UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

OHIO EDISON COMPANY, A WHOLLY OWNED SUBSIDIARY OF FIRSTENERGY CORP.

and Case 08-CA-099595

INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, LOCAL UNION NO. 1194, AFL-CIO, CLC

FIRSTENERGY GENERATION CORP.

and Case 06-CA-092312

INTERNATIONAL BROTHERHOOD OF ELECTRIC WORKERS, LOCAL UNION NO. 272, AFL-CIO, CLC

Aaron Sukert, Esq.,
for the General Counsel.
Nick Nykulak, Esq.,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This case was tried in Cleveland, Ohio, on September 17, 2013. The International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO, CLC (Local 272) filed the charge in Case 06-CA-092312 on October 30, 2012, and an amended charge on November 20, 2012 against FirstEnergy Corp. The International Brotherhood of Electrical Workers, Local Union No. 1194, AFL-CIO, CLC (Local 1194) filed the charge in Case 08-CA-099595 on March 5, 2013, against FirstEnergy Corp. and an amended charge on June 21, 2013, against Ohio Edison Co, a wholly owned subsidiary of FirstEnergy Corp. On June 28, 2013, the Acting General Counsel² issued an order consolidating cases, consolidated complaint and notice of hearing in these cases. On August 30, 2013, the

¹ All dates are in 2012 unless otherwise indicated.

² I have taken administrative notice of the fact that on October 29, 2013, the United States Senate confirmed President Obama's nomination of Richard F. Griffin Jr. to be the Board's General Counsel and that he was sworn in on November 4, 2013.

Acting General Counsel issued an amended consolidated complaint and notice of hearing (the complaint). On September 3, 2013, the Acting General Counsel issued an amendment to the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

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I. JURISDICTION

The Ohio Edison Co., a wholly owned subsidiary of FirstEnergy Corp. (Respondent Ohio Edison) is an Ohio corporation and wholly owned subsidiary of FirstEnergy Corp. with headquarters located in Akron, Ohio, and is engaged as a public utility in the purchase, production, transmission, and retail sale of electricity. Annually, in the course and conduct of its business described above, Respondent Ohio Edison derives annual gross revenue in excess of \$250,000 and purchases and receives goods and materials valued in excess of \$50,000 directly from points located outside the State of Ohio.

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FirstEnergy Generation Corp., (Respondent FirstEnergy Generation) is an Ohio corporation and a subsidiary of FirstEnergy Corp. with an office and place of business in Shippingport, Pennsylvania, and is engaged as a public utility in the generation and distribution of electricity. Annually, in the course and conduct of its business described above, Respondent FirstEnergy Generation derives gross annual revenue in excess of \$250,000 and purchases and receives at its Shippingport, Pennsylvania facility goods and materials valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania.

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Respondent Ohio Edison and Respondent FirstEnergy Generation admit, and I find, that they are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 1194 and Local 272 are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

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The complaint alleges that since on or about January 1, 2013, the Respondents unilaterally changed, from every 5 years to every 10 years, the length of service employees must serve to be eligible to receive employee service awards in violation of Section 8(a)(5) and (1) of the Act.

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Background

FirstEnergy Corp., the parent company of both Respondent Ohio Edison and Respondent FirstEnergy Generation (collectively the Respondents), was formed in 1997 as a result of the merger between Cleveland Electric Illuminating, Toledo Edison, Ohio Edison, and Pennsylvania Power. FirstEnergy currently employs approximately 16,000 employees and has a collective-bargaining relationship with approximately 23 unions.

Respondent FirstEnergy Generation and Local 272 are parties to a collective-bargaining agreement effective by its terms from December 5, 2009, until February 15, 2013, covering certain employees at Respondent FirstEnergy Generation's D. Bruce Mansfield facility in Shippingport, Pennsylvania. On August 16, 2012, the parties entered into a "stipulation of settlement" that extended that agreement with certain modifications through February 15, 2014. The employees in the bargaining unit covered by this agreement have been represented by Local 272 since 1978. There are approximately 290 employees in the bargaining unit.

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Respondent Ohio Edison and Local 1194 were parties to a collective-bargaining agreement effective from September 3, 2008, until September 3, 2013. On September 6, 2013, the parties entered into a tentative agreement effective from September 3, 2013, through September 2, 2016, that at the time of the hearing was undergoing a ratification vote. The bargaining unit is composed of transmission and distribution employees in several geographic locations in Ohio. The bargaining unit employees have been represented by Local 1194 since 1946. There are approximately 275 employees in the bargaining unit.

The Employee Recognition Award Policy

Respondent Ohio Edison and Pennsylvania Power, the predecessor to Respondent First Energy Generation, utilized an employee recognition award program applying to the FirstEnergy Generation unit and the Ohio Edison unit since at least 1973. The purpose of the policy is "To acknowledge employees for their service with the company." (Jt Exh. 6.) Pursuant to this policy, in the 1970s to the late 1980s, full-time employees received a tie tack or charm bracelet on their 1-year anniversary date of employment. During this same period, on an employee's 5-year anniversary, he or she would receive a tie tack or charm bracelet. The 5-year service recognition awards would increase in value based on length of service. Employees were also invited to a 5-year service recognition awards dinner after every 5 years of service.

In 1989, Ohio Edison and Pennsylvania Power changed their employee recognition policy to include an award catalog. Employees were permitted to choose an item from an award catalog on their 5-year anniversary. There were different levels of catalogs to celebrate different anniversaries and the awards in the catalog increased in value based on the number of years an eligible employee had been employed.

After it was formed pursuant to the merger in 1997, FirstEnergy continued the employee service recognition policy of its predecessors. The FirstEnergy employee service recognition award policy applies to all of the approximately 16,000 individuals employed by FirstEnergy, including supervisors. The employee service recognition policy is typically not incorporated into collective-bargaining agreements. The exception is that the contract between FirstEnergy Nuclear Operating Co., a subsidiary of FirstEnergy and IBEW, Local 29, effective from 2008 through 2011, and an extension of that agreement effective from October 1, 2011, through September 30, 2014, provides for the granting of service recognition awards to members of Local 29 at 5-year intervals. The most recent contracts and extensions between the Respondents and Local 272 and Local 1194 do not contain a reference to the employee service recognition policy, nor did any of the preceding contacts between those two Unions and the Respondents and the Respondents' predecessors contain such language. In fact, the parties to this case have never

negotiated regarding the employee service recognition policy. In addition, the employee service recognition policy is not listed in the employee compensation and benefits handbook utilized by the Respondents.

The employee service recognition policy is set forth in documents entitled "Human Resources Letter 307" posted on FirstEnergy's human resources website. The human resources letters constitute the formal policies of all FirstEnergy subsidiaries. It is undisputed that human resources 307 letters applied to employees represented by both Local 1194 and Local 272. In a human resources letter 307 dated January 1, 1999 (Jt. Exh. 7), eligibility was changed to include part-time employees. This letter stated that employees would be recognized for their service at 5-year intervals, thus eliminating the recognition of an employee's 1-year anniversary. The letter also indicated that awards would be shipped directly to the human resources representative at each location who would be responsible for presentation of the award to the employee. Finally, this letter contained the following language which was maintained in all subsequent human resources 307 letters:

This personnel policy is not a binding contract, but a set of guidelines for implementation. The Company expressly reserves the right to modify any of the provisions of this policy at any time and without notice.

On February 1, 2002 a new human resources 307 letter (Jt. Exh. 8) issued superseding the 1999 policy. The 2002 policy indicated, for the first time, that employees had the option of ordering their award from the website of the third-party vendor, Pat Geary and Associates, that provided the catalogs from which employees could select an award. The Pat Geary and Associates website was accessible via FirstEnergy's internal website. Awards could be selected from an individual's current service level or from the next lower level.

In 2004, FirstEnergy changed vendors for the gift catalogs from Pat Geary and Associates to C. A. Short. For the first time, employees were restricted to selecting awards from the catalog that corresponded to their award level. Previously, employees were permitted to select an award from the catalog at their anniversary level or a lower one. On January 1, 2004, the 2002 employee recognition reward policy was superseded by a new human resources letter 307 (Jt. Exh 9). Under the 2004 policy, the awards were delivered to the employee's home and not to the employee's supervisor for presentation. The 2004 policy also announced that employees would receive a "service award package" that included a certificate of appreciation and a letter from FirstEnergy's CEO. The 2004 policy also indicated that employees who failed to order an award from the catalog would not receive one. Previously, if an employee did not select an award one would be selected for him or her.

On January 1, 2009, FirstEnergy issued a human resources letter 307 (Jt. Exh. 10) that superseded the 2004 policy. Under the 2009 policy, the anniversary of employees who had a break in service and were rehired after January 1, 2005, would be measured by their rehire date, and not in accordance with the pension plan's break in service rules. Employees hired prior to January 1, 2005, would continue to have their anniversaries determined by the pension plan's break in service rules. In a human resources policy letter dated February 28, 2011 (Jt. Exh. 11), FirstEnergy only changed the Internet website for employee access to the catalog.

The record establishes that since C. A. Short began serving as the third-party vendor the value of the employee service award increased in a uniform manner with an employee's length of service. After 5 years the value of the award is \$35, after 10 years it is \$69.50, after 15 years it is \$75, and after 20 years it is \$101. The value of the awards continues to increase in 5-year increments up to a 50 year anniversary award, which is worth \$314.50. (Jt. Exh. 25.)

A sample 5 and 10-year anniversary award package, including the corresponding award catalog, was admitted into evidence at the hearing (Jt. Exhs.17 and 18, respectively). Each anniversary level of a gift catalog contains between 90 and 100 items, broken down into separate categories such as jewelry, electronics, cookware, and watches. There are 9 or 10 items contained in each category at every anniversary level. The catalogs are generated by C. A. Short around the time of an employee's anniversary date. The items contained in the catalogs are constantly changing as out-of-stock inventory is replaced with new items and new models of items replace older models. All the items contained in a catalog are limited to tangible items such as clocks, jewelry, and cookware. Employees do not receive cash or gift cards under the service recognition policy. The value of an award is not reported on an employee's W-2 form.

The Respondents' September 2012 Communications with Local 272 and Local 1194 and the Implementation of a Change in the Employee Service Recognition Policy on January 1, 2013

On September 18, 2012, FirstEnergy representatives contacted various union representatives including Herman Marshman, Local 272's president, and David Childers, Local 1194's business manager, to inform them of upcoming changes to certain FirstEnergy employment policies, including the employee service recognition policy. The ultimate decision to change these policies, including the employee recognition award policy, was made by Tony Alexander, FirstEnergy's CEO. In order to maintain uniformity in the communications with the various unions, scripts were prepared for the labor representatives to use when speaking to the union representatives.

On September 18, Eileen McNamara, FirstEnergy's director of labor relations, called Marshman and informed him that various changes in employment policies would be announced to employees the next day. According to Marshman, McNamara told him that FirstEnergy would be making changes to various employment policies including the employee service recognition policy, educational reimbursement, death benefits, and long-term disability. Specifically with respect to the employee service recognition program, Marshman testified that McNamara told him that the change to the employee service recognition award program would be from the then current 5-year service award to a 10-year service award and that the change would take place in January 2013. Marshman further testified that he told McNamara that the changes in the policies that she had informed him of were subject to negotiations and that he expressed concern about FirstEnergy making these proposed changes without negotiations. According to Marshman, McNamara replied that she understood his position but that FirstEnergy did not agree with him on this point. Marshman testified that he stated that the changes were subject to negotiations and that FirstEnergy was forcing him to file an unfair labor practice charge, which he did not want to do.

McNamara testified that she utilized the script (R. Exh. 1) that had been prepared to discuss the upcoming changes to some employment practices at FirstEnergy when she spoke to

Marshman on September 18. According to McNamara, she did not deviate from the script during her phone conversation. With respect to employee service awards the script indicates: "Will be given for each ten years of service rather than each 5 years." As a closing statement the script indicates: "As you can tell we are making changes that we believe will make a difference, but we are facing long-term challenges. These changes will take place at the beginning of the year, January 1, 2013. Should you have any concerns or questions please do not hesitate to call." McNamara testified that Marshman did not state that the changes she discussed with him were subject to negotiations nor did he request to bargain over any of the changes that she had relayed to him, including the changes to the employee service recognition policy. McNamara specifically denied that she said that FirstEnergy had no obligation to negotiate over any of the proposed changes. McNamara further testified that Marshman said in response to the changes in policies that she had announced, "Oh no you don't, you know I have to come to Akron on this." Marshman added that he would also have to go to the Board. (Tr. 131.) McNamara testified that she understood Marshman's reference to going to Akron to be that he wanted to complain to FirstEnergy CEO Alexander. McNamara further testified that union representatives frequently spoke to Alexander about employment issues that arose.

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McNamara testified that her superior, Chuck Cookson, asked her to update him on the conversations that she had with the various union representatives that she had spoken to. Accordingly, on September 19, McNamara sent the following email to Cookson:

Chuck-heard back from Herman and Local 50. Local 50 is fine. Herman is not happy (although very polite and made nice jokes). He said "on (sic) no you don't! Again? Now you know I have to file a board charge honey" and now he "has to come to Akron for this one." He was very nice about it though. He was actually quite funny-but I'm sure he's serious about the charge and coming to Akron. I told him to stop by my office if he makes it Akron-he says, "oh yes, he is coming to Akron for sure." [R. Exh. 4.]

To the extent that the testimony of Marshman and McNamara conflicts, I credit McNamara. McNamara's demeanor while testifying exhibited certainty. In addition, her testimony was consistent with both the script that was prepared prior to her discussion with Marshman and with the email she sent to Cookson following her conversation with him. I find particularly persuasive the email she sent to Cookson as I doubt she would have included such detail regarding her conversation with Marshman unless it was true. On the other hand, I do not find Marshman's testimony regarding their phone conversation to be sufficiently reliable to base findings on it. His testimony was not particularly detailed and his demeanor while testifying was not impressive.

According to the uncontroverted testimony of Childers, Local 1194's business agent, on September 18, 2012, John Rossero, a FirstEnergy labor relations representative, called him to inform him of upcoming changes to employee benefits, including the employee service recognition policy. Childers was informed by Rossero, that FirstEnergy was going to change the employee service recognition policy and that employees would be rewarded at 10-year intervals as opposed to 5-year intervals. Childers admitted that he did not request to bargain over the change to the employee service recognition policy that Rossero had announced to him. When Childers was asked at the hearing why he did not do so, he replied, "The changes were not going

to take place until January so I felt there was time, time to review what we were being told and how to respond to that." (Tr. 102-103.) The record establishes, however, that Local 1194 never requested to bargain over the change to the employee recognition policy prior to its implementation on January 1, 2013, or thereafter.

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On September 19, the Respondents distributed to their employees and to Locals 272 and 1194, a copy of "FirstEnergy Employee Update Special Issue" which included changes in employee benefits that would be taking place effective January 1, 2013, including changes to the employee service recognition policy. (Jt. Exh 12.) In this connection, this document stated "Employee Service Awards will be given for every 10 years of service rather than every 5 years of service."

The employee update included a message from FirstEnergy's CEO, Alexander, which indicated that because FirstEnergy stock had lost 6.45 percent in value, certain staff reductions as well as changes to employee benefits were being instituted. At the hearing, Stacy Silvis, a FirstEnergy benefits manager, testified that FirstEnergy and its subsidiaries would save approximately \$200,000 per year corporatewide by changing the employee recognition service policy from 5 to 10 years.

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On September 27, 2012, McNamara sent to Marshman a letter which stated in relevant part: "On September 19, 2012, the following additional benefit changes were announced, effective January 1, 2013:[. . .] Employee Service Awards-Will be given for each 10 years of service rather than each 5 years. If you have any questions or concerns regarding the foregoing, please do not hesitate to contact me." (Jt. Exh. 15) On the same date, an identical letter was sent by Rossero to Childers (Jt. Exh. 14).

On October 30, 2012, Local 272 filed an unfair labor practice charge in Case 06-CA-092312 alleging, in part, that Respondent FirstEnergy Generation violated Section 8(a)(5) and (1) by making a unilateral change in employee service awards on or about September 27, 2012. On November 20, 2012, Local 272 filed an amended charge that contained the same allegation regarding the employee service award program.

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On January 1, 2013, the Respondents implemented a new human resources letter 307 (Jt. Exh. 16) which changed the employee service recognition program to reflect that awards would be received at 10-year anniversary intervals. The effect of this was obviously to change the policy of granting an award at a 5-year anniversary date to a 10-year anniversary date. This change applied to all employees and supervisors throughout FirstEnergy and its subsidiaries, except for employees represented by IBEW Local 29. Pursuant to their collective-bargaining agreement, those employees would continue to receive awards at the 5-year anniversary date. As a result of the January 1, 2013 changes to the employee service recognition policy, approximately 89 employees represented by Locals 272 and 1194 did not have their anniversaries recognized, who otherwise would have received a recognition award at a 5-year anniversary interval.

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On March 4, 2013, Local 1194 filed the charge in Case 08-CA-099595 alleging, in part, that Respondent Ohio Edison violated Section 8(a)(5) and (1) by unilaterally announcing

changes to the employee service award program on September 27, 2012, that became effective on January 1, 2013.

Analysis

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Whether the Employee Service Recognition Policy is a Mandatory Subject of Bargaining

The General Counsel contends that the Respondents' employee service recognition policy is a condition of employment and therefore is a mandatory subject over which the Respondents had an obligation to bargain. The Respondents contend that the items provided to the employees through the employee service recognition policy are gifts and therefore not a mandatory subject of bargaining over which they are required to bargain.

Section 8(d) of the Act requires that an employer bargain with a union representing its employees with respect to "wages, hours, and other terms and conditions of employment." It is clear that an employer has a duty to bargain with the union over mandatory subjects of bargaining and that its failure to do so violates Section 8(a)(5) and (1) of the Act. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679-682 (1981); *NLRB v. Katz*, 369 U.S. 736, 743 (1962). In *Postal Service*, 302 NLRB 767, 776 (1991) the Board noted that it "has broadly construed the term 'wages' in Section 8(d) of the Act to include "emoluments of value . . . which may accrue to employees out of the employment relationship." *Central Illinois Public Service Co.*, 139 NLRB 1407 (1962). In other words the term "wages" does not refer to a sum of money given for actual hours worked; rather it also encompasses numerous other forms of compensation."

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The Board has found that employee award programs which are based upon length of service are mandatory subjects of bargaining over which an employer has an obligation to bargain. In *Conval-Ohio*, *Inc.*, 202 NLRB 85 (1973), the employer had a service award program which provided for the granting of a gold watch to employees who attain 25 years of service and granting fixed amount cash awards for employees who attained 30, 35, 40, 45 and 50 years of service. The complaint alleged only that the unilateral discontinuance of the cash awards violated Section 8(a)(5) and (1) as the union did not raise a challenge to the discontinuance of the watch award. Id. at 88.

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The Board found that the cash service award program for longevity of service was a mandatory subject of bargaining and therefore the employer violated Section 8(a)(5) and (1) by unilaterally discontinuing the program. In so finding, the Board adopted the following rationale of the administrative law judge:

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The cash service awards here involved are obviously not in the same genre as a Christmas bonus as they are not in any sense gratuities because they are essentially awards or payments for staying with [the] Company for stated long periods of time. It is significant that they are not even called bonuses. They are designated and known as employees' service awards. They are, in other words, awards for longevity of service. They are the thus definitely and positively tied into the working service of the employee and as such are part of an employee's compensation for continuous service for periods in excess of a quarter of a

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century. The cash awards are fixed in amount, depending only upon length of service and accordingly do not vary from time to time Id. at 92.

In Longhorn Machine Works, 205 NLRB 685, 690 (1973), the Board found that a service reward program that involved the tangible item of a watch and not a cash award also constitutes a mandatory subject of bargaining. In that case, the Board found that an employer's unilateral discontinuance of its established practice of awarding gold watches to employees on their 10-year anniversary date of employment violated Section 8(a)(5) and (1).

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The Board's decisions in *Conval-Ohio* and *Longhorn Machine Works*, supra, are consistent with the rationale utilized by the Board in later cases in determining whether a matter, such as the employee recognition award policy involved here, is a mandatory subject of bargaining or a gift, over which the employer has no obligation to bargain.

In *Benchmark Industries*, 270 NLRB 22 (1984), affd. *Amalgamated Clothing v. NLRB*, 760 F.267 (5th Cir. 1985) the Board found that the employer did not violate Section 8(a)(5) and (1) by unilaterally discontinuing its practice of giving employees Christmas hams and dinners. The Board found that those items were gifts because they "had been given to all employees regardless of their work performance, earnings, seniority, production, or other employment related factors." 270 NLRB at 22.

In North American Pipe Corp., 347 NLRB 836 (2006), the same employment related factors were utilized by the Board in considering whether the employer violated Section 8(a)(5) and (1) by granting stock in the employer's initial public stock offering to unit employees without notifying and giving the union an opportunity to bargain. The Board found that the stock award was a gift and not a mandatory subject of bargaining. In so finding, the Board noted the following:

The award was not tied to employee renumeration. The size of the award was established without regard to any employment-related factors, including work performance, wages, hours worked, seniority, or productivity. In fact, the value of the award, when announced and when vested, was determined solely by market demand for equity shares in Westlake. Further, all eligible employees at each of Westlake's facilities including the Respondent's Van Buren plant, received the same amount of stock whether they were the highest paid managers or the lowest paid hourly employees. Finally, the award was related to a one-time event-the parent corporation's IPO-with no promise or prospect of repetition. [Id. at 838]

In *North American Pipe Corp.*, 347 at 839, the Board further found that the stock award at issue in that case was not tied to an employee's seniority. In this regard, the Board noted that in order to establish a link between an award and seniority, the seniority of employees must either be (1) proportionally related to the amount received, see e.g., *Freedom WLNE-TV, Inc.*, 278 NLRB 1293, 1296-1297 (1986) (where the formula was based in part on years of service); and *Electric Steam Radiator Corp.*, 136 NLRB 923 (1962), enfd. 321 F.2d 733 (6th Cir. 1963) (where the bonus amount was based on length of service) or (2) an award must be given in recognition of an employee obtaining a specific level of seniority, see *United Shoe Machinery*

Corp., 96 NLRB 1309, 1326-1327 1951) (where a stock award was authorized to "recognize long continued service by employees in a substantial way.")

Finally, In *North American Pipe Corp.*, 347 at 839, the Board noted that there was no relationship between the employees' relative seniority in the amounts they received as all eligible employees received the same amount of stock. The Board also noted that the stock was not given to employees in recognition of their attaining any particular level of seniority. Accordingly, the Board concluded that the employer's unilateral award of stock to unit employees did not violate Section 8(a)(5) and (1) of the Act.

In *Phelps Dodge Mining Co.*, 308 NLRB 985, 985 fn. 3, 999-1001 (1992), the Board found that "appreciation payments" given to employees were more than token gifts. In this regard the Board found that the payments constituted significant economic benefits to eligible employees based on the employment related factors of wages and hours worked.

In the instant case, the employee service recognition policy is tied to the employment-related factor of years of employee service. It is also a recurring program that awards employees regularly when they attain certain anniversary dates of employment with the Respondents. The awards have a fixed amount of value depending upon the length of service of an employee. Thus, the value of the award selected by an employee is tied to his or her length of service. Accordingly, I find that the Respondents' employee service recognition policy constitutes a mandatory subject of bargaining and that the Board's decisions in *Phelps Dodge Mining Co.*, *Conval-Ohio*, and *Longhorn Machine Works*, support this conclusion.

I find the Board's decision in *Benchmark Industries*, supra, to be distinguishable since the dinners and hams distributed in that case were given indiscriminately to employees without regard to employment-related factors. I also find *North American Pipe Corp.*, to be distinguishable. There, the stock granted to employees was on a one-time basis without any expectation of repetition. In addition, the award of stock was not sufficiently tied to any employment related factor so as to make it a bargainable matter.

I finally consider whether the change in the employee service recognition policy was substantial and material. As a result of the January 1, 2013 change in the policy, employees were given awards at a 10-year anniversary as opposed to a 5-year anniversary. Because of that change approximately 89 employees from the Ohio Edison and FirstEnergy Generation units did not receive awards in 2013. As noted previously, the value of the items awarded ranged from approximately \$35 to \$315. I find the change instituted by the Respondents is substantial and material under the standards utilized by the Board. *Bell Atlantic Corp.*, 332 NLRB 1592, 1595 (2000); *Millard Processing Services*, 310 NLRB 421, 424-425 (1993). Because the Respondents instituted a substantial and material change in a mandatory subject of bargaining, they were required to give notice to their respective Unions of the change to the employee service recognition policy and give them an opportunity to bargain over it.

Whether the Respondents Presented Locals 272 and 1194 with a Fait Accompli regarding the Changes to the Employee Service Recognition Policy

The General Counsel contends that the Respondents' communications to the Unions reflected the predetermined nature of the change to the employee service recognition policy and thus the Unions were presented with a fait accompli. The Respondents contend that the Unions were not presented with a fait accompli but rather were given sufficient notice of the change to the employee service recognition policy and an opportunity to bargain.

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As noted above, both Marshman and Childers were called by McNamara and Rossero, respectively, on September 18 and informed that the Respondents would be instituting a change to the employee service recognition policy on January 1, 2013. Consistent with the scripts used by the Respondents' representatives for these calls, both union representatives were also told, "Should you have any concerns or questions please do not hesitate to call." On September 19 both Unions received the employee update, again informing them of the change to the employee service recognition policy the Respondents intended to institute on January 1, 2013. Finally, on September 27 both Unions also received letters again advising them of change to the employee service recognition policy that would be instituted on January 1, 2013. The letters also included the language "If you have any questions or concerns regarding the foregoing, please do not hesitate to contact me."

The standards utilized by the Board in determining whether a union is presented with a fait accompli are set forth in *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982):

The Board has long recognized that, where a union received timely notice that the employer intends to change a condition of employment, it must properly request that the employer bargain over the matter. To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before the implementation or because the employer has no intention of changing its mind, then the notice is nothing more than informing the union of a *fait accompli*. [Footnotes omitted.]

In the instant case, both Unions were advised by the Respondents that the employee service recognition policy would be changed approximately $3\frac{1}{2}$ months before the effective date of the change. On two occasions both Unions were specifically advised that if they had any questions or concerns they should not hesitate to call the Respondents' representatives. Under these circumstances, I find that the Respondents did not present the Unions with a fait accompli. Rather, both Unions were given notice long in advance of the Respondents' intended change to the employee service recognition policy. The Respondents' representatives invited the representatives of both Local 272 and Local 1194 to contact them if they had any questions or concerns regarding the new policy. Importantly, the Respondents took no action to implement the new policy prior to January 1, 2013. Under these circumstances, I find that the Unions were not presented with a fait accompli under the standards set forth above.

The Board's decision in *WPIX, Inc.*, 299 NLRB 525 (1990), relied on by the Respondents, is supportive of this conclusion. In that case, on December 8, 1988, the employer

notified its employees that effective January 1, 1989 the mileage reimbursement rate would increase from 22 ½ cents per mile to \$.24 per mile. While the union was not specifically notified by the employer of the change in the reimbursement rate, a union representative, by chance, noticed a memorandum to employees notifying them of the January 1, 1989 change in the reimbursement rate shortly before Christmas in 1988. The union never requested bargaining over the change in the mileage reimbursement rate prior to its implementation. Under these circumstances, the Board concluded that the union had failed to request bargaining over a change in working conditions of which it had actual notice and there was insufficient evidence to establish that a request to bargain would be futile. Accordingly, the Board concluded the employer did not violate Section 8(a)(5) and (1) when it implemented the proposed change in the mileage rate

In reaching the conclusion that the Unions in the instant case were not presented with a fait accompli, I find the cases relied on by the General Counsel to be distinguishable. In *Ciba-Ceigy*, supra, on April 21, 1978, the employer notified the union of changes it was going to institute changes in the attendance policy effective on May 1, 1978. The union requested time to study the new policy and also requested the statistical information relied on by the employer as the basis for its proposed changes. At a meeting held on April 27, the union had not yet received the information requested but indicated that it would file a grievance over certain provisions of the policy. In neither meeting, however, did the union specifically request bargaining. However, on April 25, 26, and 27, the employer mailed letters to employees whom it had targeted as chronic absentees which contained warnings and set up counseling sections. Under these circumstances, particularly since the new policy had already begun to be implemented before the April 27 meeting, the Board found that the union had been presented with a fait accompli regarding the implementation of the new attendance policy. Accordingly, the Board found that the employer violated Section 8(a)(5) and (1).

In *Pontiac Osteopathic Hospital*, 336 NLRB 1021 (2001), the employer sent a letter to the union advising it that it would be changing its paid time off benefits and procedures effective on January 2, 2000, that would affect both unrepresented employees and those represented by the union. In finding that the employer's notice to the union amounted to a fait accompli the Board found that the employer's decision to have a uniform policy applicable to all employees had been made prior to the December 8, 1999 notice to the union. The Board also found the language of the memo indicating it was the intention of the employer to "unilaterally" implement the revisions to be indicative of the fact that it was a final decision about which it had no intention to bargain. In the instant case, however, it is undisputed that IBEW Local 29 and FirstEnergy Nuclear Operating Company, another subsidiary of FirstEnergy, are parties to a collective-bargaining agreement that provides for employee recognition awards on an employee's 5-year anniversary date. While the record does not contain evidence as to the circumstances under which that provision was included in the collective-bargaining agreement, obviously, at some point, a subsidiary of FirstEnergy had engaged in bargaining over the employee service recognition program.

On the basis of the foregoing, I find there is insufficient evidence in the instant case to establish that the Respondents had no intention to bargain, under any circumstances, over the proposed change to the employee service recognition policy.

Whether Respondent FirstEnergy Generation Violated Section 8(a)(5) and (1) of the Act by Unilaterally Implementing a New Employee Service Recognition Policy Regarding the Unit Represented by Local 272

As noted above, I found that Local 272 was not presented with a fait accompli regarding the change in the employee service recognition policy that Respondent FirstEnergy Generation implemented at its Shippingport, Pennsylvania facility on January 1, 2013. I turn now to the issue of whether Local 272 made a valid request to bargain over those changes.

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The credited testimony establishes that when McNamara called Marshman on September 18, and notified him that FirstEnergy was going to be implementing a change to the employee service recognition policy on January 1, 2013, Marshman replied "[O] no you don't" and that he would have to "file a Board charge." Marshman added that "he has to come to Akron for this one." When McNamara told him to stop by her office if he needed to come to Akron, Marshman replied that he was "coming to Akron for sure." McNamara testified that she understood Marshman's reference about coming to Akron to be that he wanted to complain to Tony Alexander, First Energy's CEO about this issue. McNamara's email that she sent to her superior, Cookson, the following day indicates that she was sure that Marshman was serious about filing a charge and coming to Akron.

I find Marshman's statements to McNamara objecting to the change in the employee service recognition policy, that he was going to file a charge over the issue and that he was "coming to Akron on this one" constituted a request to bargain over Respondent First Energy Generation's announced change to the policy. The Board has long held that a request for bargaining "need take no special form, so long as there is a clear communication of meaning." *Armour & Co.*, 280 NLRB. 824, 828 (1986). See also *Sunoco Inc.* 349 NLRB 240, 245 (2007); *MSK Corp.*, 341 NLRB 43, 45 (2004).

In *Indian River Memorial Hospital*, 340 NLRB 467, 468-469 (2003) when the union discovered that the employer was going to institute a change in the hours of work for unit employees, it faxed a letter to the employer indicating that the change was a mandatory subject of bargaining. The letter further indicated that unless the employer rescinded the notice to employees advising them of the change the union would file an unfair labor practice charge. The union's letter did not specifically request bargaining. The Board found, however, applying the principles set forth above, found that there was no doubt that the union's letter constituted a bargaining request.

In the instant case, although Marshman did not specifically say to McNamara, "I want to bargain with you about this change" the statements he made to her leave little doubt, in my view, that he conveyed to her that he was interested in bargaining about the change to the employee service recognition policy. I find that McNamara's September 19 email reflects an understanding that Marshman was requesting bargaining as it indicates that she felt he was serious about coming to Akron to discuss the change to the policy.

On October 30, 2012, Local 272 filed an unfair labor practice charge alleging that Respondent FirstEnergy Generation violated Section 8(a)(5) and (1) by making a unilateral change to employee service awards on or about September 27, 2012. Obviously, this charge was

filed well before the implementation date of January 1, 2013. Generally, the filing of an unfair labor practice charge does not relieve a union of its obligation to request that an employer bargain over a proposed change. *Associated Milk Producers, Inc.*, 300 NLRB 561, 563 (1990). The Board has held, however, that if an employer has doubt about whether a request for bargaining has been made, such doubt can be eliminated when a union files an unfair labor practice charge claiming a refusal to bargain over the issue in dispute. *Trucking Water Air Corp.*, 276 NLRB 1401, 1407 (1985). In the instant case, I find that any doubt that the employer had regarding Local 272's desire to bargain over the announced change to the employee service recognition policy should have been removed by the language contained in the charge filed by Local 272.

I find *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975), relied on by the Respondents, to be distinguishable. In that case, the employer and the union met several times during the 2 days between the employer's announcement of the polygraph testing program for its employees and the implementation of that program. Although during this period the employer invited a discussion of alternative proposals from the union, the union never requested bargaining over the testing program but rather merely objected to it and said it would never agree to it. Under these circumstances, the Board found that the employer did not violate Section 8(a) (5) and (1) by implementing the polygraph testing program. As noted above, I find that in the instant case the statements of Marshman on September 18 indicated a desire to further discuss the implementation of the changes to the employee service recognition policy. Certainly, at no time, did Respondent FirstEnergy Generation expressly invite Local 272 to present an alternative to the impending change.

Before reaching a conclusion as to whether Respondent FirstEnergy Generation violated Section 8(a)(5) and (1) with respect to the employee service recognition policy as it applied to the unit represented by Local 272, I must consider a defense applicable to the complaint allegations involving both Respondent FirstEnergy Generation and Respondent Ohio Edison. In this connection, the Respondents argue that the acquiescence of both Unions to previous unilateral changes instituted in the employee service recognition policy constitutes a waiver of the Unions' right to bargain over the change in the length of service policy involved in this case.

The Respondents argue that FirstEnergy and its predecessors made many unilateral modifications to the employee service recognition program in the units represented by the Unions over the course of 20 years without objections being raised by the Unions. In this connection, the Respondents asserted that FirstEnergy and its predecessors have previously made the following changes to the policy: adding a gift catalog, eliminating the recognition dinners; eliminating the 1-year service anniversary award; expanding the policy to include all full-time and part-time employees; changing the method of measuring an employee's anniversary for rehired employees; changing the policy of shipping an award to the local human resources manager to shipping the award to the recipient; ceasing the policy of automatically selecting an award if the employee did not select one; adding the option of selecting a gift on the Internet; changing vendors; adding certificates of appreciation and letters from the FirstEnergy CEO along with the award catalogs; and restricting the level of the catalog from which an employee could select an award.

The burden of proof to demonstrate that a waiver exists on the basis of a union's past practice of acquiescing in unilateral changes rests on the Respondent. *Caterpillar Inc.*, 355 NLRB 521, 522 (2010).

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The Respondents cannot meet that burden in this case.³ Most importantly, it is well established that a union's acquiescence in past changes regarding a bargainable subject does not constitute a waiver of the right to bargain over further changes, even when such changes are similar to those made by the employer in the past without objection. FirstEnergy Generation Corp., 358 NLRB No. 96, slip op. at 1 and 10 (2012); Caterpillar, supra, at 523. See also Georgia Power Co., 325 NLRB 420, 421 (1998); Bath Iron Works Corp., 302 NLRB 898, 900-901 (1991); Johnson-Bateman Co., 298 NLRB 180, 187-188 (1989). Moreover, in the instant case, the change of the length of time to obtain a service award from 5 to 10 years is different in nature from prior changes to the plan. Most of the prior changes involved administrative matters involving the operation of the policy. Because the change in eligibility for an employee service award is significantly different from the relatively minor administrative changes to the policy made in the past, those prior changes do not serve as a basis to establish the Unions waived their right to bargain over the change to the eligibility period for employee service awards. FirstEnergy Generation Corp., supra. The most significant change, the inclusion of part-time employees, occurred in 1999 and is therefore remote in time. Finally, the record does not establish that the Respondents and their predecessors give specific notice to the Unions regarding prior changes to the employee service recognition policy.

Based on the foregoing, I find that Respondent FirstEnergy Generation violated Section 8 (a)(5) and (1) of the Act by failing and refusing to bargain with Local 272 prior to implementing the change in the employee service recognition policy.

Whether Respondent Ohio Edison Violated Section 8(a)(5) and (1) of the Act by Unilaterally Implementing a New Employee Service Recognition Policy Regarding the Unit Represented by Local 1194

As discussed in detail above, I find that Local 1194 was not presented with a fait accompli when Childers was notified in September 2012 that FirstEnergy would be instituting a change in the employee service recognition policy effective on January 1, 2013.

³ I do not agree with the Respondents that the Board's decision in *Mount Clemens General Hospital*, 344 NLRB 450, 460 (2005) supports their position regarding waiver. In the first instance, in *Mount Clemens*, the Board indicated that the only exceptions before it for the General Counsel's exceptions to the administrative law judge's order and notice regarding an information request. Id. at p. 450 fn..2. It is clear therefore that no exceptions were filed to the administrative law judge's finding that the employer did not violate Section 8(a)(5) and (1) by making changes in its pension plan. Id. at 459-460. It is settled Board policy that review of an administrative law judge's decision is limited to the issues raised by exceptions and that in the absence of exceptions, the Board does not pass on an administrative law judge's rationale, FES, 333 NLRB 66 (2001). Accordingly, I do not consider the portion of the Board's decision in *Mount Clemens* relied on by the Respondents to be binding precedent. I note, moreover, that in *Mount Clemens* that was specific contract language supporting the administrative law judge's conclusion that the union waived its right to bargain over changes to the pension plan. Thus, the case is also distinguishable on its facts.

After being given notice of this change, it is undisputed Local 1194 did not request bargaining over the change to the employee service recognition policy prior to its implementation on January 1, 2013, or thereafter. It was not until March 4, 2013, that Local 1194 filed an unfair labor practice charge, alleging in part that Respondent Ohio Edison unilaterally implemented the change in the employee service recognition policy in violation of Section 8(a)(5) and (1).

Under the circumstances present in this case I find that Local 1194 waived its right to bargain over the changes implemented to the employee service recognition policy on January 1, 2013. Respondent Ohio Edison met its obligation to give notice to the Local 1194 about the plans change to the employee recognition policy and afforded a reasonable opportunity to request bargaining. Since Local 1194 never requested bargaining, it waived its right to bargain over the change in the employee service recognition policy. *Associated Milk Producers*, supra at 563, and cases cited therein.

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As noted above, Local 1194 did not file an unfair labor practice charge over the implementation of the change to the employee service recognition policy until March, 2013. The filing of this charge did not relieve it of its obligation to request that the Respondent bargain over the proposed change. *Associated Milk Producers*, supra at 563.

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Based on the foregoing, I find that Respondent Ohio Edison did not violate Section 8(a) (5) and (1) of the Act when it implemented the change to the employee recognition policy in the Ohio Edison unit on January 1, 2013, and I shall dismiss that allegation in the complaint.

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CONCLUSIONS OF LAW

1. The International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO, CLC (IBEW, Local 272) is, and, at all material times, was the exclusive bargaining representative in the following appropriate unit:

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All production and maintenance employees, including control room operators, employees in the stores, electrical, maintenance, operations, I & T, and yard departments at Respondent FirstEnergy Generation's Bruce Mansfield plant, Shippingport, Pennsylvania facility; excluding technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act, as amended.

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2. By failing to bargain in good faith with IBEW, Local 272 regarding a change from 5 to 10 years in the eligibility requirement of its employee service recognition policy, implemented on January 1, 2013, Respondent FirstEnergy Generation violated Section 8(a)(5) and (1) of the Act.

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3. The above unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

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4. Respondent Ohio Edison has not violated the Act.

REMEDY

Having found that Respondent FirstEnergy Generation has engaged in an unfair labor practice by failing to bargain in good faith with IBEW, Local 272 regarding a change to its employee service recognition policy which it implemented on January 1, 2013, I shall order it to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. Specifically, I shall order Respondent FirstEnergy Generation to rescind the change to the employee service recognition policy effective January 1, 2013, which changed the length of time that an employee could receive a service recognition award from every 5 years to every 10 years. I shall also order Respondent FirstEnergy Generation to bargain with Local 272 before implementing any further changes in the employee service recognition policy. I shall also order Respondent FirstEnergy Generation to make whole each employee in the bargaining unit at its Shippingport, Pennsylvania facility, who would have been eligible to receive an employee service recognition award based upon 5 years of service, and who did not receive such an award because of the change in the eligibility policy effective January 1, 2013, by granting such employees an employee service recognition award.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

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ORDER

The Respondent, FirstEnergy Generation Corp., Shippingport, Pennsylvania, its officers, agents, successors, and assigns, shall

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1. Cease and desist from

(a) Failing or refusing to bargain in good faith with the International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO, CLC (IBEW, Local 272) as the exclusive bargaining representative of the employees in the following appropriate unit regarding the employee service recognition policy. The unit is:

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All production and maintenance employees, including control room operators, employees in the stores, electrical, maintenance, operations, I & T, and yard departments at Respondent FirstEnergy Generation's Bruce Mansfield plant, Shippingport, Pennsylvania facility; excluding technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act, as amended.

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(b) Unilaterally changing the employee service recognition policy by changing the length of time required for an employee in the bargaining unit described above to receive an employee service recognition award from every 5 years to every 10 years.

⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) On request of IBEW, Local 272, rescind the change to the employee service recognition policy regarding the 10-year length of service requirement that was instituted on January 1, 2013, and restore the 5-year length of service requirement that existed before the change was instituted.

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(b) On request, bargain with IBEW, Local 272 as the exclusive representative of the employees in the appropriate unit concerning any change to the employee service recognition policy.

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(c) Make whole all employees in the bargaining unit who were not granted an employee service recognition award because of the change in the length of service requirement instituted on January 1, 2013, and who would have received such an award based upon 5 years length of service, by granting such employees an employee service recognition award.

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(d) Within 14 days after service by the Region, post at its facility in Shippingport, Pennsylvania copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2013.

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(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the	complaint is dismissed insofar as it alleges
violations of the Act not specifically found.	

5	Dated, washington, D.C., January 17, 2014.	
		Mark Carissimi Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain in good faith with the International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO, CLC (IBEW, Local 272) as the exclusive bargaining representative of the employees in the following appropriate unit regarding the employee service recognition policy. The unit is:

All production and maintenance employees, including control room operators, employees in the stores, electrical, maintenance, operations, I & T, and yard departments at Respondent First Energy Generation's Bruce Mansfield plant, Shippingport, Pennsylvania facility; excluding technicians, office clerical employees and guards, other professional employees and supervisors as defined in the National Labor Relations Act, as amended.

WE WILL NOT unilaterally change the employee service recognition policy by changing the length of time required for an employee in the bargaining unit described above to receive a service award from every 5 years to every 10 years

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of IBEW, Local 272, rescind the change to the employee service recognition policy regarding the 10-year length of service requirement that was instituted on January 1, 2013, and restore the 5-year length of service requirement that existed before the change was instituted.

WE WILL, on request, bargain with IBEW, Local 272 as the exclusive representative of the employees in the bargaining unit concerning any change to the employee service recognition policy.

WE WILL make whole all employees in the bargaining unit who were not granted an employee service recognition award because of the change in the length of service requirement instituted on January 1, 2013, and who would have received such an award based upon 5 years length of service, by granting such employees an employee service recognition award.

		FIRSTENERGY GENERATION CORP. (Employer)	
Dated	Ву		
	_	(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1000 Liberty Avenue, Federal Building, Room 904, Pittsburgh, PA 15222-4111 (412) 395-4400, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (412) 395-6899.