

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**FIRSTENERGY GENERATION, LLC a)
wholly owned subsidiary of)
FIRSTENERGY CORP.,)
and)
INTERNATIONAL BROTHERHOOD)
OF ELECTRICAL WORKERS,)
LOCAL UNION NO. 272, AFL-CIO)**

**CASE NOS.: 06-CA-163303
06-CA-170901**

**RESPONDENT FIRSTENERGY GENERATION LLC'S BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

	Page
I. OVERVIEW	1
II. FACTUAL BACKGROUND.....	2
A. FirstEnergy’s Business and the Parties Bargaining Relationship.....	2
B. The Parties Collective Bargaining Relationship (and the Facts Relevant to Case No. 06-CA-163303).....	3
C. Decision to Subcontract Certain Work in Connection with the Unit 1 Outage (and the Facts Relevant to Case No. 06-CA-170901).....	8
D. Procedural History	13
III. SUMMARY OF EXCEPTIONS	15
IV. ARGUMENTS AND AUTHORITIES.....	15
A. FirstEnergy Lawfully Implemented Some, But Not All, of the Employment Terms Set Forth in the Company’s Pre-Impasse Proposal (Case No. 06-CA-163303).....	16
1. The ALJ Incorrectly Interpreted and Applied the Law Pertaining to Partial Implementation.....	16
2. The ALJ Erred in Concluding that FirstEnergy’s GWI, Equity Adjustment and Shift Differential Proposals Were Inexplicably Intertwined with its Proposals Related to Retiree Healthcare.....	19
3. The ALJ Erred in Concluding that FirstEnergy Unlawfully Linked the Wage Proposal to the Ratification of a New Collective Bargaining Agreement is Clearly Erroneous.....	24
(a) The ALJ Erred in Concluding that FirstEnergy Conditioned Implementation of its Wage Increases and Shift Differentials upon Ratification.....	24
(b) The ALJ Erred in Concluding that Tying Wage Increases and Shift Differentials to Ratification Violates the NLRA.....	28
B. The ALJ Erred in Concluding that FirstEnergy Violated the NLRA by Subcontracting Certain Work in Connection with the Company’s Unit 1 Outage (Case No. 06-CA-170901).....	32
1. The Subcontracting of Work in Connection with the 2016 Unit 1 Outage Was Not a Mandatory Bargaining Subject.....	32
2. The Subcontracting of Work in Connection with the 2016 Unit 1 Outage Was Consistent with the Terms of the Expired Collective Bargaining Agreement and Longstanding Past Practices.....	35

TABLE OF CONTENTS
(continued)

	Page
3. FirstEnergy Provided Ample Notice to the Union Regarding the Subcontracting of Outage Work and the The Union Failed to Timely Request Bargaining.	39
C. The ALJ Erred in Concluding that FirstEnergy Violated the NLRA by Refusing to Provide Information to the Union about Subcontracting (Case No. 06-CA-170901).	44
V. CONCLUSION.....	48

TABLE OF AUTHORITIES

	Page
CASES	
<u>ACF Indus., LLC</u> , 347 NLRB 1040 (2006)	27
<u>Airo Die Casting, Inc.</u> , 354 NLRB No. 8 (2009)	38
<u>Alltel Kentucky, Inc.</u> , 326 NLRB 561 (1990)	43
<u>American Buslines</u> , 164 NLRB 1055 (1967)	41
<u>Associated Milk Producers</u> , 300 NLRB 561 (1990)	41
<u>The Boeing Company</u> , 337 NLRB 758 (2002)	43
<u>Borden, Inc. v. NLRB</u> , 19 F.3d 502 (10th Cir. 1994), <i>cert. denied</i> , 513 U.S. 927 (1994).....	1, 16, 20
<u>Clarkwood Corp.</u> , 223 NLRB 1172 (1977)	41
<u>Cleveland Cinemas Management Co.</u> , 346 NLRB 785 (2006), The ALJ	17
<u>Colorado-Ute Electric Ass'n</u> , 295 NLRB 607 (1989), <i>enf'd denied on other grounds</i> , 939 F.2d 1392 (10th Cir. 1991), <i>cert. denied</i> , 504 U.S. 955 (1992)	19
<u>Community. General Hospital</u> , 303 NLRB 383 (1991)	17, 20
<u>Dependable Storage, Inc.</u> , 328 NLRB 44 (1999)	28

<u>Detroit Edison Co. v. NLRB,</u> 440 U.S. 301 (1979).....	45
<u>Disneyland Park,</u> 350 NLRB 1256 (2007)	45
<u>Dorsey Trailers, Inc. v. NLRB,</u> 134 F.3d 125 (3d Cir 1998).....	34
<u>Douglas Aircraft Co.,</u> 308 NLRB 1217 (1992)	23
<u>Emery Industries, Inc.,</u> 268 NLRB 824 (1984)	46
<u>Emhart Industries v. NLRB,</u> 907 F.2d 372 (2d Cir. 1990).....	17, 20
<u>The Emporium,</u> 221 NLRB 1211 (1975)	41, 43
<u>Equitable Gas Co. v. NLRB,</u> 637 F.2d 980 (3d Cir. 1981).....	45
<u>Holiday Inn Central,</u> 181 NLRB 997 (1970)	42
<u>In re Life Care Ctrs. of Am., Inc.,</u> 340 NLRB 397 (2003)	36
<u>KGTV,</u> 355 NLRB 1283 (2010)	43
<u>Korn Indus., Inc. v. NLRB,</u> 389 F.2d 117 (4th Cir. 1967)	46
<u>Mi Pueblo Foods,</u> 360 NLRB 1097 (2014)	34, 35
<u>National Gypsum Co.,</u> 359 NLRB 1058 (May 3, 2013).....	28
<u>New Process Steel,</u> 353 NLRB 111	30, 31

<u>NLRB v. ACME Industrial Co.</u> , 385 U.S. 432 (1967).....	45
<u>NLRB v. Katz</u> , 369 U.S. 736 (1962).....	17, 20, 36
<u>NLRB v. United Brass Works, Inc.</u> , 287 F.2d 689 (4th Cir. 1961)	46
<u>North Star Steel Co.</u> , 347 NLRB 1364 (2006)	33
<u>Ohio Edison Co.</u> , 362 NLRB No. 88 (May 21, 2015).....	39
<u>Ohio Edison Co. v. NLRB</u> , 847 F.3d 806 (6th Cir. 2017)	39
<u>Paulstra Corp.</u> , 2004 NLRB LEXIS 492 (2004).....	42
<u>Paulstra</u> <u>CRC Corp.</u> , Case No. 07-CA-47365, 2004 WL 2007915	42
<u>Plainville Ready Mix Concrete Co.</u> , 311 NLRB 578 (1992)	17, 18, 19
<u>Post-Tribune Co.</u> , 337 NLRB 1279 (2002)	36
<u>San Antonio Portland Cement Co.</u> , 277 NLRB 309 (1985)	38
<u>San Diego Newspaper Guild v. NLRB</u> , 548 F.2d 863 (9th Cir. 1977)	46
<u>Taft Broadcasting Co.</u> , 163 NLRB 475 (1967), <i>enf'd sub nom.</i> , <u>American Federation of Television & Radio Artists v. NLRB</u> , 395 F.2d 622 (D.C. Cir. 1968)	17, 19, 20, 21
<u>Talbert Mfg.</u> , 264 NLRB 1051 (1982)	41

<u>Torrington Industries, Inc.</u> , 307 NLRB 809 (1992)	33
<u>U.S. Lingerie Corp.</u> , 170 NLRB 750 (1968)	41
<u>Wagon Wheel Bowl, Inc.</u> , 322 NLRB 525 (1996)	36
<u>WCCO Radio, Inc. v. NLRB</u> , 844 F.2d 511 (8th Cir. 1988), <i>cert denied</i> , 488 U.S. 824 (1988).....	46
<u>Westinghouse Electric Corp.</u> , 150 NLRB 1574 (1965)	38
<u>White Cap, Inc.</u> , 325 NLRB 1166 (1988), <i>enf'd</i> , 206 F.3d 22 (D.C. Cir. 2000)	28, 29, 30
STATUTES	
National Labor Relations Act § 151 <i>et seq.</i>	passim

Respondent FirstEnergy Generation, LLC a wholly owned subsidiary of FirstEnergy Corp. (“FirstEnergy” or the “Company”) submits the following Exceptions to the Decision of the Administrative Law Judge Andrew S. Gollin (the “ALJ”), pursuant to Rule 102.46(a) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), and in support states as follows:

I. OVERVIEW

On March 15, 2017, the ALJ issued a Decision (the “ALJD”) in connection with the unfair labor practice complaints in Case Nos. 06-CA-163303 and 06-CA-170901 (the “Complaints”), holding that Respondent FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (“NLRA” or the “Act”) when the Company (i) implemented its last, best, and final offer; and 2) used subcontractors for some of the work associated with a maintenance “outage” of its Unit 1 turbine (the “Unit 1 Outage” or “Outage”) at its Bruce Mansfield facility located in Shippingport, Pennsylvania (the “Bruce Mansfield Plant”). The ALJ also held the Company did not provide the Union with certain information that the Union requested concerning the subcontracting.

This decision of the ALJ is replete with factual and legal errors. In accepting *in toto* all of the General Counsel “theories,” the ALJ misapplied settled principles of Board law. In particular, the ALJ’s decision is inconsistent with established law on the following points:

- As a matter of well-established law, FirstEnergy was privileged to implement some, but not all, of the terms in its pre-impasse proposal.
- FirstEnergy’s wage and shift differential proposals were not “inextricably intertwined” with the Company’s proposal to eliminate post-retirement health care.
- FirstEnergy’s wage and shift differential proposals were not “conditioned upon” a permissive bargaining subject (ratification).

- It is permitted by Board law, and not an unfair labor practice, to combine mandatory and permissive bargaining subjects.
- The subcontracting work associated with the Unit 1 Outage was not a mandatory bargaining subject, and, even if it were, the Company provided notice and the Union failed to request bargaining.
- FirstEnergy’s subcontracting of work associated with the Unit 1 Outage was consistent with the terms of the expired collective bargaining agreement and well-established past practice pertaining to subcontracting.
- The subcontracting information requested by the Union was not presumptively relevant and the Union failed to demonstrate the relevance of the information.
- FirstEnergy provided all relevant information in its possession to the Union in response to its information request.

Based upon the foregoing facts and applicable law, Respondent FirstEnergy’s Exceptions to the ALJ’s decision should be sustained and the Complaints should be dismissed in their entirety.

II. FACTUAL BACKGROUND

A. FirstEnergy’s Business and the Parties Bargaining Relationship.

Respondent FirstEnergy owns and operates generation facilities throughout Ohio and Pennsylvania, including the Bruce Mansfield Plant. (ALJD, p. 3). Certain production and maintenance employees at the Bruce Mansfield Plant are represented for purposes of collective bargaining by the International Brotherhood of Electrical Workers, Local Union No. 272, AFL-CIO (“IBEW” or the “Union”). (ALJD, p. 3). There are approximately 230 employees in the bargaining unit. (ALJD, p. 3). FirstEnergy and the IBEW (collectively, the “Parties”) entered into a collective bargaining agreement, effective by its terms from December 5, 2009, until February 15, 2013, covering bargaining unit employees at the Bruce Mansfield Plant (the “CBA”). (ALJD, p. 3); (Joint Exhibit “JX” 1). On August 16, 2012, the Parties entered into a

Stipulation of Settlement to extend the CBA, with certain modifications, through February 15, 2014. (ALJD, pp. 3-4); (JX 3).

B. **The Parties Collective Bargaining Relationship (and the Facts Relevant to Case No. 06-CA-163303).**

On December 19, 2013, the Parties commenced negotiations for a successor collective bargaining agreement. (ALJD, p. 4); (JX 1, at ¶¶ 1-3; and 7). Prior to the expiration of the CBA, the Parties met ten times to negotiate a successor agreement, but failed to reach a successor agreement prior to the expiration of the CBA. (JX 1, at ¶ 5; and 7). After the expiration of the CBA, the Parties continued to negotiate, meeting an additional twenty times between February 15, 2014 and September 18, 2015. (JX 7). Despite these efforts, the Parties remained deadlocked on various issues, including retiree medical benefits, pension, mobile maintenance and resource sharing. (JX 7).

During the course of negotiations, FirstEnergy presented the IBEW with two Comprehensive Offers of Settlement. (ALJD, pp. 4-5; 9); (JX 4; Respondent Exhibit (“RX”) 1). The First Comprehensive Offer of Settlement was presented to the IBEW on September 25, 2014. (ALJD, pp. 4-5); (RX 1). The Second Comprehensive Offer of Settlement (“Second Comprehensive Offer”) was presented to the Union on September 17, 2015. (ALJD, p. 9); (JX 4). The First Comprehensive Offer of Settlement contained a wage proposal that, effective upon ratification, there would be a general wage increase (“GWI”) of 1.5%, 1% GWI the year following, and an additional 1% GWI two years following ratification. (ALJD, p. 5); (RX 1).

The Parties met again on December 8, 2014. (ALJD, pp. 5-6). At this meeting, the Company presented modified proposals with respect to wages, including an “equity adjustment” to increase the wage rates by 75 cents per hour for all job classifications, which was to be effective upon ratification. (Id.). The Company explained to the Union that the proposed equity

adjustment was intended to move the wages paid to bargaining unit employees at the Bruce Mansfield Plant closer to those wages paid to similarly situated employees at FirstEnergy's nearby power generation facility in Stratton, Ohio (the "Sammis Plant"). (ALJD, p. 6 n. 15). During the meeting, the Union's bargaining representatives responded that the IBEW did not think the equity adjustment was sufficient to bridge the wage disparity between the Bruce Mansfield Plant and Sammis. (ALJD, p. 6). During this meeting, FirstEnergy's Executive Director of Labor Relations and Safety, Charles Cookson ("Cookson"), also offered higher wage increases in exchange for the Union's agreement to end "in-the-box" retiree healthcare by December 31, 2014. (ALJD, pp. 5-6); (General Counsel Exhibit ("GCX") 11) ("In-the-box" is a terms used by the parties to refer to individuals who retire during the effective period of the contract.). Cookson also offered annual contributions of \$500 for single employees with single medical coverage and \$1,000 dollars for employees that had employee and spouse, employee and children and/or family medical coverage in either a health savings account ("HSA") or 401k. (Id.). No agreement was reached.

Cookson met privately with IBEW Local 272 President Harold Marshman ("Marshman") on July 7, 2015. (ALJD, p. 7). At the meeting, Marshman and Cookson discussed wage proposals, among other issues, and the Company provided Marshman with a one page written summary of its primary proposals. (Id.); (GCX 8). As Cookson explained, the purpose of the document simply "meant to be a summary of discussion of where we were at that point in time the last time we met which was December of '14." (Tr. 136:25-137:15). Further, at this meeting, Marshman stated that he believed the Bruce Mansfield Plant employees were 12 to 15% behind the Sammis Plant in pay. (Tr. 165:3-24; 167:10-168:18). Accordingly, Marshman proposed an equity adjustment of 12% plus a 3% GWI. (Id.); (ALJD, p. 7). Significantly, Marshman's verbal

counterproposal on wages also called for payment of the first pay increases at “ratification.” (ALJD, p. 7).

At the July 7, 2015 meeting, FirstEnergy withdrew its proposal to provide greater wage increases based upon the Union’s consent to elimination of retiree health care by December 31, 2014. (Tr. 136:9-19; *see also* 166:12-167:9). As the ALJ observed, “because the December 31, 2014 deadline had passed, the Company was now only offering that portion of its proposal that related to the retiree health care benefits ending by December 31, 2015.” (ALJD, p. 7). Moreover, the withdrawal of this conditional proposal severed any link between wage increases and retiree health care:

Q. (Mr. Shepley) And during negotiations, did the employer – did FirstEnergy propose that the box be ended?

A. (Mr. Cookson) Yes, we did.

Q. Isn’t it true that if the union agreed to end the box that the employer would give certain wage increases?

A. No. They were not tied together. At one point – if you want me to go through the history. We offered at one point if it ended at the end of ’14 we would give them one set of increases. If it ended at the end of ’15, we would give them another set of increases which were less. Once we got beyond ’14, that date was gone, and we abandoned that proposal.

(Tr. 136:9-19; *see also* 166:12-167:9). Although, at one early stage in the long bargaining process, the Company offered to provide wage increases in exchange for ending “in-the-box” retiree health care, when the Union failed to accept the proposal before the December 31, 2014 deadline, the proposal was withdrawn. (ALJD, p. 7). The entire course of bargaining bears that point out plainly.

In a follow-up meeting on July 21, 2015, Cookson presented a new written proposal that included a more generous proposed equity adjustment of \$1.00 per hour for all classifications, again effective upon ratification. (ALJD, p. 7; Tr. 171:23-9; 172:13-175:5); (RX 2; GCX 9, at 4-6). That written proposal also included a GWI of 5.5%. (ALJD, p. 7; Tr. 172:7-9; 172:13-175:5);

(RX 2). The GWI together with the equity adjustment would result in approximately 8.5% increase in wages upon ratification. (ALJD, p. 8); (GCX 9). The Company also maintained its proposal to make annual contributions to HSA/401k plans to help employees save for their healthcare upon retirement. (ALJD, p. 7; Tr. 172:13-175:5). Significantly, the proposals did not include the general wage proposals that were proposed on December 8, 2014 with respect to the elimination of retiree healthcare – because, as stated above – that proposal had been withdrawn. (RX 2).

Marshman again rejected the Company’s proposal, in part because the Union claimed that the Company’s proposed equity adjustment did not bring the wages close enough to those wages paid at the Sammis Plant. (Tr. 175:14- 176:3); (GCX 9, at 4-6). Marshman further rejected the Company’s HSA/401k proposal for the elimination of retiree healthcare – wanting additional contributions for retirees and benefits to extend to 2017. (ALJD, p. 8); (GCX 9 at 5).

On August 20, 2015, Marshman and Cookson met for a third time and discussed the Company’s retiree healthcare proposal as well as its proposed equity adjustments. (ALJD, pp. 8-9). At the beginning of this meeting, Cookson responded to Marshman’s request from the previous day regarding HSA/401k contributions for retirees. (Id.); (GCX 9, at 1). Cookson told Marshman that FirstEnergy could only make annual contributions for active employees. (Id.). Marshman responded that he needed something more, to which Cookson said “[i]n this area I cannot do any more than I have already offered.” (Id.). When Marshman asked “[h]ow do we get around this?”, Cookson replied, “[w]e have offered other things – like an initial 8.5% wage increase.” (Id.)

Conversation at this August 20 meeting again focused on FirstEnergy’s equity adjustment proposals, which the Union continued to claim were not sufficient to get Bruce Mansfield Plant

bargaining unit employees close to wages paid to employees at the Sammis Plant. (Tr. 176:15-178:1); (GCX 9, at 1-3). Marshman claimed that Bruce Mansfield Plant unit employees were still 15% behind Sammis Plant; Cookson disagreed, noting that it was more likely 12% and proceeded to explain the differences. (Tr. 177:10-13); (GCX 9, at 1-3).

The next meeting between the Parties took place on September 17, 2015. (ALJD, p. 9). At the meeting, the Union was represented by Marshman, Mike Welsh from the International Union, and other members of the IBEW bargaining committee. (Tr. 178:9-19). The Company was represented by Cookson, Jim Graf, Tony Gianatasio, and Bill Drane. (Id.). At this meeting, the Company presented its Second Comprehensive Offer to the Union, which included the proposals discussed between Marshman and Cookson in their meetings, including the \$1.00 equity adjustment. (ALJD, 9); (Tr. 178:20-25; 179:5-180:16); (JX 4). Additionally, the Company's Second Comprehensive Offer included a GWI of 5.5% effective at ratification and a GWI of 2% effective one year following ratification. (JX 4). FirstEnergy also provided a summary of the main points contained in the Second Comprehensive Offer. (JX 1, at ¶ 8; and 5). Marshman responded that the adjustment was not near enough to bridge the equity disparity with the Sammis Plant and that he wanted retiree health care to extend through 2017. (Tr. 180:3-13).

On September 18, 2015, the Parties met to continue negotiations. (ALJD, p. 9); (GCX 10). Marshman, made clear that the Parties remained "miles apart" on key issues. (Tr. 181:9-16; 181:20-182:19); (GCX 10, at 9). As with the First Comprehensive Offer, the Union never submitted the Second Comprehensive Offer to its membership for a ratification vote. (ALJD, p. 9); (JX 1 ¶ 9).

Given that negotiations were unsuccessful, the Company determined that a *bona fide* bargaining impasse had been reached, a fact not in dispute. (ALJD, pp. 9-10). As such, on

October 27, 2015, FirstEnergy informed the Union it would be implementing certain provisions of its Second Comprehensive Offer. (Id.); (JX 7). The Implemented Terms consisted primarily of the Company's Second Comprehensive Offer, including eliminating "in-the-box" retiree healthcare and contributing annually to the HSA/401k. (ALJD, pp. 9-10); (JX 6-8). However, the Company did not implement the GWIs, equity adjustments and shift differentials because these were explicitly proposed to be effective on the effective date of the new collective bargaining agreement (*i.e.*, the ratification date). (ALJD, p. 10); (JX 1, at ¶ 12; and 6-8).

C. **Decision to Subcontract Certain Work in Connection with the Unit 1 Outage (and the Facts Relevant to Case No. 06-CA-170901).**

To meet its operational requirements, FirstEnergy's equipment at the Bruce Mansfield Plant is generally expected to operate 24 hours a day, seven days a week, for years at a time. (Tr. 26:16-27:19). Under such operational stress, periodically the Bruce Mansfield Plant and equipment undergoes both scheduled and emergent maintenance. (ALJD, p. 10; Tr. 26:16-27:19). As part of its regular maintenance regimen, the Company periodically conducts a full-train overhaul which includes disassembling the entire Unit, inspecting and cleaning it, and reassembling and closing the unit, generally, every nine years. (ALJD, p. 10; Tr. 40:1-4; 44:8-10). Historically, during every overhaul of the Company's units, both contractors and bargaining unit employees perform work. (ALJD, p. 10; Tr. 41:16-22; 95:1-15; 200:10-201:2).

The Company planned to conduct a full-train overhaul of its Unit 1 turbine and generator in 2016. (ALJD, p. 11; Tr. 44:11-45:8; 55:8-12; 203:3-4). Notably, this Outage, was at least 10 times larger than the most recent outage of Unit 3 in 2014, and the largest turbine outage in about 10 years. (Tr. 49:18-24; 202:22-203:2). The time period within which to complete the work associated with the Outage – 56 days – was tied to the Company's obligations to supply power to the Pennsylvania, New Jersey, Maryland Interconnection ("PJM Interconnection") – a federally

regulated and quasi-governmental regional transmission organization that regulates the regional electricity markets. (ALJD, p. 11; Tr. 203:20). If the Company did not complete the work within the allotted time period, FirstEnergy would be subject to fines and penalties. (Tr. 203:3-20).

The Company began planning for the Outage in or around January 2015. (ALJD, p. 11). As in the case of prior outages, FirstEnergy planned to use contractors to augment the Company's maintenance. With respect to the Unit 1 Outage, the Company considered three alternatives for performing the work in a way that would ensure the rebuild was conducted in a timely and safe manner: (i) utilizing the Bruce Mansfield Plant mechanical maintenance department, (ii) utilizing the mobile maintenance group, or (iii) utilizing subcontractors. (ALJD, p. 11; Tr. 38:12-39:3; 201:3-202:21). When determining whether to subcontract out certain Outage work, the Company considered various factors, including the availability of its workforce and the other needs for bargaining unit employees during the Unit 1 Outage, including ensuring that Units 2 and 3 were fully operational. (Tr. 41:23-42:13; 201:3-202:21).

As part of its analysis of the alternatives, FirstEnergy requested a proposal from General Electric ("GE") to perform the turbine rebuild. (ALJD, p. 11). GE was the original equipment manufacturer of, and had built all of the turbines at the Bruce Mansfield Plant, including the Unit 1 turbine in 1975. (Tr. 39:4-15; 205:7-16; 39:22-25). It has been a contractor in prior outages; and, importantly for the Company's consideration, GE offered a two-year warranty for its workmanship associated with the Unit 1 rebuild. (Id.; Tr. 45:15-17; 205:22-206:4); (GCX 3). FirstEnergy could not get a warranty if its own employees performed the work. (Tr. 205:22-206:2).

Ultimately, due to factors including the scope and duration of the project, the constraints on using Bruce Mansfield Plant employees and GE's proposed warranty, the Company decided

to subcontract certain work in connection with the Outage. (ALJD, p. 11; Tr. 43:3-44:7; 45:15-17; 199:10-16; 201:3-202:21); (GCX 12). Specifically, recognizing that the Unit 1 and 2 needed manpower while the Unit 1 overhaul was underway, the Company determined that the Bruce Mansfield Plant employees would not be able to complete the work within the allotted time frame. (Id.). Moreover, the Company could not utilize its mobile maintenance crew due to ongoing negotiations with the Union on that issue. (Id.). Significantly, labor costs were not a factor in the Company's decision. (Tr. 205:17-21). In fact, it was more costly for the Company to subcontract the work than it would have been had the Company used its own employees. (Tr. 205:17-21).

In having GE perform the subcontracting work, the Company was acting in accordance with the terms of the (expired) collective bargaining agreement and well-established past practices. Article IV, Section D of the expired CBA provides, in pertinent part, as follows:

It is the policy of the Company not to employ outside contractors for work ordinarily and customarily done by its regular employees where such contracting would result in the layoff or demotion of employees or the reduction of hours of work below forty (40) hours a week. Except in emergencies, the parties agree to meet prior to contracting out work and discuss the scope of the work (as to description, location, and estimated duration involved and the portion, if any, to be performed by bargaining unit employees).

(JX 2 at 4). No layoffs or demotions occurred as a result of the subcontracting of work in connection with the Outage. To the contrary, all employees in the bargaining unit continued to work at least 40 hours a week, and even further, the great majority also had overtime and even declined overtime. (Tr. 228:15-230:16; Tr. 228:15-230:3; 230:19-231:7); (RX 14).

The Union was well-informed of the potential use of subcontractors during the Outage, prior to work actually being performed. Under the terms of the expired CBA, FirstEnergy regularly faxed spreadsheets containing contractor information every Friday to the Union of

work that has been completed under emergency circumstances or will be completed in the future. (ALJD, p. 12). These notifications were implemented to comply with the subcontracting language in Article IV of the CBA, which requires the Parties “to meet prior to contracting out work and discuss the scope of work (as to description, location, and estimated duration) included, and the portion, if any, to be performed by bargaining unit employees.” (ALJD, p. 12); (JX 2, at 4). The Company continued this practice with respect to the Outage. (ALJD, p. 12).

FirstEnergy began providing notice to the IBEW regarding the potential use of subcontractors during the Outage more than a year before work commenced. (ALJD, p. 12); (RX 4). Indeed, as early as February 6, 2015 – over a year prior to the Unit 1 Outage – the Company notified the Union that work associated with the Outage would be subcontracted. (Id.). The Company also notifies the Union of upcoming work by regularly faxing the Union a spreadsheet containing contractor information, which is referred to as a “notification report” or “union report,” of work that has been completed under emergency circumstances or will be completed in the future. (Tr. 206:18-207:25; 207:4-11). Historically, this report has been faxed to the Union every Friday. (Tr. 206:18-25). Pursuant to this long-standing practice, and following its February 6, 2015 notification, the Company continued to provide notice to the Union on a weekly basis that it would be contracting out some of the Outage work. (ALJD, p. 12); (RX 4-13). In total, FirstEnergy provided no less than ten notification reports to the Union containing information regarding subcontracting of Outage work on February 6, June 5, July 6, September 14, September 18, September 28, October 2, October 9, November 6 and November 20, 2015. (ALJD, p. 12); (RX 4-13). In total, these reports notified the Union of over 115 instances of work being subcontracted out in connection with the Outage. (RX 4-13).

The Company also met every Wednesday with the Union to discuss subcontracting. (ALJD, p. 12). Indeed, as explained by Christopher Cox (“Cox”), FirstEnergy’s Maintenance Manager at the Bruce Mansfield Plant, the purpose of providing the Union with notification reports is to ensure that the Company and the Union are communicating concerns relating to subcontracting and addressing any Union questions. (Tr. 222:23-223:12).

In addition to the weekly notification reports and contractor meetings, the Company also held three “all hands” on deck meetings on June 15, 2015, which were attended by FirstEnergy’s maintenance department. (ALJD, p. 12); (RX 16, at 2, 14). At these meetings, the Company provided details regarding the Outage to Bruce Mansfield Plant maintenance employees, explaining the full scope of what was going to happen during the Outage to the maintenance department. (Tr. 267:17-268:5).

Although the Company had been providing notification and opportunities for discussion for a year, the IBEW did not express any interest or concern about contractors working on the Outage until February 10, 2016. (Tr. 224:18-225:12). On that day, at the weekly contractor information meeting, the Company discussed with the Union that GE would be performing the turbine work in connection with the Unit 1 Outage. (ALJD, p. 13). With respect to the work to be performed by GE, the Company had signed a purchase order, dated November 13, 2015. (Id.); (GCX 17). FirstEnergy further informed the Union that the Company was considering subcontracting the boiler feed pump work to GE as well. (ALJD, p. 13). Significantly, at no time during the meeting, or after it, did the Union ever request bargaining. (Tr. 224:18-225:8).

Following the meeting, Marshman submitted a written information request to the Company requesting the following: (i) the subcontractors’ names, (ii) number of subcontractors’

employees, (iii) subcontractors' estimated man/hours, (iv) subcontractors' employees' wages, and (v) subcontractors' material costs. (ALJD, pp. 13-14); (GCX 6).

Notably, the letter did not contain any request for bargaining. (GX 6). Indeed, at no time during the meeting or after it did the Union ever request bargaining. (Tr. 224:18-225:8). Moreover, the letter did not explain the relevance of any of the requested information – none of which pertained to bargaining unit employees. (GCX 6). On March 14, 2016, FirstEnergy responded to IBEW's information request, providing the identities of the contractors and an estimate of the hours required to complete each project. (ALJD, p. 14); (GCX 7).

Work began on the Outage on or about March 20, 2016 and continued until May 14, 2016. (ALJD, p. 14). During the Outage, all available bargaining unit employees worked, including voluntary and involuntary overtime. (ALJD, p. 14). Indeed, over 90% of bargaining unit employees had an opportunity to work on the Outage and bargaining unit employees worked over 16,000 hours of overtime during the Unit 1 Outage. (Tr. 228:15-230:16; 230:19-231:7); (RX 14). Further, after discussion with the Union, the Company determined that bargaining unit employees would perform the boiler feed pump work, rather than GE. (ALJD, p. 14; Tr. 228:15-20). Bargaining unit employees also performed a number of other tasks including pump inspections, safety valve repairs, boiler start up valve repairs, nozzle cleaning, tag out of the unit ensuring that all of the systems were isolated and tagged properly, and the initial boiler wash. (Tr. 228:15-229:12).

D. **Procedural History**

The charge in Case No. 06-CA-163303, with respect to the Company's implementation of terms, was filed by the Charging Party on November 4, 2015 and a copy was served on Respondent by U.S. mail on November 4, 2015. (ALJD, p. 2); (GCX 1(a)-(b)). The first amended charge in Case No. 06-CA-163303 was filed by the Charging Party on February 29,

2016, and a copy was served on Respondent by U.S. mail on February 29, 2016. (ALJD, p. 2); (GCX 1(c)-(d)). On May 27, 2016, the Regional Director issued a complaint against FirstEnergy with respect to the Company's failure to implement wage increases. (ALJD, p. 2); (GCX 1(g)-(h)). The Company filed its Answer and Affirmative Defenses on June 9, 2016. (ALJD, p. 2); (GCX 1(i)).

The charge in Case No. 06-CA-170901, with respect to the Company's subcontracting of work associated with the Unit 1 Outage at its Bruce Mansfield Plant, was filed by the Charging Party on March 2, 2016. (ALJD, p. 2); (GCX 1(e)-(f)). On July 29, 2016, the Regional Director issued the Subcontracting Complaint against the Company. (ALJD, p. 2); (GCX 1(m)-(n)). The Company filed its Answer and Affirmative Defenses on August 11, 2016. (ALJD, p. 2); (GCX 1(o)).

On November 10, 2016, the Regional Director issued an order consolidating the partial implementation and subcontracting complaints (the "Complaints"). (ALJD, p. 2); (GCX 1(r)). A Hearing was held with respect to the Complaints in Pittsburgh, Pennsylvania on December 1-2, 2016 before ALJ Andrew Gollin. (ALJD, p. 1). On March 15, 2017, the ALJ entered his Decision holding that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act.

III. SUMMARY OF EXCEPTIONS

A. The ALJ erred in concluding that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act by implementing some, but not all, of the employment terms set forth in the company's pre-impasse failing to implement its GWI, equity adjustment and shift differential proposals. Exceptions 1, 6-17, 56, 60-63 and 66-68.

B. The ALJ erred in concluding that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act by conditioning the Company's wage and shift differential proposals on a non-mandatory bargaining subject (ratification). Exceptions 1, 18-27, 57, 60-63 and 66-68.

C. The ALJ erred in concluding that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act erred in concluding that FirstEnergy unlawfully subcontracted work in connection with FirstEnergy's Unit 1 Outage. Exceptions 2, 4, 28-49, 58, 60-61, 64, and 66-68.

D. The ALJ erred in concluding that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act in concluding that FirstEnergy violated the Act by failing to provide information to the Union pertaining subcontracting. Exceptions 3, 5, 50-55, 59-61 and 65-68.

IV. ARGUMENTS AND AUTHORITIES

This consolidated unfair labor practice proceeding involves two entirely unrelated cases that were combined by the Regional Director for hearing. In the first case, the "implementation" case, the General Counsel alleges the Company violated Sections 8(a)(1) and 8(a)(5) of the Act by not including the wage increases as part of the implemented terms. Significantly, the General Counsel conceded that a bargaining impasse had been reached prior to implementation. However, the ALJ concluded that the Company's implementation of its pre-impasse proposal violated the NLRA on two alternative theories: (i) the Company's wage proposal was "inextricably intertwined" with its proposal to eliminate retiree health care, such that both proposals must be implemented simultaneously, and (ii) the Company unlawfully conditioned its wage proposals on a non-mandatory bargaining subject – ratification. Both theories are legally flawed, and stand in stark contrast to well-established Board law. As such, the ALJ's decision that FirstEnergy violated the NLRA under both theories cannot be sustained.

The second unrelated case involves allegations that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act in connection with the Company's subcontracting of certain work in connection with the Outage at the Bruce Mansfield Plant. Once again, the ALJ accepted the General Counsel's claim *in toto* that FirstEnergy violated the Act by subcontracting bargaining unit work because the Company had failed to provide sufficient notice and opportunity to bargain, and failed to provide certain information pertaining to the Company's subcontractors. Once again, the ALJ's analysis and conclusions are legally defective and cannot be sustained.

For these reasons, Respondent's Exceptions should be sustained and the Complaints should be dismissed in their entirety.

A. **FirstEnergy Lawfully Implemented Some, But Not All, of the Employment Terms Set Forth in the Company's Pre-Impasse Proposal (Case No. 06-CA-163303).**

In his decision, the ALJ erroneously concluded that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act by failing to implement the wage increases and shift differentials set forth in the Company's Second Comprehensive Offer because (i) the wage proposals were "inextricably intertwined" with, and *quid pro quo* for, the Company's proposal to eliminate retiree healthcare,¹ and (ii) the wage proposals were conditioned upon ratification – a permissive bargaining subject. (ALJD, pp. 14-20). The ALJ is profoundly mistaken on both counts.

1. **The ALJ Incorrectly Interpreted and Applied the Law Pertaining to Partial Implementation.**

The controlling case law is clear: an employer is not required to implement its entire proposal after a *bona fide* impasse is reached but, instead, the employer may choose to implement only portions of the employer's pre-impasse proposal. *See, e.g., Borden, Inc. v.*

¹ As the ALJ noted, it was not until its post-hearing brief that the "General Counsel made clear that it was alleging that Respondent violated Sections 8(a)(5) and (1) of the Act when it failed to implement the general wage increases, equity adjustments, and shift differentials when it eliminated health benefits for 'in-the-box' retirees." (ALJD, p. 15).

NLRB, 19 F.3d 502, 512 (10th Cir. 1994), *cert. denied*, 513 U.S. 927 (1994) (as a matter of law, employer has the right to implement all or part of its final offer upon impasse); Community General Hospital, 303 NLRB 383 n.1 (1991) (employer’s implementation of “certain terms” of its last contract proposal was not unlawful). Indeed, under the Act, after bargaining to a *bona fide* impasse, an employer may implement unilateral changes in working conditions so long as the changes are “reasonably comprehended” within its pre-impasse proposals to the union, even if certain aspects of that proposal were not also implemented. NLRB v. Katz, 369 U.S. 736, 743 (1962); *see also* Emhart Industries v. NLRB, 907 F.2d 372, 376 (2d Cir. 1990); Taft Broadcasting Co., 163 NLRB 475, 478 (1967), *enfd sub nom.*, American Federation of Television & Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

None of the foregoing is in dispute. However, in a handful of cases the Board has sometimes held that when certain proposals were “inextricably intertwined” with, or *quid pro quo* for, others, then both those proposals must be implemented together. *See* Plainville Ready Mix Concrete Co., 44 F.3d 1320, 1340 (6th Cir. 1995); Cleveland Cinemas Management Co., 346 NLRB 785, 789 (2006).² It is with this exception that the ALJ’s application of the law is fundamentally wrong. The ALJ’s decision essentially concludes that when proposals are presented in the same document and discussed together in the heat of bargaining, such proposals are “inextricably intertwined.” Not so. In order to be deemed to be “inextricably intertwined” for purposes of the partial implementation exception, the proposals must be interrelated such that the failure to implement one aspect of the proposal fundamentally changes the other proposal. The case cited by the ALJ in his decision illustrates this point.

² The ALJ also relies on Cleveland Cinemas Management Co., 346 NLRB 785, 789 (2006), but that case essentially relied strictly upon the holding in Plainville Ready Mix.

In Plainville Ready Mix Concrete Co., 311 NLRB 578, 579-580 (1992), relied upon by the ALJ, the employer's final pre-impasse proposal offered to increase hourly wages in conjunction with the proposal to eliminate the gain sharing and incentive pay plans. Post-impasse, the employer eliminated the incentive pay and gain sharing, but did not implement the wage increases. Id. at 580. There was substantial testimony from the union's bargaining representative that (i) the proposed reduced hourly wage rates would be supplemented by a variable rate per hour based on incentive pay and gain sharing; (ii) the employer maintained the proposal in all five of its proposals presented to the union before impasse was reached; and (iii) at every bargaining meeting there was a comparison between the current earnings under the existing fixed hourly wage rate and the total earning possible under the employer's new proposal. Id. at 580-81. Based upon those facts, the ALJ concluded that the implemented terms were not "reasonably comprehended" within the employer's pre-impasse proposal because "[t]he elimination of these plans in 1989 was, I find, according to the intent of the parties, entirely conditional upon the Union's acceptance of a fixed rate." Id. at 582-83.

The factual situation in this case is entirely different. Any wage enhancement that FirstEnergy offered would not in any way affect the health care benefits of those retirees who were already "in-the-box" because such individuals were *already retired*. Indeed, the wage proposals would only be implemented for the benefit of current employees. These employees were the beneficiaries of the HSA/401k contribution proposals by FirstEnergy that were implemented at the same time as the elimination of retiree health care. (ALJD, pp. 9-10). Under such circumstances, the ALJ's finding that pay increase were *quid pro quo* for, or "inextricably intertwined" with, the elimination of "in-the-box" retiree health care is demonstrably incorrect.

Indeed, if any proposal was “inextricably intertwined” with the elimination of “in-the-box” healthcare, it was the Company’s proposal to provide annual HSA or 401k contributions to employees. (Tr. 191-192). Any labor practitioner with any experience at all is aware that these items often go hand-in-hand with each other. Indeed, just as in Plainville Ready Mix, FirstEnergy continued to present its proposals to eliminate “in-the-box” retiree healthcare and provide annual contributions to a HSA or 401k from December 8, 2014 forward as an integrated retiree benefit proposal. (Id.) Further, the elimination of the retiree healthcare to bargaining unit employees and the proposed annual contributions to HSA or 401k were part of a packaged healthcare proposal. Had the Company eliminated retiree healthcare without implementing the HSA/401k benefit, the ALJ would have been on much firmer ground. The case would then conceivably be analogous to Plainville Ready Mix, where the employer implemented only the detrimental parts of a comprehensive health insurance proposal. However, in this case, as the ALJ recognized, FirstEnergy did implement its proposal to contribute annually to either an HSA or a 401k for active employees. (ALJD, p. 9-10; 16 n. 25).³

2. The ALJ Erred in Concluding that FirstEnergy’s GWI, Equity Adjustment and Shift Differential Proposals Were Inexplicably Intertwined with its Proposals Related to Retiree Healthcare.

Whether the Company was required to implement its wage and shift differential proposals upon reaching an impasse in bargaining with the IBEW is strictly a legal issue. Taft Broadcasting Co., 163 NLRB 475, 478 (1967), *enf’d sub nom.*, American Federation of Television & Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968); Colorado-Ute Electric

³ The ALJ clearly erred by failing to recognize that the only proposal that the Company continued to link the elimination of retiree healthcare with was FirstEnergy’s offer to provide annual contributions to HSA or 401K accounts to offset the impact of the elimination of retiree medical benefits – not wage increases. The ALJ specifically noted in his decision that FirstEnergy offered “to make \$500/\$1,000 annual contributions into employees’ HSA or 401K accounts to help employees save for their health care upon retirement . . .” (ALJD, p. 7) (RX 2). Despite the fact that the Company’s HSA/401K proposal was definitively linked to the elimination of retiree health benefits and was implemented by the Company, the ALJ nevertheless concluded that FirstEnergy violated the Act by not implementing its wage and shift differential proposals.

Ass'n, 295 NLRB 607, 609 (1989), *enf'd denied on other grounds*, 939 F.2d 1392, 1404 (10th Cir. 1991), *cert. denied*, 504 U.S. 955 (1992) (“If the parties have bargained to good-faith impasse and the union has been unable to secure concessions or agreement to its proposals, then the employer may proceed to implement the changes it proposed to the union in negotiations.”). As noted above, the General Counsel stipulated that the parties had reached a *bona fide* impasse. (ALJD, pp. 9-10). Accordingly, there is no legal or factual dispute that FirstEnergy could lawfully implement new terms and conditions of employment. (*see* ALJD, pp. 14-15).

Rather, the disputed issue in this case is the scope of the Company’s implementation. As stated above, the Board law is clear: An employer is not required to implement its entire proposal after a *bona fide* impasse is reached but, instead, the employer may choose to implement only portions of the employer’s pre-impasse proposal. *See, e.g., Borden, Inc.*, 19 F.3d at 512; Community. General Hospital, 303 NLRB at 383, n.1. Under the NLRA, after bargaining to a *bona fide* impasse, an employer may implement unilateral changes in working conditions so long as the changes are “reasonably comprehended” within its pre-impasse proposals to the union, even if certain aspects of that proposal were not also implemented. NLRB v. Katz, 369 U.S. 736, 743 (1962); *see also* Emhart Industries v. NLRB, 907 F.2d 372, 376 (2d Cir. 1990); Taft Broadcasting Co., 163 NLRB 475, 478 (1967), *enf'd sub nom.*, American Federation of Television & Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968).

In his decision the ALJ acknowledged the applicable legal principles (ALJD, p. 15); however, the ALJ erred by failing to apply these principles in this case. Instead, the ALJ held that the general rule on partial implementation does not apply in this case, because the Company’s wage and shift differential proposals were part of an “integrated package” consisting of GWIs, equity adjustments, shift differentials and annual contributions to the employees’ HSA

or 401k accounts that was offered as a “quid pro quo” for, the ALJ decided, the elimination of “in-the-box” retiree healthcare. (ALJD, p. 18).⁴

Based upon this dubious premise, the ALJ held that when the Company implemented its proposals pertaining to retiree health care without also implementing its wage and shift differential proposal, FirstEnergy “implemented a change in terms and conditions of employment not contemplated in its Second Comprehensive Offer of Settlement.” (ALJD, p. 18). This legal conclusion is patently wrong for two distinct reasons, each of them equally compelling.

First, as a factual matter, no reasonable person would agree that the Company’s wage and retiree medical proposals were “inextricably intertwined” as the ALJ concluded. (ALJD, p. 16). The basis for this finding was the ALJ’s conclusion that the Company’s wage and shift differential proposals were “presented as part of an overall package to compensate the Union for elimination of ‘in-the-box’ retiree health benefits.” (*Id.*). Yet this conclusion contradicts the other finding of the ALJ, in which he found that the proposal of higher wages for eliminating health care was dropped very early in the bargaining. The ALJ correctly observed that in its December 8, 2014 verbal proposal, the Company offered higher GWIs if the Union agreed to the elimination of retiree health benefits by the end of 2014, and lower GWIs if the Union agreed to the elimination of retiree health benefits by the end of 2015. (ALJD, pp. 5-6) (GCX 11). The ALJ also correctly found that the Company dropped this *quid pro quo* proposal on retiree health care benefits on July 7, 2015 “because the December 31, 2014 deadline has passed . . .” (ALJD,

⁴ Throughout his decision, the ALJ refers to the wages, equity adjustment and shift differentials as part of an overall package to “compensate the Union for the elimination of ‘in-the-box’ retiree health benefits.” (ALJD, p. 16, 17). As noted above, retiree health care was never raised, at any point, in the long procedural history of this case. It was not mentioned in the original Implementation Charge, it was not mentioned in the amended Implementation Charge, it was not mentioned in the Regional Director’s dismissal letter, it was not mentioned in the amended dismissal letter, and it was not mentioned in the Complaint. As the ALJ noted, the General Counsel raised this “theory” about retiree health care for the first time in his post-hearing brief. (ALJD, pp. 14-15 n. 24).

p. 7). It makes no sense, then, to hold these proposals were inexplicably intertwined, when the proposals were clearly extricated from the other, and no longer intertwined.

Second, the ALJ found – but again, somehow ignored his own finding – that the Company’s proposed wage increases were directly tied to the wages paid at other FirstEnergy locations, not to retiree medical benefits. In his decision, the ALJ repeatedly makes the mistake of conflating the Company’s GWI, equity adjustment, shift differential, and annual contributions to HSA/401k proposals into a single item that, in the ALJ’s view, was designed to compensate the Union for the elimination of retiree medical benefits. In reality, and as the ALJ also found, the thrust of the Company’s equity adjustment proposals was to “to bring them closer to the Sammis employees.” (ALJD, p. 6 n. 15; 17). The ALJ also found that “[t]he Union wanted to bring wages at the Bruce Mansfield facility closer to those at the Sammis facility.” (ALJD, p. 6). Indeed, the evidentiary record is replete with testimony from both Company and Union witnesses that the wage negotiation was centered around achieving parity between Bruce Mansfield employees and FirstEnergy employees at other power generation facilities. (Tr. 163:19-164:12; 167:10-19; 168:7-18; 172:13-173:9; 175:14-21; 177:2-13; 180:3-7).

This crucial point, by itself alone, undercuts the theory that the wage increases were “inextricably intertwined” with healthcare. In the December 8, 2014 meeting, Cookson explained that a proposed 75 cent equity adjustment was offered “to help get them closer to the Sammis wages.” (Tr. 163:19-164:12). In the July 7, 2015 meeting, equity adjustments were again discussed, and Marshman stated he believed that Bruce Mansfield Plant employees were 12% to 15% behind Sammis, and that he wanted a 12% equity adjustment and 3% GWI “on ratification” which would get them to the 15% to bridge the gap with Sammis. (Tr. 168:7-14). Marshman and Cookson again discussed the equity issue in a meeting on July 21, 2015, and

Marshman again stated that the wages were not close to those paid at the Sammis. (Tr. 172:13-173:9; 175:14-21). During the August 20, 2015 meeting, Marshman and Cookson again focused primarily on the wage disparity with the Sammis Plant. (Tr. 177:2-13). Indeed, Marshman again told Cookson that the equity adjustment was not enough to get close to Sammis. (Id.). And at the September 17, 2015 meeting, the Union again rejected the equity adjustment because it was “not nearly enough. It’s not nearly close to Sammis. You got to give us more equity.” (Tr. 180:3-7).

Notably, the General Counsel’s own witness, Dennis Bloom (“Bloom”), a mechanic in the mechanical maintenance department at the Bruce Mansfield Plant, admitted that the parties discussed equity adjustments in order to move the wage rates closer to those paid at the Sammis Plant. (Tr. 87:10-14). It is significant, and very telling, that Marshman – the Union’s chief negotiator – who had participated in every bargaining session and in numerous meetings with Cookson, and was the closest Union representative to the issues – was not called to testify on this issue. The ALJ erred by failing to draw an adverse inference against the General Counsel based upon the failure to call Marshman to testify on this issue. *See, e.g., Douglas Aircraft Co.*, 308 NLRB 1217, 1217 n. 1 (1992) (failure to call a witness “who may reasonably be assumed to be favorably disposed to the party, [supports] an adverse inference . . . regarding any factual question on which the witness is likely to have knowledge”).

Despite this overwhelming evidence and the ALJ’s own factual findings regarding the Parties’ wage negotiations, the ALJ erroneously concludes that the wage proposals were a “quid pro quo for the elimination of ‘in-the-box’ retiree benefits.” (ALJD, p. 18). Retiree Healthcare was not and never was the sole focus of the bargaining, and the record evidence simply does not support the ALJ’s conclusion.

3. The ALJ Erred in Concluding that FirstEnergy Unlawfully Linked the Wage Proposal to the Ratification of a New Collective Bargaining Agreement is Clearly Erroneous.

As an alternative basis for finding a violation, the ALJ accepted the General Counsel's theory that FirstEnergy had unlawfully conditioned its wage proposals on ratification. It is impossible, under any view, to justify such a conclusion. It is both contrary to law and contrary to the facts. Indeed, it is an absolutely common practice in collective bargaining to offer monetary compensation conditioned only upon ratification. The ALJ's novel theory that doing so violates the Act would invalidate collective bargaining practices that have been utilized by both employers and union negotiators for decades.

(a) *The ALJ Erred in Concluding that FirstEnergy Conditioned Implementation of its Wage Increases and Shift Differentials upon Ratification.*

According to the ALJ, the Company violated Sections 8(a)(1) and 8(a)(5) "when it conditioned implementation of the proposed wage increases on contract ratification." (ALJD, pp. 19-20). The ALJ's decision is flawed for two separate and distinct reasons. *First*, simply as a factual matter, the Company did not "condition" anything upon ratification. Instead, as Cookson explained, the effective date of the wage increases was tied to ratification because the Company wanted an *agreement* (not just implemented terms) and both the Company and the Union understood that ratification was essential to finalizing an agreement. This position was confirmed by a Union witness (Bloom) at the Hearing. *Second*, the ALJ erroneously held that an employer violates the Act by offering a proposal that ties compensation increase to ratification.

Contrary to the ALJ's decision and the General Counsel's position, FirstEnergy did not "condition" its wage and shift differential proposals on ratification. Indeed there is substantial evidence in the record showing that both the Company and the Union proposed that the wage and shift differential improvements would be effective at the same time as the new collective

bargaining agreement – that is, when a new contract was ratified. Moreover, the ALJ erroneously concludes “there was no evidence that this type of situation has happened before, so Respondent had no basis for asserting that it was simply abiding by the Union’s established policy or practice when it required ratification.” (ALJD, pp. 19-20). In direct contrast to the ALJ’s conclusion, the record evidence established that (i) any new agreement would have to be ratified by the Union membership before it became effective; and (ii) the Company’s use of the term “ratification,” and the Parties’ understanding of the term, was basically shorthand for saying that the Parties would reach a binding successor agreement:

Q. (Mr. Easley) Can you explain to the judge why the general wage increases were tied to ratification?

A. (Mr. Cookson) Yeah. In our terminology or at least the way we think about that is basically the effective date of the agreement.

Q. And why would you think that ratification would be the effective date of the agreement?

A. In our mind, it’s when the contract is ratified. It’s when it’s effective. It’s the mechanism the union uses to make the contracts effective.

Q. Did you ever have any discussions with the union about the option of ratification on the collective bargaining agreement?

A. It was my understanding that in 2012 when we negotiated the one year extension there was no ratification vote. I actually called Mike W[e]lsh from the international union to make sure that was okay. I didn’t realize that was or wasn’t okay under their bylaws and he said for an extension it was, and it was my understanding that for a new contract they would have to have a ratification vote.

Q. When you say the extension, you’re talking about JX No. 3?

A. Yes, that extended the contract from 2013 to 2014.

Q. To [your] knowledge was the collective bargaining agreement, when that was extended, was there a ratification vote for that collective bargaining agreement?

A. For that? Yes, for 2009.

(Tr. 157:18-158:17). For that very reason the Company took pains to state in its letter to the employees that the wage increases would be effective upon ratification, explaining parenthetically that “(Note: Ratification means that the contract has been approved by the union

in accordance with their bylaws/constitution.)” (GCX 4). The whole purpose was to make clear that the Company did not care how or what internal union process the Union used to get an agreement; the Company’s sole point was that the wages would be implemented only when an actual agreement was reached.⁵

Significantly, in that regard, at no point during the Hearing did the General Counsel demonstrate that the Union at any time contested or objected to the use of the term “ratification.” To the contrary, the General Counsel’s one – and only – bargaining witness, Bloom, corroborated Cookson’s testimony. Indeed, Bloom explained that once the Union’s bargaining committee enters into a collective bargaining agreement it is submitted to the membership for ratification and is ratified to become effective:

Q. (Mr. Easley) You testified on direct examination with respect to JX No. 3. That should be in front of you.

A. (Mr. Bloom) Yes.

Q. Stipulation of settlement?

A. Yes.

Q. I believe that your testimony was that this document wasn’t submitted to the membership of IBEW Local 272 for ratification; correct?

A. Correct.

Q. Isn’t it true that IBEW Local 272 typically submits a new collective bargaining agreement to its membership for ratification?

A. A new bargaining agreement that’s been negotiated?

Q. Yes, sir.

A. Typically a multi-year agreement, yes.

Q. And the reason that this particular stipulation of settlement was not submitted was because it was an extension of an existing agreement; is that right?

A. Correct.

Q. So if there was a new collective bargaining agreement negotiated between FirstEnergy Generation and IBEW Local 272, you would expect that the members would be able to vote on ratification of that agreement?

A. If we came to an agreement between the parties?

⁵ Significantly, the General Counsel presented no evidence to demonstrate that the Company made any attempt to dictate the process of ratification. (Tr. 167:10-19; 168:7-18).

Q. Yes, sir.

A. Yes.

(Tr. 90:6-91:5). Further, the record is replete with examples showing that Marshman *himself*

proffered wage proposals tied to ratification:

Q. (*Mr. Easley*) Can you describe the conversation that took place on July 7th at the Perkins Restaurant?

A. (*Mr. Cookson*) We talked about this and got a lay of the land as to where we were. Herman said to me, “You have the take retiree health care to the end of 2017. I need 12 percent equity adjustments plus 3 percent both at ratification. No cash balance pension plan for new hires. There’s no way I’m going to be negotiate cash balance pension plans for employees that are not on the property today,” and those were the basic statements that he made back to me.

* * * * *

Q. (*Mr. Easley*) And you said that Mr. Herman had requested an equity increase?

A. (*Mr. Cookson*) That is correct.

Q. He explain what the basis for that was?

A. He said in his mind they were 12 to 15 percent behind Sammis and that’s what he wanted; 12 percent equity, 3 percent GWI on ratification which would be 15 percent to get them to Sammis wages.

Q. And both of the proposals related to wages or the verbal proposals related to wages made by Mr. Marshman in that meeting were both tied to ratification?

A. Yes.

(Tr. 167:10-19; 168:7-18); (*see also* GCX 9, at 6). This explains why the General Counsel was unable to come up with evidence indicating that the Union objected to the use of the term “ratification.” *See, e.g., ACF Indus., LLC*, 347 NLRB 1040, 1058 (2006) (holding that a party’s “insistence on a nonmandatory subject of bargaining, where the opposite party does not object to that insistence” does not violate Section 8(a)(5) because “[t]he Act necessarily assumes that a bargaining position that is taken without objection is not unlawful”).

Instead, as demonstrated at the Hearing, the evidence simply reflects that the Parties understood – based on past practice, their proposals, and simple common sense – that the way to reach a new collective bargaining agreement was by ratifying the Second Comprehensive Offer. *See National Gypsum Co.*, 359 NLRB 1058, 1073 (May 3, 2013) (finding that the “statements simply reflected what was patently true at that point: the only apparent way to reach a new collective-bargaining agreement-- consistent with both the parties' practice and their proposals and express understanding regarding the necessity of a ratification vote--was for the employees to revote in favor of the [c]ompany's [last, best, and final offer]”). In short, the mere fact that the timing of FirstEnergy’s wage increases contained in its Second Comprehensive Offer was tied to the effective (or “ratification”) date of the new collective bargaining agreement does not violate the Act. As such, the ALJ’s conclusion is clearly erroneous as a matter of law.

(b) *The ALJ Erred in Concluding that Tying Wage Increases and Shift Differentials to Ratification Violates the NLRA.*

Even if the General Counsel had proved that FirstEnergy conditioned its wage proposals upon ratification (which he did not), the ALJ’s decision that such proposals violate the Act is nevertheless erroneous. It is simply not an unfair labor practice to couple mandatory and non-mandatory bargaining subjects in a single proposal. *See Dependable Storage, Inc.*, 328 NLRB 44, 50 (1999) (“[T]here is no legal impediment to the linking of mandatory and nonmandatory or permissive subjects of bargaining . . .”). Significantly, neither the General Counsel nor the ALJ cited a single case that held it was unlawful to make wage increases effective upon ratification – because there are no such cases. To the contrary, the Board, as affirmed by the Courts, permits it. *See White Cap, Inc.*, 325 NLRB 1166, 1168-69 (1988), *enfd.*, 206 F.3d 22 (D.C. Cir. 2000).

The Board’s decision in *White Cap, Inc.*, is directly on point and dispositive in this case. In *White Cap, Inc.*, the NLRB held that an employer lawfully tied wage increases and other

economic improvements to ratification of a new agreement by a certain date. Id. at 1167-68. Further, the Board found no violation where the employer ultimately withdrew its wage proposals because ratification did not occur in the designated time limit. Id. at 1169 (“The record evidence does not support a finding that the [r]espondent engaged in unlawful regressive bargaining when it diminished certain contract terms on resumption of bargaining.”). Further, after resuming bargaining, the employer lawfully implemented a proposal that did not contain the proposed wage increases that had been withdrawn. Id. at 1170 (“[r]espondent lawfully implemented its September 22 proposal . . . following impasse.”). Note that these aggressive bargaining strategies went much further than the Company’s proposal that wage increases would be implemented upon ratification. Even so, the Board found that they were entirely lawful.

The ALJ unpersuasively attempted to distinguish White Cap, Inc. from this case asserting that the employer in White Cap, Inc. was “transparent” that the wage incentives were offered as an inducement to ratification, whereas FirstEnergy, according to the ALJ, never indicated to the Union “that it would eliminate ‘in-the-box’ retiree health benefits without also implementing the wage proposal.” (Id.). The ALJ also found that the case could be distinguished because the employer’s withdrawal of monetary incentives in White Cap, Inc. was unrelated to any other proposal, while FirstEnergy’s wage proposals were part of a “quid pro quo package to compensate for the elimination of ‘in-the-box’ retiree health benefits.” (Id.).

Neither of these alleged “distinctions” are even true, much less do they matter. Further, the ALJ again comes back to “retiree health care” as if that was the only subject discussed in bargaining. FirstEnergy *did* inform the bargaining unit employees in its October 27, 2016 letter that impasse had been reached in negotiations with the IBEW, and that the Implemented Terms would thus be going into effect. (Tr. 188:5-12); (GCX 4). In the letter, the Company explicitly

told the bargaining unit that the wage adjustments would be implemented if the new agreement became effective (or “ratified”). (GCX 4). It is hard to imagine any greater “transparency.”

It is readily apparent that the ALJ conflated his conclusion with respect to partial implementation to reach his desired outcome with respect to the ratification issue. This is plainly erroneous. The Board’s decision in White Cap, Inc. is directly on point and the ALJ’s reasoning in no way reflects the issues on which the opinion in White Cap, Inc. turned. If it is lawful to threaten to withdraw – and actually withdraw – wage proposals based upon a union’s failure to ratify a new agreement, then it is lawful to time wage proposals to coincide with ratification. Unlike the employer in White Cap, Inc., FirstEnergy neither threatened to nor actually withdrew its wage proposals. Instead, the Company did not implement these proposals as an inducement to convince the Union to finalize a new agreement. (Tr. 184:11-185:12); (JXs. 1, at ¶ 12; 6-8). Such conduct is entirely consistent with good faith bargaining. See White Cap, Inc., 325 NLRB at 1169 (“This is simply not a case where the [r]espondent withdrew its bargaining offer without explanation or to circumvent imminent union acceptance. . . . [T]he record evidence establishes an intent, even a desire, by [r]espondent to reach agreement . . .”). Further, the ALJ’s reasoning fails because the wage proposals were not “inextricably intertwined” with or *quid pro quo* for elimination of “in-the-box” retiree healthcare, as demonstrated above.

In reaching his erroneous conclusion, the ALJ relied on two cases, both of which are thoroughly inapposite to this case. In New Process Steel, 353 NLRB 111, 115-16; 118 (1991), *rev’d on other grounds*, 560 U.S. 674 (2010), the employer repudiated an agreement it had executed after discovering that the ratification voting processes was not based on a majority vote in favor of ratification, but by failure to garner enough votes to strike. The Board held that the employer “does not have standing to challenge the methods or mechanics of the [u]nion’s

ratification process because it did not bargain for an agreement on the methods or mechanics of the ratification process.” Id. at 115-16, 118. Clearly this has no application, whatsoever, to the instant matter. In this case, there was no ratification vote of any kind and FirstEnergy never refused to enter into an agreement – the Union did. Id. Further, the Board noted that the employer “could have tried to bargain for any or all manner of ratification requirements and procedures.” Id. at 116. This finding undermines the ALJ’s conclusion that Respondent was not permitted to submit proposals linked to ratification. Regardless, in this case, FirstEnergy did not care about the Union’s process as demonstrated by its letter to employees: “(Note: Ratification means that the contract has been approved by the union in accordance with their bylaws/constitution.)” (GCX 4).

In Beatrice/Hunt-Wesson, the employer and the union conditioned the effectiveness of the new agreement on ratification and agreed to the specific ratification process – that bargaining unit employees had to ratify, rather than just union members. 302 NLRB at 227. Ultimately, bargaining unit employees failed to ratify the tentative agreement and the Board therefore held that the employer did not violate the Act when it refused to execute the agreement. Id. Once again, this case simply does not apply. As noted above, in this case, there was no ratification vote and the Company never refused to enter into an agreement. Thus, the Board’s decision in Beatrice/Hunt-Wesson offers no support for the ALJ’s conclusions with respect to partial implementation.

In summation, the ALJ accepted the General Counsel’s self-described “theories,” and by doing so undercut and undermined decades of well-established Board law and practice. The Company’s bargaining conduct and proposals were lawful and proper in every respect. FirstEnergy did not implement the wage proposals because, as it said all along, wage increases

would be effective at the time of ratification, and that never happened. (Had Marshman actually allowed the bargaining unit the chance to vote, things may have been different.) Such conduct does not constitute an unfair labor practice.

B. **The ALJ Erred in Concluding that FirstEnergy Violated the NLRA by Subcontracting Certain Work in Connection with the Company's Unit 1 Outage (Case No. 06-CA-170901).**

The second unrelated case at issue the Hearing concerned subcontracting work. This case has nothing at all to do with the partial implementation case, and was consolidated for seemingly no other reason that it involves the same parties. The ALJ concluded that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act by subcontracting work in connection with the Company's Unit 1 Outage. Specifically, the ALJ concluded that FirstEnergy (i) was obligated to bargain with the Union regarding the decision to subcontract certain Outage work to GE and (ii) did not provide timely notice and an opportunity to bargain because its decision to subcontract work to GE was a *fait accompli*. (ALJD, pp. 20-23)

This decision, like the implementation case, rests upon several fundamental errors of law, each of them independently sufficient to set aside the ALJ's decision, and certain to when considered together. *First*, FirstEnergy's decision to subcontract work in connection with the Outage was not a mandatory bargaining subject. *Second*, the ALJ ignored the fact that the subcontracting was consistent with the terms of the expired CBA and well-established past practices. *Third*, the ALJ erroneously concluded that FirstEnergy failed to provide the Union with notice and presented its subcontracting plans to the Union as a *fait accompli*.

1. **The Subcontracting of Work in Connection with the 2016 Unit 1 Outage Was Not a Mandatory Bargaining Subject.**

As an initial matter, the ALJ erred in concluding that, under the facts of this case, the subcontracting of work pertaining to the Outage was a mandatory bargaining subject. Under

Board law, the duty to bargain “arises only if the change is a ‘material, substantial, and a significant’ one affecting the terms and conditions of employment of bargaining unit employees.” North Star Steel Co., 347 NLRB 1364, 1366 (2006). The ALJ held, however, that subcontracting is a mandatory bargaining subject under all circumstances where an employer replaces bargaining unit employees with non-bargaining unit employees. (ALJD, p. 20). This is not the law. *See generally* Torrington Industries, Inc., 307 NLRB 809, 810 (1992) (“there may be cases in which the nonlabor-cost reason for subcontracting may provide a basis for concluding that the decision to subcontract is not a mandatory subject of bargaining”).

The ALJ compounded this error by refusing to seriously consider the many legitimate justifications for the subcontracting of the disputed work. In particular, there was unrebutted evidence in that record that (i) there was not enough manpower available at the Bruce Mansfield Plant to perform the work within the time framed allotted by the PJM Interconnection and (ii) GE offered a warranty. (ALJD, pp. 11, 20-24; Tr. 41:23-42:13; 43:3-44:7; 45:15-17; 199:10-16; 201:3-202:21; 203:3-20; 205:22-206:4). The evidence conclusively demonstrated that, in order to ensure the safe and timely completion of work associated with the Outage, the Company had no choice but to subcontract the remaining portion of the work. (Tr. 43:3-44:7; 45:15-17; 199:10-16; 201:3-202:21). FirstEnergy did not impose an arbitrary timeframe for rebuilding Unit 1; the period of time that the Company had to rebuild was imposed by the PJM Interconnection. (Tr. 203:3-20). As explained by Cox at the Hearing, FirstEnergy simply did not have the bandwidth to repair Unit 1, while still operating and maintaining Units 2 and 3. (Tr. 199:10-16; 201:3-201:22). Further, GE offered a warranty for the work it performed; the Company would have no such warranty if it used its own employees. (Tr. 45:15-17; 205:22-206:4). However, the ALJ rejected all of this evidence, concluding that “[t]he duty to bargain is triggered by concern that

the subcontracting could *potentially* affect the size of the unity or dilute the union's strength.” (ALJD, p. 22) (emphasis added). In so holding, the ALJ overlooked cases like Dorsey Trailers, Inc. v. NLRB, 134 F.3d 125, 131-32 (3d Cir 1998), where the Court held that the employer had no duty to bargain about subcontracting manufacturing operations where employer's decision was premised in part, on “the lack of available manpower at the Northumberland plant.”

Further, FirstEnergy did not have a duty to bargain because the decision to subcontract the turbine rebuild was not based upon labor costs. *See, e.g., Oklahoma Fixture Co.*, 314 NLRB 958, 959 (1994), *enforcement denied on other grounds*, 79 F.3d 1030, 1037 (10th Cir. 1996) (subcontracting was not a mandatory bargaining subject where employer's decision was motivated by risk of legal liability and losing revenue – as the Board stated: “ ‘[I]abor costs,’ even in the broad sense of the term employed by the Board, were not a factor in the decision.”); Furniture Rentors of Am., Inc. v. NLRB, 36 F.3d 1240, 1248-49 (3d Cir. 1994) (holding employer was not required to bargain over subcontracting because decision was based on lower than expected productivity, unacceptable damage to furniture, complaints by customers, and employee theft rather than labor costs). The ALJ makes no finding that FirstEnergy's decision to subcontract was based on labor costs. In fact, to the contrary - the ALJ noted that a Company witness testified that it was more expensive to utilize a subcontractor rather than have bargaining unit employees perform the work. (ALJD, p. 21; Tr. 205:17-20).

In support of his legal conclusion that the Company had a duty to bargain, the ALJ relies heavily on Mi Pueblo Foods, 360 NLRB 1097 (2014), a case where the employer completely outsourced work ordinarily performed by bargaining unit employees to an outside trucking company. Indeed, the employer permanently and entirely substituted one group of drivers to perform work ordinarily performed by the bargaining unit employees. *Id.* at 1098. The NLRB

found that there was “essential continuity” in the employers operations, and it was no defense that the work was subcontracted to achieve increased efficiency and reduce warehouse congestion. Id. Further, the Board found that although there was no immediate impact on the driver’s terms and conditions of work, there was a risk that the employer would continue to freely subcontract work – potentially reducing the bargaining unit and diluting the union’s bargaining strength. Id.

By contrast, FirstEnergy subcontracted a portion of the Outage work to GE, but the bargaining unit employees were to resume all work on the turbine after the Unit 1 Outage work was completed. Thus, the same “essential continuity” in operations did not exist here as it did in Mi Pueblo Foods with respect to the use of subcontractors. Moreover, there was neither an immediate impact nor a risk that the scope of the bargaining unit or the Union’s bargaining strength would be diluted. Indeed, the scope of Outage work – involving the complete rebuild of a turbine – only occurs approximately every nine years. (Tr. 40:1-4; 44:8-10).

For these reasons, the ALJ erred in concluding that FirstEnergy had a mandatory bargaining obligation with respect to the subcontracting of work in connection with the 2016 Unit 1 Outage.

2. The Subcontracting of Work in Connection with the 2016 Unit 1 Outage Was Consistent with the Terms of the Expired Collective Bargaining Agreement and Longstanding Past Practices.

Even if First Energy had a duty to bargain with respect to the subcontracting of work with respect to the 2016 Outage, the Union waived any bargaining rights with respect to such subcontracting. As in Poe’s classic, *The Purloined Letter*, sometimes the most obvious things of the most easily overlooked. In this case, the ALJ entirely overlooked one of the most fundamental of all labor law axioms, *status quo*.

It is well-settled that when the parties' collective bargaining agreement expires, they are bound to maintain the existing terms and conditions of employment at the time of expiration. *See NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Wagon Wheel Bowl, Inc.*, 322 NLRB 525, 526 (1996). As a result, practices that existed during the term of the agreement can lawfully be continued after its expiration and become part of the *status quo*. *In re Life Care Ctrs. of Am., Inc.*, 340 NLRB 397, 398-99 (2003) (*citing Post-Tribune Co.*, 337 NLRB 1279, 1279-80 (2002)). Thus, "where an employer's action does not change existing conditions – that is, where it does not alter the status quo – the employer does not violate Section 8(a)(5) and (1)" of the Act. *Id.* (internal citations omitted); *Airo Die Casting, Inc.*, 354 NLRB No. 8 (2009) ("Here, the parties' [expired] agreement expressly permits the Respondent to subcontract bargaining unit work 'only when such subcontracting does not result in a layoff or [when] there are no employees on layoff.' We find that the express language of the parties' contract should be construed as a clear and unmistakable waiver of the Union's right to bargain over the Respondent's decision to subcontract bargaining unit work when no employees are on layoff or laid off as a result.").

In having GE perform the subcontracting work, the Company was acting in accordance with the terms of the (expired) CBA. The terms of the expired CBA state:

It is the policy of the Company not to employ outside contractors for work ordinarily and customarily done by its regular employees where such contacting would result in the layoff or demotion of employees or the reduction of hours of work below forty (40) hours a week.

(ALJD, p. 12); (JX 2, Article IV, at 4). Thus, under the extent terms of employment, subcontracting is permitted if it does not result in a layoff, demotion or the reduction of hours below 40 hours a week. The General Counsel did not submit any evidence of layoff or demotion. To the contrary, the evidence showed clearly that all employees in the bargaining unit continued to work at least 40 hours a week, and what is more, the great majority also had

overtime, declined overtime and were forced to work overtime. The ALJ failed to consider the amount of work that bargaining unit employees performed during the Outage, including the opportunities for overtime and the Company's need to force overtime. (ALJD, p. 21). As the evidence showed at the Hearing, bargaining unit employees would not have been able to do all the work on the project, and notwithstanding the use of subcontractors, bargaining unit employees performed a substantial amount of the work during the Unit 1 Outage, including significant overtime. (Tr. 40:2-41:22; 43:3-43:15; 44:11-45:8; 49:18-24; 55:8-12; 201:3-25; 202:22-203:4; 228:15-230:3; 230:19-231:7); (RX 14; GCX 2). Indeed, during the Unit 1 Outage, over 90% of the bargaining unit employees had an opportunity to perform work. (Tr. 229:13-230:3). Moreover, bargaining unit employees worked over 16,000 hours of overtime during the Unit 1 Outage. (Tr. 228:15-230:3; 230:19-231:7); (RX 14). Significantly, due to the sheer volume of overtime available during the Outage, bargaining unit employees declined overtime opportunities and, as a result, FirstEnergy had to force bargaining unit employees to work overtime. (Tr. 234:5-7; 239:17-240:5).

The Company also continued to comply with the terms of the expired CBA that required notice to the Union with respect to subcontracting of bargaining unit work. (ALJD, p. 12). Indeed, as described in more detail above, FirstEnergy provided no less than ten notification reports to the Union containing information regarding subcontracting of Outage work on February 6, June 5, July 6, September 14, September 18, September 28, October 2, October 9, November 6 and November 20, 2015. (ALJD, p. 12); (RX 4-13). Further, the Company also met every Wednesday with the Union to discuss subcontracting. (ALJD, p. 12). The Company clearly abided by its status quo obligations, as the law directed it to. Accordingly, it had the right as well to look to the status quo to determine the circumstances when it could engage

subcontractors. The expired CBA made it clear that the Company could subcontract work when employees worked their full forty hour work week. Accordingly, FirstEnergy did not violate the Act by subcontracting Outage work. *See Airo Die Casting, Inc.*, 354 NLRB No. 8.

Further, the subcontracting of work during the Outage was consistent with longstanding past practices. The ALJ recognized in his decision that outage work is performed by a combination of bargaining unit employees and subcontractors. (ALJD, p. 10). Historically, FirstEnergy has always used subcontractors to augment its maintenance workforce during outages. (Tr. 41:16-22; 95:1-15; 200:10-201:2). However, the Unit 1 Outage required substantial manpower to complete a high volume of repair work within a short timeframe. (Tr. 44:11-45:8; 55:8-12; 202:22-203:20). As the Company clearly demonstrated at the Hearing, the Unit 1 Outage was unlike any planned outage at the Bruce Mansfield Plant in approximately 10 years. (Tr. 49:18-24; 202:22-203:20). Because of that fact, and because the other two units, Units 2 and 3, were still operational during the Outage, the project required more manpower than any other outage in FirstEnergy's recent history. (Tr. 42:6-13; 43:3-44:7; 45:15-17; 49:18-24; 199:10-16; 201:3-203:20). Because the Outage was larger in scope and scale than prior outages, the Company was required to expand its use of subcontractors in order to complete the project on time. (Tr. 43:3-43:15; 44:11-45:8; 49:18-24; 55:8-12; 201:3-25; 202:22-203:4). The Board, however, has found no violation where the subcontracting did not "vary significantly in kind or degree" from what had been customary under established past practice, it had "no demonstrable adverse impact on employees in the unit." *Westinghouse Electric Corp.*, 150 NLRB 1574, 1577 (1965); *see also San Antonio Portland Cement Co.*, 277 NLRB 309, 314 (1985) (subcontracting of front end loader work had no detrimental impact on employee wages or other working conditions and therefore did not require bargaining). The evidentiary record clearly

demonstrated that the subcontracting of Outage work did not vary “significantly in kind or degree” nor did it have any “demonstrable adverse impact” on bargaining unit employees.

3. FirstEnergy Provided Ample Notice to the Union Regarding the Subcontracting of Outage Work and the The Union Failed to Timely Request Bargaining.

The ALJ also erred in concluding that the Company failed to provide adequate notice of the subcontracting of Outage work to the Union and that the decision to subcontract was presented as a *fait accompli*. The undisputed evidence presented at the hearing demonstrated that FirstEnergy provided multiple notices to the Union that Outage work would be subcontracted and the Union never requested bargaining. In a decision dated February 10, 2017, the Sixth Circuit Court of Appeals considered a case concerning the same two parties involved here. Ohio Edison Co. v. NLRB, 847 F.3d 806 (6th Cir. 2017). In this unanimous decision, the Court denied enforcement of the NLRB’s decision and order made in favor of the Union. Id. at 812. The particulars of the case, though very interesting in light of this case, need not detain us here, except for this: the Court found that Marshman never made a request to bargain over the alleged unilateral changes. Id. at 811-12. In sharp language, the Court said “the Board’s two-member majority neglected to consider all the circumstances here” and that “[t]he surrounding circumstances only undermine the Board interpretation of [the issues.]” Id. at 810-11. The Court concluded that “the [r]ecord instead supports the view of the Board’s dissenting member in that case.” Id. at 812. Indeed, that dissenting Member – now Chairman Miscimarra – had written a lengthy dissent in that case, reasoning that Marshman never actually requested bargaining over the alleged unilateral change. *See* Ohio Edison Co., 362 NLRB No. 88 (May 21, 2015) (Member Miscimarra, concurring in part and dissenting in part)

Just as in the foregoing case, the ALJ here concluded that FirstEnergy failed to provide adequate notice and an opportunity to bargain. (ALJD, p. 24). However, the evidence adduced

at the Hearing – unrebutted and uncontradicted – showed that the Company provided notice to the Union of its subcontracting plans in accordance with the Company’s past practice, and well in advance of the work being performed, and the Union once again failed to request bargaining. As set forth in full detail above, the Company faxed over to the Union, every week, a list setting forth all of the upcoming work planned for subcontracting. (Tr. 206:18-207:25; 207:4-11); (RX 5-13). Beginning in February 2015, almost a year before the subcontracting began, the Company began providing notice to the Union that work during the Unit 1 Outage would be offered to subcontractors (as it has in the past). The whole purpose of sending such reports to the Union is to encourage discussion. (Tr. 222:5-19; 277:9-278:4). One of these reports, dated June 5, 2015, specifically informed the Union that turbine work would be subcontracted. (Tr. 210:14-20; 211:13-212:8); (RX 5). In addition to the faxes, the Company held weekly meetings with the Union on Wednesdays to discuss work proposed for contracting. (Tr. 92:12-22; 222:5-19; 277:9-278:4). Paul Rundt (“Rundt”), the maintenance superintendent at the Bruce Mansfield Plant, explained that the purpose of the meetings was to discuss work that could potentially be contracted out, including what portion of the work that the bargaining unit employees could do as well as emergency work that has to be done. (Tr. 277:9-278:4).

Given that the Union clearly knew that the Company planned to subcontract Outage work, the Union had an obligation to request bargaining about it. Although the ALJ focuses on one single aspect of the subcontracted Outage work (the turbine), the evidence showed that the Union received notice more than a year prior to the commencement of work that subcontractors would be working at the Bruce Mansfield Plant during the 2016 Outage. As a matter of law, this notice triggered the Union’s obligation to request bargaining about the subcontracting of work during the Outage. However, as the record reflects, the Union never did. The only evidence in

the record elicited by the General Counsel's witnesses was that the Union complained about the Company's decision, filed an unfair labor practice charge. Indeed, the best of the General Counsel's evidence, introduced through Union representative Bloom, shows only that the Union complained that the work contracted out to GE was bargaining unit work, that the Union wanted the work, and that the Company should hire more employees and force more employees to work overtime. (Tr. 56:5-18; 64:9-13). This testimony was corroborated by Company witnesses Cox and Rundt. (Tr. 253:12-254:9; 282:24-283:5).

It is well-settled Board law that complaining is not the same as requesting bargaining. *See, e.g., Associated Milk Producers*, 300 NLRB 561 (1990) ("It was incumbent upon the Union to request bargaining - not merely to protest or file an unfair labor practice charge."); *Clarkwood Corp*, 223 NLRB 1172 (1977) (no violation where union "contacted Respondent and protested its contemplated actions" but "at no time did employee representatives request Respondent to bargain about removing the phones or closing the restroom."); *The Emporium*, 221 NLRB 1211 (1975) (no violation where union "simply requested that Respondent not contract out", complained, and asked whether Respondent "would do something about this", but never actually requested bargaining); *U.S. Lingerie Corp*, 170 NLRB 750 (1968) (Union had sufficient notice of Respondents intended move to place upon it the burden of demanding bargaining if it wished to preserve its rights); *American Buslines*, 164 NLRB 1055, 1056 (1967) ("union failed to prosecute its rights to engage in...discussions, but contented itself by protesting the contemplated promotions" and "by filing a refusal to bargain charge."). As these numerous cases demonstrate, once the union is aware of a proposed plan in sufficient time to engage in bargaining before the change is implemented, and fails to request the opportunity to do so, it is considered to have waived the right to oppose the change. *Talbert Mfg.*, 264 NLRB 1051, 1055

(1982); Holiday Inn Central, 181 NLRB 997 (1970). The union must actually request bargaining, or else be deemed to have forgone that right. *See, e.g., Paulstra Corp.*, 2004 NLRB LEXIS 492 (2004) (“The Board has frequently held that a protest, a grievance, or the filing of a charge are not tantamount to a request to bargain.”). Clearly, Bloom’s protesting and the Union’s filing of an unfair labor practice charge does not fulfill its obligation to request bargaining. The Union in this case, just as it did in the case decided by the Sixth Circuit weeks before this one, failed to request bargaining.

To resort to arguing, as the General Counsel did as accepted by the ALJ, the decision to subcontract bargaining was a *fait accompli* is simply not true and not supported by the facts. (ALJD, p. 24). The basis for this finding rests almost entirely upon a purchase order made on November 13, 2015, and management confirming on January 11, 2016 that the purchase was settled. (ALJD, p. 24). Of course, the Union was notified as early as January of 2015 that the Company planned to subcontract work in connection with the Unit 1 outage. (ALJD, p. 12). Despite receiving ten notification reports outlining numerous projects in connection with the Outage that would be subcontracted, the Union never once requested bargaining. Significantly, at least nine of these notices were provided prior to the November 13, 2015 purchase order.

Further, even when the Company discussed the specific work pertaining to the Unit 1 turbine rebuild on February 10, 2016, the notice was timely since the work was not scheduled to commence for several weeks. Contrary to this fact, the ALJ held that this notice of the turbine re-build was presented as a *fait accompli*. (ALJD, pp. 20-23). However, it is not unlawful for an employer to present a proposed decision or change in the form of a fully developed plan. *See, e.g., Paulstra CRC Corp.*, Case No. 07-CA-47365, 2004 WL 2007915 (rejecting the General Counsel’s *fait accompli* argument because the evidence showed that the change was “not set in

stone and could be changed”). Even where an employer informs a union “that its position would not change,” such conduct “does not relieve a union from its responsibility to request bargaining.” The Boeing Company, 337 NLRB 758, 763 (2002) (citing Alltel Kentucky, Inc., 326 NLRB 561 (1990)); The Emporium, 221 NLRB 1211, 1214 (1975) (rejecting the *fait accompli* argument because there was “no evidence . . . that in fact [r]espondent's decision to contract out was irrevocable or that [r]espondent would not have bargained in good faith. The [u]nion never tested [r]espondent's willingness to satisfy its bargaining obligation in this respect.”). Further, the union’s subjective belief that the decision was *fait accompli* does not carry the day or relieve it of its obligation to request bargaining. See KGTV, 355 NLRB 1283, 1285 (2010) (the Board rejected the ALJ’s finding of *fait accompli* and concluded the union’s “subjective belief” that the employer had already made the decision - i.e. that “the horse had already left the stable” - was not a *fait accompli*).

The Company did not even sign a purchase agreement with GE until November 13, 2015 – over nine months after the Company first began providing notice to the Union that the Company would subcontract out a significant amount of work in connection with the Outage. Further still, following February 6, 2015, and as the Company clearly demonstrated, there was ample opportunity for the Union to engage in discussions with the Company about the Outage. Either because of lack of interest, or because they already had plenty of other work to do already, the Union never raised the issue of subcontracting Outage work during any of the weekly meetings or at any other time. Again, it must be recalled that the Company employs contractors on a regular basis, and the Union was familiar with the Company using contractors, provided their work did not go beneath forty hours.

In addition, the evidence also demonstrated that FirstEnergy retained flexibility to assign work to bargaining unit employees. Indeed, even though the Company initially decided to subcontract the overhaul of the boiler feed pump turbine – and signed a purchase order with GE to do so – FirstEnergy later decided to have its own employees perform the inspection and overhaul of the boiler feed pump turbine. (Tr. 254:10-255:6; 283:13-284:8; *see also* 228:15-230:3). Thus, the ALJ’s finding that bargaining would have been futile is belied by the record evidence. The evidence adduced at the Hearing clearly shows both that the Company provided timely notice and the Union failed to request to bargain. The ALJ’s decision is clearly erroneous and should be set aside.

C. **The ALJ Erred in Concluding that FirstEnergy Violated the NLRA by Refusing to Provide Information to the Union about Subcontracting (Case No. 06-CA-170901).**

Lastly, the ALJ concluded that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act by failing to provide information to the IBEW regarding the subcontracting of Unit 1 Outage work. (ALJD, p. 25). As described above, on February 10, 2016, the Union sent a letter requesting information regarding the contractors working at the Bruce Mansfield Plant, including all contractors for the Unit 1 Outage. Specifically, the Union requested the following information regarding such contractors: (i) name, (ii) numbers of employees, (iii) estimated man/hours, (iv) wages, and (v) material costs. (Tr. 114:4-15); (GCX 6). On March 14, 2016, before Outage work began, the Company furnished information regarding the name of the contractor, a description of the contracted work, the man hours, and the location of the work. (Tr. 121:11-20; 226:3-19; 226:25-227:14); (GCX 7).⁶ However, the Company did not provide information about the subcontractors’ costs. (Tr. 122:17-23:4).

⁶ The information provided was entirely consistent with the Parties’ past practices with respect to subcontracting and the terms of the expired CBA. (JX 2, at 4).

The Company concedes, as it must, that Section 8(a)(5) of the Act requires an employer to provide relevant information, upon request, that the union needs for the proper performance of its duties as collective bargaining representative.⁷ Disneyland Park, 350 NLRB 1256, 1257 (2007); Detroit Edison Co. v. NLRB, 440 U.S. 301, 303 (1979); NLRB v. ACME Industrial Co., 385 U.S. 432, 435 (1967). However, there are limits to what can be asked and what must be provided. In this case, the information the Company provided was consistent with what the expired CBA required the Company to provide as part of status quo. The language of the expired CBA clearly delineates the information the Company is obligated to provide. That includes “description, location, and estimated duration involved and the portion, if any, to be performed by bargaining unit employees”. (JX 2, Article IV, Section d). The Company is not obligated to provide the number of employees employed by the contractors, the wages paid by contractors, or the contractors’ material costs

Moreover, as the ALJ points out, even in cases where information must be provided, the General Counsel must present evidence to show either that (i) the union demonstrated to the employer that the non-bargaining unit information was relevant, or (ii) the relevance of the information should have been apparent to the employer under the circumstances. (ALJD, p. 24); Disneyland Park, 350 NLRB at 1258-59. Further, as the ALJ acknowledges, a union’s explanation of relevance “must be made with some precision; and a generalized conclusory explanation is insufficient to trigger an obligation to supply information.” Disneyland Park, 350 NLRB at 1258 n.5 (ALJD, p. 25).

⁷ It is important to note that, because the Company had no duty to bargain with the Union regarding the subcontracting of work in connection with the Outage, it had no duty to provide information regarding the subcontracting. *See, e.g., Equitable Gas Co. v. NLRB*, 637 F.2d 980, 993-94 (3d Cir. 1981) (holding that “[n]o obligation to provide information exists . . . unless there is an obligation to bargain over the subject matter”). Thus, the Company went above and beyond its statutory duties by providing some information regarding subcontracting to the Union consistent with the Parties’ past practices.

Here, the ALJ only relies upon only two “facts” adduced at the Hearing, and deposited in a footnote, to support his conclusion: (i) Marshman contacted Cox to tell him the information provided was “insufficient”, and (ii) Marshman told Cox that he needed to know the “apples to apples.” (ALJD, p. 25). It is quite troubling that the ALJ relies so much upon a witness who was carefully shielded from any important testimony, and who has previously been found to be not credible. Indeed, on that note, Marshman testified at the Hearing that he called Cox and “explained,” in detail, to him that the information provided was insufficient. (Tr. 123:5-21). However, Marshman’s testimony at the Hearing directly conflicted with his affidavit, where he stated only that he left a voicemail for Cox. (Tr. 127:13-128:8).

Regardless of Marshman’s credibility, these two “facts” hardly establish that the General Counsel met its burden to show that the Union demonstrated to the Company, at or near the time of the request, that such information was relevant to any legitimate collective bargaining purpose. In the absence of any demonstrable nexus between the requested information and the Company’s subcontracting decision, the ALJ’s decision finding that the Union demonstrated the relevance was clearly erroneous. *See, e.g., WCCO Radio, Inc. v. NLRB*, 844 F.2d 511, 514 (8th Cir. 1988), *cert denied*, 488 U.S. 824 (1988); *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977); *Emery Industries, Inc.*, 268 NLRB 824, 825 (1984).

Even if the information was relevant, FirstEnergy provided all of the information that it had its possession at the time of the Union’s request. The Board has held that where an employer provided all the information it had in its possession, even though the response was incomplete it did not violate the Act because an employer is not “required to furnish information which is not available to it.” *See Korn Indus., Inc. v. NLRB*, 389 F.2d 117, 123 (4th Cir. 1967); *NLRB v. United Brass Works, Inc.*, 287 F.2d 689, 697 (4th Cir. 1961) (“We need cite no

authority for the proposition that an employer could not be required to accede to a request to furnish information which it did not possess”).

The Company did not have information regarding the specific number of employees that would be employed and used by the contractors or cost associated with the subcontractors’ workers. (Tr. 226:25-227:14; 244:5-19). Cox testified that the subcontractors only provide man hour estimates of the work that they plan to complete and the duration on how long it would take to complete that job. (Tr. 226:25-227:14). Further, once the work begins, the subcontractor’s man power will vary based on the resources that they can attain from the hall and actually the productivity of their employees. (Id.). FirstEnergy is also not provided with the wage rates for the subcontractors’ workers; it only receives information about the total charge for the work. (Tr. 226:25-227:14; 244:5-19). Similarly, the Company did not have the contractors’ employees’ wage rates or material costs. (Tr. 244:5-245:3). Thus, even if relevance would be established, no violation can be found when the Company did not have the information.

In sum, the ALJ’s decision was clearly erroneous because the General Counsel failed to establish that the Union was entitled to information that the Company failed to provide. The Company clearly demonstrated that because it had no duty to bargain with the Union regarding the subcontracting of work in connection with the Outage, FirstEnergy likewise had no duty to provide information regarding the subcontracting. Further, the General Counsel at the Hearing failed to demonstrate that the information was relevant. Regardless, even if the information was relevant, such information was not in FirstEnergy’s possession.

V. **CONCLUSION**

Based on the foregoing, the ALJ's decision finding that FirstEnergy violated Sections 8(a)(1) and 8(a)(5) of the Act is clearly erroneous and must be sustained and the Complaints should be dismissed in their entirety. As detailed in the foregoing, the evidence adduced at the Hearing clearly demonstrated that (i) FirstEnergy was privileged to implement some, but not all, of its last, best and final offer to the Union, and that its wage proposal was not unlawfully tied to any other proposal; (ii) FirstEnergy's decision to subcontract work associated with the Unit 1 Outage was not a mandatory bargaining subject, and, even if it were, the Company provided advance notice and the Union failed to promptly request bargaining; and (iii) FirstEnergy provided all relevant information in its possession to the Union in response to its information request.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 12th day of April, 2017, I electronically filed the foregoing Respondent FirstEnergy's Exceptions to the Decision of the Administrative Law Judge. In addition, a copy of the document was served as follows:

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