of the discovery, including copies of all of the discovery from the audit, so OCC should have that information.

MR. FINNIGAN: Okay. I'll go back and look at that afterwards. If there's any questions, we can sort through that later.

Q. Now, getting back to the allocation of the FirstEnergy Solutions share. Is it something that occurred automatically or did Duke have any say in this?

A. I thought you were going to say something additional.

Q. Let me strike that. That wasn't a very good question.

Did Duke have any choice in whether to accept a proportionate share of the FirstEnergy Solutions OVEC entitlement after FirstEnergy Solutions declared bankruptcy?

MR. D'ASCENZO: Objection, asked and answered.

Q. Go ahead, Mr. Swez.

A. Oh, okay. I wasn't sure if I needed to keep talking.

So, I discussed the energy -- so, again, there's two halves to this question: The energy allocation -- and energy, when we say "energy," that includes ancillary services -- energy and ancillary services allocation and capacity allocation.

In order to make this work, we have to understand, again, that there are 11 physical units and we can't magically make them smaller. So from an energy allocation, the answer to that question is basically no, there was really no choice.

Now, I mean, I guess had we said, had we refused -- first of all, had we refused and other PJM counter-parties said yes, I don't know how that would have worked because that would have -- I don't want to -- it's going to get way too complicated of a discussion but that would really throw off PJM because PJM has to take the revenue for that entire bucket and they have to allocate it and multiply it by a certain factor for every gen -- every owner, okay? So if one person said yes and one person said no, essentially we -- PJM couldn't have handled that; so, really, we all needed to say yes, or we all needed to say no, okay?

So if we all said no, then the unit is still going to be dispatched to full load by PJM.

There's going to be additional revenue created. OVEC is going to get that revenue and they're going to allocate it to the joint owners. So from an energy standpoint, no. At the end of the day you're going to get the allocation because you go back to the fact that these power plants are 200 megawatts apiece and you can't change the size of the unit.

And like I mentioned, we knew, we had an expectation, that the revenues would be greater than the variable cost of the allocation so we knew it was good for our customers. That's why we agreed and all of the PJM sponsors agreed.

On the capacity side, you know, OVEC was, you know, pointing to that, that section in the ICPA. Could we have refused? I don't know. Maybe. But they used that section of the ICPA to allocate the energy. And again, we knew, we had an expectation that we were going to receive more capacity value, more revenue from the capacity, and we weren't accepting any payment or we weren't paying for any of the demand costs, all right? It was just an allocation of the revenue on the capacity side.

Again, we knew it was going to be the right thing for our customers and, like I said, it ended up being a positive benefit to our customers.

Q. Mr. Swez, you mentioned that all the other co-owners agreed. Do you mean by that that all the other co-owners of OVEC agreed to take their proportionate share of the capacity and the energy from the FirstEnergy Solutions OVEC entitlement after FirstEnergy Solutions declared bankruptcy?

A. So I'll be clear: There's -- on the non-PJM sponsors, it's my understanding, yes, they did receive additional allocation of the energy. All PJM sponsors received the allocation of the energy. All PJM sponsors received allocation of the capacity.

But for the non-PJM sponsors, they have no way to monetize the capacity value, so I don't know what they did in terms of the capacity side. I don't think they would have been able to receive any benefit because they don't -- they don't sell the capacity into PJM.

Q. Are you aware of the fact that, after FirstEnergy Solutions declared bankruptcy and then refused to take their proportionate share of the output from the OVEC plants, that FirstEnergy Solutions later entered into a settlement with OVEC in the bankruptcy case and paid compensation to OVEC covering a time period during which FirstEnergy Solutions refused to take their share of the output of the OVEC plants?

A. I'm aware that occurred, yes.

Q. What is your understanding of what the payment represented? What -- what -- what was it intended to cover to your understanding?

A. I will say I'm not a legal expert. I did follow that as close as I could. I understand they received, OVEC received $32.5 million, I believe. That's a public amount, I think. Much beyond that, I really don't know a lot about, you know, exactly what it was supposed to cover. My assumption is it would cover the costs that FirstEnergy didn't pay during that time period.

Q. Okay. But you said it wasn't a cost, it was a benefit.

A. No. This is two different things we're talking about. You asked me about FirstEnergy or Energy Harbor's payment to OVEC of the $32.5 million. That's a different topic than our allocation of energy and capacity during the time when FirstEnergy refused to take their energy and capacity.

Q. Okay. Can you explain the difference?

A. Sure. So I mentioned the allocation issue, right? So FirstEnergy says we're not taking this. OVEC looks at that clause in the ICPA and says we have some extra capacity and energy and we allocated -- we all agreed to allocate that as a benefit. Like I mentioned, that's the $700,000 benefit.

The other side, really, to me, somewhat unrelated, is FirstEnergy paid $32.5 million in that settlement because, when they walked away, they didn't pay for their fixed costs, their demand components, right. FirstEnergy wasn't being allocated any energy component because they weren't receiving any energy but they were still being allocated the capacity or fixed costs, the demand costs, and my understanding they refused to pay and so that payment was compensating OVEC for that loss of the fixed payment piece.

Q. I thought you mentioned that Duke took the allocation from the FirstEnergy Solutions share for energy and capacity.

A. We did. Again, capacity revenue. No -- no fixed costs were involved, only the --

Q. I see.

A. -- revenue.

Q. So -- I see what you're saying. So the figures that you were describing earlier were the PJM revenues from capacity, and the bankruptcy settlement was intended to represent the costs that FirstEnergy Solutions was responsible for that it didn't pay after it revoked responsibility for the agreements. That's the difference.

A. Yeah. And I can see where this is going to get -- it got confusing. So when I say "capacity," I meant the capacity revenue from PJM.

Q. Right.

A. I think you can also say capacity and mean the fixed costs or the demand costs of operating the units. Yeah, I'm sorry. Capacity from PJM is my -- when I talk about allocation of capacity, it's all about capacity revenue from PJM.

Q. I understand. I think I understand, so thank you for explaining that.

Did any of the $32 million bankruptcy settlement that FirstEnergy Solutions paid to OVEC flow through to any of the OVEC members?

A. Yeah, I can't answer that. I don't -- I don't know anything about that.

Q. Okay. Now, let's change topics and go back to this subject we were discussing at the beginning of your deposition and that is how the plants are committed into the PJM market. Can you talk about what's the difference in committing plants on a must-run basis versus an economic basis?

A. Sure. So like I mentioned -- well, actually I didn't mention, but there are four different offer statuses in PJM. We're really talking about two of the statuses: Economic -- and I capitalize that word, big E -- and must-run.

So an economic commitment and so it's an offer is what we're talking about, and PJM also calls that a pool scheduled, so pool scheduled like P-O-O-L scheduled. So if you make an offer of economic, you're telling PJM that you want them to decide whether the unit should be committed; i.e., should it run or not.

If you make an offer of must-run, you're telling PJM that we are committing the unit, we want this unit, this unit is going to run. It does not, however, mean that the unit will not still be dispatched between minimum and maximum loading, which it will be.

So, again, these are -- we're talking about two different things: We're talking about commitment versus dispatch. So from a commitment standpoint, both are valid offers, that's economic and must-run, and both can be used, and overall you're still committing the unit economically. Different use of the word "economic." This might get confusing.

Q. Why would you, as an operator, choose one or the other? What factors would you use in making that decision?

A. This is a fairly long answer so I'll try to do my best to be brief but you need to understand the impacts of each commitment offer.

So with an economic commitment offer, that can be -- really it tends to be more beneficial to be used with units that are higher cost and with units that have shorter startup time, so, for instance, a combustion turbine. I -- I can't speak for every other operator but I think many operators, including Duke Energy, use the economic status for units that are more, quote/unquote, nimble, lower startup costs, shorter startup times.

We have to understand -- we have to

remember the day-ahead market is a 24-hour market into the future. So the day-ahead market, the world really does end at midnight tomorrow night. So a status of economic -- and what's the goal? The goal is to maximize the value of that generator, and so that status of economic may maximize the value of generators that tend to have higher costs and a shorter startup time.

An offer of must-run, because these assets we're talking about have startup times, startup costs that are larger, they don't necessarily overcome the costs, the hurdle of that startup in that 24-hour period. So for a unit that's a slower unit, that has a lower cost, can't cycle as quickly, takes time to start up, has more risk around shutting down and starting back up, the benefits are felt over a longer time period, that's when you're more likely to use must-run.

Neither one is wrong. Neither one is perfect. You need to understand the consequences of each.

Q. Is that decision of how to commit the plants made on a daily basis then?

A. It is. It's -- it's included in the

offer that each asset is made into PJM each day.

Q. And then does this relate to the information you discussed at the beginning of the deposition where Duke has these profit and loss reports where you try to forecast the expected revenue for each unit and that's one of the things you take into consideration in making those daily commitment decisions?

A. That's correct. We are -- we're forecasting for all of our units, you know, not just the OVEC units, but the OVEC units are included in that report and so we make that forecast.

Now, with OVEC it's a little bit different because you've got -- it's complicated. You've got sponsors outside of PJM, you've got sponsors inside of PJM. You also have the fact that these are generally pretty low-cost units that compete pretty favorably in the energy market and they do -- they're coal units and you can't typically cycle them on and off very, very extremely quickly.

So with the OVEC units, the default assumption is made that the units are going to have an offer of must-run and it's been agreed upon in the operating committee with the exception of Clifty

Creek 6 during ozone season. So because I know, we know, that those units are being offered as must-run, then we are going to monitor the units, look for opportunities when the must-run status may not make sense, and if we see that, then we will talk to OVEC and the operating committee.

Q. Have you ever had occasion to do that?

A. Yes, I have.

Q. And when has that happened?

A. That happened during the extremely low energy prices that occurred this year when the COVID pandemic kind of decreased demand at the same time we had low natural gas prices. So during March, April, May, Juneish time period, really kind of the spring of 2020 was the instance when that was mostly used.

Q. And what was the nature of those discussions in the operating company -- committee meetings?

A. I brought the -- this -- so through our monitoring of the OVEC profitability, I saw that the units were going to start receiving less revenue than variable cost to operate, so I brought it to not the operating committee's attention, I brought it to OVEC's attention. But once an OVEC sponsor brings something to OVEC's attention, then OVEC, in turn, takes that and they send out a communication to the entire operating committee. Sometimes it might be included in a meeting where we have -- someone has to explain. I think this was relatively simple and the e-mail that OVEC sent explained the situation.

Q. What was the explanation?

A. Basically, like I said, you know, due to the pandemic, we're seeing revenues that -- one of the sponsors brought up the fact that revenues are now not covering the -- not always covering the variable cost of the unit, and the sponsor is submitting a motion, I don't know exactly what the legal words are, but they're proposing to change the way the units, the OVEC units, are being committed; and that motion passed.

Q. And what was the change that was made as a result of that decision?

A. OVEC started encomp -- started using an economic commitment status during that time period more often, not necessarily all the time, but they used it more often like I said because it's not one size fits all. It's not like you always do one or always do another. That was during a period where

OVEC had a lot of maintenance outages. You have -- we have a lot of other factors. You know, we have startups and shutdown and there's time involved and risk. So OVEC used, at that point in time, that commitment status for some of the units, but not all; for some.

Q. Okay. And the period we're describing is March through June of 2020?

A. The pandemic started obviously, I think the big -- the day I hear is March 13th is the date kind of everyone shut down and every -- that's what I always kind of have been told but, anyway, I think once, you know, the shutdowns occurred, power prices started going south, lower, I think the change didn't occur until sometime in April so I think it was April, May, and June of 2020.

Q. Now, going back to 2019, were there ever any times when the Duke forecast of the expected profit and loss for the OVEC plants showed that the revenues from the PJM day-ahead energy market might not cover the plants' variable operating costs?

A. Yes.

Q. Did you discuss that with the operating committee?

A. No, because, again, you know, we're talking about units that have startup costs. So let's say for instance tomorrow is a week -- a Saturday and you're expected to lose $5,000 from operation of the unit but you also know that it costs $20,000 to start the unit up and shut it down. So it's something where you know, well, I'm not going to shut it down for tomorrow and Sunday because Monday the unit makes money. So, you know, there are going to be days in which you lose money, absolutely.

Q. Okay. So your judgment was that the non-cost physical factors related to the OVEC plants would not justify switching the commitment status to economic at any point during 2019.

A. Well, it's not just the non-cost, it's the cost as well. Like I mentioned, I talked a minute ago about the startup cost; that's a cost item, right? So even, you know, yes, there are going to be days and this is true of almost every single power plant on the grid, maybe not, you know, a zero-cost asset but for the most part, you know, all coal units certainly have days in which they're going to be, quote/unquote, out of the money, so that's going to occur.

Now, you have to consider the cost impact of it, the startup cost. Once you get past that, you have to start talking about, well, you know, are there other risk factors by slapping it offline. All the other impacts to unit commitment. Perhaps there was a required test that had to occur. Obviously if you have say an environmental test, they call them RATA tests, it's R-A-T-A test, you can't turn it off, right? So you have to -- you have to understand, do I have testing on the unit.

So there are a lot of other factors than just cost factors and, you know, the other physical parameters like startup time and startup costs. You need to, you know, understand the other bucket, you know, testing, things like that.

(Ms. Bojko and Ms. Whitfield join the videoconference.)

Q. Now, I thought you mentioned earlier when you were describing these profit and loss forecasts for individual plants, that the startup costs were one of the factors that you took into account in the expected profit and loss report.

A. The startup cost is on the report. However, it doesn't make sense to try to -- I don't know how best to explain this.

THE COURT REPORTER: Hold on, hold on, hold on. Somebody who just joined, if they can mute themselves because I'm hearing it's either maybe Ms. Whitfield -- there you go. Thank you.

(Court reporter clarification with the witness.)

A. The profit and loss report, so the report that we produce daily that shows the expected revenues and variable costs for every unit, it shows operation of that unit, it's a simulated dispatch for the next 21 days by hour.

Okay. So each day, take for instance today is -- is today Tuesday, I guess? Yeah, today is Tuesday. That report we'll run today will show the expected profit and loss for Wednesday, Thursday, Friday, et cetera, out for the next 21 days.

In addition, on the same report you're going to see a column that has startup costs on it. It could be cold start, hot start, intermediate start. There's different kinds of startup costs. We don't try to take the startup cost and show that for each day, and the reason is is because when you look at this report there are so many different scenarios that could occur. You want to understand those two factors separately. So the user of the report can look at the report and see the expected value of operating that unit for tomorrow and then it can see the startup cost separately.

Q. Is it your testimony then that during 2019, Duke did not make any recommendations to OVEC to switch the commitment status from must-run to economic?

A. So, no. I think there's -- there's two different types of -- where I would suggest switching from must-run to economic. There's the daily operation like for instance I mentioned in 2020 during COVID when I noticed, we monitor, and I saw the revenues not exceeding the variable costs, I notified OVEC. So that's what I would call a -- a notice to OVEC that I believe now we need to change the commitment.

However, during operating committee meetings, you know, I've talked about this for roughly I don't know exactly when, it might have been '18 or '19, but I've mentioned this to OVEC because I believe that, due to increasing amounts of renewable energy on the grid and lower natural gas prices, we will see energy prices, we have seen energy prices, steadily drop over the past five years.

Now, the OVEC units are relatively low-cost units. They -- energy -- they have a relatively low-energy cost and they compete pretty favorably in the energy market. However, when you have, like, for instance, renewable generators that have a zero-production cost or even perhaps negative, you know, energy prices, along with natural gas prices dropping, are getting lower, are steadily dropping over time.

So I brought this up, again I don't remember if it was '18 or '19, with OVEC, that we need to work on creating a new process that starts to include periods where we may use a commitment status offer of economic in addition to must-run.

Q. And what response was made by the other members of the operating committee to your recommendation?

A. I believe it was generally received pretty favorably. I think the thought was, was that, over time we would work into this, especially if energy prices dropped.

I should mention that OVEC did only

become a full member of PJM, I believe December 1st, 2018. So this was something that I didn't really necessarily think that OVEC would want to make this change right away because it's fairly complicated; you've got generators outside of PJM, you've got generators inside of PJM, you've got OVEC becoming a full member of PJM on, I believe, December 1st of 2018, so there's a lot of change occurring at the same time. So this was something that we were -- I was gonna -- my goal is to get OVEC to work into over time.

But for now the process that we're using, you know, to protect our customers, make sure this is a valuable asset for our customers energy-wise, is to monitor the profit and loss ourselves and then bring that to OVEC's attention.

Q. Did OVEC commit any of the plants into PJM's day-ahead energy market on an economic basis in 2019?

A. Yes. For sure I can answer that question by saying Clifty Creek 6 was offered on an economic basis between May 1st of 2019 and the end of September of 2019 because that is the ozone season. That unit doesn't have an SCR and so that -- that's the ozone period, that five-month period of the year is the ozone, quote/unquote, ozone season. I can't speak for the other units, I just don't know.

Q. Could you please turn your attention back to the Audit Report at page 44.

A. I'm there.

Q. Okay. Now, this goes to a topic that you were discussing earlier where there's language on this page talking about how energy prices fell dramatically in April of 2020 resulting from the COVID pandemic and it mentions here that Duke Energy Ohio raised this concern with OVEC, and OVEC responded by proposing a change to the operating committee process. Do you see that section of the report?

A. Can I ask, what's the top of your page 44 say? I think my page numbers are slightly different.

Q. Okay. Let me pull mine up. We might -- must have different page numbers. Give me a second here and I'll get that for you. I can give you the section number that might help you find it more easily, but just give me a moment to get there.

Okay. This is in Section 5.3.4 where it says "DEO's Involvement in the Energy Offer Process."

Do you see that section in your report?

A. I do. It's on my page 45, but yes.

Q. Okay. If you could take a moment to just, you know, review that section again, and I want to ask you about a change in OVEC operating committee process that's described in that section. So take a moment to review it again and refresh your memory and then let me know when you've had a chance to do that.

A. Okay. I've read 5.3.4.

Q. Okay. That section talks about a change in the OVEC operating committee process. What was that change?

A. Yeah, I don't -- the word "process" there probably is not correct. It was a -- it was a -- well, let me just explain.

So OVEC sent an e-mail to all of the -- I'm not sure if it went to all of the sponsors or all of the PJM sponsors. I'm going to -- I'm going to assume it went to all of the PJM sponsors only, and the e-mail would have said, you know, this was brought up by one of the sponsor companies that a change to the process that is shown in the operating committee -- operating committee procedure, I guess, is the name, because in the operating committee it talks about commitment of the units and it talks about how the default offer is must-run with the exception of of Clifty Creek 6 during the ozone season.

And so the proposal was sent out to all the PJM sponsors that said we want to make a change to the operating committee procedure due to the COVID pandemic and we need to have all the sponsors -- I'm not sure what the required approval is, but we need to have the sponsors vote. And I believe it passed unanimously. That's -- that's what I remember.

Q. Okay. That occurred in 2020.

A. That's correct.

Q. Okay. After the energy prices fell dramatically beginning in March of that year due to the pandemic as you discussed.

A. Yeah. "Dramatically," I'm not sure if "dramatic" is the right term but, yeah, they definitely fell, yes.

Q. Now, you mentioned earlier that you started making the recommendation to the OVEC operating committee back in 2018 and 2019 that they consider changing the commitment status from must-run to economic. What was the result of those discussions in the operating committee at that time when you began to make that recommendation?

A. Well, okay, to be -- make sure we're clear. I didn't propose a change. I proposed that we need to have a process put in place where OVEC would make that determination each day. We all agreed that -- you know, and when I'm talking, this is during the time period where OVEC is taking on all these new roles by being an actual full member of PJM. Again, like I mentioned, OVEC didn't become a member until December 1st of 2018.

So the discussion that took place in the operating committee meeting was that there needs to be a process put in place where OVEC begins to forecast this expected operating margin each day, and we discussed that, and I think we agreed, yeah, that makes sense but that, you know, that's something that we're going to get into, or OVEC would get into and begin that -- begin that type of daily process once kind of it got up to speed, you know, once really the units kind of they got acclimated to PJM.

So it wasn't -- it wasn't -- I wasn't necessarily suggesting we need to change the commitment status. I was suggesting that we needed a process, OVEC needed a process to examine the profit and loss each day so in the event prices dropped, our default must-run offer would need to be reconsidered.

During 2019, the units competed very favorably in the energy market, for the most part they were economic to operate from an energy standpoint, so I didn't suggest -- I don't believe I suggested at any point in time during the year that we needed to change the actual offer made to economic.

So I want to make sure I'm clear on there's a difference between me, you know, like I did in the spring of 2020 where I suggested we need to start offering the units as economic. In that '18-'19 time frame, I was suggesting we needed a process so that OVEC had the tools necessary to begin a potential change if needed. Again, I knew all along that we were doing this process already, so there really was no urgency.

Q. Did the OVEC operating committee adopt this recommendation of yours?

A. Like I said, at the time, OVEC was just getting into being a full member of PJM, so my recollection is that the conversation was that makes sense, let's kind of revisit that once OVEC, you know, has time to actually -- let's get the -- let's get the actual units integrated into PJM first and then we'll talk about potential changes to the process down the road. And I knew it wasn't urgent because I knew the units had a favorable energy market margin and it would work as a must-run offer.

Q. When were the OVEC plants integrated into the PJM market?

A. I believe it was December 1st, 2019. I'm sorry. Now I'm -- now I'm -- now I'm questioning myself. December 1st, 2018.

Q. So during the entire year of 2019, which is the subject of this Audit Report, did PJM adopt your recommendation to change their process for deciding how the plants would be committed into the PJM market?

A. I believe you said "did PJM adopt"; so, no, it wouldn't be PJM.

Q. I meant did the OVEC operating committee adopt your recommendation, at any time during 2019, to change their process regarding how the OVEC plants should be committed into the PJM day-ahead energy market?