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**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA SIERRA CLUB'S MOTION TO COMPEL DISCOVERY RESPONSES

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I. INTRODUCTION

Sierra Club's motion to compel is more a needless exercise in motion practice than a legitimate effort to obtain discovery. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the "Companies") have to date responded to approximately 3,200 discovery requests, nearly a thousand of which have come from Sierra Club alone. In addition, the Companies' witnesses have been subjected to extensive depositions. Yet, that apparently is not enough for Sierra Club. Its motion demonstrates a disregard for the Attorney Examiner's entries and the Commission's rules and barely attempts to justify its disagreements with objections. Indeed, Sierra Club's memorandum in support of its motion, in certain respects, actually supports the Companies' objections.

On March 23, 2015, after general discovery and Stipulation-related discovery that spanned five months had closed,[1] the Attorney Examiner issued an Entry ("March 23 Entry")

[1] After the written discovery deadline on December 8, 2014, the Attorney Examiner modified the procedural schedule to allow for additional discovery related to the Stipulation filed in this case. Case No. 14-1297-EL-SSO, Entry at ¶7, Jan. 14, 2015; Case No. 14-1297-EL-SSO, Entry at ¶23, Dec. 1, 2014. The additional period

that allowed for limited additional discovery regarding "factors" listed in the Commission's Opinion and Order in *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan*, Case No. 13-2385-EL-SSO (the "AEP Ohio Order"): (1) financial need of the generating plant; (2) necessity of the generating facility, in light of future reliability concerns, including supply diversity; (3) description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and (4) the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state. March 23 Entry at ¶¶4-5 (the "AEP Ohio Order factors").

Using the March 23 Entry as an excuse to rain more paper on the Companies, Sierra Club subsequently served an additional 160 discovery requests on the Companies. Revealing Sierra Club's true intent not to seek legitimate discovery, many of those requests were beyond the scope of discovery permitted by the March 23 Entry. In fact, the Companies had already provided Sierra Club with information that was responsive to most of those requests. To the extent that there is any additional (i.e., new) information, that information was protected by attorney-client privilege or work-product doctrine. Notwithstanding that Sierra Club has already received an extensive amount of information in response to over 3,200 discovery requests and without any basis to challenge the work-product or privileged status of any additionally potentially responsive materials, Sierra Club now seeks to compel the Companies to provide further responses to 49 of its discovery requests.

(continued…)

for Stipulation-related discovery ran from January 14, 2015 through February 13, 2015. Case No. 14-1297-EL-SSO, Entry at ¶7, Jan. 14, 2015.

Sierra Club wholly ignores the limitations described in the March 23 Entry. Indeed, Sierra Club's overblown view of permissible discovery is demonstrated by its motion to compel. There should be little question that the March 23 Entry set the bounds for additional discovery; as noted, the ordering paragraphs expressly limited such discovery to the "AEP Ohio Order factors." March 23 Entry at ¶5. Yet, Sierra Club erroneously views the March 23 Entry differently, i.e., as essentially providing no limit on discovery. For example, Sierra Club says:

- "In reopening discovery 'regarding the AEP Ohio Order factors,' the March 23 Entry indicated that *the permissible scope of discovery is broad*." (Mem. Supp. at 7 (emphasis added).)
- "These discovery requests sought information and documents that will enable the parties – and the Commission – to evaluate the impact of the AEP Ohio Order on Rider RRS. In other words, [Sierra Club's] [] requests effectuate *the very purpose of the March 23 Entry, which was to give the parties an opportunity to explore the implications of the AEP Ohio Order to FirstEnergy's proposal*." (Mem. Supp. at 2 (emphasis added).)
- "The March 23 Entry thus *authorizes discovery requests related to the Commission's resolution of the PPA rider proposal, including requests that seek information pertaining to the factors and additional issues identified by the Commission*." (Mem. Supp. at 7 (emphasis added).)

Indeed, Sierra Club admits that its discovery requests seek information beyond the AEP Ohio Order factors: "[A]ll of Sierra Club's discovery requests relate to the AEP Ohio Order's resolution of the PPA rider proposal, including the factors *and additional issues discussed on pp. 25-26 of the Order*." (Mem. Supp. at 12 (emphasis added).)

Sierra Club also baldly claims that the Companies' privilege and work-product claims are unfounded and wrong. Yet, Sierra Club's argument actually supports the work-product status of the disputed information. For example, addressing discovery seeking updated information from Company witness Judah Rose, Sierra Club admits, "If Mr. Rose had developed a price forecast specifically for FirstEnergy's supplemental testimony, the forecast may be privileged until the supplemental testimony is filed." (Mem. Supp. at 21.) This precisely describes the information over which the Companies are asserting work-product protection: the Companies developed additional information at the request of counsel for the express purpose of potentially using that information in the Companies' supplemental testimony.

Sierra Club's motion to compel this information should be denied.

II. THE MARCH 23 ENTRY LIMITED ADDITIONAL DISCOVERY TO REQUESTS REGARDING THE AEP OHIO ORDER FACTORS.

The *only* discovery order that applies to Sierra Club's motion to compel is the March 23 Entry. That Entry amended the procedural schedule to allow for additional discovery. March 23 Entry at ¶4.

The Entry explained that the modification was the result of the Commission's AEP Ohio Order. In the AEP Ohio proceeding, the Commission authorized the establishment of a placeholder purchase power agreement ("PPA") rider to be set initially at zero. *Id*. The Entry further explained that "[t]he Commission also presented *several factors* it may balance, but not be bound by, in deciding whether to approve future cost recovery requests associated with PPAs." *Id*. The Entry specifically listed the factors:

> Those *factors* were listed as follows: financial need of the generating plant; necessity of the generating facility, in light of future reliability concerns, including supply diversity; description of how the generating plant is compliant with all pertinent environmental regulations and its plan for compliance with pending environmental regulations; and the impact that a closure

> of the generating plant would have on electric prices and the resulting effect on economic development within the state. [*Id*.]

The Attorney Examiner found that it was reasonable to modify the procedural schedule in this case for the limited purpose of allowing the parties to address whether and how the four factors in the AEP Ohio Order should apply to this case. *See id*. at ¶5. The Entry stated:

> [i]n order to provide the parties in this proceeding sufficient time to conduct additional discovery and to evaluate and offer supplemental testimony addressing the AEP Ohio Order, as applied to this case, the attorney examiner establishes the following procedural schedule . . . (b) *Discovery requests regarding the AEP Ohio Order factors*, except for notices of deposition, should be served by April 13, 2015. [*Id*. (emphasis added).]

The Entry did *not* include allowing parties "to explore the implications of the AEP Ohio Order," or to conduct discovery "relating to the resolution" of Rider RRS or to any "additional issues."

III. SIERRA CLUB'S MOTION TO COMPEL SHOULD BE DENIED.

Sierra Club seeks to compel the Companies to provide supplemental discovery to 49 discovery requests contained in Sierra Club's ninth and tenth sets of discovery requests: SC-INT-159, -163, -164; SC-RPD-128, -132 through -134, -135, -136; SC-INT-176 through -183; -185 through -193, -195 through -210, -194, -211; SC-RPD-139 through -141,[2] -143 (collectively "the Supplemental Discovery Requests"). (Mem. Supp. at 3.) These requests are improper because they sought information that is work product or beyond the scope of the March 23 Entry.[3]

[2] Sierra Club's SC Set 10-RPD-139 and 140 are catch all requests for the production of any documents referenced in SC Set 10-INT-175 through 211 and any documents relied on to prepare the responses to SC Set 10-INT-175 through 211. The Companies responded to these document requests by referencing their responses to those interrogatories.

[3] The Companies also made additional objections to these requests and continue to stand by those objections. These objections include: the requests are not relevant or reasonably calculated to lead to the discovery of admissible evidence (SC Set 9-RPD-128, SC Set 10-INT-176 through -178, -185 through -188); the requests are vague and ambiguous (SC Set 9-INT-163, SC Set 9-RPD-128, SC Set 10-INT-176 through -178, -181, -182, -196 through -209, SC Set 10 RPD-141); the requests seek information outside of the possession, custody and control of

A. Sierra Club Seeks To Compel Information Protected By The Work-Product Doctrine.

The Commission routinely denies motions to compel when the movant seeks material protected by the attorney-client privilege or the work-product doctrine. *See, e.g., In the Matter of the Complaint of Brenda Fitzgerald v. Duke Energy Ohio*, Case No. 10-791-EL-CSS, 2011 WL 1428223, at ¶ 7 (Apr. 4, 2011) (denying a motion to compel with respect to a request for "copies of all respondent's correspondence, both internal and external" related to the proceeding because the request sought documents "protected by the attorney-client privilege and/or Work Product Doctrine."); *In the Matter of the Complaint of Cameron Creek Apartments*, 08-1091-GA-CSS, 2009 WL 2138514, at ¶ 13 (July 8, 2009) (denying a party's motion to compel in part because the party sought the production of many documents that "contain[ed] information that is protected under the attorney-client privilege or the work-product doctrine."); *In the Matter of the Application of The Dayton Power and Light Company for Approval of its Electric Security Plan, Case No. 12-426-EL-SSO*, Opinion and Order at 8-9 (Sept. 4, 2013) (denying motion to compel information regarding potential increases in revenue related to increases in distribution and transmission rates because the information was protected by attorney-client privilege as well as the work-product doctrine) ("*DP&L ESP*"). *See also, In the Matter of the Application of Buckeye Wind LLC for A Certificate to Construct Wind-Powered Elec. Generation Facilities,* Case No. 08-666-EL-BGN, 2009 WL 3699059, at *2 (Oct. 30, 2009) (denying the motion to compel production of preliminary drafts of an application submitted to the Ohio Power Siting

(continued…)

the Companies (SC Set 10-INT-176 through -178, -180); the requests mischaracterize testimony (SC Set 10-INT-185 through -188); the requests are overly broad (SC Set 9-INT-163, SC Set 9-RPD-128, SC Set 10-RPD-141); the requests are unduly burdensome and designed to harass and annoy (SC Set 10-INT-176 through -178, SC Set 10-RPD-141); and the request is redundant (SC Set 10-INT -182).

Board because "any drafts that were edited or modified under the advice of counsel would be protected by the work product doctrine and under attorney-client privilege").

Most of Sierra Club's discovery requests at issue are improper because they seek information prepared at the direction of counsel for purposes of this litigation. *See* SC Set 9-INT-159, 163, SC Set 9-RPD-128, -132, SC Set 10-INT-176 through -183, -181 through -183, -187, -190 through -193; -195 through -197, -201 through -209, -211, SC Set 10-RPD-141 and -143.

In response, Sierra Club offers nothing more than conclusory assertions that the supplemental requests seek "factual information" that does not fall under the work-product doctrine.[4] (Mem. Supp. at 16.) But as even Sierra Club's brief shows, this is not the test for work product. As Sierra Club itself recognizes: "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." (Mem. Supp. at 16.) As noted, Sierra Club also admits that if a witness had developed information specifically for the Companies' supplemental testimony, that information may be protected at least until the supplemental testimony is filed. (Mem. Supp. at 21.)

Here, to the extent that the Companies have any responsive information that has not been provided, that information has been developed at the request of counsel for the preparation of supplemental testimony. This is, as Sierra Club's own briefing shows, the very definition of work product.

[4] Sierra Club also argues that the Companies have objected to requests by stating that the Companies will provide responses after the deadline for supplemental testimony. (Mem. Supp. at 8, 14-15.) Sierra Club is mischaracterizing the Companies' responses. The Companies objected to these requests, among other reasons, based on the work-product privilege. The Companies, however, also responded that to the extent they disclose material that would be otherwise protected by the work-product doctrine in their supplemental testimony, then the Companies will supplement their discovery responses.

Indeed, Sierra Club took this exact stance with respect to the Companies' discovery. Sierra Club refused to provide responses to discovery relating to Sierra Club's then-upcoming testimony on the grounds of work product. (*See* Sierra Club's Responses and Objections to First Set of Discovery Requests of Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Sierra Club at INT. Nos. 1-2; 1-4 (Dec. 10, 2015).)[5]

Sierra Club's legal authority does not save its motion. Sierra Club cites three Ohio cases: *Ingram v. Adena Health Sys*., 2002-Ohio-4878, ¶14 (4th Dist. 2002); *State v. Hoop*, 731 N.E.2d 1177, 1186 (12th Dist. 1999); and *DeCuzzi v. Westlake*, 947 N.E.2d 1229 (8th Dist. 2010). These cases ostensibly stand for the proposition that the attorney-client privilege and work-product "doctrine does not apply to…underlying factual information." (Mem. Supp. at 16.) Sierra Club also cites two Commission cases – *In the Matter of the 1990 Long-Term Forecast Report of Ohio Power Company*, Case No. 90-659-EL-FOR (Nov. 20, 1990) and *In the Matter of the Regulation of the Purchased Gas Adjustment Clause Contained Within the Rate Schedules of The East Ohio Gas Company d.b.a. Dominion East Ohio and Related Matters*, Case No. 05-219-GA-GCR (July 28, 2006) – for essentially the same proposition. Yet, all of these cases are inapposite.

The privilege at issue in *Ingram* involved physician-patient confidentiality related to statutorily-defined communications regarding mental and dental diagnoses. *Ingram* at ¶14. *Ingram* is thus hardly on point here. *Hoop* involved the appeal of an aggravated murder conviction. In that case, the appellate court was tasked with considering whether a defendant's

[5] For example, in response to Interrogatory No. 1-2, Sierra Club objected as follows:

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

Sixth Amendment confrontation rights could trump attorney work-product protection. *See Hoop* at 1186. That case obviously has little applicability here as well. In *DeCuzzi*, the appellate court reversed a trial court's grant of a motion to compel because the trial court order would have required the production of information protected by the work-product doctrine. *See DeCuzzi* at 1223. Thus, if anything, *DeCuzzi* supports the Companies.

Similarly, neither *In re Ohio Power* nor *In re East Ohio* are on point. In *In re Ohio Power,* the Commission held that the information sought to be protected was not prepared in anticipation of, or related to, any ongoing or pending Commission proceeding. *In re Ohio Power* at ¶10. Indeed, the utility admitted that it "did not know the timing or exact nature of the proceeding" to which the information at issue might be applicable. *Id.* at ¶9. Here, however, the information subject to work-product protection was prepared as a direct result of the Companies' participation in this proceeding. *In re East Ohio* involved a Commission investigation into a pattern of alleged fraudulent behavior by the utility. *See In re East Ohio* at ¶¶10-17. No such allegations have been raised here. Hence, none of Sierra Club's authorities are on point.

Sierra Club's attempt to distinguish the Attorney Examiner's denial of a motion to compel in *DP&L ESP* falls flat. In that case, the Attorney Examiner denied a motion to compel financial data and projections because such information was protected by the attorney-client privilege and the work-product doctrine. The Commission subsequently affirmed. *DP&L ESP* at 8-9. Sierra Club states, the Attorney Examiner found it was "clear that the documents were prepared in anticipation of litigation and at the direction of counsel." (Mem. Supp. at 18.) This exactly describes the documents that may be responsive to the above-indicated requests here.

Sierra Club's request for a privilege log is specious. To the extent that the Companies include information protected by work product in their supplemental testimony, the Companies will produce this information. The Companies, however, are not required to determine any waiver of work product before that date. A privilege log is merely Sierra Club's backhanded attempt to force the Companies to reveal privileged or work-product information before the deadline for supplemental testimony.

A privilege log also would waste the Attorney Examiner's time. Indeed, Sierra Club understands this point when it states:

> if the in camera review occurs after the deadline for supplemental testimony, and the Attorney Examiners conclude that a document was protected by the work product doctrine at the time of the discovery request, Sierra Club respectfully requests that the Attorney Examiners consider whether the privilege was mooted by FirstEnergy's filing of supplemental testimony. [Mem. Supp at 19, n. 56.]

Notably, Sierra Club never bothered to provide a privilege log to respond to the Companies' discovery when it asserted work-product or privilege objections. (*See e.g.*, Sierra Club's Responses and Objections to First Set of Discovery Requests of Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Sierra Club at INT. Nos. 1-2; 1-4 (Dec. 10, 2014); Sierra Club's Responses and Objections to Second Set of Discovery Requests of Ohio Edison, The Cleveland Electric Illuminating Company, and The Toledo Edison Company to Sierra Club at INT Nos. 2-3; 2-4; 2-6 to 2-17 (Dec. 28, 2014).)[6]

Sierra Club offers nothing to show that the Commission should compel the Companies to produce information protected by the work-product doctrine. Instead, Sierra Club's arguments

[6] For example, Sierra Club did not provide a privilege log for its objections based on attorney-client and work product to Company INT-2-15: "Please produce all Documents regarding or related to the Stop FirstEnergy campaign, as described on Your website at the following website address: http://content.sierraclub.org/coal/ohio/stop-firstenergy."

support the Companies' objections. Simply put, all responsive, non-privileged financial information has already been produced to Sierra Club. The only such information that has not been produced was generated specifically in anticipation of litigation in this proceeding or is currently being created for use in anticipated supplemental testimony.[7] Consequently, Sierra Club's motion to compel regarding the Supplemental Discovery Requests should be denied.

B. To The Extent That Sierra Club Seeks Information That Is Not Otherwise Privileged Or Work Product, The Information Sierra Club Seeks Falls Beyond The Scope Of The Attorney Examiner's March 23 Entry.

Many of Sierra Club's requests also exceed the scope of the additional discovery allowed by the Attorney Examiner's March 23 Entry. *See* Responses to SC Set 9-INT-159, SC Set 9-INT-163 to -164, SC Set 9-RPD-132 to -136, SC Set 10-INT-176 to -181, SC Set 10-INT-185 to -210, and SC Set 10-RPD-141 to -143.

In an attempt to expand the scope of the March 23 Entry, Sierra Club resorts to mischaracterizing the March 23 Entry.[8] For example, Sierra Club erroneously states that the

[7] In a footnote, Sierra Club also suggests that the Commission should waive the work-product doctrine because Sierra Club needs the information. (Mem. Supp. at 17, n.52.) Sierra Club offers no support for this argument other than its naked assertion that good cause exists because the requests seek information regarding "key issues" and the Companies are the only parties with access to the information. But a showing of good cause is not so easily made. In *Jackson v. Greger*, 110 Ohio St. 3d 488, 492 (2006), a medical malpractice action, the defendant argued that he was entitled to discovery of the file materials of the plaintiff's attorney because those materials related to causation and damages, an essential part of the case. *Id.* The Court first stated that "a showing of good cause under Civ.R. 26(B)(3) requires demonstration of need for the materials--i.e., a showing that the materials, or the information they contain, are relevant and otherwise unavailable." *Id.* at 491. The Court further observed, "The purpose of the work-product rule is (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of his adversary's industry or efforts." *Id.* at 491-92 (internal citation and quotation omitted). The Court then held that the defendant did not establish good cause to discover the work product of the plaintiff's attorney because information on causation and damages was available elsewhere. *Id.* at 492. For example, the Court stated that the defendant could have its own expert witness to evaluate the issues. *Id.* Clearly, Sierra Club has not made such a showing. Nor could it do so given that the Companies intend to address the AEP Ohio Order factors in their supplemental testimony.

[8] Sierra Club's penchant for mischaracterizations also extends to its recitation of the background of this case. For example, Sierra Club misleadingly asserts that the Economic Stability Program will result in a net loss of $404 million. (Mem. Supp. at 4, 5 n.14.) Sierra Club ignores that the Companies' project that the Economic Stability Program will result in a $2 billion benefit to customers. Sierra Club also incorrectly claims that FirstEnergy Solutions will receive guaranteed revenue. (Mem. Supp. at 4.) This is not the case. Further, the Companies' recovery of costs under Rider RRS would be subject to audits and thus subject to a risk of nonrecovery.

March 23 Entry "reopen[ed]" discovery in a "broad" manner. (Mem. Supp. at 7.) Sierra Club further says that the purpose of the discovery allowed in the March 23 Entry is "to give the parties an opportunity to explore the implications of the AEP Ohio Order to FirstEnergy's proposal." (*Id*. at 2.) Sierra Club also claims that the March 23 Entry allows it to seek discovery based on the AEP Ohio Order factors and "*additional issues discussed on pp. 25-26 of the Order*." (*Id*. at 12.)

None of this is true. The March 23 Entry was not an invitation to restart wide-ranging discovery. It permitted discovery only regarding the specific delineated factors that the Commission may apply to its consideration of Rider RRS.

In issuing the March 23 Entry, the Attorney Examiner was well aware that extensive discovery had already been undertaken in this case. The discovery period (including time for additional discovery related to the Stipulation and Recommendation) spanned approximately five months. Intervenors have served over 3,200 discovery requests on the Companies, 998 specifically from Sierra Club. The March 23 Entry did not envision allowing parties to plow old discovery ground.

Sierra Club's attempts to imply that, absent an order compelling the Companies to respond to the 49 discovery requests at issue, Sierra Club's factual discovery will be thwarted. Not so. To begin, in sixteen of the discovery requests included in this motion, the Companies responded by referring Sierra Club to previous discovery responses. (SC-INT-163, -176, -177, -178, -179, -180, -181, -182, -185, -187, -211; and SC-RPD-128, -132, -139, -140, -143.) With regard to the four broad categories of information that Sierra Club seeks through the instant motion, the Companies have already provided an extensive amount of discovery. For each of those categories, the specific requests are listed below:

- **Financial Information About the Generating Plants**

OCC Set 11-INT-245	Costs of all capital projects planned for Davis-Besse over the next decade
P3-EPSA Set 4-INT-62	Capital costs related to the Plants[9]
P3-EPSA Set 4-INT-64	Environmental and non-environmental investments for Davis-Besse and related costs and expenses
SC Set 1-INT-9	Fuel, O&M, fixed maintenance, fuel and environmental and non-environmental capital costs for W. H. Sammis, Kyger Creek and Clifty Creek from 2010-2014
SC Set 1-INT-10	Fuel, O&M, fixed maintenance, fuel and environmental and non-environmental capital costs for W. H. Sammis, Kyger Creek and Clifty Creek from 2015-2034
SC Set 1-INT-17	Revenue and costs for operation of W. H. Sammis and Davis-Besse plants from 2015-2034
SC Set 1-RPD-49	Forecasting and related financial and pricing information and projections exchanged between the EDU and FES negotiating teams
SC Set 1-RPD-54	Modeling for projected costs and revenue for the Plants
SC Set-2-INT-72	Environmental and non-environmental capital costs for W. H. Sammis from 2014-2031
SC Set 2-INT-82	OVEC forecasts regarding environmental compliance and carbon price costs
SC Set 2-RPD-69	Clifty Creek and Kyger Creek new capital and variable costs
SC Set 4-INT-109	Potential environmental compliance costs for Clifty Creek, Kyger Creek, and W.H. Sammis
SC Set 2-RPD-68	Costs forecasts and carbon price applied to variable costs per unit of the Plants
FES Responses to Sierra Club Subpoena Requests Nos. 1 and 2	Detailed, updated costs and revenue projections for the Plants current through December 9, 2014

- **Updated Market Prices and Related Assumptions**

SC Set 1-INT-58	Dispatch modeling
SC Set 1-INT-59	Dispatch modeling and sensitivity analyses
SC Set 1-RPD-4	All workpapers, including formulae, for Company witnesses Fanelli, Strah, Lisowski, Staub and Rose
SC Set 1-RPD-49	Forecasting and related financial and pricing information and projections exchanged between the EDU and FES negotiating teams

[9] "Plants" refers to the following generating facilities: Davis-Besse; W.H. Sammis; Clifty Creek; and Kyger Creek.

SC Set 1-RPD-54	Modeling, sensitivity analyses, inputs, outputs, and workpapers
SC Set 2-INT-82	OVEC forecasts
SC Set 4-INT-95	Economic modeling related to environmental regulations at W.H. Sammis, Kyger Creek and Clifty Creek
SC Set 4-RPD-86	Capacity factor calculations
SC Set 4-RPD-87	Capacity factor calculations
FES Responses to Sierra Club Subpoena Requests Nos. 1 and 2	Detailed, updated costs and revenue projections for the Plants current through December 9, 2014

- **Environmental and Operating Performance of the Generating Plants**

P3-EPSA Set 4-INT-64	Environmental and non-environmental capital investment
SC Set 1-INT-9	Environmental capital costs, capacity factor, heat rate, forced or random outage rate, SO2 emission rate, NOX emission rate, mercury emission rate, particulate matter emission rate, hydrochloric acid emission rate for W. H. Sammis, Kyger Creek, and Clifty Creek from 2010-2014
SC Set 1-INT-10	Environmental capital costs, capacity factor, heat rate, forced or random outage rate, SO2 emission rate, NOX emission rate, mercury emission rate, particulate matter emission rate, hydrochloric acid emission rate for Sammis, Kyger Creek and Clifty Creek from 2014-2034
SC Set 1-INT-11	Outages (planned and forced) at Davis–Besse
SC Set 1-INT-13	Outages (planned and forced) at W. H. Sammis, Kyger Creek and Clifty Creek
SC Set 4-INT-109	Analysis of future environmental compliance costs
SC Set 2-INT-61	Compliance with various environmental regulations for W. H. Sammis, Kyger Creek and Clifty Creek ad related costs
SC Set 2-INT-67	Entrainment at W. H. Sammis
SC Set 2-RPD-68	Carbon pricing

- **Supply Diversity, Grid Reliability and Impacts of Plant Retirement**

OCC Set 11-RPD-074	Studies related to economic viability of the Plants
SC Set 1-RPD-49	Forecasting and related financial and pricing information and projections exchanged between the EDU and FES negotiating teams
SC Set 3-INT-83	Economic impact of closure of W. H. Sammis or Davis-Besse

Accordingly, Sierra Club has already received an extensive amount of discovery on the four topics of information it seeks in the Supplemental Discovery Requests.

Given its erroneously broad view of permissible discovery at this stage of the case, it's no surprise that Sierra Club fails to show that its requests are proper. For example, Sierra Club simply asserts that SC Set 9-INT-164 and Set 9-RPD-133 fall with the scope of discovery because they relate to the first AEP Ohio Order factor, "financial need of the generating plant" and the fourth factor, "the impact that a closure of the generating plant would have on electric prices and the resulting effect on economic development within the state." (Mem. Supp. at 13-14.) This discovery seeks updates to the Companies' estimates regarding the impact that Rider RRS will have on customers. The impact of Rider RRS on customers is not related to the financial need or the impact of the closure of the Plants at issue. Certainly, revenues received for the Plants' output or the Plants' costs might be relevant to the "financial need" factor. But calculating specific rate impacts, although based in part on such information, requires several additional pieces of information and steps of analysis.

Similarly, SC Set 10-INT-189 seeks information regarding whether the Companies' customers have faced retail price volatility. But retail volatility, like customer impacts generally is not one of the AEP Ohio Order factors. Sierra Club blithely contends that "retail volatility" falls within the scope of discovery because it was "at the heart of the Commission's ruling on AEP Ohio's PPA rider." (Mem. Supp. at 26.) While the Companies agree that retail volatility is an important issue to consider in reviewing Rider RRS (indeed, reducing retail rate volatility is one of Rider RRS's principal benefits), such volatility has nothing to do with any of the AEP Ohio Order factors.

SC Set 10-RPD-142 is also out of bounds. That request asks the Companies to produce the ICF Strategic Energy Outlooks for 2014 Quarter 4 and 2015 Quarter 1. Sierra Club contends that these forecasts are related to the financial need of the Plants because they supposedly bear on the benefits of Rider RRS. (Mem. Supp. at 20-21.) Like rate or customer impacts, the benefits of Rider RRS are beyond the scope of the AEP Ohio Order factors. Nor does Sierra Club show to the contrary.[10]

Sierra Club asserts that SC Set 9-RPD-134, 135 and 136 relate to the environmental performance, physical condition and operating performance of the Plants. (Mem. Supp. at 22.) SC Set 9-RPD-134 seeks information regarding the operational characteristics, physical condition and operating performance of the Plants. Similarly, SC Set 9-RPD-135 and 136 seek information regarding equipment and component health studies of the Plants. Beyond its bare assertion, Sierra Club never explains why general information relating to the expansive topic of a plant's operational characteristics, physical condition or operating performance or a unit's "health" have anything to do with environmental compliance.

C. Sierra Club's Requests For Supplemental Responses Are Untimely.

Sierra Club also seeks to skirt the discovery deadline in this case by asking that the Companies' supplement certain prior discovery request responses. (*See* SC Set 10-INT-176, SC Set 10-INT-178 to -181, SC Set 10-INT-210 to -211 and SC Set 10-RPD-143.) As noted, the deadline for general discovery in this proceeding has long since expired. Case No. 14-1297-EL-SSO, Feb. 4, 2015 Entry. And the limited discovery allowed by the March 23 Entry does not provide Sierra Club with an excuse for these belated requests to expand discovery.

[10] In fact, in his deposition, Mr. Rose testified that the ICF publication lacked data about relevant interconnections or hourly data.

To be sure, Rule 4901-1-16(D)(5) of the Ohio Administrative Code allows for supplementation of discovery requests at a party's request. However, the rule contemplates that a party has the *ability to ask* for supplemental discovery. Consequently, if the discovery deadline has passed, a party cannot request that discovery responses be supplemented. In any event, the Attorney Examiner always has the ability to modify the procedural rules. Thus, even if Rule 4901-1-16(D) permitted unlimited supplementation, the Attorney Examiner here has limited the discovery that may be taken at this stage of the case. The requests for discovery response supplementation are untimely. The Commission should deny Sierra Club's motion to compel the Companies' response to these requests.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny Sierra Club's Motion to Compel.

Date: May 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served upon the following parties via electronic mail on May 4, 2015.

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Summary: Memorandum Contra Sierra Club's Motion to Compel Discovery Responses electronically filed by MR. DAVID A KUTIK on behalf of The Cleveland Electric Illuminating Company and The Toledo Edison Company and Ohio Edison Company