn't it true that settlement talks
5 generally are confidential or conducted
6 confidentially?

7 A. When they're required to be, yes.

8 Q. Now, you're denying that one of the
9 reasons that you did not ask was because you knew the
10 discussions were confidential. Is that your
11 testimony today?

12 A. That's correct.

13 Q. May I refer you to your deposition
14 testimony, sir. Well, let me go on to another
15 different subject.

16 You were aware, were you not, that there
17 were other parties to the 09-906 case that were
18 potential participants in the ATSI auction, correct?

19 A. Generally, yes.

20 Q. Now, when you learned about the fact that
21 there were settlement talks going on, you did not
22 intervene, that is you EnerNOC, did not intervene or
23 attempt to intervene, correct?

24 A. No, we did not intervene.

25 Q. And you were not particularly interested

1 in seeing settlement proposals because the companies
2 were entirely in control of what it could do because
3 they have veto at the end, correct?

4 A. That and the time frame, but yes,
5 correct.

6 Q. Your view is that FirstEnergy, and I'm
7 talking about FirstEnergy operating companies, were
8 entirely in control of what the deal would be,
9 correct?

10 A. Yes.

11 Q. Now, I want to talk to you about that
12 case, the 09-906 case, and this case. You would
13 agree with me that no one in this room certainly,
14 maybe even no one in this building certainly, knows
15 what the outcomes of the 09-906 case and this case
16 are or will be, correct?

17 EXAMINER PRICE: Can I have that question
18 again, please?

19 (Record read.)

20 A. I do not. I don't know what others know.

21 Q. Okay. Do you believe that those outcomes
22 currently are knowable today?

23 A. Not that I'm aware of.

24 Q. You would agree with me that there could
25 be a variety of outcomes in those cases, correct?

1 A. In the cases, yes. In terms of what
2 happens going forward, no. Some of that information
3 is knowable today.

4 Q. Well, let's talk about, we don't know,
5 for example, whether the Commission's going to accept
6 FirstEnergy's MRO proposal, correct?

7 A. Correct.

8 Q. And if FirstEnergy -- excuse me, if the
9 Commission accepted that proposal, the ELR and OLR
10 tariffs would expire, correct?

11 A. Under what the company's proposed, yes.

12 Q. And another outcome could be that the
13 Commission could reject the stipulation in this case
14 and take no further action in this case or the 09-906
15 case, correct?

16 A. Yes.

17 Q. And if that happened the ELR and OLR
18 tariffs might expire as well, correct?

19 A. Yes.

20 Q. And we don't know whether that's going to
21 happen either, correct?

22 A. Can I correct my last answer? They would
23 expire by operation of the tariff --

24 Q. All right.

25 A. -- if the stipulation were rejected.

1 Q. And we don't know at this time whether
2 the Commission would actually reject the stipulation,
3 take no further action in this case, and take no
4 action in the 09-906 case, correct?

5 A. The Commission hasn't ruled so I guess we
6 don't know.

7 Q. Okay. Now I want to focus a little bit
8 on what you believe FirstEnergy did wrong. Let me
9 ask you some questions about that. It's true, is it
10 not, that you focus on four areas or four sources of
11 statements, and let me state them and see if we can
12 agree. One is statements that were made at an
13 October 2nd, 2009, meeting of stakeholders in the PJM
14 integration process; 2, statements that were made in
15 the FirstEnergy operating companies' MRO application;
16 3, statements that were made by FirstEnergy operating
17 companies' Witness Fanelli; and lastly, statements
18 made by an individual by the name of Morgan Parke on
19 behalf of the FirstEnergy operating companies at a
20 meeting on January 1st, 2010, correct?

21 A. Mr. Parke was representing American
22 Transmission Systems, Inc. He variously represents a
23 number of the affiliates of FirstEnergy, but those
24 statements are correct. There's an additional one I
25 guess if you're not done.

1 Q. No, those are the four statements that
2 you identified to me in your deposition as statements
3 that were of concern to you, correct?

4 A. If I identified those, there's one that
5 was missed. But we discussed it, so I can refresh
6 your recollection if you'd like.

7 Q. Well, isn't it true that those are the
8 four statements that you mentioned in your
9 deposition?

10 A. I also mentioned the ATSI auction FAQs.

11 Q. Okay. And that was another source.

12 A. Yes.

13 Q. Okay. Fair enough. Thank you for that
14 correction.

15 Isn't it true that the statements that
16 were made, each of those statements, when they were
17 made were not misleading at the time that they were
18 made?

19 A. I don't know whether they were misleading
20 when made, but they were -- statements were what they
21 were. They became misleading subsequently.

22 Q. So isn't it true that your testimony is
23 that the statements that the FirstEnergy operating
24 companies made, that were made and those sources,
25 were not misleading at the time they were made but

1 they became misleading in light of subsequent events?

2 A. What I just said was I don't know whether
3 they were misleading or not when they were made, but
4 I know they became misleading in light of subsequent
5 events.

6 Q. Mr. Schisler, let me refer you to page
7 140 in your deposition. Are you there?

8 A. Yes.

9 Q. I want to start on page, excuse me, on
10 line 24. Is this the testimony that occurred:
11 "Question: Before the break, we were talking about
12 certain statements that were made by FirstEnergy that
13 you believe in light of subsequent events were
14 misleading, correct?

15 "Answer: Became false and misleading,
16 yes.

17 "Question: Okay. And those statements
18 are statements made in the ATSI stakeholder meeting
19 of October 2nd, 2009 -- let me finish -- statements
20 made in the application filed in the 09-906 case,
21 statements made by Mr. Fanelli in his testimony in
22 the 09-906 case, statements made by Mr. Parke in a
23 meeting with respect to the PJM integration
24 stakeholders on or about January 19th, 2010, to the
25 best of your knowledge, and further, statements made

1 in the FAQ's or in response to the FAQ's, correct?

2 "Answer: No, I do not believe they were
3 misleading when they were made.

4 "Okay.

5 "But they became misleading in light of
6 subsequent events." Is that your testimony?

7 A. That's my testimony.

8 Q. Thank you.

9 Now, as I think we said earlier today,
10 that you believe that in essence FirstEnergy was in
11 control of the deal, correct? Any deal that might be
12 made in the MRO case or in this case, correct?

13 A. Yes.

14 Q. And when we talk about deal, we're
15 talking about an agreement, right?

16 A. Yes.

17 Q. Now, you believe that there was a deal
18 before the stipulation was signed, correct?

19 A. Unless someone can draft a monstrous
20 document and get 20-some odd parties to sign it,
21 draft it -- agree to it, draft it, and sign it all on
22 the same day, I find it hardly credible that it was
23 all done within the confines of 24 hours.

24 Q. So you believe there was a deal before
25 this stipulation was signed, correct?

1 A. Yes.

2 Q. And, in fact, you believe that
3 FirstEnergy had a deal by March 15th, 2010, correct?

4 A. I believe that FirstEnergy had changed
5 its position by March 15th and that there was a deal
6 at least in principle amongst the parties.

7 Q. On March 15th.

8 A. At least by March 19th, but probably, I
9 mean given the breadth of the document and the
10 dockets that had closed, it was a massive stipulation
11 that it appears sort of obvious just knowing how
12 these things work that these things take time to
13 draft and circulate for signatures.

14 Q. My question simply, sir -- I'm sorry, had
15 you finished?

16 A. Yes.

17 Q. My question simply, sir, is you believe
18 FirstEnergy had a deal by March 15th, correct?

19 A. There's a -- the answer is the only
20 knowledge I have is that they represented that their
21 positions were changing privately and when the deal
22 was reached versus when it was signed and, therefore,
23 became perfected, I don't have that specific
24 information.

25 Q. Okay. Could you turn to your deposition,

1 please, page 102.

2 MS. ROBERTS: I'm sorry, what page?

3 MR. KUTIK: Page 102.

4 Q. Are you there, sir?

5 A. Yes.

6 Q. Starting at line 15 was your testimony as
7 follows: "Question: Okay. My question simply is,
8 sir -- and you've danced around that lot and I just
9 want to know -- do you believe that FirstEnergy had a
10 deal on March 15th, 2010?

11 "Answer: Yes."

12 Was that your testimony?

13 A. Yes.

14 Q. Thank you.

15 Now, with respect to this deal, isn't it
16 true that you don't know who the deal was with?

17 A. The document filed on March 23rd lists a
18 number of stipulating parties so it was amongst them.

19 Q. But isn't it true that the deal as of
20 March 15th, you don't know who that deal was with
21 other than FirstEnergy operating companies, correct?

22 A. It was certainly FirstEnergy operating
23 companies and affiliates. I don't know who else.

24 Q. And you don't know if the deal changed
25 from let's say March 15th to March 23rd, correct?

1 A. I know that well before that time they
2 had -- that the company had changed its position with
3 respect to Rider ELR and OLR, but specifically
4 whether other elements could have changed, I don't
5 know.

6 MR. KUTIK: I move to strike everything
7 before the word "before" and including the word "but"
8 as nonresponsive.

9 EXAMINER BOJKO: Granted.

10 Q. And you don't know whether the parties to
11 the deal, supposedly took place as of March 15th,
12 were still negotiating their deal or continuing to
13 negotiate the deal between March 15th and March 23rd,
14 correct?

15 A. I do not.

16 Q. And you can't say whether by
17 March 15th that the company had reduced the terms of
18 the deal to writing in any way.

19 A. No.

20 Q. And you don't know when the document was
21 signed, correct?

22 A. It says it was signed on March 23rd.

23 Q. Okay. Isn't it true that at your
24 deposition you said you didn't know when it was
25 signed?

1 A. I don't know when all of the individual
2 parties signed it. The top of the document's dated
3 March 23rd.

4 Q. Now, would it be fair to say that you
5 believe that -- or part of the basis and maybe all
6 the basis for your belief that there was a deal as of
7 March 15th was a discovery answer that FirstEnergy
8 gave, FirstEnergy operating companies gave? Correct?

9 A. Give me a moment to think about that.

10 Yes.

11 MR. KUTIK: May I approach the witness,
12 your Honor?

13 EXAMINER BOJKO: You may.

14 Q. Mr. Schisler, I want to show you a
15 document entitled, "Response to Request," it says,
16 "EnerNOC Set 1-7." Please review that.

17 Have you reviewed that, sir?

18 A. Yes.

19 Q. Is this the discovery response that
20 you're referring to?

21 A. Yes.

22 MR. KUTIK: Your Honor, at this point I'd
23 like to mark as --

24 EXAMINER BOJKO: 5, I believe.

25 MR. KUTIK: -- Applicant or Companies'

1 Exhibit 5 this document.

2 EXAMINER BOJKO: It will be so marked.

3 (EXHIBIT MARKED FOR IDENTIFICATION.)

4 Q. Now, is it also true that you believe
5 that either slightly before or as of
6 March 15th FirstEnergy had made a unilateral offer to
7 extend the Riders ELR and OLR?

8 A. What I know is that they put that on the
9 table as a possibility, a negotiable item as of those
10 dates.

11 Q. Is the answer to my question yes?

12 A. Yes.

13 Q. Isn't it true that you don't know whether
14 the idea to put that on the table came from
15 FirstEnergy or some other party?

16 A. No. I do not know.

17 Q. Now, is it true that you believe that
18 FirstEnergy should have disclosed to potential
19 participants in the ATSI integration auction or
20 auctions the fact that it was a possibility that the
21 FirstEnergy operating companies were going to extend
22 Riders ELR and OLR?

23 A. It had a legal obligation to do so.

24 Q. So the answer to my question is yes.

25 A. Yes.

1 Q. And if they would have disclosed that
2 possibility, it would have caused some bidders not to
3 bid supply in and could have caused the price to
4 clear at a higher amount.

5 A. That's one potential outcome, yes.

6 Q. And if there are less amounts bid, that
7 would have dramatic impacts on the clearing price,
8 correct?

9 A. It's the interaction of supply and demand
10 so if there are less amounts bid, depending upon the
11 price it could lower the clearing price. I'm sorry,
12 I'll speak up.

13 Q. Yes. The answer is "yes"?

14 A. If there's less amounts bid, actually it
15 will raise the clearing price. I think I got it
16 exactly backwards.

17 Q. So if there's less amounts bid in,
18 there's a tendency for the clearing price to rise,
19 correct?

20 A. Yes.

21 Q. Now, we said that you believed that
22 the -- that the FirstEnergy operating companies
23 should have told potential auction participants that
24 it was a possibility that they were going to extend
25 Riders ELR and OLR, correct?

1 A. Not should have, were legally required
2 to.

3 Q. Okay. And would it also be the case that
4 you believe that the companies should have disclosed
5 that the RFP may not go as they thought would happen?
6 That may not have been implemented as they suggested.

7 A. They would have been legally required to
8 disclose that as well.

9 Q. Now, if they would have disclosed the
10 possibility that they were going to extend Riders ELR
11 and OLR and that possibility, then, did not happen,
12 isn't it true that the companies could have been
13 accused of manipulating the market?

14 A. Would you restate or could I have the
15 question read back?

16 EXAMINER BOJKO: You may.

17 (Record read.)

18 A. No. That's not true.

19 Q. Well, let me have you refer to your
20 deposition, sir, and particularly page 126 of your
21 deposition. Starting at line 7, "Question: If,
22 let's say, on" April 1st -- excuse me, "March 1st,
23 FirstEnergy had announced that there was a
24 possibility that the ELR" --

25 A. Excuse me, I'm not sure where you're

1 referring to so I can't follow you.

2 Q. Page 126.

3 A. Yes.

4 Q. Line 7. Are you there?

5 A. Uh-huh.

6 Q. Okay. Was the testimony as follows:

7 "Question: If, let's say, on March 1st FirstEnergy
8 had announced that there was a possibility that there
9 was a possibility that the ELR and the OLR auctions,"
10 it says, "might be extended as a result of the
11 stipulation, and then on March 10th the deal fell
12 apart -- let's say on March 15th the deal fell
13 apart -- do you think that FirstEnergy might be
14 susceptible to the charge that it was attempting to
15 manipulate the market?

16 "Answer: FirstEnergy having put material
17 representations that are, without equivocation, into
18 the market was entitled to make sure that that
19 information was kept accurate on a continuing basis.
20 And if on March 1st they materially altered the --
21 their position in such a way that it rendered the
22 information that they put in FirstEnergy at the
23 integration auction false, then they did have an
24 obligation to correct it."

25 And then I asked to read the question and

1 the colloquy with Ms. Roberts and then over on page
2 128 the question's read again.

3 MS. ROBERTS: I'm sorry, I just lost your
4 train. Continuing on page what?

5 MR. KUTIK: 128.

6 MS. ROBERTS: Thank you.

7 Q. Your answer is: "Yes, if they failed to
8 correct the information that they put in the market
9 as of March 1st when they were prepared to change
10 their position, under your hypothetical."

11 Was that your testimony?

12 A. I didn't follow all the way through it.
13 I accept that this is my deposition. I do need to
14 point out, Mr. Kutik, that on page 126, line 17, the
15 word "entitled," I'm not sure how the transcriber
16 might have even used the word "entitled" but it
17 doesn't make sense in the context. It would have
18 been something like acquired.

19 Q. With that correction you believe that's
20 your testimony.

21 A. Well, everything you've just read as I
22 was able to follow you is accurate, so I accept it's
23 my testimony.

24 Q. Now, isn't it a fact that in
25 December 2009 FirstEnergy had publicly disclosed that

1 its proposal to replace the ELR/OLR tariff was the
2 subject of litigation and, therefore, it was not yet
3 known whether the RFP process would be incorporated
4 in 2001 as currently contemplated? Excuse me, in
5 December.

6 THE WITNESS: Could you restate the
7 question?

8 Q. Sure, let me restate the question to you.
9 In fact, in December 2009 FirstEnergy operating
10 companies had publicly disclosed that their proposal
11 to replace the ELR and OLR tariffs was the subject of
12 litigation and, therefore, it was not yet known
13 whether the RFP process would be incorporated in 2011
14 as then currently contemplated.

15 A. I don't have specific knowledge of that
16 public disclosure you're referring to. I know they
17 disclosed that they were going to be doing an RFP
18 actually later than that, but I don't know about the
19 public disclosure and that it was subject to
20 litigation. You'd have to refer me to that.

21 Q. Are you aware that the companies had to
22 file an energy efficient and peak demand reduction
23 plan?

24 A. I'll accept your representations,
25 probably like I said, Senate Bill 221 obligations, so

1 not as I sit here today but they probably did.

2 Q. Okay.

3 A. If you say so.

4 Q. And there are cases, there are cases at
5 the Commission that have been established to review
6 those plans, correct?

7 A. There probably are.

8 Q. Okay. And, in fact, EnerNOC intervened
9 in the case involving the FirstEnergy operating
10 companies' plans, correct?

11 A. We probably did.

12 Q. Okay.

13 A. Or one of my colleagues.

14 Q. Do you need to be refreshed on that, sir?

15 A. If you represent that we were an
16 intervenor, I'll accept that.

17 Q. Okay. You have no reason to doubt that,
18 correct?

19 A. I have no reason to doubt that.

20 MR. KUTIK: May I approach the witness,
21 your Honor?

22 EXAMINER BOJKO: You may.

23 Mr. Kutik, before we leave Company
24 Exhibit 5, Mr. Schisler, do you know the date of this
25 discovery request and the response?

1 THE WITNESS: I do not know the date of
2 this response.

3 EXAMINER BOJKO: You don't know when you
4 received it from the company? Recently?

5 THE WITNESS: Like, maybe, I think the
6 last 48 hours maybe.

7 EXAMINER BOJKO: Okay.

8 Q. (By Mr. Kutik) Well, did you receive it
9 before your testimony in your deposition?

10 A. I don't know.

11 Q. Well, isn't it true that you referred to
12 that testimony in your deposition -- that discovery
13 request in your deposition?

14 A. I think I referred to your demand
15 response plan, I remember talking about that in my
16 deposition, so I saw that document but I don't know
17 about this document.

18 Q. Let's go back to your deposition then.
19 I'll refer you to page 99 of your deposition.

20 MS. ROBERTS: Your Honor, I can provide
21 those dates if you want them.

22 EXAMINER BOJKO: No, he'll actually ask
23 the witness, thank you.

24 MR. KUTIK: I'm sorry, I --

25 EXAMINER BOJKO: Please continue.

1 MR. KUTIK: Sure.

2 Q. Are you there, sir, page 99?

3 A. Yes.

4 Q. Okay. And starting on line 3, was it
5 your testimony as follows: "Question: Okay. Now,
6 it is your view that the parties in this case had a
7 deal that any time before the stipulation was filed?

8 "Answer: Yes.

9 "Question: Okay. When did they have a
10 deal?

11 "Answer: To be responsive to that, I may
12 have to reveal information that I believe I know that
13 may be in confidence, may be protected information
14 from FirstEnergy, I believe. I might be wrong about
15 that, but before I blurted an answer out, I wanted to
16 put you on notice of that."

17 Then I said: "Well, go ahead."

18 And you said, "Pardon?"

19 And I said, "Go ahead. I don't think
20 there's anybody on this call that I -- that I have a
21 problem hearing your answer. If I think the question
22 or the information is confidential, I'll designate it
23 after you say it. So go ahead.

24 "Answer: I believe that FirstEnergy
25 responded to an interrogatory in which it knew at

1 least as of March 15th that it was in a position to
2 agree to extending rider ELR and OLR."

3 Is that your testimony?

4 A. Uh-huh, yes.

5 Q. And that interrogatory response was the
6 one that I've just shown you; isn't that true?

7 A. As I testify here today, I remember
8 seeing your demand response plan before the
9 deposition, I don't remember seeing this document,
10 but I think I've seen this document, I just can't
11 remember whether it was before my deposition or not.

12 Q. Well, isn't it true when you're referring
13 to an interrogatory in your deposition, that
14 Interrogatory Set 1-7 is what you're referring to?

15 A. I may have been phrasing it loosely, I
16 may have meant FirstEnergy discovery. I know the
17 demand response plan was a protected document. I'm
18 not denying you had this. You asked what I was
19 testifying about in my deposition and I don't
20 remember being deposed about this.

21 EXAMINER BOJKO: Ms. Roberts, it may be
22 helpful just for the record, can you provide me the
23 dates, please?

24 Q. Now, is it your testimony, sir, that
25 you --

1 EXAMINER BOJKO: Hold on. I'm sorry, I
2 asked Ms. Roberts for the dates.

3 MR. KUTIK: I'm sorry.

4 EXAMINER BOJKO: I did ask for the dates.

5 MR. KUTIK: Dates of the what?

6 EXAMINER BOJKO: The discovery response.

7 MS. ROBERTS: And I'm getting those for
8 you, it will take me a minute.

9 EXAMINER BOJKO: Please continue then.

10 Q. (By Mr. Kutik) Mr. Schisler, is it your
11 testimony that you saw the demand response plan
12 before your deposition?

13 A. It's been a long 72 hours. I think I --
14 yes, I think I recall seeing it. I mean, again,
15 there were a lot of documents but I think we talked
16 about it. I mean there's one specific date in it
17 that I remember as an important date that's not in
18 this document but in the plan.

19 Q. Now, your deposition started at about
20 4:30 on Monday afternoon, correct?

21 A. I remember it well, yes.

22 Q. And FirstEnergy did not produce its
23 demand response plan until 5:30. Now, sir, did you
24 receive the demand response plan from another source?

25 A. No. I would have gotten it from my

1 counsel.

2 Q. Did you get the demand response plan
3 during your deposition?

4 A. It went until 10:30. I don't remember,
5 really.

6 Q. Okay. You believe that you saw the
7 demand response plan in the deposition?

8 A. Somehow it's pretty clear in my
9 deposition that I knew about your demand response
10 plan and the date that you submitted it. I don't
11 remember if you, you know, during those six hours
12 whether you deposed me about it or, I saw it, I'm not
13 denying that I saw it. I know I saw it and I know I
14 saw -- because I was able to testify about it but
15 whether it was this interrogatory. I'm not saying I
16 didn't see this or anything of this sort but I just
17 don't know if it was this interrogatory.

18 Q. Isn't it true, sir, in light of the fact
19 that the demand response plan was not filed or
20 submitted to EnerNOC before your deposition started
21 and this interrogatory, was that when -- referring to
22 the interrogatory in your deposition testimony, the
23 interrogatory you're referring to, the interrogatory
24 that you're referring to was in fact an interrogatory
25 and it was Interrogatory Set 1-7?

1 MS. ROBERTS: Your Honor, let me help
2 move this along.

3 EXAMINER BOJKO: No, wait. There's a
4 pending question first.

5 MS. ROBERTS: I may be able to resolve
6 that question.

7 THE WITNESS: I don't know, I apparently
8 had an interrogatory in front of me. This is Set No.
9 1-7. Yes, I knew the information because I can see I
10 testified about it, but, you know, the time line here
11 I don't recall which particular interrogatory or
12 discovery response I was referring to.

13 Q. Well, certainly when we referred earlier
14 in your testimony today, when I asked you when you
15 thought they had a deal, you pointed to this
16 discovery, this now Exhibit 5, and you said yes, this
17 was the discovery. That was your testimony, was it
18 not?

19 A. I guess so. My frame of reference is
20 that the March 15th date was the beginning of the FRR
21 integration auction and demand response plans had to
22 be submitted before that so that's how I knew there
23 had to be a FirstEnergy's willingness to agree to the
24 change before then.

25 Q. Is the answer to my question yes, that

1 was your testimony?

2 A. I give up. I don't know. I don't know.
3 I would have to read more pages. But I accept that I
4 knew in the deposition somehow because it's in my
5 testimony that -- I somehow knew that, had made
6 representations about extending Rider ELR in the
7 private information that they filed with PJM --

8 Q. And you knew because --

9 A. -- and ATSI.

10 Q. And you knew because that's what it says
11 in this interrogatory, correct?

12 A. If it doesn't, I'll put it this way,
13 maybe this will help move it along, if it doesn't say
14 it anywhere else and I did not see any other
15 documents in discovery, then it must have come from
16 here.

17 Q. Thank you.

18 Now, before the question that was raised
19 by the Bench, we were talking about the energy
20 efficiency and peak-demand reduction plan, correct?

21 A. Yes.

22 MR. KUTIK: I have permission to approach
23 the witness.

24 Q. I want to show you, Mr. Schisler, an
25 excerpt of those plans which starts at page 26. And

1 if you need to, I'm going to give you a copy, a full
2 copy of those as well if you feel you need to review
3 the document in context.

4 MS. ROBERTS: May I approach the witness
5 then?

6 EXAMINER BOJKO: I'm sorry, I didn't
7 hear.

8 MS. ROBERTS: I didn't have a full copy
9 of the document to refer to.

10 MR. KUTIK: I'm going to refer to only
11 one sentence or one paragraph in this document.

12 EXAMINER BOJKO: You may stand behind
13 your witness if you'd like. Please do not assist the
14 witness but you may stand behind him.

15 Q. (By Mr. Kutik) Okay. Mr. Schisler, I
16 want to direct you to the first paragraph on page 26.
17 Are you there?

18 EXAMINER BOJKO: I'm sorry, Mr. Kutik.
19 Did you lay the foundation of this document?

20 MR. KUTIK: Sure.

21 EXAMINER BOJKO: Did I miss it?

22 MR. KUTIK: No, your Honor.

23 Q. Mr. Schisler, this is part of a document
24 and it is labeled at the top "3.0 Program
25 Descriptions," and it says in the upper right "EE &

1 PDR Program Plan, the Cleveland Electric Illuminating
2 Company," correct?

3 A. Yes.

4 Q. And do you recognize this as part of a
5 document that was filed at the Commission?

6 A. No.

7 Q. Let me, sir -- let me have you, sir, read
8 to yourself the last sentence in the first paragraph
9 on that page.

10 EXAMINER BOJKO: Mr. Kutik, just for the
11 record since I cannot see the top page of the
12 document, when was it filed at the Commission? Or
13 Mr. Schisler.

14 MR. KUTIK: December 15th, 2009.

15 EXAMINER BOJKO: Thank you.

16 MS. ROBERTS: Your Honor, I object to the
17 question. The witness has testified he's not
18 familiar with this document or where it was filed and
19 has obviously no personal knowledge of it.

20 EXAMINER BOJKO: Actually, there's no
21 question pending at this moment. He asked him to
22 read the sentence.

23 THE WITNESS: Do you want me to read the
24 sentence?

25 Q. Read to yourself actually the last two

1 sentences of the first paragraph.

2 A. Okay. I have read them.

3 Q. Does that refresh your recollection as to
4 whether the FirstEnergy operating companies indicated
5 that the issue of whether to continue the provisions
6 included in Rider OLR was currently the subject of
7 litigation and, therefore, it was not known whether
8 the request for a frozen process would be
9 incorporated in 2001 as was currently contemplated?

10 A. Yes.

11 Q. Is that what they in fact said?

12 A. This is what this document that you
13 represent was filed on December 15th, 2009, said, so
14 yeah, I have no reason to doubt it.

15 EXAMINER BOJKO: I'm sorry, didn't you
16 just say it refreshed your recollection?

17 THE WITNESS: He asked me if it refreshes
18 my recollection, no, it doesn't refresh my
19 recollection. It's in the document, and he laid a
20 foundation for the document, so I read it, but it
21 doesn't refresh my recollection of the document.

22 MR. KUTIK: Thank you.

23 Q. But you agree that now seeing that
24 FirstEnergy did in fact publicly say that.

25 A. It said these sentences, yes.

1 Q. Okay. Now, with respect to the
2 stipulation itself and when you were aware of the
3 stipulation, you first became aware of the
4 stipulation when you were on vacation, correct?

5 A. Yes.

6 Q. And you were in Europe on a two-week
7 vacation.

8 A. Yes.

9 Q. And the decision to intervene by EnerNOC
10 was made before you returned from vacation.

11 A. Yes.

12 Q. And I think you said your vacation
13 started around March 26th?

14 A. Yes. I think so. We had to fly out a
15 day early because of the British Airways strike,
16 maybe it was our original date and we would have left
17 on the 25th or something.

18 Q. Now, EnerNOC has propounded discovery in
19 this case, correct?

20 A. Yes.

21 Q. And you don't know whether you played a
22 role in making sure that you were getting the types
23 of information that you wanted from the FirstEnergy
24 operating companies, correct?

25 A. I think we talked about it, but I was

1 away and just staying in touch by Blackberry
2 occasionally.

3 Q. So you don't know whether you played a
4 role, correct?

5 A. I think I -- I was aware of it. I think
6 we talked about it. But we, you know, have a
7 regulatory affairs team that was working in my
8 absence on things too, so specifically what decisions
9 I directed, I don't recall that because I was on
10 vacation, but I was aware of it while I was on
11 vacation.

12 Q. Again, you don't know whether you played
13 a role in making sure that you were getting the types
14 of information that you wanted from FirstEnergy.

15 A. I don't know.

16 Q. Pardon?

17 A. I don't know.

18 Q. Okay. Is it also fair to say that you
19 don't know who has the burden of proof in this case?

20 A. Are you referring to the 996 case, the
21 energy efficiency case, or this docket?

22 Q. This case, the case we're in.

23 A. Okay. They filed -- the company and some
24 parties filed a stipulation and I believe it
25 affect -- I don't know specifically.

1 Q. Okay. Now, you believe that -- well, let
2 me back up.

3 MR. KUTIK: Your Honor, I would like to
4 inquire of the witness of a part of the confidential
5 portion of his testimony, and I am willing with
6 Ms. Roberts in camera to discuss generally what I
7 intend to discuss because I don't think my questions
8 the way I'm going to ask them is going to touch upon
9 necessarily the content or the substance of what's in
10 there. But I obviously don't want to cross a line
11 that I shouldn't be crossing. Is that an acceptable
12 procedure?

13 EXAMINER BOJKO: It is. Are you finished
14 with nonconfidential? Can we save this to the end or
15 do you need to do it now?

16 MR. KUTIK: Well, I can do other things
17 now, but this is a relatively short line of
18 questions. But I will direct it however you want me
19 to proceed.

20 EXAMINER BOJKO: Let's go ahead and take
21 a five-minute break and let counsel talk and see if
22 we can't just handle it in the public record.
23 Obviously we have an interest in keeping as much in
24 the public record as possible.

25 (Recess taken.)

1 EXAMINER BOJKO: Back on the record.

2 Mr. Kutik, please proceed.

3 Q. Mr. Schisler, on page 18 of your
4 testimony, line 12, there is a statement, correct?

5 A. Yes.

6 Q. And you did not have a part in drafting
7 that, correct?

8 A. No.

9 Q. What I said was correct?

10 A. What you said was correct.

11 Q. And you don't recall seeing it when it
12 was drafted, correct?

13 A. No.

14 Q. What I said was correct?

15 A. Yes.

16 Q. And the earliest you recall seeing it was
17 in the last week or two, correct?

18 A. Correct.

19 Q. And you don't think that you discussed
20 that statement with the author of the statement,
21 correct?

22 A. That is not correct.

23 Q. Okay. Let me refer you to page 200 of
24 your deposition, I'm sorry, 203, starting at line 23.
25 "Now, have you discussed this with" -- and I'm not

1 going to mention the individual's name -- "this
2 document"?

3 "Answer: My testimony?

4 "Question: No. This document that
5 you're quoting," and I won't mention how you've
6 described it.

7 "Answer: Discuss it? No. I don't think
8 I discussed it with him. But I saw it."

9 Was that your testimony?

10 A. Those are the words in the transcript,
11 but I can't explain the -- I need to explain the
12 context of that.

13 Q. That's what redirect is for.

14 A. Okay.

15 Q. Now, when you saw it, it didn't surprise
16 you and there was nothing in it that you disagreed
17 with, correct?

18 A. Correct.

19 Q. Now, earlier we had talked about that you
20 were aware that there were entities that were in
21 charge of dealing with market manipulation, correct?

22 A. Yes.

23 Q. And you believe in this case that
24 FirstEnergy was in a way manipulating the market by
25 not being truthful, correct?

1 MS. ROBERTS: I'm sorry, what was the
2 last part of that question, could you reread the
3 question? I didn't hear the whole question.

4 EXAMINER BOJKO: Yes.

5 (Record read.)

6 A. To the extent that calls for a legal
7 conclusion, I don't know. I know that FirstEnergy
8 made material misrepresentations in the market.

9 Q. Well, with respect to making material
10 misrepresentations in the capacity market, that might
11 be something that the FERC would look at and
12 something that the PJM market monitor would look at,
13 correct?

14 A. Yes.

15 Q. And you haven't talked to anyone at FERC
16 about your complaints, correct?

17 A. No.

18 Q. Is that correct?

19 A. That is correct.

20 Q. And you've spoken with counsel for the
21 market monitor of PJM, correct?

22 A. Yes.

23 Q. You've given him your testimony, correct?

24 A. Yes.

25 Q. And is it fair to say that even after

1 that there have been no public statements from the
2 market monitor about any wrongdoing on behalf of
3 FirstEnergy operating companies? Correct?

4 A. Not to my knowledge, sir.

5 MR. KUTIK: I have no further questions.

6 EXAMINER BOJKO: Mr. Lavanga?

7 MR. LAVANGA: Just a couple, your Honor.

8 EXAMINER BOJKO: Excuse me just for a
9 moment.

10 Mr. Kutik, are you done with
11 cross-examination or do you have a confidential
12 portion?

13 MR. KUTIK: I do not have any
14 confidential portion.

15 EXAMINER BOJKO: Thank you. Sorry,
16 Mr. Lavanga.

17 - - -

18 CROSS-EXAMINATION

19 By Mr. Lavanga:

20 Q. Good morning, Mr. Schisler.

21 A. Good morning.

22 Q. My name is Mike Lavanga. I'm an attorney
23 for Nucor Steel Marion.

24 Can you turn to page 11 of your
25 testimony, please. Are you there?

1 A. Yes, sir.

2 Q. Now, on page 9 or, I'm sorry, page 11,
3 line 9, you say "The payments to customers are far
4 higher than market pricing," well, let's leave it
5 there. When you say "market pricing," do you mean
6 the prices that came out of the ATSI integration
7 auction?

8 A. Yes.

9 Q. The capacity prices.

10 A. Yes.

11 Q. Okay. And is it your understanding --
12 well, is it your understanding that the company bids
13 in Rider ELR load into the capacity auctions?

14 THE WITNESS: Your Honor, answering
15 counsel's question would require me to reveal
16 information about the company that I only know by
17 virtue of a confidential -- he hasn't objected but I
18 just didn't want to reveal confidential information
19 without putting everyone on notice.

20 EXAMINER BOJKO: Can you reread the
21 question, Maria.

22 MR. KUTIK: May I have the question read,
23 please?

24 (Record read.)

25 EXAMINER BOJKO: I don't think that's

1 confidential. Does the company?

2 MR. KUTIK: No. It's not confidential.

3 EXAMINER BOJKO: Okay. Please proceed,
4 Mr. Schisler.

5 A. Yes, the company bid in Rider ELR load
6 into the ATSI auctions.

7 Q. Is it your understanding that Rider ELR
8 provides only PJM capacity?

9 A. No.

10 Q. Okay. Isn't it the case that under Rider
11 ELR the FirstEnergy utilities, ATSI, or PJM can
12 interrupt customers whenever in their respective sole
13 discretion an emergency situation exists that may
14 jeopardize the integrity of either the distribution
15 or transmission system in the area?

16 A. Yes. They are subject to NERC
17 requirements but this balancing authority is
18 reliability coordinators comply with NERC
19 requirements.

20 Q. So the answer is yes, any one of those
21 entities could call an emergency interruption --

22 A. Yes.

23 Q. -- if in their sole discretion they
24 determine there's an emergency situation.

25 A. There are objective standards, but yes.

1 EXAMINER BOJKO: Mr. Schisler, you're
2 getting away from the mic now.

3 THE WITNESS: Sorry.

4 EXAMINER BOJKO: Thank you.

5 Q. Is it also the case that the hours PJM
6 may call an emergency interruption are limited under
7 ELR while there is no such restriction on ATSI or a
8 FE utility on when they may call an emergency
9 interruption?

10 A. No; that's not correct.

11 Q. That's not correct?

12 A. That's not correct.

13 Q. Do you have a copy of the application
14 with you?

15 A. No, but I know the rules. Maybe if you
16 would ask it a different way, I could clarify what
17 you're asking and why I think it's incorrect.

18 Q. I'd actually like to refer you to the
19 tariff.

20 A. Okay.

21 MR. LAVANGA: Your Honor, may I approach
22 the witness?

23 EXAMINER BOJKO: You may. Mr. Lavanga,
24 just for all of us to locate it, which one are you
25 referring to?

1 MR. LAVANGA: Your Honor, this is the
2 first errata filing from March 30th, and it includes
3 the riders, reference to the riders or modifications
4 to the riders.

5 EXAMINER BOJKO: And which sheet number
6 is it?

7 MR. LAVANGA: I'm taking an example of
8 Rider ELR sheet 101.

9 MR. KUTIK: Which company?

10 MR. LAVANGA: Cleveland Electric.

11 MS. ROBERTS: I don't have that.

12 MR. LAVANGA: You don't have it?

13 MS. ROBERTS: I don't have the first
14 errata for ELR, the first errata for --

15 EXAMINER BOJKO: I believe the company
16 provided copies of the application and errata
17 yesterday.

18 MR. LAVANGA: You know, I think the
19 language is the same in the application.

20 MR. RANDAZZO: Yes.

21 MR. LAVANGA: If that's easier.

22 EXAMINER BOJKO: Which page are you
23 looking at?

24 MR. LAVANGA: I'm looking at page 101,
25 page 4 of 5.

1 EXAMINER BOJKO: 4 of 5.

2 Q. Mr. Schisler, can you read the underlying
3 language starting emergency curtailment and going all
4 the way to the end of the paragraph?

5 A. "If the emergency curtailment event is
6 requested solely by the regional transmission
7 organization, the maximum duration that load must be
8 curtailed will be six hours and shall be limited to
9 ten events per planning year as defined by PJM. Any
10 interruptions requested by the regional transaction
11 organization will only occur between 12 noon and 8
12 p.m. for the months May through September and 2 p.m.
13 to 10 p.m. for the months October through April on
14 weekdays other than PJM holidays, period."

15 Q. So let me ask you the question again. Is
16 it the case that for an emergency interruption called
17 by PJM they can only call it in certain hours, but
18 there's no such restriction on when either ATSI or an
19 FE utility can call an emergency interruption?

20 A. No. The restatement of the PJM tariff in
21 here is wrong. Events can be called at any time by
22 PJM, 365 days a year, 24 hours. Emergency events can
23 be called and emergency resources can be dispatched.

24 Q. But that's what the tariff says, sir?

25 A. That's what the PJM tariff and business

1 rules say.

2 Q. I'm talking about the FirstEnergy tariff.

3 A. The FirstEnergy tariff limits it to
4 hours. The PJM tariff is not at all limited because
5 this is an emergency product and when -- emergencies
6 could happen in the middle of the night like the
7 FirstEnergy blackout or at times you don't anticipate
8 I should say, I don't know exactly when the
9 FirstEnergy blackout occurred.

10 Emergencies can happen any time. There
11 are compliance periods when you can establish
12 penalties and the hour limitations are around the
13 penalty sections. Actually now that you point it out
14 it's kind of disturbing that they would represent
15 that in their tariff because emergencies can happen
16 any time. This is only around the penalty language
17 in the tariff but the obligation of a curtailment
18 service provider including FirstEnergy would be to
19 dispatch their resources in the event that an
20 emergency, when they might occur, 24 hours a day, 365
21 days a year.

22 MR. KUTIK: Move to strike his editorial
23 comments about the tariff. Especially the word, the
24 sentence I believe starts now this is disturbing.

25 MS. ROBERTS: I'm sorry, I couldn't hear

1 you, Mr. Kutik.

2 EXAMINER BOJKO: Could you please scroll
3 up so I can read the response?

4 MS. ROBERTS: I didn't hear what he was
5 moving to strike.

6 MR. KUTIK: His editorial comments.

7 MS. ROBERTS: And then you identified
8 something, Mr. Kutik.

9 MR. KUTIK: Yes, the sentence that begins
10 something like now this is disturbing or this is
11 particularly disturbing.

12 EXAMINER BOJKO: I think everything after
13 "The FirstEnergy tariff limits it to hours" should be
14 stricken from the response.

15 MS. ROBERTS: Can the court reporter read
16 what is being stricken so I know what's being
17 stricken?

18 (Record read.)

19 MS. ROBERTS: And you're striking
20 everything after --

21 EXAMINER BOJKO: "The FirstEnergy tariff
22 limits it to hours" or something to that effect.

23 Please proceed, Mr. Lavanga.

24 Q. (By Mr. Lavanga) Mr. Schisler, you also
25 understand that FirstEnergy may call interruptions

1 under Rider ELR?

2 A. Yes.

3 Q. And economic interruptions are not a
4 feature of the PJM, RPM, or the ATSI integration
5 auction.

6 A. The FirstEnergy integrations I don't
7 think are part of the ATSI commitment to FirstEnergy.
8 I believe the ATSI auction was a sale to FirstEnergy
9 and I don't believe -- I think you're correct.

10 Q. Would you agree with me that Rider ELR is
11 a different product than RPM or what's bid into the
12 ATSI integration auction?

13 A. Yes. One is retail, one is wholesale.

14 MR. LAVANGA: No further questions.

15 EXAMINER BOJKO: Mr. Kurtz?

16 MR. KURTZ: Thank you, your Honor.

17 - - -

18 CROSS-EXAMINATION

19 By Mr. Kurtz:

20 Q. Just following up on that last question,
21 the Rider ELR is different than the PJM demand
22 response --

23 MR. KUTIK: Could I ask Mr. Kurtz to use
24 a microphone.

25 Q. -- in addition to one being retail and

1 one being wholesale, are you not?

2 EXAMINER BOJKO: Mr. Kurtz, could you
3 speak up, please. Mr. Kutik is having trouble
4 hearing you.

5 Q. The ELR tariff here and the PJM demand
6 response are different in ways other than one is
7 retail and one is wholesale, correct?

8 A. I don't know what you mean.

9 Q. Well, under the ELR the utility can
10 interrupt for economic reasons up to 860 hours a
11 year; can they do that on the PJM?

12 A. The company under Rider ELR can call like
13 an economic buy-through event. I would quarrel with
14 the word "interrupt." That's not part of the PJM
15 capacity program, that may be part of the economic DR
16 program but it's not part of the capacity program.

17 Q. So the ELR product is different than the
18 PJM product for that reason, correct?

19 A. As I mentioned, it's not the same as the
20 capacity product because it's a wholesale, it has the
21 requirements to the wholesale market.

22 Q. Can PJM interrupt for 860 hours a year
23 for or call economic buy-through events 860 hours a
24 year?

25 A. Not unless there are 860 hours worth of

1 emergencies, no.

2 Q. Do you understand that the ELR is more
3 than just a demand, an emergency demand response,
4 it's also an economic development rate?

5 A. It's an economic subsidy, yes.

6 Q. You said economic subsidy. It's an
7 economic development rate approved by the Commission.
8 The Commission doesn't call it a subsidy, does it?

9 A. I don't think this Rider ELR has been
10 approved by the Commission. The current Rider ELR I
11 presume has been approved by the Commission.

12 Q. As an economic development rate as well
13 as a demand response rate.

14 A. I accept that. It's called ELR economic
15 load response, so I accept that -- your statement.

16 Q. Under the ELR tariff the interruptible
17 credit paid to the customer is fixed for three years
18 as proposed under the stipulation or from June 2011
19 through three years past that, correct?

20 A. Yes.

21 Q. Now, we don't know what the PJM capacity
22 rate will be for that period, do we?

23 A. We do for two of the three years.

24 Q. Okay. We don't know for the third year,
25 do we?

1 A. We do not.

2 Q. We don't know if the ELR is more or less
3 than what PJM will pay for reliability, do we, in
4 that third year?

5 A. We do not.

6 Q. Okay. So we don't know if it's a
7 subsidy, we don't know if it's above or below market
8 for that third year sitting here today, do we?

9 A. We do not know that.

10 Q. I'd like to ask you a few questions about
11 your testimony. Page 20, just at the beginning you
12 say that EnerNOC is a competitor of FirstEnergy.

13 A. Yes, sir.

14 Q. Do you mean the utilities, the operating
15 companies, Cleveland Electric, Ohio Edison, and
16 Toledo Edison?

17 A. I do mean them in the event that they are
18 competing against a service. I think in this
19 phraseology I was using FirstEnergy in a generic term
20 to refer to entities that may be under FirstEnergy
21 that offer services in competition with EnerNOC.

22 Q. Now, you would agree, would you not, that
23 the FirstEnergy utilities don't make any money on the
24 ELR program, not a penny?

25 A. I do not know that, because they also

1 have to take generation service and you have to
2 follow the entire accounting treatment back.

3 Q. How might they make a penny off the ELR
4 program?

5 A. It's the -- it's a full requirements sort
6 of situation. In order to get on Rider ELR you have
7 to take generation service from FirstEnergy, the
8 operating company, and so whether there is a profit
9 component in the FirstEnergy generation service
10 portion, because you have to couple that with now
11 they're also on Rider ELR, they can't make a profit
12 from Rider ELR because they are selling it for higher
13 than they get paid for it.

14 Q. I'm talking about the utilities. The
15 utilities buy the generation service through an
16 auction, correct?

17 A. Yes.

18 Q. Because the utilities don't own
19 generation, correct?

20 A. My answer to the question is I do not
21 know because I do not -- you have to sort of -- you
22 asked me did they earn a profit, and I don't know the
23 answer to that because you have to trace the
24 relationship between the supply arrangement and the
25 component of the DR rider and look at them together.

1 Q. Well, let me ask you this: Do you think
2 the utilities mark up the auction price and charge
3 ratepayers more than what they're paying?

4 A. I do not know. There are sometimes a
5 profit adder or a retail adder or a return component
6 in some of the POLR standard service auctions in
7 different states, so I don't know the answer.

8 EXAMINER PRICE: We're talking about
9 FirstEnergy. Do you know whether FirstEnergy has any
10 of those sort of components you just mentioned?

11 THE WITNESS: I don't know.

12 EXAMINER BOJKO: I don't think you
13 answered Mr. Kurtz's question of whether you think
14 that FirstEnergy owns generation.

15 THE WITNESS: I don't believe the
16 utilities own generation. I believe their affiliates
17 own generation.

18 Q. (By Mr. Kurtz) Let's talk about the ELR
19 credit. Do you think the utilities make any kind of
20 profit off the ELR credit or is it a straight
21 pass-through to the end-use customer?

22 A. The credit pays more to the customer than
23 the company can get from the capacity market and it
24 then charges the rest of customers. So I don't see
25 how they could make a profit, they're selling it at a

1 loss.

2 Q. How much does EnerNOC take as its fee
3 when you do demand response for customers?

4 A. We have different arrangements with
5 different customers and that's proprietary
6 information.

7 Q. You do take a cut out of the
8 interruptible demand response fee, don't you? You
9 make a -- well, maybe not enough because I guess you
10 lost 77 million, but the idea is that you're supposed
11 to -- you do make a profit off of this, that's the
12 business you're in.

13 A. Our economic arrangement with our
14 customers, we do earn income from those arrangements.

15 Q. Can you share with the Commission the
16 general amount of cut that EnerNOC takes on these
17 type of deals without divulging anything
18 confidential? Is it 20 percent? 30 percent?
19 2 percent?

20 A. Not without revealing anything
21 confidential.

22 Q. Do you have your testimony in front of
23 you?

24 A. I do, sir.

25 Q. Okay. Page 3, line 16, I want to just

1 read a phrase "FirstEnergy repeatedly and
2 unequivocally stated that it would allow those Riders
3 ELR and OLR to expire on May 31, 2011." I want to
4 focus on the phrase "it would allow."

5 Do you understand that the utilities
6 don't control the retail tariffs but the Public
7 Utilities Commission of Ohio does?

8 A. I'm sorry, I was getting to the
9 testimony. Give me the line number again.

10 Q. Lines 16 through 18. "FirstEnergy
11 repeatedly and unequivocally stated that it would
12 allow those Riders ELR and OLR to expire on May 31,
13 2011." My question is do you understand that the
14 utilities don't dictate the tariffs, that the
15 Commission does?

16 A. The Commission can set policy, but the
17 company can reject the Commission's order and allow
18 the preexisting market -- retail market design to
19 continue and so that's -- my understanding is that
20 all -- and that's what I have testified is
21 effectively a veto.

22 Q. So you --

23 A. If they don't like a term, they can
24 reject it by rejecting the -- and leaving the status
25 quo in place.

1 Q. So you think the utility can set whatever
2 tariff it wants; is that your understanding of Ohio
3 law?

4 A. No, that's not my understanding of Ohio
5 law.

6 Q. Okay. So when you said it would allow,
7 you meant the utility would allow ELR and OLR to
8 expire; is that what you meant?

9 A. Yeah, because by their terms they did
10 expire, they would expires, they do expire.

11 Q. So you think FirstEnergy can control that
12 unilaterally, the expiration of tariffs or the extent
13 of tariffs.

14 A. It can control that under Ohio law
15 unilaterally.

16 Q. They can -- if the Commission alters an
17 ESP, the utility can go to an MRO, but the utility
18 can't dictate the terms of the tariffs, can it?

19 A. The utility couldn't change the tariffs
20 without Commission approval, but they could keep
21 them -- they could keep their tariffs in place, and
22 these tariffs expire.

23 Q. Let me ask, turn to page 4 of your
24 testimony, same type of thing, lines 3 through 4, you
25 say "Through my testimony I will demonstrate that if

1 FirstEnergy" -- excuse me. "That FirstEnergy is
2 allowed to extend" -- let me refer you to a different
3 quote here.

4 Page 10, do you see the question on lines
5 15 through 17 where you say that "FirstEnergy failed
6 to disclose that it was extending Riders ELR and
7 OLR"? Again, same question, the utility doesn't
8 extend the tariffs, the Commission does, correct?

9 A. The company would have to accept the
10 Commission's extension of the tariffs. If it were
11 to -- the company has it within its power to reject
12 the Commission's extension of the tariffs.

13 Q. Only by rejecting the entire ESP.

14 A. That's correct.

15 Q. And moving to an MRO.

16 A. I'm not sure about the last part of your
17 statement.

18 Q. Let me ask you this, do you know if it
19 was the customers who were pushing to get the ELR
20 tariff extended or if it was the utility?

21 A. The company -- the utilities, the
22 operating companies, proposed to allow them to expire
23 and to do a demand response RFP instead. So the
24 companies were not proposing to extend them. There
25 is some comments in the 906 docket that customers

1 were proposing that they be extended.

2 Q. So it wasn't the utilities that were
3 trying to extend these. The utilities don't, I think
4 we established don't make any profit off the ELR
5 rate, do they? Did we establish that?

6 A. Well, they make a profit in the totality.
7 The stipulation gives them a rate increase and other
8 things. So it may have been a position that they
9 bargained away. So yeah, I mean they make a profit
10 on the totality of the circumstance.

11 Q. That's exactly what happened. They
12 bargained that away in the context of a settlement,
13 but the customers who want those rates were the ones
14 pushing for it; is that your understanding?

15 A. I know there are some customers in the
16 record that were asking for it. I don't know more
17 than that.

18 Q. Let me ask what would happen if the
19 Commission accepts your recommendation. Your
20 recommendation is to either throw out Rider ELR or
21 just reject the stipulation; is that your
22 recommendation?

23 A. My recommendations are to eliminate Rider
24 ELR or, in the context of this expedited case, to
25 remove them from the expedited case and investigate

1 possible wrongdoing by FirstEnergy in connection with
2 the extension of the riders.

3 Q. Do you understand what happens to the
4 overall stipulation if the Commission follows your
5 advice, that if the stipulation is not approved as
6 filed, that the whole thing could unravel and blow
7 up? Is that your understanding of how it would work?

8 A. I don't know that.

9 Q. You don't --

10 EXAMINER BOJKO: Wait a second,
11 Mr. Kurtz.

12 Do you think the Commission has the
13 authority to do what you're requesting?

14 THE WITNESS: The Commission would have
15 the authority to reject the stipulation or propose an
16 order that modifies the stipulation and in either
17 event, if they follow my recommendation, the tariff
18 would expire because if they rejected them, if the
19 company rejected whatever modifications that the PUCO
20 would make, it reverts back to the old tariffs which
21 by the operation of the tariffs they expire.

22 If the company were to accept whatever
23 modifications that the PUCO made in an order and was
24 following my recommendation, in that event the riders
25 would also expire.

1 EXAMINER BOJKO: Okay. Because, I mean,
2 you put on page 19 of your testimony, you give the
3 Commission two options which is allowing the tariffs
4 to expire or to strip them out of this, and I
5 understood your testimony earlier to Mr. Kurtz that
6 the Commission had no authority to do either of
7 those. So you're saying we can do them, you just
8 don't know if our authority will stick because --

9 THE WITNESS: No.

10 EXAMINER BOJKO: -- they can withdraw
11 their ESP; is that what you're now saying?

12 THE WITNESS: No. I am not challenging
13 the PUCO's authority to make orders. The only thing
14 that I'm referring to is the provisions of Ohio law
15 that do not bind FirstEnergy to accept changes to its
16 ESP. And so at the end of the day if the PUCO were
17 to order something that FirstEnergy didn't like, it
18 could leave the status quo in place; that's the way
19 that the Ohio law works as I understand it to be.

20 But that doesn't mean that the PUCO can't
21 issue an order, I'm not suggesting that at all.

22 EXAMINER BOJKO: And if the Commission
23 issues an order and modifies the stipulation in some
24 way and the company withdraws it, what is your
25 understanding happens under the law?

1 THE WITNESS: That the current ESP would
2 continue.

3 EXAMINER BOJKO: And wouldn't that
4 include the continuation of the tariffs?

5 THE WITNESS: It would. However, the
6 tariffs as they exist in -- currently in the tariff
7 today expire by operation, it's written in the tariff
8 that they expire May 31st, 2011.

9 EXAMINER BOJKO: But if the law says the
10 existing ESP continues, wouldn't that in turn extend
11 any tariffs, otherwise all the tariffs could expire
12 if they had an end and then we'd be stuck doing what?

13 THE WITNESS: This expiration is
14 explicitly to these interruptibles tariffs. This
15 May 31st, 2011, expiration is specific. The other
16 elements of the ESP, there may be other expiration
17 dates but these specific riders under the current in
18 effect ESP expire in 2011.

19 EXAMINER BOJKO: Do you understand that
20 all the tariffs have an expiration date?

21 THE WITNESS: I don't have that
22 understanding.

23 EXAMINER BOJKO: Do you know whether the
24 Commission has ever extended tariffs that have
25 expired by what you're calling their own terms

1 because they have an expiration date at the bottom?

2 THE WITNESS: I'm sure that the

3 Commission has extended tariffs --

4 EXAMINER BOJKO: But you think that --

5 THE WITNESS: -- that are sunseting,

6 excuse me.

7 EXAMINER BOJKO: But you think this would
8 somehow be different?

9 THE WITNESS: What I said is that the
10 tariffs by their terms do expire. That a change
11 would have to be made to keep them into existence.

12 EXAMINER BOJKO: And that's what I'm
13 trying to ask you. Does the Commission have the
14 authority to make that change to keep them in
15 existence?

16 THE WITNESS: It would have the authority
17 to issue a change to them, including a change to
18 extend them. If it is as proposed here, a part of an
19 electric security plan --

20 EXAMINER BOJKO: We're outside of the
21 electric security plan, under my hypothetical the
22 company withdrew it and threw it out the window, so
23 we're outside of that.

24 THE WITNESS: Okay.

25 EXAMINER BOJKO: I'm asking you if the

1 Commission has the authority to extend the tariffs,
2 and I -- well, answer that question.

3 THE WITNESS: Yeah, perhaps, your Honor.
4 But I don't know the answer to that. If the current
5 tariffs are part of an original ESP, then the
6 Commission changing it would be a change to the ESP
7 and that would be a change that under Ohio law the
8 company would have to agree to or it could reject.

9 So I guess what I'm saying is, is that I
10 don't know the answer to your question because it
11 really depends on the status of the ELR tariffs and
12 the current tariff arrangement.

13 EXAMINER BOJKO: Are you familiar with
14 Senate Bill 221?

15 THE WITNESS: Yes.

16 EXAMINER BOJKO: Do you know whether it
17 speaks to this issue precisely?

18 THE WITNESS: I would have to research
19 it, your Honor.

20 EXAMINER BOJKO: Do you know whether the
21 Commission has ever been in this exact situation in
22 the past?

23 THE WITNESS: I believe the Commission
24 has issued orders before to modify I think standard
25 service offer and one of the Ohio companies, might

1 have been FirstEnergy, rejected it and left the
2 status quo in place. I don't know really many more
3 details than that.

4 EXAMINER BOJKO: Did you say you do know
5 that there's a specific provision in SB 221 that
6 deals with the situation of what happens when the
7 utility rejects a Commission modification and
8 withdraws the pending electric security plan? Do you
9 know whether a provision exists to deal with that
10 situation?

11 THE WITNESS: Yeah, yes, as I've
12 described it, I'd have to find it in the statute
13 books, but it essentially works the way I've
14 described of an electric security plan has to be
15 accepted by a company.

16 EXAMINER BOJKO: Go to the next step.
17 What if it's not?

18 THE WITNESS: My understanding, that the
19 status quo ante continues.

20 EXAMINER BOJKO: Okay, but you believe
21 that your status quo ante continues but tariffs would
22 still expire?

23 THE WITNESS: Yes, because the status quo
24 ante was a tariff by its terms -- had a rider to the
25 tariff that by its terms expire.

1 EXAMINER BOJKO: But all the tariffs
2 expire by terms.

3 THE WITNESS: I don't know that. I don't
4 know whether the entire tariff expires by its terms
5 or not.

6 EXAMINER BOJKO: Do you know that the
7 tariff has an expiration date on the bottom of it,
8 every tariff?

9 THE WITNESS: I do not know that.

10 EXAMINER BOJKO: Okay. Sorry, Mr. Kurtz.

11 MR. KURTZ: Thank you, your Honor.

12 Q. (By Mr. Kurtz) Mr. Schisler, assume the
13 Commission adopts your recommendation, it either
14 throws out the entire stipulation or it throws out
15 the ELR/OLR tariffs for separate investigation. What
16 do you hope to gain? What do you want out of this?

17 A. What we hope to gain is a transparent,
18 fair, competitive landscape consistent with Ohio
19 pronouncements of its statutory objectives and
20 policies for compensation. EnerNOC wants to serve
21 FirstEnergy customers and wants to provide them with
22 demand-side management service including energy
23 efficiency and demand response. EnerNOC wants there
24 to be competition among other innovators in this
25 area.

1 Q. So that's it, you want to take the
2 customers who are interruptible right now and make
3 them your customers and take them away from the
4 program that they want, the ELR program, and you want
5 to sell them PJM demand response for less than what's
6 in the current stipulation for the first two years
7 and then take a cut out of it, your profit, and make
8 it even lower. That's really what you want, right?
9 You're in this to make a profit because you want
10 those ELR customers to be your customers.

11 A. No.

12 Q. So you're in it for altruistic reasons,
13 for transparency, that's your motivation?

14 A. You asked a multiple compound question
15 that I responded to, sir.

16 Q. Well, let me rephrase it. What you
17 really want is you want to take these ELR customers
18 and see if you can sell them demand response, right?

19 A. Yes.

20 Q. Okay. Now, what in the world, why in the
21 world would these customers sign up with EnerNOC if
22 you are the -- if you prevail and you win and have
23 this program which the customers want thrown out?
24 Why do you think that they would do business with
25 you?

1 A. Well, we have a lot of innovative
2 service, we offer competitive pricing and we have a
3 number of -- we have satisfied customers throughout
4 the country and we believe we would satisfy
5 FirstEnergy customers as well.

6 Q. Well, I thought you said for the first
7 two years the price you would offer is less than what
8 the stipulation provides, in the third year we don't
9 know.

10 A. That was not my testimony. What my
11 testimony was, that the compensation available from
12 the capacity market is lower than the amount that is
13 being paid by the company. The company is paying a
14 substantially higher than market price for what it's
15 getting from the interruptible customers.

16 Q. What would you pay the customer, the
17 interruptible customers in the stipulation get \$10 a
18 kilowatt month for interruption plus they're subject
19 to economic interruption, what would you pay the
20 interruptible customers? What's your offer?

21 A. We would pay the customer -- I don't want
22 to be evasive but it really depends on the customer.
23 If the customer is a very reliable load with a flat
24 load shape so you know exactly how much you're going
25 to get every time, that customer might be worth more

1 than say like a scrap metal yard who has a very, you
2 know, wildly changing peak, you don't know when you
3 call it how much you're going to get. So every one
4 of these is customized.

5 But they would share in the or get paid
6 through some economic arrangement in the capacity
7 element and then we might also be, because of our
8 technology, enabling them to participate in economic
9 load response and bidding those resources into the
10 market or providing synchronized reserves, those are
11 compatible revenue streams, we would maximize the
12 value of that customer's demand side response.

13 Q. Tell me for example how much would you
14 pay a fluctuating load versus a flat road? Why would
15 the Commission want to trash a deal that the
16 customers want and they've agreed to for the if come
17 that you're going to provide some sort of other
18 product? How much -- what is that other product?

19 A. You ask why would the Commission and what
20 is that other product. Can I answer the first one
21 first?

22 Q. Go ahead.

23 A. Okay. The Ohio laws encourage
24 development of a competitive marketplace as the best
25 means to ensure fair and reasonable pricing to

1 customers, and so having out-of-market tariffs is
2 anathema to having that competitive marketplace
3 develop so its policy judgment, the Commission might
4 find that that is contrary to public policy set forth
5 in Ohio statutes that encourages competition,
6 especially where we have clear misrepresentations in
7 the wholesale market while these things were
8 occurring at the same time.

9 Q. So you think it's good for the Ohio
10 economy, which is also one of the policy goals of
11 Senate Bill 221, to promote economic development, you
12 think it's good for the Ohio economy if these big
13 industrial customers pay higher electric rates so you
14 can take a profit on this PJM demand response instead
15 of the deal on the table.

16 A. Again, you asked a compound question,
17 sir. It is good for the economy, the Ohio economy,
18 including those industrial customers because it
19 creates an opportunity for not just giant industrials
20 who can get a favored arrangement but supermarkets
21 and Best Buys and Wal-Marts and hotels, all of those
22 customers get to participate too in this competitive
23 market. They're not being served by the utility.
24 And all of those other customers participating lowers
25 the price for all customers, residential or

1 otherwise.

2 Q. You're free to sell to Wal-Mart and Best
3 Buy and Kroger and everybody else. They're not on
4 the ELR tariff. They're not even -- that's not a
5 problem.

6 A. I don't know who's onto ELR --

7 EXAMINER BOJKO: Wait a second.
8 Mr. Schisler, are we talking about purchasing
9 electricity and the global suppliers and everybody
10 can shop?

11 THE WITNESS: Yes.

12 EXAMINER BOJKO: Well, don't you sell one
13 product which is the demand response piece? I mean,
14 you're talking pretty broad about what's in the
15 public interest but I thought we were talking about
16 having competitive options for one piece.

17 THE WITNESS: Right, thank you, your
18 Honor. In the commodity arrangement that a customer
19 has there's a demand charge and then there's the
20 commodity charge, if you will. The demand charge is
21 relating to their peak capacity, and it's a component
22 of what they pay for supply service, regular
23 generation service.

24 What demand response does, it knocks down
25 that peak capacity so it lowers their generation cost

1 as well. And then by lowering the peak cost for --
2 across for the FirstEnergy load, that alters the
3 supply and demand which means that capacity generally
4 clears lower. Demand response, and you can read
5 numerous reports in the market monitor and PJM state
6 of the market report how we place dramatic downward
7 pressure on the resulting market clearing prices for
8 capacity in the wholesale market and that rolls right
9 through to customers in the purchase of electricity
10 supply.

11 Q. (By Mr. Kurtz) How many employees in Ohio
12 does EnerNOC have?

13 A. It would be a guess but I'd say around
14 five or six.

15 Q. Do you think the Commission should do
16 what's in the best interest of the Ohio economy in
17 general or of EnerNOC in particular in deciding this
18 case?

19 A. They should do what's in the best
20 interest of Ohio.

21 MR. KURTZ: Okay, good. Thank you.

22 Sorry, your Honor, that's all my
23 questions.

24 EXAMINER BOJKO: Let's go off the record
25 for a moment.

1 (Discussion off the record.)

2 EXAMINER BOJKO: Let's go back on the
3 record.

4 Mr. Smith.

5 MR. SMITH: Thank you.

6 - - -

7 CROSS-EXAMINATION

8 By Mr. Smith:

9 Q. Good morning, I represent Materials
10 Science Corporation. Turning to page 19 of your
11 testimony, throughout your testimony you present
12 arguments that the FirstEnergy companies allegedly
13 misinformed you and did other actions that you
14 considered to be acting in bad faith; is that
15 correct?

16 A. I didn't use the word "bad faith" but
17 they made misrepresentations or failed to correct
18 misrepresentations.

19 Q. And then your remedy, is it not, that the
20 Commission should exclude the ELR and OLR riders from
21 the agreed-to stipulation; is that true?

22 A. Yes.

23 Q. And in order for that to happen is it not
24 true the Commission has to make independent
25 determinations that your allegations are true?

1 A. No.

2 Q. It's your testimony that the Commission
3 should accept your allegations as true in order to
4 exclude the ELR and OLR remedies -- riders?

5 A. Despite my testimony with respect to
6 FirstEnergy's misrepresentations, there are very
7 sound policy reasons why these riders are bad policy.

8 Q. So they need not consider the
9 misrepresentations in their exclusion of the ELR/OLR
10 riders from the stipulation; is that correct?

11 A. They don't have to consider them to
12 reject them, but one would expect that they should be
13 concerned about serious misrepresentation in the
14 marketplace; the Commission I'm referring to.

15 Q. Then the sole basis that you request the
16 Commission act is on policy grounds.

17 A. I requested, as I've stated in my
18 testimony, that they -- on both policy grounds and
19 with respect to the misrepresentations made by
20 FirstEnergy that calls for a rejection of the
21 stipulations portion of the tariff that relates to
22 Rider ELR and OLR and, if the Commission views it
23 necessary, an investigation into FirstEnergy's
24 conduct.

25 Q. Well, is not your answer totally

1 inconsistent with your previous answer that the
2 Commission need not consider the misrepresentations
3 and that solely their decision should be based on
4 policy?

5 A. Okay. Maybe I misspoke or maybe you
6 misheard me but what I was saying is there's
7 sufficient policy grounds if you forget about the
8 points that I made about their misrepresentation,
9 there are sound policy grounds why this is bad policy
10 for Ohio, which I've testified and there are other
11 witnesses that are going to testify about. So they
12 can forget about that stuff and still say this is bad
13 policy but this is yet another reason why they should
14 not go forward.

15 Q. And do you accept that the General
16 Assembly of Ohio laid out the policy considerations
17 in the Commission's decisions under Chapter 4928? Do
18 you accept that?

19 A. I'll accept that.

20 Q. Do you also accept the Commission has
21 broad discretion in determining what is
22 reasonableness under Ohio public utility statutes?

23 A. Yes.

24 MR. SMITH: I have nothing further.

25 EXAMINER BOJKO: Constellation?

1 MR. SETTINERI: No questions, your Honor.

2 EXAMINER BOJKO: Mr. Conway?

3 MR. CONWAY: No questions, your Honor.

4 EXAMINER BOJKO: Mr. Randazzo?

5 MR. RANDAZZO: Thank you.

6 - - -

7 CROSS-EXAMINATION

8 By Mr. Randazzo:

9 Q. Just I remain so we're almost done.
10 You're a former regulator; is that correct?

11 A. I am, sir.

12 Q. And as a former public utility regulator,
13 you are aware that utility proceedings are frequently
14 multiparty proceedings; is that correct?

15 A. Yes, I am.

16 Q. And, in fact, you are here today on
17 behalf of one of the parties in this proceeding,
18 correct?

19 A. Yes, sir.

20 Q. And in your capacity here today you're
21 urging the Commission to make a change to a proposal
22 that is being supported by a utility, correct?

23 A. Yes.

24 Q. And that's irrespective of your views
25 about what rights the utility may have to ultimately

1 veto the Commission's decision; is that correct?

2 A. That's correct.

3 Q. All right. Now, have you ever presided
4 over a public utility proceeding in which a wild-eyed
5 intervenor made a proposal that was adopted by the
6 Commission?

7 A. Yes. Though I wouldn't necessarily
8 called them wild-eyed.

9 Q. Well, even wild-eyed advocates sometimes
10 offer something up that the regulator finds merit in,
11 correct?

12 A. Sure. If a party presents meritorious
13 arguments, the Commission could accept them.

14 Q. And the regulator is charged with a
15 responsibility for evaluating the proposals based
16 upon their merits; is that correct?

17 A. Yes. Yes.

18 Q. And based on the evidence presented in a
19 proceeding and the law applicable to the regulator;
20 is that correct?

21 A. Yes.

22 Mr. Randazzo, I need to qualify that just
23 a bit, that in this position I wouldn't want to be in
24 the position of the Commission because in this
25 position they sort of have to say this --

1 Q. Well, you're not.

2 A. -- versus the status quo ante and that's
3 not a good choice.

4 Q. You're not in the position of the
5 Commission.

6 A. Right.

7 Q. So I don't want to put you there either.

8 How long has EnerNOC been soliciting
9 retail customers in Ohio?

10 A. I could give you like a date within a
11 year or two. I would say 2006-2007.

12 Q. And does EnerNOC in soliciting customers
13 in Ohio, does EnerNOC offer other things other than
14 demand response?

15 A. Yes, we do.

16 Q. Do you provide generation supply
17 services?

18 A. We do not.

19 Q. What other services do you make available
20 or offer to retail electric consumers in the state of
21 Ohio?

22 A. We offer energy efficiency services, we
23 help customers manage the use of their buildings so
24 that they can not waste energy. We have a carbon
25 accounting software package that helps enterprises

1 manage their carbon footprint. And in retail choice
2 areas of the country we provide a consulting service
3 to customers who -- to help them optimize their
4 energy purchases and risk management. We don't take
5 title, we're on the customer's side of the table, but
6 we provide that kind of consultative support.

7 Q. Do you engage in aggregation?

8 A. Aggregation, you have to be careful how
9 you use the term because it means something different
10 in the wholesale market than in a retail market.
11 It's not a defined term in both contexts. But yes,
12 we do aggregation.

13 EXAMINER BOJKO: On the retail side?

14 THE WITNESS: We do aggregation in the
15 wholesale market and we aggregate load response. In
16 the retail sense it means aggregating the generation
17 commodity demand, we don't do that.

18 Q. Okay. Have you looked at Ohio law to see
19 whether or not aggregation is a competitive retail
20 electric service?

21 A. Aggregation in the retail sense I believe
22 could be because you could have aggregators that are
23 for-profit aggregators, if they're, you know,
24 bundling up say the load of the, you know, all of the
25 supermarkets in Ohio that could be a competitive

1 service they probably, I don't know what your
2 question was, if you were asking do they need to get
3 a license, was that your question?

4 Q. I'll skip it.

5 A. Okay.

6 Q. May see something in the brief on it.

7 You indicated you were, as of yesterday
8 you were registered to do business in Ohio; is that
9 correct?

10 A. Yes, sir.

11 Q. And when does that -- when does your
12 status to do business in Ohio become effective?

13 A. It became effective yesterday.

14 Q. And that's a result of you proceeding to
15 the Secretary of State's office and requesting
16 expedited treatment of your registration?

17 A. Not me personally, but my company, yes.

18 Q. Okay. And what prompted you to seek
19 registration in the state of Ohio?

20 A. You.

21 Q. No charge.

22 And have you filed a tax return in the
23 state of Ohio?

24 A. I do not know.

25 Q. You're currently serving customers in the

1 state of Ohio, correct? EnerNOC. When I say "you"
2 I'm referring to EnerNOC, not you personally.

3 A. We currently -- yes, we currently have
4 customers in the state of Ohio.

5 Q. Are you familiar with the corporate
6 activity tax?

7 A. I am not.

8 Q. If you know, have you submitted any tax
9 returns to the state of Ohio?

10 A. I do not know.

11 Q. You're generating revenue from the state
12 of Ohio presently, correct?

13 A. I don't know that. I don't know whether
14 it's like a -- where the revenue is actually earned.
15 I mean the company's headquartered in Boston, the
16 transactions are in the wholesale market, I don't
17 know tax law or where the energy revenues are being
18 earned.

19 We actually pay our customers, we don't
20 get paid from them, so I don't know where the
21 earnings take place.

22 Q. Okay. Fair enough.

23 Have you made any -- paid any assessments
24 to the Office of Consumers Counsel or the Public
25 Utilities Commission of Ohio?

1 A. No. I don't think we're a utility, I
2 think that's...

3 Q. Are you aware of whether or not those
4 assessments are also obligations of entities that
5 provide competitive retail electric service in the
6 state of Ohio?

7 A. It may be.

8 Q. Do you think you have some competitive
9 advantage if folks that are certified competitive
10 retail electric suppliers have to pay those taxes and
11 assessments and you do not?

12 A. That's a policy decision and I don't
13 know. I don't know.

14 Q. But for FirstEnergy's efforts to
15 participate in PJM, you would not have had
16 opportunity to solicit FirstEnergy's Ohio customers,
17 retail customers, to participate in PJM's demand
18 response program; is that correct?

19 A. There was a piece of your question that
20 was a little bit circular so I either need it read
21 back or restated.

22 Q. Let me withdraw it.

23 A. Okay.

24 Q. The opportunity to solicit FirstEnergy's
25 retail customers in Ohio to participate in the PJM

1 demand-response programs is a function of FirstEnergy
2 migrating to PJM, right?

3 A. We could serve them in MISO. We are not,
4 but we could.

5 Q. But you didn't.

6 A. We have not.

7 Q. Yeah. And so you became interested in
8 serving FirstEnergy's customers in Ohio as a result
9 of the migration that PJM proposed, correct?

10 A. I think that's a fair statement, yes.

11 Q. So in a way FirstEnergy created a
12 business opportunity for you, EnerNOC, by proposing
13 to go to PJM, correct?

14 A. Yes.

15 Q. And by the way, is that certain? Is
16 FirstEnergy's migration to PJM a certain thing at
17 this point?

18 A. It is approved by FERC and subject to --
19 I don't know, there may be court challenges. It was
20 approved by FERC so unless something changes, I think
21 that it is certainly.

22 Q. Well, FirstEnergy could change its mind,
23 right?

24 A. They can exit a RTO voluntarily. They
25 have the -- under federal law they can move to an RTO

1 voluntarily or quit an RTO and be their own beast, if
2 you will.

3 Q. Yeah, and in the scheme of things, and
4 FirstEnergy is not alone, but in the scheme of
5 things, and you've been around for a while so I'll
6 ask you this historical question, in the scheme of
7 things FirstEnergy has been a part of how many
8 regional transmission organizations?

9 A. Well, they've been around since 1999, and
10 I think they had a couple iterations of when they
11 were trying to figure out what they were trying to
12 be, there was align RTO.

13 Q. Alliance.

14 A. They ultimately became MISO for some of
15 their operating companies and PJM for others.

16 Q. But initially there was the Alliance,
17 correct?

18 A. I don't remember the complete history
19 perfectly.

20 Q. Never mind.

21 A. But MISO, in recent history it was MISO
22 and PJM.

23 Q. All right. Now, I want to talk a little
24 bit about the PJM demand-response program as you
25 describe it in your testimony. The demand-response

1 program is really a component of a larger resource
2 adequacy structure market that is operated by PJM; is
3 that correct?

4 A. Capacity demand response is, yes.

5 Q. Yeah. And in the capacity context,
6 again, relative resource adequacy requirement that is
7 established by PJM, PJM establishes the resource
8 adequacy requirement for the PJM footprint, right?

9 A. Yes.

10 Q. Okay. And everybody that operates within
11 that footprint that serves load has to satisfy PJM's
12 resource adequacy requirement, correct?

13 A. Yes.

14 Q. And you can do that in a variety of ways,
15 can you not?

16 A. With a variety of resources or variety of
17 ways?

18 Q. Variety of resources, that's correct.
19 There's generation resources.

20 A. That's what I thought you were getting
21 at, generation, transmission, exports, demand
22 response, energy efficiency.

23 Q. Yeah.

24 A. I think that's all of them.

25 Q. And demand response in effect competes

1 against those other resources for a place in the
2 stack of resources; is that right?

3 A. Right. Yes. That's how you could
4 displace a generation resource that's higher cost and
5 you're lower in price.

6 Q. So the opportunity for any demand
7 resource to be accepted by PJM as a dispatchable
8 resource depends upon how it interacts with all the
9 other resources that are competing for that place in
10 the stack, right?

11 A. It has to be lower cost; yes.

12 Q. And, in fact, when PJM had its ATSI
13 integration auction, it identified which types of
14 resources filled how much of the capacity that was
15 cleared in the auction; is that correct?

16 A. FirstEnergy and PJM did that.

17 Q. Okay. Now, with regard to
18 demand-response resources, are there various types of
19 demand-response resources?

20 A. Yes.

21 Q. And can you identify those types?

22 A. Okay. There are, in the emergency
23 program there are three types. There's one that's
24 like an energy-only product, you can -- you're not
25 committed and it's voluntary and you can, when

1 there's an emergency you'll get a signal and if you
2 get a signal you'll get paid from the wholesale
3 market, no commitment, but that's called the
4 emergency only.

5 And then there's the capacity only where
6 you might be in a competitive service where they've
7 got -- you're on a, some kind of a retail arrangement
8 where you only get the capacity payment. And then
9 the third type of emergency capacity is full
10 emergency where you get a capacity payment and when
11 the resources get dispatched, you get paid for the
12 demand-response energy. Then there's some other
13 noncapacity nonemergency type programs like sync
14 reserves, regulation and economic energy.

15 Q. Okay. Do the names firm and guaranteed
16 load drop have any significance to you?

17 A. Those are baselines methodologies for
18 measuring how much demand response is being committed
19 to the market.

20 Q. Okay. And within the demand-response
21 component of the resources that are eligible to
22 participate in PJM's capacity market are there
23 existing resources as well as planned resources?

24 A. Yes.

25 Q. And what is the difference between those

1 two?

2 A. Okay. It is different from the common
3 man's understanding of what an existing resource is
4 from a planned resource because it exists in the
5 world of credit, and existing demand response
6 resource is -- if you deal with the power plant, a
7 power plant, you see it, there's iron in the ground,
8 and so when they bid into forward auctions, they
9 don't have to post collateral because you can look at
10 it. The collateral requirement ensures that you will
11 actually deliver the resource to the market. In the
12 case of a power plant it's there so the rules allow
13 you to not post collateral to ensure delivery for an
14 existing power plant.

15 So PJM had to write rules for demand
16 response that were comparable. So how do you write
17 that for a demand response because the customer can
18 quit tomorrow, right? So essentially what they did
19 is they came up with a comparable set of rules that
20 said if you have an existing customer, you can apply
21 those resources in a comparable way to an obligation
22 for a resource for future delivery, but if you don't
23 have a current customer, that's called a planned
24 demand-response resource.

25 Q. Okay. And you mentioned the FAQs that

1 PJM issued in conjunction with the ATSI integration
2 auction in your prior testimony; do you recall that?

3 A. Yes.

4 Q. And do you know whether the PJM FAQs
5 established what would be existing versus planned
6 resources for purposes of the ATSI integration
7 auction?

8 A. What the FAQs clarified was that in order
9 to be counted as an existing demand-response
10 resource, this is a credit issue, that Rider ELR
11 resources would meet that definition and the reason
12 for that was that in MISO there was no comparable
13 product to the existing DR product, so you had to
14 have some way of defining what's an existing versus
15 planned resource.

16 Q. Okay. And if a curtailment service
17 provider like EnerNOC wanted to bid into the PJM
18 capacity auction something that was classified as an
19 existing resource, it was a separate process
20 associated with how you would go about doing that,
21 correct?

22 A. Yes.

23 Q. And there's a, in the case of existing
24 resources there's actually a numerical identification
25 of those existing resources; isn't there?

1 A. To be very precise, you have to identify
2 the customer that you're relying upon to make sure
3 that's the existing -- that you really got an
4 existing customer to satisfy an obligation. You
5 don't associate the customer that's actually going to
6 deliver the resource until the delivery year.

7 So yes, you have to have an existing
8 customer account to say, okay, therefore I don't have
9 to post credit for this obligation that I'm taking
10 on.

11 Q. Right. And if you were going to register
12 something in the ATSI integration auction that was
13 classified as an existing resource, you would have to
14 demonstrate that you had the authority to register
15 that resource coming from the customer, correct?

16 A. Yes.

17 Q. Now, can customers sign up with multiple
18 curtailment service providers?

19 A. In different programs, yes.

20 Q. Well, can they sign up? It doesn't mean
21 they get selected, they can sign up with EnerNOC,
22 they could sign up with...

23 A. Customers can't be committed by two
24 different ESPs to the PJM market for the same
25 product.

1 Q. Well, let's explore that a second. In
2 the case of planned resources where a curtailment
3 service provider is bidding into the PJM capacity
4 auction, is there any specific consumer identity
5 associated with those planned resources?

6 A. By virtue of the fact that they're
7 planned you haven't identified customers. What
8 you're doing is taking on an obligation, a risk. So
9 you do not have to identify the customers by name.

10 Q. In fact, it would be possible for a
11 curtailment service provider to bid in a quantity of
12 planned resources and if that curtailment service
13 provider cleared capacity through the auction, the
14 curtailment service provider could then go out and
15 try to sign up customers to satisfy the obligation
16 created by the auction process, correct?

17 A. Yes.

18 Q. All right. Now, and as a curtailment
19 service provider, hypothetically speaking, you would
20 not necessarily have to have customers signed up in
21 advance in order to submit a bid in the resource or
22 capacity auction process that was conducted in
23 conjunction with -- conducted by PJM under the ATSI
24 integration process; is that correct?

25 A. Yes.

1 Q. Now, in the frequently asked questions
2 that were issued by PJM -- and by the way, PJM
3 instructs parties that are interested in these sorts
4 of things to please check its website frequently
5 because these things change frequently and so you're
6 always sort of on guard to make sure you're following
7 the latest, greatest information from PJM; is that
8 correct?

9 A. Yes.

10 Q. And in the information that was issued by
11 PJM did they specifically identify how the ELR
12 customers would be classified, whether they would be
13 classified as existing or planned resources?

14 A. I'd have to see the FAQ.

15 Q. Would it make a difference?
16 Hypothetically let's assume that PJM had classified
17 the ELR customers as an existing resource. In that
18 circumstance, before EnerNOC could bid the demand
19 response of any ELR customer into the PJM auction
20 process, it would have had to complete the paperwork
21 associated with bidding in existing resources, right?

22 A. We'd have to have the customer, yes. I
23 think -- if I understood your question.

24 MR. RANDAZZO: May I approach the
25 witness?

1 EXAMINER BOJKO: You may.

2 Q. Sir, I'm laying in front of you a
3 document that's called RPM FRR Integration Auction
4 FAQs, this one is dated March 12th, 2010.

5 A. And is this a printout from the web page?

6 Q. It's a printout from the website, PJM's
7 website. Your understanding is this information is
8 readily available, it's public, not secret,
9 confidential.

10 A. That's correct.

11 Q. All the stuff that curtailment service
12 providers would be paying attention to --

13 A. Yes.

14 Q. -- and actively watching to make sure
15 that they were putting themselves in the appropriate
16 position to be successful in a competitive bidding
17 process, right?

18 A. Yes. Okay.

19 Q. Now, I'd like you to turn to, if you
20 will --

21 MR. RANDAZZO: And by the way, your
22 Honor, part of this information was included in the
23 record that was developed during the MRO proceeding,
24 it was I believe IEU Exhibit 3 introduced
25 approximately December the 23rd, a portion of this.

1 Q. I'd like you to turn to page 22 of the
2 document and specifically CR22. Do you know what CR
3 stands for?

4 A. I think it might be credit. I don't
5 know. After a while there were so many questions
6 they started to give them like little monikers on the
7 start, that's not how it started with the FAQs, but
8 over time.

9 Q. In any event, it's identified as CR22.

10 A. Yes.

11 Q. Now would you read that, it carries over
12 to the top of page 23, and would you read that?

13 A. Okay. The question CR22: What standards
14 are being used to determine which demand resources
15 are considered existing resources for the purpose of
16 the FRR integration auctions?

17 Answer: And this is an answer from the
18 ATSI utilities because they have to make their
19 information generally available to the public, so
20 answer: Existing demand resources are defined as
21 those resources that are currently linked to
22 emergency load reduction customers registered in
23 PJM's load response application for the current
24 delivery year.

25 Since demand response customers located

1 in the ATSI zone for the current delivery year do not
2 yet exist in the PJM load response application, PJM
3 will consider sites currently participating in the
4 ATSI utility's DR program via Rider ELR as existing
5 resources. These resources total approximately
6 400 megawatts. Participants wishing to offer these
7 sites into the FRR integration auction should contact
8 PJM with the appropriate EDC account numbers to
9 qualify these sites as existing.

10 If requested by a CSP, sites in the ATSI
11 zone not participating in the ATSI utility's DR
12 program via ELR will be evaluated on a case-by-case
13 basis to determine if they are eligible to offer as
14 existing DR.

15 Similar to the current RPM process, in
16 the event two providers claim ownership of the same
17 site, letters from the customer site will be required
18 that clearly designate the correct supplier. If
19 consensus cannot be reached, no supplier can claim
20 the existing site in their -- their site as existing
21 in their portfolio. But either supplier has the
22 option to offer the site as a planned resource
23 provided appropriate DR plan documentation has been
24 submitted by February 22, 2010.

25 Unlike other RPM auctions, planned

1 resources do not establish an RPM credit limit with
2 PJM prior to the ATSI FRR auction, instead, PJM will
3 require credit from FE for any planned resources
4 contained in their FRR capacity plan.

5 FE will require performance assurance
6 from noninvestment grade companies for all resources
7 including planned that clear in the ATSI FRR
8 auctions. In this case noninvestment grade is
9 designed as being below BBB- by S&P, Standard &
10 Poor's, or below Baa3 by Moody's. The performance
11 assurance amount is based on the calculation shown in
12 Article 6.1 of the capacity purchase and sale
13 agreement.

14 Q. Thank you. Now it's clear to you from
15 that that there's a reference to the Rider ELR. Is
16 that the same Rider ELR you understand --

17 A. Yes.

18 Q. -- is in place presently for the retail
19 operating companies of FirstEnergy?

20 A. Yes.

21 Q. Okay.

22 A. As currently in existence, yes.

23 Q. And that there were approximately
24 400 megawatts associated with the Rider ELR that were
25 classified as existing resources; is that correct?

1 A. That's what FirstEnergy represents, yes.

2 Q. Well --

3 A. I only know what FirstEnergy represents.

4 Q. Right. Okay. And, again, this was in
5 conjunction with the ATSI integration auction for
6 purposes of planning years -- for what planning
7 years?

8 A. Two different planning years. 2011-'12,
9 and 2012-'13.

10 Q. Okay. So do you know whether any
11 curtailment service providers submitted in the ATSI
12 integration auction demand response bids for existing
13 demand response?

14 A. Do not know.

15 Q. Do you know if any curtailment service
16 providers signed up customers that are currently
17 served by -- under Rider ELR for purposes of bidding
18 into PJM's ATSI integration auction?

19 A. That information isn't public and I don't
20 know it.

21 Q. Thank you.

22 If customers served under Rider ELR were
23 already signed up with other curtailment service
24 providers, they would not be available to EnerNOC; is
25 that correct?

1 A. Yes. Well, again, yes if they are
2 committed through the relevant period. You can have
3 an existing customer, again this is a credit term, so
4 they may have an existing customer and they can count
5 them to avoid the credit obligation but maybe their
6 contract expires in 2011 and they could -- they could
7 replace that customer with another customer and so
8 you could have another CSP serving that customer,
9 just to be precise. You know, there -- to be precise
10 on your answer.

11 Q. Well, but you did not go after -- strike
12 that.

13 Now, with regard to the auction, the ATSI
14 integration auction, do you have, for the two
15 planning years that you mentioned earlier, do you
16 have some sense of how much capacity was bid in and
17 how much capacity cleared?

18 A. That information is public information.

19 Q. Right.

20 A. I don't recall the numbers off the top of
21 my head.

22 MR. RANDAZZO: May I approach the
23 witness?

24 EXAMINER BOJKO: You may.

25 Q. Sir, I'm handing you a document that at

1 the top of it has 2011-'12, 2012-'13 ATSI FRR
2 Integration Auction Results. Is that the document
3 that describes publicly PJM's -- the results of the
4 ATSI integration auction?

5 A. Yeah, this is where I know the
6 information to be public. This looks like a printout
7 from PJM.

8 Q. And rather than asking you to describe
9 the results of the auction here today and take up the
10 time to do that, you believe that that document is an
11 accurate indication of the auction results?

12 A. Yes.

13 Q. Okay.

14 MR. RANDAZZO: Your Honor, I would like
15 to have marked for identification purposes IEU
16 Exhibit No. 1, and I have copies for the parties.

17 EXAMINER BOJKO: It will be so marked.

18 (EXHIBIT MARKED FOR IDENTIFICATION.)

19 Q. It's fair to say, sir, is it not, that
20 there was much more capacity bid into the ATSI
21 integration auction than cleared?

22 A. I might have to look at the document
23 again to sort of say much more, but there was more
24 that bid than cleared, I can recall that much.

25 Q. Right. So the thing that determined

1 whether a resource was selected from the auction
2 process was the price that that resource bid into the
3 auction; is that correct?

4 A. Yes.

5 Q. And in the PJM process all the resources
6 that clear through the auction process get paid the
7 same clearing price irrespective of what they bid; is
8 that correct?

9 A. Yes.

10 Q. So hypothetically it's possible for a
11 supplier to -- curtailment service provider to bid a
12 much lower price than they actually get paid.

13 A. Yes.

14 Q. Is that correct?

15 MS. ROBERTS: Excuse me, may I see that
16 before you continue?

17 MR. RANDAZZO: Yeah, you've already seen
18 it. It's the one marked as IEU Exhibit 1.

19 MS. ROBERTS: Thank you.

20 MR. RANDAZZO: No surprises.

21 Q. Has there been a fair amount of
22 volatility in the capacity auction results that have
23 been conducted by PJM in terms of the clearing
24 prices?

25 A. Yes.

1 Q. And based upon what has been marked for
2 identification as IEU Exhibit No. 1, what was the
3 clearing price for the 2011-2012 planning year versus
4 2012-2013 planning year?

5 A. The clearing price in 2011-'12 was
6 \$108 per megawatt day.

7 Q. Right. And the clearing price in the
8 subsequent planning year?

9 A. The clearing price for 2012-2013 planning
10 year for the ATSI territory is \$20.46 per megawatt
11 day.

12 Q. All right. And again, that clearing
13 price is a function of what folks bid into the
14 auction process; is that correct?

15 A. That's correct.

16 Q. And when I say "folks," I'm really
17 meaning the various resources that we talked about
18 earlier, correct?

19 A. Yes.

20 Q. All right. Do you have any idea what the
21 auction results for capacity auctions that have been
22 conducted by PJM were over the last five years?

23 A. That information, a similar report is
24 available for all of PJM capacity auctions.

25 Q. And if we were to compare the results of

1 the auctions, would you agree that there's a fair
2 amount of volatility that has occurred in those
3 auction prices?

4 A. There are different load zones and there
5 hasn't been volatility in all of them but there has
6 been volatility in some of them.

7 Q. Okay.

8 MR. RANDAZZO: I'm done with the, what
9 I'll call the public portion of my cross-examination.
10 I have I think two or three questions that I need to
11 ask out of an abundance of caution in the
12 confidential portion.

13 EXAMINER BOJKO: At this time we are
14 going to go in camera and only the parties that have
15 confidentiality agreements with both FE as well as
16 EnerNOC will be able to remain in the room. We've
17 decided that we will go from the confidential portion
18 to lunch so all of you that cannot stay can just go
19 to lunch, and then we'll come back after lunch and do
20 redirect as well as the Bench's questions, and that
21 way we'll give you time to get your redirect so we're
22 not taking multiple breaks.

23 So, Mr. Randazzo, how long do you think
24 your --

25 MR. RANDAZZO: I think two or three

1 questions, I don't anticipate it's going to take very
2 long.

3 EXAMINER BOJKO: The computer's our
4 official clock since we don't have one in the room
5 and it says 1:01. Please return from lunch at 2:15.
6 Thank you.

7 (Confidential portion excerpted.)
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2
3
4 Wednesday Afternoon Session,
5 April 21, 2010, Open Record.

6 - - -

7 EXAMINER BOJKO: Let's go back on the
8 record. We are now again in the public version of
9 the transcript. I believe before we went into the
10 confidential version we said we were going to do
11 redirect once we got back to the public version.
12 Miss Roberts, do you have any redirect?

13 MS. ROBERTS: I have hopefully about four
14 minutes.

15 EXAMINER BOJKO: Mr. Schisler, please
16 remember you are still under oath.

17 THE WITNESS: Thank you, your Honor.

18 EXAMINER BOJKO: You have how many, four
19 minutes?

20 MS. ROBERTS: I'm hoping I can do it in
21 four minutes.

22 - - -

23 FURTHER REDIRECT EXAMINATION

24 By Ms. Roberts:

25 Q. Mr. Schisler, do you recall when you were

1 asked to turn to deposition page 126 and you were
2 asked about a word you used on line 17?

3 A. Yes.

4 Q. Can you explain why you did or didn't use
5 that word?

6 A. Okay. And I just want to make sure I was
7 not confusing my words that the hearing examiners --
8 in that sentence that I read from my testimony, it
9 said "FirstEnergy having put material representations
10 that are, without equivocation, into the market was
11 entitled to make sure that that information was kept
12 accurate on a continuing basis."

13 Whatever I said, what I meant to say is
14 that "entitled" doesn't make sense in that sentence
15 as a matter of grammar and it would have been -- what
16 I would have meant to say was required, you know,
17 whatever I said, so required in that sense.

18 I did otherwise testify that we were
19 entitled to rely upon information that FirstEnergy
20 put into the market, but in this instance "required"
21 was a better word than "entitled."

22 Q. Do you recall questions by Mr. Kutik
23 about the company's financial condition?

24 A. Yes, I do.

25 Q. And he referred you to the company's 10-K

1 for the year ending December 31st, 2009; is that
2 correct?

3 A. Yes.

4 Q. The company's financial --

5 EXAMINER BOJKO: I'm just trying to
6 figure out, your client just --

7 EXAMINER PRICE: We'll talk about it
8 later.

9 EXAMINER BOJKO: Okay.

10 THE WITNESS: It was a foundational
11 question I think so I don't think there's anything --

12 EXAMINER PRICE: Can we have the last
13 question and answer back again?

14 EXAMINER BOJKO: I was trying to protect
15 the confidential nature of a certain paragraph and I
16 was just making sure we were all okay.

17 MR. KUTIK: I believe the question was to
18 the 10-K.

19 (Record read.)

20 Q. (By Ms. Roberts) And do you recall
21 Mr. Kutik's questions concerning the viability of the
22 company?

23 A. Yes.

24 Q. And whether it was profitable.

25 A. Yes.

1 Q. Has the company achieved profitability?

2 A. Yes. The company, this was -- a 10-K is
3 an annual report. You're also required to file a
4 10-Q which is a quarterly report and the company was
5 a start-up in 2007 and for the quarter, the fourth
6 quarter of 2009 as we deployed the capital raised in
7 our initial public offering, we scaled up and turned
8 a profit in '09 on the fourth quarter and we've given
9 guidance to the market, to the securities market, I
10 should clarify, that we will be profitable on an
11 annual basis with all the normal securities law
12 caveats but throughout calendar year 2010.

13 MS. ROBERTS: I have no other questions.

14 EXAMINER BOJKO: Consumers' Counsel, any
15 recross?

16 MR. POULOS: We do not.

17 EXAMINER BOJKO: Mr. Heintz?

18 OEC?

19 MR. DYAS: No.

20 EXAMINER BOJKO: Mr. Eckhart?

21 MR. ECKHART: No questions.

22 EXAMINER BOJKO: NOPEC?

23 MR. WARNOCK: No, your Honor.

24 EXAMINER BOJKO: Direct?

25 MR. DYAS: No questions, your Honor.

1 EXAMINER BOJKO: Kroger?

2 MR. YURICK: No questions, your Honor,
3 thank you.

4 EXAMINER BOJKO: City of Akron?

5 MR. RANDAZZO: None.

6 EXAMINER BOJKO: Constellation?

7 MR. SETTINERI: No questions, your Honor.

8 EXAMINER BOJKO: Nucor?

9 MR. LAVANGA: No, your Honor.

10 EXAMINER BOJKO: OEG?

11 MR. KURTZ: No questions, your Honor.

12 EXAMINER BOJKO: Mr. O'Brien?

13 MR. O'BRIEN: No, your Honor, thank you.

14 EXAMINER BOJKO: Mr. Conway?

15 MR. CONWAY: No questions, your Honor.

16 EXAMINER BOJKO: Mr. Porter?

17 MR. PORTER: No questions.

18 EXAMINER BOJKO: Mr. Heintz?

19 MR. HEINTZ: No questions, your Honor.

20 EXAMINER BOJKO: Mr. Smith?

21 MR. SMITH: No questions.

22 EXAMINER BOJKO: IEU?

23 MR. RANDAZZO: None.

24 EXAMINER BOJKO: Staff?

25 MR. McNAMEE: No, thank you.

1 EXAMINER BOJKO: Mr. Kutik?

2 MR. KUTIK: Thank you, your Honor. I do
3 have some questions.

4 - - -

5 FURTHER RECROSS-EXAMINATION

6 By Mr. Kutik:

7 Q. Mr. Schisler, do you have your 10-K
8 before you?

9 A. Yes, I do.

10 Q. Would you please turn to page 23.

11 A. Okay. Yes, sir.

12 Q. I want to direct you to the paragraph
13 under the title "We have incurred net losses since
14 our inception and we may continue to incur net losses
15 in the future and may never reach profitability."

16 A. Right.

17 Q. Does this also say, quote, "Our net
18 losses in 2009, 2008, and 2007 were \$6.8 million,
19 \$36.7 million, and \$23.6 million respectively?"

20 A. Yes.

21 Q. "We have not achieved profitability for
22 any calendar year, although we have for certain
23 quarters, and we may continue to incur operating
24 losses in the amount as of December 31, 2009, we had
25 an accumulated deficit of \$77.3 million. Initially

1 our operating losses were driven principally, or
2 principally driven by start-up costs and the costs of
3 developing our technology which included research and
4 development expenses. More recently our net losses
5 have been principally driven by selling and marketing
6 expenses and general and administrative expenses
7 including, without limitation, expenses related to
8 increased headcount and the expansion of the number
9 of megawatts under our management.

10 "Although we currently expect to be
11 profitable for the year ending December 31, 2010, as
12 we seek to grow our revenues and customer base, we
13 plan to continue to expand our demand response energy
14 management solutions which will require increased
15 operating expenses. These increased operating costs
16 as well as our factors may cause us to incur net
17 losses for the foreseeable future and there can be no
18 assurance that we will be able to grow our revenues,
19 sustain the growth rate of our revenues, expand our
20 customer base, become profitable in 2010, or maintain
21 profitability in any future years.

22 "Furthermore, these expenses are not only
23 factors that may contribute to our net losses. As a
24 result, even if we significantly increase our
25 revenues, we may continue to incur net losses in the

1 future. If we fail to achieve profitability, the
2 market price of our common stock could decline
3 substantially."

4 Have I read that paragraph correctly?

5 A. Yes.

6 Q. Thank you.

7 MS. ROBERTS: I move to strike that. He
8 was testifying. And it was beyond the scope of my
9 redirect.

10 MR. KUTIK: She asked about the 10-K, I'm
11 entitled to --

12 MS. ROBERTS: I asked -- excuse me, your
13 Honors. I asked whether the company had achieved
14 profitability in the fourth quarter.

15 EXAMINER BOJKO: Ms. Roberts, you opened
16 the door and as far as testifying, he wasn't
17 testifying, he was reading an excerpt out of a
18 document. Your objection is overruled.

19 Q. (By Mr. Kutik) Mr. Schisler, you're
20 familiar with the FRR integration auction rules, are
21 you not?

22 A. Yes.

23 MR. KUTIK: May I approach the witness,
24 your Honor?

25 EXAMINER BOJKO: You may.

1 THE WITNESS: Your Honor, is he -- I
2 don't in my redirect --

3 EXAMINER BOJKO: No, no, no, huh-uh,
4 huh-uh.

5 THE WITNESS: Okay.

6 EXAMINER BOJKO: No.

7 THE WITNESS: All right.

8 EXAMINER BOJKO: I know you're an
9 attorney, but you're not yourself -- you're not your
10 own attorney.

11 Q. (By Mr. Kutik) Let me show you a copy of
12 the FRR integration rules. I'd like to also show you
13 a page, page 9 out of those rules. Do you see that?

14 MR. KUTIK: Your Honor, I'd like to have
15 this marked as Company Exhibit 6.

16 EXAMINER BOJKO: It will be so marked.

17 (EXHIBIT MARKED FOR IDENTIFICATION.)

18 Q. Sir, I want to direct you to Section
19 Roman Numeral III.1.3.

20 A. Yes, sir.

21 Q. And it says, does it not, "No warranty on
22 information. The information provided in the auction
23 or on the auction website has been provided to assist
24 offerors in evaluating the auction. It does not
25 purport to contain all the information that may be

1 relevant to an offeror in satisfying its due
2 diligence."

3 A. Yes, sir.

4 Q. "Neither the ATSI utilities nor the
5 auction manager nor any of their representatives make
6 any express or implied representation or warranty as
7 to the accuracy or completeness of the information
8 and shall either individually or jointly be liable
9 for information provided in connection with the
10 auction where any omissions from such information or
11 any information provided to an offeror by any other
12 source. Neither the ATSI utilities nor the auction
13 manager nor any of their representatives shall be
14 liable to an offeror or any of its representatives
15 for any consequences relating to or arising from the
16 offeror's use of any information provided through
17 this auction process." Have I read that correctly?

18 MS. ROBERTS: I object.

19 A. You did, that's correct.

20 MS. ROBERTS: Excuse me, I object.

21 EXAMINER BOJKO: There's a pending
22 objection. Hold on. An equipment malfunction up
23 here.

24 Yes, what is the grounds for your
25 objection, Ms. Roberts?

1 MS. ROBERTS: It's beyond the grounds of
2 redirect. On redirect I asked him about a correction
3 in his testimony that related to a grammatical
4 correction, not anything substantive and I certainly
5 asked him nothing about this.

6 MR. KUTIK: Your Honor, the witness said
7 he was entitled to rely. He said that.

8 EXAMINER BOJKO: To my surprise, you are
9 right. He did use those words, Mr. Kutik.

10 Please proceed. Answer the question.

11 THE WITNESS: Could I explain?

12 Q. No. Did I read that correctly? That's
13 the question.

14 EXAMINER BOJKO: Did you answer that
15 question? Did he read it correctly?

16 THE WITNESS: He read that correctly.

17 MR. KUTIK: No further questions.

18 EXAMINER BOJKO: Thank you.

19 - - -

20 FURTHER EXAMINATION

21 By Examiner Bojko:

22 Q. I have some questions, Mr. Schisler.
23 Could you please turn to page 2 of your testimony.

24 A. Yes, your Honor.

25 Q. I just want to clarify a couple things.

1 I believe I heard different things today and I just
2 want to make sure that the record's clear.

3 A. Sure.

4 Q. First of all, you state on line 23 that
5 you're an indirect customer. I just want to make
6 sure I'm clear. You do not take any kind of services
7 from FirstEnergy distribution utilities; is that
8 right?

9 A. The only thing that we get from
10 FirstEnergy utilities is we may get metering, we may
11 pay them for their interval metering and may have to
12 pay them for data, but we don't -- and we may have to
13 pay them so we're a customer in that sense.

14 Q. That's what you meant by this statement
15 that you buy -- purchase metering data and that's why
16 you're a customer.

17 A. EnerNOC's clients are FirstEnergy's
18 customers. I'm not sure I understand your question.

19 Q. Line 23 you said "EnerNOC is also, albeit
20 indirectly, a customer of FirstEnergy."

21 A. Right.

22 Q. And I'm trying to figure out what kind of
23 customer, indirect or not, that you are of
24 FirstEnergy and my question was do you take any kind
25 of service from FirstEnergy?

1 A. FirstEnergy is a load-serving entity and
2 we are a seller of capacity supply. FirstEnergy has
3 to buy capacity supply through the PJM auction. We
4 are a seller, they are a buyer.

5 Q. Right. So it sounds like if anybody's a
6 customer of anybody, FirstEnergy would be a customer
7 of you.

8 A. In a manner of speaking, you're correct,
9 your Honor.

10 Q. Okay. So again I'm going to ask my
11 question, are you a customer of FirstEnergy?

12 A. Other than the metering thing I would
13 have to say we have no direct customer relationship.

14 Q. Can you use your mic, please?

15 A. I'm sorry.

16 Q. Let's put aside this load-serving entity
17 concept for a minute. Let's just talk about what
18 you've discussed in your testimony. How do you
19 actually get a customer for these demand-response
20 programs?

21 A. So we have a --

22 Q. Wait. I'm sorry, let me clarify. The
23 customer I'm speaking of, for the purpose of you
24 being a curtailment service provider, your customers
25 are typically in manufacturing, commercial-type

1 customers; is that correct?

2 A. That's correct.

3 Q. Okay. So now tell me, now that I've
4 defined customer, tell me how you sign up these
5 customers.

6 A. Okay. So step one is the sales,
7 marketing and sales process. We have probably over a
8 hundred, I'm sure over a hundred, folks who go out
9 and educate customers on these demand-side
10 opportunities and explain to them how they can take
11 certain steps to reduce demand in critical periods
12 and get paid for that.

13 Once we enroll them, we then are to --
14 once we get them to agree that they're interested, we
15 then have to go figure out how much they've got and
16 figure out which pieces of equipment they're going to
17 turn on or turn off and how reliable it is, so you
18 kind of do like an auditing process.

19 Then we figure out, okay, you've got,
20 just for round numbers, a megawatt, this is how much
21 revenue can be derived from a megawatt through the
22 auctions, the market's process. EnerNOC is going to
23 give you metering, is going to provide the management
24 of the service, and manage the resource so obviously
25 we need to -- we're going to bid it into the market,

1 so we need an economic arrangement between the
2 customer and EnerNOC that works for both parties.

3 So then we negotiate that, and then we
4 register them into the market.

5 Q. So you basically just go and talk with
6 customers and you can do that with any customer, any
7 mercantile customer in the state of Ohio.

8 A. I think we can talk to customers that are
9 not mercantile customers as well.

10 Q. Okay. And you could today go out and
11 attempt to sign up, so to speak, or attempt to get at
12 a customer, one of FirstEnergy's current ELR-tariffed
13 customers.

14 A. Not -- we could talk to them today, we
15 couldn't enroll their resource before June 1 of 2011
16 into PJM because they're not part of PJM until 2011.

17 Q. Okay. And you could -- a customer could
18 choose to sign up with you starting in June 2011
19 versus remain on the ELR tariff.

20 A. Once they sign the ELR tariff they are to
21 give 36 months' notice to cancel, so effectively it's
22 an irrevocable election by the customer. So if
23 they've signed up on ELR, we can't enroll them.

24 Q. I think my question was starting the
25 current ELR tariff I think you've said many times

1 today by its own terms expires at the end of
2 May 2011; is that right?

3 A. That's correct.

4 Q. So my question is June 1st, 2011, a
5 customer could elect to not take service from the
6 company's ELR tariff, not do that tariff offering,
7 and instead sign up for your DR program.

8 A. Yes, if they have not signed the
9 extension addendum that Mr. Randazzo has explained.
10 Yes, they could do that but only if they had not
11 signed the addendum, because if they signed the
12 addendum, they'd have to give 36 months' notice so
13 they can't do that. You understand, I'm not trying
14 to be dense, but I --

15 Q. So you're assuming that every customer
16 that is currently on an ELR tariff may have signed
17 the addendum that was presented in the stipulation, I
18 mean is that the assumption you're making?

19 A. I make no assumption in that respect.
20 All I know is that Rider ELR is proposed to be
21 extended and it would be available to be extended to
22 those customers.

23 Q. Well, but that's my point. I mean, it's
24 proposed to be extended, it hasn't yet been extended,
25 the Commission has not yet approved an extension of

1 that tariff.

2 A. That's correct.

3 Q. So sitting here today, as far as you
4 know, you could sign up any of the ELR customers
5 today, you could sign them up for the program
6 beginning June 1st.

7 A. Yes, but when they set the tariff up,
8 they put a date that the customer had to sign up by
9 April 22nd, which is -- is that today or tomorrow?
10 It's --

11 Q. Tomorrow.

12 A. -- tomorrow. So the thing is that the
13 stipulation was filed on April 24th and customers had
14 one month to sign the --

15 Q. March 24th.

16 A. -- ELR tariff, to sign up to extend the
17 ELR tariff, so all of the re-rolling over of the
18 tariff activity would have been done already. So the
19 customer would have already been locked up.

20 Q. Except you're assuming that the
21 Commission has approved the tariff and that it will
22 continue.

23 A. It sounds strange, your Honor, but that's
24 how Rider ELR extension was set up. It's got its
25 retroactive enrollment date built into the rider.

1 Q. Okay. So you're telling me today that if
2 the Commission doesn't approve the tariff on the
3 terms that it's proposed, that the customers are
4 still going to continue on a tariff that doesn't
5 exist?

6 A. The customers will continue on the
7 current tariff as it exists until May 31st of 2011.
8 If the tariffs are not extended, they are not then
9 under -- going to be under an interruptible tariff
10 but they would then be available to be participating
11 in the PJM demand-response programs.

12 EXAMINER PRICE: But the customers are
13 able to make an effective choice now. We're talking
14 about large, sophisticated industrial customers.
15 They know today, we're still not 30 days past the
16 filing of the stipulation, they know today that they
17 can have a choice of the ELR, OLR, or pursue an
18 alternative demand-response provider; is that not
19 right?

20 A. Yes, that's correct.

21 EXAMINER PRICE: So the only way to take
22 away that choice is for the Commission to throw out
23 Rider ELR and OLR, is that not right?

24 THE WITNESS: It really is no choice
25 because the subsidies embodied --

1 EXAMINER PRICE: You just told me it is a
2 choice.

3 THE WITNESS: Okay, but it is a false
4 choice. I should be clear, your Honor, I'm sorry.
5 It's a false choice because the opportunity presented
6 in Rider ELR with the subsidies built into it are so
7 out of market that there is no way that someone
8 that's relying upon the market, I mean, by orders of
9 magnitude out of the market, so there's no way it's
10 not -- it's not competitive. So there's no choice.

11 EXAMINER PRICE: It's just a much better
12 deal than what the market would offer.

13 THE WITNESS: An incredibly better deal
14 than the market would offer.

15 Q. (By Examiner Bojko) It's still a choice,
16 I think earlier you said, well, you have all these
17 things to offer. So a person could pay a higher
18 price for better service. I mean it's still a
19 choice.

20 A. It is a choice. Rational -- rationally
21 speaking there's only one rational choice if one is,
22 you know, exercising his fiduciary obligation to his
23 company because one is so generous that they, of
24 course, would be in their best interest to choose the
25 subsidized one.

1 Q. What about a customer that doesn't sign
2 up by tomorrow, they clearly have a choice to go with
3 a provider such as EnerNOC if they would like to; is
4 that right?

5 A. They do have that choice, and they have
6 the choice of enrolling under Rider ELR -- excuse me,
7 under Rider OLR.

8 Q. And even if a person that's under ELR
9 today, they can choose to go with somebody else if
10 they choose to and not EnerNOC, they can go with any
11 other provider if they don't meet the deadline
12 tomorrow.

13 A. That's correct.

14 Q. Okay. And you did not provide -- I'm
15 going to close the loop on something Mr. Kutik asked
16 you. You did not provide in your testimony an FRR
17 auction rule that substantiates the claim you made a
18 few minutes ago you were entitled to rely on certain
19 representations; is that correct?

20 A. We have not been -- not in the context of
21 your question earlier, maybe Mr. Kutik's question
22 earlier, I don't have the -- I have now Mr. Kutik
23 just gave it to me moments ago, but I have not been
24 able to find out which rule it is, et cetera.

25 Q. Okay. But my question was it's not in

1 your testimony.

2 A. It's not in my -- the rule itself,
3 representation that there is such a rule is in my
4 testimony. But the citation to the rule is not in my
5 testimony.

6 Q. Really, in your testimony it says that
7 you are relying on a particular rule?

8 A. No, it says I was entitled to rely.

9 Q. Okay. On page 10 of your testimony you
10 talk about FirstEnergy dramatically shrinking the
11 market size of available customers. I think you
12 explained earlier that -- you explained that there's
13 existing customer or existing customers and then
14 planned customers that you can bid into the market;
15 is that right?

16 A. Yes, your Honor.

17 Q. I'm trying not to say anything
18 confidential. Please stop me if you think I'm going
19 to.

20 And it's my understanding that under the
21 plan you don't have to have customers known at the
22 time that you bid that in; is that right?

23 A. No, you do not. You do not have to
24 identify customers. You're correct.

25 Q. Okay. And a curtailment provider could

1 bid, they could clear the auction, and then they
2 could go out and procure customers; is that right?

3 A. That's correct.

4 Q. And that is true regardless of whether
5 FirstEnergy says that they're going to put their
6 Rider ELR -- those customers in as existing
7 resources; is that right?

8 A. Yes.

9 Q. Could you turn to page 16, please.

10 A. 16 of what, my testimony?

11 Q. Yes, your testimony.

12 A. Okay.

13 Q. On page 16 of your testimony on line 8
14 you say "EnerNOC and other curtailment service
15 providers would have likely worked with FirstEnergy
16 under the RFP arrangement" and you used the word
17 "worked" and I just want to clarify that. You would
18 have actually had to have won the RFP bid; isn't that
19 correct?

20 A. No. Can I clarify, your Honor?

21 Q. Please.

22 A. The RFP, the precise terms of the RFP in
23 Ohio had not been described as just that was going to
24 be an annual RFP process instead of the riders. In
25 FirstEnergy's territories in Pennsylvania they have a

1 similar requirement to Senate Bill 221 and they are
2 doing an RFP in Pennsylvania where they're asking
3 companies like EnerNOC to go out and essentially find
4 the customers for them to meet their Pennsylvania
5 obligations.

6 That issue -- those issues about how the
7 RFP would be constructed have not been worked out in
8 Pennsylvania, just that there would be an RFP. And
9 what I mean by that is it seems plausible to me that
10 among the possibilities is that they might do a
11 similar-type RFP in Ohio. There's nowhere where they
12 said they would do that, that's why I said we would
13 have likely worked. The RFP could have been
14 structured differently but that's what I mean by
15 that.

16 Q. On lines 15 through 17 you talk about
17 that, you say "curtailment service customers," I
18 think you might have meant providers in that
19 sentence; is that right?

20 A. Yes.

21 Q. But when you talked about -- you're
22 talking about FirstEnergy serving the very customers
23 that curtailment service providers were expecting to
24 serve if they cleared demand-response resources, and
25 I guess you say the word "expecting." Even if you

1 bid in the load, you weren't guaranteed to receive
2 those customers, right? I mean, you weren't
3 guaranteed the load -- you used the word "expecting."
4 You weren't guaranteed to clear --

5 A. Yeah, what I -- clearly what I mean by
6 that is what Morgan Parke told me is that they're
7 not -- they're not extending their riders. That's
8 what you guys are for. We want the competition.
9 They were going to exit this space and their plan was
10 to allow the curtailment service provider to provide
11 this service to their customers. And so we were
12 expecting to be the successor to the tariff.

13 Q. You personally, EnerNOC, was expecting
14 like you were guaranteed --

15 A. No, no, no.

16 Q. -- those customers?

17 A. I'm sorry. No, we weren't guaranteed, we
18 would have to sell them, we would have to convince
19 the customers to enroll with us.

20 Q. Right. And as we discussed before, you
21 don't know necessarily if you would have had those
22 customers signed up prior to the March 15th auction,
23 and indeed you don't know because you don't even have
24 to if you do the demand resource versus the existing
25 resource, right?

1 A. That's correct.

2 Q. Last page of your testimony, I just want
3 to make sure the record's clear, we haven't asked you
4 this and it's in your testimony, I know it was
5 discussed a little bit yesterday with counsel, but
6 you state on the last line, 18, you talk about you
7 need more time to conduct discovery and challenge the
8 riders. Just so the record's clear, you do not have
9 any outstanding discovery at this time; is that
10 right?

11 A. You'd have to ask my counsel. I don't
12 believe we do have outstanding discovery at the
13 moment. We had issues that we would like to have
14 probed but given the compressed nature of this
15 schedule we couldn't -- we couldn't reasonably get
16 that information or the discovery deadlines wouldn't
17 allow us to get that information.

18 Q. Okay. But you did ask -- you did do
19 discovery on FirstEnergy's --

20 A. Yes, we did.

21 Q. -- companies. Okay.

22 A. Excuse me. I'm sorry. Yes, we did.

23 - - -

24 EXAMINATION

25

1 By Examiner Price:

2 Q. I have a couple questions on page 19
3 still. At line 4, you say "As such, the Commission
4 should simply allow the Tariff Riders ELR and OLR to
5 expire on their own terms." Is that correct?

6 A. I remember those words but I just want to
7 get my --

8 Q. Page 19, line 4.

9 A. Page 19, lines --

10 Q. Beginning in the middle of the line or
11 so.

12 A. Line 11, did you say?

13 Q. Page 19.

14 A. 19.

15 Q. Line 4, middle of the line.

16 A. Oh, middle of the line, yes. That's my
17 testimony.

18 Q. If the Commission did that, would you
19 support the ESP as modified?

20 A. I would have no opposition to the ESP and
21 I would not have a position necessarily, I mean, so
22 in that sense yes, we would support. What we object
23 to in the ESP --

24 Q. Okay.

25 A. -- are these riders.

1 Q. You asked the Commission to do so because
2 you say FirstEnergy failed to correct materially
3 false market information. So you're relating this
4 back to FirstEnergy's actions.

5 A. Yes.

6 Q. But FirstEnergy wouldn't be harmed or
7 punished whatsoever by what you propose. FirstEnergy
8 cannot make any money, does not make any money from
9 Riders ELR or OLR, do they?

10 A. I don't know the answer to that because,
11 again, you have to flow it all the way through their
12 generation service because these customers are
13 captive generation service customers. I don't know
14 the complete accounting treatment. I know that --

15 Q. Do you know whether FirstEnergy recovers
16 on a dollar-for-dollar basis all of their generation
17 costs that are procured on the market under the ESP?

18 A. I expect that they would recover all of
19 those costs.

20 Q. But you do know they don't make any money
21 on the ELR/OLR, they recover all the costs from Rider
22 ELR/OLR from ratepayers, right?

23 A. They don't make money on the capacity
24 payment piece of this, they get made whole -- they
25 get made whole for their costs from their other

1 ratepayers.

2 Q. So they're not harmed at all if you strip
3 out Rider ELR/OLR, the only people being harmed, the
4 only stakeholders being harmed would be the
5 industrial customers; is that right?

6 A. I don't think so, no, your Honor.

7 EXAMINER PRICE: I think they perhaps
8 have a different opinion. Thank you, that's all I
9 have.

10 - - -

11 FURTHER EXAMINATION

12 By Examiner Bojko:

13 Q. Does the FRR auction have an auction
14 manager similar to some of the competitive
15 procurement auctions that I'm more accustomed to on
16 the retail side?

17 A. Yes.

18 Q. And the auction rules that you've
19 referred to are specific to FRR auction, they're
20 called FRR auction rules?

21 A. Okay. To be clear, the ATSI utilities
22 auctions were an FRR auction, that is a term of art
23 in the PJM FERC tariff. It's -- and these were a
24 special FRR option because after the full
25 integration, there's not going to be a FirstEnergy

1 FRR plan.

2 PJM, during this period of integration,
3 PJM itself was an auction manager in terms of the
4 conduct of the auction but FirstEnergy still had to
5 review the materials, the credit, et cetera, but PJM
6 has the experience with managing and the
7 infrastructure to have -- conduct auctions so
8 FirstEnergy worked with PJM to manage the auction.

9 Q. Do the auction rules that were in place
10 that we've referenced today, and I think you just
11 said Mr. Kutik gave you a copy, do those have a
12 provision for disputes or complaints of a mediation
13 process so to speak?

14 A. I do not know.

15 Q. Are you familiar with other competitive
16 bidding auctions that do also have an independent
17 auction manager and whether they have those kind of
18 provisions that allow disputes to be taken up with
19 the auction manager?

20 A. In my home state of Maryland, I know
21 there's sort of like a bid protest opportunity that
22 gets written into those standard service offer type
23 agreements, but I don't know specifically with
24 respect to the ESP.

25 Q. I think people asked you earlier today

1 whether you filed any complaints about this issue
2 with PJM or FERC, and I believe your answer was no;
3 is that right?

4 A. That was my testimony.

5 Q. But did you do any kind of complaints or
6 protest, to use the term you just used, with the FRR
7 auction manager in this particular auction?

8 A. My testimony was that I've spoken with
9 the PJM market monitoring unit, the attorney for the
10 PJM market monitoring unit.

11 Q. You've spoken with him but you did not
12 file a complaint?

13 A. No. You are correct.

14 Q. Okay. But I'm asking about the
15 independent auction manager in this case, did you
16 file a complaint or speak to them about any concerns
17 with how the auction process ran?

18 A. The PJM market monitor is the independent
19 market monitor that reports to FERC, and the -- PJM
20 had a role to conduct the auction, the independent
21 market monitor had a role -- has a role to evaluate
22 the auction and the auction results to ensure that
23 they were competitive.

24 Q. So you're telling me that you went to the
25 PJM market monitor but not the independent auction

1 and you're trying to tell me that PJM is the
2 independent auction manager in this case?

3 A. I think, your Honor, it's different than
4 the state procurement processes you may be familiar
5 with in that context.

6 Q. I thought you told me there wasn't an
7 auction manager for the FRR auction.

8 A. PJM, I think they may have even said
9 was -- in their materials was operating as the
10 manager of the auction. They have the computer
11 equipment, et cetera. It was a -- but they always
12 made clear because of a contractual relationship
13 these resources were, and bankruptcy rules, I mean
14 this is big stuff and big dollars so they had to get
15 this all right. PJM looks to the ATSI utilities to
16 satisfy their obligations to PJM.

17 Suppliers who bid into the market were
18 selling resources to FirstEnergy. Suppliers were not
19 selling them to PJM. So they were selling them to
20 FirstEnergy and then FirstEnergy was going to supply
21 them to PJM. So this was a FirstEnergy auction.

22 PJM was using its infrastructure to
23 conduct the procurement and they were the worker bees
24 that ran the auction and whose job it was to kind of
25 make sure that everything, the train ran on time, if

1 you will.

2 The independent market monitor is
3 responsible for not only the capacity auctions but of
4 the markets to make sure that the markets are
5 operated --

6 Q. I understand. I really do know about the
7 PJM market monitor.

8 A. I'm sorry.

9 Q. I'm asking specifically about this
10 auction and you're the one, I wasn't trying to show
11 my state experience about prior procurements, I asked
12 you if there was an independent market monitor for
13 this type of auction, and I thought you told me yes.
14 So now all I asked was did you go to that entity to
15 voice concerns about how the auction materials were
16 given, the FAQs, did you go to that person, it could
17 have been a PJM employee, I'm not saying that, did
18 you go to that person to express a concern with how
19 the auction was handled?

20 A. I just remembered a conversation that I
21 had with a PJM employee about the problems of the
22 FirstEnergy, of what FirstEnergy misrepresented here.
23 So I did, yes. And I also went to the PJM market
24 monitor, counseled with the --

25 Q. You talked to an employee, is that an

1 employee that would have had any say so over how the
2 auction was run?

3 A. PJM as distinguished from the market
4 monitor, PJM is completely independent of the market
5 and doesn't take sides in these disputes.

6 Q. No. No. Let's back up. Maybe you
7 answered my question wrong to begin with.

8 A. Okay.

9 Q. Was there an FRR auction manager for this
10 particular auction?

11 A. Yes.

12 Q. Did you go to that person and express
13 concerns with what occurred in this auction?

14 A. No. It was not a person, it's the entity
15 PJM. There's no one person that's the auction
16 manager.

17 EXAMINER PRICE: Okay. Well, did you
18 express concerns to the entity known as PJM about
19 this auction?

20 THE WITNESS: Yes. Through a
21 conversation, yes.

22 EXAMINER PRICE: Through a conversation
23 with some employee.

24 THE WITNESS: With an employee that's in
25 charge of their demand response operations.

1 EXAMINER PRICE: Who?

2 THE WITNESS: Pete Langbein.

3 EXAMINER PRICE: His job is?

4 THE WITNESS: He's director of demand
5 response operations.

6 Q. (By Examiner Bojko) Okay. And did that
7 in turn result in some kind of complaint?

8 A. No.

9 Q. Okay.

10 EXAMINER PRICE: I think we covered this
11 on the confidential transcript, just to be clear,
12 this auction was performed pursuant to PJM's FERC
13 approved tariff; is that correct?

14 THE WITNESS: Not precisely.

15 EXAMINER PRICE: How precisely was it,
16 then?

17 THE WITNESS: Again, I don't want to be
18 dense, I just want to be precise for this record.

19 EXAMINER PRICE: That's fine.

20 THE WITNESS: The tariff didn't apply --

21 EXAMINER PRICE: Actually, I think we can
22 fix this more simply. This was a wholesale auction;
23 is that correct?

24 THE WITNESS: Yes.

25 EXAMINER PRICE: FERC has jurisdiction

1 over wholesale auctions; isn't that correct?

2 THE WITNESS: Yes.

3 EXAMINER PRICE: Thank you.

4 EXAMINER BOJKO: Okay. Thank you,
5 Mr. Schisler.

6 THE WITNESS: Thank you.

7 EXAMINER BOJKO: Thank you for your time.

8 At this time, Mr. Eckhart --

9 MS. ROBERTS: Your Honor, I would --

10 EXAMINER BOJKO: I apologize. I'm sorry,
11 please proceed, Miss Roberts.

12 MS. ROBERTS: I would move EnerNOC
13 Exhibit 1, the prefiled direct testimony of Kenneth
14 D. Schisler, into the record.

15 EXAMINER BOJKO: I'm sorry, which version
16 did you move? We have Exhibits 1 and 2.

17 MS. ROBERTS: 1 is the public version and
18 how do I -- how would you like me to handle the
19 confidential version?

20 EXAMINER BOJKO: Just move them both.

21 MS. ROBERTS: Okay, I'll move both
22 EnerNOC 1 and EnerNOC 2 into the record.

23 EXAMINER BOJKO: Any objection to the
24 admission of EnerNOC Exhibit 1 or EnerNOC Exhibit 2?

25 MR. KUTIK: No objection.

1 EXAMINER BOJKO: They will be admitted.

2 (EXHIBITS ADMITTED INTO EVIDENCE.)

3 MR. KUTIK: Your Honor, at this time the
4 companies move the admission of Companies' Exhibits 5
5 and 6.

6 EXAMINER BOJKO: He went out of turn.

7 MR. RANDAZZO: That's all right.

8 EXAMINER BOJKO: Mr. Randazzo was
9 patiently waiting.

10 MR. RANDAZZO: He's a very aggressive
11 guy.

12 EXAMINER BOJKO: Any objections to the
13 admission of Company Exhibits 5 and 6?

14 Hearing none, they will be admitted.

15 (EXHIBITS ADMITTED INTO EVIDENCE.)

16 EXAMINER BOJKO: Mr. Randazzo.

17 MR. RANDAZZO: I would move the
18 admission -- thank you, your Honor, for the
19 opportunity to address the Bench. I would move the
20 admission of IEU Exhibit No. 1 which is the PJM
21 document announcing the results of the ATSI
22 integration auction, and for the benefit of the Bench
23 also includes information on the certification by the
24 market monitor of the auction.

25 EXAMINER BOJKO: Oh, thank you.

1 MR. RANDAZZO: You're welcome.

2 EXAMINER BOJKO: Any opposition to the
3 admission of IEU Exhibit 1?

4 Hearing none it will be admitted.

5 (EXHIBIT ADMITTED INTO EVIDENCE.)

6 MR. RANDAZZO: And for convenience, I
7 believe, your Honor, I would ask the Bench to take
8 administrative notice of the March 12th, 2010, RFP
9 FRR integration auction FAQs which have been
10 frequently referenced during the course of this
11 proceeding. I believe the Bench and the Commission
12 would benefit by having the complete document before
13 it as opposed to snippets.

14 MS. ROBERTS: And, your Honor, I believe
15 those would be identified as the ATSI integration
16 auction's frequently asked questions.

17 MR. RANDAZZO: I will supply copies for
18 the Bench and the parties to make it specifically
19 clear as to what I'm asking the Bench to take
20 administrative notice of. I just wanted to give
21 folks notice.

22 EXAMINER BOJKO: We'll defer ruling on
23 that until you provide a copy.

24 MR. RANDAZZO: And so it's clear, it
25 would not be for the truth of the matter asserted but

1 for the statements, the content of the statements
2 contained therein.

3 EXAMINER BOJKO: Mr. Eckhart, are you
4 ready to proceed with your witness?

5 MR. ECKHART: Yes, your Honor, NRDC will
6 call Dylan Sullivan to the stand, please. Your
7 Honor, I've provided the reporter with a copy of his
8 testimony and I believe you have or do you need
9 copies?

10 EXAMINER BOJKO: I do not need a copy.

11 MR. ECKHART: Okay. I have a couple
12 extras.

13 EXAMINER BOJKO: Mr. Sullivan, could you
14 please raise your right hand. Would you please stand
15 up and raise your right hand?

16 (Witness sworn.)

17 EXAMINER BOJKO: Please be seated.

18 - - -

19 DYLAN SULLIVAN

20 being first duly sworn, as prescribed by law, was
21 examined and testified as follows:

22 DIRECT EXAMINATION

23 By Mr. Eckhart:

24 Q. Would you state your name, please.

25 A. My name is Dylan Sullivan.

1 Q. And who are you employed by?

2 A. Natural Resources Defense Council.

3 Q. And your address?

4 A. Two North Riverside Plaza, Suite 2250,
5 Chicago, Illinois 60606.

6 Q. Do you have before you a copy of your
7 direct testimony as filed with this Commission on
8 April 15, 2010?

9 A. Yes, I do.

10 MR. ECKHART: Your Honor, I'd ask that
11 that direct testimony be marked as NRDC Exhibit 1.

12 EXAMINER BOJKO: It will be so marked.

13 (EXHIBIT MARKED FOR IDENTIFICATION.)

14 Q. Mr. Sullivan, do you have any changes or
15 corrections to your testimony as prepared and filed
16 with the Commission?

17 A. I have one change, Mr. Eckhart.

18 Q. What is that?

19 A. On page 6, line 18, after the word
20 "proceeding" insert "most" so the sentence will read
21 "The parties in this proceeding most interested in
22 the fixed cost revenue impact of energy efficiency
23 programs did not sign the stipulation."

24 Q. Any other changes?

25 A. No, Mr. Eckhart.

1 Q. Other than that are the answers that you
2 have provided in that prepared testimony true?

3 A. Yes.

4 Q. Would your answers be the same as they
5 are in that testimony?

6 A. Yes.

7 MR. ECKHART: Your Honor, I offer
8 Mr. Sullivan for cross-examination.

9 MR. LANG: Your Honors, would you
10 entertain a motion to strike, please?

11 EXAMINER BOJKO: I would.

12 MR. LANG: I have a motion, it's on page
13 5, line 18, starting with "in a comprehensive"
14 running through the end of that sentence on line 22
15 through and including footnote 4, and the basis is
16 hearsay.

17 MR. RANDAZZO: Could you repeat the
18 reference, please? I'm sorry.

19 MR. LANG: Page 5, line 18, starting with
20 "in a comprehensive examination," through the end of
21 that sentence on line 22 through and including
22 footnote 4.

23 MR. RANDAZZO: Thank you.

24 MR. ECKHART: Your Honor, his whole
25 testimony is based on his expertise as having

1 knowledge of this process in numerous jurisdictions
2 and by examination of numerous sources, this is just
3 another reference to what some of those sources are,
4 I think it's entirely improper.

5 EXAMINER PRICE: Mr. Lang, isn't the
6 Electricity Journal a peer reviewed journal?

7 MR. LANG: I do not know the answer, your
8 Honor.

9 EXAMINER PRICE: Isn't it true that the
10 majority of articles that appear in Electricity
11 Journal are peer reviewed?

12 MR. LANG: I am aware that there are
13 articles in the journal that are peer reviewed, I do
14 not know if this one is.

15 EXAMINER PRICE: I understand that. If
16 Electricity Journal is a peer reviewed journal,
17 wouldn't it qualify under the scholarly treatise
18 exception to the hearsay rules broadly interpreted by
19 the Commission in our desire to have as full a record
20 as possible?

21 MR. LANG: That would be extremely broad,
22 it would have to be -- the article itself would have
23 been recognized as an authoritative source, your
24 Honor.

25 EXAMINER BOJKO: We're going to deny the

1 motion to strike. Any other ones?

2 MR. LANG: No, your Honor.

3 EXAMINER BOJKO: Anybody else, any
4 motions to strike before we move on?

5 Hearing none, we will proceed with
6 Mr. Poulos.

7 MR. POULOS: No cross. Thank you, your
8 Honor.

9 EXAMINER BOJKO: Ms. Roberts?

10 Mr. Heintz?

11 MR. HEINTZ: No questions, your Honor.

12 EXAMINER BOJKO: OEC?

13 MS. De LISI: No questions, your Honor.

14 EXAMINER BOJKO: NOPEC?

15 MR. WARNOCK: No questions, your Honor.

16 EXAMINER BOJKO: And then Direct?

17 MR. DYAS: No questions, your Honor.

18 EXAMINER BOJKO: Kroger?

19 MR. YURICK: No questions, your Honor,
20 thank you.

21 EXAMINER BOJKO: City of Akron?

22 MR. RANDAZZO: None. And the same for
23 IEU, your Honor.

24 EXAMINER PRICE: We're always interested
25 in administrative efficiencies, Mr. Randazzo.

1 MR. RANDAZZO: Yes.

2 EXAMINER BOJKO: Mr. Smith?

3 MR. SMITH: No questions.

4 EXAMINER BOJKO: Mr. Porter?

5 MR. PORTER: No questions, your Honor.

6 EXAMINER BOJKO: Schools?

7 MR. WARNOCK: No questions.

8 EXAMINER BOJKO: Mr. O'Brien?

9 MR. O'BRIEN: No questions, your Honor.

10 EXAMINER BOJKO: Mr. Conway?

11 MR. CONWAY: No questions, your Honor.

12 EXAMINER BOJKO: Mr. Kurtz?

13 MR. KURTZ: No questions, your Honor.

14 EXAMINER BOJKO: Mr. Lavanga?

15 MR. LAVANGA: No questions, your Honor.

16 EXAMINER BOJKO: Mr. Settineri?

17 MR. SETTINERI: No questions, your Honor.

18 EXAMINER BOJKO: Got it right this time.

19 MR. SETTINERI: Perfect.

20 EXAMINER BOJKO: Staff, Mr. McNamee?

21 MR. MCNAMEE: Just one or two, I think.

22 - - -

23 CROSS-EXAMINATION

24 By Mr. McNamee:

25 Q. Mr. Sullivan, when I look at your

1 testimony, page 6, you indicate "the stipulation's
2 lost revenue provisions cannot be considered a
3 product of 'lengthy, serious bargaining.'" Do you
4 see that reference?

5 A. Yes, I see that.

6 Q. Were you involved in settlement
7 discussions?

8 A. I wasn't present in the room when the
9 settlement was being discussed, but I followed the
10 term sheet as it was being developed.

11 Q. But you weren't there.

12 A. That's correct.

13 MR. McNAMEE: Thank you. That's all.

14 EXAMINER BOJKO: Mr. Lang?

15 MR. LANG: Thank you, your Honor.

16 - - -

17 CROSS-EXAMINATION

18 By Mr. Lang:

19 Q. Mr. Sullivan, you would agree that when
20 an electric distribution utility is required to
21 implement energy efficiency programs, that this
22 should not endanger the collection of that utility's
23 fixed cost distribution service, correct?

24 A. That's correct.

25 Q. In your testimony you refer to revenue

1 decoupling. Is it correct that you are not
2 recommending that revenue decoupling be included in
3 the electric security plan proposed in this case?

4 A. In my testimony I don't recommend that
5 revenue decoupling be adopted in this case.

6 Q. What you are recommending is that the
7 lost distribution revenue provision that is in the
8 stipulation not be included in the electric security
9 plan; is that correct?

10 A. My answer to that question is on page 6
11 starting line 9. I think the recommendation that you
12 talk about in your question is an implication of the
13 second paragraph that starts on line 17 of page 6.
14 In the alternative, I also recommend that lost
15 revenue be considered a cost of the agreement when
16 considering the benefits and costs of the electric
17 security plan.

18 Q. And there is an existing lost
19 distribution revenue or existing lost distribution
20 recovery provision in Rider DSC, correct?

21 A. That's correct, it's a result of the last
22 ESP stipulation.

23 Q. In the existing -- the existing provision
24 recovers distribution revenues lost from energy
25 efficiency programs implemented in 2009, 2010, and

1 2011, correct?

2 A. I would have to take a look at the tariff
3 but I believe, in my opinion, that is what the past
4 stipulation authorizes.

5 Q. And you refer to page 6 of your testimony
6 and you state there that lost revenue recovery is an
7 issue in the 09-1947 proceeding, the company's energy
8 efficiency and peak demand reduction proceeding. You
9 would agree that the only open issue with regard to
10 lost revenue collection is for programs initiated in
11 2012.

12 A. I believe there's also an issue about the
13 collection of lost revenues from the CFL program. I
14 would have to check the briefs, but there might be an
15 additional issue there.

16 Q. But in terms of lost distribution revenue
17 recovery, years 2009, '10, and '11, those years are
18 resolved. What is potentially at issue in the
19 09-1947 case is year 2012, correct?

20 A. I'm sorry, I didn't understand the
21 question.

22 Q. With regard to recovery of lost
23 distribution revenues, as you had mentioned in the
24 existing electric security plan programs initiated in
25 2009, 2010, 2011, the recovery of lost distribution

1 revenues from those programs is provided for in the
2 existing ESP. So the one open year at issue that
3 relates to programs initiated, energy efficiency
4 programs initiated in 2012, correct?

5 A. That's generally correct, with the caveat
6 that there are -- lost revenue is considered a cost,
7 a program cost of delivering energy efficiency
8 programs and there are -- there's very detailed
9 language in the stipulation about what is considered
10 a reasonable cost, and most of it has to do with
11 collaborative approval of programs.

12 Q. So what this new proposed stipulation,
13 this new electric security plan would do is resolve
14 the issue as to how lost distribution revenues are
15 recovered for 2012 and then extend that existing
16 procedure for another, slightly under a year and a
17 half through May 31, 2014, correct?

18 A. Yes, but it doesn't preclude further
19 collection of lost revenues after the end of that
20 period. The stipulation states that after May 31st,
21 2014 -- or, the collection of such lost distribution
22 revenues by the companies after May 31st, 2014, is
23 not addressed nor resolved by the terms of this
24 stipulation.

25 Q. So there's certainly no authorization in

1 the ESP for what will happen after May 31, 2014,
2 correct?

3 A. That's right.

4 Q. Now, you discuss in your testimony
5 decoupling as one of the alternatives to lost revenue
6 recovery or an alternative methodology for lost
7 revenue recovery. And that's something that could be
8 implemented in the future instead of the existing
9 lost distribution revenue methodology process,
10 correct?

11 A. That's correct. A revenue decoupling
12 mechanism would address the same concern that lost
13 revenue recovery attempts to address.

14 Q. Would you agree with me that the term
15 "revenue decoupling" means different things to
16 different people?

17 A. No, I wouldn't.

18 Q. Would you agree that there's different
19 ways to define what revenue decoupling is?

20 A. I believe that when people speak about
21 revenue decoupling, they are referring to a rate
22 adjustment, and in terms of differing definitions, I
23 think the differing definitions lie -- and that is
24 getting sort of into the weeds and I apologize --
25 when you use the term "decoupling" generally, I think

1 when the term "decoupling" generally is thrown
2 around, that that can be straight fixed variable rate
3 design or revenue decoupling, but I believe that when
4 the term "revenue decoupling" is used, it generally
5 means a rate adjustment.

6 Q. So in your understanding when someone
7 refers to straight fixed variable rate design, that
8 is not revenue decoupling.

9 A. Yes.

10 Q. So when you refer to revenue decoupling,
11 you're referring to a rate adjustment that involves
12 comparing the rate case revenue requirement being the
13 revenue requirement authorized in whatever the last
14 distribution rate case was and that's compared to the
15 actual recovery of distribution costs over a given
16 period.

17 A. That's correct.

18 Q. And typically that given period, is that
19 an annual period or does that vary?

20 A. That varies.

21 Q. So if and when the Commission determines
22 or would determine that revenue decoupling is
23 appropriate, do you agree that the Commission will
24 have to make determinations concerning the mechanics
25 of how any adjustment to distribution revenues would

1 be made?

2 A. Yes.

3 Q. And the Commission would have to decide,
4 for example, whether to apply the rate adjustment to
5 all customer classes or only a particular class, for
6 example I think you referenced an adjustment to the
7 residential class in your testimony, so that would be
8 something the Commission would have to determine,
9 correct?

10 A. That's correct.

11 Q. And the Commission would have to
12 determine the time period for performing the
13 adjustment, whether it's to do it annually or
14 semiannually, whatever was deemed reasonable,
15 correct?

16 A. Yes, or monthly perhaps.

17 Q. And they would also have, one of the
18 options would be to determine whether the adjustment
19 should be made on a per-customer basis.

20 A. That's correct too. Or how the revenue
21 requirement would -- the authorized revenue
22 requirement would change between rate cases.

23 Q. And the Commission will also have to
24 determine whether to adjust the rate requirement
25 between rate cases using an inflation adjustment,

1 correct?

2 A. That's correct.

3 Q. And those are all, there's all
4 alternatives and nuances of how revenue decoupling as
5 you're using the term can be applied to a particular
6 electric distribution utility, correct?

7 A. There are nuances, but many states have
8 worked through these issues.

9 Q. If I can refer you to page 4 of your
10 testimony, in particular lines 5 through 7. You
11 refer here that during the period of the proposed
12 ESP, which would be through May 31, 2014, it is
13 conceivable that residential customers will pay more
14 in lost revenue collection than they will in energy
15 efficiency program costs. Now, by drawing that
16 comparison between lost revenue recovery and energy
17 efficiency program costs, am I correct that you're
18 not, you know, are you using some sort of magic
19 threshold where lost revenue becomes problematic
20 because it exceeds program costs?

21 A. I'm making the point that lost revenue
22 recovery will get expensive and that the expense of
23 lost revenue recovery has caused problems in the
24 past.

25 Q. If I can give you a another reference,

1 page 5 of your testimony, lines 10 through 11. You
2 have a reference to, it says, "While such a case is
3 underway." Are you referring there to a future
4 distribution rate case that would be filed by the
5 utilities?

6 A. Yes.

7 Q. On that same page, the last sentence,
8 lines 18 through 22, which I unsuccessfully moved to
9 strike, I'll ask you a question about it now.
10 There's a reference to the rate adjustment method of
11 decoupling and I guess the comparison is a percentage
12 of the rate adjustment to base rates; is that
13 correct?

14 A. Yes.

15 Q. Using that rate adjustment method can
16 result in percentage adjustments to base rates of
17 more than 2 percent, correct?

18 A. That's correct. But since the year 2000
19 and the 12 rate adjustments that Miss Lesh identifies
20 in her paper, no decoupling adjustment has been
21 larger than 3 percent, either a refund or a
22 surcharge.

23 Q. And there has been -- there have been
24 experiences when rate adjustments have been greater
25 than 3 percent.

1 A. Yes. Not since the year 2000, and I
2 believe that those are -- those represent special
3 cases.

4 EXAMINER PRICE: Is it possible that
5 FirstEnergy would be a special case? I too had
6 questions on Miss Lesh's footnote which is why I
7 wanted to leave it in.

8 THE WITNESS: That worked out.

9 EXAMINER PRICE: FirstEnergy collects
10 approximately 15 percent of its distribution revenue
11 through its fixed customer charge and 85 percent from
12 the variable rate; is that correct? Is that roughly
13 your understanding?

14 THE WITNESS: I'm not sure.

15 EXAMINER PRICE: Okay. Assuming for the
16 sake of argument that my numbers are correct then,
17 assume a hypothetical there's a 15 percent 85 split
18 fixed charge to variable charge, are the other
19 instances Miss Lesh looked at comparable, are the
20 other instances where the distribution utility had
21 roughly the same split or are those cases where the
22 distribution utility had a higher fixed charge which
23 probably would result in less variation?

24 THE WITNESS: I don't think I can answer
25 that specific question, but I know that there are

1 instances, and the California utilities that have
2 revenue decoupling are examples of this where revenue
3 decoupling is combined with inverted block rates, and
4 there more fixed costs are in variable charges
5 because the purpose of inverted block rates is to
6 provide a conservation signal. And so those cases
7 are included in Mrs. Lesh's discussion and I think
8 that the lack of extreme rate impacts in those cases
9 can be illustrative.

10 EXAMINER PRICE: But we're going to move
11 to a flat-rate structure for residential rates in
12 this case, are we not? We're not going to have
13 inverted block rates.

14 THE WITNESS: That's correct.

15 EXAMINER PRICE: So let me ask my
16 question again. Hypothetically, if it is true that
17 FirstEnergy is a 15 percent fixed rate to 85 percent
18 variable rate, doesn't that make it more likely that
19 it could -- that the variation could exceed what
20 Miss Lesh observed if that is above the norm?

21 THE WITNESS: Yeah. In theory.

22 EXAMINER PRICE: Thank you.

23 Thank you, Mr. Lang.

24 Q. (By Mr. Lang) Mr. Sullivan, your
25 understanding of what adjustments to base rates are

1 typical or atypical, that comes from your review of
2 Ms. Lesh's report, correct?

3 A. Yes, but I also look for, when I hear
4 about a decoupling rate adjustment, you know, I make
5 note of it and so I try to, I do try to follow
6 decoupling rate adjustments.

7 Q. We've talked about collection of lost
8 distribution revenues under the existing ESP through
9 rider DSC. Under the new ESP as proposed lost
10 distribution revenues would continue to be recovered
11 through Rider DSC, correct?

12 A. Yes, that's correct. DSC2, I believe.

13 Q. And each customer class as you understand
14 it pays for its own energy savings and lost revenues,
15 correct?

16 A. Yes. Each customer class I believe pays
17 its own program costs which are inclusive of program
18 administrative costs and lost revenues.

19 Q. And that DSC2 charge that you referenced
20 is -- recovers costs from each customer class on an
21 energy basis or a kilowatt-hour basis, correct?

22 A. I believe you're right, but -- I know
23 that some other Ohio utilities collect it on a basis
24 of revenue requirement, so I'm not 100 percent
25 positive about that.

1 Q. That was not an issue that you confirmed
2 for purposes of preparing your testimony.

3 A. No.

4 Q. On page 6 of your testimony, lines 18
5 through 19, as modified by you at the beginning it
6 would read "The parties in this proceeding most
7 interested in the fixed cost revenue impact," and by
8 the fixed cost revenue impact there are you, again,
9 referring to the issue of lost distribution revenue
10 recovery?

11 A. I'm referring to parties interested in
12 how energy efficiency affects the utility's recovery
13 of its fixed cost of distribution service.

14 Q. And according to your testimony the
15 parties that signed the stipulation are not the
16 parties in your understanding that are most
17 interested in that issue, correct?

18 A. That's correct. It's my understanding
19 that parties outside of the -- of residential pay
20 very little if any lost revenues.

21 Q. And so that would include -- that would
22 include, in your opinion, the Commission staff not
23 having that interest.

24 A. In the past cases that I've been involved
25 in including the most recent program portfolio plan

1 case of FirstEnergy staff hasn't made lost revenue
2 collection a focus of their arguments.

3 Q. Another signatory is the Ohio
4 Manufacturers Association and so you're taking the
5 same position with regard to them, that the
6 methodology for recovery of lost distribution
7 revenues is not a concern for that association.

8 A. Yes, I take that position.

9 Q. And you take the same position with
10 regard to Kroger, correct?

11 A. Again, Kroger pays little if any lost
12 distribution revenues in my understanding.

13 Q. Does it depend on the -- as I understand
14 it, it depends on the rate class of a customer and
15 only customers who are in the residential rate class,
16 to your understanding, are the ones that would have
17 an interest in this issue?

18 A. That's my understanding, yes.

19 Q. So customers, for example, in rate class
20 GS, is it your understanding that they don't pay or
21 that they would not be paying lost distribution
22 revenues? That would not be part of the DSC2 charge
23 for rate class GS.

24 A. GS includes small commercial customers?

25 Q. Yes.

1 A. I believe that some lost revenues are
2 also collected from that rate class but, again, they
3 are not of the same magnitude as the lost revenues
4 collected from the residential class.

5 Q. So is it your position that even though
6 they do pay lost distribution revenues, that it's not
7 sufficiently large enough for them to care?

8 A. It's my position that the parties most
9 interested in the revenue impacts of energy
10 efficiency didn't sign the stipulation.

11 Q. Have you consulted with any rate class GS
12 customers to determine whether it is an issue for
13 them?

14 A. No, I haven't.

15 Q. Is it your position that the city of
16 Cleveland would not have an interest in the fixed
17 cost revenue impact of energy efficiency programs?

18 A. Within its own operations I don't think
19 the utility -- sorry, the city of Cleveland has an
20 interest. To the extent that they are arguing on
21 behalf of their residents, I admit they might have an
22 interest.

23 Q. I also want to ask you about Ohio
24 Partners for Affordable Energy. Is it your position
25 that they do not have an interest or they are not

1 most interested?

2 A. I make the point in my testimony that
3 many of the customers that OPAE claims to represent
4 do not directly pay the costs of lost revenue
5 recovery.

6 Q. And that's because it's your
7 understanding that those PIPP customers do not pay
8 the DSC2 charge.

9 A. It's my understanding that they pay a
10 percentage of their income to the utility for
11 electric service and that the difference between what
12 their bill would have been and the percentage of
13 income that they pay is put into an arrearage account
14 and that often those arrearages are deferred or
15 forgiven.

16 EXAMINER PRICE: Are you saying that OPAE
17 only advocates on behalf of PIPP customers and not
18 more generally on behalf of low or perhaps even
19 arguably low to moderate income customers?

20 THE WITNESS: No, I'm not.

21 EXAMINER PRICE: So they do advocate on
22 behalf of customers that pay those charges you're
23 talking about.

24 THE WITNESS: Yes, I was just saying that
25 a portion of the clients that they represent do not

1 pay DSC2 charge.

2 EXAMINER PRICE: A portion of the clients
3 OCC represents doesn't pay the DSC charge, do they?
4 OCC represents residential customers too, do they
5 not?

6 THE WITNESS: They do, but presumably
7 more of the customers that OCC represents pay the
8 DSC2 charge than the customers that OP&E represents.

9 EXAMINER BOJKO: Is it your understanding
10 that FirstEnergy has a PIPP arrearage forgiveness
11 program currently?

12 THE WITNESS: I don't know enough to
13 answer that question.

14 Q. (By Mr. Lang) With regard to, again, the
15 Ohio Partners for Affordable Energy, you are aware
16 that they represent both low and moderate income
17 residential customers, correct?

18 A. Yes, that's correct.

19 Q. And that organization is a, it's an
20 organization of other organizations, so the Ohio
21 Partners, let's say there's several, there's many
22 organizations that make up the Ohio Partners for
23 Affordable Energy, correct?

24 A. That's correct, and it's my understanding
25 that most of the members are community action

1 agencies.

2 Q. Can you name any of those organizations?
3 Is that something you've investigated?

4 A. I'm sorry, I can't name them.

5 Q. Attached to your -- you have one exhibit
6 attached to your testimony, Exhibit DES-1. This
7 exhibit is remarkably similar to an exhibit attached
8 to Mr. Gonzalez's testimony, is this an exhibit you
9 prepared and provided to him or did he prepare it and
10 give it to you?

11 A. I prepared the exhibit that is on this
12 page. Mr. Gonzalez and I are members of a coalition,
13 and we talk about how to analyze issues.

14 Q. So you prepared it and provided it to
15 him?

16 A. I prepared it. I let him know what my
17 assumptions were. I don't know what he did with it
18 or what he changed about it.

19 Q. So you prepared this exhibit and then --
20 you didn't send him a copy.

21 A. No; I sent him a copy.

22 Q. In your footnote 3 you have an assumption
23 of a distribution rate. How did you -- what was your
24 source for that particular rate?

25 A. The source for that rate was a discovery

1 response from the companies to the staff in I believe
2 the 09-1947-EL-POR case.

3 Q. Is that a -- do you know how that rate
4 was derived or how it was described? For example, is
5 it an aggregate rate? Is it an average of the three
6 rates for the companies?

7 A. It's an average of the three rates for
8 the companies as are -- these are total FirstEnergy
9 savings numbers are, you know, basically numbers, I
10 don't disaggregate by operating company.

11 MR. LANG: That's all the questions I
12 have, your Honors.

13 EXAMINER BOJKO: Mr. Eckhart, do you have
14 any redirect?

15 MR. ECKHART: I don't know, your Honor,
16 could we have few minutes?

17 EXAMINER BOJKO: Yes. Let's take a
18 five-minute recess.

19 MR. ECKHART: Thank you.

20 (Recess taken.)

21 EXAMINER BOJKO: Mr. Eckhart.

22 MR. ECKHART: Yes, your Honor, just one
23 brief line.

24 EXAMINER BOJKO: Please proceed.

25 - - -

REDIRECT EXAMINATION

By Mr. Eckhart:

Q. Mr. Sullivan, you were asked by a number of parties in this case --

EXAMINER BOJKO: Could you speak up, please, Mr. Eckhart?

MR. ECKHART: What's that?

EXAMINER BOJKO: Could you speak up, I can't hear you.

MR. ECKHART: Excuse me, that's why I moved down here so people could hear me.

Q. I'll start again. Mr. Sullivan, you were asked about the people who signed the stipulation and the reference to most of them, and particularly about OP&E, and just specifically to -- is it your understanding that OP&E does not represent individual customers but simply represents agencies that supply services to individual customers?

A. It's my understanding that OP&E represents community action agencies.

MR. ECKHART: That's all, thank you.

EXAMINER BOJKO: Let's do recross, first.

Mr. Lang?

MR. LANG: No questions.

EXAMINER BOJKO: Mr. Randazzo?

1 MR. RANDAZZO: No.

2 EXAMINER BOJKO: Mr. Yurick?

3 MR. YURICK: No questions, thank you,
4 your Honor.

5 EXAMINER BOJKO: Mr. Lavanga?

6 MR. LAVANGA: No questions, your Honor.

7 EXAMINER BOJKO: Mr. Conway?

8 MR. CONWAY: No questions, your Honor.

9 EXAMINER BOJKO: Mr. McNamee?

10 MR. MCNAMEE: No, thank you.

11 EXAMINER BOJKO: OCC?

12 MR. POULOS: No, your Honor, thank you.

13 EXAMINER BOJKO: Ms. Roberts?

14 MS. ROBERTS: No.

15 EXAMINER BOJKO: Mr. Dyas?

16 MR. DYAS: No questions, your Honor.

17 EXAMINER BOJKO: Ms. De Lisi?

18 MS. De LISI: No questions.

19 EXAMINER BOJKO: Mr. Kurtz?

20 MR. KURTZ: No questions.

21 EXAMINER BOJKO: Mr. Settineri?

22 MR. SETTINERI: No questions, your Honor.

23 EXAMINER BOJKO: Mr. Heintz?

24 MR. HEINTZ: No questions, your Honor.

25 EXAMINER BOJKO: Mr. Warnock?

1 MR. WARNOCK: No.

2 EXAMINER BOJKO: Mr. O'Brien?

3 MR. O'BRIEN: No questions, your Honor.

4 EXAMINER BOJKO: Mr. Porter?

5 MR. PORTER: No questions, your Honor.

6 EXAMINER PRICE: Thank you.

7 - - -

8 EXAMINATION

9 By Examiner Price:

10 Q. Mr. Sullivan, in your testimony on page 6
11 you say at line 3, "The stipulation would preclude
12 implementation of alternatives until mid-2014"; is
13 that correct?

14 A. I'm sorry, could you refer me to that
15 again?

16 Q. Your testimony, page 6, line 3.

17 A. Yes.

18 Q. Now, are you aware that -- do you have a
19 copy of the stipulation in front of you? It's okay
20 if you don't, you can use mine.

21 A. I have it.

22 EXAMINER PRICE: May I approach?

23 EXAMINER BOJKO: You may.

24 Q. Would you look on page 9, the highlighted
25 portion? Can you read that into the record, please?

1 A. The rate design currently in effect
2 remains in place other than as modified below,
3 however, the Commission may, with the company's
4 concurrence, institute a changed revenue neutral
5 distribution rate design.

6 Q. So in fact the stipulation provides that
7 there may be an alternative rate design; is that not
8 correct? Isn't that what this says? It doesn't
9 preclude it.

10 A. Can I see it again?

11 Q. Sure.

12 A. I'm having trouble understanding the term
13 "revenue neutral distribution rate design," but --

14 Q. Revenue neutral is fairly
15 self-explanatory, isn't it? It would generate the
16 same amount of revenue as the previous rate design,
17 isn't that how you would define revenue neutral?

18 A. Yes, but is it referring to what was
19 authorized in the last distribution rate case and in
20 this ESP?

21 Q. Well, I think it would be most likely
22 designed to generate the same revenues that were
23 authorized in the last rate case but I'm not certain,
24 it's not my language.

25 A. Okay.

1 Q. I guess we would have to explore that
2 later.

3 A. Yes, and there's also the caveat that the
4 company has to concur to it.

5 Q. But you wouldn't expect the company to
6 unreasonably withhold their concurrence, would you,
7 if it was revenue neutral?

8 MR. ECKHART: Is that a question?

9 EXAMINER PRICE: Yes, that was my
10 question. It's a fair question.

11 Q. Would you? You would not expect the
12 company to unreasonably withhold their concurrence,
13 would you?

14 MR. ECKHART: Your Honor, my client can't
15 speak for the company.

16 EXAMINER PRICE: He can speak to his
17 expectations which is what I asked him, Mr. Eckhart,
18 however much I appreciate your objection to my
19 question.

20 A. Just a moment.

21 My hesitation here is that in my
22 testimony I talk about how lost revenue recovery
23 perhaps might allow the company to recover more than
24 its actual -- more than the actual impacts of energy
25 efficiency on its recovery of its fixed costs. So if

1 they feel like they're giving up some sort of up
2 side, I can see some hesitation there.

3 Q. So if there was a way to protect against
4 that, then, and the Commission could address your
5 concern over the through-put incentive either by a
6 revenue decoupling or by a straight fixed variable
7 rate design, would NRDC support the stipulation if
8 they've addressed your issues?

9 A. I'm sorry, could you ask the question
10 again?

11 Q. If the Commission, assuming that your
12 concerns about the company overrecovery, it was truly
13 revenue neutral, and the Commission implemented or
14 ordered a rate design that addressed your concerns of
15 the through-put incentive, either through a revenue
16 decoupling or a straight fixed variable rate design,
17 would NRDC support the stipulation?

18 A. So if this stipulation included revenue
19 decoupling or straight fixed variable rate design,
20 would we sign the stipulation?

21 Q. Yes.

22 A. We would sign the stipulation if there
23 were revenue decoupling in the stipulation.

24 Q. Okay.

25 A. Most likely. I have to -- there are

1 other issues that I don't raise in my testimony with
2 the stipulation, and of course NRDC is a member of
3 coalition and we would have to talk to our coalition
4 partners.

5 Q. So irrespective of the questions you
6 raised in your testimony you may or may not support
7 the stipulation if the Commission made modifications
8 to address your issues.

9 A. It's likely that we would, but I would
10 have to see the agreement.

11 Q. And I'm not asking for a binding
12 commitment here.

13 One last question. On page 6 at line 9
14 you say "At a minimum, the lost revenue collection in
15 the Stipulation should be considered a cost that
16 reduces the Company's claimed benefits of the
17 agreement." Were you here for Ms. Turkenton's
18 testimony yesterday?

19 A. I was not.

20 EXAMINER PRICE: Well then you can't
21 answer this question. That's all I have.

22 - - -

23 EXAMINATION

24 By Examiner Bojko:

25 Q. Mr. Sullivan, do you recall a line of

1 questions from Mr. Lang and then I guess I believe
2 your counsel, Mr. Eckhart, also touched on it
3 regarding the statement on the bottom of page 6
4 regarding the parties -- items that you -- you're
5 making assumptions I guess about what the parties are
6 interested in and are not interested in, right? Do
7 you recall that conversation?

8 A. Yes, I do.

9 Q. And in that conversation I believe you
10 made a reference to staff, and Mr. Lang was on a
11 roll, I didn't want him to stop, but I want to go
12 back to that comment that you made about staff. And
13 I wrote it down, and I'm not trying to put words in
14 your mouth so correct me if I'm wrong, but I believe
15 that you said staff hasn't raised it, meaning this
16 issue, in its arguments, and then you also mentioned
17 the POLR case. I was a little confused about what
18 you were trying to say and which arguments you were
19 referencing.

20 A. I meant the POR case, the program
21 portfolio plan case which was the last time that I
22 recall this issue being addressed with FirstEnergy.

23 Q. You said they haven't raised them in
24 their arguments. Did you mean in the litigation they
25 didn't ask questions, or in brief, in testimony?

1 What did you mean?

2 A. I meant testimony and briefs.

3 Q. You mean they didn't file testimony
4 regarding this issue specifically.

5 A. Yes. Nor did they raise it in their
6 briefs in my recollection.

7 Q. And you're talking about lost revenues in
8 general they didn't touch on at all?

9 A. In my recollection of staff's testimony
10 in the FirstEnergy program portfolio plan case they
11 did not raise the lost distribution revenue issue.

12 Q. Does your recollection extend to the
13 interim programs or I guess they were called
14 fast-track if I can recall, programs including the
15 CFL one that you reference in here?

16 A. I don't recall staff's argument regarding
17 CFL lost revenues, but I do think that there's a
18 difference between general lost revenue collection
19 for programs in 2009, 2010, and 2011, and the
20 argument about CFL lost revenues. But I don't -- I
21 don't recall the existence of or if it does exist
22 what the -- what staff's testimony was on that issue.

23 Q. I guess maybe it's the word "argument"
24 that I am trying to figure out what you mean by that
25 word. You're not saying that this -- the issue of

1 lost revenues in many different contexts, I just gave
2 you the one about the CFL, you're not saying that
3 that was never discussed by parties in the case.

4 A. In the program portfolio plan case?

5 Q. Sure.

6 A. No, I'm not saying that.

7 Q. So to say that somebody has no interest
8 in the subject matter seems pretty far-reaching,
9 doesn't it?

10 A. I don't believe that's what I said.

11 Q. Okay, now we're quarreling over the word
12 "most interested in" is what you're saying, I mean
13 have you been privy to every discussion that every
14 single signatory party or every party in this
15 proceeding has ever had on the subject?

16 A. No.

17 EXAMINER BOJKO: Okay. Thank you.
18 That's all I have.

19 Thank you, you may step down.

20 THE WITNESS: Thank you, your Honors.

21 MR. ECKHART: Your Honor, I'd like to
22 offer NRDC Exhibit 1 for admission.

23 EXAMINER BOJKO: Any opposition to the
24 admission of NRDC Exhibit 1, Mr. Sullivan's
25 testimony?

1 Hearing none, it will be admitted.

2 (EXHIBIT ADMITTED INTO EVIDENCE.)

3 EXAMINER BOJKO: Mr. Randazzo.

4 MR. RANDAZZO: Your Honor, I would ask
5 that Mr. John D'Angelo be called to the stand and
6 sworn as a witness.

7 And while Mr. D'Angelo is coming to the
8 stand I would ask that his prepared testimony that
9 was filed with the Commission on April the 15th of
10 this year be marked as IEU Exhibit No. 2 for
11 identification purposes.

12 EXAMINER PRICE: So marked.

13 (EXHIBIT MARKED FOR IDENTIFICATION.)

14 MR. RANDAZZO: I've provided a copy to
15 the reporter, and if anybody else needs a copy
16 afterwards.

17 (Witness sworn.)

18 EXAMINER PRICE: State your name and
19 business address for the record, please.

20 THE WITNESS: My name is John D'Angelo,
21 my business address is 9500 Euclid Avenue in
22 Cleveland, Ohio 44115.

23 EXAMINER PRICE: Please proceed,
24 Mr. Randazzo.

25 - - -

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

JOHN D'ANGELO

being first duly sworn, as prescribed by law, was
examined and testified as follows:

DIRECT EXAMINATION

By Mr. Randazzo:

Q. Mr. D'Angelo, you've been with us for
quite a while today, have you not?

A. I have.

Q. Thank you for doing that. Do you have
before you what has been marked for identification
purposes as IEU Exhibit No. 2?

A. I do.

Q. Am I correct that that is the prepared
testimony that has been submitted in this proceeding
on your behalf?

A. It is.

Q. And were you responsible for the
preparation of what has been marked for
identification purposes as IEU Exhibit No. 2?

A. Yes.

1 Q. Do you have any changes or corrections
2 that you would like to make in what has been marked
3 for identification purposes as IEU Exhibit No. 2?

4 A. I do not.

5 Q. Mr. D'Angelo, if I were to ask you the
6 questions that are set forth in what has been marked
7 for identification purposes as IEU Exhibit No. 2,
8 would the answers you would give to those questions
9 here today be those that are set forth in what has
10 been marked for identification purposes as IEU
11 Exhibit No. 2?

12 A. Yes.

13 MR. RANDAZZO: Your Honors, I would move
14 the admission of IEU Exhibit No. 2 and make
15 Mr. D'Angelo available for cross-examination.

16 EXAMINER PRICE: Thank you. We'll
17 reserve ruling on the motion for admission of IEU
18 Exhibit 2 until after cross-examination.

19 Companies?

20 MR. POULOS: Your Honor, at this point
21 would you consider motions to strike?

22 EXAMINER PRICE: I'll come around to you.

23 Companies?

24 MR. KUTIK: No questions, your Honor.

25 EXAMINER PRICE: Staff?

1 MR. McNAMEE: No.

2 EXAMINER PRICE: Mr. Conway?

3 MR. CONWAY: No questions, your Honor.

4 EXAMINER PRICE: Mr. Lavanga?

5 MR. LAVANGA: No questions.

6 EXAMINER PRICE: Mr. Yurick?

7 MR. YURICK: No questions, your Honor.

8 EXAMINER PRICE: Mr. Smith?

9 MR. SMITH: No questions.

10 EXAMINER PRICE: City of Akron?

11 MR. RANDAZZO: None.

12 EXAMINER PRICE: Mr. Settineri?

13 MR. SETTINERI: No questions, your Honor.

14 EXAMINER PRICE: Mr. Kurtz?

15 MR. KURTZ: No questions, your Honor.

16 EXAMINER PRICE: Mr. Porter?

17 MR. PORTER: No questions, your Honor.

18 EXAMINER PRICE: Mr. Heintz?

19 MR. HEINTZ: No questions, your Honor.

20 EXAMINER PRICE: Ms. De Lisi?

21 MS. De LISI: No questions, your Honor.

22 EXAMINER PRICE: Mr. Dyas?

23 MR. DYAS: No questions, your Honor.

24 EXAMINER PRICE: Mr. Warnock, under any
25 of your various representations?

1 MR. WARNOCK: No questions.

2 EXAMINER PRICE: Mr. O'Brien?

3 MR. O'BRIEN: Yes, your Honor, I have one
4 very brief clarifying question we'd like to ask this
5 witness.

6 EXAMINER PRICE: Please proceed.

7 - - -

8 CROSS-EXAMINATION

9 By Mr. O'Brien:

10 Q. Good afternoon, Mr. D'Angelo. I'm Tom
11 O'Brien, I'm asking this question on behalf of the
12 Ohio Hospital Association. You have before you your
13 prefiled testimony in this proceeding?

14 THE WITNESS: Your Honor, I cannot really
15 hear the question.

16 Q. Mr. D'Angelo --

17 A. I cannot hear you. There is an air
18 conditioner behind me.

19 Q. I will borrow Mr. Poulos's microphone.

20 EXAMINER PRICE: You're a facility
21 manager so we expect you to fix that.

22 MR. O'BRIEN: Does not apply to
23 foundational questions.

24 Q. Good afternoon, Mr. D'Angelo, I just have
25 one very brief question, you have your prefiled

1 question in front you, do you?

2 A. I do. Is that your question?

3 Q. No.

4 Turning to page 9 of your testimony, your
5 answer to question No. 10, in that answer you
6 reference the fact that the clinic is a member of
7 both IEU-Ohio and the OHA and that those entities
8 were signatories to the stipulation. By that
9 reference you weren't implying that the OHA is either
10 supporting or opposing the provisions that pertain to
11 the clinic in this case, were you?

12 MR. RANDAZZO: Your Honors, for the
13 benefit of the record we will stipulate there's a
14 specific footnote in the settlement that deals with
15 the OHA's position on that and we stand by that
16 footnote as accurately reflecting the Hospital
17 Association's position.

18 MR. O'BRIEN: That works fine, your
19 Honors, thank you.

20 EXAMINER PRICE: Thank you. Thank you
21 for the clarification.

22 Mr. Eckhart?

23 Ms. Roberts?

24 MS. ROBERTS: No questions, your Honor.

25 EXAMINER PRICE: Mr. Poulos, do you have

1 a motion to strike?

2 MR. POULOS: I do, your Honor, thank you.

3 Your Honor, turning to page 7 of the
4 prefiled testimony, IEU Exhibit 2, lines 7 to 11 on
5 the basis of hearsay.

6 EXAMINER PRICE: Mr. Randazzo.

7 MR. RANDAZZO: Your Honor, there's
8 already been testimony in the record on this subject
9 from FirstEnergy's witness Mr. Ridmann and
10 Mr. D'Angelo is indicating the background information
11 that caused the clinic to consider moving forward in
12 the fashion that's been described in this testimony.

13 It is, I believe, not hearsay, it's not
14 offered for the truth of the matter that's contained
15 in the statement, it's offered to provide the
16 Commission with background information on what caused
17 the clinic to proceed in the direction it did.

18 I think it's useful information
19 nonetheless, but there's already testimony in the
20 record from Mr. Ridmann on this precise point.

21 EXAMINER PRICE: In light of the -- I'm
22 not sure if this strictly, the hearsay exception for
23 admission by a party opponent applies but we're going
24 to stretch it. OCC had an opportunity to
25 cross-examine Mr. Ridmann on this very topic, I don't

1 recall if you did, but if you didn't, then you missed
2 your opportunity. If you did, I'm sure it was very
3 effectively done.

4 MR. POULOS: Thank you, I think, your
5 Honor.

6 CROSS-EXAMINATION

7 By Mr. Poulos:

8 Q. Good afternoon, Mr. D'Angelo.

9 A. Good afternoon.

10 Q. Your testimony addresses the provisions
11 on pages 26 to 28 of the stipulation regarding the
12 Cleveland Clinic provision, correct?

13 A. I believe those are the pages but I do
14 not have them in front of me.

15 Q. You don't have the application in front
16 of you? I don't think we'll need it at this point,
17 so we'll go from there for at least now.

18 One of the points of your testimony is to
19 support the fact that the Cleveland Clinic has
20 developed an expansion proposal of its main campus,
21 correct?

22 A. Yes.

23 Q. And that expansion proposal is for
24 economic development purposes; would you agree with
25 that?

1 A. The expansion is due to increased demand
2 from our patient base.

3 Q. And would you agree that's for economic
4 development?

5 A. I guess I would have to have the terms
6 "economic development" defined. It's a
7 patient-driven increase as a not-for-profit it's not
8 a for-profit model, so it's really, it's a patient
9 driver.

10 Q. As a prerequisite to this expansion
11 proposal you need -- your testimony also I believe
12 supports the fact that the Cleveland Clinic will
13 first need the size and functionality of the utility
14 infrastructure that serves the main campus to first
15 be developed and enlarged; would that be correct?

16 A. I think if you refer to the testimony, it
17 doesn't say first, it talks about a clear concurrent
18 need to develop prior to the end stages of that
19 growth.

20 Q. And where are you referring to in your
21 testimony? Strike that, let me state it this way:
22 Can I have you turn to page 5 of your testimony, line
23 3. Do you see on line 3 where it talks about
24 "prerequisite to this growth, the size and
25 functionality of the utility infrastructure that

1 serves the Main Campus must grow"?

2 A. I do.

3 Q. So would it be accurate to say that as a
4 prerequisite to the growth, that the utility
5 infrastructure must first be enlarged?

6 A. What I was referring to on line 3 was the
7 final phase of the growth. There is some of the
8 activities that are enabling activities that are
9 already underway.

10 Q. Where do you see final stages of growth?

11 A. I believe what I just stated is what I
12 was discussing in line 3 when I said "As a
13 prerequisite to the growth," I was discussing the
14 final stages. And if I did not make that clear in
15 the written testimony, I'm attempting to do so now.

16 Q. So this growth, let me ask it this way,
17 when we're talking about expansion or growth of the
18 Cleveland Clinic, we're talking about the
19 \$1.4 billion proposal, correct, that's in the
20 stipulation?

21 A. Yes.

22 Q. And so that's already started.

23 A. The initial planning and design phases,
24 even some initial demolition have started, that is
25 correct.

1 Q. So the company's already started to spend
2 the \$1.4 billion.

3 A. The company has not.

4 MR. RANDAZZO: Just to be clear when
5 you're using the word "company," are you referring to
6 the utility or who?

7 MR. POULOS: Thank you, Sam. The
8 Cleveland Clinic.

9 A. In that case, yes, the Cleveland has
10 started expending funds towards that master plan
11 growth that is described in the testimony as
12 \$1.4 billion.

13 Q. Now, the provisions in the stipulation
14 that you're supporting provides that the clinic will
15 not have to pay for the \$70 million infrastructure,
16 electric infrastructure regarding the improvement we
17 were just discussing; is that correct?

18 A. For the improvement that we're talking
19 about for the clinic, the nonclinic-owned portion of
20 the infrastructure, that is correct.

21 Q. And I was going to ask you that question
22 that it is not -- is it your position that the
23 expansion won't happen, that the \$1.4 billion
24 expansion of the Cleveland Clinic main campus would
25 not happen if you didn't receive the 70 million, but

1 it's already started. That's correct?

2 A. The full expansion will likely not be
3 able to take place. What we're starting is some of
4 the outpatient areas. It's a very tight schedule as
5 I'm sure you can imagine.

6 Q. The \$70 million for the electric
7 infrastructure improvements that the company's
8 requesting in this stipulation provision, would that
9 happen, in your understanding, if the company -- if
10 Cleveland Clinic did not receive \$70 million to do
11 that infrastructure?

12 MR. RANDAZZO: Can I have the question
13 read back?

14 EXAMINER PRICE: You may.

15 (Record read.)

16 MR. POULOS: Let me strike that and ask
17 it over.

18 Q. Mr. D'Angelo, the \$70 million for the
19 electric infrastructure, the new improved expanded
20 electric infrastructure on the main campus, would
21 that improvement happen if the Cleveland Clinic was
22 required to pay for part of that -- pay part of that
23 \$70 million?

24 A. No. A large portion of it would not be
25 able to occur.

1 Q. What do you mean by a large portion? So
2 some of it would happen; is that correct?

3 A. There is a likelihood that some limited
4 growth would still continue, but it would not be of
5 anywhere near the same magnitude.

6 Q. Can you identify -- can you quantify what
7 you mean by some of it would not happen?

8 A. Quantify in which terms?

9 Q. In the sense that you were giving a
10 pretty vague description that some of it may not
11 happen.

12 MR. RANDAZZO: Well, I object to the
13 characterization of vague description. I mean, he's
14 responding to the questions.

15 EXAMINER PRICE: Sustained.

16 MR. POULOS: May I have the last answer
17 read back, please?

18 (Record read.)

19 Q. Could you quantify what you mean by
20 limited growth would still happen?

21 A. The planning to date has really been
22 based on the necessity of increasing the
23 infrastructure that supports the inpatient and
24 outpatient areas. As you can imagine, inpatient by
25 its very definition is a 24 hour a day, 7 day a week,

1 much more intensive use.

2 Some of the outpatient is going to have
3 to be either relocated or will have to expand because
4 we're physically out of space. I don't see how we
5 could possibly move forward with any of the inpatient
6 based on the existing infrastructure which is the
7 studies that we initially completed and led us down
8 this path in the first place.

9 Q. So the outpatient provision part of the
10 plan would still go forward but the inpatient would
11 not?

12 A. I can't honestly answer that question
13 other than to say that my belief is that we would
14 probably still continue with a portion of the
15 outpatient. There is also the opportunity to move
16 that outpatient to another location, but the planning
17 to date has been for keeping that in downtown
18 Cleveland.

19 Q. Is it your understanding that if the
20 Cleveland Clinic does not pay the \$70 million for the
21 infrastructure improvements, that FirstEnergy's
22 customers will be responsible for paying that
23 \$70 million?

24 A. Yes.

25 Q. Have you conducted any studies on the

1 impact of that \$70 million on the different classes
2 of customers who have to pay for the \$70 million if
3 Cleveland Clinic does not pay that alone?

4 A. I have not.

5 Q. Are you aware if any other parties in
6 this case have done that?

7 A. I am not.

8 Q. And you're aware that as a result of this
9 proposed electric enhancement that will cost
10 \$70 million, residential customers of FirstEnergy
11 will be required to pay for portions of the
12 infrastructure improvements.

13 A. I am as written in the stipulation.

14 Q. To be clear, it is the Cleveland Clinic's
15 position that residential customers should pick up a
16 portion of that 70 million the Cleveland Clinic is
17 requesting relief from; is that correct?

18 THE WITNESS: May I have the question
19 read, please?

20 EXAMINER PRICE: Please.

21 (Record read.)

22 A. I think that the way that the law is
23 written is what was followed in this stipulation and
24 the clinic supported the law as well as supported
25 this text in the stipulation.

1 Q. The text that -- what text are you
2 referring to?

3 A. That FirstEnergy would be reimbursed
4 through all rate classes.

5 Q. Including the residential customers?

6 A. Through all rate classes.

7 Q. That's a "yes"?

8 A. That's a "yes."

9 Q. Looking at page 10 of your testimony,
10 line 13, and part of the answer at the end of the
11 line "in an area sorely in need of good news on the
12 job creation front." Do you see that?

13 A. I do.

14 Q. Would you agree with me the economy in
15 Cleveland is not good?

16 A. Yes, I would.

17 Q. What about the, would you say the same
18 for the FirstEnergy -- let me put it this way, Ohio
19 Edison, Cleveland Electric Illuminating Company, and
20 the Toledo Edison Company utility areas, that the
21 economy in those areas are not good at this point as
22 well? Would you say that?

23 A. I am not an expert in the economies
24 outside of where I physically work. I don't know the
25 answer to your question.

1 Q. And how would you -- what do you mean by
2 the area you work? Would say Cleveland Illuminating
3 Company?

4 A. I'm not able to answer for all of
5 Cleveland Electric Illuminating Company's territory.
6 I'm only able to answer for a portion that neighbors
7 my main campus that is written about quite often.

8 Q. Okay, thank you.

9 Would you agree with me that the poor
10 economy currently in Cleveland and around the
11 Cleveland Clinic area would also affect other
12 customers besides Cleveland Clinic such as
13 residential customers?

14 A. Yes.

15 Q. Do you have an understanding of the
16 impacts on residential customers for this request for
17 other customers besides Cleveland Clinic to pay this
18 \$70 million?

19 A. As previously answered, I do not.

20 Q. Have you completed a study or analysis of
21 the benefits that will be attributed to the
22 \$70 million for the electric infrastructure provision
23 of this stipulation?

24 A. I do not understand the question.

25 Q. The \$70 million for the electric

1 infrastructure provision part of the stipulation that
2 we've been talking about --

3 A. Yes, I understand the \$70 million. I
4 didn't understand your question.

5 Q. My question is has there been a study or
6 an analysis done by you or Cleveland Clinic that can
7 attribute the benefits that will be derived from that
8 expansion of the infrastructure?

9 A. You mean besides the health-care benefits
10 and the thousand or so jobs and the \$1.4 billion,
11 besides those benefits?

12 Q. And that's for the \$70 million for the
13 electric infrastructure?

14 A. That's the enabling project that allows
15 the rest of it to go forward, yes.

16 Q. The enabling project is the \$70 million.

17 A. That is certainly a big piece of the
18 enabling project, yes, sir.

19 Q. When you talk about the jobs and
20 everything, is there an actual study that was done
21 for those jobs?

22 MR. RANDAZZO: What do you mean by
23 "study"?

24 MR. POULOS: Study or analysis. Thank
25 you.

1 Q. Let me ask you what's your backup support
2 for that, for those statements about the jobs and the
3 health care benefits?

4 A. We have completed the program which in
5 medical planning terms shows what services are going
6 to go where and those jobs and the rest of the
7 clinic's investment are primarily tied to the
8 inpatient tower. As you can imagine, the 24/7
9 support to patient care requires 24/7 support from
10 clinicians, nurses, and other support staff. We have
11 both internal, local, regional and national metrics
12 by program area that show how many support staff is
13 required for each of those services and that study
14 was done and that is the number that was used to come
15 up with the job impact.

16 EXAMINER PRICE: Just to clarify, you're
17 talking about a thousand new jobs directly employed
18 by Cleveland Clinic. You're not estimating the
19 indirect impact.

20 THE WITNESS: That is true.

21 MR. POULOS: Your Honor, I ask that the
22 question be stricken -- the response be stricken as
23 not responsive. My question is what is your
24 support --

25 EXAMINER PRICE: Overruled.

1 Q. Again, let me ask what is your support?
2 Is there a document that you would derive these
3 numbers that you were just talking about or referring
4 to?

5 A. There are national metrics that are
6 publicly available.

7 Q. So there's national metrics regarding the
8 \$70 million expansion that you're referring to?

9 A. Sir, you asked me where the jobs number
10 came from.

11 Q. Yeah, I'm asking, talking about this
12 \$70 million expansion of the electric infrastructure,
13 correct?

14 MR. RANDAZZO: I object.

15 THE WITNESS: I'm not sure what your
16 question is.

17 EXAMINER PRICE: One minute.

18 Mr. Randazzo, please.

19 MR. RANDAZZO: I understand the line of
20 cross-examination that was occurring prior to this
21 question was related to the jobs that were associated
22 with the \$1.4 billion investment and now we seem to
23 be associating with jobs related to the \$70 million
24 expenditure. So either I'm confused or the record is
25 going to be very confused.

1 EXAMINER PRICE: Mr. Poulos, if you can
2 rephrase your question, please.

3 MR. POULOS: Yes. Thank you, your Honor.

4 Q. (By Mr. Poulos) Mr. D'Angelo, I am
5 looking, I've heard you talk about some benefits that
6 will happen from, I'll start with the \$1.4 billion
7 expansion project. You just referred to some
8 benefits that would happen as a result of that
9 project going forward, correct?

10 A. Yes, sir.

11 Q. And you referred to some national
12 metrics; is that correct? Did I get that right?

13 A. Those are planning and programming
14 numbers; yes, sir.

15 Q. And where did you get those numbers from
16 for the \$1.4 billion expansion plan?

17 A. The same place the \$1.4 billion came
18 from, you start with the services you need to provide
19 and then you cost out those services including the
20 expense portion, which are the number of FTE or jobs,
21 full-time equivalent, that you need to be able to run
22 those nursing units, those operating rooms, those
23 intensive care units. This is health care 101; it's
24 what's done in the planning and design of every
25 health care organization.

1 Q. And I would like to see where I could
2 find health care 101. Is there a document that
3 supports --

4 A. Sir, it's called the AIA Design
5 Guidelines for Health Care.

6 MR. RANDAZZO: And AIA stands for?

7 THE WITNESS: American Institute of
8 Architects.

9 MR. RANDAZZO: Thank you.

10 Q. So if I were to call the AIA or to look
11 on the website, I would find specific information
12 about the Cleveland Clinic's \$1.4 billion expansion
13 project?

14 EXAMINER PRICE: Mr. Poulos, I don't
15 think that's a fair characterization of what the
16 witness said so if you could rephrase.

17 Q. I'm just trying to look for is there a
18 specific document anywhere that's -- where I can find
19 the benefits regarding, the specific benefits for the
20 \$1.4 billion expansion project.

21 A. You mean besides the stipulation and my
22 testimony?

23 Q. Yes.

24 A. There are straight calculations. They're
25 not on a document at this point other than on both

1 the stipulation and this testimony.

2 Q. Okay. Thank you.

3 Regarding the \$70 million for the
4 electric infrastructure, has the clinic requested
5 support from any, let's start with government
6 agencies to help pay for part of this expansion or,
7 excuse me, to help pay for part of the \$70 million?

8 A. The clinic had put in an American
9 Reinvestment and Recovery Act through the state of
10 Ohio for a small portion for planning, but that was
11 not picked up by the state. That was very early on
12 in the planning before we had the type of information
13 that we've been developing since.

14 Q. Since you had the information, you've
15 developed the information further, have you reapplied
16 for that?

17 A. That program closed.

18 Q. Is there any other types of government
19 agency type of funds you've requested to help pay for
20 the \$70 million project?

21 A. There are no programs that I'm aware of
22 that I could request from. I will happily accept a
23 list.

24 Q. Have you applied for any grant money?

25 MR. RANDAZZO: As distinguished from

1 programs, agency programs?

2 MR. POULOS: Yes.

3 A. We have not.

4 Q. All right. Are you aware of any grant
5 moneys available?

6 A. For this specific growth there is not any
7 that I am aware of.

8 Q. I'm going to make a reference that you
9 can look at if you want but on page 6, lines 19
10 through 22 you talk about the Marymount Hospital is
11 also getting a benefit from this electrical
12 infrastructure improvement; is that correct?

13 A. That is not correct.

14 Q. That is not correct? I guess we'll go to
15 page 6. So is it your position that if the
16 infrastructure design and construction plan is added,
17 it will increase the reliability of community
18 services since both the main campus and Marymount
19 Hospital are currently fed off of a single medium
20 voltage substation. That's not a benefit to
21 Marymount Hospital?

22 A. I don't understand your question.
23 They're both fed off the same substation so if the
24 substation catches on fire, both hospitals will go
25 dark. That doesn't accrue a benefit to Marymount

1 Hospital, it's a community benefit that you're not
2 going to lose the beds and the emergency services in
3 both hospitals at the same time. It doesn't make
4 Marymount more reliable or less reliable. It doesn't
5 increase or decrease Marymount's rates.

6 Q. If Marymount went down because of a
7 substation catching fire, Marymount Hospital wouldn't
8 lose money from that?

9 A. As a not-for-profit, it's -- it's not a
10 question that is easy to answer. Their primary
11 person, their raison d'etat, their reason for being
12 is they serve the community as does the Cleveland
13 Clinic campus. If they're down, they're not able to
14 serve the community.

15 Q. Let me ask a different part then. Let me
16 go to a different one. Looking at your footnote 4 on
17 page 7 about the Cleveland's Opportunity Corridor, is
18 it true that this footnote is regarding a benefit to
19 the Cleveland's Opportunity Corridor by the improving
20 electric infrastructure of the Cleveland Clinic's
21 main campus?

22 A. I can't answer that it's a benefit. I
23 can answer that it won't hurt it. You're asking me
24 to answer a planning project that has not been fully
25 developed yet.

1 Q. Could you explain for me what you mean by
2 "works to help address" at the end of line 1 to line
3 2?

4 MR. RANDAZZO: Now on the top of page 7
5 of his testimony?

6 MR. POULOS: Page 7, yes. Thank you,
7 Sam.

8 A. I'm sorry, what was the question?

9 Q. The question is you said that in your
10 last answer that it's not a benefit, it won't hurt,
11 so I wanted you to just explain for me what you meant
12 by the words "also," well, let me read the whole
13 sentence, "Freeing up the capacity of a medium
14 voltage substation also works to help address
15 potential growth in electric demand in an area of
16 Cleveland that is expected to grow rapidly following
17 the completion of the 'Opportunity Corridor.'" And
18 that's at the top of page 7.

19 A. Yes, sir.

20 Q. And I was wondering what you mean by
21 "also works to help address."

22 A. Help address potential growth that is
23 expected to grow rapidly as I had stated in my answer
24 to your previous question, I can't specifically state
25 that it's going to benefit a program that's not

1 developed yet, but that is certainly going to help
2 the growth in that area.

3 Q. Have you asked for the Cleveland -- for
4 the people who are responsible at the Cleveland's
5 Opportunity Corridor if they would be able to help
6 assist with funds for this \$70 million?

7 A. No, sir, I'm unaware of the mechanism
8 with which to do so.

9 Q. Now, look at page 10, lines 7 through 9
10 of your testimony again. It talks about here the
11 fact that you believe that the prompt approval of the
12 ESP stipulation will permit us to maintain the type
13 of progress that is required to timely complete the
14 main campus expansion. Do you see that?

15 A. Yes, sir.

16 Q. When did you first meet with the PUCO to
17 discuss this expansion project?

18 A. It's, you know, I don't honestly know the
19 date. I know that several key milestones occurred in
20 September, October, and November of last year and I
21 believe we met once we had enough information
22 gathered, which I believe was December, but I'm
23 guessing.

24 Q. So the first ones, with the PUCO, the
25 first meetings were approximately September, October.

1 A. No, sir, that's not what I said. I said
2 we started gathering the data in September, October,
3 November, and had enough data available to have our
4 first informal meeting around the December time
5 frame.

6 Q. So your statement is the first meeting
7 with PUCO in December.

8 A. Yes, sir, to the best of my recollection.

9 Q. Is it your recollection that the first
10 time that the PUCO or that, excuse me, that the
11 \$70 million expansion -- strike that.

12 Do you recall a renewed set of
13 discussions regarding the settlement happening in the
14 late-February time period? Do you recall that?

15 A. Sir, I wasn't involved in the
16 discussions, but I do believe that there were
17 discussions occurring about that time frame, whether
18 they were renewed or not, I don't honestly know.

19 Q. Okay. Is it your belief or would you
20 agree with me that there was no discussion about a
21 \$70 million electric infrastructure expansion of the
22 Cleveland Clinic prior to the end of
23 February/early-March time period?

24 A. I'm not sure I understand the question.
25 I thought that we had talked, the clinic had been

1 discussing it since December.

2 Q. Well, as part of the stipulation.

3 A. I don't know, sir, I wasn't party to all
4 the discussions in the stipulation.

5 Q. One quick question for you. In a couple
6 places you talk about local, and if you would like me
7 to refer to you, you're talking about local, state
8 and national. I was curious what you meant by
9 "local." If you want references, I can give them to
10 you.

11 MR. RANDAZZO: Please do.

12 Q. On page 14, line 10.

13 MR. RANDAZZO: Page 14?

14 MR. POULOS: Excuse me, page 4. Page 4,
15 line 10.

16 Q. Let me give you all three, see if it's
17 the same answer for all three. Page 5, line 20.

18 MR. RANDAZZO: Can we do one at a time so
19 we don't lose the context?

20 MR. POULOS: Sure.

21 Q. I will start page 4, line 10. What do
22 you mean by "local"? What is your -- how would you
23 describe "local"?

24 A. We have patient metrics that are for main
25 campus, for example, that includes Cuyahoga County,

1 the three counties surrounding Cuyahoga County, and
2 the seven counties surrounding the main campus's
3 location and that is our definition of local.

4 Q. Would that be the same for your use of
5 the word "local" on page 5, line 20?

6 A. Yes, sir.

7 Q. And page 8, line 12?

8 A. I'm sorry, sir? Page 8?

9 Q. Page 8, line 12.

10 A. Yes, sir.

11 MR. POULOS: Your Honor, if I may have
12 just one moment.

13 EXAMINER PRICE: You may.

14 MR. POULOS: Your Honor, if I may go off
15 the record for a moment.

16 EXAMINER PRICE: You may.

17 (Discussion off the record.)

18 EXAMINER PRICE: Let's go back on the
19 record.

20 MR. POULOS: Thank you, your Honor. I
21 have a document I'd like to --

22 THE WITNESS: I'm sorry, I can't hear
23 you.

24 EXAMINER PRICE: Go ahead, Mr. Poulos.

25 MR. POULOS: Your Honor, I have a

1 document I'd like to show the witness to refresh his
2 recollection of when the Cleveland Clinic first met
3 with the PUCO. May I approach the witness?

4 EXAMINER PRICE: You may approach.

5 MR. POULOS: Thank you, your Honor.

6 MR. RANDAZZO: Greg, do you mind if I
7 stand relatively close to the witness so I can see
8 the document?

9 MR. POULOS: Certainly.

10 MR. RANDAZZO: Thank you.

11 Q. (By Mr. Poulos) Mr. D'Angelo, looking at
12 the document I put in front of you, you may review it
13 if you like, do you recognize this document?

14 A. I do. This came from a brief that was
15 the end product to a study that the clinic had hired
16 FirstEnergy to do.

17 Q. And does this refresh your recollection
18 on when the Cleveland Clinic first met with the PUCO
19 representatives regarding a reasonable arrangement
20 for this electric infrastructure expansion project?

21 A. It says quite clearly --

22 MR. KUTIK: Well, excuse me.

23 MR. RANDAZZO: Don't read from it.

24 MR. KUTIK: This was a document that was
25 provided by FirstEnergy on a confidential basis. If

1 the witness was asked if it refreshes his
2 recollection, he can answer "yes" or "no" to that.
3 And then there's another question that comes
4 following that.

5 EXAMINER PRICE: Please answer "yes" or
6 "no."

7 A. It does not, no, to your answer, I can
8 read what's written here.

9 MR. RANDAZZO: No, no, you can't.

10 THE WITNESS: I'm sorry.

11 MR. POULOS: Okay. Thank you.

12 MR. RANDAZZO: But that was a great
13 answer.

14 Q. And I do have just one last question or
15 one question. Mr. D'Angelo, in your testimony it
16 states that you would have filed a reasonable
17 arrangement if you had not filed this electric
18 infrastructure expansion as part of the stipulation.
19 Do you recall that testimony?

20 A. Yes, sir.

21 Q. And if you would have filed this as a
22 reasonable arrangement, would you have provided more
23 information than you provided in the stipulation?

24 MR. RANDAZZO: We're excluding the
25 testimony now?

1 Q. The testimony, more information than is
2 in your testimony and in the stipulation.

3 A. Sir, I can't answer that question. We
4 provided everything that we were asked.

5 Q. Asked by who?

6 A. Anybody who asked it. Would you like to
7 be more specific, sir? We offered to OCC a tour and
8 an inside look at exactly what the expansion was
9 going to do and we certainly would have stood behind
10 that.

11 Q. When did you offer that tour?

12 A. Sir, three weeks or four weeks ago,
13 somewhere in that time frame.

14 Q. And who was this that you offered it to?

15 A. We offered it from counsel to counsel,
16 sir.

17 Q. You don't know who you offered it to.

18 MR. RANDAZZO: You.

19 MR. POULOS: To me.

20 MR. RANDAZZO: You're on the e-mail.

21 EXAMINER PRICE: Let's not testify.

22 Q. Are you aware of who was offered this?

23 A. Sir, I did not see the e-mail but I
24 certainly just heard the goings on around me so I
25 guess no. Sir, we give tours to --

1 EXAMINER PRICE: There's no question
2 pending.

3 THE WITNESS: Yes, sir.

4 MR. RANDAZZO: There's a bus leaving in
5 five minutes.

6 EXAMINER BOJKO: Mr. D'Angelo, while
7 we're waiting for OCC to continue, I thought earlier
8 you were talking about discussions with staff
9 concerning the stipulation and you gave an October,
10 November, December time line, and just to clarify the
11 record you just meant discussions with staff, and
12 then Mr. Poulos also talked about a reasonable
13 arrangement.

14 You weren't saying or trying to tell us
15 what you talked to staff about, just that you talked
16 about the issue in general of an expansion at
17 Cleveland Clinic; is that accurate?

18 THE WITNESS: Yes, ma'am, that is
19 accurate.

20 EXAMINER PRICE: Mr. Poulos.

21 MR. POULOS: I have no further questions,
22 thank you.

23 EXAMINER PRICE: Thank you. Did we miss
24 anybody?

25 Seeing none, redirect?

1 MR. RANDAZZO: None.

2 EXAMINER PRICE: Thank you.

3 Ms. Bojko?

4 EXAMINER BOJKO: No.

5 EXAMINER PRICE: Thank you, you're
6 excused.

7 THE WITNESS: Thank you, sir.

8 EXAMINER PRICE: Mr. Randazzo, would you
9 like to renew your motion?

10 MR. RANDAZZO: I'm sorry?

11 EXAMINER PRICE: Would you like to renew
12 your motion?

13 MR. RANDAZZO: Yes, I would if I need to,
14 I made it the first time and I would ask you to
15 reconsider it and grant it forthwith.

16 EXAMINER PRICE: Any objections to the
17 admission of IEU Exhibit 2?

18 MR. POULOS: Subject to my motion to
19 strike, no.

20 EXAMINER PRICE: Subject to your motion
21 to strike.

22 Seeing none, it will be admitted.

23 (EXHIBIT ADMITTED INTO EVIDENCE.)

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

25 (Recess taken.)

1 EXAMINER BOJKO: Let's go back on the
2 record.

3 Ms. De Lisi, would you like to call your
4 first witness?

5 MS. De LISI: Yes, your Honor, at this
6 time the OEC would like to call Miss Carrie Cullen
7 Hitt to the witness stand. And, your Honor, I've
8 provided the court reporter with a copy of
9 Miss Hitt's testimony and ask at this time it please
10 be marked as OEC Exhibit 1.

11 EXAMINER BOJKO: It will be so marked.

12 (EXHIBIT MARKED FOR IDENTIFICATION.)

13 EXAMINER BOJKO: Ms. Hitt, would you
14 please raise your right hand.

15 (Witness sworn.)

16 EXAMINER BOJKO: Please be seated.
17 Please proceed.

18 - - -

19 CARRIE CULLEN HITT
20 being first duly sworn, as prescribed by law, was
21 examined and testified as follows:

22 DIRECT EXAMINATION

23 By Ms. De Lisi:

24 Q. Ms. Hitt, would you please state your
25 name and business address for the record.

1 A. Yes. My name is Carrie Cullen Hitt and
2 my business address is Post Office Box 534, North
3 Scituate, Massachusetts 02060.

4 EXAMINER BOJKO: Would you please put the
5 mic closer to you and bend it down a little bit.

6 Thank you.

7 Q. And who are you employed by and in what
8 capacity?

9 A. I'm employed by The Solar Alliance and
10 I'm the president of the association.

11 Q. Do you have a copy of your direct
12 testimony in front of you?

13 A. I do.

14 Q. And were the contents of OEC Exhibit 1
15 prepared by you or under your direction?

16 A. Yes.

17 Q. Do you have any corrections to make to
18 that testimony at this time?

19 A. No.

20 Q. Is the testimony that you've provided in
21 OEC Exhibit 1 true to the best of your knowledge and
22 belief?

23 A. Yes.

24 Q. If I were to ask you the same questions
25 today that are asked in your direct testimony, would

1 your answers be the same?

2 A. Yes.

3 MS. De LISI: Thank you, Miss Hitt.

4 Your Honor, the witness is available for
5 cross.

6 EXAMINER BOJKO: Thank you.

7 Mr. Dyas?

8 MR. DYAS: No questions, your Honor.

9 EXAMINER BOJKO: Mr. Heintz?

10 MR. HEINTZ: No questions, your Honor.

11 EXAMINER BOJKO: Ms. Roberts?

12 Mr. Warnock?

13 MR. WARNOCK: None in either capacity.

14 EXAMINER BOJKO: OCC?

15 MR. POULOS: No questions, your Honor.

16 EXAMINER BOJKO: City of Akron?

17 MR. RANDAZZO: None for Akron.

18 EXAMINER BOJKO: Mr. Yurick?

19 MR. YURICK: No questions, thank you,
20 your Honor.

21 EXAMINER BOJKO: Mr. Smith?

22 MR. SMITH: No.

23 EXAMINER BOJKO: Mr. Warnock? Oh, you
24 said in both capacities, sorry.

25 Mr. O'Brien?

1 MR. O'BRIEN: No questions, your Honor.

2 EXAMINER BOJKO: Mr. Porter?

3 MR. PORTER: No questions, your Honor.

4 EXAMINER BOJKO: Mr. Conway?

5 MR. CONWAY: No questions, your Honor.

6 EXAMINER BOJKO: Mr. Kurtz?

7 MR. KURTZ: No questions.

8 EXAMINER BOJKO: Mr. Lavanga?

9 MR. LAVANGA: No questions, your Honor.

10 EXAMINER BOJKO: Mr. Randazzo?

11 MR. RANDAZZO: Just a couple.

12 - - -

13 CROSS-EXAMINATION

14 By Mr. Randazzo:

15 Q. Good evening.

16 A. Good evening.

17 Q. The thrust of your testimony as I take it
18 is designed to gain support from the Commission for a
19 requirement for long-term purchase contracts related
20 to solar RECs; is that correct?

21 A. That's correct.

22 Q. You understand from, well, do you know if
23 solar is a requirement in the Ohio portfolio
24 requirements?

25 A. My understanding is it is.

1 Q. And do you know whether or not it's in
2 the energy resource category?

3 A. My understanding is that it is.

4 Q. And if an electric distribution utility
5 like the three operating utilities underneath
6 FirstEnergy that have service areas in Ohio, if those
7 utilities were to incur costs related to solar RECs,
8 in compliance with the alternative energy resource
9 requirement in the Ohio portfolio, would those costs
10 be bypassable by shopping customers?

11 A. Can you clarify what you mean by
12 "shopping customers"?

13 Q. Customers that obtain their generation
14 supply from a competitive retail electric supplier
15 such as Constellation.

16 A. I'm not sure.

17 Q. Well, assume for me that the costs are
18 bypassable by customers that obtain their generation
19 supply from a competitive supplier, and the utility
20 is required to enter into long-term contracts to
21 purchase solar RECs, how would you, if you would, how
22 would you propose to provide the financial support
23 for the utility to pay for the RECs that are
24 purchased under those arrangements?

25 A. If I assume that they are bypassable,

1 meaning they're on the generation portion of the
2 bill, I would assume that the utility or, I'm sorry,
3 the operating companies would recover those costs
4 from the customers remaining on the generation
5 tariff.

6 Q. Okay. So --

7 A. Or, excuse me, I'm sorry, transmission
8 and distribution tariff. Excuse me.

9 Q. Okay. So as more customers shop, the
10 price for the remaining customers needed to support
11 cost recovery would go up in that scenario, correct?

12 A. It could, but not necessarily so. If the
13 operating companies were to engage in a long-term
14 contract for solar RECs and plans their load
15 appropriately, or understood what their forecasts
16 might be, there may not be additional costs.

17 If there were excess -- if the long-term
18 contract resulted in excess S because load had
19 shifted, if possible the operating company might sell
20 those SRECs to other parties who are serving load or
21 to any other party who may want to purchase them.

22 Q. Do you understand that the alternative
23 energy resource obligation attaches not only to
24 incumbent electric distribution utilities but
25 competitive suppliers of generation supply?

1 A. Yes.

2 Q. Have you approached competitive suppliers
3 to see if they're interested in entering into
4 long-term REC purchase agreements for solar?

5 A. I have not.

6 Q. Why not?

7 A. I represent a trade association. I don't
8 do commercial transactions.

9 Q. I'll take that answer.

10 Are you familiar with the solar energy
11 industry's association?

12 A. Yes.

13 Q. Do they publish a, typically a year-end
14 review document?

15 A. I'm aware that they publish one, yes.

16 Q. And in the course of that document do
17 they talk about the ability of the solar industry,
18 solar energy industry, to raise capital and grow?

19 A. They might. But I have not read the
20 document, so I can't speak to any specific language.

21 Q. Well, is it your view that the solar
22 industry is having difficulty raising capital?

23 A. In specific instances in terms of
24 construction facilities in some parts of the country
25 it is difficult to get investment to provide

1 development for solar resources.

2 Q. Well, in general is the solar industry
3 having difficulty raising capital?

4 A. I can't say.

5 MR. RANDAZZO: That's all I have. Thank
6 you.

7 EXAMINER BOJKO: Mr. Settineri?

8 MR. SETTINERI: No questions, your Honor.

9 EXAMINER BOJKO: FirstEnergy?

10 MS. MILLER: Yes, your Honor.

11 - - -

12 CROSS-EXAMINATION

13 By Ms. Miller:

14 Q. I guess good evening now. My name is
15 Ebony Miller. Throughout your testimony you used the
16 term "alternative energy portfolio standards." But
17 your testimony is limited to the companies meeting
18 their solar energy requirements, correct?

19 A. Yes.

20 Q. And you're not offering any opinion on
21 nonsolar.

22 A. Not in my testimony, no.

23 Q. Okay. Would you agree that the solar
24 energy market here in Ohio is immature?

25 A. Yes.

1 Q. Would you also agree that generally
2 prices are higher when demand is high and supply is
3 constrained?

4 A. It generally might be true, that's not
5 always the case.

6 Q. But generally that's true.

7 A. Also depends on what's going to happen in
8 the future.

9 Q. And what would happen in the future is
10 unknown, correct?

11 A. Well, market dynamics sometimes are based
12 on expectations of what might happen next, so if, for
13 example, if there are anticipated policies that will
14 come into play that may change supply and demand.

15 Q. But it may not, correct?

16 A. It may not.

17 Q. And at this point a typical or average
18 cost for a solar contract is unclear because the
19 contracts can range in size, shape, length,
20 et cetera, and those components would dictate the
21 cost of those contracts, correct?

22 A. I don't think it's unclear what the costs
23 are. It's that they differ by project and by
24 location and by technology. It's clear to the
25 parties engaging in those contracts.

1 Q. Do you have a copy of your deposition
2 with you?

3 A. I do not.

4 MS. MILLER: May I approach, your Honor?

5 EXAMINER BOJKO: You may.

6 Q. There are page numbers on the actual page
7 of the transcript and then there's page number at the
8 bottom. I'm going to refer throughout to the page
9 number at the upper right corner of each section,
10 okay, for ease.

11 A. Sure.

12 Q. Could you turn to page 15 of the
13 deposition. If you could read to yourself as I read
14 aloud. Line 3, "Question: Are you aware of what the
15 typical costs for a solar contract is?

16 "Answer: I think typical cost is not --
17 can't really be clarified. Contracts can be of any
18 shape, sort, size, et cetera, length, and that would
19 dictate the cost.

20 "How about the average cost?

21 "Same answer.

22 "Question: Is there a" -- I guess I'll
23 stop there.

24 Did I read that correctly?

25 A. Yes.

1 Q. In fact, in your opinion the point in
2 which a contract becomes unreasonable is in the eye
3 of the contracting party, correct?

4 A. It depends. There may be other parties
5 involved in reviewing a contract. Perhaps the Public
6 Utilities Commission of Ohio may review a contract
7 and they may have an opinion about whether or not a
8 contract is reasonable.

9 Q. So the parties negotiating a contract
10 could believe it's reasonable but, for example, the
11 Public Utilities Commission of Ohio can indicate that
12 the contract is unreasonable.

13 A. I would assume that any parties that
14 engage in a contract, if they're parties to the
15 contract, would believe it would be reasonable. In
16 terms of the Public Utilities Commission, it depends
17 on what process is set up and what the review process
18 is.

19 Q. Do you believe that would add additional
20 risk to the contracting parties, the fact that they
21 thought the contract is reasonable at the time they
22 executed it and the Public Utilities Commission or
23 any commission later could find the contract
24 unreasonable?

25 A. Not necessarily so. I think that you set

1 up a process, the Commission could set up a process
2 in which certain parameters were laid out in advance
3 and if those contracts met the parameters, it would
4 be deemed reasonable if it were submitted to the
5 Commission.

6 Q. And under that framework would that be
7 that the contracts would be preapproved by the Public
8 Utilities Commission?

9 A. Not necessarily so.

10 Q. The framework would be preapproved?

11 A. I'm suggesting it could be.

12 Q. And when you suggest that it could be,
13 that is the remedy to reduce the risk to the
14 contracting parties?

15 A. It may be a remedy, perhaps there are
16 others.

17 Q. If parties executed a contract for RECs
18 for \$5,000 a REC, is it correct to say that you would
19 not be able to say that that was reasonable or
20 unreasonable because you'd have to review the entire
21 contract, the terms and conditions of the entire
22 contract?

23 A. I couldn't speak to a specific contract,
24 a hypothetical contract. I don't know the context in
25 which you're just, you know, addressing. I

1 couldn't -- I'm not -- I couldn't answer the question
2 concerning whether or not a \$5,000 contract was
3 reasonable or not.

4 Q. I guess my question is is there a per se
5 amount for a solar REC amount per REC that would be
6 unreasonable? Is there a range right now here in
7 Ohio that you could provide where it goes from
8 reasonable to unreasonable?

9 A. I wouldn't judge the reasonableness. I
10 would suggest that the parties would based on what
11 the expectation given the solar requirements are in
12 Ohio. My understanding is that there is an
13 alternative compliance payment, an ACP, in Ohio as
14 well that may well set that sort of framework, my
15 understanding is there are rate caps in Ohio as well,
16 all those things would play into a decision of
17 reasonableness of the parties, and if the Commission
18 were involved, I suspect they would consider those
19 factors as well.

20 Q. Okay. So if you heard that RECs here in
21 Ohio were going for \$5,000 per REC, you wouldn't say
22 per se that that was unreasonable.

23 A. I don't have an opinion because I don't
24 have all the characteristics or context for which
25 you're speaking to.

1 Q. You don't negotiate or engage in
2 contracts, do you?

3 A. No; I run a trade association.
4 Contracts, excuse me, let me clarify, contracts
5 related to solar investments. I might negotiate
6 contracts to hire an attorney or something, but...

7 Q. Fair enough.

8 Could you turn to page 6 of your
9 testimony. In lines, the question and answer
10 starting on lines 13 through 22, you reference that
11 AEP contract with the solar provider. Do you see
12 that?

13 A. I'm sorry, when you started your
14 conversation I believe you said you were referring to
15 the page numbers in the right-hand corner of each
16 page.

17 Q. I'm sorry, I meant your testimony, not
18 your deposition.

19 A. Excuse me. Okay.

20 And, I'm sorry, what line?

21 Q. The question starting on line 13 and the
22 response running through line 22.

23 A. Okay.

24 Q. Have you read the AEP contract?

25 A. I have not read the contract.

1 Q. So you have no basis to determine if that
2 contract is reasonable or not.

3 A. No. It is included in here as an example
4 of a 20-year contract.

5 Q. So 20-year contracts, I guess it just
6 provides information that 20-year contracts exist.
7 Whether the terms and conditions are reasonable or
8 not, that's not why this particular testimony is
9 offered. It could be unreasonable, but it exists.
10 Is that fair to say?

11 A. Again, I'm not clear who's determining
12 what's reasonable and what is not reasonable. I
13 would suggest that reasonableness be determined in a
14 ratemaking case by the Commission.

15 Q. But you're not setting forth this
16 testimony for the Commission as a model contract or a
17 model example of agreements that utilities can enter,
18 correct?

19 A. I'm providing it as an example that a
20 Ohio utility has engaged in a long-term contract.

21 Q. You were asked a few questions by
22 Mr. Randazzo regarding shopping. And I think that he
23 explained the concept of shopping. And you had
24 indicated that the companies could project what their
25 needs will be in the future. Is that fair to say?

1 Is that a characteristic of your testimony?

2 A. Yes, it is.

3 EXAMINER BOJKO: Excuse me, Ms. Miller.
4 You're going to have to talk into -- there are a lot
5 of horns beeping, I can't hear.

6 MS. MILLER: Sorry, rush-hour.

7 (Record read.)

8 THE WITNESS: Can I complete that? I
9 actually didn't finish my answer before --

10 EXAMINER BOJKO: I interrupted. Please.

11 A. Yes, it is, and I would add that I
12 imagine that the operating companies actually project
13 what their energy needs are into the future or their
14 distribution and their generation needs are as well.

15 Q. Just to be clear, when we talk about
16 long-term contracts, what length are we talking
17 about?

18 A. In my testimony on several occasions I
19 discuss what a long-term contract might look like in
20 terms of length of time. I think the first time I
21 reference a specific period. Excuse me. Well, a
22 time, I'm not sure if this is the first, it would be
23 on page 6, line 5 in answer to the question on line
24 4.

25 Q. So is your response 10 to 15 years or 10

1 to 20 years?

2 A. In here I say 10 years, however, 15 years
3 is more likely to result in a needed development.

4 Q. Do you believe that 20 years is also an
5 appropriate long-term contract?

6 A. It could be, it depends on the
7 circumstances.

8 Q. And I guess is it your opinion that the
9 companies can project the level of shopping or what
10 customers they may have out 20 years or out 15 years?

11 A. I suspect they could produce a forecast
12 out to 10, 15, or 20 years, I suspect they do that
13 for their energy needs. Now, obviously, the further
14 you get out in the forecast, there are parameters
15 around that which may increase or decrease the load.

16 But I would add that it wouldn't
17 necessarily be my expectation that all of the load
18 would be contracted under a long-term contract. One
19 way to satisfy what I believe your question would be
20 is how do you manage that forecast in the
21 potential -- matching that forecast with a contract.
22 You wouldn't necessarily have to have 100 percent of
23 your forecast under long-term contract.

24 Q. Do you recognize that the companies do
25 not purchase their energy through long-term

1 contracts?

2 A. Yes.

3 Q. And would you agree that the long-term
4 forecast, in order for a party or the companies to
5 feel comfortable, it would have to be pretty
6 reliable?

7 A. What would have to be reliable?

8 Q. The forecast the company's producing on
9 what their customer load would be in 15 years from
10 now.

11 A. Reliable for what purposes?

12 Q. Reliable for the purposes of entering
13 into a 15-year contract.

14 A. A 15-year contract?

15 Q. That's correct.

16 A. It would have to be fairly reliable, but
17 again, I'll refer to the comment I made earlier that
18 if circumstances were to change in the future, I
19 don't necessarily at this point see a barrier to the
20 operating company selling their excess RECs back into
21 the market.

22 Q. If the companies were to sell the SRECs,
23 solar RECs, back into the market, at this time the
24 price of solar had gone down and so they sell it at a
25 loss, is it your opinion that the companies should

1 pass on that loss to Ohio ratepayers?

2 A. I think you're assuming that the price of
3 that SREC would stay fixed over the course of the
4 term, and that the market would necessarily go down
5 and those are two fairly large assumptions. Ohio, as
6 I understand it, has a RPS or alternative energy
7 requirement that actually increases over time and so
8 I think to assume that the market is going to
9 decrease is quite a big assumption.

10 Your question is whether or not if there
11 is a cost differential should that be borne by Ohio
12 customers or ratepayers, is that the question?

13 Q. That's my question, correct.

14 A. I would say yes.

15 Q. Is it your experience that when the
16 market is immature such as it is in Ohio the price
17 for SRECs is higher than as the market matures. As
18 there's more product, the price goes down.

19 A. Not necessarily so.

20 Q. So you have not seen in the industry that
21 the price of solar energy RECs decrease over time?

22 A. Oh, I'm sorry. I think there are some
23 markets where SRECs may have decreased, but in most
24 markets right now in the United States where there is
25 a solar requirement, those requirements are actually

1 increasing over time. And so I think it would really
2 depend on the circumstance.

3 Q. I understand that the solar requirement
4 may increase, but I'm really focusing on the cost per
5 REC. Isn't it correct to state that the cost of
6 producing or building a solar project has decreased?

7 A. It would depend on the project. I
8 believe the nationwide trends, if you read, I'm not
9 citing anything specific here, if you would read
10 trade press today that the general trend up until
11 now, maybe up until the last two years has been some
12 decline in installation of solar projects, but it
13 depends on the location, the geography, the
14 technology, et cetera.

15 Q. And you had stated earlier that you're
16 the president of Solar Alliance, correct?

17 A. That's correct.

18 Q. And the board of directors of Solar
19 Alliance is generally composed of solar companies,
20 correct?

21 A. It's 100 percent composed of companies
22 engaged in the solar business.

23 Q. Okay. And so it's not composed of any
24 individuals or utility companies then.

25 A. No.

1 Q. And generally speaking these solar
2 companies represent aspects such as manufactured
3 installation?

4 A. And development.

5 Q. And development. And so the solar
6 companies, part of the solar companies board are
7 developers.

8 A. Yes.

9 Q. And these developers are the likely
10 counterparty to the long-term agreements that the
11 utilities would be entering into, correct?

12 A. Yes.

13 MS. MILLER: No further questions.

14 EXAMINER BOJKO: Staff? Mr. McNamee?

15 MR. McNAMEE: No, thank you.

16 EXAMINER BOJKO: Any redirect, Ms. De
17 Lisi?

18 MS. De LISI: If we could just have three
19 minutes, your Honor.

20 MR. RANDAZZO: If I may, can we go off
21 the record for a second?

22 (Discussion off the record.)

23 EXAMINER BOJKO: Let's go back on the
24 record. Do you have any redirect?

25 MS. De LISI: The OEC has no further

1 questions.

2 EXAMINER BOJKO: I have a few.

3 MS. De LISI: Your Honor, at this time I
4 might --

5 EXAMINER BOJKO: Oh, wait. I have a few
6 questions.

7 - - -

8 EXAMINATION

9 By Examiner Bojko:

10 Q. Miss Hitt, is your testimony providing
11 specific recommendations as to actual solar long-term
12 contracts or is it just your -- the purpose of your
13 testimony to state that the Commission should provide
14 for recovery, cost recovery, for long-term contracts?

15 A. The focus of my testimony is on cost
16 recovery for long-term contracts, not the specifics
17 of contracts.

18 Q. I think you said in answer to
19 Mr. Randazzo's question that you are aware that other
20 CRES providers -- are you familiar with that term?

21 A. Yes.

22 Q. That other CRES providers are also, or
23 electric services companies is actually what the law
24 says, are also required to meet certain solar
25 requirements; is that your understanding?

1 A. Yes.

2 Q. Now, do you know whether those CRES
3 providers are able to seek cost recovery for
4 long-term contracts?

5 A. From the Commission they are not at this
6 point, my understanding is that they would not be
7 able to come to the Commission and ask for that.
8 They may well on their own accord seek cost recovery
9 from their customers via their own retail contracts.

10 Q. You're saying that they would maybe build
11 that into the price of generation?

12 A. Yes.

13 Q. And it's my understanding from your
14 testimony, even though you're not providing specifics
15 today, that you do recommend all entities that have
16 these kind of alternative energy portfolio
17 requirements to enter into long-term solar contracts;
18 is that correct?

19 A. I think it would be prudent for entities
20 that have solar obligations to engage in long-term
21 contracts.

22 Q. And I believe in answer to Miss Miller's
23 questions regarding specifically the electric
24 utilities that have service territories, distribution
25 utilities in Ohio, if there is a loss associated with

1 the entering into of those long-term contracts, that
2 this would be passed on to ratepayers; is that
3 correct?

4 A. Yes. I would like to add, if I may, that
5 if there's a benefit as well, that that also be
6 passed on, for example if they determine that they
7 have excess SRECs in the future, which I would find
8 hard to imagine, but if they did and they were
9 permitted to sell those back into the market, that
10 the revenues from that sale be returned to the
11 ratepayers.

12 Q. And similarly with regard to CRES
13 providers, if they entered long-term contracts that
14 turned out to be imprudent, to use your words, would
15 they also be able to pass on some kind of loss to
16 their customers?

17 A. That would be a commercial arrangement
18 that they would have to determine how to handle.

19 Q. The Commission is not -- it's your
20 understanding that, as you had said before, that the
21 Commission would not get involved in any kind of cost
22 recovery, guaranteed cost recovery for CRES
23 providers.

24 A. That is the current status is my
25 understanding.

1 Q. And so given your recommendations today
2 in the testimony, if the Commission would modify the
3 stipulation before us to provide for long-term
4 financing for these solar contracts or projects,
5 would OEC support the stipulation then?

6 A. I'm a witness on the long-term contract
7 provision, not on the entire stipulation, so I
8 couldn't answer the question on the entire
9 stipulation.

10 EXAMINER BOJKO: Okay. Thank you. Thank
11 you. I have nothing further.

12 THE WITNESS: Thank you, your Honor.

13 EXAMINER BOJKO: Now, Ms. De Lisi.

14 MS. De LISI: Your Honor, at this time
15 OEC moves for OEC Exhibit 1 to be entered into
16 evidence.

17 EXAMINER BOJKO: Any opposition to the
18 admission of Ms. Hitt's testimony, OEC Exhibit 1?

19 Hearing none, it will be admitted.

20 (EXHIBIT ADMITTED INTO EVIDENCE.)

21 EXAMINER BOJKO: Thank you. You may step
22 down and catch your plane.

23 THE WITNESS: Thank you very much.

24 EXAMINER BOJKO: That has concluded our
25 witnesses for the day. We will reconvene tomorrow

1 morning at 9 a.m. and at that time we will take Staff
2 Witness Fortney, followed by Mr. Campbell, then
3 Mr. Ibrahim, then Mr. Gonzalez. Thank you, we are
4 adjourned.

5 (Thereupon, the hearing was adjourned at
6 6:01 p.m.)

7 - - -

8 CERTIFICATE

9 I do hereby certify that the foregoing is a
10 true and correct transcript of the proceedings taken
11 by me in this matter on Wednesday, April 21, 2010,
12 and carefully compared with my original stenographic
13 notes.

14
15 Maria DiPaolo Jones, Registered
16 Diplomate Reporter and CRR and
Notary Public in and for the
State of Ohio.

17 My commission expires June 19, 2011.

18 (MDJ-3550)

19 - - -
20
21
22
23
24
25

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

5/6/2010 10:45:08 AM

in

Case No(s). 10-0388-EL-SSO

Summary: Transcript Transcript of FirstEnergy hearing Volume II held on 04/21/10.
electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Jones,
Maria DiPaolo Mrs.