

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the :
Application of Ohio Edison:
Company, The Cleveland :
Electric Illuminating :
Company, and The Toledo :
Edison Company for : Case No. 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. :

- - -

PROCEEDINGS

before Mr. Gregory Price, Ms. Mandy Chiles, and
Ms. Megan Addison, Attorney Examiners, at the Public
Utilities Commission of Ohio, 180 East Broad Street,
Room 11-A, Columbus, Ohio, called at 9:00 a.m. on
Friday, September 18, 2015.

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VOLUME XIV

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1 Friday Morning Session,

2 September 18, 2015.

3 - - -

4 EXAMINER PRICE: Let's go back on the
5 record. Before we continue with our questioning of
6 this witness -- let's go on the public record at this
7 point.

8 Before we finish or before we proceed
9 with our cross-examination of this witness, Mr. Kutik
10 had a housekeeping matter.

11 MR. KUTIK: Yes, your Honor. In
12 reviewing the official copy of Sierra Club Exhibit
13 37, it appears -- and this is the copy that the court
14 reporter has. It appears that it does not contain
15 Attachments 2 and 3 to Sierra Club -- Response to
16 Sierra Club Set 1-RPD-49.

17 My understanding is that it is supposed
18 to include that. I think the witness who was
19 initially shown the document was shown those two
20 attachments, but somehow in terms of whatever the
21 court reporter got, she didn't get those, so counsel
22 for Sierra Club and I will endeavor to provide the
23 court reporter with those attachments and include
24 them in Exhibit 37.

25 EXAMINER PRICE: Thank you. If you could

2932

1 advise the bench once we have accomplished that task.

2 MR. KUTIK: Yes, we will, your Honor.

3 EXAMINER PRICE: Perfect. Let's go back
4 on the confidential transcript.

5 (CONFIDENTIAL PORTION EXCERPTED.)
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(OPEN RECORD.)

EXAMINER PRICE: Mr. Kutik, redirect.

MR. KUTIK: Yes, your Honor. May I have
a moment, your Honor?

EXAMINER PRICE: Yes, you may. Let's go
off the record.

(Discussion off the record.)

EXAMINER PRICE: Let's go back on record.

MR. KUTIK: May I proceed, your Honor?

EXAMINER PRICE: You may proceed. I just
remind you, we are on the public record at this
point.

MR. KUTIK: Thank you, your Honor. To
make clear, I have no redirect on the confidential
record.

EXAMINER PRICE: Great.

- - -

REDIRECT EXAMINATION

By Mr. Kutik:

Q. I was almost going to call you Mr. Lisowski. But, Mr. Ruberto, you were asked a question about whether you had ever negotiated a PPA before. Do you feel that you are qualified to head the EDU team in this case?

A. I do. In my -- my 30 or 31 years with the company and the predecessor companies, I have been involved in several very large multidisciplinary projects that involve many of the same types skills that were involved here.

In the past seven or eight years, I was responsible for the transmission siting, right-of-way real estate surveying, permitting, environmental reviews, testimony for many large transmission projects, including a billion-dollar transmission project that went from Pennsylvania through West Virginia into Virginia.

Other those years I have been leading teams that included external consultants. I negotiated with consultants for their services and have done that for over 500 miles of high-voltage transmission lines in pretty much every state that FirstEnergy currently operates in.

1 Prior to that I also had extensive
2 experience in creating a call center from scratch for
3 the former Allegheny companies. In that role I was
4 responsible for a large team of people implementing
5 various technologies, consultants, consulting
6 arrangements, telephony equipment, and those are very
7 similar to this type of arrangement where you are
8 relying on a group of external experts. You are
9 working with a cross-section of various skilled
10 internal and external experts, and from that
11 perspective, it's similar.

12 Q. You were also asked some questions about
13 whether the EDU team considered -- or you were asked
14 some hypotheticals about a gas conversion for the
15 Sammis plant. Was that a notable omission on your
16 part, do you think?

17 A. No. One of the considerations of whether
18 gas would make sense is that the fuel diversity we
19 were seeking was to decouple it from the more
20 volatile gas prices over time. By retaining the
21 resources in this proposal, it does give us that. If
22 we would convert units to gas, we would, once again,
23 be subject to the market volatility of gas, which
24 would largely be counter to what we were doing.

25 And, secondly, the effort and costs to

1 convert these types of facilities would be
2 significant and unlikely to achieve anywhere near the
3 efficiencies you can get out of a brand-new combined
4 cycle gas plant. The efforts to do these conversions
5 would likely result in efficiencies that are much
6 less than a new combined cycling plant. Because of
7 those lower efficiencies, you would end up with
8 marginal costs or variable costs that would likely
9 exceed what the plants have in the first place.

10 Q. In answering some questions on the term
11 sheet, you mentioned a few times that capital
12 expenditures were not subject to good utility
13 practice standard. Does that mean that the companies
14 would not have any recourse with respect to
15 depreciation or capacity payment that would be part
16 of the price under the term sheet?

17 A. No. As the term sheet shows in Section
18 12, there is a process for capital expenditures, and
19 as we discussed several times, FES is required to
20 give us those plans, work with us, and we fully
21 expect we would cooperatively agree on what those
22 capital plans are. And as we said, to the extent FES
23 has the final say, they still can execute those --
24 those capital expenses. Once the capital work is in
25 use, it now is subject to Section 11, where those

1 costs that the companies would pay would be subject
2 to good utility practices.

3 Q. So, for example -- can you give us an
4 example of how that would work?

5 A. For example, let's suppose FES decided
6 they wanted a goldplated conference room, and we
7 didn't want them to do it. They did it anyway. So
8 all the capital work that they would be doing, as is
9 described in the agreement, they are paying all that
10 capital. We are not paying for that. They are
11 paying for it.

12 Once that's in use and they would move
13 that into operating work, and operating work in
14 Section 11, I believe, describes that it must be in
15 accordance with good utility practice, providing we
16 are able to demonstrate that capital expense wasn't
17 in conformance with good utility practice, we would
18 no longer be responsible to pay for that expense that
19 as -- as they are outlined in section 13.

20 MR. SOULES: Excuse me, your Honor.

21 EXAMINER PRICE: Yes, sir.

22 MR. SOULES: Could I have the
23 third-to-last question read back, the one regarding
24 the natural gas hypothetical? Can I have that
25 question and answer?

1 EXAMINER PRICE: Yes, you may.

2 Could we have the third-to-last question
3 relating to natural gas.

4 (Record read.)

5 MR. SOULES: Thank you, your Honor.

6 EXAMINER PRICE: Thank you.

7 Mr. Kutik.

8 Q. (By Mr. Kutik) Mr. Ruberto, you were
9 asked some questions by the Attorney Examiner --
10 Attorney Examiner Price about risks with respect to
11 the term sheet. Focusing on the companies' proposal
12 in total, are all the risks with the customers?

13 A. No. The companies also face risk on two
14 fronts. The costs that the company pays to FES, the
15 revenues the companies receive through PJM are both
16 subject to the PUCO's audit process. It is -- it is
17 possible that those costs and revenues could be
18 deemed imprudent and the company would not collect
19 those revenues, so the company does have the risk of
20 not fully collecting all of its costs and not
21 retaining all the revenues it generated in the
22 markets.

23 FES has risks as well. As we just spoke
24 about good utility practices, expenses that are not
25 deemed good utility practices that FES incurs, they

1 will not get recovery or reimbursement of. FES also
2 has a \$2 billion projected loss that could even be
3 worse during the term, so they've lost the upside
4 from that perspective as well.

5 FES also has the risk of capital
6 expenses. As we had mentioned, FES pays for all the
7 capital so they have all upfront risks for all the
8 capital, and to the extent that capital is put in use
9 and becomes operating work, that's an end to the
10 extent that is done as operating work that is based
11 upon good utility practices, they would receive
12 recovery. But other than that, they are at risk of
13 not recovering those capital costs as well.

14 Q. Does FES also face a risk under the unit
15 contingent provision of the term sheet?

16 A. They do. In section 8, the Unit
17 Contingent provision, FES, if they do not exercise
18 good utility practices, would be responsible for
19 replacing the capacity, energy, ancillary services
20 and environmental attributes during any time, and if
21 an outage occurs longer than 180 days, regardless of
22 their exercise of good utility practices, they would
23 be responsible for, once again, acquiring and
24 replacing the capacity, energy, and ancillary
25 services at their costs.

1 MR. KUTIK: Thank you, your Honor.

2 That's all I have.

3 EXAMINER PRICE: Thank you.

4 Mr. O'Brien, any cross?

5 MR. O'BRIEN: Thank you, your Honor.

6 - - -

7 RECROSS-EXAMINATION

8 By Mr. O'Brien:

9 Q. Mr. Ruberto, did I understand you to just
10 say in response to a question from Mr. Kutik that FES
11 is viewing the proposed transaction as having a \$2
12 billion loss associated with it?

13 A. FES is viewing the transaction as showing
14 the \$2 billion value that we've described in the --
15 in the proposal. I'm not sure that they're viewing
16 it as a loss from their perspective. I don't know
17 that they view it as a loss. I'm not sure.

18 Q. Okay. But by your answer you meant to
19 say that's \$2 billion in revenue they are not going
20 to have?

21 A. Well, the \$2 billion that are -- that is
22 listed here is the 2 billion I was referring to. And
23 my -- my point was that they're -- they are not going
24 to gain -- if there are market gains, they are not
25 going to get them. If there are less, they are not

1 going to lose them. But they are giving any upside
2 beyond what the power purchase agreement would be
3 limited to, so their upside is limited by the power
4 purchase agreement.

5 Q. Okay. Thank you. I think I understand
6 that now. Also when you were discussing with
7 Mr. Kutik your goldplating example under good utility
8 practice, did you mean to say that depreciation
9 expense generally is going to be subject to the
10 standard of good utility practice?

11 A. Yes. If -- once -- once a facility is in
12 use, it falls under operating work, and in the
13 definition, operating work includes use, and in
14 Section 11 it describes operating work being subject
15 to good utility practice.

16 Q. And that's going to include all of the
17 depreciation of the involved plants during the term
18 of the agreement?

19 A. Everything included in Section 13, which
20 includes that, would apply.

21 MR. O'BRIEN: Okay. Thank you. That's
22 all the questions I have, your Honor.

23 EXAMINER PRICE: Mr. Dougherty?

24 MR. DOUGHERTY: Yes, just a couple.

25 - - -

1 RECROSS-EXAMINATION

2 By Mr. Dougherty:

3 Q. You were asked a question by your counsel
4 about your experience negotiating other deals that
5 you have been involved in over the past 30-plus
6 years, I think you said; is that correct?

7 A. Correct.

8 Q. And you mentioned one multiple large
9 transmission project as an example, correct?

10 A. I did.

11 Q. And you also mentioned building from
12 scratch a call center, correct?

13 A. Yes. But my role was the technology
14 telephony and other systems of the call center.

15 Q. And with that call center and that part
16 of the deal, as you just mentioned, did you -- did
17 you competitively bid or issue any RFPs to determine
18 the best supplier for those technologies?

19 MR. KUTIK: Objection.

20 EXAMINER PRICE: Grounds?

21 MR. KUTIK: Relevance.

22 EXAMINER PRICE: Overruled.

23 A. Purchasing equipment was, in some cases,
24 done by an RFP when it was apparent there were equal
25 sources of that same equipment. For instance,

1 predictive dialer equipment, there were three or four
2 vendors that provided basically the same thing.
3 Those we would have. There was other equipment that
4 was not because there was unique benefits that a
5 singular vendor would have supplied. Because of
6 those unique benefits, we sought negotiations
7 directly, not necessarily through an RFP.

8 Q. When you did do an RFP, why did you do
9 the RFP?

10 MR. KUTIK: Objection, asked and
11 answered.

12 EXAMINER PRICE: Sustained.

13 Q. In doing the RFP, did you attempt to get
14 the best deal for the company?

15 A. We attempted to get a product that best
16 suited our needs. That includes balancing
17 everything. It would not include the lowest bid, for
18 example. It may include the lowest bid, but you
19 certainly would look at what is the product providing
20 and the value for the cost to provide that product,
21 the ongoing service support upgrades, longevity of
22 said equipment, so there's many things that in a
23 technical evaluation you would consider after you've
24 issued an RFP.

25 MR. DOUGHERTY: Could I have that answer

1 read back actually, please?

2 EXAMINER PRICE: You may.

3 (Record read.)

4 MR. DOUGHERTY: And, I'm sorry, can I get
5 the question as well.

6 EXAMINER PRICE: You may.

7 (Record read.)

8 Q. Now I am not 100 percent sure that the
9 answer you gave answered the question. I think it
10 explained the answer to the question. But if you
11 could answer that part of the question, whether it
12 was -- whether your explanation and that answer would
13 be the answer to the question, was it -- did you do
14 it to receive the best deal for the company?

15 EXAMINER PRICE: I think you -- I think
16 you need to define what you mean by "best deal." If
17 you mean best deal in economic terms, that's one
18 thing. But I think best deal could also be
19 interpreted best overall product for the price. Do
20 you understand what I am saying? One person may look
21 at an Apple laptop that may be the best deal.
22 Another person may say the best deal is a Chromebook.

23 Q. Is it a deal that -- did you do the RFP
24 to -- strike that.

25 MR. DOUGHERTY: I'll take that

1 explanation. No further questions.

2 EXAMINER PRICE: Mr. Settineri.

3 MR. SETTINERI: Thank you, your Honor.

4 - - -

5 RECROSS-EXAMINATION

6 By Mr. Settineri:

7 Q. Mr. Ruberto, do you recall some questions
8 from your counsel regarding FES providing replacement
9 capacity in the event of certain circumstances?

10 A. Yes.

11 Q. Okay. In a circumstance where FES would
12 be responsible for providing replacement capacity,
13 under the term sheet would FES also be responsible
14 for recovering any charges from PJM for
15 nonperformance of the units?

16 MR. KUTIK: Objection, asked and
17 answered.

18 EXAMINER PRICE: Overruled.

19 A. If they were providing replacement
20 capacity and energy, there wouldn't be those
21 nonperformance charges you are speaking of.

22 Q. And in the event that FES was required to
23 replace capacity but was unable to meet the
24 companies' obligations to perform, in that
25 circumstance would FES be responsible for covering

1 any charges from PJM for nonperformance of the units?

2 A. Section 8 defines they can either replace
3 that capacity, energy, or ancillary services or
4 provide the financial equivalent thereof, so I would
5 view that as if they didn't have it, they can provide
6 the financial equivalent, which would be pay for what
7 it takes to get the replacement capacity, energy, and
8 ancillary services.

9 EXAMINER PRICE: I'm sorry. Hold on. I
10 want to follow up. Does that include charges for
11 nonperformance?

12 THE WITNESS: If they are providing the
13 money for us to replace it, there shouldn't be a
14 nonperformance charge so I'm struggling to say there
15 is a charge if they've provided the replacement or
16 the money for us to get the replacement.

17 EXAMINER PRICE: If they offer the money
18 for replacement but you were still unable to procure
19 the capacity, are they responsible for the
20 nonperformance charges?

21 THE WITNESS: I would probably need some
22 legal advice then. I viewed it as the financial
23 equivalent would cover it, but I would probably need
24 some legal advice on that.

25 EXAMINER PRICE: Fair enough.

1 MS. BOJKO: May I have your question read
2 back again, please.

3 EXAMINER PRICE: You may.

4 MS. BOJKO: I couldn't hear it.

5 (Record read.)

6 Q. (By Mr. Settineri) Mr. Lisowski --

7 MR. KUTIK: It's Mr. Ruberto.

8 MR. SETTINERI: I have Lisowski on the
9 mind today, unfortunately. My apologies, and thank
10 you, Mr. Kutik, for keeping me straight.

11 Q. Mr. Ruberto, do you recall questions from
12 your counsel regarding your qualifications to lead
13 the EDU team?

14 A. I do.

15 Q. And would you agree with me understanding
16 who would be responsible for a nonperformance
17 penalty or charges from PJM in the circumstances that
18 Attorney Examiner Price raised with you would be an
19 important business term to understand and resolve in
20 the term sheet?

21 A. Yes.

22 Q. Okay. And as of today, you can't tell us
23 who would be responsible for the nonperformance
24 charges -- strike that. As of today you can't tell
25 me who would be responsible for nonperformance

1 charges from PJM in the instance that capacity can
2 not be secured, whether through FES or through a
3 financial payment that could be made to the
4 companies, correct?

5 A. I've given you my belief that they are
6 required to provide replacement capacity, energy,
7 ancillary services or the financial equivalent
8 thereof.

9 MR. SETTINERI: And, your Honor, if I
10 could have the question read back, please.

11 EXAMINER PRICE: You may.

12 (Record read.)

13 MR. SETTINERI: Your Honor, at this time
14 I would ask that you instruct the witness to answer
15 the question. His answer was completely
16 unresponsive. It's a simple "yes" or "no" answer,
17 and I am simply following up to your line of
18 questioning.

19 MR. KUTIK: Well, frankly, your Honor
20 this has all been asked and answered. The witness
21 has established what his position is. Counsel has
22 asked him a position that he doesn't agree with. He
23 doesn't think that's a feasible hypothetical, and he
24 is saying so.

25 EXAMINER PRICE: Sustained.

1 Q. (By Mr. Settineri) Mr. Ruberto, you
2 remember questions from your counsel about the
3 goldplated -- in your answer you gave an example of
4 the goldplated conference room, correct?

5 A. I did.

6 Q. Okay. And in that example you gave --
7 you used that example to show how a charge could be
8 disallowed under the term sheet, correct? Or let me
9 strike that and be more precise for you. You used
10 that example to show how a capital investment could
11 be disallowed under the term sheet; is that correct?

12 MR. KUTIK: Well, I guess I'll object to
13 the term "disallowed." Disallowed by whom?

14 EXAMINER PRICE: If you can rephrase.

15 Q. Sure. Under the term sheet the companies
16 have an opportunity to challenge capital expenditures
17 that they believe don't constitute good utility
18 practice, correct?

19 A. Taken as a whole, the capital expenses
20 they can incur, FES has the right to spend whatever
21 they want.

22 Q. And to follow-up then with you, but there
23 would be no form of reimbursement from the companies
24 for that capital expenditure through the term sheet
25 in that case, correct?

1 A. Correct.

2 Q. Okay. And in regards to the portion of
3 the monthly payment that would -- where that payment
4 for the goldplated conference room, not for the
5 capital expenditures but for various charges
6 associated with it, would be deducted -- would be
7 through the capacity payment on page 5 of 15 of the
8 term sheet, correct?

9 A. Correct, it would be deducted from that.

10 MR. SETTINERI: Okay. No further
11 questions.

12 Thank you, your Honor.

13 EXAMINER PRICE: Thank you.

14 Ms. Bojko?

15 MS. BOJKO: Thank you, yes.

16 - - -

17 RECROSS-EXAMINATION

18 By Ms. Bojko:

19 Q. Mr. Ruberto, could you turn to Section 8,
20 please that was discussed with your counsel, the Unit
21 Contingent provision of the term sheet.

22 A. I have that.

23 Q. Where in Section 8 of the term sheet does
24 it say FES is required to replace power during the
25 first 180 days?

1 A. On page 3 at the top it indicates that
2 the "delivery of Capacity, Energy and Ancillary
3 Services will not be excused if the Seller could have
4 avoided such failure by the exercise of Good Utility
5 Practice."

6 Q. Okay. And where does it say in that
7 situation that FES has to provide replacement
8 capacity, energy, ancillary services, and
9 environmental attributes?

10 A. On page 2, the second paragraph where it
11 reads, "Unit Contingent means, with respect to
12 Energy, Capacity, or Ancillary Services, that such
13 Energy, Capacity, and Ancillary Services is intended
14 to be supplied from a given Facility and Seller's
15 failure to deliver such Energy, Capacity, and
16 Ancillary Service is excused to the extent that a
17 given Facility or a portion of a Facility is
18 unavailable; provided the Seller's failure" was not
19 due to failure to exercise good utility practices.
20 So their requirement is not removed. Their
21 requirement is to deliver.

22 Q. Sir, isn't it true that the only place in
23 that section that says that FES actually has to
24 provide replacement capacity, energy, ancillary
25 services, and environmental attributes is on page 3

1 where it says, "and for any remaining unavailability
2 period beyond the initial 180 day period, Seller will
3 provide replacement Capacity, Energy, Ancillary
4 Services and Environmental Attributes"?

5 A. It would be helpful if you could direct
6 me to where you are reading. I was trying to catch
7 up.

8 Q. Page 3 in the middle of Section 8, and it
9 ties the provision of replacement power to "any
10 remaining unavailability period beyond the initial
11 180 day period." Isn't that true?

12 A. I read that to mean they have the
13 requirements, and they are only excused for the first
14 180, if they exercised good utility practices.

15 Q. But the requirement is they only have to
16 provide replacement power beyond the initial 180-day
17 period; isn't that correct?

18 MR. KUTIK: Objection, asked and
19 answered.

20 EXAMINER PRICE: Sustained.

21 Q. Okay. Let's turn, sir, to your
22 discussion about capital expenditures in Section 12.

23 A. I have that.

24 Q. First of all, I believe that you state
25 that you believe FES Energy Solutions has the final

1 say in whether a capital expenditure is ultimately
2 made or not; is that correct?

3 A. That's correct.

4 Q. And if you look at Section 12, isn't it
5 true that Section 12 in no place discusses good
6 utility practice related to capital expenditures?

7 A. That's correct.

8 Q. So your analysis of the goldplated
9 conference room would not be subject to good utility
10 practices under Section 11, capital expenditures;
11 isn't that true?

12 MR. KUTIK: Objection. Mischaracterizes
13 his testimony. It was just the opposite.

14 EXAMINER PRICE: Sustained.

15 Q. Under Section 12 there is no reference to
16 good utility practice when discussing capital
17 expenditures; is that correct?

18 MR. KUTIK: Asked and answered, and we
19 will stipulate to that.

20 MS. BOJKO: If the witness has an
21 opinion.

22 EXAMINER PRICE: You can go ahead and
23 answer the question.

24 A. That's correct.

25 Q. And let's turn to the definition section

1 of the term sheet, please, sir. It's on page 13.

2 A. I have it.

3 Q. And if you turn to page 14, you'll see
4 the definition of good utility practice. Do you know
5 who determines what is good utility practice?

6 A. I would anticipate, for the most part, we
7 would be able to work out through an evaluation
8 between us and FES whether something did or did not
9 meet good utility practices. To the extent there is
10 a dispute, I would expect some dispute resolution
11 process to be available to reach that conclusion.
12 Neither party will have the sole determination.

13 Q. Is that contained in the term sheet, the
14 process you just stated, that there would be some
15 kind of mediation about good utility practice?

16 A. I didn't say there would be mediation,
17 and no, it's not included.

18 Q. You did say there would be some kind of
19 dispute resolution, some kind of process, right?

20 A. Correct. I just don't want to imply it
21 would be a mediation process.

22 Q. Oh, I'm sorry, dispute resolution. So is
23 dispute resolution found in the term sheet anywhere?

24 A. No.

25 Q. And as I understand -- so in response to

1 my prior question, you don't believe that the
2 companies will ultimately have the decision of what
3 is good utility practice with regard to the operation
4 of the generating units or capital expenditures?

5 MR. KUTIK: Objection, asked and
6 answered.

7 EXAMINER PRICE: Overruled.

8 A. I believe I said neither the companies
9 nor FES will have the sole right to make a
10 determination of what constitutes good utility
11 practices.

12 Q. Okay. And so if FirstEnergy Solutions --
13 strike that. And if you look at the definition of
14 good utility practice on page 14 of the term sheet,
15 isn't it true that good utility practice is not
16 limited to optimum practice? It just has to be a
17 generally accepted practice?

18 A. That's correct.

19 Q. And it's my understanding, sir, that
20 FirstEnergy Solutions would bill the companies in the
21 form of an invoice for the monthly payment; is that
22 correct?

23 A. That's correct.

24 Q. And at that time would FirstEnergy -- the
25 companies have any ability to challenge or dispute

1 that invoice?

2 A. We would.

3 Q. Okay. And that process would be a
4 disputed invoice, a nonpay of the invoice, is that
5 correct, in your mind?

6 A. I believe we could either withhold
7 payment. We could make a payment and challenge for
8 more information, or it could be any one of those,
9 but if it -- in our view is a charge we are not
10 responsible for, we would not need to make that
11 payment.

12 Q. And is that process outlined in the term
13 sheet, that the companies have the ability to not pay
14 the invoice by FirstEnergy Solutions or have the
15 ability to somehow challenge it?

16 A. The process isn't outlined, but the term
17 sheet defines what we are obligated to pay.

18 Q. Right. And the term sheet also says that
19 FirstEnergy Solutions shall make capital expenditures
20 if they deem they are necessary, correct?

21 A. That's correct.

22 Q. And you discussed operating work a little
23 bit previously with your counsel, and under the
24 definition section on page 15, "Operating Work means
25 the operation, maintenance, use, repair or retirement

1 of the Facility on or after the Effective Date,
2 including but not limited to labor; parts; supplies;
3 insurance; permits; licensing; taxes other than
4 income"; is that correct?

5 A. Correct.

6 Q. And isn't it also true that operating
7 work at the bottom says "but excluding any Capital
8 Expenditures Work"?

9 A. That's correct. The capital expenditures
10 work is the work that is in progress for capital.

11 MS. BOJKO: Okay. Thank you. I have no
12 further questions. Thank you, Mr. Ruberto.

13 EXAMINER PRICE: Before we leave this
14 area, there is no provision in rider RRS which binds
15 the Commission in making a disallowance of a cost
16 incurred by the utilities with respect to whether the
17 utilities did or did not agree that a given practice
18 was in accordance with good utility practices; is
19 that correct?

20 THE WITNESS: Could I hear that again?

21 EXAMINER PRICE: I am not sure if I can
22 say it again, but we will have the reporter reread
23 it.

24 (Record read.)

25 THE WITNESS: To the extent I understand

1 you are asking if the Commission is bound?

2 EXAMINER PRICE: Yes.

3 THE WITNESS: I don't know.

4 EXAMINER PRICE: You don't know the
5 answer to that question?

6 THE WITNESS: I don't know what the
7 Commission is bound to do. I understand the
8 Commission has the right to audit what is being
9 passed through RRS.

10 EXAMINER PRICE: Right. In making our
11 audit determinations, is the Commission bound in any
12 sense by a dispute resolution or whether there was or
13 was not a dispute between FES and the utilities?

14 THE WITNESS: I understand. No. The
15 dispute process between the companies and FES doesn't
16 bind, in my view, anyway, the Commission's audit
17 rights to RRS.

18 EXAMINER PRICE: So if the Commission
19 found that a given cost should be disallowed, it
20 doesn't matter whether or not the utilities agreed it
21 was a good utility practice; is that correct?

22 THE WITNESS: That's correct. And it
23 would have no effect on the payments the utility --
24 the utilities need to make to FES as well.

25 EXAMINER PRICE: You bear the

1 disallowance risk in that situation?

2 THE WITNESS: Exactly.

3 EXAMINER PRICE: Thank you.

4 Ms. Fleisher.

5 - - -

6 RECROSS-EXAMINATION

7 By Ms. Fleisher:

8 Q. Mr. Ruberto, I believe you just testified
9 in response to Mr. Kutik's question that one aspect
10 of risk to the companies is the risk of disallowance
11 of rider RRS cost recovery; is that correct?

12 A. Correct.

13 Q. Okay. And do you recall yesterday I
14 asked you whether you considered the possibility of
15 such a disallowance affecting the companies' credit
16 rating?

17 A. I do.

18 Q. And is it correct that at that time you
19 testified that you had considered that possibility
20 but thought that there wouldn't be much chance of
21 such a disallowance happening?

22 MR. KUTIK: Objection, asked and
23 answered.

24 EXAMINER PRICE: She is just laying a
25 foundation. She has got a follow-up.

1 MR. KUTIK: I don't think so, your Honor,
2 but go ahead.

3 THE WITNESS: I don't think that's what I
4 said. I was characterizing a disallowance of a
5 substantial magnitude that could possibly have an
6 effect on the companies' financial condition.

7 Q. Okay. And if there's not going to be a
8 disallowance of substantial magnitude, is that much
9 of a risk to the companies?

10 A. The substantial magnitude to the
11 financial condition may be different. It's possible
12 a \$50 million disallowance that the company incurs.
13 That would be a substantial loss to the company.
14 That may not affect the companies' ability to secure
15 debt, for instance.

16 Q. Okay. So your testimony is that a
17 disallowance of \$50 million, you think it is unlikely
18 to affect the companies' credit; is that correct?

19 A. I didn't say that. What I was giving as
20 an example of an illustrative way there could be
21 amounts that are important to the company but may not
22 have a lasting effect on the viability of the
23 company.

24 Q. Can you give any quantification of where
25 the line is?

1 A. I cannot.

2 Q. Okay. And you testified about a
3 transmission project and a call center project,
4 correct, that you believed were examples of
5 negotiating large transactions. Am I characterizing
6 that correctly?

7 A. Not examples of negotiating large
8 transactions, but examples of leading large efforts
9 of multidisciplinary individuals for some very
10 substantial projects.

11 Q. Okay. And did either of those projects
12 involve assessing the cost and revenues of generation
13 assets?

14 A. No.

15 Q. And did either of them involve assessing
16 forecasts of wholesale energy prices or capacity
17 prices?

18 A. No.

19 Q. And did either of them involve long-term
20 contracts amounting -- involving billions of dollars?

21 A. No.

22 Q. And I think you were talking with
23 Mr. Dougherty about some RFP processes that had
24 occurred with respect to the call center, and am I
25 reiterating correctly that you said you would do an

1 RFP when it seemed there were equal sources of
2 equipment available or multiple sources of equivalent
3 equipment?

4 A. Correct.

5 Q. And how would you determine whether there
6 were equal sources available?

7 A. Industrially or industry data that would
8 be available. Generally there's a fairly small
9 number of companies that provide certain types of
10 equipment.

11 Q. Okay. So for a given type of equipment,
12 you might look at who sold that equipment and what
13 the price would be, for example?

14 A. You wouldn't know the price in that
15 example, but you would look at the major vendors of
16 that equipment and you would look at what products
17 they had to see if that fit your need.

18 MS. FLEISHER: That's all I have, your
19 Honor. Thank you.

20 EXAMINER PRICE: Thank you.

21 Sierra Club?

22 MR. SOULES: Thank you, your
23 Honor.

24 - - -
25

RECROSS-EXAMINATION

By Mr. Soules:

Q. Mr. Ruberto, just a few questions.

First, depreciation is an expense related to a capital expenditure that was previously incurred, correct?

A. Correct.

Q. And depreciation is essentially a straight-line accounting exercise, correct?

A. The straight-line accounting exercise still could cause a change from month to month, obviously, as the plant changes.

Q. When you say "as the plant changes," you mean as the amount of capital and services, that amount varies over time?

A. Correct.

Q. But the depreciation rate remains consistent over time, correct?

A. I believe so.

Q. So for any given capital expenditure, there would be a consistent rate of depreciation over time; is that a fair statement?

A. Yes.

Q. If you could please turn to page 13 of the term sheet.

1 A. I have that.

2 Q. Okay. Looking at the definition of
3 Seller's Invested Capital or SIC, that definition
4 explicitly includes capital expenditures work,
5 correct?

6 A. It does.

7 Q. And I believe you previously testified
8 that the definition of operating work specifically
9 excludes capital expenditures work, correct?

10 A. That's correct.

11 Q. Okay. If you could please look at
12 Section 13 of the term sheet and, in particular, the
13 discussion of capacity payment on pages 5 to 6 of the
14 document. Please let me know once you're there.

15 A. I have that.

16 Q. Okay. Under Section 13 of the term
17 sheet, seller's invested capital is used in
18 calculating the capacity payment, correct?

19 A. That's correct.

20 MR. SOULES: Nothing further, your Honor.
21 Thank you, Mr. Ruberto.

22 EXAMINER PRICE: Thank you. NOPEC?

23 MR. BORCHERS: No questions, your Honor.

24 EXAMINER PRICE: Consumers' Counsel?

25 MR. SAUER: Just a couple, your Honor.

1 - - -

2 RECROSS-EXAMINATION

3 By Mr. Sauer:

4 Q. Mr. Ruberto, you were asked a question
5 about the proposed transaction shifting all the risk
6 to customers. Do you recall that? And you talked
7 about the companies were at risk for imprudent --
8 disallowance as a result of imprudent spending,
9 correct?

10 A. Spending or revenues.

11 Q. Okay. And would you agree that the
12 companies today accept the regulatory risk associated
13 with a Commission disallowance for imprudent
14 spending?

15 A. Yes.

16 Q. And the companies have requested through
17 the approval of rider RRS the expectation that the
18 Commission would review charges and revenues flowing
19 through rider RRS and potentially arrive at a
20 disallowance for any imprudence passed through the
21 rider, correct?

22 EXAMINER PRICE: Could I have the
23 question back again.

24 (Record read.)

25 A. I can't speak to the expectation of that,

1 but they certainly have that ability and that right.

2 Q. And you also were talking about FES has
3 some risks for outages that under Section 8, outages
4 that last longer than 180 days, correct?

5 A. As well as those that are less than 180
6 days, correct.

7 Q. Okay. But today FES would be at risk for
8 an outage at Sammis or Davis-Besse beginning from day
9 1, correct?

10 A. Yes.

11 MR. SAUER: Okay. No further questions,
12 your Honor.

13 EXAMINER PRICE: Thank you.

14 Mr. Lindgren?

15 MR. LINDGREN: No questions your Honor.

16 EXAMINER PRICE: Ms. Addison?

17 EXAMINER ADDISON: Mr. Ruberto, I just
18 had a quick follow-up regarding the depreciation
19 payments. In section 13 of the term sheet there is
20 the opportunity to recover -- or for FES to charge
21 accelerated depreciation; is that correct?

22 THE WITNESS: I'm sorry, did you say
23 there is or is not?

24 EXAMINER ADDISON: There is.

25 THE WITNESS: There is not.

1 EXAMINER ADDISON: There is not?

2 THE WITNESS: I think I can point to
3 that. Well, it's in that same section on page 5
4 where except as -- this is halfway through Roman iii.
5 "Except as may be required by law, adverse
6 Governmental Authority... Seller agrees not to charge
7 accelerated depreciation... without Buyers' written
8 agreement."

9 EXAMINER ADDISON: Assuming that -- you
10 are saying there would never be a possibility that
11 accelerated depreciation charges would be presented
12 to the companies then? I know it says "without
13 buyers' written agreement," but there would be the
14 possibility that the companies would agree to this.

15 THE WITNESS: I don't foresee a situation
16 where the companies would agree to an accelerated
17 appreciation that increases our costs. I don't
18 envision that. We put this in to protect us so the
19 depreciation can't change, not so we can change it.

20 EXAMINER PRICE: Are you economically
21 indifferent? Wouldn't you just pass the increased
22 cost along to the ratepayers?

23 THE WITNESS: Given the Commission's
24 right to review the charges that are passed through,
25 the Commission would certainly review and say you

1 allowed depreciation to go to 10 years and now your
2 payment went up \$10 million a year, and the
3 Commission would be within its rights to determine
4 that that was an imprudent decision, so the company
5 would forfeit.

6 EXAMINER PRICE: Okay. Just to be clear,
7 make the record clear, the Commission would have the
8 right to review for prudence a company decision
9 whether to allow or not allow accelerated
10 depreciation?

11 THE WITNESS: My understanding, the
12 Commission can review all the costs which would
13 include that.

14 EXAMINER PRICE: I just have one or two
15 remaining questions. You've said a couple of
16 times -- Mr. Kutik asked you about risk to the
17 company, and you responded the company has risks of
18 imprudence on revenue; is that correct?

19 THE WITNESS: Correct.

20 EXAMINER PRICE: The companies intend to
21 sell this generation in the PJM market; is that
22 right?

23 THE WITNESS: That's correct.

24 EXAMINER PRICE: And when you say that,
25 do you mean the companies just intend to sell the

1 generation into the PJM day-ahead or real-time
2 market, or do you plan to actively manage this
3 portfolio?

4 MR. KUTIK: Your Honor, I would only note
5 if we could keep the conversation on a general level
6 without exposing any particular proprietary
7 strategies or bid strategies.

8 EXAMINER PRICE: Yes, yes, absolutely. I
9 am asking at the 10,000 foot level.

10 THE WITNESS: What our intent would be is
11 to participate in the capacity market which, of
12 course, is one revenue piece within PJM.
13 Additionally the day-ahead market is generally where
14 most generation is marketed in PJM, and I would
15 expect we would do that. There is additionally some
16 real-time market participation for any generating
17 unit simply because its output may be more or less
18 than what you cleared in the day-ahead market. So I
19 would view it as actively managing all three of those
20 components. And on a daily basis my group would be
21 responsible to make those offers into the market in a
22 manner to maximize those revenues for the company.

23 EXAMINER PRICE: But you do not intend to
24 make wholesale sale of -- long-term wholesale sales
25 of energy outside of the PJM market.

1 THE WITNESS: That's correct.

2 EXAMINER PRICE: And you do not intend
3 to, for example, every -- you are aware that every
4 unit in the state has a standard service offer that
5 is supplied by a wholesale competitive bid.

6 THE WITNESS: Yes.

7 EXAMINER PRICE: And you do not intend to
8 participate with the companies' generation in those
9 wholesale competitive bids?

10 THE WITNESS: That's correct.

11 EXAMINER PRICE: So the only disallowance
12 risk that you would be looking for would be the
13 three -- for revenue would be the three areas you
14 identified earlier.

15 THE WITNESS: I don't want to
16 artificially limit the Commission's authority to
17 review. But those certainly are the big components.
18 I mean, there is ancillary services. But that's the
19 big component of how we intend to achieve revenues.

20 EXAMINER PRICE: Perfect. Okay. Thank
21 you very much. You are excused.

22 MR. KUTIK: Your Honor, at this time the
23 companies would move for the admission of Companies'
24 Exhibits 33 and 34.

25 EXAMINER PRICE: Any objection to the

1 admission of Companies' Exhibits 33 and 34?

2 Seeing none, it will be admitted.

3 (EXHIBITS ADMITTED INTO EVIDENCE.)

4 EXAMINER PRICE: Mr. Soules.

5 MR. SOULES: Thank you, your Honor.

6 Sierra Club moves for the admission of Sierra Club
7 Exhibit 52, Sierra Club Exhibit 53 Confidential,
8 Sierra Club 55 Confidential, and Sierra Club Exhibit
9 37B Confidential.

10 EXAMINER PRICE: Any objection to the
11 admission of those exhibits?

12 MR. KUTIK: No objection.

13 EXAMINER PRICE: Those exhibits will be
14 admitted.

15 (EXHIBITS ADMITTED INTO EVIDENCE.)

16 EXAMINER PRICE: At this time we'll
17 adjourn until 10 o'clock Monday morning. Thank you
18 all. Have a good weekend. We are off the record.

19 (Discussion off the record.)

20 (Thereupon, at 12:19 p.m., the hearing
21 was adjourned.)

22 - - -

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1 CERTIFICATE

2 I do hereby certify that the foregoing is
3 a true and correct transcript of the proceedings
4 taken by me in this matter on Friday, September 18,
5 2015, and carefully compared with my original
6 stenographic notes.

7
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9
10 _____
11 Karen Sue Gibson, Registered
12 Merit Reporter.

13 (KSG-6092)

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Case No(s). 14-1297-EL-SSO

Summary: Transcript In the Matter of the application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company hearing held on 09/18/15 - Volume XIV electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Gibson, Karen Sue Mrs.