

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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PREHEARING CONFERENCE

before Mr. Gregory Price and Ms. Megan Addison,  
Attorney Examiners, at the Public Utilities  
Commission of Ohio, 180 East Broad Street, Room 11-A,  
Columbus, Ohio, called at 10:05 a.m. on Tuesday,  
June 2, 2015.

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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. James Lang  
and Mr. N. Trevor Alexander  
The Calfee Building  
1405 East Sixth Street  
Cleveland, Ohio 44114

Jones Day  
By Mr. David A. Kutik  
901 Lakeside Avenue  
Cleveland, Ohio 44114

On behalf of the Applicants.

Bruce E. Weston, Ohio Consumers' Counsel  
By Mr. Larry Sauer  
Ms. Maureen R. Grady  
Mr. Michael Schuler  
Mr. William J. Michael,  
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.

Bricker & Eckler, LLP  
By Mr. Dane Stinson  
and Mr. Dylan Borchers  
100 South Third Street  
Columbus, Ohio 43215-4291

On behalf of the Northeast Ohio Public  
Energy Council.

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APPEARANCES: (Continued)

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

Earthjustice  
By Mr. Michael Soules  
1625 Massachusetts Avenue NW, Suite 702  
Washington, D.C. 20036

Kegler, Brown, Hill & Ritter  
By Mr. Christopher J. Allwein  
Capitol Square, Suite 1800  
65 East State Street  
Columbus, Ohio 43215-4294

Mr. Tony Mendoza  
85 Second Street, 2nd Floor  
San Francisco, California 94105

On behalf of the Sierra Club.

Ohio Partners for Affordable Energy  
By Ms. Colleen L. Mooney  
231 West Lima Street  
Findlay, Ohio 45846

On behalf of the Ohio Partners for  
Affordable Energy.

McNees, Wallace & Nurick LLC  
By Mr. Frank P. Darr  
and Mr. Matthew Pritchard  
21 East State Street, 17th Floor  
Columbus, Ohio 43215

On behalf of the Industrial Energy Users  
of Ohio.

IGS Energy  
By Mr. Joseph Olikier  
6100 Emerald Parkway  
Dublin, Ohio 43016

On behalf of IGS Energy.

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APPEARANCES: (Continued)

Taft, Stettinius & Hollister LLP  
By Mr. Mark S. Yurick  
and Mr. Devin D. Parram  
65 East State Street, Suite 1000  
Columbus, Ohio 43215

On behalf of The Kroger Company.

Vorys, Sater, Seymour & Pease, LLP  
By Mr. M. Howard Petricoff  
Ms. Gretchen Petrucci  
and Mr. Michael J. Settineri  
52 East Gay Street  
Columbus, Ohio 43215

On behalf of Retail Energy Supply  
Association, PJM Power Providers Group,  
Electric Power Supply Association,  
Constellation, and Exelon.

Mike DeWine, Ohio Attorney General  
By Mr. William L. Wright,  
Section Chief  
Mr. Ryan P. O'Rourke  
Mr. Thomas G. Lindgren  
Mr. Thomas W. McNamee,  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street, 6th Floor  
Columbus, Ohio 43215

On behalf of the Staff of the PUCO.

Direct Energy  
By Mr. Joseph M. Clark  
21 East State Street, 19th Floor  
Columbus, Ohio 43215

On behalf of the Direct Energy Services,  
LLC; Direct Energy Business, LLC; and  
Direct Energy Marketing, LLC.

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APPEARANCES: (Continued)

Carpenter Lipps & Leland LLP  
By Ms. Kimberly W. Bojko  
and Ms. Rebecca L. Hussey  
280 North High Street, Suite 1300  
Columbus, Ohio 43215

On behalf of the Ohio Manufacturers'  
Association Energy Group.

Boehm, Kurtz & Lowry  
By Mr. Michael L. Kurtz  
and Ms. Jody Kyler Cohn  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202

On behalf of the Ohio Energy Group.

FirstEnergy Corp.  
By Mr. Mark A. Hayden  
and Mr. Brian Knipe  
76 South Main Street  
Akron, Ohio 44308

On behalf of FirstEnergy Services.

Environmental Law & Policy Center  
By Ms. Madeline Fleisher  
21 West Broad Street, Suite 500  
Columbus, Ohio 43215

On behalf of the Environmental Law &  
Policy Center.

Spilman, Thomas & Battle, PLLC  
By Mr. Derrick Price Williamson  
and Ms. Carrie Harris  
310 First Street, Suite 1100  
Roanoke, Virginia 24011

On behalf of Wal-Mart Stores East, LP and  
Sam's East, Inc.

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APPEARANCES: (Continued)

Mr. Richard L. Sites  
155 East Broad Street  
Columbus, Ohio 43215

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

On behalf of the Ohio Hospital  
Association.

Ohio Environmental Council  
By Mr. Trent A. Dougherty  
and Mr. John Finnigan  
1145 Chesapeake Avenue, Suite I  
Columbus, Ohio 43212

On behalf of the Ohio Environmental  
Council and the Environmental Defense  
Fund.

Mr. Thomas R. Hays  
8355 Island Lane  
Maineville, Ohio 45039

On behalf of the Northwest Ohio  
Aggregation Coalition and the Individual  
Communities.

American Electric Power  
By Mr. Steven T. Nourse  
and Mr. Matthew J. Satterwhite  
1 Riverside Plaza  
Columbus, Ohio 43215

On behalf of Ohio Power Company.

ALSO PRESENT:

Duke Energy Ohio  
By Ms. Jeanne Kingery  
and Ms. Amy Spiller  
139 East Fourth Street  
Cincinnati, Ohio 45202

On behalf of Duke Energy Ohio.

1 Tuesday Morning Session,  
2 June 2, 2015.

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4 EXAMINER ADDISON: Let's go on the  
5 record.

6 The Public Utilities Commission of Ohio  
7 calls for a prehearing conference at this time and  
8 place Case No. 14-1297-EL-SSO being in the Matter of  
9 the Application of Ohio Edison Company, The Cleveland  
10 Electric Illuminating Company, and The Toledo Edison  
11 Company for Authority to Provide a Standard Service  
12 Offer Pursuant to RC 4928.143 in the Form of an  
13 Electric Security Plan.

14 My name is Megan Addison and with me is  
15 Gregory Price, and we are the Attorney Examiners  
16 assigned to preside over this prehearing conference.

17 Let's go ahead and begin by taking  
18 appearance starting with the company.

19 MR. BURK: On behalf of Ohio Edison  
20 Company, The Cleveland Electric Illuminating Company,  
21 and The Toledo Edison Company, James W. Burk and  
22 Carrie M. Dunn, 76 South Main Street, Akron, Ohio  
23 44308.

24 MR. KUTIK: David Kutik, Jones Day law  
25 firm, 901 Lakeside Avenue, Cleveland, Ohio 44114.

1 MR. KNIPE: Good morning, your Honors.  
2 Brian Knipe on behalf of FirstEnergy Solutions, 76  
3 South Main Street, Akron, Ohio 43308.

4 MR. NOURSE: Good morning, your Honor.  
5 On behalf of Ohio Power Company, Steven T. Nourse and  
6 Matthew J. Satterwhite, 1 Riverside Plaza, Columbus,  
7 Ohio 43215.

8 MS. COHN: On behalf of the Ohio Energy  
9 Group, Michael Kurtz and Jody Kyler Cohn from the law  
10 firm Boehm, Kurtz & Lowry, 36 East Seventh Street,  
11 Cincinnati, Ohio 45202.

12 MS. BOJKO: Thank you, your Honor. On  
13 behalf of Ohio Manufacturers' Association Energy  
14 Group, the law firm Carpenter Lipps & Leland,  
15 Kimberly W. Bojko, Rebecca L. Hussey, 280 North High  
16 Street, Suite 1300, Columbus, Ohio 43215.

17 MR. OLIKER: Good morning, your Honors.  
18 On behalf of IGS Energy, Joseph Olikier, 6100 Emerald  
19 Parkway, Dublin, Ohio 43016.

20 MR. ALLWEIN: Good morning, your Honor.  
21 On behalf of Sierra Club, Christopher J. Allwein,  
22 Kegler, Brown, Hill & Ritter, Capital Square, Suite  
23 1800, 65 East State Street, Columbus, Ohio 43215. I  
24 have with me Shannon Fisk of Earthjustice, 1617 John  
25 F. Kennedy Boulevard, Suite 1675, Philadelphia,



Pennsylvania 19103, and Michael Soules of Earthjustice, 1625 Massachusetts Avenue Northwest, Suite 702, Washington, D.C., 20036. And not with us today is Tony Mendoza of the Sierra Club, 85 Second Street, San Francisco, California 94105.

MS. FLEISHER: Good morning, your Honors. Madeline Fletcher on behalf of the Environmental Law & Policy Center at 21 West Broad Street, Suite 500, Columbus, Ohio 43215.

MS. HARRIS: Good morning. My name is Carrie Harris and my colleague Derrick Williamson are here on behalf of Wal-Mart Stores East, LP, and Sam's Club. Address is 310 First Street, Suite 1100, Roanoke, Virginia 24011.

MR. HAYS: Thomas Hays for NOAC, N-O-A-C, and the individual communities. Address is 8355 Island Lane, Maineville, Ohio 45039.

MR. SAUER: Thank you, your Honors. On behalf of the residential consumers of the FirstEnergy companies, the Office of the Ohio Consumers' Counsel, Bruce J. Weston, Consumers' Counsel, Larry Sauer and Michael Schuler, 10 West Broad Street, Suite 1800, Columbus, Ohio 43215.

MR. YURICK: Good morning, your Honors. On behalf of The Kroger Company, Mark Yurick and

1 Devin Parram with the law firm of Taft, Stettinius &  
2 Hollister, 65 East State Street, Suite 1000,  
3 Columbus, Ohio 43215. Thank you.

4 MR. DARR: Good morning. On behalf of  
5 Industrial Energy Users - Ohio, Frank Darr with the  
6 firm of McNees, Wallace & Nurick, 21 East State  
7 Street, Columbus.

8 MR. STINSON: Thank you, your Honors. On  
9 behalf of Northeast Ohio Public Energy Council, law  
10 firm of Bricker & Eckler, LLP, Dane Stinson and Dylan  
11 Borchers, 100 South Third Street, Columbus, Ohio  
12 43215.

13 MR. O'BRIEN: Your Honors, on behalf of  
14 the Ohio Hospital Association, Richard L. Sites, 155  
15 East Broad Street, Columbus, Ohio 43215, and Thomas  
16 J. O'Brien with the law firm of Bricker & Eckler, 100  
17 South Third Street, Columbus, 43215. Thank you.

18 MR. O'ROURKE: Good morning, your Honor.  
19 On behalf of staff, Ryan O'Rourke, Thomas Lindgren,  
20 and Thomas McNamee with the Ohio Attorney General's  
21 Office, Public Utilities Section. Our address is 180  
22 East Broad Street, 6th Floor, Columbus, Ohio 43215.

23 MS. MOONEY: On behalf of Ohio Partners  
24 for Affordable Energy, I'm Colleen Mooney, 231 West  
25 Lima Street, Findlay, Ohio 45840.

1 MR. CLARK: On behalf of Direct Energy,  
2 Joseph M. Clark, 21 East State Street, 19th Floor,  
3 Columbus, Ohio 43215.

4 MR. DOUGHERTY: Your Honors, on behalf  
5 Ohio Environmental Council and Environmental Defense  
6 Fund, Trent Dougherty and John Finnigan, 1145  
7 Chesapeake Avenue, Suite I, Columbus, Ohio 43212.

8 MR. PETRICOFF: Thank you, your Honor.  
9 On behalf of the Retail Energy Supply Association,  
10 Electric Power Supply Association, and PJM Power  
11 Providers, Howard Petricoff, Gretchen Petrucci, and  
12 Mike Settineri from the law firm of Vorys, Sater,  
13 Seymour & Pease, 52 East Gay Street, Columbus, Ohio.

14 EXAMINER PRICE: Mr. Parram.

15 MR. PARRAM: Mark already did.

16 EXAMINER PRICE: You are not sitting  
17 together. You are messing me up entirely.

18 Let's go off the record for one second.

19 (Discussion off the record.)

20 EXAMINER PRICE: Let's go back on the  
21 record.

22 Ms. Kingery, would you like to enter a  
23 limited appearance solely for the purpose of  
24 discussing your motion to quash?

25 MS. KINGERY: Thank you, your Honor.

1 Jeanne Kingery and Amy Spiller on behalf of Duke  
2 Energy Ohio, 139 East Fourth Street, Cincinnati,  
3 Ohio. And as your Honor just mentioned, we are not a  
4 party. I am not making an appearance for that sake,  
5 but I am here because we filed a motion.

6 EXAMINER PRICE: Thank you.

7 EXAMINER ADDISON: Okay. We have several  
8 pending motions for a protective order that were  
9 filed in this docket between December 10, 2014,  
10 through May 11, 2015. No memoranda contra to the  
11 motions for protective order were ever filed. The  
12 attorney examiners have reviewed the information  
13 filed under seal and find that all of this  
14 information constitutes trade secrets and shall be  
15 protected pursuant to RC 4928.06. Therefore, all of  
16 the pending motions for protective order are granted,  
17 and confidential treatment should be afforded to the  
18 documents filed under seal for a period ending 24  
19 months from the date of the final appealable order in  
20 this proceeding.

21 MR. KUTIK: Your Honor.

22 EXAMINER PRICE: Mr. Kutik.

23 MR. KUTIK: I wonder, can we recount on  
24 the record as to what those motions are? And I am  
25 prepared to give at least my list of the pending

1 motions.

2 EXAMINER PRICE: Sure.

3 MR. KUTIK: May I proceed?

4 EXAMINER PRICE: You want -- do you want  
5 us to tell you which ones we were ruling on?

6 MR. KUTIK: Yes, or I can give you my  
7 list and you can say, yeah, that's what you were  
8 thinking.

9 EXAMINER ADDISON: Sure. Go ahead and  
10 give your list.

11 MR. KUTIK: The companies filed a motion  
12 on May 4, 2015, regarding Mr. Moul and Mr. Evans'  
13 supplemental testimony. FirstEnergy Solutions filed  
14 a motion on April 14, 2015, with respect to their  
15 motion to quash. Sierra Club filed three motions for  
16 protective order, first on April 24 with respect to  
17 their memorandum contra to FES's motion to quash.  
18 They also filed a motion on April 27 regarding  
19 confidential motion -- portions of their motion to  
20 compel against the companies and again on May 11  
21 confidential portions of Mr. Lanzalotta's  
22 supplemental testimony. ESP -- EPSA 3 filed a motion  
23 on May 11 to protect confidential portions of  
24 Mr. Campbell's supplemental testimony. Exelon filed  
25 a motion on May 1 with respect to confidential

1 portions of Mr. Kalt's supplemental testimony and I  
2 believe it was NOAC filed testimony -- or filed a  
3 motion for protective order on April -- on May 11  
4 with respect to confidential portions of  
5 Mr. Vallen's, V-A-L-L-E-N, supplemental testimony.

6 EXAMINER ADDISON: All of those are  
7 covered.

8 MR. KUTIK: Thank you.

9 EXAMINER ADDISON: In addition Sierra  
10 Club filed a motion to file out of time on May 12,  
11 2015. At this time we would like to also grant that  
12 motion.

13 EXAMINER PRICE: The next motion we have  
14 to discuss is ELPC's motion to compel FirstEnergy to  
15 discovery, FirstEnergy. Ms. Fleisher, if you would  
16 like to briefly recount your arguments.

17 MS. FLEISHER: Yes. I will just speak  
18 loudly. Yes, your Honor, thank you. In brief our  
19 motion to compel sought an answer to single --  
20 perhaps better without the microphone. Our motion to  
21 compel sought an answer to a single interrogatory  
22 seeking information regarding FirstEnergy's, by which  
23 I mean the three distribution companies, decision to  
24 eliminate a swath of its energy efficiency programs  
25 and the relationship between that decision and the

1 rationale for putting forward the economic stability  
2 program proposed in this case.

3 EXAMINER PRICE: Mr. Kutik.

4 MR. KUTIK: Ms. Dunn.

5 EXAMINER PRICE: Ms. Dunn, I'm sorry.

6 MS. DUNN: Your Honor, to be brief the  
7 interrogatory was couched on Mr. Moul's testimony.  
8 They asked him pretty close to those questions during  
9 his depo. The testimony was attached to the  
10 response. He answered their question that it had no  
11 relevant -- that resource diversity in his testimony  
12 was not meant to be EE-PDR resources. They got the  
13 answer. There is no reason to answer the  
14 interrogatory at this point. They got the answer  
15 they needed.

16 EXAMINER PRICE: Final word?

17 MS. FLEISHER: Certainly. I think this  
18 issue is covered in both our motion and our reply  
19 filed in the docket; but, just to recap, the issue  
20 with FirstEnergy relying on Mr. Moul's testimony is  
21 that Mr. Moul is an employee of FirstEnergy  
22 Solutions. It's not clear that he has any knowledge  
23 or role with respect to FirstEnergy's energy  
24 efficiency and peak demand reduction programs. And  
25 so to suggest that I could have asked him about that

1 in the deposition is -- it was not clear to me. He  
2 is not designated a witness as responding to that  
3 discovery request, and so I would respectfully  
4 request -- continue to request a response from  
5 someone at the company with the relevant knowledge to  
6 address specifically the efficiency and demand  
7 reduction programs.

8 EXAMINER PRICE: Okay. We are going to  
9 go ahead and grant in part and deny in part the  
10 motion to compel. FirstEnergy's directed to answer  
11 the interrogatory; but, Ms. Fleisher, you do not get  
12 to pick the witness. You should designate the  
13 appropriate witness. If you wish to recall any  
14 witnesses after that, you will have to ask the Bench.

15 Next up we have Duke Energy Ohio's motion  
16 to quash the subpoena issued by Interstate Gas  
17 Supply. Ms. Kingery.

18 MS. KINGERY: Yes, thank you, your Honor.  
19 I'm not going to repeat all of the arguments that  
20 we've made in writing but would just hit a few high  
21 points. IGS here is seeking to obtain from us a copy  
22 of a confidential forecast from a prior proceeding in  
23 which Duke Energy Ohio was the applicant.

24 This information is initially not  
25 discoverable because it's not relevant and not likely



1 to lead to the discovery of admissible information.  
 2 The forecasts that Mr. Rose prepared for Duke Energy  
 3 Ohio was based on Duke Energy Ohio's specific facts  
 4 and was based on assumptions that were created either  
 5 with Duke Energy Ohio, for Duke Energy Ohio, or by  
 6 Duke Energy Ohio; thus, the outcome of those  
 7 forecasts and whether or not Mr. Rose correctly  
 8 predicted the future as IGS has -- has termed it is  
 9 irrelevant. It has nothing to do with whether --  
 10 with the correctness of his work in this case.

11 Second of all, even if discoverable, the  
 12 information is not admissible simply because the  
 13 probative value is outweighed by the risk of unfair  
 14 prejudice, confusion, or misleading the Commission.  
 15 And your Honors have previously decided in this case  
 16 on that very same basis that discovery from other  
 17 nonparties should be not forced on the nonparties in  
 18 those situations and that argument is even more  
 19 compelling here considering that the generating  
 20 assets that formed the basis for Mr. Rose's forecasts  
 21 have been sold to Dynegy who is not even present and  
 22 has not been included in any pleadings in this  
 23 proceeding.

24 EXAMINER PRICE: That raises an  
 25 interesting question in terms of whether or not this

1 information today is a trade secret. If Duke is no  
2 longer engaged in the generation business, has sold  
3 the assets, why is this still competitive information  
4 as to Duke?

5 MR. KUTIK: Well, your Honor --

6 EXAMINER PRICE: I will give you an  
7 opportunity, Mr. Kutik, but let's --

8 MR. KUTIK: I would like to respond to  
9 that specific question.

10 EXAMINER PRICE: After Ms. Kingery.

11 MS. KINGERY: I would have two answers to  
12 that. First of all, there is a contractual  
13 relationship between Duke Energy and Dynegy and I  
14 have not -- I wasn't part of that -- that  
15 transaction, so I don't know all the terms of it, but  
16 I would be very surprised if there weren't a term in  
17 that contract that required Duke Energy Ohio to  
18 continue to protect such information that might, if  
19 released, have a negative effect on the business of  
20 Dynegy. So I think we still as an entity have a  
21 responsibility toward that information.

22 And, second of all, there is an impact on  
23 the competitive market as a whole as well as just on  
24 the individual owner of the information.

25 EXAMINER PRICE: Is Dynegy a party to

1 this proceeding?

2 MS. KINGERY: To this proceeding?

3 EXAMINER PRICE: Yeah, this proceeding.

4 MS. KINGERY: I have no idea. I am not a  
5 party.

6 EXAMINER PRICE: Well, you were once.

7 MR. OLIKER: I'll represent to you, your  
8 Honor, they are.

9 EXAMINER PRICE: That's my understanding.  
10 Mr. Kutik.

11 MR. KUTIK: I was going to mention, your  
12 Honor, in addition to whatever Duke's interest is or  
13 Dynegy's interest is with respect to confidentiality,  
14 ICF also has a confidential interest as well and  
15 certainly in the information that Mr. Rose has  
16 provided that has been the subject of a protective  
17 order as you know because of confidentiality to ICF.

18 MS. KINGERY: And, your Honor, if I may,  
19 just one more point that I would like to highlight  
20 and that is IGS argues that it wants to have access  
21 to this information so that it can attack the  
22 credibility of Mr. Rose. However, it's not really  
23 the credibility of Mr. Rose that they are attempting  
24 to attack. Credibility is truthfulness. It's a  
25 question of whether the witness is telling the truth

1 or is lying, and I don't believe that that's what IGS  
2 is attempting to get at. They are trying to get at  
3 whether or not Mr. Rose is good at his job, whether  
4 he is a good expert. That's different than whether  
5 he is telling the truth.

6 MR. OLIKER: Is it my turn, your Honor?

7 EXAMINER PRICE: Mr. Oliker.

8 MR. OLIKER: Thank you, your Honor. I'll  
9 go without the microphone.

10 With regard to the issue of relevance,  
11 your Honor, what the Commission has been asked to do  
12 in this case is to approve a 15-year contract that  
13 makes customers to some extent investors in these  
14 power plants. That decision is largely driven by a  
15 forecast of future prices for electricity, capacity,  
16 and natural gas prepared by Mr. Rose.

17 He's prepared a very similar forecast for  
18 Duke Energy Ohio, and it happens to have a -- the --  
19 there's a large overlapping period of time for these  
20 forecasts. And I think that the methodologies and  
21 the actual conclusions that he prepared in these two  
22 forecasts would be very illustrative for the  
23 Commission to determine, for example, did he predict  
24 two crashes of natural gas prices, and if he didn't,  
25 what methodologies did he use in that forecast or if

1 he did, maybe that shows that his methodologies were  
 2 correct. But either way you can say what  
 3 methodologies did you use in this time? Are you  
 4 using the same methodologies now? And if that's the  
 5 case, maybe his methodologies are wrong, and they  
 6 need to be adjusted, so it goes to the methodologies  
 7 themselves that he used, goes to whether they are  
 8 working, whether he is credible, has very -- there  
 9 are many different elements to that. It's whether or  
 10 not he is an honest witness, whether or not he is  
 11 willing to accept assumptions from one company that  
 12 he may know nothing about and then submit testimony  
 13 to this Commission as holding himself out as an  
 14 independent expert when maybe he is not so  
 15 independent.

16 I think that there are many different  
 17 ways that this testimony could potentially lead to  
 18 relevant evidence and that's the issue that we are  
 19 citing today, could this potentially lead to relative  
 20 evidence. We are not ruling out admissibility here.  
 21 That's going to happen in the hearing and it will be  
 22 within your Honors' discretion to determine that the  
 23 testimony is not relevant at that time based upon the  
 24 facts and circumstances that are presented.

25 But we don't have to decide that today.

1 We are only talking about whether IGS should have  
2 access to a forecast that FirstEnergy's witness has  
3 submitted to this Commission as sworn testimony. I  
4 mean, that's a common practice letting somebody look  
5 at their prior sworn testimony. They give a list of  
6 the testimony they provided in other proceedings for  
7 that very reason.

8 EXAMINER PRICE: Mr. Olikier, how many  
9 forecasts have -- by Mr. Rose has FirstEnergy given  
10 you in discovery?

11 MR. OLIKER: The only forecasts that we  
12 have, I believe, your Honor, are the ICF forecasts  
13 which are not necessarily specific to Mr. Rose. And  
14 as far as I know, I do not believe there are any  
15 forecasts of capacity prices in the ICF quarterly so  
16 this is a completely new issue that has not been  
17 addressed in prior forecasts. Granted there has been  
18 a lot of discovery so I may have missed something but  
19 that's my honest representation.

20 EXAMINER PRICE: Mr. Kutik, care to  
21 respond to that?

22 MR. KUTIK: Yes, your Honor. As  
23 Ms. Kingery noted, the Bench has already ruled that  
24 Mr. Rose's forecasts for other clients should not be  
25 produced. And as you might recall when we argued

1       that motion, one of the concerns that we had and  
2       Mr. Rose had was that it would delve into other  
3       parties' trade secrets, proprietary information, and  
4       so forth. And that fully applies to Duke's testimony  
5       here and just look at it from the companies'  
6       standpoint. Assume that this information is provided  
7       to IGS. And certainly you would expect that we would  
8       want to talk to Mr. Rose about, okay, what went into  
9       the forecasts. How are these forecasts different  
10      from the forecasts that you provided for the company?

11               And it's likely that Mr. Rose is going to  
12      be -- is going to say I can't tell you because I'm  
13      bound contractually to Duke, whether Duke is a party,  
14      not a party, whether it's been sold or hasn't been  
15      sold. He is under a contractual obligation not to  
16      disclose that information.

17               So ultimately at the end of the day we  
18      are going to -- we are going to be potentially having  
19      a mini trial on whether this Duke forecast has any  
20      relevance to the forecasts he has done for the  
21      company and you are going to hamstring the companies'  
22      ability to be able to explain the differences.

23               MR. OLKER: Your Honor, if I may briefly  
24      respond? There is a provision in the contract that  
25      allows any court order to require Mr. Rose to

1 disclose that information to any party and it would  
 2 be within your discretion to require Mr. Rose to  
 3 under the appropriate level of confidentiality give  
 4 that information to -- pursuant to the very  
 5 restrictive confidentiality agreement we have in this  
 6 case to the appropriate attorneys, and then they can  
 7 prepare with Mr. Rose. It will probably be at the  
 8 best -- the best situated company to prepare for  
 9 Mr. Rose's testimony because they have retained him  
 10 so the notion that they are not going to know what's  
 11 in those forecasts is unlikely. And if Mr. Rose  
 12 still cannot tell them what's in those forecasts,  
 13 that itself sheds light into his credibility.

14 And just one more thing regarding the  
 15 prior ruling with respect to other parties that are  
 16 not before the Commission, your Honor. This is a  
 17 very different scenario. We are not talking about  
 18 unknown parties. We are talking about one isolated  
 19 company that regularly practices before the  
 20 Commission and about a forecast that they have  
 21 already filed with this Commission. This is a very  
 22 narrowly tailored subpoena where I don't have to open  
 23 a can of worms.

24 EXAMINER PRICE: I would like Ms. Kingery  
 25 to address the two issues you just raised. One is



1 what's the burden to Duke here where the information  
2 already resides in the Commission's docketing system,  
3 has already been admitted to a Commission proceeding,  
4 presumably has already been relied upon by the  
5 Commission in reaching a final now nonappealable  
6 order in that proceeding; and, two, why were the  
7 Commission's procedures for protective order  
8 sufficient in the Duke ESP II case but insufficient  
9 in this case to protect your interests?

10 MS. KINGERY: With regard to your first  
11 question, the burden to Duke Energy currently, the  
12 fact that this information is already in docketing  
13 and has already been submitted to the Commission and  
14 relied upon has nothing to do from our perspective  
15 with its confidentiality and the proprietary nature  
16 of some of the information that's in that forecast.  
17 For example --

18 EXAMINER PRICE: Take our chances without  
19 the microphone.

20 MS. KINGERY: Okay. For example,  
21 certainly to the extent that Mr. Rose's forecasts are  
22 based on assumptions that Duke Energy Ohio had  
23 anything to do with, whether we simply agreed with  
24 them or proposed them to Mr. Rose, whatever their  
25 nature was, the details of those assumptions would

1 reveal to an outside party our strategies, our  
2 thinking about the future.

3 EXAMINER PRICE: The future in the  
4 business you are no longer engaged in. You are a  
5 monopoly distribution only utility now.

6 MS. KINGERY: It may still -- I don't  
7 know what those assumptions were, and so I can't tell  
8 whether at this point that would reveal anything  
9 about our ongoing approach to anything else and  
10 frankly --

11 EXAMINER PRICE: You've got to tie it  
12 back to being a D company. I mean, you are not here  
13 representing Duke holding company. You are here  
14 representing Duke the utility and what I am just not  
15 understanding is that might have been relevant back  
16 when you owned GEN assets, but you don't any more you  
17 said up front.

18 And, second, the information is already  
19 four or five years old to begin with, so I am  
20 struggling how does this tie to your current, you  
21 know, situation. You raise certainly it's a  
22 competitive market. You're not a participant in the  
23 competitive market any more.

24 MS. KINGERY: We are not directly, that's  
25 correct. We do, of course, enter into transactions

1 in the competitive market to the extent that we are  
2 purchasing at wholesale through our auctions.

3 EXAMINER PRICE: But you're indifferent  
4 to those outcomes. You pass those -- you pass those  
5 prices 100 percent on to customers.

6 MS. KINGERY: Other than we care about  
7 our customers.

8 EXAMINER PRICE: We all care about your  
9 customers.

10 MS. KINGERY: Right. We are not really  
11 indifferent. We are indifferent financially, that's  
12 correct, yeah.

13 EXAMINER PRICE: Okay. So let's go back  
14 to -- and I would like Mr. Kutik to address both  
15 these issues too. Why are the Commission's existing  
16 procedures for protective orders insufficient in this  
17 case to protect all the issues that you have raised  
18 when they were sufficient in 2011?

19 MS. KINGERY: In 2011, we were  
20 voluntarily in that proceeding. And we designed a  
21 confidentiality agreement that we negotiated with the  
22 parties in our case and that included provisions that  
23 worked for us, that were sufficient for us in that  
24 case. Here we are not a party.

25 EXAMINER PRICE: You were a party at one

1 time.

2 MS. KINGERY: We were a party at one  
3 time.

4 EXAMINER PRICE: You withdrew solely to  
5 frustrate his discovery requests.

6 MS. KINGERY: That's one way to put it.  
7 We withdrew because we did not wish to share it, that  
8 information, in this case. So in this case I don't  
9 have the confidentiality agreement. I have no  
10 control over what those terms are. And at this point  
11 is Mr. Olier going to get a copy of our confidential  
12 information and then seek to use it in yet another  
13 case? We have no way of knowing.

14 EXAMINER PRICE: I am sure Mr. Olier  
15 will pledge never to use this information in another  
16 case if I ask him to.

17 MR. OLIER: Well, normally that would be  
18 an issue with us, your Honor. In this instance I  
19 understand this is a unique circumstance. We would  
20 agree to that restriction.

21 MS. KINGERY: Well, that doesn't entirely  
22 fix it for us because here we are in another case and  
23 the information that we released in that prior case  
24 was subject to a restriction wherein other parties  
25 could not use the information in a subsequent

1 proceeding.

2 EXAMINER PRICE: A restriction the  
3 Commission has never recognized as being applicable  
4 to Commission proceedings. In fact, in other  
5 proceedings we have allowed people to cross-examine  
6 your witnesses based -- based upon this con -- based  
7 upon proprietary information that was presented in  
8 another proceeding.

9 MS. KINGERY: I am only aware in one  
10 proceeding in which that's happened; and,  
11 nevertheless, we have a binding contract with these  
12 other parties that included that provision.

13 EXAMINER PRICE: Not with IGS as you  
14 pointed out.

15 MS. KINGERY: Right, because they chose  
16 not to enter into it.

17 EXAMINER PRICE: Mr. Kutik.

18 MR. KUTIK: Well, just to follow on the  
19 last thing that Ms. Kingery talked about, you know,  
20 there is a set of rules that they agreed to it --  
21 that they agreed to abide by. And one of the things  
22 I think the Commission has been very good about is  
23 making sure that when parties are participating in  
24 Commission proceedings or in proceedings related to  
25 Commission proceedings or auctions that parties know

1 ahead of time what the rules are going to be and that  
 2 those rules won't change. And what I am concerned  
 3 about is the notion that Duke could come in -- came  
 4 into this case or this other case, they had certainly  
 5 expectations as to how their data would be used and  
 6 wouldn't be used; and, now, you are changing the  
 7 rules of the game which makes it less likely that  
 8 people are going to want to provide confidential  
 9 information on a -- on a relatively easy basis by  
 10 signing protective agreements if those agreements can  
 11 later be changed because some other party who wasn't  
 12 even a party to that doesn't like it or wants to use  
 13 the information in some creative way. So that's the  
 14 first comment I have.

15 The second comment I have is that  
 16 regardless of what you may think as to whether the  
 17 information is confidential or not I am pretty sure I  
 18 know what Mr. Rose thinks and that is that it's  
 19 confidential and I have no confidence unless -- even  
 20 if you "order" him to do so that I will have any  
 21 ability to under -- to understand what information  
 22 underlies that if he believes it's confidential  
 23 because of his contract with Duke. And I am not sure  
 24 you can tell him how he has to abide by his contract  
 25 or not.

1 EXAMINER PRICE: Mr. Kutik, there was a  
2 time in a hearing over here where a marketer  
3 represented by Mr. Petricoff was testifying in a case  
4 that offers had been made to a given I believe it was  
5 actually an aggregation at the time.

6 MR. KUTIK: I remember the colloquy, your  
7 Honor.

8 EXAMINER PRICE: And you asked the  
9 marketer what prices did you offer, and Mr. Petricoff  
10 stood up and said absolutely not, that's  
11 confidential. And you stood up and said I need this  
12 information to cross-examine this witness. So why is  
13 that situation different from this situation?

14 MR. KUTIK: Sure. Because in that  
15 situation he was affirmatively offering testimony  
16 with respect to a fact. I'm entitled to understand  
17 what the fact is based upon, whether that's true or  
18 not true.

19 EXAMINER PRICE: Why is Mr. Olier not  
20 entitled to understand the basis for Mr. Rose's  
21 projections and whether or not a past one was flawed  
22 or not flawed?

23 MR. KUTIK: Well, he is certainly  
24 entitled to examine Mr. Rose and to understand  
25 everything that Mr. Rose is offering in this case,

1 and we have, other than the confidentiality  
2 requirements for ICF, produced -- have not gotten in  
3 anyone's way in understanding that information.

4 What Mr. Rose did, as we discussed, in  
5 the last hearing for another client in another  
6 proceeding under other assumptions is different in  
7 terms of what he did here. The question is is what  
8 he did here valid in terms of the assumptions he  
9 made, and people can attack those assumptions until  
10 they are blue in the face, but we are not  
11 affirmatively offering the Duke forecast and that's  
12 the difference.

13 EXAMINER PRICE: Okay.

14 MR. OLIKER: Your Honor, may I briefly?

15 EXAMINER PRICE: You can have the last  
16 word, Mr. Olikier. It's your subpoena.

17 MR. OLIKER: As everyone here knows,  
18 cross-examination is allowed on all matters related  
19 to credibility. This is Mr. Rose's prior testimony  
20 which sheds light on his credibility and the  
21 methodologies he uses in providing testimony. It  
22 should be allowed to have full and fair discovery to  
23 access his testimony as you are allowed in all other  
24 circumstances.

25 The only wrinkle here is it happens to be



1       proprietary. We have an agreement to ensure that  
2       that information is not transmitted into the wrong  
3       people. We take that very seriously. I think  
4       everybody in this room takes that very seriously.

5               EXAMINER PRICE: You don't have an  
6       agreement today. You don't have an agreement with  
7       Duke at this point.

8               MR. OLIKER: We do not, your Honor, but  
9       because we have already litigated that issue in this  
10      proceeding I think that could be easily resolved at a  
11      level of confidentiality and protection that the  
12      company should be acceptable because it's frankly  
13      more restrictive than the agreement in their last ESP  
14      case which they were able to live with, so I think  
15      they could live with the agreement we are using now.

16              EXAMINER PRICE: Ms. Kingery.

17              MS. KINGERY: I would just note we have  
18      not litigated that confidentiality agreement.  
19      Parties to the case have but we have not.

20              EXAMINER PRICE: I think at the time we  
21      discussed this you were a party.

22              Okay. I think we've heard plenty. I  
23      think we'll probably want to caucus among the  
24      examiners assigned to this case before we issue a  
25      ruling.

1           So we will move on to the next topic  
2       which would be FES's motion to quash the subpoena  
3       filed by Sierra Club. FirstEnergy Solutions.

4           MR. KNIPE: Thank you, your Honor. And  
5       mindful of the suggestion to be brief, I realize we  
6       filed an extensive motion with copious details and  
7       tables and appendices, but I would like to hit a few  
8       important points to start, and then if your Honor  
9       would like me to go topic by topic, I would be  
10      pleased to do so.

11           There are two grounds for the motion to  
12      quash, undue burden and beyond the scope of  
13      discovery. With respect to undue burden, the  
14      subpoena served by Sierra Club is duplicative of a  
15      large amount of discovery questions and answers in  
16      deposition testimony previously received by Sierra  
17      Club in this proceeding.

18           From the very outset of the case from the  
19      companies' initial filing to hundreds, if not  
20      thousands of discovery responses, to 30 hours of  
21      deposition testimony by two FES officers and an  
22      officer of FirstEnergy Nuclear Operating Company that  
23      supports the FES plants, there were questions on  
24      these same topics as well as the opportunity to ask  
25      even more detailed questions and then FES's response

1 to the first Sierra Club's subpoena which the  
2 examiners heard argument last fall additional  
3 documents responsive to certain of these topics,  
4 certainly to the filing of pleadings and closing of  
5 the -- I think the reply to the memoranda contra FES  
6 filed on May 1 FES has indicated in its reply served  
7 even additional documents on Sierra Club with  
8 financial information with the generating plants.

9 Also the companies have filed  
10 supplemental testimony relating to a couple of these  
11 issues; and two of those witnesses, one of whom is an  
12 FES officer, have been noticed for depositions by  
13 Sierra Club at a date to be determined.

14 And then most recently the companies  
15 provided additional supplemental answers to discovery  
16 addressing certain of these topics, so suffice it to  
17 say these 10 topics have been addressed extensively.  
18 As an example, Sierra Club has received no fewer than  
19 five sets of projected financial data for the plants.  
20 Now, at some point enough is enough and it becomes  
21 burdensome to continue answering the same questions  
22 or receiving -- or being asked to produce a witness  
23 on the same questions.

24 Now, Sierra Club's memo contra does not  
25 respond to all the detail in FES's motion. Rather it

1 categorically dismisses it saying that was the  
2 companies'; this is FES. You can't take credit for  
3 the companies' answers, but the fact is, your Honors,  
4 that the companies don't own the generating plants  
5 and that information that was produced could not have  
6 been produced without FES's full cooperation in  
7 assembling it and producing it. FES has been  
8 involved extensively in making sure that the  
9 requested information is already in the hands of the  
10 Sierra Club.

11 Beyond that, as we make clear in our  
12 reply, other than what's already been produced there  
13 are no additional responsive documents and to the  
14 extent there's any further information as this case I  
15 don't want to say ages but continues --

16 EXAMINER PRICE: It might be a proper  
17 term.

18 MR. KNIPE: Every month projected data  
19 becomes actual data. There's no obligation on FES to  
20 create new documents each time and we oppose a  
21 precedent whereby each extension of the case is  
22 accompanied by another subpoena to FES and another  
23 request to do the same questions with maybe a couple  
24 of months added at the front end and back end of the  
25 time of the 15-year time period. So that's the

1       undue -- the undue burden portion of it.

2               That raises a question of whether Sierra  
3 Club has a substantial need for the documents and no  
4 substantial need has been shown. They already have  
5 an extensive amount of information. Their witnesses  
6 were able to put in supplemental testimony that while  
7 different parties in the room have different opinions  
8 about how persuasive it is, it is complete and it  
9 nowhere complained that the witnesses were unable to  
10 opine because they didn't have information from FES.  
11 Other than -- for that reason on the grounds of undue  
12 burden alone we would ask that the motion to quash be  
13 granted.

14               We've also raised a second ground that  
15 it's beyond the scope of discovery permitted by your  
16 Honors' March 23 entry that in paragraph 5B limited  
17 supplemental discovery to the AEP Ohio -- the four  
18 factors set forth in the order. Many of these topics  
19 1 through 10 have nothing to do with that. They go  
20 more broadly to the question of is -- are the amount  
21 of credits and charges under the rider good for  
22 customers? Is this a good deal for customers? That  
23 was the broader issue on which the parties took  
24 discovery from August through December. And it  
25 doesn't relate to these narrow subset of issues that

1 we now have through the order which presumably tried  
2 to create some organization and maintain some control  
3 of the scope of discovery in the proceeding.

4 So for that reason too we would ask that  
5 it -- that the motion to quash be granted and that  
6 the -- and that FES not be required to produce a  
7 witness. And frankly with respect to documents there  
8 are no further responsive documents for the subpoena.

9 EXAMINER PRICE: Thank you.

10 MR. KNIPE: Thank you, your Honor.

11 EXAMINER PRICE: Mr. Fisk, undue burden?

12 MR. FISK: Thank you, your Honor. So I  
13 guess to put this in context the subpoena that we  
14 filed here was in direct response to the AEP order  
15 and the factors identified there, especially the  
16 identification of financial need for the generating  
17 plant being a core issue that the Commission is  
18 interested in.

19 And also given that in deposition  
20 testimony of company witnesses it became clear that  
21 there were additional documents that FES had that had  
22 not been produced that were responsive, specifically  
23 various projections of revenues and costs for the  
24 plants.

25 EXAMINER PRICE: Can you -- without

1 violating -- can you on the public record identify  
2 without violating any confidentiality provisions yet,  
3 and if we have to go under seal, we will, but can you  
4 identify which witnesses indicated that there were  
5 additional documents that -- and projections that had  
6 not been produced?

7 MR. FISK: Sure. Yes, I believe I can.  
8 And please let me know if you think I'm infringing on  
9 any confidentiality. I believe Mr. Moul's testimony  
10 regarding profit and loss statements that he had  
11 reviewed in between January and June of 2014 when FES  
12 was developing the proposed transaction and then  
13 Mr. Lisowski's testimony that in the normal course of  
14 business FES regularly updates and reforecasts its  
15 plants.

16 So those are the reasons we submitted the  
17 subpoena, and we got a lot of responses, you know, in  
18 the motion to quash and in the reply saying there  
19 were no additional responsive documents yet there was  
20 also the production of two more projections which  
21 were, in part, the projections we were looking for  
22 and that we believed existed and lo and behold they  
23 do exist and they were finally produced. After the  
24 reply brief attacking us for filing a subpoena  
25 seeking documents that didn't exist, we actually did

1 get two additional documents.

2 So on the projections it is true we now  
3 have five sets of financial projections, each of  
4 which are different from the one another, both the  
5 internal FES ones and the ones -- the FES ones  
6 compared to the companies'. What we don't have and  
7 we believe is still relevant and important to have is  
8 the forecasts that went into those projections, so we  
9 have two new projections from the companies that  
10 presumably are based on forecasts of things like coal  
11 price, market energy price, natural gas prices.

12 That is what we requested in subpoena  
13 topic 4. We don't have those from FES, so we don't  
14 know what the basis for the additional projections of  
15 revenues and costs they finally reluctantly provided  
16 to us are.

17 We believe those forecasts of natural  
18 gas, market energy price, coal prices, and capacity  
19 prices go directly to the question of whether and  
20 what the financial need for the generating plants are  
21 which is one of the factors identified in the AEP  
22 Ohio order. So we believe that we still are entitled  
23 to getting that information from FES.

24 On the point that FES is taking credit  
25 for documents that the companies provided, we found



1 out in the depositions that the projections -- the  
2 forecasts of things like market energy prices and  
3 capacity prices done by FES are different than the  
4 ones that the companies did. FES has its own  
5 internal forecasts as opposed to what the companies  
6 did which was brought in Mr. Rose. So that is why we  
7 are seeking that information.

8 To briefly address two other areas, topic  
9 10 which is more focused on the environmental  
10 compliance which again is a -- one of the factors  
11 directly identified in the AEP Ohio order, FES's  
12 response appears to be essentially the companies have  
13 given you lots of responses to questions about that.  
14 The reason why there were lots of questions about  
15 that to the companies is because they were extremely  
16 evasive in their answers and often punted the issue  
17 back to FES saying we don't have that information.  
18 Ask FES. In the deposition of Mr. Harden, he made  
19 clear most of his opinions about environmental  
20 compliance were based on a discussion with somebody  
21 at FirstEnergy Generation.

22 What we don't have is any documents from  
23 FES or the companies laying out what do they think  
24 are the costs facing the Sammis plant from pending  
25 and proposed environmental regulations. And I find

1     it hard to believe that a major energy company faced  
2     with a number of regulations from the Clean Power  
3     Plan to CSAPR to various MATS requirements has no  
4     internal evaluation of what costs those -- those  
5     regulations could -- could impose on the Sammis  
6     plant.

7             The third area I would focus on briefly  
8     is our topic 7 which is any FES communications, et  
9     cetera, regarding whether any of the plants might  
10    retire if the proposed transaction were rejected.  
11    You know, FES has tried to have it both ways here.  
12    They are saying -- they are holding the threats of  
13    retirement of these plants over our heads to say we  
14    have to have this proposed transaction in order to  
15    keep these plants going yet they haven't provided any  
16    analysis showing that they -- that they actually  
17    would retire the plants or when they would retire  
18    plants. At what point would it become, you know, so  
19    burdensome for them to keep the plants going to  
20    retire instead?

21            When we asked them in deposition of  
22    company witnesses, they simply said, well, you know,  
23    the plants are at risk, but we don't have anything  
24    beyond that, just saying the plants are at risk. FES  
25    is proposing here under their projections to give up

1     \$2 billion of revenue over the next 15 years on  
2     the -- on the theory that because the plants may be  
3     struggling in the short term they need to -- you  
4     know, they wouldn't have to retire those plants. I  
5     find it very hard to believe that a major energy  
6     company would willingly give up \$2 billion over 15  
7     years of revenue without some sort of an analysis  
8     showing that these plants actually are at risk of  
9     retiring if they don't get the transaction.

10                 So those are the main topics of what our  
11     subpoena is focused on, and we believe all are  
12     clearly relevant and within the limits of the AEP  
13     Ohio order and are information that has not been  
14     provided by the companies and should be provided by  
15     FES.

16                 EXAMINER PRICE: Response?

17                 MR. KNIPE: Thank you, your Honor. I  
18     might start toward the end. There was a lot there  
19     but I can't get into every mischaracterization of the  
20     case or what witnesses said or didn't say. I'll try  
21     to address a few points that stood out.

22                 I mean, there seems to be an overarching  
23     disparity between some of the things the Sierra Club  
24     says they are asking for and what they asked for in  
25     their subpoena. I would say also the suggestion that

1 FES has documents that it has been denying the  
2 existence of is patently false. I think our reply  
3 said those documents would be produced, and they were  
4 provided. And I am here today to tell you that those  
5 are all the responsive documents. I don't know what  
6 more we can do.

7 These arguments also neglect that the  
8 companies filed supplemental testimony including the  
9 testimony of Donald Moul. Sierra Club has again  
10 noticed his deposition. Mr. Moul talks about the  
11 financial viability of the plants. He will have an  
12 opportunity to talk with him. He is an FES officer.  
13 He handled all their questions the last time. They  
14 may not like all the answers. They may not have  
15 liked that he was able to fully answer questions  
16 about FES's commitment to the full 15 years under the  
17 term sheet and inability to terminate the agreement  
18 early. But he had the answers; he will again.

19 Similarly Mr. Raymond Evans provided  
20 testimony regarding the plants' environmental  
21 compliance. I did not hear that mentioned in Sierra  
22 Club's counterarguments.

23 EXAMINER PRICE: How could they cross him  
24 in the deposition if they don't have the underlying  
25 documents? I get that they have an opportunity to

1 talk to him, but if assuming for the sake of argument  
2 there exists documents that are responsive to the  
3 request, I'm sure that every litigant would like to  
4 have those documents before the deposition so they  
5 can ask -- review them and ask questions about those  
6 documents.

7 MR. KNIPE: Certainly if there were  
8 documents that were responsive to the topic in their  
9 request, that would be a different matter but there  
10 are not.

11 EXAMINER PRICE: There are no projections  
12 regarding the environmental compliance for Sammis?

13 MR. KNIPE: The witnesses explained how  
14 the budget -- in their prior depositions how the  
15 budgeting process was done and how the numbers were  
16 calculated, and Mr. Evans will be able to explain  
17 from the environmental group's perspective what their  
18 input is in the process, but the document that they  
19 are looking for, this is what we budget for this  
20 particular plant is going to pay to comply with this  
21 particular regulation, is not there. It's not --  
22 they are not using the Sierra Club uniform model of  
23 business records to maintain their books.

24 And beyond that I'm not sure what to tell  
25 them, but they have noticed the deposition. They

1 have supplemental testimony directly addressing the  
2 AEP Ohio order factor.

3 EXAMINER PRICE: Can you address this,  
4 his point about they would like the forecasts  
5 underlying the projections that you have already  
6 given them?

7 MR. KNIPE: They have two sets of  
8 forecasts, one that the company has provided through  
9 their expert. That's one the company has elected to  
10 use. FES produced its own forecast from August,  
11 2014. It is not surprising or troubling that their  
12 forecast differs from the companies' since they use  
13 different inputs provided by different sources.

14 They deposed an FES officer at length  
15 about those forecasts and how they were developed.  
16 This was provided in response to their first subpoena  
17 last fall in an effort to resolve some of the issues.  
18 They also received the very inputs and assumptions  
19 that go into the model through which the forecasted  
20 data was run, so they have had full access to how  
21 that's done. It has not been updated but that is the  
22 data that they -- that they use.

23 So that's -- that's my response. They  
24 have possession of this. They have more than they  
25 care to admit. They have a good deal of information

1 that's been provided over the -- over the months this  
2 case has gone on.

3 EXAMINER PRICE: Thank you.

4 MR. KNIPE: Thank you, your Honor.

5 EXAMINER PRICE: Final word, Mr. Fisk?

6 MR. FISK: Just briefly we have the  
7 market price and other forecasts that went into the  
8 projections that were produced last fall, that is --  
9 that is correct. However, the companies in response  
10 to our subpoena have -- I'm sorry, FES in response to  
11 our subpoena has produced two additional projections  
12 of revenues and costs from early 2014 and early 2015  
13 that we don't have any of the underlying forecasts  
14 for and that is -- that is what we are looking for in  
15 topic 4.

16 As for environmental compliance, you  
17 know, we have testimony from company witnesses saying  
18 that everything is fine, that, you know, they are  
19 going to comply with the environmental laws. What we  
20 don't have is any of the underlying documents that  
21 must have gone into some of these analyses. For  
22 example, we have, you know, the carbon price of FES,  
23 no workpapers or discussion of how they come up with  
24 their carbon price, where that comes from, what's the  
25 bases; you know, no discussion of what their plan for

1 complying with the Clean Power Plan which, you know,  
2 obviously is very largely in the news and being  
3 actively debated by the utility industry as a whole.  
4 You know, once again, I find it hard to believe there  
5 isn't some document at FES discussing what the Clean  
6 Power Plan means for their plants.

7 EXAMINER PRICE: Okay. Thank you. We  
8 will again caucus on this and give you a ruling.

9 Let's talk about the motion to compel  
10 filed by Sierra Club against the companies.

11 Mr. Fisk, you're up.

12 MR. FISK: Thank you, your Honor. So on  
13 the -- on our motion to compel the backdrop here, as  
14 your Honors are certainly aware, is that in the March  
15 23 entry you authorized additional discovery  
16 regarding the factors that had been identified in AEP  
17 Ohio's proceeding as relevant to evaluating these  
18 types of proposed transactions.

19 In response Sierra Club submitted  
20 discovery requests to the companies seeking  
21 information relevant to those AEP Ohio factors, and  
22 the companies essentially eliminated the identified  
23 discovery period by failing to provide any  
24 substantive responses to any of the requests with a  
25 couple of very small exceptions.



1           Going through kind of the categories of  
2 requests that we've made, one set of requests sought  
3 any updated projections of revenues and costs or  
4 updated forecasts that the companies might have for  
5 these -- for Sammis and Davis-Besse, the OVEC plants  
6 which go directly to financial need for these plants.

7           EXAMINER PRICE: Every time you say  
8 updated in response to the March 23 entry, I cringe  
9 because I think the intent was to examine areas you  
10 hadn't already examined, not to simply supplement or  
11 update the testimony. So I get what you are trying  
12 to tie back to, well, you said financial in the  
13 entry; but, you know, I think the intent in the entry  
14 was to give you an opportunity to do discovery on  
15 areas you previously had not done, not simply file a  
16 whole new set of discovery.

17           MR. FISK: Okay. I would say that if the  
18 companies had additional projections that they had  
19 done since their filing, those are plainly relevant  
20 to the financial needs of these plants. If the, you  
21 know, finances had significantly changed one way or  
22 the other for these plants, that would go to the  
23 question of whether there is a financial need as  
24 identified in the AEP Ohio order and that's what we  
25 were seeking is were there new projections.

1                   And we are willing on the projections, as  
2                   I noted earlier off the record, if the company is --  
3                   the companies are willing to state on the record that  
4                   they have no new projections for these plants since  
5                   the testimony that they filed, we are willing on  
6                   those requests to say, fine, there's nothing to  
7                   pursue there. You know, they did not provide updated  
8                   projections in their supplemental testimony; so, you  
9                   know, perhaps they don't have that and that could  
10                  address those issues.

11                  A couple of other areas that we focused  
12                  on in our -- in our discovery requests were on the  
13                  reliability and transmission issues. For example,  
14                  Interrogatories 159 and 185 to 189 the companies  
15                  responded that these were -- these areas were beyond  
16                  the scope of the March 23 entry and that they would  
17                  address them in supplemental testimony which, you  
18                  know, if they were beyond the scope of the March 23  
19                  entry, then why are they addressing them in  
20                  supplemental testimony under the March 23 entry?

21                  The reality is they did. In the  
22                  supplemental testimony they presented significant new  
23                  testimony about purported transmission-related costs  
24                  if these plants were to retire and about the  
25                  purported supply diversity and reliability values of

1 these plants. We believe that puts these issues  
2 directly at stake in this case and that as a result,  
3 Interrogatory 185 to 189 and 159 should be responded  
4 to.

5 We also asked for any new assumptions  
6 that Mr. Rose might -- might be using in his work.  
7 The one I would highlight is Request for Production  
8 142 which sought ICF's strategic energy outlooks for  
9 the fourth quarter of 2014 and the first quarter of  
10 2015 which, you know, of course, is additional  
11 information that goes to the financial need for these  
12 plants. The company refused to produce those. We  
13 believe they clearly fall within the March 23 entry  
14 and should be produced.

15 And then finally we asked for updated --  
16 not updated but the actual performance data for the  
17 plants for the last six months of 2014 and the first  
18 three months of 2015 and that information was also  
19 not provided. We think it goes to the question of  
20 what the financial need for these plants are and  
21 should be produced.

22 EXAMINER PRICE: FirstEnergy.

23 MR. KUTIK: Thank you, your Honor.

24 When -- in any discussion of discovery abuse, look at  
25 a definition, legal commentary, discovery, overuse is

1 included. And it really speaks to the approach that  
2 counsel takes in crafting discovery. You can craft  
3 discovery to say, you know, there are certain  
4 arguments that we want to pursue, certain issues we  
5 want to pursue, and you craft discovery tailored to  
6 those, or you could just start coming up with a  
7 catalog of everything you could possibly think of to  
8 ask. That's discovery abuse. That's discovery  
9 overuse.

10 And as you know, many courts, your Honor,  
11 have rules that limit the number of interrogatories,  
12 data requests, and so forth. And, of course, the  
13 Commission doesn't have a rule but if there was ever  
14 a case which was the poster child for having such a  
15 rule, it's this case. The companies have responded  
16 to over 3,200 data requests in this case. I don't --  
17 you know, I have been practicing before the  
18 Commission for 35 years. I can't recall a case that  
19 comes even close to this.

20 And so it isn't as if the parties have  
21 not had an ample opportunity to do whatever they  
22 thought in their wildest imaginations they could want  
23 to do to develop their arguments with respect to the  
24 companies' proposal. And so the attitude that I am  
25 just going to ask whatever I can think of that might

1 be in any way relevant or any way remotely I can make  
2 an argument that it's somehow admissible or somehow  
3 would lead to the admissibility -- the discovery of  
4 admissible evidence, that's kind of the attitude we  
5 are faced with here.

6 And indeed, your Honor, there was a  
7 discovery cutoff, as you know, that was extended once  
8 for the supplemental stipulation; and then, as you  
9 know, you extended it again on a limited basis with  
10 respect to the AEP order and the reason why, your  
11 Honor, it's very apparent why you asked for  
12 supplemental testimony, why you asked or allowed  
13 discovery to say, listen, the Commission came out  
14 with this AEP order with a framework to analyze in  
15 that case their -- their PPA rider and then by  
16 analogy that analysis might apply in our case to our  
17 rider RRS.

18 The parties obviously haven't had the  
19 opportunity to know of that framework and certainly  
20 didn't have the opportunity to present evidence with  
21 respect to that framework, and you also allowed the  
22 parties an opportunity to seek additional discovery  
23 with respect to that framework but additional  
24 discovery about stuff they hadn't sought discovery on  
25 before. And in this case with respect to this motion

1       there is about 50 or so discovery requests. Almost  
2       all of them have been responded to previously by  
3       information. And Mr. Fisk doesn't deny that. They  
4       already have the information.

5               Mr. Fisk doesn't deny that Sierra Club  
6       was able to file their testimony, and indeed nothing  
7       in the testimony complains about the fact that they  
8       didn't get whatever they were seeking in discovery;  
9       and, in fact, their witness said, gee, you know, we  
10      asked for additional updates. They don't have  
11      additional updates. Their data is old. It's still  
12      old. It's still bad and so they are trying to use  
13      that against us. More power to them. Let them do  
14      that if that's what they want to do.

15             The fact of the matter is, your Honor, we  
16      validly, appropriately made a work product objection  
17      at the time we were answering those questions.  
18      Any -- they had whatever we had and anything that was  
19      being updated, anything that was -- we were going to  
20      produce in addition was -- was information that we  
21      were contemplating that was going to be part of our  
22      supplemental testimony, information that -- and  
23      documents that are generated at the request of  
24      counsel in anticipation of litigation is the very  
25      definition of work product. They admit that and

1 this -- and this Commission has for years used that  
2 as the definition; and, in fact, when we asked them  
3 discovery, they used the work product objection as we  
4 are not -- we are not entitled, we are not required  
5 to give you any information about what our testimony  
6 might be until we file our testimony. If it's fair  
7 for them, it's fair for us, and it's appropriate that  
8 that's going to happen and that's what we did.

9 And so there is nothing that we have now  
10 that we are withholding on the basis of work product  
11 or attorney-client privilege. We have supplemented  
12 probably about eight of our responses either by  
13 virtue of the supplemental testimony or by virtue of  
14 information that we provided.

15 Now, as they did in their opposition or  
16 in their moving papers, they do now say, well, I am  
17 just generally going to talk about what our discovery  
18 is about, but we don't have that luxury. We have to  
19 look at every discovery request just like you in  
20 ruling on these have to look at every discovery  
21 request.

22 So I'm -- I'm not going to read every  
23 discovery request, but I want to give you kind of a  
24 breakdown in terms of how we see what they've asked  
25 for. Almost everything that they have asked for, I

1 think I would take four or five aside, except for  
 2 those four or five, is the nature of an update or a  
 3 supplement. They have specifically asked for  
 4 supplements for nine requests, and if I could list  
 5 those requests for the record, your Honor, those are  
 6 Set 10, Interrogatory 176, 179, 180, 181, 210, 211,  
 7 and Request for Production 43. Those specifically  
 8 rely on or cite Ohio Administrative Code Rule  
 9 4901-1-16(D), and as we noted in our brief, having  
 10 the ability -- making a request for supplementation  
 11 requires that they have the ability to request a  
 12 supplement. Once there is a discovery cutoff, they  
 13 don't have the ability to supplement.

14 Otherwise, if their reading of the rule  
 15 is correct, they could ask for supplemental any time,  
 16 then we could ostensibly be subject to 50 different  
 17 requests for supplementation. We go around the  
 18 table, every two weeks another party could ask us to  
 19 supplement. That's not how the rule works. There is  
 20 a discovery cutoff. There is a discovery cutoff so  
 21 they don't have the right to ask us for  
 22 supplementation in those improper requests. 22 of  
 23 the requests ask for updated information with respect  
 24 to Mr. Rose. Those are requests -- or Interrogatory,  
 25 Set 10, 189 through 209 and Request for Production



1 142. Those are -- they go through every assumption  
2 or every category of assumption that Mr. Rose made  
3 and say give us an update with respect to those. We  
4 don't have those, and we don't believe we are  
5 required to ask Mr. Rose if he has those either. We  
6 are standing on the testimony that's been submitted.  
7 They can cross-examine Mr. Rose about them. They can  
8 cross-examine Mr. Rose about the change in  
9 circumstances and why he thinks that his -- his  
10 testimony or his projections are still valid. We  
11 don't have to update because they want us to update.

12 Similarly there are requests for updated  
13 information with respect to forecasts and inputs.  
14 Those are Set 9, Interrogatory 163, 164; Set 9,  
15 Request for Production 132, 133; and Set 10,  
16 Interrogatory 176; and Set 10, Request for Production  
17 141.

18 They've also asked seven -- seven  
19 requests requesting updated information about various  
20 aspects of the operation of the plant and those would  
21 be requests -- Set 9, Request for Production 134  
22 through 136 and Interrogatory Set 10, 177 as well as  
23 Interrogatories 185 -- excuse me, 177, 182, and 183.

24 They also asked for an updated profit and  
25 loss statement. That was Sierra Club Set 9, Request

1 for Production 128 and I believe, your Honor, that  
2 was produced in response to FES's subpoena. That was  
3 one of a few documents that were produced.

4 So essentially then we're left with,  
5 let's see, six -- six or seven interrogatories or  
6 requests. One of those requests that was Set 9,  
7 Interrogatory 159 deals with transmission update  
8 information. Mr. Fisk said, well, we objected  
9 because it was beyond the scope yet we provided the  
10 information. Well, we objected beyond the scope  
11 because among the things it asks for is it asks for  
12 information about whether reliability must-run  
13 payments would reduce some issues. Well, that's --  
14 we believe that was beyond the scope and that was the  
15 point of our scope objection.

16 With respect to cost information,  
17 Mr. Phillips provided updated information with  
18 respect to cost of transmission upgrades, and we also  
19 provided workpapers on a confidential basis. The  
20 parties have that.

21 So what we are left with now would be six  
22 more requests, four of those at Set 10, 185 to 188,  
23 and these relate to Mr. Moul's testimony about the  
24 winter of '13-'14 and what happened during the winter  
25 in terms of problems on the gas delivery system at

1 PJM. And so these requests ask for information about  
2 what happened during the '14-'15 year on the gas  
3 system. Well, certainly the companies don't have any  
4 information with respect to the gas system and with  
5 respect to any information Mr. Moul has. That's  
6 information that PJM -- from PJM that certainly is  
7 available to Sierra Club. So we don't -- we don't  
8 believe that we have to provide that information  
9 because whatever we have they can look in the Sierra  
10 Club operating reports in the -- in the Market  
11 Monitor reports. That's public information that we  
12 don't have to provide them or get for them. They can  
13 get them themselves.

14 So then, your Honor, we are left with two  
15 requests and these are Request for Production 139 and  
16 140 and those ask for anything that we relied upon or  
17 reviewed in answering interrogatories so that's  
18 basically covered by the remarks that I have had.

19 The bottom line here is, your Honor, they  
20 used discovery, or this round of discovery,  
21 improperly as a vehicle to ask anything they wanted  
22 to think about or anything they could think about to  
23 up -- and specifically to update information that  
24 they already had. They have voluminous information  
25 on every detail with respect to this case and they

1 were able to present testimony and I am sure that  
2 they will be able to adequately represent their  
3 client in cross-examining the companies' witnesses.

4 EXAMINER PRICE: Mr. Fisk, there's a lot  
5 there. I have just a couple of clarifying questions.

6 MR. FISK: Sure.

7 EXAMINER PRICE: Do you dispute the  
8 company has answered 3,200 different data requests?

9 MR. FISK: I believe through -- in  
10 response to requests submitted by all the parties  
11 here there have been some sort of responses to those  
12 requests, yes. Many of them were purely objections.

13 EXAMINER PRICE: So you are saying some  
14 number of those 3,200 are not actually responsive.

15 MR. FISK: Right. And one of the reasons  
16 why there were so many questions because the answers  
17 have been so evasive. We have had to do multiple  
18 questions on things, for example, on environmental  
19 compliance because, you know, you get objections  
20 where they say that the word compliance is vague or  
21 the word modified is vague and unclear. So, you  
22 know, part of why there has been so many requests is  
23 the companies have been very uncooperative in  
24 actually providing information.

25 EXAMINER PRICE: How many sets have you

1 propounded?

2 MR. KUTIK: 10.

3 MR. FISK: 10.

4 EXAMINER PRICE: How many individual  
5 requests between those 10 sets?

6 MR. FISK: I have not counted them.

7 EXAMINER PRICE: Guess. Give me an  
8 estimate.

9 MR. FISK: I think we are up to 200.

10 EXAMINER PRICE: Are we at a thousand?

11 MR. FISK: I think we are up to 200  
12 interrogatories, 100 something requests for  
13 documents.

14 MR. KUTIK: Not including subparts.

15 MR. FISK: In a case that involves a  
16 15-year contract that will cost customers --

17 EXAMINER PRICE: \$2 billion.

18 MR. FISK: Well, no.

19 EXAMINER PRICE: It is \$2 billion at  
20 issue.

21 MR. FISK: 14 billion over 15 years. It  
22 is a significant proceeding and that is part of why  
23 there is a significant amount of discovery in this  
24 proceeding.

25 EXAMINER PRICE: I've asked you my

1 questions. Why don't you generally respond to  
2 Mr. Kutik.

3 MR. FISK: Certainly. Thank you. With  
4 regard to supplementation our understanding of the  
5 rules is that supplementation doesn't -- a duty to  
6 supplement doesn't end simply because there is a  
7 discovery cutoff date. If there is supplement --  
8 request for supplementation up to the date of the  
9 hearing, there needs to be -- that information needs  
10 to be supplemented. So we believe they were fully  
11 within the rules there, and regardless the  
12 supplementation requests we filed were with regard to  
13 requests that were specifically relevant to the AEP  
14 Ohio factors.

15 So the March 23 entry we opened discovery  
16 on those factors and issues related to those factors,  
17 and our supplementation requests were relevant to  
18 those. It's not as Mr. Kutik is trying to portray  
19 that we are simply asking for supplementation of  
20 everything. We picked a narrow set of requests to  
21 ask for supplementation on.

22 On Interrogatory 159, the RMR payments,  
23 you know, a core portion of the companies'  
24 supplemental testimony is this newly discovered \$1.1  
25 billion in alleged transmission costs if these plants

1 hypothetically were to retire. Clearly the question  
2 of whether RMR payments could address some of these  
3 reliability issues and how those costs might be  
4 distributed are relevant and fall directly within  
5 what the companies' own supplemental testimony under  
6 the March 23 order was focused on.

7           On Interrogatories 185 to 188 some --  
8 some of the questions there asked for information.  
9 Some asked also for whether -- whether any of  
10 Mr. Moul's testimony regarding the polar vortex in  
11 2014 had changed given the performance of the system  
12 in 2015. Those questions go directly to the  
13 reliability issues, that the company claims these  
14 plants are needed for reliability in situations such  
15 as the polar vortex. And the question of whether the  
16 2015 winter performance was different and affects  
17 those opinions we think is -- clearly falls within  
18 the March 23 entry.

19           Generally, you know, I think our response  
20 is simply that we tried to craft a set of discovery  
21 focused on the AEP Ohio order factors to ensure that  
22 the Commission and the parties would have the full  
23 amount of information needed to evaluate this  
24 proposed transaction based on the information today  
25 rather than simply only information that had been

provided back in the fall.

EXAMINER PRICE: Thank you.

MR. KUTIK: Your Honor, may I respond briefly?

MS. BOJKO: Your Honor.

EXAMINER PRICE: Ms. Bojko and then you will have an opportunity to respond to Ms. Bojko too.

MS. BOJKO: Your Honor, I feel the need to respond to either a misunderstanding or misrepresentation of Administrative Code 4901-1-16(D). The parties, the companies, have an obligation, a continual obligation, to supplement discovery responses in certain circumstances. And (D)(3) requires them to supplement a response if the response was unknown or nonexistent and if subsequently that information becomes known and existent. That purely -- that clearly falls under some of these questions and issues that we are discussing today and it actually raises an issue of whether my discovery that I issued has been properly and completely responded to and supplemented.

Also (D)(5) of that same rule requires requests to supplement, as Sierra -- Mr. Fisk has pointed out, that it requires a request to supplement as long as the request is requested prior to the



1 hearing. It says commencement of the hearing in the  
2 rule. It doesn't say anything about a discovery  
3 cutoff date, so if you request it to be supplemented,  
4 it is required to be supplemented. So those two  
5 fundamental rules I think were either misunderstood  
6 or misrepresented to you, and I wanted to clarify  
7 that for the record. Thank you.

8 EXAMINER PRICE: Mr. Kutik.

9 MR. KUTIK: Your Honor, there is a  
10 remarkable lack of specificity in the arguments that  
11 Sierra Club has made to you and there is a reason  
12 why, because they really don't want to stand behind  
13 the specific requests that they've made. They wave  
14 around this notion, well, generally our requests  
15 relate to this or, gee, the company has been evasive  
16 and that's why we've done this. Well, we have been  
17 evasive. Where is the motion to compel that we have  
18 been evasive? What is a specific --

19 EXAMINER PRICE: Don't ask for more  
20 motions, Mr. Kutik. We have enough.

21 I understand what you are saying.

22 MR. KUTIK: The proof is in the conduct.  
23 The proof is in the conduct. And with respect to our  
24 duty to supplement, you know, I'm not going to repeat  
25 what I have said before, but the fact of the matter

1 is there is always in every case before the  
2 Commission except perhaps maybe a complaint case but  
3 every case before the Commission always involves or  
4 mostly involves time periods in the future. So we're  
5 never in trial or hearing with absolutely totally  
6 up-to-date information as of the time the witness is  
7 on the stand. Sometimes that happens.

8 But the vast majority of the time it  
9 isn't and there is normally expected to be some lag  
10 between the information that was provided in  
11 discovery and the information that parties have when  
12 they prepare their testimony. And certainly they are  
13 not entitled to ask every -- whenever it suits them,  
14 oh, gee, now, it's supplemental discovery time. Now,  
15 under (D) -- (D)(5) you have to provide discovery.  
16 That's not how the rule works. Discovery cutoffs  
17 mean something.

18 And with respect to the representation I  
19 think Mr. Fisk said that they weren't asking for  
20 updates, well, you know, I just urge you to read  
21 their discovery, and they are asking for updates.  
22 Either they are specifically talking in reference to  
23 the Rule 4901-1-16(D), or they are asking for  
24 information in '15 or whatever but information that  
25 they've already had. And he hasn't denied that he

1 had all this information with respect to -- except  
2 with respect to the transmission information and the  
3 information in 185 to, I believe, 186, 187.

4 Again, he misrepresented what those  
5 requests are. Those requests specifically ask about  
6 our knowledge about what happened out in the gas  
7 system in the '14-'15 time period. There is one  
8 request perhaps in those many subparts which  
9 specifically asks about Mr. Moul's current view on  
10 something. But, again, that would be based upon  
11 information that's in PJM.

12 My final point, your Honor, is just to  
13 answer your question how many requests have they  
14 made, 998 including supplements.

15 EXAMINER PRICE: Thank you.

16 At this time we are going to take a brief  
17 recess while the attorney examiners assigned to this  
18 case caucus on all of the information we've heard,  
19 and we will get back to you.

20 Let's go off the record.

21 (Recess taken.)

22 EXAMINER PRICE: Let's go back on the  
23 record.

24 Before we recessed we had took arguments  
25 on three motions, Duke's motion to quash,

1 FirstEnergy's motion to quash, and Sierra Club's  
2 motion to compel.

3           These are our rulings: With respect to  
4 Duke's motion to quash we are going to deny the  
5 motion. IGS has demonstrated a need for the  
6 information, the information they thought is  
7 reasonably calculated to lead to admissible material.

8           We are not ruling on any admission of the  
9 material at this time, solely for discovery. But IGS  
10 has demonstrated the information may reflect upon  
11 Witness Rose's credibility. We believe this imposes  
12 a limited burden on Duke which is a nonparty. The  
13 information has already been admitted into evidence  
14 before the Commission and already resides in the  
15 Commission records. The Commission has adequate  
16 procedures to protect the information, and the  
17 information is already four or five years old and  
18 relates to businesses with which Duke is no longer  
19 engaged. Duke is strictly a monopoly distribution  
20 service and no longer engages in the privilege of  
21 generation service in this state.

22           MR. OLKER: Thank you, your Honor.

23           EXAMINER PRICE: The parties are directed  
24 to negotiate a protective agreement which should be  
25 on substantially the same terms and conditions with

1     respect to FirstEnergy's protective agreement for the  
2     highest tier or the same terms and conditions that  
3     Duke used in its ESP II case in which this  
4     information was admitted. If the parties cannot  
5     reach a resolution within 48 hours, the parties  
6     should contact the examiners, and we will impose  
7     whatever protective order we believe appropriate.

8             However, having said that I am doing this  
9     based upon Mr. Oliker's representation that for this  
10    one time and nonprecedential purposes he would agree  
11    this information will not be used in any other  
12    proceeding before this Commission.

13            MR. OLIKER: Thank you, your Honor.

14            MS. KINGERY: And, your Honor, if I could  
15    just clarify, you said the parties are to negotiate.  
16    Duke Energy is not a party to this case.

17            EXAMINER PRICE: I misspoke. The  
18    litigants to this motion, Duke Energy Ohio and  
19    Interstate Gas Supply, are directed to negotiate a  
20    protective agreement.

21            MR. KUTIK: May we be parties to that  
22    negotiation as well?

23            EXAMINER PRICE: You may. At this time  
24    we are going to limit the distribution of the  
25    information to Interstate Gas Supply and FirstEnergy.

1 The other intervenors, although this departs from  
2 general Commission practice, are at this point not  
3 going to be supplied the information.

4 Does that answer the question you are  
5 about to ask, Ms. Bojko?

6 MS. BOJKO: You did, your Honor.

7 EXAMINER PRICE: Thank you. Okay.

8 MR. KUTIK: So may I ask a question, your  
9 Honor?

10 EXAMINER PRICE: Yes, sir.

11 MR. KUTIK: As we discussed during the  
12 arguments in this, are you making a ruling that the  
13 information that is embedded in Mr. Rose's forecasts  
14 for Duke as the assumptions are not proprietary to  
15 Duke, or are they proprietary to Duke?

16 EXAMINER PRICE: I am not arguing they  
17 are not proprietary to Duke. I am ruling that the  
18 Commission procedures for managing that proprietary  
19 information are more than sufficient and that being  
20 required to produce this proprietary information is  
21 imposing a limited burden on Duke because, No. 1, the  
22 information already exists in our docketing system.  
23 It has already been admitted before this Commission.  
24 And, No. 2, the information is aging. I know there  
25 is a pending motion to extend its protective

1 agreement from August -- August, 2014 -- 2014, which  
2 has not been ruled upon by the attorney examiner in  
3 that case, and the information involves a line of  
4 business that Duke by its own admission no longer is  
5 engaged in. They are no longer engaged in any  
6 respect in competitive generation service in this  
7 state.

8 MR. KUTIK: Okay. The reason I ask is  
9 because Mr. Rose may still be bound to not disclose  
10 that information but if that's an issue, then if we  
11 have to bring that back to the Bench, we will.

12 EXAMINER PRICE: Okay. I suspect it  
13 will -- we will be discussing this issue quite a bit  
14 if not before that, certainly at the hearing.

15 MR. OLIKER: And, your Honor, just one  
16 clarification. Because the motion to quash has been  
17 denied I assume that the transfer of the information  
18 will be achieved by the third-party subpoena or is  
19 the Bench ruling more narrowly tailored?

20 EXAMINER PRICE: I think that my ruling  
21 is modifying your motion for the subpoena, but I  
22 expect Duke will tender the information within 48  
23 hours when the protective agreement is negotiated.

24 MR. OLIKER: Thank you, your Honor.

25 EXAMINER PRICE: In fact, I would like to

1 impose on the parties you have an affirmative duty to  
2 report to the examiners within 48 hours the status of  
3 that negotiations.

4 MS. BOJKO: Your Honor, if I might.

5 EXAMINER PRICE: Yes.

6 MS. BOJKO: At what point would -- in  
7 this release and decision-making process would the  
8 other parties become privy to such information? Is  
9 it after the point of whether relevance is determined  
10 or?

11 EXAMINER PRICE: Maybe never. I mean,  
12 first of all, Mr. Olikar has no idea whether he  
13 intends to even use this information at the hearing,  
14 so the first step we are going to get to is whether  
15 he is going to use this information with respect to  
16 Mr. Rose at the hearing. At that point we are going  
17 to have to determine admissibility, and at that point  
18 we are going to have to take up whether the other  
19 parties should be subject to this. If you wanted  
20 access to the information, you should have litigated  
21 the issue.

22 MS. BOJKO: Well, your Honor, it's -- in  
23 order to not abuse discovery as has been discussed  
24 this morning, once a party asks for documents in  
25 discovery and interrogatories the other parties are



1 not permitted to reask or ask for the same  
2 information because the course is that all  
3 information is produced to all parties.

4 EXAMINER PRICE: I understand that but  
5 we're not talking about parties. We are talking  
6 about a motion for subpoena on a nonparty. We are  
7 trying to limit the burden on the nonparty to -- in  
8 terms of producing the information. For now we are  
9 going to disseminate the information only to the  
10 parties who are actually people -- parties who made  
11 the motion and the utility that needs to defend  
12 against the motion.

13 I understand it is our practice for  
14 discovery responses to generally be disseminated with  
15 respect to all the parties but that would entail Duke  
16 negotiating the protective agreement with 50 other  
17 parties in two days. I think it's more important to  
18 get the information to Mr. Olier's hands quickly  
19 than have a 50-part negotiation as to what the proper  
20 protective agreement is.

21 MS. BOJKO: And I understand that. I  
22 would just add for the record that at the time the  
23 discovery request was made, Duke was a party, and  
24 other parties did not duplicate those efforts in  
25 order to obtain the same information that they may or

1 may not use.

2 EXAMINER PRICE: I think I made clear I  
3 am well aware they were a party at the time that the  
4 discovery response was made, and I think that I  
5 fairly characterized that they withdrew solely to vex  
6 Mr. Olikier.

7 MS. KINGERY: And I would just note on  
8 behalf of Duke Energy Ohio we were not a party at the  
9 time that IGS propounded this discovery on us. We  
10 had already withdrawn.

11 EXAMINER PRICE: I understand.

12 MR. OLIKER: And one last clarification,  
13 your Honor. I assume that the dissemination of  
14 information from a nonparty does not apply to  
15 FirstEnergy Solutions because they have a joint  
16 defense agreement with FirstEnergy, and they have  
17 actively participated in this proceeding through  
18 depositions and subpoenas. Or are you indicating  
19 that we should also file subpoenas against  
20 FirstEnergy Solutions' witnesses if we want  
21 information they are going to produce?

22 EXAMINER PRICE: I don't think that -- I  
23 don't believe that I'm ordering that the information  
24 be given to FirstEnergy Solutions. I think I am  
25 ordering that they be given solely to the utility.

1 Just to be clear unless otherwise ordered by the  
2 examiner FirstEnergy operating companies are directed  
3 not to share this information with FirstEnergy  
4 Solutions, their competitive affiliate.

5 MR. OLKER: I'm sorry, your Honor. That  
6 was my poorly articulated question. I was referring  
7 more to the depositions, for example, Witness Moul,  
8 who is a FirstEnergy Solutions' employee, and to the  
9 extent he has been subpoenaed by the Sierra Club, if  
10 he disseminates information to them as a nonparty.

11 EXAMINER PRICE: I am solely talking  
12 about Duke's information relating to the Duke motion  
13 to compel at this point.

14 MR. OLKER: Thank you, your Honor.

15 EXAMINER PRICE: I'm sorry, I misspoke.  
16 I am solely responding to Duke's motion to quash your  
17 subpoena. That is the only scope of this ruling and  
18 parties should consider this probably nonprecedential  
19 for any other but these extremely unique  
20 circumstances.

21 MR. OLKER: Thank you, your Honor.

22 EXAMINER PRICE: Okay. With respect to  
23 FES's motion to quash the subpoena submitted by  
24 Sierra Club, the motion will be granted in part and  
25 denied in part. The Bench believes the information

sought by Sierra Club is generally beyond the scope of the March 23 entry except with respect to topic 4 and that topic will be modified to -- for the timeframe will only be projections between February 13, 2015, which was the prior discovery cutoff date, and June 2, 2015, and the word reviewed will be stricken because it was overly broad. So it will only be projections prepared, received, or sent by FirstEnergy Solutions. Second, topic 10.

So the motion to quash will be granted for all other topics and denied with respect to topic 4 and topic 10 as delineated previously.

MR. FISK: Thank you, your Honor.

MR. KNIPE: Thank you, your Honor.

EXAMINER PRICE: With respect to Sierra Club's motion to compel, again, the examiner finds that the specific topics are generally outside the scope of the March 23 entry. Sierra Club is operating under the belief that the March 23 entry was a broad opportunity for discovery. It was not. It was a narrow opportunity for discovery solely of the issues related to the AEP order.

In addition, the Bench finds that the requests are unduly burdensome. Although the civil rules do not bind the Commission the civil rules

1 provide for 40 interrogatories including all  
2 subparts. Sierra Club is now sitting at 998. They  
3 have had an ample opportunity for discovery, and they  
4 have exhausted that opportunity except for any future  
5 discovery opportunities which we will discuss with  
6 our next topic and change in procedural schedule.

7 MR. FISK: Thank you, your Honor.

8 MR. KUTIK: So the motion to compel is  
9 denied.

10 EXAMINER PRICE: That is correct. Sorry.  
11 I thought I said that. The motion to compel is  
12 denied.

13 Okay. The next topic we have is the --

14 MR. FISK: Your Honor, if I could just  
15 clarify on the subpoena. On topics 4 and 10 what's  
16 the timing for responses? Are you setting a timing,  
17 or are we supposed to work that out with FES?

18 EXAMINER PRICE: FirstEnergy Solutions,  
19 when can you have responses?

20 MR. KNIPE: I would like a couple of  
21 weeks.

22 EXAMINER PRICE: I think a couple of  
23 weeks is a little bit too long. What's today? Today  
24 is the 2nd of June.

25 MR. KNIPE: Topic 10 I can respond, I

1 think.

2 EXAMINER PRICE: We'll make it June 12.

3 You need to respond by then.

4 MR. KNIPE: Okay.

5 EXAMINER PRICE: If you want to preview  
6 topic 10, feel free.

7 MR. KNIPE: I'll save the surprise.

8 EXAMINER PRICE: Okay.

9 MR. KNIPE: Thank you, your Honor.

10 MR. FISK: And is your Honors' ruling  
11 only with regard to documents or witnesses for  
12 deposition?

13 EXAMINER PRICE: Your subpoena was solely  
14 for documents, was it not, or a subpoena for  
15 witnesses?

16 MR. FISK: I believe we asked for  
17 witnesses also.

18 EXAMINER PRICE: FirstEnergy Solutions'  
19 response -- if FirstEnergy Solutions has a response  
20 to topic 4 or topic 10, they should produce it.

21 MS. BOJKO: I'm sorry. Did you say  
22 witnesses' responses?

23 EXAMINER PRICE: If they have a witness  
24 responsive. If they are going to have a witness  
25 that's going to answer 4 and 10, that witness should

1 be available for deposition unless, of course, the  
2 answer to 10 is there are no other documents. In  
3 which case --

4 MR. KNIPE: There may be but, like I  
5 said, your Honor, the notice of deposition of Company  
6 Witness Evans, that's his bailiwick.

7 MR. FISK: Thank you, your Honor.

8 EXAMINER PRICE: Let's talk procedural  
9 schedule. Mr. Petricoff, you had a proposal.

10 MR. PETRICOFF: Yes, your Honor, thank  
11 you. Your Honor, in your order of May 29 -- in your  
12 order of May 29, paragraph 6, you indicate that you  
13 are going to afford the staff and intervenors  
14 sufficient time to review the supplemental  
15 stipulation and the impact of the proposed ESP.

16 We have looked at the -- had a cursory  
17 review of the amendment to the stipulation. This  
18 morning we were served with testimony as well. I  
19 think based on that, our view is that we will need an  
20 additional three weeks to not only review this but  
21 also have discovery and file testimony. We think the  
22 testimony will be -- will be necessary. The  
23 supplemental portion of the stipulation raises two  
24 new issues, issues that we have not discussed before,  
25 disputing issues that have not been the subject of

1 discovery before.

2 The first one, and the one that my client  
3 is probably the most interested in, is the  
4 transmission carving out of the mandatory  
5 transmission rider, some type of pilot group that  
6 wouldn't be paying that. That means that that pilot  
7 group has got to be taken out of the -- of the cost  
8 calculations that are made by the utility at -- at  
9 PJM.

10 It also means that since that has to be  
11 taken out there has got to be data that has to flow  
12 back from the meter readings from that pilot group to  
13 be able to do that to make sure it's being fairly  
14 allocated. In terms of fairly allocated we think if  
15 this is a pilot, that's good; it ought to be open  
16 ended, not just specified people to be -- to be in  
17 it. So that's something we are going to have to have  
18 discovery and testimony on.

19 The other is to change the rider ELR  
20 which up until now had not been the subject of a  
21 change here, going to increase the amount of  
22 interruptible service and interruptible credits that  
23 go with that service. Increasing the amount of -- of  
24 the demand that should be interrupted will have an  
25 effect on -- on what the requirements are. It will



1 have an effect on reliability. It will have effects  
2 on operations. That needs to be explored. That's  
3 why we need discovery.

4 In addition, it's going to have cost  
5 impact because all of those credits are going to have  
6 to be paid and there's a rider, that that goes back  
7 to the other -- other customers. There is going to  
8 have to be some calculations that are done on -- on  
9 that as -- as well.

10 All in all putting that together we think  
11 six weeks was fine in terms of impact, but if we are  
12 going to have full discovery and -- and testimony  
13 being filed, that's going to take nine weeks. With  
14 that in mind we propose that the -- that there be a  
15 line for testimony, the testimony from the  
16 intervenors be due on August 17, adding three weeks  
17 on top of the 27th.

18 That being the case, right now, we have  
19 the staff doing their testimony on July 10. I  
20 suspect that the staff may -- generally staff wants  
21 to reply to everything. That means they have got to  
22 see the intervenors' testimony so we would move that  
23 to a week after that, would make that August 24, and  
24 we would start the hearing then right after Labor  
25 Day. We would suggest September 9, it's one day

1 after Labor Day, to start it up.

2 One other item on that. I realize that  
3 is backing it up a bit but there is one other  
4 advantage going to that schedule. Right now, and  
5 this was reflected in the Commission's decision in  
6 the AEP ESP III order, we are expecting to have the  
7 BRA, the base residual auction, conducted on August  
8 10, and we are supposed to have the final order in  
9 Rule 111(D) by the end of August as well.

10 EXAMINER PRICE: You are optimistic.

11 MR. PETRICOFF: Well, on the first one I  
12 think August 10 --

13 EXAMINER PRICE: I meant the second one.

14 MR. PETRICOFF: The second one I will  
15 admit that it's only a probability that the EPA will  
16 make its goal.

17 Anyway we know that it's coming. It's  
18 the end of summer. It makes sense we think to adopt  
19 this schedule to start after Labor Day and hopefully  
20 there will be no additional delays. That's our  
21 proposal and our request.

22 EXAMINER PRICE: Is this -- I mean, is  
23 this consensus among the intervenors or is this just  
24 your clients right now?

25 MR. PETRICOFF: I have had informal

1 conversation with the intervenors but I think at this  
2 point I would leave it up to them to voice their view  
3 but, yes, I have floated this with some of the  
4 intervenors.

5 EXAMINER PRICE: Does anybody want a  
6 shorter extension who is an intervenor? NOPEC -- or  
7 NOAC may want a shorter extension.

8 MR. HAYS: NOAC and local communities,  
9 Toledo, Lucas County, et cetera --

10 EXAMINER PRICE: We will get to the  
11 longer extension in just a minute. I am curious if  
12 anyone wants a shorter one.

13 MR. HAYS: I definitely don't want a  
14 shorter one. If I could simply say something, I  
15 think a lot of parties are going to find themselves,  
16 like I do, where my expert when we moved the last  
17 time has scheduled himself out of the country on  
18 vacation in anticipation of when he would next be  
19 needed. I myself, as soon as I get out of here, I am  
20 driving off to Maine.

21 And so I think, you know, when we look at  
22 this thing realistically for trying to put it in the  
23 summer, we have to look at how many plans have made  
24 people unavailable for the next couple weeks. And so  
25 I would say I agree thoroughly with Mr. Petricoff, a

1 wise and learned counsel, and would suggest that even  
2 if it needed to go a little further because of other  
3 people -- other plans have been made around the  
4 already change of the trial date, some people  
5 probably moved their vacations off to August thinking  
6 they would be free, so I would just simply point out  
7 there is a lot of practical impact at this time.

8 Thank you, sir.

9 EXAMINER PRICE: Any intervenor disagree  
10 with Mr. Petricoff's proposal and want a more  
11 extended date?

12 MR. NOURSE: Your Honor, I do but I  
13 suspect you were asking for a different target  
14 audience.

15 EXAMINER PRICE: Ms. Bojko.

16 MS. BOJKO: Your Honor, I just would --  
17 my availability of one of my witnesses is going to be  
18 difficult in August and that's -- I am happy to try  
19 to work with the company to get a depo, but when I  
20 look at the 8-17, I am sure they don't want to do a  
21 deposition until after testimony is filed, so when we  
22 look at the 8-17 date with the hearing on 9-9, that's  
23 the last week of August which my witness has a little  
24 difficulty with.

25 EXAMINER PRICE: If we don't change the

1 hearing date, he would be able to testify.

2 MS. BOJKO: If we don't change the  
3 hearing date --

4 EXAMINER PRICE: See, there is an  
5 intervenor who wants to keep the hearing schedule.

6 MS. BOJKO: No, I do not. I am saying he  
7 doesn't have a problem with the September. He has a  
8 problem with the deposition being the last week of  
9 August, so if you would push it back a week, it would  
10 be preferred which is, I guess, my proposal to go one  
11 additional week back.

12 EXAMINER PRICE: Somehow I think  
13 Mr. Kutik is not going to agree to this. Mr. Kutik.

14 MR. KUTIK: You're right, your Honor. We  
15 respectfully disagree. There is always going to be  
16 some reason that somebody can think of as to, gee,  
17 maybe we should wait because this thing is going to  
18 happen, and then we could all react to it.

19 We are certainly well beyond the 275 days  
20 now. We continue to talk to parties, your Honor, and  
21 I can imagine that it's not outside the realm of  
22 possibility there would be other stipulations that  
23 are opined. And at some point we need to say we are  
24 going to hearing, and we will just react to it and  
25 figure out what the best way to accommodate people's

1 concerns to be able to get whatever information they  
2 think necessary to present their point of view to the  
3 Commission.

4 The other reality is this, that the  
5 parties were very cooperative in providing us their  
6 estimates of trial testimony or cross-examination.  
7 And at this point, assuming those estimates are even  
8 reasonably close, we are talking about 25 plus  
9 hearing days just for the companies' witnesses. So  
10 when we -- when people are complaining about  
11 witnesses' availability in August, I don't think we  
12 have to worry about that.

13 Now, with respect to the specific thing  
14 that we are reacting to, frankly it is in our view a  
15 very narrow proposal. Ms. Mikkelsen's testimony,  
16 which was filed last night, circulated this morning,  
17 contains 38 lines of substantive testimony. That's  
18 not a lot to go through even for intervenors.

19 So it surprises me anybody wants to  
20 conduct discovery, but to the extent discovery is  
21 necessary, your Honor, we would say discovery --  
22 people can get their discovery done this week. We  
23 would ask that if you are going to seek to have  
24 people file discovery, allow them to file discovery  
25 with respect to the stipulation provisions only, that

1 people file -- that the due date for that discovery  
2 to come to the companies should be next Monday,  
3 June 8, and that the companies would respond to that  
4 discovery by Monday, June 15, and that parties to the  
5 extent that they were going to file testimony would  
6 file testimony by Monday, June 22.

7 We don't see that there's a need to move  
8 the hearing schedule at all. We have a lot to get  
9 through in this case, your Honor. It's going to take  
10 a lot of time to get through the companies'  
11 testimony, and we might as well get about the  
12 business of doing that.

13 EXAMINER PRICE: Mr. Petricoff.

14 MR. PETRICOFF: Let's start with the  
15 items that I agree with Mr. Kutik on and there is one  
16 and that is it should just be limited -- we are just  
17 going to have discovery on the -- on the new -- the  
18 new additions to the stipulations. We can agree with  
19 that.

20 However, I have to disagree with how much  
21 discovery time is necessary. The fact that the  
22 witness's testimony is so cursory, it's just three  
23 pages, it doesn't provide any of the details. It  
24 means we are going to have to drag the details out in  
25 discovery, and it's going to take more than probably

1 one round to do it. These are areas that we have not  
 2 explored up until now because we have -- they have  
 3 not been in the case up until now, and it's a complex  
 4 area. This whole idea of having a separated  
 5 distribution fee that's different for some is an area  
 6 that's going to take some thrashing, some thrashing  
 7 out, and I think that it's just going to take some  
 8 time. So that's why we go back to our --

9 EXAMINER PRICE: Let's put the rider NMB  
 10 issue to the side for a second. Let's talk about the  
 11 ELR/OLR changes. I thought that the first stip  
 12 already increased the rider ELR/OLR to new customers  
 13 by a certain amount, 60,000 --

14 MR. KURTZ: 75,000.

15 EXAMINER PRICE: Yeah, 75. And then this  
 16 stipulation is simply increasing that threshold so we  
 17 were already -- everybody has had a chance -- why are  
 18 you shaking your head? You don't agree?

19 MS. BOJKO: I don't agree. I have not  
 20 been able to read Ms. Mikkelsen's testimony that  
 21 was --

22 MR. KUTIK: Then why are you shaking your  
 23 head no?

24 MS. BOJKO: I am going to answer that if  
 25 you give me a moment. I believe that there are



1 additional requirements in the stipulation that have  
2 changed. If you go back to we have done a lot of  
3 discovery and depositions on this and there are many  
4 provisions that relate to the last ESP case and there  
5 are requirements from that last ESP case and I  
6 believe that the new stipulation modifies and changes  
7 those provisions and changes the last stipulation.

8 EXAMINER PRICE: Mr. Kutik.

9 MR. KUTIK: No.

10 EXAMINER PRICE: You seem like you want  
11 to respond to that.

12 MR. KUTIK: The answer to that is no.

13 EXAMINER PRICE: The answer to that is  
14 no. The only change from the ELR/OLR is the increase  
15 in the threshold.

16 MR. KUTIK: Let me check with Mr. Burk.  
17 I believe that's the case. Well, your Honor, if you  
18 want Ms. Mikkelsen's testimony which shows the  
19 differences?

20 EXAMINER PRICE: I've got it. I have not  
21 read it yet.

22 MR. BURK: It's the last page.

23 MR. KUTIK: The guts of it, your Honor,  
24 is the increase in the eligibility for the ELR.

25 MS. BOJKO: The language is different.

1 If you compare the two stipulations, the language is  
2 different.

3 EXAMINER PRICE: It's definitely  
4 different, but they have redlined it on page 3 --  
5 Attachment EMM-3.

6 MR. BURK: It's increasing the amount and  
7 clarifies the notice.

8 EXAMINER PRICE: Uh-huh. Okay. But --

9 MS. BOJKO: I'm sorry, what are you  
10 referring to? Is that Ms. Mikkelsen's testimony?

11 EXAMINER PRICE: Yes, Attachment EMM-3,  
12 page 1. It is just a redline.

13 MR. PETRICOFF: Well, your Honor, the  
14 point I made before was that it's not just an  
15 increase; it's a significant increase. We are going  
16 from 75,000 to 136,250. We have to find out why that  
17 number was chosen, what effect that will have on  
18 reliability by increasing the -- because it should  
19 make things more reliable which cuts against some of  
20 the other aspects of the support for the rider RRS,  
21 and then the most important part what's it going to  
22 do on impact and will that affect the charts that we  
23 have in here that show that the rate impacts of this  
24 because all of this is going to have to be picked up  
25 and there may be -- that would affect what other --

1       what the other services pay. We have to at least  
2       find out what that is.

3               MR. KUTIK: It sounds like Mr. Petricoff  
4       already has his discovery outlined in his head.

5               EXAMINER PRICE: I suspect that that's  
6       true. I suspect Mr. Petricoff has it in writing.

7               MS. BOJKO: Your Honor, there's also --

8               EXAMINER PRICE: Mr. Kurtz asked for the  
9       floor first. You can have it next.

10              MR. KURTZ: The increase in the  
11       eligibility, you're right, is the big change. The  
12       notice -- the notice change, if there is any,  
13       involves PJM changing the rules on that, so it isn't  
14       a result of the stipulation. The rate impact is hard  
15       to estimate because there is the offsetting credits  
16       when this capacity is bid into the incremental or the  
17       base residual auction. So that's -- this part of the  
18       stipulation is -- you are correct, it's a minor  
19       change, just basically extends the eligibility.

20              EXAMINER PRICE: Ms. Bojko.

21              MS. BOJKO: There are also -- there is an  
22       additional party that is involved in this new  
23       stipulation, and just as we served discovery on  
24       signatory parties of the last stipulation, I suspect  
25       that we would also serve discovery on different

1 parties that have either --

2 EXAMINER PRICE: Mr. Darr will be happy  
3 to respond in seven days. I mean, there is no  
4 question we are going to have to shorten the  
5 discovery period. I am hearing the company say they  
6 can respond in seven days. I think that the ELR/OLR  
7 changes truly are just math. There is going to be a  
8 rate impact and there is going to be impacts but it's  
9 just math. Whatever the multipliers were at 75,000  
10 kilowatts is now going to be at 136,250 kilowatts.  
11 So it should be algebra; and, of course, I am  
12 terrible at math, but the parties all have experts  
13 that can sort that out.

14 Having said that I do think the rider NMB  
15 change is a big change, and I don't think it's fair  
16 to the parties to limit them to only one set of  
17 discovery on the rider NMB change. So what I would  
18 propose without changing the hearing date -- somebody  
19 had something to add? Excellent.

20 Without changing the hearing date parties  
21 will have until June 22 to file written discovery  
22 except for notices of deposition strictly with  
23 respect to the terms of the supplemental stipulation.  
24 And as I indicated previously, Sierra Club is not  
25 foreclosed from filing written discovery with respect

1 to the supplemental stipulation. The company will  
2 serve discovery responses within seven days. The  
3 intervenors can present a witness strictly with  
4 respect to the second -- to the supplemental  
5 stipulation. You need to file written testimony on  
6 June 29. The staff -- the staff does not need to  
7 change its date, July 10 for staff.

8 MS. BOJKO: I'm sorry. Testimony is due  
9 the same day that the response to discovery is  
10 argued?

11 EXAMINER PRICE: It's due a week after  
12 the last day for filing -- if you would like more  
13 time, simply ask.

14 MS. BOJKO: No. I might have misheard  
15 you. I thought you said discovery cutoff is June 22,  
16 that the company has to respond on June 29, the same  
17 day --

18 EXAMINER PRICE: I am anticipating with  
19 the seven-day turnaround we are going to have time  
20 for more than one set. Are you saying you don't like  
21 June 29?

22 MS. BOJKO: I am saying I would like to  
23 see the responses to discovery before my witness  
24 files testimony on the issues.

25 EXAMINER PRICE: You can have July 6.

1 MR. O'ROURKE: Your Honor, did you say  
2 staff testimony is the same, July 10?

3 EXAMINER PRICE: Staff's testimony is the  
4 same. If staff ends up being prejudiced because the  
5 intervenors are getting until July 6, we will address  
6 that later, but it would strictly be for a witness on  
7 the supplemental, on rider NMB or the ELR/OLR  
8 changes. If that poses a problem, let us know.

9 I understand this is cutting the company  
10 close in time to depose any additional witnesses but.

11 MR. KUTIK: My suggestion, your Honor, in  
12 response to your "proposal" is that parties that --  
13 or witnesses that have not dealt with rider ELR and  
14 are not anticipated dealing with non-PPA issues would  
15 be -- their depositions will be taken before the  
16 filing of the intervening -- intervenors' testimony  
17 in response to the stipulation. In other words, what  
18 we request is that parties provide us with dates for  
19 those witnesses that are not going to be supplemented  
20 by the end of this week so that we can start the  
21 discovery process, the deposition process, for these  
22 other witnesses and get those out of the way before  
23 we have to deal with depositions of witnesses that  
24 are filing on the 6th.

25 EXAMINER PRICE: Any objections?

1           Seeing none, all intervenors will give  
2           the companies proposed dates for witnesses not  
3           dealing with rider NMB or rider ELR/OLR we said the  
4           end of the week?

5           MR. KUTIK: Yes, your Honor.

6           EXAMINER PRICE: Noon on Friday, June 5.  
7           Any other questions?

8           MS. BOJKO: Just subject to  
9           clarification.

10          EXAMINER PRICE: Sure.

11          MS. BOJKO: You are just talking about  
12          the people that you requested to redepose? Because  
13          you have already deposed many of them.

14          MR. KUTIK: Yes, the witnesses that have  
15          testimony outstanding for the so-called AEP Ohio  
16          factors.

17          MS. BOJKO: Thank you.

18          MR. FISK: Your Honor, may we request  
19          that the companies also provide us dates by the end  
20          of the week on their witnesses?

21          MR. KUTIK: We would be glad to.

22          EXAMINER PRICE: That worked out.

23          Okay. To recap then the hearing date of  
24          July 27 will not change unless otherwise ordered by  
25          the examiners. The staff testimony date of July 10

1 will not change. Intervenor will have an  
2 opportunity to file supplemental testimony strictly  
3 related to the supplemental stipulation by July 6 and  
4 the discovery cutoff for written discovery but not  
5 notices of deposition will be June 22. The company  
6 will serve -- will respond to discovery responses  
7 within seven days.

8 MS. BOJKO: Your Honor, sorry.

9 EXAMINER PRICE: Yes.

10 MS. BOJKO: The company will respond or  
11 any other parties that received discovery in seven  
12 days? You just said the company will respond to  
13 discovery in seven days. I am assuming that expands  
14 to any other signatory or nonopposing party?

15 EXAMINER PRICE: Yes. Let me rephrase  
16 that. All parties, whether a signatory party,  
17 nonsignatory party, or opposed to the stipulation,  
18 will file testimony -- will respond to discovery  
19 requests within seven days with respect to discovery  
20 related to the supplemental stipulation.

21 Any further modifications requested or  
22 clarifications? Any other -- Mr. Olikier, we have an  
23 issue you want to raise before we go off.

24 MR. OLIER: Yes, your Honor. On behalf  
25 of I believe the companies, myself, and the



1 aggregation communities, IGS would like to clarify  
 2 that aggregation data was previously transmitted to  
 3 parties in discovery and there was a question  
 4 regarding which level of confidentiality would attach  
 5 to that information. And pursuant to the existing  
 6 confidentiality agreement we've agreed that it would  
 7 be designated as level I, merely confidential, and  
 8 this is high level cumulative data regarding  
 9 aggregation statistics in the utility service  
 10 territory. And pursuant to your earlier ruling, and  
 11 I cannot remember which prehearing conference it was  
 12 at, Mr. White would likely be submitting a very brief  
 13 supplemental of his testimony regarding those  
 14 statistics under seal, of course.

15 EXAMINER PRICE: Thank you. Is that the  
 16 company's understanding?

17 MS. DUNN: Yes.

18 MR. FISK: Your Honor, I had one other  
 19 quick matter.

20 EXAMINER PRICE: Yes.

21 MR. FISK: Going back to the FES subpoena  
 22 topic 4, I believe you set a date of February 13,  
 23 2015, for the starting of --

24 EXAMINER PRICE: Yes.

25 MR. FISK: -- the projections that the

1 company provided to us with their reply brief on the  
2 motion to quash. It simply says that it was early  
3 2015, so we don't -- we don't know if that's before  
4 or after the February 13 date, and I believe that is  
5 the projections that the forecasts would be tied to.  
6 I wanted to see if you would be willing to amend the  
7 date on that to make sure it's clear it covers the  
8 forecasts that went into that reduction.

9 EXAMINER PRICE: Why don't we simply  
10 say -- amend it to say that it specifically covers to  
11 any projections including but not limited to those  
12 attached to the reply brief and then within the date  
13 so the date's irrelevant to the one attached to the  
14 reply brief. How's that?

15 MR. FISK: I misspoke. It wasn't  
16 actually attached, but it was just referenced.

17 EXAMINER PRICE: Referenced, yes. Does  
18 that make sense?

19 MR. KNIPE: Yes, your Honor.

20 MR. FISK: Thank you, your Honor.

21 EXAMINER PRICE: Sure. Anything else?

22 Okay. We are adjourned.

23 (Thereupon, the prehearing conference was  
24 concluded at 12:42 p.m.)

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CERTIFICATE

I do hereby certify that the foregoing is  
a true and correct transcript of the proceedings  
taken by me in this matter on Tuesday, June 2, 2015,  
and carefully compared with my original stenographic  
notes.

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Karen Sue Gibson, Registered  
Merit Reporter.

(KSG-6050)

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Summary: Transcript in the matter of the Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company hearing held on 06/02/15 electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.