BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

SIERRA CLUB'S MEMORANDUM *CONTRA*
FIRSTENERGY SOLUTIONS CORP.'S MOTION TO QUASH

Pursuant to O.A.C. §§ 4901-1-12 and 4901-1-25, Sierra Club files this response to FirstEnergy Solutions Corp.'s ("FES") Motion to Quash Sierra Club's Subpoena Duces Tecum ("Motion"). Sierra Club's subpoena, which it served on April 1, 2015, is both reasonable and narrowly tailored, and there is no legitimate basis for FES's motion to quash. *See* O.A.C. § 4901-1-25.

While this case involves an application submitted by the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies" or "FirstEnergy"), the sole beneficiary of the proposed purchase power agreement ("PPA") at stake here is the Companies' unregulated affiliate, FES. Under the PPA, FES would receive a guaranteed profit on various power plants that it owns in whole or part, while under the Companies' proposed Rider RRS the economic risk of those plants would be shifted to the Companies' ratepayers for the next 15 years.

Despite FES's role as owner of the subject power plants and sole beneficiary of the proposed PPA, FES refuses to substantively respond to Sierra Club's subpoena seeking

documents and a witness (or witnesses) regarding, among other things, up-to-date information about the current and projected financial status of the plants that FES is seeking to shift the economic risk of onto ratepayers. FES contends that Sierra Club's subpoena is unduly burdensome and duplicative, citing to the Companies' production of some information on these topics in response to discovery in this proceeding. FES's objection, however, ignores the fact that (i) the subpoena seeks information that pre- and post-dates the information provided by the Companies, (ii) [redacted], and (iii) relevant FES documents, the existence of which was demonstrated by deposition testimony, have not been produced. FES's Motion also relies on flawed legal arguments, and mischaracterizations of the Attorney Examiner's March 23, 2015 Entry and the record in this case.

Because FES's objections to the subpoena are without merit, the Motion to Quash should be denied so that the entity with the best access to the information that the Commission has deemed relevant is required to produce such information to the parties in this proceeding

I. Background

A. Rider RRS

In this proceeding, the Companies seek approval of a proposal that would have significant consequences and risk for Ohio ratepayers, while providing guaranteed revenue and profits to FirstEnergy's unregulated affiliate, FES. As part of their electric security plan ("ESP"), the Companies have requested that the Commission approve a Retail Rate Stability Rider ("Rider RRS"), a non-bypassable rider that would tie their customers' bills to the economic fortunes of four major generating facilities owned wholly or partly by FES: the W.H. Sammis, Kyger Creek, and Clifty Creek coal plants, and the Davis-Besse nuclear plant.

If Rider RRS is approved, the Companies would enter into a 15-year PPA with FES. Under this proposed PPA, the Companies would commit to paying all of FES's costs for these facilities, purchasing all of FES's output from these facilities, and selling all of that output into the market. The Companies would then pass any costs or savings on to their ratepayers for the term of the contract. The rates paid by the Companies' customers over the next 15 years would therefore be directly linked to the financial performance of these four power plants. In other words, if Rider RRS is approved, this proposed transaction would shift all of the financial risk for Sammis, Davis-Besse, and FES's share of Clifty Creek and Kyger Creek (the "OVEC plants") away from FES and onto the Companies' ratepayers for the next 15 years.

Although there is considerable uncertainty regarding the financial impact of this proposal,[1] the Companies' own projections estimate that customers would incur a net loss of $404 million in 2016-18 if Rider RRS were approved.[2] Meanwhile, under the terms of the proposed transaction, FES would be guaranteed an 11.15% return on equity for its Sammis and Davis-Besse plants, and full recovery of costs for its ownership share of the OVEC plants.[3] In other words, if Rider RRS is approved, FES will not only receive a $400 million subsidy in the next few years, it will enjoy a guaranteed rate of return on Sammis and Davis-Besse for the next 15 years, regardless of those plants' profitability.

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

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

[3] Ruberto Testimony at 3:3-11, Attachment JAR-1 Revised; *see also* IEU Set 1-INT-25 Attachment 1 (copy of term sheet for the proposed transaction) (attached as Ex. 1).

B. The AEP Ohio Order

On February 25, 2015, the Commission issued its opinion and order on AEP Ohio's proposed electric security plan, which included a PPA rider proposal that bears many similarities to Rider RRS.[4]

In its Order, the Commission ruled that PPA riders are permissible under Ohio law,[5] but rejected AEP Ohio's specific proposal. In doing so, the Commission noted that "[a]lthough the magnitude of the impact of the proposed PPA rider cannot be known to any degree of certainty, the Commission agrees with OCC, IEU-Ohio, and other intervenors that the evidence of record reflects that the rider may result in a net cost to customers, with little offsetting benefit from the rider's intended purpose as a hedge against market volatility."[6] The Commission also expressed concern over the possibility that AEP Ohio could terminate the PPA rider early.[7] The Commission then created a placeholder PPA rider, with an initial value of zero.

In its decision, the Commission made clear that it would consider a broad range of information in evaluating future PPA rider proposals. The Commission identified several factors that it stated it would balance, but not be bound by, in considering such proposals: "financial need of the generating plant; necessity of the generating facility, in light of future reliability

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[4] *In re Ohio Power Co.*, Case No. 13-2385-EL-SSO, et al., Opinion and Order (Feb. 25, 2015). On April 2, 2015, the Commission issued a very similar ruling with regards to Duke Energy's proposed PPA for its share of the Clifty Creek and Kyger Creek plants. *See* Opinion and Order, Case Nos. 14-841-EL-SSO, 14-842-EL-ATA.

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

[6] AEP Ohio Order at 24.

[7] *See id.* at 24 (noting that AEP Ohio "seeks to reserve the right to terminate the ESP after two years," and concluding that "[i]t is, therefore, evident from AEP Ohio's testimony that the Company has made no offer to ensure that customers receive the alleged long term benefits of the PPA rider or even a commitment or any type of proposal to continue the rider in subsequent ESP proceedings").

concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state."[8] The Commission also identified several issues that a rider proposal must address, namely, that they "provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit; commit to full information sharing with the Commission and its Staff; and include an alternative plan to allocate the rider's financial risk between both the Company and its ratepayers."[9]

C. The March 23 Entry

On March 23, 2015, the Attorney Examiner amended the procedural schedule in light of the AEP Ohio Order.[10] The Attorney Examiner did so "[i]n order for the parties to address whether and how the Commission's findings in the AEP Ohio Order should be considered in evaluating FirstEnergy's application in this proceeding," and he provided the parties with an opportunity to "conduct additional discovery and to evaluate and offer supplemental testimony addressing the AEP Ohio Order, as applied in this case."[11]

The March 23 Entry specifically references the Commission's ruling on the PPA rider proposal, including the "factors it may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs," and the additional issues that such

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[8] *Id.* at 25.

[9] *Id.*

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

[11] Mar. 23 Entry ¶ 5.

proposals must address.[12] The March 23 Entry thus authorized discovery, and invited supplemental testimony, related to the Commission's resolution of the PPA rider proposal, including the factors and additional issues identified by the Commission in the AEP Ohio Order.

D. Sierra Club's Subpoena

On March 31, 2015, Sierra Club filed a Motion for a Subpoena Duces Tecum pursuant to O.A.C. § 4901-1-25. Sierra Club sought expedited treatment for its subpoena by submitting the subpoena and accompanying motion in person to the Attorney Examiner. O.A.C. § 4901-1-25(A)(2). The Attorney Examiner signed the subpoena, which was served on FES the following day. *See* Ex. 2 (copy of subpoena).

Pursuant to the March 23 Entry, the subpoena seeks documents and testimony on several topics regarding the AEP Ohio Order's ruling on PPA riders, and the application of that ruling to this case. More specifically, Sierra Club's subpoena seeks:

- financial information about the Rider RRS generating plants, including the possibility of a plant or unit retirement (Topics 1-7);
- information about potential customer risks that could result from Rider RRS, including whether FES could terminate the proposed PPA early, and whether the Commission would be able to audit the PPA (Topics 8-9); and
- information regarding plans concerning the plants' compliance with pending or proposed environmental regulations (Topic 10).

The subpoena sought the production of responsive documents by April 14, 2015, and the appearance of a knowledgeable witness (or witnesses) on April 21.

Following service of the subpoena, counsel for FES did not notify Sierra Club's counsel regarding its stated concern that some information responsive to the subpoena had been provided by the Companies through discovery. In fact, FES did not attempt to contact Sierra Club's

[12] Mar. 23 Entry ¶ 4 (citing AEP Ohio Order at 25-26).

counsel at all. FES instead waited until shortly before 5 p.m. on April 14 – the exact date and time when its document production was due[13] – and then filed a motion to quash the subpoena in its entirety.

II. Legal Standard

A subpoena served on a person other than a party to the proceeding should be upheld unless "it is unreasonable or oppressive."[14] The Commission has found that a subpoena is reasonable where it seeks relevant information, i.e., information that may lead to admissible evidence.[15] And the Commission has found that subpoenas were not oppressive where they were properly focused and not unduly burdensome.[16]

Although not binding on the Commission,[17] the standards set forth in Ohio Rule of Civil Procedure 45 are generally consistent with those established in O.A.C. 4901-1-25. A subpoena may be quashed or modified where, *inter alia*, the subpoena fails to allow reasonable time to comply, requires disclosure of protected material with no exception or waiver, or imposes an undue burden. Ohio Civ. R. 45(C)(3). If a motion to quash is based on a claim that responding to the subpoena would be unduly burdensome, a court will quash or modify the subpoena unless the subpoenaing party can show a substantial need for the information which "cannot be

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[13] Subpoena at 4.

[14] O.A.C. 4901-1-25(C); *see also In the Matter of the Complaint of Westside Cellular Inc. DBA Cellnet v. GTE Mobilnet Incorporated, et al.*, Case No. 93-1758-RC-CSS, 1998 WL 35478518, at *1 (P.U.C.O. Dec. 18, 1998).

[15] *See In the Matter of the Application of Duke Energy Ohio, Inc. to Establish & Adjust the Initial Level of Its Distribution Reliability Rider*, Case No. 09-1946-EL-RDR, at 5, 2010 WL 2344078 (P.U.C.O. June 2, 2010) (affirming attorney examiner's denial of a motion to quash).

[16] *See id.* at 6; *see also In re Duke Energy Ohio, Inc.*, Case No. 03-93-EL-ATA, et al., 2007 WL 581489 (P.U.C.O. Jan. 2, 2007) (narrowing subpoena to cover relevant information within the movant's possession or control, and otherwise rejecting movant's arguments that the subpoena is oppressive).

[17] *In the Matter of Roger S. Davis, Notice of Apparent Violation and Intent to Assess Forfeiture*, No. 14-1891-TR-CVF, 2014 WL 6687265, at *3 (P.U.C.O. Nov. 20, 2014) (noting that "the Commission is not bound by the Ohio Rules of Civil Procedure").

otherwise met without undue hardship."[18] Ohio courts have held that the moving party carries the burden of proving that a subpoena is unduly burdensome.[19]

III. Argument

Sierra Club's subpoena duces tecum is reasonable and properly focused because it seeks the production of documents and a witness (or witnesses) relating to topics that the AEP Ohio Order and March 23 Entry have identified as relevant to this proceeding; namely, the current and projected financial status of the Rider RRS plants, the risks to ratepayers of Rider RRS and the PPA, and environmental compliance plans for the plants. In addition, the subpoena seeks such information from the entity most likely to have it – FES, which is the owner of Sammis, Davis-Besse, and the OVEC share, and the developer and sole beneficiary of the proposed PPA. As such, FES has not and could not demonstrate that these requests are unreasonable.

Instead, FES contends that the subpoena is purportedly unduly burdensome and duplicative. In support, FES, which has produced a total of four documents to Sierra Club in this proceeding, details information that the Companies provided in discovery. FES's argument, however, fails for at least three reasons. First, the subpoena does not seek information that has already been produced but, instead, seeks the more recent projections of revenues, costs, and market conditions that FES has presumably created or obtained since the information from the summer and fall of 2014 that was previously produced. Second, the subpoena seeks information from FES, not the Companies, which is not the same thing. [redacted]

[18] Civ R. 45(C)(5). Where a party moves to quash based on undue burden, the court can uphold the subpoena, even if burdensome, if the subpoenaing party has a substantial need for the information. *See Future Communications, Inc. v. Hightower*, 2002-Ohio-2245, ¶ 18, 2002 WL 926769 at *4 (Ohio App. 10th Dist. May 9, 2002) (affirming denial of motion to quash where the trial court assumed that movant "had made the required showing of undue burden," but found that the subpoenaing party "demonstrated a substantial need for the requested information").

[19] *See Future Communications*, 2002-Ohio-2245, at ¶ 17 (citing Civ. R. 45(C)(3)(d) and relevant cases).

[redacted]. Third, deposition testimony by a Companies witness who was also appearing on behalf of FES identifies certain documents that are responsive to this subpoena, but those have not been produced.

In short, because the requested information satisfies the Commission's standards for a subpoena, and FES has not met its burden of demonstrating that the subpoena is unduly burdensome or unreasonable, FES's Motion to Quash should be denied.

A. Topics 1 through 7 are Reasonable and Should be Upheld.

Topics 1 through 7 of the subpoena seek information about the financial status of the generating plants. More particularly, these topics seek:

- Future projections of costs and revenues, as well as supporting information, for the Sammis, Davis-Besse, Kyger Creek, and Clifty Creek plants (Topics 1 and 2);
- Profit and loss statements for the generating plants that were prepared by, sent or received by, or reviewed by FES between January 1, 2014 and the present (Topic 3);
- Projections of future prices of natural gas, coal, energy, capacity, and carbon (Topic 4);
- Communications with investors and financial institutions regarding the financial condition or possible retirement of the generating plants (Topic 5);
- FES assessments concerning the possible retirement of any of the plants, including potential impacts that a retirement would have on electric prices, economics, electric supply diversity, or reliability concerns (Topic 6); and
- FES communications, analyses, or other documents regarding whether any of the plants would be retired if the proposed purchase power agreement between FES and the Companies is not executed (Topic 7).

These topics easily satisfy the Commission's standards for a subpoena. First, these topics are reasonable because they seek information that is relevant to a central issue in this proceeding,

namely, the reasonableness of the Companies' Rider RRS proposal.[20] If Rider RRS is approved, and the proposed transaction with FES is executed, customers' finances will be directly tied to the profitability of Sammis, Davis-Besse, and FES's share of the OVEC plants over the next 15 years. Because ratepayers would bear the costs and financial risks of these generating plants, the parties – and the Commission – are entitled to the best information available regarding these plants' finances. In addition, because Rider RRS, which would enable the PPA, is being promoted on the implication that the poor finances of the plants might lead to their retirement if they are not subsidized by the Companies' ratepayers, the parties – and the Commission – are entitled to the best information regarding such potential retirements.[21] As the owner of these plants, FES is best positioned to provide such information.

These subpoena topics are also well within the scope of discovery authorized by the Attorney Examiner's March 23 Entry. Each of these topics relates to the "financial need of the generating plant[s]," a factor that, in the AEP Ohio Order, the Commission stated "it may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs."[22] These topics also relate to several other factors listed in the AEP Ohio Order, namely, the "necessity of the generating facilit[ies], in light of future reliability concerns . . . ; and the impact that a closure of the generating plant[s] would have on electric prices and the

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[20] *See* O.A.C. 4901-1-25(C); *In re Duke Energy Ohio*, Case No. 09-1946-EL-RDR, at 5, 2010 WL 2344078 ("the Commission finds that the issue raised . . . may lead to admissible evidence in this case; thus, supporting the finding that the subpoena is reasonable").

[21] The relevance of the requested up-to-date financial information from FES is further demonstrated by the inherent inconsistency between the Companies' suggestion that the Rider RRS plants may retire without the PPA and the Companies' projection that ratepayers will receive a net present value benefit of $770 million over the next 15 years if they become financially responsible for the plants. This inconsistency lends additional importance to the parties and the Commission having the best and most up-to-date information regarding the projected finances of the Rider RRS plants.

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

resulting effect on economic development within the state."[23] Because the March 23 Entry permitted supplemental discovery on these very issues, there is no question that Topics 1-7 are permissible under that Entry.[24]

The documents responsive to these subpoena topics generally fall into two categories. *First*, these topics seek updated financial information that has been generated since last fall. The original discovery period for this case closed in early December, [redacted]. If FES has updated projections of the generating plants' costs and revenues, or other new information regarding the financial condition or potential retirement of the plants, that information bears directly on the "financial need of the generating plant[s]."[25] That information also relates to the claimed benefits of Rider RRS, which after a projected $404 million loss over the first three years, the Companies contend will provide ratepayers with a $770 million net present value revenue benefit over the 15-year term of the rider.[26] Thus, to the extent FES has updated projections of its plants' costs and revenues, updated market price forecasts, or other recent financial information, such information is responsive to these topics, and should be produced.

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[23] *Id.*

[24] FES implicitly concedes that Topics 1-6 are within the scope of discovery permitted by the March 23 Entry. *See* Mot. at 11-19 (discussing Topics 1-6, but not questioning whether these topics are within the scope of discovery). FES asserts that Topic 7 – which seeks communications and other documents "regarding whether any of the Plants (or units thereof) would be retired if the proposed purchase power agreement between FES and the Companies is not executed" – is beyond the scope of the discovery. *Id.* at 19-20. FES is wrong. By seeking information about the plants' risk of retirement, Topic 7 directly relates to the "financial need of the generating plant[s]," AEP Ohio Order at 25, and it could shed light on the necessity of these plants in light of reliability concerns, as well as impacts that could result from retirement of such plants. The March 23 Entry permits discovery on such issues. *See* Mar. 23 Entry ¶¶ 4, 5, 5(b). FES's scope objection to Topic 7 is therefore without merit.

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

[26] Ruberto Testimony, Attachment JAR-1 Revised, Nov. 14, 2014.

Although Sierra Club does not have access to FES's files, and therefore cannot be certain, it is likely that FES has updated its cost and revenue forecasts for its generating plants. According to the deposition testimony of Companies' witness Jason Lisowski, FES prepares internal forecasts for its generating plants using its own inputs and assumptions,[27] and these forecasts – which generally extend over a four-year timeframe but may include longer-term projections – are periodically updated.[28] At his December 19, 2014 deposition, Mr. Lisowski testified that the last time these forecasts had been prepared was in the August 2014 timeframe.[29]

[redacted] Such forecasts are responsive to this subpoena and should be produced.

Second, Topics 1-7 seek other financial information regarding the generating plants that has not been previously produced but that FES witnesses acknowledge exists. This includes Topic 3, which seeks profit and loss statements for the generating plants dating back to January

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[27] *See generally* Transcript of Deposition of Jason Lisowski at 63:5 to 70:16 (excerpts attached as Ex. 3).

[28] *Id.* at 63:15-20 (confirming that FES produces forecasts of revenue from its generating units on a "regular basis," but noting that the frequency of such forecasts "can vary greatly year to year"); *id.* at 66:24 to 67:3 (noting that "[i]n that same August timeframe we would have also used this model to project out even longer term including the years in this PPA for," *inter alia*, "the Sammis, Davis-Besse, and FES's share of OVEC").

[29] *Id.* at 64:1-14 (initially testifying that the forecasts were done "[a] couple of months ago"); *id.* at 66:11-18 (clarifying that forecasts were done in August).

[30] [redacted]

1, 2014, when FES first began developing the PPA. Sierra Club first learned of the existence of these profit and loss statements in the January 2015 deposition of Donald Moul, FES's Vice President of Commodity Operations. Mr. Moul testified at his deposition that FES began developing the idea for a purchase power agreement with the Companies in early January 2014, and that FES was reviewing information, and communicating internally, regarding a PPA between January and May 2014.[31] Mr. Moul identified specific documents that FES reviewed or prepared as part of that process, including "profit and loss statements" for the Sammis and Davis-Besse plants.[32] Mr. Moul stated that he reviewed these statements during the first quarter of 2014.[33] These profit and loss statements from the time period during which FES was developing the PPA would obviously provide insight into the "financial need of the generating plant[s],"[34] and, therefore, are relevant and reasonable to seek through the subpoena.

Likewise, to the extent FES has other documents responsive to Topics 1-7, those documents will shed light on the financial status of the plants, including their risk of retirement, as well as the potential electric price, reliability, and economic impacts stemming from a retirement. As such, because Topics 1-7 seek information that is relevant to key issues in this proceeding, and because these topics fall well within the scope of discovery authorized by the March 23 Entry, these subpoena topics are reasonable.

1. Topics 1 through 7 Are Neither Duplicative Nor Unduly Burdensome.

In moving to quash Topics 1-7, FES stakes its argument on the erroneous claim that these topics "request[] information which Sierra Club has already been provided in response to written

[31] Transcript of the Deposition of Donald Moul at 51:16 to 56:6; 104:4-18 (excerpts attached as Ex. 4).

[32] *Id.* at 60:20 to 61:5, 103:14 to 104:18, 107:4 to 108:9. These statements were also likely reviewed by other FES personnel. *Id.* at 60:20 to 61:3, 103:19-23.

[33] *Id.* at 107:4 to 108:9.

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

discovery requests."[35] Indeed, this argument is so central to its motion that FES repeats a version of it in challenging each of Topics 1 through 7.[36] FES's argument, however, is both legally flawed and factually inaccurate.

For the most part, FES's motion is based on the mistaken claim that the subpoena seeks to require FES to produce documents that are identical to materials that the Companies previously provided in discovery. It would make little sense for a party to go through the trouble of drafting, filing, and serving a subpoena merely to seek the same documents it already has, and this is not what Sierra Club did here. Rather, Sierra Club is seeking documents and information within FES's possession, custody, or control that the Companies have not produced, including documents and information that pre-date or post-date what the Companies have produced, that are inconsistent with the Companies' production, and/or that the Companies disclaim having. Sierra Club made this clear in its memorandum in support of the motion for a subpoena, stating:

> Additionally, *this information is being sought from FES because no other entity can adequately provide it.* Although the Companies have provided some financial information about the generating plants in response to discovery requests, the Companies objected to several requests on grounds that this information is not within their possession, custody, or control, and further indicated that such information is within FES's possession, custody, or control. It is critical that the Commission's review of proposed Rider RRS be based on the most detailed, accurate financial information available. This is especially so given the factors announced in the AEP Ohio Order. *FES is best positioned to provide the requested information regarding Sammis, Davis-Besse, and FES's ownership stake in the OVEC plants.*[37]

In short, the subpoena seeks documents and information that have not been produced through discovery. And, contrary to FES's suggestion, this subpoena does not require FES to produce

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[35] Mot. at 2.

[36] Mot. at 11-22. In fact, FES repeats a version of this argument in discussing every single topic of the subpoena. *See id.* at 10-31.

[37] Memorandum in Support of Sierra Club's Motion for a Subpoena Duces Tecum, at 4 (Mar. 31, 2015) (emphasis added).

previously-disclosed documents: if, in searching for documents responsive to the subpoena, FES finds a document that is identical to one that has been previously supplied through discovery, FES need not produce it. In that circumstance, FES could simply notify Sierra Club that a responsive document was provided through discovery. FES is therefore wrong in claiming that the subpoena would force it "to compile and produce [] voluminous duplicative materials."[38]

For this same reason, FES's "undue burden" argument is without merit.[39] This argument is premised on FES's claim that Sierra Club already has been provided the requested information, such that the subpoena is duplicative.[40] This is a red herring because, as explained above, Sierra Club is not seeking the production of previously-provided documents. FES's undue burden argument should be rejected.[41]

Even *if* FES had met its burden of showing that any of Topics 1-7 were unduly burdensome[42] – it has not – there is no basis for quashing or modifying these topics because

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[38] Mot. at 30; *id.* at 2 (claiming that the subpoena will require FES to "to compile vast quantities of information with which Sierra Club has already been provided").

[39] FES's motion does not argue that *searching* for responsive documents poses an undue burden: rather, the company argues that "compiling" and "producing" is unduly burdensome. If, in its reply brief, FES shifts gears and claims that the search presents an undue burden, the Attorney Examiners should reject any such argument. First, that argument was not raised in FES's opening brief. Second, and more importantly, there is nothing unreasonable about asking the recipient of a subpoena to thoroughly search its files for responsive and relevant documents.

[40] Mot. at 2, 10, 30.

[41] FES misconstrues the subpoena in characterizing the topics as "broad-ranging," and in claiming that the subpoena will require FES to "compile vast quantities of information." Mot. at 1, 2, 4. FES is wrong on both counts. First, these subpoena topics seek targeted information about the financial condition of the generating plants. Second, Sierra Club's subpoena seeks documents within FES's possession, custody, or control, and the subpoena does not require FES to produce documents that are identical to documents previously provided to Sierra Club. The only way that this subpoena would require a "voluminous" document production, *id.* at 30, would be if FES possessed a vast trove of financial documents that had not been provided. Sierra Club does not anticipate this to be the case. If FES does, however, possess a large trove of undisclosed financial documents about the generating plants, that information is relevant and should be produced. The existence of such a trove would also further disprove FES's erroneous claim that all documents have been provided.

[42] *See Future Communications,* 2002-Ohio-2245, ¶ 17 (citing Civ. R. 45(C)(3)(d) and relevant cases).

Sierra Club has a substantial need for the information. The requested information not only bears directly on the financial need of the generating plants (a factor highlighted in the AEP Ohio Order),[43] this information is crucial for evaluating whether ratepayers would financially benefit from Rider RRS, and what risks and costs those ratepayers would be exposed to. Because FES is best positioned to provide this financial information, Sierra Club has a substantial need for the information which "cannot be otherwise met without undue hardship."[44]

With respect to Topics 1 through 4, FES goes even further in pressing its "duplicative" argument, claiming that Sierra Club has already received *all* of the documents and information being sought.[45] FES's assertions are incorrect. For example, though FES claims that "the information sought under Topic 1 . . . has been provided to Sierra Club already," and that "Sierra Club already has had access to all of the projected cost information it seeks under Topic 2,"[46] Sierra Club has not received any updated cost and revenue forecasts – from either FES or the Companies – since December 2014. In his deposition, Mr. Lisowski indicated that FES regularly updates the forecasts for its generating plants.[47] [redacted] Because any updated cost and revenue forecasts would likely be different than those provided earlier, FES's "duplicative" accusation is misplaced.[48]

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[43] AEP Ohio Order at 25.

[44] *See Future Communications*, 2002-Ohio-2245, ¶ 18 (quoting Civ. R. 45(C)(5)).

[45] *See* Mot. at 11 ("the information sought under Topic 1 (as well as the other Topics) has been provided to Sierra Club already"), 14 ("Sierra Club already has had access to all of the projected cost information it seeks under Topic 2"); 16 ("Topic 3 seeks any profit and loss statements prepared or reviewed by FES for the time period from January 1, 2014 to the present. This information has also already been provided."), 16 ("Topic 4 similarly seeks duplicative information to which Sierra Club already has access.").

[46] Mot. at 11, 14.

[47] Lisowski Depo. Tr. at 65:15-20; *id.* at 71:20-22 ("[A]s I mentioned already, FES continually will look at its plants, reforecast all the plants, not just these plants.").

[48] Likewise, the fact that FES previously provided a single set of forecasts does not excuse the company from providing updated information that is responsive to Topics 1 and 2.

The same holds true for Topics 3 and 4: although the Companies may have provided *some* information on those topics in Fall 2014, FES incorrectly assert that Sierra Club has all responsive documents. With respect to Topic 3, if FES has profit and loss statements with information than what was provided in the Companies' August 2014 Application, those statements should be produced. And as noted in Section III.A above, Mr. Moul testified that he reviewed internal FES profit and loss statements while developing the proposed PPA.[49] The statements reviewed by Mr. Moul have not been produced in this case. In wrongly claiming that such statements have "already been provided," FES cites to Attachments JJL-1 to -3 of Jason Lisowski's direct testimony, and to the information provided in response to SC-RPD-49.[50] The attachments to Mr. Lisowski's testimony, however, are not FES's internal forecast; rather, they were developed by Mr. Lisowski for the Companies using market price projections supplied by Judah Rose, [redacted].[51] Similarly, the forecast information produced in response to SC Set 1-RPD-49 could not have been the same statements that Mr. Moul reviewed during the first quarter of 2014, [redacted]

With respect to Topic 4, which seeks market price projections, the fact that the Companies provided Mr. Rose's workpapers, which contain price projections that pre-date the

[49] Moul Depo. Tr. at 60:20 to 61:5, 103:14 to 104:18, 107:4 to 108:9.

[50] Mot. at 16.

[51] [redacted]

Companies' August 2014 application, does not obviate the need for FES to provide updated projections within its possession.

In an effort to demonstrate the purportedly "duplicative" nature of Sierra Club's subpoena, FES also filled its brief with lengthy string cites of direct and deposition testimony of the Companies' witnesses.[52] FES confuses deposition testimony with the production of documents; simply because the depositions referred to some of the same topics raised in this subpoena does not mean that the information sought in this subpoena has been produced. Indeed, because testimonial evidence is qualitatively different than the documents sought in this subpoena duces tecum, deposition testimony cannot excuse FES from producing responsive documents.[53] And, of course, deposition testimony presented in December 2014 and January 2015 about documents and analyses produced in the second half of 2014 could not and did not provide any of the more recent projections and information sought in this subpoena.[54]

2. FES's Cited Authorities Are Inapposite.

In addition to mischaracterizing the factual record, FES misconstrues the law. As explained above, Sierra Club has not been provided with relevant information responsive to

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[52] Mot. at 12-13, 15, 16-17, 19, 20-21. FES's claim that it "provided" three witnesses in response to the first subpoena, Mot. at 10, is misleading. FES allowed two witnesses, Jason Lisowski and Paul Harden to specifically provide testimony related to its subpoena, and both of those witnesses were going to be deposed anyway because they are also witnesses for the Companies. And FES did not provide a single *unique* witness in response to the first subpoena.

[53] For this same reason, the "second bite" argument that FES advances in challenging Topic 6 necessarily fails. *See* Mot. at 18-19. The January depositions of Ms. Murley and Mr. Moul simply cannot substitute for the production of documents concerning the possible retirement of the generating plants, and/or the impact of such retirement. *See* Subpoena ¶ 6. Nor does this "second bite" accusation undercut Sierra Club's request for a knowledgeable witness on Topics 1-7. The fact that a subpoena topic references an issue that was previously the subject of discovery is unremarkable, and certainly does not provide a basis for quashing the topic.

[54] Based on FES's representation that any FirstEnergy Corporation communications "with shareholders and financial institutions are made publicly and may be found on FirstEnergy Corp's website," Mot. at 17, Sierra Club agrees to not further pursue Topic 5 of the subpoena.

Topics 1-7. FES nevertheless maintains that because Sierra Club was provided some information on these topics, FES should be excused from providing anything else. FES's theory is contrary to law. There is nothing unusual or improper about a party serving a third-party subpoena that concerns the same topics that are the subject of discovery among the parties. Indeed, this is precisely what a subpoena duces tecum is designed to do: to allow for the production of relevant documents within the possession of a non-party. Put simply, there is no basis for quashing the subpoena simply because Sierra Club previously received some documents related to some of the subpoena topics.[55]

Nor do FES's cited authorities hold otherwise. In advancing its "duplicative" argument, FES repeatedly cites to five decisions; three court cases and two Commission entries.[56] But FES's reliance on these cases is misplaced, because none of them hold that a subpoena seeking relevant information should be quashed simply because *some* information on the subpoena topic was previously produced in discovery. If anything, these precedents undermine FES's argument, because the decisions hinged on the fact that all responsive documents had been already provided – which is not the case here.

For example, the court in *In re Gerber Children* upheld a trial court order quashing a subpoena because the appellant had already been "afforded the records she had requested"

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[55] To be sure, Sierra Club sought some of the information requested in this subpoena through discovery requests to the Companies. Although the Companies provided some financial information about the generating plants in response to those discovery requests, the Companies objected to many requests on grounds that this information was not within their possession, custody, or control, and that such documents and information are within FES's possession, custody, or control. *See* Resps. to SC-1-INT-16; [redacted]; SC-2-INT-70; [redacted]; SC-4-INT-103; SC-4-RPD-79; [redacted]. Moreover, with only a couple of minor exceptions, the Companies have refused to provide any new substantive information or documents in response to any of the discovery requests that Sierra Club submitted to them pursuant to the March 23 Entry.

[56] *See* Mot. at 13, 15, 16, 17, 22. (FES also cites these cases in challenging Topics 8 and 10. *See id.* at 26, 30.)

through her subpoena.[57] Likewise, the *State ex rel Doe* court reached a similar outcome in reviewing the trial court's denial of a motion to compel; the *Doe* court found no abuse of discretion where the appellant had "moved the court to compel Respondents to provide documentation and information *that they had previously provided.*"[58] And in *Fitzgerald v. Duke Energy Ohio*, Case No. 10-791-EL-CSS, the Attorney Examiner denied a motion to compel because the information sought was either irrelevant or had already been provided.[59] By contrast, in the one instance in *Fitzgerald* where the requested information had not previously been produced, the Attorney Examiner found that "complainants' motion to compel is reasonable and should be granted."[60] Similarly, in *Ruth L. Wellman v. Ameritech Ohio*, the Attorney Examiner denied a motion to compel where the respondent had provided all of the information requested, or where the requests sought irrelevant information.[61] In this case, where Sierra Club

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[57] *See In re Gerber Children*, 2008-Ohio-1044 ¶ 41 (Stark Cty. Mar. 10, 2008). *Gerber* also discussed some confidential records regarding an investigation of domestic abuse. Such records are subject to special protections, and the appellant in that case did not follow the proper procedures in seeking those requests. *Gerber* ¶¶ 44-48. To the extent FES relies on that holding to support its motion to quash, the company's reliance is misplaced.

[58] *State ex rel Doe v. Register*, 2009-Ohio-2448 ¶ 41 (Clermont Cty. May 26, 2009).

[59] *In the Matter of the Complaint of Brenda Fitzgerald v. Duke Energy Ohio*, Case No. 10-791-EL-CSS, Entry ¶¶ 6-11 (April 4, 2011).

[60] *Id.* ¶ 8.

[61] *In the Matter of the Complaint of Ruth L. Wellman v. Ameritech Ohio*, Case No. 99-768-TP-CSS, Entry ¶¶ 3-11 (June 21, 2002). FES's final authority, *Carrier v. Weisheimer Cos.*, No. 95APE04-488, 1996 WL 76317 (Ohio App. 10th Dist. 1996), which involved an allegation of "cooked" financial books, simply has no bearing on FES's motion to quash. As an initial matter, FES ignores the very different procedural posture of that case: in Carrier, the court was considering an appeal from a denial of a motion to compel, such that the appellant needed to establish an abuse of discretion by the trial court. FES neglects to mention this important point, just as it failed to mention that it bears the burden of proving that the subpoena is unduly burdensome. *See Future Communications*, 2002-Ohio-2245, ¶ 17. More importantly, however, the facts of *Carrier* are easily distinguishable: there, the court found no abuse of discretion where the appellant had not shown the requested information was essential to its case, and where there was no evidence that information had previously been withheld or falsified. Here, by contrast, the documents requested in Sierra Club's subpoena are important to core issues in this case, including the AEP Ohio Order's application to FirstEnergy's proposed PPA rider. And, as explained above in Section III.A and III.A.1, there is strong evidence that FES possesses documents that have not been previously provided to Sierra Club.

seeks documents and information that have not been previously produced, FES's own authorities support denial of the motion to quash.[62]

FES's argument also ignores an important timing issue: To the extent Sierra Club has received some documents relating to Topics 1-7, those documents were provided four to six months ago. If FES possesses more recent financial information about its plants, that information is relevant in evaluating the Companies' ESP application. When the Commission considers the Companies' application, it will do so based on the full evidentiary record, which remains open until the end of the hearing.[63] And the Commission will consider information and events subsequent to the Companies' initial filing. Because updated financial information is relevant to the issues in this proceeding, and responsive to Sierra Club's subpoena, FES's motion to quash should be denied.

B. Topic 8 Is Reasonable, and Neither Duplicative Nor Unduly Burdensome.

Topic 8 is relevant because it seeks information about potential risks to the Companies' customers, namely whether FES could terminate the proposed PPA early, and if so, what damages it would owe the Companies and their customers. FES's claim that this topic is beyond the scope of the AEP Ohio Order (Mot. at 22) is simply wrong. Given that the Companies are projecting that ratepayers would incur a $404 million loss in the first three years of the proposed

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[62] FES's theory that it should be excused from responding to the subpoena because the Companies previously provided some information related to some of the subpoena topics is not only inconsistent with Ohio law, it would also create an unfortunate precedent. Because FES's rule would penalize a party for initially seeking information through the discovery process, it would create an incentive for parties to pursue third-party subpoenas before they engage in discovery. The Attorney Examiners should reject FES's flawed legal theory.

[63] *See, e.g., In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment*, Case No. 07-478-GA-UNC, Entry ¶ 11 (Jan. 10, 2008) (noting that "the evidentiary record in this proceeding is currently closed," and that "[t]he presentation of testimony was completed on December 3, 2007, and the examiner closed the hearing with a statement that 'this case is submitted on the record'").

PPA, and that the purported ratepayer benefits would not accrue until later in the 15-year period, the concern is that FES could collect ratepayer subsidies while the Rider RRS plants are losing money over the first three years, and then terminate the PPA if the plants turned profitable again in the future. This concern is directly relevant to a core issue raised by the Commission in the AEP Ohio Order, in which the Commission rejected AEP's proposal in part because it failed to "ensure that customers receive the alleged long term benefits of the PPA rider."[64] FES's assertion to the contrary is meritless.

FES's contention that Topic 8 is duplicative is similarly unavailing. In support of its contention, FES points to a term sheet between FES and the Companies, and some deposition testimony in which the witnesses just generally refer to portions of the term sheet to claim that FES cannot terminate the PPA before the 15-year term runs.[65] That term sheet, of course, is not a contract that would actually bind the parties and, regardless, it provides that liability for a breach of the PPA would be limited solely to "direct damages," and would not include "indirect damages, lost profits or other business interruption damages."[66] FES has not produced any documents regarding whether it views the PPA as legally binding for 15 years with penalties or whether FES would be subject to penalties if it terminated the PPA early. As such, Topic 8 is not duplicative and the Attorney Examiners should deny FES's motion to quash Topic 8.

C. Topic 9 Is Reasonable, and Neither Duplicative Nor Unduly Burdensome

Topic 9 also seeks information about a potential risk to customers, specifically, the possibility that the Commission's auditing powers over costs that would be passed on to

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[64] AEP Ohio Order at 24 (noting that AEP Ohio "seeks to reserve the right to terminate the ESP after two years," and concluding that "[i]t is, therefore, evident from AEP Ohio's testimony that the Company has made no offer to ensure that customers receive the alleged long term benefits of the PPA rider or even a commitment or any type of proposal to continue the rider in subsequent ESP proceedings").

[65] Mot. at 26.

[66] *See* IEU-INT-25 Attachment 1 at § 19 (Ex. 1).

ratepayers under Rider RRS may be limited. FES contends that Topic 9 is "well beyond the limited scope" of additional discovery authorized under the March 23 Entry.[67] This contention should be rejected, however, because Topic 9 relates directly to the AEP Ohio Order's admonition that a PPA rider proposal must "provide for rigorous Commission oversight of the rider, including a proposed process for a periodic substantive review and audit."[68]

FES also claims that Topic 9 is duplicative because Companies' witness Eileen Mikkelsen provided some testimony at her deposition regarding the Commission's purported ability to audit costs that would be charged to ratepayers under Rider RRS.[69] But Ms. Mikkelsen's testimony was on behalf of the Companies and, therefore, cannot be considered duplicative of a subpoena topic that seeks information about FES's position as to whether costs that it is seeking to put onto the Companies and their ratepayers would be subject to audit by the Commission. Topic 9 is focused on FES documents regarding FES's position and, therefore, the motion to quash Topic 9 should be denied.

D. Topic 10 Is Reasonable, and Neither Duplicative Nor Unduly Burdensome.

Finally, Topic 10 is relevant because it seeks information about the generating plants' future regulatory risks, which could significantly affect customers' bills if Rider RRS were approved. This topic also relates to the AEP Ohio Order factor seeking a description of the plants' "plan[s] for compliance with pending environmental regulations."[70]

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[67] Mot. at 26.

[68] *Id.* at 25.

[69] Mot. at 27.

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

FES claims that Topic 10 need not be responded to because any response would be "duplicative" of information that has already been produced.[71] In support, FES contends that environmental compliance costs have been "extensively addressed" by a series of the Companies' discovery responses.[72] In reality, those responses demonstrate just how little information the Companies have produced about such costs. For example, in response to SC-RPD-12, the Companies contended that [redacted] And the deposition testimony of Mr. Harden cited by FES makes clear that virtually all of Mr. Harden's testimony about environmental compliance costs were based on little more than a conversation with a manager at the environmental department at FirstEnergy Generation.[73] What has not been produced is what is sought through Topic 10: a document clearly identifying what the owner of the Sammis plant – FES – estimates are the steps needed to comply with pending or proposed environmental regulations, and the environmental compliance

[71] Mot. at 28.

[72] Mot. at 28.

[73] Motion at 28-30; Harden Depo. Tr. at 69:14-18, 69:24-70:20 (cited in Motion at 29-30).

costs facing that plant over the life of the PPA. As such, the Attorney Examiner should reject FES's motion to quash Topic 10.[74]

E. FES's Claim That It Can Wait to Produce any Responsive Information Until After the Companies File Supplemental Testimony Should be Rejected.

FES finally contends it "would be improper to require FES to provide any new possibly responsive material until the Companies filed any supplemental testimony" on the grounds that any such material is purportedly privileged.[75] Such blanket privilege claim, however, is unfounded. Although a party may withhold communications and documents that are legitimately protected by the attorney-client privilege or attorney work product doctrine, these privileges cannot be used to shield relevant, factual information from discovery. And yet such factual information is exactly what is sought in Sierra Club's subpoena and what FES appears to be attempting to shield here.

Neither the attorney client nor the work product privilege applies to the topics sought in Sierra Club's subpoena. The attorney-client privilege does not apply because that "privilege does not prevent disclosure of the underlying fact, it only protects against compelled disclosure of the communications."[76] Yet underlying facts, such as FES's latest projection of various plant or market costs, are exactly what are responsive to the subpoena. Nor can FES use the attorney work product doctrine to insulate itself from Sierra Club's subpoena. The work product doctrine applies to "materials prepared in anticipation of trial," such as "notes, documents, or memoranda prepared by the attorney or his representatives in preparation of litigation."[77] The doctrine does

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[74] Topic 10 also seeks documents and information regarding the Davis-Besse plant's plans for compliance with any pending or proposed environmental regulations. Because such information has not been produced by either FES or the Companies, FES's "duplicative" claim fails for this reason as well.

[75] Mot. at 31-32.

[76] *Ingram v. Adena Health Sys.*, 149 Ohio App.3d 477, 2002-Ohio-4878, ¶ 14 (4th Dist. 2002).

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

not apply to the underlying factual information, such as the information being sought in Sierra Club's subpoena.[78] FES's reliance on this doctrine is particularly misplaced with respect to Topics 1 and 2, because FES regularly updates its forecasts for the generating plants on a regular basis,[79] with respect to Topic 3, because FES regularly reviews profit and loss statements "through the course of normal business.[80]" In sum, FES's suggestion that it should be allowed to withhold responsive information until after the Companies submit supplemental testimony must be rejected.

The net impact of FES's claim that any information is privileged until supplemental testimony is filed, combined with the Companies taking the exact same erroneous position, has been to effectively eliminate the supplemental discovery period established by the Attorney Examiner in the March 23 Entry. In particular, neither the Companies (with a couple very minor exceptions) nor FES have produced any new substantive information in response to discovery requests or the Sierra Club subpoena. While that strategy has helped enable FES and the Companies to thwart the parties' efforts to obtain information in the wake of the AEP Ohio Order, it is plainly contrary to the Attorney Examiner's March 23 decision to provide the parties in this proceeding sufficient time [to] conduct additional discovery . . . addressing the AEP Ohio Order.[81]

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[78] The fact that FES's counsel may have viewed such information does not transform it into attorney work product. *See DeCuzzi v. Westlake*, 947 N.E.2d 1229, 1232 (Ohio App. 8th Dist. 2010) (rejecting an overbroad reading of the work-product doctrine that would allow "opposing counsel [to] thwart every discovery request by merely reviewing evidence and turning previously discoverable evidence into privileged material").

[79] Lisowski Depo. Tr. at 65:15-20, 71:20-22.

[80] Moul Depo. Tr. at 109:1-8.

[81] March 23 Entry at p. 2 ¶ 5.

IV. Conclusion

For the foregoing reasons, Sierra Club respectfully requests that the Attorney Examiner deny FES's Motion to Quash, and uphold the subpoena duces tecum that Sierra Club served on April 1, 2015.

April 24, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing redacted version of Sierra Club's Memorandum Contra FirstEnergy Solutions Corp.'s Motion to Quash were served upon the following parties via electronic mail on April 24, 2015.

s/ Michael C. Soules

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Term Sheet	
1. *Buyers:*	Ohio Edison Company, The Cleveland Electric Illuminating Company, The Toledo Edison Company; provided that each Buyer's obligation will be several (and not joint) and provided further that the Buyer's several *pro rata* obligations will be updated on June 1st of each year during the term hereof based on each Buyer's average of the coincident MW peaks, including distribution losses, on the ATSI system from the months of June through September of the prior year.
2. *Seller:*	FirstEnergy Solutions Corp.
3. *Product:*	All of Seller's rights in the Capacity of each Facility, together with the associated Energy, Ancillary Services, and Environmental Attributes
4. *Facilities:*	i. W. H. Sammis Plant, a 2,220 MW coal-fired and 13 MW diesel-fired power plant located in Stratton, Jefferson County, Ohio ii. Davis-Besse Power Station, a 908 MW nuclear power plant located in Oak Harbor, Ottawa County, Ohio; subject to condition that the NRC renews the operating license for Davis-Besse Facility for a 20-year term iii. Seller's 4.85% entitlement in Ohio Valley Electric Corporation ("OVEC")[1]
5. *Quantity/Buyers' Contractual Capacity:*	One hundred percent (100%) of Sellers rights to the Capacity of each Facility together with Sellers rights to the Energy and

[1] Representing the rights and obligations associated with OE's 0.85% and TE's 4.00% OVEC ownership interests that were transferred to FE Generation and subsequently to Seller.

	Ancillary Services output associated with such 100% of each Facility's Capacity; provided that this term "Buyers' Contractual Capacity" includes one hundred percent (100%) of Sellers' rights to any capacity derates, uprates or capacity expansions at any Facility during the term of this Agreement.
6. *Delivery Points for Energy and Ancillary Services*	The unit-specific LMP Points at each Facility (PJM Pnodes to be specified in PPA).
7. *Obligation to Deliver/Receive:*	Seller agrees to sell and deliver, and Buyers agree to purchase, receive, and pay for, Buyers' Contractual Capacity and the Energy and Ancillary Services associated with Buyers' Contractual Capacity delivered by Seller to the Delivery Points during each hour of the Delivery Period. Seller also agrees to sell and deliver, and Buyers agree to purchase and receive and pay for all Environmental Attributes associated with the Facilities; provided that at termination of the Agreement Buyers will assign to Seller, and Seller will accept without recourse, all Environmental Attributes for the Facilities and that are owned or controlled by Buyer that are effective or in effect for time periods after the termination date.
8. *Unit Contingent:*	All Energy, Capacity and Ancillary Services associated with each Facility and all of (i) Seller's obligation to sell and deliver, and (ii) Buyers' obligation to purchase, receive, and pay for, the Energy, Capacity and Ancillary Services associated with each Facility are Unit Contingent. Unit Contingent means, with respect to Energy, Capacity or Ancillary Services, that such Energy, Capacity or Ancillary Services is intended to be supplied from a given Facility and Seller's failure to deliver such Energy, Capacity or Ancillary Services is excused to the extent that a given Facility or portion of a Facility is unavailable; provided that Seller's failure to

	delivery Capacity, Energy or Ancillary Services will not be excused if the Seller could have avoided such failure by exercise of Good Utility Practice; and provided further that if Seller's failure to deliver Capacity, Energy or Ancillary Services could not have been avoided by exercise of Good Utility Practice then the failure to deliver such Energy, Capacity and Ancillary Services will be excused for the first 180 consecutive days of such unavailability period, and for any remaining unavailability period beyond the initial 180 day period Seller will provide replacement Capacity, Energy, Ancillary Services and Environmental Attributes (as the case may be), delivered to the ATSI zone, or the financial equivalent thereof for such remaining unavailability period; and provided further that in the event that a Capital Expenditure is required for Facility operations but such Capital Expenditure would render the affected Facility to be uneconomic then upon Buyers and Seller's written agreement Seller will either replace the Facility's output of Energy, Capacity, Ancillary Services and Environmental Attributes (all to be delivered to the ATSI zone at Seller's cost), or the Facility will be dropped from the PPA and Seller's obligations under the PPA for supply with regard to such Facility will be reduced to reflect that the Facility was dropped from the PPA.
9. Effective Date:	The date the Agreement is executed by all Parties.
10. Delivery Period:	June 1, 2016 to May 31st, 2031.
11. Operating Work:	During the Delivery Period, Seller has an obligation to perform the Operating Work in accordance with Good Utility Practice.
12. Capital Expenditures:	As pertains to the W.H. Sammis Plant and Davis-Besse Power Station, from time to time during the Delivery Period as deemed

	necessary by Seller, Seller shall perform, or cause to be performed, Capital Expenditures Work related to such W.H. Sammis Plant and such Davis-Besse Power Station. By 120 days prior to the 12-month period that starts on June 1st of each year during the term of this agreement, Seller will develop and submit to Buyer for Buyer's review and comment an annual written Capital Expenditures plan for all Capital Expenditures Work deemed necessary by Seller that is scheduled to be performed at the Sammis Plant and the Davis-Besse Power Station during the referenced 12-month period. Within twenty (20) days of Buyer's receipt of the referenced plan, Buyer shall provide in writing to Seller any comments or queries to such plan, and Seller shall respond in writing (including where appropriate with documents as attachments or exhibits) to Buyer's queries (if any) within twenty (20) days of receipt of the Buyer's comments or queries. By 90 days prior to the referenced 12-month period, Seller and Buyer shall meet and discuss Buyer's comments and queries, and Seller's responses thereto. By 60 days prior to the referenced 12-month period, Seller shall issue a revised annual written Capital Expenditure plan that to the extent reasonable takes into account, or responds to, Buyer's comments and queries, including for each instance where the Seller did not accept or adopt one or more of Buyer's comments, an explanation for such non-acceptance or non-adoption.
13. Contract Price:	The Monthly Payment will be Seller's sole compensation for Seller's sale and delivery to Buyers of the Energy, Capacity and Ancillary Services and Environmental Attributes associated with the Facilities.

The Monthly Payment will comprise the sum of monthly charges for: (1) the W.H. Sammis Plant and Davis Besse Power Station; and (2) the OVEC entitlement interest.

(1) For the W.H. Sammis Plant and Davis-Besse Power Station, the Monthly Payment will be equal to the sum of (i) a Fuel Payment, (ii) an O&M Payment, (iii) a Depreciation Payment, (iv) a Capacity Payment, and (v) a Tax Reimbursement Payment.

i. Fuel Payment: amount of Fuel Expenses incurred by Seller to operate some or all of the Facilities for each calendar month during each Contract Year.

ii. O&M Payment: amount of Operation and Maintenance Expenses of each Facility incurred by Seller for each calendar month during each Contract Year.

iii. Depreciation Payment: for each calendar month during each Contract Year, amount of depreciation, accretion and decommissioning expenses actually incurred by Seller during the relevant month and directly related to its ownership interest in each Facility. Except as may be required by law, adverse Governmental Authority action or due to an impairment of the asset due to Governmental Authority action(s) or change in law, Seller agrees not to charge accelerated depreciation (*i.e.*, advance the useful life of an asset) without Buyers' written agreement.

iv. Capacity Payment: an amount for each calendar month during each Contract Year equal to:

	SIC x WACOC 12 v. Tax Reimbursement Payment: amount of Income Taxes applicable to Buyers' Capacity Payment based on the effective tax rate of the Seller. The effective tax rate will be updated annually. . (2) For the OVEC entitlement interest, the Monthly Payment will be equal to those costs related to and deriving from Seller's 4.85% entitlement in OVEC, as provided for in the Amended and Restated Inter-Company Power Agreement ("ICPA") dated as of September 10, 2010 among OVEC and its Sponsoring Companies (as such ICPA is amended from time to time).[2]
14. Planned Outage Schedule:	Seller will develop and implement, or cause to be developed and implemented, an annual scheduled outage program for each Facility. Seller will review with Buyers the annual scheduled outage program for each Facility by no later than 120 days prior to the 12-month period that starts on June 1st during each year of the agreement. Seller agrees to notify Buyers of changes to the scheduled outage program as soon as reasonably practicable.
15. Scheduling and Dispatch:	Buyers will Schedule and Dispatch 100% of the Energy and Ancillary Services associated with each Facility in accordance with the Agreement and within the operating parameters of each of the Facilities, as such operating parameters are determined by Seller from time to time.

[2] As that term is defined in the ICPA, and which includes FirstEnergy Generation, LLC.

	Upon the Effective Date, but no later than five (5) business days after the Effective Date, Seller will effect in PJM's eRPM system the transfer of capacity rights to Buyers for the Delivery Period. Buyers will be solely responsible for offering Buyers' Contractual Capacity into the PJM capacity auctions occurring after the Effective Date and covering PJM capacity delivery years within the Delivery Period. Seller assigns to Buyers, and Buyers accept, all rights and obligations for any portion of Buyers' Contractual Capacity in respect of the Delivery Period that has been offered or otherwise committed to PJM or another third party as of the Effective Date of the Agreement. Seller acknowledges Buyers' rights after the Effective Date to offer into the PJM capacity auctions Buyers' Contractual Capacity in respect of the Delivery Period that has not been offered or otherwise committed as of the Effective Date of the Agreement. Buyers assign to Seller, and Seller accepts without resource, all rights and obligations for any portion of Buyers' Contractual Capacity in respect of the Delivery Period that has been offered or otherwise committed to PJM or another third party for time periods at or after termination of the Agreement. All Energy and Ancillary Services associated with Buyers' Contractual Capacity and made available at a given Delivery Point will be allocated to Buyers in accordance with their respective Shares and will be recorded by the Parties in PJM's scheduling and settlement systems. All credits and charges (including Imbalance Charges) associated with the Capacity, and Energy and Ancillary Services associated therewith and made available at a given Delivery Point will be settled in the

	respective PJM accounts of Buyers by means of the PJM settlement process.
16. Force Majeure:	To the extent any Party is prevented by Force Majeure from carrying out, in whole or in part, its obligations under the Agreement (other than an obligation to pay money), and such Party (the "Affected Party") gives notice and details of the Force Majeure to the other Parties as soon as practicable (but not later than thirty (30) days thereafter to the extent such details are then available) then the Affected Party shall be excused from the performance of its obligations under the Agreement (other than the obligation to make payments and, in the case of Seller, Seller's obligation to supply Capacity) so long as the Affected Party shall be using all reasonable efforts to overcome the Force Majeure and resume performance as soon as possible; provided that such term "Force Majeure" will not include any event, circumstance or occurrence which could have been avoided through the exercise of Good Utility Practice; and provided further that such term "Force Majeure" will not apply to Seller's obligation to cover the capacity supply obligation associated with each facility as such obligation is reflected in PJM's eRPM system. The non-Affected Parties shall not be required to perform or resume performance of its obligations (excluding payment obligations) to the Affected Party corresponding to the obligations of the Affected Party excused by Force Majeure, until such time and to the extent the Affected Party resumes its performance.
17. Payments and Netting:	As soon as practicable after the end of each month, but no later than fifteen (15) days before payment is due, Seller will render to Buyers an invoice for the payment obligations incurred during the preceding month. All invoices shall be due and payable on or before the twentieth (20th) day of each month.

	The Parties shall discharge mutual debts and payment obligations due and owing to each other under the Agreement through netting, in which case all amounts owed by each Party to the other Party, including any related damages, interest, and payments or credits, shall be netted so that only the excess amount remaining due shall be paid by the Party who owes it.
18. *Books and Records; Audit:*	Seller shall keep all necessary books of record, books of account, and memoranda of all transactions involving each Facility, in conformance, where required, with GAAP and the FERC's Uniform System of Accounts. Seller shall make all computations relating to the Facility and all allocations of the costs and expenses of each Facility. Buyers have the right to examine the Seller's records to the extent reasonably necessary to verify the accuracy of any statement, charge or computation. If requested, Seller shall provide to Buyers statements evidencing the quantities delivered to the Buyers at the Delivery Points. If any such examination reveals any inaccuracy in any statement, the necessary adjustments in such statements and the payments thereof will be made promptly, provided, however, that any claim by a Party for overpayment or underpayment with respect to an invoice is waived unless the other Party is notified of the claim within ninety (90) days after the invoice is rendered or any specific adjustment to the invoice is made. Seller shall reasonably and timely provide all data and information requested by Buyers: (i) to respond to a Governmental Authority request for information; (ii) to prepare for and make other regulatory filings; and (iii) as required by law with respect to Buyers.

19. Limitations of Liability:	For breach of any provision of the Agreement, obligor's liability shall be limited to direct damages only, such direct damages shall be the sole and exclusive remedy and all other remedies or damages are waived. No Party shall be liable for consequential, incidental, punitive, exemplary, or indirect damages, lost profits or other business interruption damages, by statute, in tort or contract, under any indemnity provision or otherwise.
20. Conditions:	Seller's obligation to consummate the transaction is subject to the Seller having obtained any and all Approvals required with respect to its obligations under the Agreement and such Approvals shall be in form and substance satisfactory to Seller in its sole and absolute discretion; provided that, in the event that Seller learns that a required Governmental Approval is lacking and after reasonable effort is not and will not be forthcoming (such reasonable effort to be determined by Seller), then Seller may upon ten (10) days written notice to Buyers terminate the Agreement.
21. Representations and Warranties:	Each Party represents and warrants that: (i) It is duly organized, validly existing, and in good standing (ii) The execution, delivery and performance of the Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, and any contracts to which it is a party (iii) The Agreement is a legally valid and binding obligation enforceable against it (iv) It is not bankrupt

	(v) There is not pending against it legal proceedings that could materially adversely affect its ability to perform its obligations under this Agreement (vi) No material breach of the Agreement has occurred and would not occur as a result of its entering into or performing its obligations under the Agreement (vii) It has entered into the Agreement in connection with the conduct of its business and it has the capacity or ability to make or take delivery of the Buyers' Contractual Capacity and associated Energy and Ancillary Services
22. Risk of Loss:	Title to and risk of loss related to the Capacity and associated Energy and Ancillary Services shall transfer from Seller to Buyers at the Delivery Points.
23. Indemnification:	Each Party shall indemnify, defend and hold harmless the other Parties and such Parties' partners, directors, officers, employees, agents and representatives from and against any Claims arising from or out of any event, circumstance, act or incident first occurring or existing during the period when control of, risk of loss related to, and title to the Capacity and associated Energy and Ancillary Services is vested in such Party.
24. Assignment:	No Party shall assign the Agreement without the prior written consent of the other Parties, which consent may be withheld in a Party's sole discretion; provided, however, that any Party may, without the consent of the other Parties (and without relieving itself from liability), (i) transfer, sell, pledge, encumber or assign the Agreements or the accounts, revenues or proceeds thereof in connection with any financing or other financial arrangements, (ii) transfer or assign the Agreement to an

	Affiliate which shall agree in writing to be bound to the terms and conditions of the Agreement.
25. Governing Law:	Ohio
26. Standard of Review:	Absent the agreement of all Parties to the proposed change, the standard of review for changes to any rate, charge, classification, term or condition of the Agreement shall be the *Mobile-Sierra* Doctrine ("public interest" standard).

Definitions

"Ancillary Services" means regulation and frequency response services; energy imbalance services; automatic generating control services; spinning, non-spinning, supplemental and replacement reserve services; reactive power and voltage support services; black start services; and all other services or products ancillary to the operation of the Facilities that are defined as ancillary services in PJM's tariff or are commonly sold or saleable, to the extent that the assets comprising a given Facility are technically capable of providing those services or products.

"Approvals" means all approvals, permits, licenses, consents, waivers or other authorizations from, notifications to, or filings or registrations with, third parties, including Governmental Approvals.

"Capacity" means the output level, expressed in MW, that each Facility, or the components of equipment thereof, is capable of continuously producing and making available at the Delivery Point associated with such Facility, taking into account the operating condition of the equipment at that time, the auxiliary loads and other relevant factors; provided that the term Capacity shall mean the capacity supply obligation that is associated with each of the Facilities in PJM's eRPM system for any PJM Delivery Year for which a capacity supply obligation has been established under PJM's tariffs.

"Capacity Payment"

$$\text{"Capacity Payment"} = \frac{\text{SIC} \times \text{WACOC}}{12}$$

"Seller's Invested Capital ("SIC")" means the total net book value of the in-service Facilities, including nuclear fuel (but only to the extent that applicable accounting rules permit nuclear fuel costs to be capitalized), any Accumulated Deferred Income Taxes associated with the invested capital, allocations of capital used to support the Facilities, Materials and Supplies Inventory (including to the extent that applicable accounting rules permit fossil fuel), and Capital Expenditures Work that is performed at any Facility and that is placed into service after the Effective Date. To the extent that there is a difference between SIC costs for a given month and SIC collections for that month, the SIC calculation for future months will include a reconciliation to "true up" such difference. The total SIC will be calculated as the average of the total net book value at beginning of the month and the end of the month, respectively.

"Weighted Average Cost of Capital ("WACOC") means the sum of the equity component and the debt component of the WACOC. WACOC is calculated using a 50% equity and 50% debt capital structure. The equity component of the WACOC will be the product of the equity share of the capital structure and the ROE (*i.e.*, 0.5 * 0.1115). The debt component will be the product of the debt share of the capital structure and the Seller's embedded cost of debt which changes annually (*i.e.*, 0.5 * long-term embedded cost of debt). An example formula for calculating the WACOC is:

$$\text{WACOC} = (0.5 * 0.1115) + (0.5 * \text{long-term embedded cost of debt})$$

"Seller's Return on Equity ("ROE")" means Seller's ROE, which is defined as 11.15% and shall be fixed over the term of the agreement.

"Capital Expenditures Work" shall mean the modeling, studying, engineering, design, procurement, purchasing, construction, inspection, start-up and testing of capital expenditures, replacements, spares,

repairs or additions to a given Facility, procurement of auxiliary power necessary to support other Capital Expenditures Work, procurement or retention of licenses (but only where applicable accounting rules permit such costs to be capitalized); including any and all such actions as may be required to comply with a permit, rule, regulation, order, standard or other requirements of a Governmental Authority.

"Claims" means all claims or actions, threatened or filed and, whether groundless, false, fraudulent or otherwise, that directly or indirectly relate to the subject matter of an indemnity, and the resulting losses, damages, expenses (including reasonable attorneys' fees and disbursements) and court costs, whether incurred by settlement or otherwise, and whether such claims or actions are threatened or filed prior to or after the termination of the Agreement.

"Effective Date" means the date on which all of the conditions precedent set forth in Section 20 have been satisfied or waived.

"Energy" means three-phase, 60-cycle alternating current electric energy, expressed in MWh.

"Environmental Attributes" means, to the extent associated with one or more the Facilities and/or the generation of Energy at a given Facility, as applicable, any and all of the following: renewable energy credits, renewable energy certificates, alternative energy credits, and any other credits, including environmental air quality credits, emissions reduction credits, energy credits, and any allowances, reductions, offsets, certificates, property, and benefits, that are granted or awarded or transferred or conferred or acquired over the Delivery Period through existing or new governmental programs on the basis of environmental, or power source, or emissions characteristics that are or may be related to Facility operations, and actual or potential emissions or avoided emissions or reductions of waste of any kind, to the air, soil or water of substances (in whatsoever form) that is or are now or may be in the future regulated under federal, state or local laws. The term "Environmental Attributes" does not include Energy, Capacity, or Ancillary Services or the power or energy attributes of a Facility or Facilities.

"**Fuel Expenses**" means all fixed or variable costs, expenses, losses, liabilities, claims and charges related to the acquisition, storage, inventory, balancing and transportation and delivery of fuel for the Facilities, including reagents, emissions allowances, and related costs of credit at weighted average cost; provided that the term "Fuel Expenses" excludes the costs of any fuel that is capitalized under applicable accounting rules and guidance; and provided further that all costs and expenses will be calculated on a consumed basis.

"GAAP" means accounting principles generally accepted in the United States of America.

"Good Utility Practice" means any of the practices, methods and acts engaged in or approved by a significant portion of the electric utility industry during the relevant time period, or any of the practices, methods and acts which, in the exercise of reasonable judgment in light of the facts known at the time the decision was made, could have been expected to accomplish the desired result at a reasonable cost consistent with good business practices, reliability, safety and expedition. Good Utility Practice is not intended to be limited to the optimum practice, method, or act to the exclusion of all others, but rather to be acceptable practices, methods, or acts generally accepted in the region.

"Governmental Approvals" means any permit, authorization, registration, consent, action, waiver, exception, variance, order, judgment, decree, license, exemption, publication, filing, notice to, or declaration of or with, or required by any Governmental Authority or applicable law; provided that the

term Governmental Approval as used in this definition does not include the Public Utilities Commission of Ohio or its successor agency.

"Governmental Authority" means any federal, state, local, or municipal government body; and any governmental, regulatory, or administrative agency, commission, body, agency, instrumentality, or other authority lawfully exercising or entitled by law to exercise any executive, judicial, legislative, administrative, regulatory, or taxing authority or power, including any court or other tribunal.

"Imbalance Charges" means any penalties, fees or charges assessed by PJM for failure to satisfy requirements for balancing of electric energy receipts and deliveries or loads and generation, or payable to any other Person in connection with the delivery of energy in an amount(s) different from the amount(s) scheduled.

"Materials and Supplies Inventory" is as defined in Part 101, Uniform System of Accounts for Public Utilities, of FERC's regulations, as such may be amended from time to time.

"**Operation and Maintenance Expenses**" means all fixed or variable costs, expenses, losses, liabilities, claims, charges and associated credits incurred directly or indirectly in the performance of operation, maintenance, use, repair of the Facility, including the procurement of auxiliary power, but not including Fuel Expenses.

"**Operating Work**" means the operation, maintenance, use, repair or retirement of the Facility on or after the Effective Date, including but not limited to labor; parts; supplies; insurance; permits; licensing; taxes other than income; procurement of ancillary services, fuel and other consumables; fuel acquisition, transportation balancing and storage; waste handling and disposal (including coal ash or spent nuclear fuel); filing, defense and settlement of claims, suits and causes of action; procurement (or sale) of Allowances and settlement of all other environmental charges (or credits) pertaining to the operation of the Facility; including any and all such actions as may be required to comply with a permit, rule, regulation, order, standard or other requirements of a Governmental Authority; but excluding any Capital Expenditures Work.

"Share" means, with respect to each Buyer, each Buyer's several (and not joint) obligation, as such obligation is calculated as of June 1, 2016 based on each Buyer's average of the coincident MW peaks, including distribution losses, on the ATSI system from the months of June through September of 2015; and provided further that the Buyer's several *pro rata* obligations will be updated on June 1st of each subsequent updated on June 1st of each year during the term hereof based on each Buyer's average of the coincident MW peaks, including distribution losses, on the ATSI system from the months of June through September of the prior year year during the term hereof based on each Buyer's average of the coincident MW peaks, including distribution losses, on the ATSI system from the months of June through September of the prior year .

EXHIBIT A

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

SUBPOENA DUCES TECUM

TO: FirstEnergy Solutions Corp.
c/o Statutory Agent
CT Corporation System
1300 E. 9th Street
Cleveland, OH 44114-0000

Upon application of Sierra Club, FirstEnergy Solutions Corp. ("FES") is hereby required to provide a person(s) with knowledge and expertise on the following topics:

1. All projections for any years 2014 through 2031 prepared by, sent or received by, or reviewed by FES between August 4, 2013, and the present of any of the following for the W.H. Sammis, Davis-Besse, Kyger Creek, and/or Clifty Creek plants (collectively, the "Plants"):
    a. Annual energy market revenue;
    b. annual capacity market revenue;
    c. annual ancillary services revenue;
    d. outage schedules and forecasts;
    e. capacity factor;
    f. forced outage rate;
    g. availability;
    h. heat rate;
    i. all modeling input and output files, work papers, and other documents used in developing the projections set forth in (a)-(h) above; and
    j. all other documents that were reviewed or otherwise relied on in developing the projections set forth in (a)-(h) above.

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

2. All projections for any years 2014 through 2031 prepared by, sent or received by, or reviewed by FES between August 4, 2013, and the present, of any of the following for any of the Plants:
    a. Annual capital expenditures;
    b. non-fuel variable costs;
    c. fixed costs;
    d. operation and maintenance costs;
    e. fuel costs;
    f. labor costs;
    g. all modeling input and output files, work papers, and other documents used in developing the projected costs set forth in (a)-(f) above; and
    h. all other documents that were reviewed or otherwise relied on in developing the projected costs set forth in (a)-(f) above.

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

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

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

4. All projections prepared by, sent or received by, or reviewed by FES between August 4, 2013, and the present of the following:
    a. Natural gas prices;
    b. Coal prices;
    c. Market energy prices;
    d. Capacity prices; or
    e. Carbon prices.

5. All communications with shareholders, current or potential investors, ratings agencies, investment banks, or financial institutions regarding any of the following:
    a. The current financial condition and/or profitability of the Plants;
    b. The future financial condition and/or profitability of the Plants;
    c. Projected future costs and revenues at the Plants;
    d. Possible retirement of any of the Plants, or any unit thereof; and
    e. Market price projections or forecasts.

6. All studies, analyses, or assessments that were prepared by, sent or received by, or reviewed by FES concerning the possible retirement of any of the Plants (or any unit of a plant). This request includes, but is not limited to,
    a. Any studies, analyses, or assessments concerning the impact that any retirement would have on electric prices;
    b. Any studies, analyses, or assessments concerning the economic impact of any retirement;
    c. Any studies, analyses, or assessments concerning the impact that any retirement would have on electric supply diversity; and
    d. Any studies, analyses, or assessments concerning the need for any Plant (or any unit of a plant), in light of reliability concerns.

7. Any FES communications, analyses, or other documents regarding whether any of the Plants (or units thereof) would be retired if the proposed purchase power agreement between FES and the Companies is not executed.

8. Any FES communications, analyses, or other documents regarding the length of the proposed purchase power agreement between FES and the Companies, including whether FES would be able to terminate such agreement before the proposed 15-year term expires and what penalties or liabilities, if any, FES would incur if it were to terminate the agreement before the proposed 15-year term expires.

9. Any internal FES communications regarding the Commission's authority, ability, or permission to review and audit the proposed purchase power agreement between FES and the Companies. This topic includes, but is not limited to, any communications about the Commission's potential review and audit of the Plants' costs and revenues, and the impacts to FES or its shareholders of any finding by the Commission that particular costs are imprudent.

10. Any plans that were prepared by, sent or received by, or reviewed by FES concerning the Plants' compliance with pending or proposed environmental regulations. This topic seeks unit-level information wherever available, as well as information for each plant as a whole.

This person(s) is required to attend and give deposition testimony upon oral examination at a location of Sierra Club's and FES's mutual agreement on April 21, 2015 at 9:00 a.m. ET. The deponent(s) is required to attend from day-to-day until the deposition(s) is completed. Such person(s) will be deposed and will be subject to cross examination by Sierra Club in the above-captioned proceeding.

In addition to a witness (or witnesses), FES must provide all documents within its possession, custody, or control that are relevant to the above-described topics. *See* Ohio Administrative Code § 4901-1-25(D). Unless otherwise indicated, the preceding topics require the production of information and tangible materials pertaining to, in existence, or in effect for the whole or any part of the period from August 4, 2013, through and including the date of FES's response. In construing these topics:

- The "Companies" refers to the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company.
- "And" and "or" shall be construed either conjunctively or disjunctively as required by the context to bring within the scope of these topics any documents or other information which might be deemed outside their scope by another construction.
- "Relating to," "regarding," or "concerning" means and includes pertaining to, referring to, or having as a subject matter, directly or indirectly, expressly or implied, the subject matter of the specific topic or issue.
- Each singular shall be construed to include its plural, and vice versa, so as to make the request inclusive rather than exclusive.

FES is required to produce documents to Sierra Club covering the foregoing topics no later than April 14, 2015, at 5:00 p.m. ET.

Dated at Columbus, Ohio, this 31 day of March, 2015.

Attorney Examiner

Notice: If you are not a party or an officer, agent, or employee of a party to this proceeding, then witness fees for attending under this subpoena are to be paid by the party at whose request the witness is summoned. Every copy of this subpoena for the witness must contain this notice.

EXHIBIT 3

IN THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

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

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DEPOSITION

of Jason Lisowski, taken before me, Karen Sue Gibson, a Notary Public in and for the State of Ohio, at the offices of FirstEnergy Corporation, 76 South Main Street, Akron, Ohio, on Friday, December 19, 2014, at 8 a.m.

- - -

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

- - -

APPEARANCES:

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

Calfee, Halter & Griswold LLP
By Mr. N. Trevor Alexander
The Calfee Building
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Cleveland, Ohio 44114

On behalf of the Applicants.

Bruce E. Weston, Ohio Consumers' Counsel
By Mr. Larry Sauer (via speakerphone)
Assistant Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485

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

Earthjustice
By Mr. Shannon Fisk
Northeast Office
1617 John F. Kennedy Boulevard, Suite 1675
Philadelphia, Pennsylvania 19103

Earthjustice
By Mr. Michael Soules (via speakerphone)
1625 3Massechusetts Avenue NW, Suite 702
Washington, D.C. 20036

On behalf of the Sierra Club.

Bricker & Eckler, LLP
By Mr. Dane Stinson (via speakerphone)
100 South Third Street
Columbus, Ohio 43215-4291

On behalf of the NOPEC.

APPEARANCES: (Continues)

Ohio Partners for Affordable Energy
By Ms. Colleen Mooney(via speakerphone)
231 West Lima Street
Findlay, Ohio 45846

On behalf of the Ohio Partners for Affordable Energy.

McNees, Wallace & Nurick LLC
By Mr. Matthew Pritchard (via speakerphone)
21 East State Street, 17th Floor
Columbus, Ohio 43215

On behalf of the Industrial Energy Users of Ohio.

IGS Energy
By Mr. Joseph Oliker (via speakerphone)
6100 Emerald Parkway
Dublin, Ohio 43016

On behalf of the IGS Energy.

Vorys, Sater, Seymour & Pease, LLP
By Mr. Michael Settineri (via speakerphone)
52 East Gay Street
Columbus, Ohio 43215

On behalf of RESA.

Carpenter Lipps & Leland LLP
By Ms. Rebecca Hussey(via speakerphone)
280 North High Street, Suite 1300
Columbus, Ohio 43215

On behalf of the Ohio Manufacturers' Association Energy Group.

Environmental Law & Policy Center
By Ms. Madeline Fleisher (via speakerphone)
1207 Grandview Avenue, Suite 201
Columbus, Ohio 43212

Policy Center.

APPEARANCES: (Continued)

Taft, Stettinius & Hollister LLP
By Mr. Devin Parram (via speakerphone)
65 East State Street, Suite 1000
Columbus, Ohio 43215

On behalf of the The Kroger Company.

Taft, Stettinius & Hollister LLP
By Mr. Adrian D. Thompson (via speakerphone)
200 Public Square, Suite 3500
Cleveland, Ohio 44114

On behalf of the Cleveland Schools

Exelon Generation Company, LLC
By Ms. Cynthia A. Brady (via speakerphone)
550 West Washington Street
Chicago, Illinois 60661

On behalf of the Exelon Generation Company, LLC.

Mike DeWine, Ohio Attorney General
By Mr. William L. Wright, Section Chief
Public Utilities Section
Mr. Ryan O'Rourke (via speakerphone)
Assistant Attorney General
180 East Broad Street, 6th Floor
Columbus, Ohio 43215

On behalf of the Staff of the PUCO.

ALSO PRESENT:

Ms. Katie Kline.

- - -

EXHIBIT 3

INDEX

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INDEX (Continued)

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A. Yes.

Q. Okay. And what did -- did he have any opinions as to whether you should work on this?

A. Not that I recall, no.

Q. Okay, okay. You state in your testimony that part of your responsibilities of your job is to work -- I am reading from page 1, line 18, actively participate with FES and Generation business executive management and leadership teams on financial accounting and forecasting planning matters. What -- what sort of work have you done on forecasting planning matters?

A. A lot of -- a lot of items when FES has needed to produce forecasts.

Q. Okay. Do you -- so does FES produce forecasts of, say, the revenue from its generating units on a regular basis or?

A. Yes.

Q. And what -- how often?

A. It can vary greatly year to year.

Q. Okay. So it's not -- it's not like on a consistent schedule; it's not like every six months they do it.

A. No, not necessarily.

Q. Do you recall the last time you were asked to project revenues from FES's generating units?

A. Project it for this PPA, the proposed PPA?

Q. Outside of this PPA.

A. For FES's internal management.

Q. Yes.

A. I don't recall the specific date. A couple of months ago.

Q. A couple of months ago. More recently than the projections that you provided in your testimony in this proceeding?

A. Yes.

Q. Okay. And what sort of -- what sort of projections were those that you did?

MR. ALEXANDER: Objection. Relevance.

Q. You can answer.

A. I'm sorry, can you repeat the question?

Q. What sort of projections did you do?

A. Projections --

MR. ALEXANDER: Objection. Are you asking for a general category or the results of those forecasts?

EXHIBIT 3

MR. FISK: First, general category.

MR. ALEXANDER: Okay. The concern is these are internal FES proprietary forecasts, and I don't want to get too far down that path so I understand, I think, where you are getting. Let's just be cognizant of that.

MR. FISK: Sure. We can punt to the afternoon.

MR. ALEXANDER: Even in the afternoon I would have objection to non-PPA forecasts if you ask, but we can cross that bridge when we come to it.

MR. FISK: We can deal with that then.

A. Make sure I clarify, your question was when -- what kind of forecasts has FES done since the PPA?

Q. Yeah.

A. What the forecast is going to be for is the competitive business of the FirstEnergy Solutions for over the next couple of years.

Q. Okay. Any other projections?

A. No.

Q. Okay. Have you modeled the projected operation of any of the Sammis plant or any of the Sammis units since your testimony in this proceeding?

A. No.

Q. Okay. And have you projected revenues or costs for any of the Sammis units since your testimony in this proceeding?

A. No.

Q. Okay. Outside of this proceeding have you modeled the projected operation of any of the Sammis units any time in the past year?

A. Yes.

Q. Okay. And when was that?

A. In the August timeframe we projected what the plants are doing not just -- I'm sorry, let me clarify. We forecasted all of FES's plants and their operations over -- over the near term.

Q. When you say near term, what -- how --

A. Typically four, four years out.

Q. Okay. And you did that in August?

A. That was in August, yes.

Q. Okay. And you did that through the same model that you used in this proceeding?

MR. ALEXANDER: Objection. Beyond the scope of his testimony. Go ahead.

A. The -- let me clarify something I said earlier. In that same August timeframe we would have

also used this model to project out even longer term including the years in this PPA for, again, not just the Sammis, Davis-Besse, and FES's share of OVEC but all of FES's assets and generation plants.

Q. In separate modeling from what you presented in this proceeding?

A. No. It was using the same dispatch model.

Q. Same dispatch model but different runs.

A. Different -- different inputs were used.

Q. Okay. And to your knowledge have any of those modeling runs been presented to any of the parties in this proceeding?

A. My understanding is using FES's projections, they've been provided to the Sierra Club.

MR. FISK: Can we go off?

(Discussion off the record.)

Q. We can go back on. So you're saying that there were different modeling runs using different inputs, but your belief is those were presented to the Sierra Club?

A. My understanding was there was a subpoena by the Sierra Club requesting that information.

Q. Okay. And outside of that, outside of whatever may have been produced in the response to that subpoena, were there any other modeling runs that you have done in the past year evaluating the projected revenues or operation of any of the FES units?

A. No.

Q. Okay. And when did you do the modeling that you presented in this proceeding in your testimony?

A. I don't remember the specific dates, but I started to work on it right after I had the discussions with Kelley Mendenhall based on Jim Haney's request.

Q. May, June timeframe?

A. Somewhere, I don't remember the specific timeframe, in that area.

Q. Okay. So the August modeling runs that you referred to a couple of minutes ago were more recent than the ones that you presented in your testimony here?

A. The August -- those August runs were not using Witness Rose's inputs. Those were using FES's inputs.

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Q. Okay. We'll talk about those in the afternoon. Those are probably confidential.

A. They are.

Q. Yes, so we will get to those. But the question was those were done more recently than the modeling that you did for the testimony you presented here today.

A. Yes.

Q. Okay. And the near-term, four-year approximately forecasts that you referenced earlier, those were done more recently than your testimony in this proceeding?

A. Those were done at around the same -- same period of time, may have been a little bit later but it would have been in that same time period.

Q. And did those use different inputs than what was -- what was used in modeling in this proceeding?

MR. ALEXANDER: Objection. Go ahead.

A. Which inputs?

Q. Any of the inputs that you used in your -- in the four-year, near-term forecast different than the ones you used in the modeling you presented in your testimony.

MR. ALEXANDER: Objection. Go ahead.

A. Well, near term, remember, we've got different periods so this starts June 1 of 2016, so we are talking there would only be an overlap of a year and a half. Notwithstanding the forecast that would have been run around that time period -- period of time would have been consistent assumptions used, FES assumptions, as we used in the longer-term projected run.

Q. Okay. But the four-year forecast did not use Mr. Rose's assumptions.

MR. ALEXANDER: Objection. Go ahead.

A. FES's -- the four-year projections were used for FES forecasting. They would have been based on FES's assumptions and inputs, so they did not use Judah Rose's inputs.

Q. Okay. And to your knowledge have any of those four-year forecasts been produced to any of the parties in this proceeding?

MR. ALEXANDER: Objection both to form and relevance.

A. What do you mean by -- can you repeat the question?

MR. FISK: Can you read that question

back?

(Record read.)

A. Those forecasts, what do you mean by those forecasts? We are talking about a lot of forecasts here. I want to make sure we are clear.

Q. The four-year, near-term forecasts that you mentioned in the last few minutes, were any of those forecasts presented to any of the parties in this proceeding?

MR. ALEXANDER: Same objection.

A. Those -- clarify, those four-year forecasts that were run around the late August time period, somewhere in that area; is that correct? That's what you are asking me?

Q. Yes, yes.

A. Not that I am aware of, no.

Q. Okay. All right. Any other modeling runs that you have done with regards to the Sammis, Davis-Besse, or OVEC units in the past year?

A. We -- as I mentioned already, FES continually will look at its plants, reforecast all the plants, not just these plants. There would have been other forecasts run prior to us preparing the information that's laid out in my attachments. There

would have been forecasts that were done prior in the normal course of FES's business.

Q. Within the past year.

A. Within the past year, yes.

Q. Were you involved in any of those?

A. Yes.

Q. Okay. And did any of those use assumptions from Mr. Rose?

A. No.

Q. So did they all use FES assumptions?

A. When FES is forecasting, it is always going to use their own internal projections.

Q. So then why -- why did you decide to use Mr. Rose's assumptions in the modeling for this proceeding when normally you forecast using FES's?

A. I didn't -- I didn't decide that.

Q. Do you know who did?

A. I was --

MR. ALEXANDER: Objection.

A. I don't know who decided to use it. I was asked to run the forecast using Mr. Rose's projections.

Q. And who -- who -- who asked you to use Mr. Rose's projections?

A. That was a part of the request with Jim Haney.

Q. Okay. And were you involved in any discussions regarding whether to use Mr. Rose's assumptions as opposed to FES's?

A. No.

MR. FISK: If we can go off for one minute.

(Discussion off the record.)

MR. ALEXANDER: At this point let's go back on the record. And, OCC, if you would like to go next.

MR. SAUER: Thanks, Trevor.

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CROSS-EXAMINATION

By Mr. Sauer:

Q. Good morning, Mr. Lisowski.

A. Good morning.

Q. My name is Larry Sauer. I am an attorney with the Office of the Ohio Consumers' Counsel, and I want to ask you a few questions about your testimony this morning.

You were asked some questions regarding kind of the modeling process, and I wonder if I could

EXHIBIT 4

IN THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

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

- - -

DEPOSITION

of Donald A. Moul, taken before me, Karen Sue Gibson, a Notary Public in and for the State of Ohio, at the offices of FirstEnergy Corporation, 76 South Main Street, Akron, Ohio, on Thursday, January 15, 2015, at 8 a.m.

- - -

ARMSTRONG & OKEY, INC.
222 East Town Street, Second Floor
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- - -

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- - -

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ALSO PRESENT:

Mr. Hisham Choueiki, PUCO Staff (via speakerphone)
Mr. Kevin Murray (via speakerphone)

- - -

EXHIBIT 4

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what the final version was.

Q. Okay. Well, we will spare you that.

A. Okay. I have a high degree of confidence that it's the final version and that we presented it to you as an INT so.

Q. Okay. All right. Fair enough. Thank you. And has anyone from FES approved this term sheet?

A. Yes.

Q. And who is that?

A. Don Schneider.

Q. All right. So we can set this aside for the time being. We will come back to it a little bit later.

A. Okay.

Q. So kind of stepping back to the proposed transaction more generally, is it FES that made the initial proposal to the companies; is that correct?

A. Yes.

Q. Okay. And with respect to the very first proposal overture that was made, who was involved in developing that proposal?

A. I had a conversation with Jim Haney.

Q. Okay. And that was the first

communication with the companies about the proposed transaction.

A. Yes.

Q. Okay. Before you went to Mr. Haney, did you discuss this proposal with anyone at FES?

A. Yes.

Q. And who was that?

A. Donny Schneider.

Q. Okay.

A. Kelley Mendenhall and in my organization Kevin Warvell.

Q. Kevin Warvell?

A. Yes.

Q. And Kelley Mendenhall, that's a woman, right?

A. Yes.

Q. All right. What is Ms. Mendenhall's position at FirstEnergy?

A. Right now, I don't recall her title, but she transitioned from FirstEnergy Solutions which is where she was at the time.

Q. Okay.

A. And she's now in the market policy group.

Q. Is that part of FirstEnergy Service

Company?

A. Yes.

Q. Okay. And Kevin Warvell?

A. Warvell.

Q. Warvell, he works for you?

A. Yes.

Q. And what does his job involve?

A. He's the vice president of commercial operations structuring and pricing.

Q. So does that relate to retail pricing?

A. Also -- also the wholesale functions of the organization and a lot of the analytics that we mentioned earlier.

Q. Okay. Apart from those three individuals, was there anyone else you discussed this proposal with at FES?

A. No.

Q. Okay. And, I'm sorry, Miss Mendenhall's position at the time this proposal was made was what?

A. She was one of the -- she was vice president of -- her title changed a couple of times, but it was retail ops and strategy.

Q. Okay. And did she report to you?

A. No.

EXHIBIT 4

Q. Did she report to Don Schneider?
A. Yes.
Q. Are you -- at the time were the two of you kind of at the same --
A. We're peers.
Q. Okay. All right. And when you say strategy was part of her job responsibility, what do you mean by strategy?
A. It was associated with market strategies and our interface with states to advocate the FES position.
Q. Okay. So kind of -- so partially kind of an external affairs role?
A. Not really. I mean, interfaced with external bodies but it wasn't -- it wasn't about relationship management.
Q. Okay. And who has that position now now that Ms. Mendenhall has left?
A. It was eliminated.
Q. Eliminated, okay. Cutbacks?
A. Yes.
Q. And did you -- were you the one who first came up with the idea of doing a purchase power agreement for the companies?

A. Yes.
Q. Okay. How -- how did you come up with that idea?
A. Well, in late December of 2013, we saw what AEP had filed and used that as a foundation and had some conversations about how we might be able to structure something that would make sense for the customers of Ohio as well as FirstEnergy Solutions.
Q. And when you say we had some conversations, you mean the four of you internal at FES.
A. Correct.
Q. All right. Did you discuss this idea with anyone at AEP?
A. No.
Q. Okay. Anyone at Duke Energy?
A. No.
Q. Okay. So that was in December, 2013, that AEP made its filing, right?
A. Yes.
Q. Is this something that was being discussed internal at FES for a five -- four- or five-month period?
A. Could you be more specific when are you

talking about?
Q. Well, how long were there conversations internal at FES regarding coming up with something?
A. Really from the first of the year basically after the holidays until I approached Mr. Haney in early May.
Q. Okay, okay. And did you -- apart from the three people that we just discussed, Ms. Mendenhall, Mr. Schneider, and Mr. Warvell, was there anyone else within the FirstEnergy corporate family that you discussed the proposal with prior to going to Mr. Haney?
A. Legal counsel.
Q. Okay. Anyone else besides that?
A. No.
Q. Okay. And why was FES interested in making this proposal to the companies?
A. Well, from my testimony basically there's transition in the markets. The future of some of these generating units is in doubt. So while we see some upside in the out years based on the construct, we would be trading certainty for that timeframe to provide that upside to customers and that protection to customers against rising prices based on the

experience of January, 2014. We thought it was a fair tradeoff.
Q. Okay. And when you say the experience of January, 2014, are you referring to the polar vortex --
A. Yes.
Q. -- and the subsequent winter conditions?
A. And the subsequent runup in energy prices.
Q. Okay. Were there -- apart from what you just mentioned were there any other reasons why FES wanted to enter into the proposed transaction?
A. No.
Q. Okay. But at the heart of it was a concern about, you know, Sammis, Davis-Besse from an economic -- or a profitability perspective they weren't looking good in the near term.
A. There was uncertainty in the near term.
Q. Okay. And you were willing to get some certainty for the near term. You were willing to trade that for the hundreds of millions of dollars you -- these plants are projected to make in the out years; is that correct?
A. Yes.

Q. Okay. And you said it was in early May, 2014, when you approached Mr. Haney?

A. Yes.

Q. And was that a phone call, a meeting, some other communication?

A. Verbal conversation, I believe it was a phone call.

Q. Okay. And what did you propose to him at that time?

A. I proposed to him up to all of the FirstEnergy Solutions' plants.

Q. Did you set out a proposed timeframe for this purchase power agreement?

A. Not at the time.

Q. Okay.

A. It was more of a conceptual discussion.

Q. Do you remember, was there anything else that you discussed during that phone call?

A. No.

Q. Okay. Do you know how long the phone call lasted?

A. No.

Q. Okay.

A. But it wasn't long.

Q. Okay. Did Mr. Haney ask you any questions when you -- you know, during that relatively short call?

A. He asked some clarifying questions, and then he told me he would think about it and get back to me.

Q. Okay. And at that time did the two of you discuss limiting the PPA to just Sammis, Davis-Besse, and the OVEC share?

A. Not at that time.

Q. Okay. And did you offer to do a PPA that would -- that would include some or all of the units -- up to all of the units; is that what you said?

A. Up to all of the units.

Q. Okay. All right.

A. The focus was on all of them at the time.

Q. The focus was on all of them at the time? Okay. And is that because the FES units that are not included in the proposed transaction today, the ones that were excluded, also face uncertain economic --

A. They are operating in the same market.

Q. Yeah. Okay. Fair enough. And the way you left it was he said he would think about it and

get back to you.

A. Yes.

Q. All right. Is there anything else you recall about that telephone conversation in May you haven't already mentioned?

A. No.

Q. All right. Before calling Mr. Haney, did -- did you prepare any kind of internal assessment of this proposal?

A. Could you clarify what you're -- what you're looking for?

Q. Sure. So this proposal that you made to the companies would involve potentially all of the generating units, the one that we are talking about as of May --

A. Yeah.

Q. -- that uncertain timeframe, that's a pretty big proposal; would you agree?

A. Yes.

Q. Before proposing that to, you know, the regulated companies, did you prepare some kind of internal report saying this is a good idea and here is why or?

A. No. We really looked at the -- at the

P&Ls for all the stations and had a conversation about which ones to include as consideration for the -- for the companies.

Q. Okay.

A. Profit and loss statements.

Q. Thank you.

A. You're welcome.

Q. So you didn't prepare any kind of written report or analysis.

A. Just -- just a listing of the plants associated with it and what their -- what their profit and loss statements were showing. I mean, it wasn't a formalized report. It wasn't some formalized analysis associated with it.

Q. Okay. Did the four of you exchange any e-mails at that time?

A. I don't remember.

Q. Okay. So -- so I have this clear in my head, prior to going to Mr. Haney, the only -- the only kind of written analysis or report would have been simply a list of the profit and loss statements for the FES units.

MR. LANG: Objection, asked and answered but you can answer it again.

EXHIBIT 4

A. Yeah. It essentially was that, yes.
Q. Do you remember putting anything else in writing relating to this proposal prior to May, 2014?
MR. LANG: Objection, asked and answered and I guess beyond the scope of his testimony and not relevant to the part of this -- not relevant to what's in this proceeding but you can answer.
A. Not that I remember right now.
Q. Okay. Do you remember reviewing any other data or information prior to making that proposal?
A. Aside from the profit and loss statements that I've mentioned to you?
Q. Yeah.
A. No.
Q. So after you made this initial proposal to the companies, you then -- FES made a more specific proposal; is that correct?
A. Yes.
Q. Okay. And that was the one that specifically mentioned the Sammis, Davis-Besse, and OVEC share, correct?
A. Yes.
Q. Okay. And were you involved in

Corporation -- if anyone within FirstEnergy Corporation has an internal asset evaluation of the Sammis units?
A. I don't know.
Q. Okay. Do you know if anyone within FirstEnergy Corporation has an asset evaluation of the Davis-Besse plant?
A. Well, there would be -- there would be a book value that business development would have for Davis-Besse and Sammis but other than that, I don't know.
Q. Okay, okay. Sorry I am skipping around here a little bit. Just trying to get done as quick as we can. So cycling back for a moment to the period before you had that initial conversation with James Haney in May, 2014, do you recall that discussion?
A. Yes.
Q. Okay. And you had said that before approaching Mr. Haney you and three others at FES were looking at profit and loss statements for the FES generating units; is that correct?
A. Yes.
Q. Okay. And when you were looking at those

statements, were you evaluating what the terms of the PPA with the companies might ultimately look like?
A. Could you rephrase that question?
Q. Sure. So we -- so Exhibit 1 is the term sheet, right, which reflects the proposed transaction.
A. Yes, yes.
Q. And that term sheet is a culmination of a process that began shortly after New Year's of 2014, correct?
A. Yes.
Q. Okay. Prior to -- when you were looking at these earlier profit and loss statements thinking about approaching the companies, were you thinking about, you know, what the term of the proposed transaction might look like or might be?
A. Yes. As I mentioned, 15 years was what we had originally thought.
Q. Okay. And you had also mentioned after the initial discussion with Mr. Haney but before making the specific proposal for Sammis, Davis-Besse, and the OVEC share, FES had prepared a PowerPoint presentation?
A. No. That was after I got a letter back

from Mr. Haney on May 13 that said we're not interested in all of the assets and we would like to take a look at a subset of them and that's when we prepared that. It was after May 13.
Q. Okay, okay. But it was in the process of going back to the companies with the specific proposal for Sammis, Davis-Besse, and OVEC.
A. Yes.
Q. Okay. And when -- did you prepare the PowerPoint yourself?
A. No.
Q. Who did?
A. I don't know.
Q. Okay. Was the PowerPoint -- as FES was evaluating, you know, the proposed transaction it was going to offer to the companies, were you using this PowerPoint as part of that evaluation process?
A. No.
Q. So it simply reflected what you had already decided?
A. Reflected our recommendation.
Q. Reflected your recommendation, okay.
MR. SOULES: Could I have a 2-minute break?

(Recess taken.)

MR. LANG: Want to go back on the record. We actually had a -- we were thinking about one of his answers. You were asking about different shared services employees, what information they can exchange and the conduit. But we -- and we think he misspoke with regard to what shared services employees can share, and so I think just so the record is clear I think it might be helpful --

Q. Yeah, please.

MR. LANG: -- to explain that.

A. Shared services employees can speak with each other across shared services, but they can't provide that information to either marketing function employees or regulated employees inappropriately. That's that conduit. They can't be a conduit to the other side of the operation.

Q. Okay. That makes sense.

A. But shared services is allowed to talk with each other.

Q. Yeah.

A. So we wanted to clarify that.

Q. Okay. Yeah, thank you for the clarification. And I am sure you know that any time

you think of something like that later on is good to clarify for the record.

A. Sure.

Q. So just a few quick things, going back to the profit and loss statements that FES was looking at prior to May, 2013, just -- just so I understand, you had said those statements were incorporated into Mr. Lisowski's modeling?

A. They may have been, yeah.

Q. Okay.

A. Mr. Lisowski is a source of P&Ls for our plants for us so that's where we get that information.

Q. Okay. But those profit and loss statements were provided to the company -- the ones that you were specifically looking at were provided to the companies at some point.

A. I don't know.

Q. Okay.

A. Those specific ones were but profit and loss statements were.

Q. Okay. So when you earlier said that you thought that had been provided by Mr. Lisowski, you're not actually sure about that; is that correct?

A. I thought the information had been provided by Mr. Lisowski. I don't know if it's the specific sheets that we were looking at.

Q. Okay. Do you generally remember the timeframe in which you were looking at those sheets?

A. No.

Q. Okay. You just know it was sometime between January and early May.

A. First quarter.

Q. First quarter, okay. All right. That's a good window. And I think earlier -- correct me if I am wrong, but I think earlier you said that FES did not prepare any four-year forecasts apart from whatever was reflected in Mr. Lisowski's modeling runs; is that correct?

A. Yes.

Q. Okay. Has -- does FES prepare any other kind of short-term forecasts for the profitability of its units?

A. Could you rephrase that question?

Q. In the regular -- so Mr. Lisowski's modeling runs were something specific to this proposed transaction, would you agree?

A. Yes.

Q. Okay. So in the regular course of business, does FES prepare any kind of short-term forecasts of its generating units' profitability?

A. Well, regularly look at P&L statements but those all come from Mr. Lisowski's team as well.

Q. Okay.

A. Just through the course of normal business.

Q. Okay. And he -- just to clarify he does not work for business development, correct?

A. That's correct.

Q. Okay. Does FES have any other short-term forecasts apart from the ones you just mentioned with respect to the profitability of its units?

A. No.

Q. Okay. Do you know an individual named Paul Harden?

A. Yes.

Q. Okay. And do you know where he works?

A. Yes. He works for FENOC.

Q. Did you have any communications with Mr. Harden regarding the proposed transaction?

A. No.

Q. No. Do you communicate with him in the

Summary: Memorandum Sierra Club's Memorandum Contra FirstEnergy Solutions Corp.'s Motion to Quash electronically filed by Mr. Christopher J. Allwein on behalf of SIERRA CLUB