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1 BEFORE  
2 THE PUBLIC UTILITIES COMMISSION OF OHIO  
3 - - -  
4 Consolidated Duke Energy ) Case Nos.  
5 Ohio, Inc. Rate ) 03-93-EL-ATA  
6 Stabilization Plan Remand) 03-2079-EL-AAM  
7 and Rider Adjustment ) 03-2080-EL-ATA  
8 Cases. ) 03-2081-EL-AAM  
9 05-724-EL-UNC  
10 05-725-EL-UNC  
11 06-1068-EL-UNC  
12 06-1069-EL-UNC  
13 06-1085-EL-UNC  
14

15 Deposition of Beth Hixon, a witness  
16 herein, called by Duke Energy Ohio, Inc. for  
17 cross-examination under the statute, taken before  
18 me, Kimberly A. Kaz, Registered Professional  
19 Reporter and Notary Public in and for the State of  
20 Ohio, pursuant to notice and stipulations of  
21 counsel hereinafter set forth, at the offices of  
22 Ohio Consumers' Counsel, 10 West Broad Street,  
23 Suite 1800, Columbus, Ohio, on Tuesday, March 13,  
24 2007, and concluding on the same day.

25

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21 ALSO PRESENT:

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- - -

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S T I P U L A T I O N S

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1 BETH HIXON

2 of lawful age, being by me first duly placed under  
3 oath, as prescribed by law, was examined and  
4 testified as follows:

5 CROSS-EXAMINATION

6 BY MR. COLBERT:

7 Q. Good morning, Ms. Hixon.

8 A. Good morning.

9 Q. You've been deposed before?

10 A. Yes.

11 Q. Just as is Mr. Small's custom, just a  
12 couple reminders: I will try and make my  
13 questions clear. If I'm not successful in  
14 that --

15 MR. SMALL: If I may interrupt, before we  
16 give instructions, I'd like to put on the record  
17 what we're doing as far as confidentiality, make  
18 sure all the Is are dotted and Ts are crossed.

19 MR. COLBERT: Do you want to do that or  
20 would you like me to do it?

21 MR. SMALL: I'd like you to make the  
22 representations regarding IEU's attendance at this  
23 deposition because I don't have agreements with  
24 them, you do.

25 MR. COLBERT: That's fine. The -- I'm

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1 Paul Colbert. I'm an attorney for DE Ohio, and in  
2 this regard, can also represent Cinergy Corp and  
3 Duke Energy Retail Sales, all of whom have  
4 confidentiality agreements with Industrial Energy  
5 Users Ohio that are -- who have their attorney  
6 present at this deposition, and they need not  
7 leave the deposition, regarding materials produced  
8 by the companies and/or discussed in this  
9 deposition. And just to confirm that, that's also  
10 the understanding of IEU's counsel, Dan Neilsen.

11 MR. NEILSEN: Yes.

12 MR. SMALL: And that covers Cinergy DERS  
13 and Duke Energy Ohio?

14 MR. COLBERT: That's correct.

15 It is -- I have no knowledge of any  
16 confidentiality agreements that I -- IEU may have  
17 with other parties that have confidential  
18 information that may arise in the depositions such  
19 as Ohio Hospital Association, Kroger and others.  
20 And to the extent that there's no confidentiality  
21 agreement produced for those entities and  
22 confidential information is discussed in the  
23 course of this -- of this deposition, then we  
24 would ask that IEU's counsel leave for those  
25 portions of the deposition. We would keep those

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1 to a minimum.

2 MR. SMALL: For my part, OCC has  
3 confidentiality agreements not only with the three  
4 Duke affiliated companies, but also with the Ohio  
5 Hospital Association and Kroger. We have  
6 identified four attachments to Ms. Hixon's  
7 testimony that were produced according to those  
8 productive agreements, Attachment 7, 13, 16 and  
9 24. And it's my understanding that IEU Ohio does  
10 not have protective agreements with those  
11 entities; is that correct, Mr. Neilsen?

12 MR. NEILSEN: Yes.

13 MR. SMALL: And discussions of those  
14 attachments in Ms. Hixon's testimony would not be  
15 possible in front of Mr. Neilsen. So to the  
16 extent that there's a response regarding one of  
17 those documents or something else having to do  
18 with protected information under those protective  
19 agreements, Ms. Hixon will be asked to not respond  
20 in front of Mr. Neilsen. All right.

21 MR. COLBERT: Thank you.

22 BY MR. COLBERT:

23 Q. Ms. Hixon, as we were saying, if you need  
24 a clarification of any question, please ask, I'll  
25 do my best to clarify it. To the extent that you



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1 can answer briefly with a "yes" or "no", that will  
2 help us get through it quicker. I will do my best  
3 to shorten this as we go, but otherwise, I  
4 anticipate a fairly lengthy deposition here. So  
5 if you need a break, just say so. As long as  
6 there's no question pending, that's fine. And I  
7 would anticipate that we can take a break for  
8 lunch somewhere around an hour if we can figure  
9 out when the best time to break for that is. Is  
10 that okay with you?

11 A. Okay.

12 Q. Great.

13 Ms. Hixon, let me start with your  
14 employment history a little bit. Just to be  
15 clear, you have never worked in an organization  
16 where you were responsible for any or were  
17 involved in any type of trading activities, were  
18 you?

19 A. Trading of what?

20 Q. Anything. Commodities, financial paper,  
21 any types of commercial trading activities.

22 A. No, I don't believe so.

23 Q. All right. So you've never -- you have  
24 never worked in a company where any of your  
25 responsibilities, for example, dealt with options

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1 of any kind, commodity, financial or otherwise?

2 A. No.

3 Q. Okay. But you do have a fair -- You have  
4 an accounting background?

5 A. My education is accounting.

6 Q. And in your job responsibilities over the  
7 years, particularly for OCC, you have done a fair  
8 amount of analysis of financial documents; is that  
9 fair to say?

10 A. Yes.

11 Q. Okay. Ms. Hixon, you are familiar with  
12 legislation in Ohio that is known as SB3 Electric  
13 Regulation or restructuring legislation?

14 A. Yes, I'm familiar with that.

15 Q. And are you generally familiar with the  
16 ability of what is called a CRES provider,  
17 Competitive Retail Electric Service provider, to  
18 enter into contracts with end-use customers for  
19 the sale of generation service or other  
20 competitive retail electric services?

21 A. I'm familiar that the term Competitive  
22 Retail Electric Service is what is used to  
23 describe those suppliers that in the competitive  
24 market in Ohio are allowed to provide generation  
25 to customers.

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1 Q. Okay. And, typically, is it your  
2 understanding that they would do that through a  
3 contractual arrangement with customers?

4 A. Generally, yes.

5 Q. And are the -- Would the customer and the  
6 CRES provider negotiate a price term and other  
7 terms and conditions as part of that contract?

8 A. I'm generally aware that in the rules  
9 that the Commission has in regards to contracts,  
10 that price is one of those provisions that would  
11 be included in a contract.

12 Q. I'm wondering if you have any particular  
13 knowledge as to how price and other terms and  
14 conditions in those contracts would be arrived at.

15 A. Since I'm not a CRES provider, I don't  
16 work for a CRES provider, I don't know from this  
17 perspective. From a consumer perspective, I know  
18 the requirements related to contracts and what  
19 individual consumers would want.

20 Q. So you don't have any knowledge of  
21 nonresidential contracts? Your knowledge would be  
22 in the area of residential contracts?

23 A. In regards to provisions related to price  
24 and the specifics of it. In regards to  
25 nonresidential agreements, I have reviewed the

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1 agreements that were part of the settlement that  
2 CRS entered into with customers, so that would be  
3 my knowledge of nonresidential in this case.

4 Q. Well, you used the term "settlement"  
5 there. Did CRS enter into -- You're referring to  
6 the contracts?

7 A. I'm referring to the side agreements that  
8 I discuss in my testimony.

9 Q. Okay.

10 MR. SMALL: Could we go off the record  
11 for just a second? I want to tie up something.

12 (Discussion held off the record.)

13 BY MR. COLBERT:

14 Q. Regarding residential contracts, are you  
15 aware that CRES providers send out marketing  
16 materials to residential customers on occasion?

17 A. Yes, I'm aware of that.

18 Q. Okay. And when they send out marketing  
19 materials, do they typically send them to all of  
20 their customers in the state?

21 A. I don't know.

22 Q. Do you know whether they send them to all  
23 of the customers in a particular sort of high  
24 territory?

25 A. I don't know.

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1 Q. Are you aware of CRES providers that have  
2 supplied governmental aggregation contracts?

3 A. I'm aware that there's governmental  
4 aggregation for electric service. I'm generally  
5 aware that some of them have been supplied by CRES  
6 providers, but I don't know the specifics.

7 Q. Okay. Are you aware that previously a  
8 company called Dominion supplied a governmental  
9 aggregator in DE Ohio's service territory?

10 A. No.

11 Q. So you have no knowledge of Dominion  
12 supplying residential load in DE Ohio's  
13 residential territory?

14 A. No. You asked me if I was aware that  
15 they served a residential aggregation. I'm not  
16 aware of that. I am aware that Dominion retail  
17 did service some customers in SEG's territory, and  
18 that included some residential.

19 Q. Do you know whether it  
20 includes -- whether Dominion serves exclusively  
21 residential?

22 A. No, I don't.

23 Q. And you're not aware that Dominion was  
24 the supplier for Indian Hill?

25 A. No.

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1 Q. Okay. Have you gone to the website of  
2 Dominion to check and see what their offer is to  
3 residential customers?

4 A. No.

5 Q. Okay. Do you have any knowledge of  
6 whether Dominion has offered one price to  
7 residential customers who renew their contracts  
8 and another price to new customers?

9 A. No.

10 Q. And other than the offers of -- For  
11 clarification, the contracts, of course, because  
12 it was the prior name, refer to Cinergy Retail  
13 Sales, CRS and, of course, they also refer to the  
14 prior name of Duke Energy Ohio, the Cincinnati Gas  
15 and Electric Company. For ease of communication  
16 here, I am going to call everybody by their  
17 current names, DERS for Duke Energy Retail Sales  
18 and DE Ohio. Is that -- Will that work for you?

19 A. I understand. I may not always fall into  
20 that, but I'll try my best.

21 Q. That's fine. If you have any question or  
22 if I'm confusing, let me know.

23 The only nonresidential CRES contracts  
24 that you are aware of are those between DERS and  
25 counterparties in this case; is that correct?

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1 MR. SMALL: Objection concerning facts  
2 not presented to the witness, but you may answer.

3 THE WITNESS: I'm not aware and have not  
4 seen any CRES contracts with nonresidential  
5 customers. What I'm aware of are the side  
6 agreements that I describe in my testimony between  
7 DERS, Cinergy Corp -- I think that covers it. The  
8 side agreements that I discuss in my testimony.

9 BY MR. COLBERT:

10 Q. But I asked about CRES contracts. And  
11 for example, Cinergy is not a CRES.

12 A. Okay. Again, I said I was not aware of  
13 any CRES contracts related to nonresidential.  
14 What I am aware of are the side agreements that I  
15 discuss in my testimony.

16 MR. SMALL: Can we go off the record for  
17 a second?

18 MR. COLBERT: Sure.

19 (Discussion held off the record.)

20 BY MR. COLBERT:

21 Q. From this point, I think it makes sense  
22 to go under seal. I think I'm going to start  
23 talking somewhat more specifically about  
24 contracts, so we'll seal the record from here.

25 Ms. Hixon, from your answers, I take it

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1 that the contracts that you've reviewed that you  
2 have characterized as side agreements you don't  
3 believe are CRES contracts?

4 A. I don't think in my testimony I ever  
5 refer to them as CRES contracts. I don't believe  
6 that I made a judgment call as to whether they  
7 were CRES contracts. I treated them as side  
8 agreements. I read the provisions. CRES, at  
9 times, was involved in some of those agreements.  
10 Provision of generation was sometimes discussed.  
11 The clarity of those provisions and whether or not  
12 that constituted a contract, I did not make a  
13 judgment call on.

14 Q. Well, let's take them by the three  
15 categories that you raise. Correct me if I'm  
16 wrong but, basically, you put them in categories  
17 of pre-order contracts, pre-rehearing contracts  
18 and then option contracts; is that fair?

19 A. Option agreements.

20 Q. Okay. The pre-order contracts and the  
21 pre-rehearing contracts with a couple of  
22 exceptions that we need not discuss here are  
23 direct-serve contracts, are they not?

24 MR. SMALL: Objection to the extent that  
25 you're using the word "contract". This witness



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1 has already stated that she doesn't have the legal  
2 knowledge regarding what is regarded as a contract  
3 or not a contract.

4 MR. COLBERT: If she wants to refer to  
5 them as agreements, I'll not object.

6 MR. SMALL: And I am objecting on the  
7 basis to the extent your questions call for a  
8 legal conclusion regarding the agreements.

9 MR. COLBERT: I'm not asking for a legal  
10 conclusion. I'm simply asking whether --

11 MR. SMALL: It's not clear to me what  
12 you're asking, so....

13 MR. COLBERT: Well, I'm asking her  
14 whether or not the contracts that she reviewed --  
15 and I will continue to call them contracts. She  
16 can call them whatever she likes -- were the  
17 earlier contracts, that is in May and November,  
18 with just a couple of exceptions that is -- will  
19 include the Cinergy contract, the City of  
20 Cincinnati contract, and I believe contracts with  
21 a grocery retailer that we won't name. The rest  
22 of them would all be characterized, would they  
23 not, as direct-serve contracts or, in your words,  
24 agreements?

25 MR. SMALL: Same objection concerning

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1 legal conclusion.

2 State your understanding of it.

3 THE WITNESS: Well, with all the caveats  
4 that I've already given and my counsel has  
5 discussed, I'm not judging whether they are a  
6 contract. I also do not know what you mean by  
7 "direct-serve contract".

8 BY MR. COLBERT:

9 Q. I mean, they called for DERS to provide  
10 generation service to the end-use customer.

11 A. I think that you would need to go through  
12 each agreement and look at the terms related to  
13 generation service. My recollection is that more  
14 often than not, there is an offer to sell at some  
15 time in the future conditioned upon a variety of  
16 terms, occurrences.

17 I know at the early agreements in May,  
18 CRS was referenced, but at that time, CRS was not  
19 a CRES. There's references to affiliated CRES,  
20 C-R-E-S, providers. In my mind, if your  
21 definition of direct-serve is for CRES to provide  
22 service, I don't see that clarity reflected in  
23 those early agreements.

24 Q. So it's not your understanding that had  
25 those contracts remained effective and continued

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1 to this day between the parties, that DERS would  
2 not be serving the counterparties?

3 A. Perhaps you could rephrase that. I think  
4 you got some negatives in there, would not be  
5 providing, and I lost the train of thought.

6 Q. If I understood your answer correctly,  
7 you're suggesting that there are circumstances  
8 under which DERS would not be providing generation  
9 service to the counterparties if those contracts  
10 were in effect today. Is that your understanding?

11 A. I think that that's a possibility based  
12 on what I described as the provisions and the  
13 terms and the conditions. Like I said, my  
14 recollection is that sometimes the terms were an  
15 offer to sell. That's one side. I don't know if  
16 the party would have accepted. Sometimes the  
17 parties were offered options of either being  
18 served or not being served. So yes, it is  
19 possible that DERS would not have been.

20 Q. And do you know whether the options to be  
21 served or not served had to do with whether or not  
22 some of the counterparties were already taking  
23 service from other CRES providers not affiliated  
24 with DE Ohio?

25 A. I'd have to refer to the specific

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1 agreements, but my general recollection is that  
2 sometimes it did and sometimes it did not.

3 Q. Under what circumstances did it not?

4 A. May I refer -- review the agreement?

5 Q. Certainly.

6 A. Okay. The agreement I was going to refer  
7 to is one that might be protected.

8 Q. We're under seal. They're protected.

9 MR. SMALL: I think she's referring to  
10 Mr. Neilsen.

11 MR. NEILSEN: Could I make a suggestion?

12 MR. COLBERT: Certainly.

13 MR. NEILSEN: I do have some questions.

14 Most are -- I mean, they're fairly general to  
15 Ms. Hixon's testimony. If it makes all parties in  
16 here feel better, I could begin -- I could present  
17 my questions and then I could leave and I can  
18 review the transcripts, whatever part of the  
19 transcripts that are -- that should be unredacted  
20 as to --

21 MR. COLBERT: We have no objection.

22 MR. NEILSEN: If that makes things move  
23 more smoothly for today's deposition, that's fine  
24 with me.

25 MR. SMALL: I have no objection to it.

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1 Of course, you know, there will only be two  
2 flavors to the transcript, which is public and the  
3 redacted portion of it, so you probably will not  
4 be able to go through the protected portion.

5 MR. NEILSEN: Well, I mean, there are  
6 obviously portions -- there is a discussion in  
7 Ms. Hixon's testimony that goes directly to IEU  
8 Ohio, which is protected. We obviously have  
9 intervened and have a protective agreement with  
10 Duke and all of its affiliates. So at some point  
11 we have to be involved in this, as well, and have  
12 the right to be.

13 MR. SMALL: I understand your position.  
14 I'm just informing you that I am not going to  
15 instruct the Court Reporter and I'm not going to  
16 review the transcript to decide what can and  
17 cannot be released to you. And if Mr. Colbert  
18 releases the protected portion to you and it  
19 contains things about Kroger and Ohio Hospital  
20 Association, it will be his revelation against  
21 OCC's wishes. I'm just saying that you won't be  
22 able to see the protected portion of the  
23 transcript. I don't have any --

24 MR. NEILSEN: Unless it's provided to me  
25 by another party who has the protective agreement

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1 with me or with IEU or amongst those parties. We  
2 do have a protective agreement with Duke and its  
3 affiliates. I understand your concern.

4 MR. SMALL: You understand that Hospital  
5 Association's given to me --

6 MR. COLBERT: May I suggest we have this  
7 discussion off the record, I mean, unless you  
8 really want this on the record for some reason?

9 MR. SMALL: Yeah, I do want it on the  
10 record. I've been accused over and over again of  
11 not protecting information by Mr. Neilsen's party,  
12 by the way, and now he's suggesting Ohio Hospital  
13 Association gives it to me, you get it through  
14 this deposition, and that you give it to him, not  
15 protecting the material.

16 MR. COLBERT: Well, that had nothing to  
17 do with the instance regarding when you were  
18 accused, Jeff. You sent out an e-mail with all  
19 sort of materials.

20 MR. SMALL: I am just informing your  
21 parties that's not going to get the Hospital  
22 Association's material through this means without  
23 OCC's objection.

24 MR. NEILSEN: Very well.

25 MR. COLBERT: Fair enough.

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1 MR. NEILSEN: I can ask these questions  
2 and I can leave and we can deal with whether or  
3 not I can review the transcript or not offline and  
4 at another time. I'm coming up with a solution  
5 here that I would hope makes things run a little  
6 easier for all of us.

7 MR. SMALL: I have no objection to your  
8 suggestion. I am telling IEU and all the  
9 companies represented by Mr. Colbert that this  
10 transcript, the protected portion of it, to the  
11 extent that it includes any responses having to do  
12 with Ohio Hospital Association or Kroger material,  
13 and specifically the material that I mentioned at  
14 the beginning of this, cannot be released to you.  
15 And that will be my instruction to the  
16 hearing -- to the Court Reporter, that it should  
17 be released only upon my approval.

18 MR. NEILSEN: You just said -- Okay.  
19 Didn't you just say that you weren't going to  
20 determine whether or not the transcript couldn't  
21 be released to whatever party?

22 MR. SMALL: I said I'm not going to spend  
23 days of my time pouring through the transcripts  
24 deciding what can and cannot be released to you.  
25 It's just going to be withheld from you entirely.

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1 But if it is released to you, it will be over my  
2 objection.

3 MR. COLBERT: Well, unless they get a  
4 confidentiality agreement with the Hospital  
5 Association.

6 MR. SMALL: That's true. To that extent,  
7 if IEU enters with the Hospital and Kroger, they  
8 can see the material that I can see. There's no  
9 problem with that, to the extent that those  
10 parties are willing to give that to IEU. So that  
11 is another solution.

12 MR. NEILSEN: I mean, you had a question  
13 earlier whether I had the information that was  
14 provided at the Whitlock deposition.

15 MR. SMALL: And that's because there is  
16 materials in the Whitlock deposition that has to  
17 do with the Hospital Association and Kroger. And  
18 to the extent that was provided by DERS and  
19 provided under the protective agreement, you  
20 already have it and you can see that material.

21 Unfortunately, there are things that were  
22 provided to those parties that were not made in  
23 the Whitlock deposition, so I separated the things  
24 that you received from the company from the things  
25 that I received only from the Hospital Association



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1 and Kroger.

2 MR. COLBERT: I will point out, we were  
3 talking about a contract here and all of the  
4 contracts were provided in that deposition.

5 MR. SMALL: And I did not -- When I was  
6 referring to the attachment to Ms. Hixon's  
7 testimony, I didn't include those because those  
8 agreements were handed over by parties.

9 MR. COLBERT: I'm simply asking whether  
10 that was a document that Ms. Hixon was going to  
11 refer to. I assume she's not going to be  
12 referring to the e-mails.

13 MR. SMALL: Ms. Hixon understands the  
14 distinction between the two of them. Now, of  
15 course, I haven't consulted with her, but she does  
16 understand the difference between the materials  
17 provided at the Whitlock deposition and the other  
18 materials. And we've marked them conspicuously in  
19 the materials in front of her so that she doesn't  
20 refer to these.

21 MR. COLBERT: Okay.

22 MR. SMALL: Up to you.

23 MR. NEILSEN: I can go through my  
24 deposition now.

25 MR. COLBERT: That's fine.

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1 MR. NEILSEN: I apologize for  
2 interrupting your --

3 MR. COLBERT: It's not a problem. Do you  
4 want to come down here and ask your questions or  
5 do you want to do it from there?

6 MR. NEILSEN: If the Court Reporter can  
7 hear me all right from here, and if Ms. Hixon  
8 doesn't mind, I can do it from here rather than  
9 moving everybody around.

10 - - -

11 EXAMINATION

12 BY MR. NEILSEN:

13 Q. Well, good morning, Ms. Hixon. I'm Dan  
14 Neilsen with Industrial Energy Users Ohio,  
15 otherwise referred to as IEU Ohio.

16 A. Good morning.

17 Q. I begin with some questions regarding  
18 your testimony and hopefully this won't last long.

19 Was your testimony reviewed and approved  
20 by Janine Migden-Ostrander?

21 A. Yes.

22 Q. Did she make any revisions?

23 MR. SMALL: Objection. Privileged.

24 You're instructed not to answer.

25 BY MR. NEILSEN:

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1 Q. Ms. Hixon, on Page 57 of your testimony,  
2 you say it's important to return to the root of  
3 this proceeding to consider post MDP, market  
4 development period, or MDP pricing proposals of  
5 Duke Energy Ohio, correct?

6 A. Yes.

7 Q. Okay. I'd like to explore those roots.  
8 Your testimony was filed in a number of  
9 cases that are at issue in this proceeding,  
10 correct?

11 A. The cases that are listed in the  
12 consolidated docket on the front of the testimony,  
13 yes.

14 Q. Can you tell me which case is the oldest?

15 A. No, I can't. I would have to go back and  
16 look at the document.

17 Q. Would you agree, subject to check, that  
18 it's Case No. 03-93-EL-ATA?

19 A. By "oldest", you mean when was the first  
20 document filed?

21 Q. Yes.

22 A. Subject to the check, sure.

23 Q. Are you familiar with the history of that  
24 case?

25 A. Generally, yes.

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1 Q. Do you know when the application in that  
2 case was filed?

3 A. I think if you look at my testimony at  
4 Page 4, I indicate that the Case 03-93 commenced  
5 on January 10, 2003, with an application filed by  
6 CG&E.

7 Q. Did the application filed by CG&E in that  
8 case have any root in any other cases? For  
9 example, was any provision in CG&E's transition  
10 plan approval in Case No. 99-1658-EL-ETP  
11 referenced in the case filed 03-93?

12 A. I would have to look at the application  
13 to see if it was referenced. The application  
14 would speak for itself. I don't recollect.

15 Q. Would you agree, subject to check, that  
16 the transition plan gave CG&E the ability to end  
17 the market development period for class where  
18 there was 20 percent shopping?

19 MR. SMALL: Objection to the extent it  
20 calls for a legal conclusion, but you can state  
21 your understanding of the situation.

22 THE WITNESS: Could you repeat the  
23 question, please?

24 BY MR. NEILSEN:

25 Q. Would you agree, subject to check, that

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1 the transition plan gave CG&E the ability to end  
2 the market development period for any class where  
3 there was 20 percent shopping?

4 A. My recollection is that coming out of the  
5 ETP cases, the Commission did approve in CG&E's  
6 ETP case a provision that would allow them to end  
7 their EDP based on a percentage of switching. I  
8 think it was 20 percent. I'm not sure that it was  
9 for any class, and I'd have to check the specifics  
10 about how they'd have to go to prove that.

11 Q. Was the application filed in 03-39 filed  
12 to the Commission's finalization of the rules  
13 required by Section 4928.14, Ohio Revised Code?

14 MR. SMALL: Objection to the extent that  
15 you're asking for a legal conclusion having cited  
16 the Ohio Revised Code, but she can state her  
17 understanding of the relationship.

18 THE WITNESS: Can you explain to me what  
19 rules you're referring to when you say 4928.14?

20 BY MR. NEILSEN:

21 Q. This would be the rules, I believe, that  
22 you reference with regard to the -- on Page 68 of  
23 your testimony.

24 A. Could you give me a line number on  
25 Page 68, please?

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1 Q. Generally, Question A62, the answer to  
2 Question 62.

3 A. In the answer to Question 62, I say that,  
4 upon advice of counsel, an antidiscrimination  
5 statute and cite two statutes that reflect the  
6 theme in Ohio's regulations. I guess what I'm  
7 looking for is what you say is 4928.14 rules. I  
8 want to make sure I understand what rules you're  
9 talking about.

10 Q. Just strike the question.

11 A. Okay.

12 Q. Do you know whether or not the  
13 application filed by CG&E in Case No. 03-93 was  
14 limited to establishing a market-based standard  
15 service offer for MBSSO for nonresidential  
16 customers that do not switch to a CRES to be  
17 effected at the end of the market development  
18 period?

19 A. On my testimony on Page 4 when I describe  
20 the case, I describe it as a modification of  
21 nonresidential rates to provide for MBSSO service  
22 pricing subsequent to the market development  
23 period.

24 Q. Ms. Hixon, will you accept, subject to  
25 check, that on January 24, 2003, IEU Ohio filed a

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1 motion to intervene in Case No. 03-93 which showed  
2 Ms. Kim Bojko as one of the lawyers working for  
3 IEU Ohio?

4 A. I could only accept that subject to check  
5 because I don't have the ability to check right  
6 now.

7 Q. Okay. I happen to have that motion here  
8 with me. Ms. Hixon, I'm handing you a copy of IEU  
9 Ohio's Motion to Intervene. And in that case, if  
10 you go to the back, you will see who the parties  
11 are, who the attorneys are representing IEU Ohio  
12 in that proceeding.

13 A. Is there a question pending?

14 Q. Yes. Will you accept that Ms. Kim Bojko  
15 is shown as one of the lawyers working for IEU  
16 Ohio in that proceeding in the signature line,  
17 Page 6, and then the Certificate of Service,  
18 Page 7?

19 A. Yes. The document you give me is  
20 seemingly signed by Kimberly Bojko, Sam Randazzo,  
21 trial attorney, Gretchen Hummel, Kimberly Bojko  
22 and Lisa Gatchel.

23 Q. Thank you.

24 Is it true that Ms. Bojko went to work  
25 for OCC and began to work for OCC in this

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1 proceeding?

2 MR. SMALL: Objection. Maybe clarify  
3 what this proceeding is that you're talking about.

4 MR. NEILSEN: The proceeding which draws  
5 us to this deposition, Case No. 03-93-EL-ATA, et  
6 al.

7 MR. SMALL: Is there a reference to at  
8 all times during the case?

9 BY MR. NEILSEN:

10 Q. Since Ms. Bojko came to the office of the  
11 Ohio Consumers' Counsel, has she represented OCC  
12 in this proceeding?

13 A. So the question is whether or not Kim  
14 Bojko represented OCC during her employment here  
15 in Case No. 03-93-EL-ATA. Is that the question?

16 Q. Yes.

17 A. Yes, she did.

18 Q. Do you know if Ms. Bojko or OCC obtained  
19 IEU Ohio's consent for representing OCC in a case  
20 where she had previously represented IEU Ohio?

21 A. I do not know.

22 Q. Will you accept, subject to check, that  
23 initial comments filed by IEU Ohio in this  
24 proceeding, Case No. 03-93-EL-ATA on  
25 March 4, 2003, were signed by Ms. Bojko?



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1 A. I would have to do it subject to check  
2 because I don't have the documents.

3 Q. Ms. Hixon, I'm handing you a copy of IEU  
4 Ohio's initial comments in Case No. 03-93-EL-ATA  
5 filed on that date. I'll hand a copy to counsel,  
6 as well. Can you look at that document and tell  
7 me whether or not Ms. Bojko was involved in filing  
8 those comments for IEU Ohio?

9 A. The document that you've just given me is  
10 entitled: Initial Comments of Industrial Energy  
11 Users Ohio, seems to be signed by Kimberly Bojko.

12 Q. Thank you.

13 Will you accept, subject to check, that  
14 Energy America filed a Motion to Intervene in Case  
15 No. 03-39-EL-ATA on February 11, 2003 showing  
16 Janine Migden as counsel?

17 A. Again, I don't have that document.

18 Q. Ms. Hixon, I am handing you a copy of  
19 Energy America's Motion to Intervene in Case  
20 No. 03-93-EL-ATA. Can you tell me if Janine  
21 Migden filed that Motion to Intervene?

22 A. The document you've handed me, the Motion  
23 to Intervene, on cover says: Of counsel Janine  
24 Migden, attorneys for Energy America.

25 Q. And Janine Migden is the current Ohio

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1 Consumers' Counsel, Janine Migden-Ostrander, is  
2 she not?

3 A. Yes.

4 Q. Will you accept, subject to check, that  
5 on -- Strike that.

6 Will you accept that on March 4, 2003, a  
7 group of marketers filed comments on the  
8 application in 03-93-EL-ATA and that the comments  
9 advanced certain fundamental concepts, which I  
10 will show you. I'm handing you a copy of initial  
11 comments filed by several marketers in Case  
12 No. 03-93-EL-ATA.

13 Will you accept that being that the  
14 marketers filed comments to advance certain  
15 fundamental concepts, including the following at  
16 Page 11, beginning at Page 11, that default  
17 service should be short term only and should  
18 reflect market prices, that the provider of last  
19 resort or POLR, P-O-L-R, provider should recover  
20 all costs of providing retail electric service  
21 delivered at the meter and that a fixed price  
22 option look not be designed for nonresidential  
23 customer classes?

24 MR. SMALL: Objection. Dan, I'm going to  
25 end this deposition if you don't get somewhere

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1 close to the proceeding. I'm looking at a  
2 document having to do with positions by Mid  
3 America, Strategic, WPS Energy and Green Mountain.  
4 And I have no idea why you're asking an OCC  
5 witness about their filing in March 2003. And,  
6 you know, this is oppressive to ask her about  
7 somebody else's filing four years ago which she  
8 has no connection with whatsoever.

9 MR. NEILSEN: Ms. Hixon's testimony  
10 describes the root of this proceeding and, in  
11 fact, using the parties' positions throughout this  
12 proceeding.

13 MR. SMALL: And that has to --

14 MR. NEILSEN: Excuse me, to empower the  
15 arguments or assertion that parties in this  
16 proceeding are taking certain positions or for  
17 specific reasons or purposes to advance OCC's  
18 argument herein.

19 MR. SMALL: If you were talking about IEU  
20 Ohio or somebody else, but you're talking about  
21 parties which have absolutely no connection with  
22 the OCC, have no connection even with the parties  
23 that you just mentioned of Energy America, IEU as  
24 far as people who are associated with OCC. I  
25 don't see the connection with this at all.

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1 MR. NEILSEN: Well, people are  
2 associated. People associated with OCC are  
3 involved in the history of this proceeding that  
4 I'm bringing up, and I'm merely showing the  
5 different things and the history of this case from  
6 that point forward and the positions parties have  
7 taken since that time, just as OCC is doing  
8 throughout the pleadings in this case.

9 I think -- she opened the door in her  
10 testimony to this line of questioning, and I don't  
11 see why IE Ohio shouldn't be able to ask those  
12 questions.

13 MR. COLBERT: And, Jeff, we would  
14 support. I mean, these are all parties that have  
15 been in the case, were referenced by Ms. Hixon in  
16 her testimony in relation to the speculation and  
17 other matters.

18 MR. SMALL: How are these parties  
19 referenced in her testimony?

20 MR. COLBERT: That's Ohio Marketers  
21 Group.

22 MR. SMALL: Just to say whether they  
23 support it or didn't support it? That's it?  
24 That's the link with Ms. Hixon's testimony?

25 MR. COLBERT: Well, she makes reference

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1 as to why they support it or why they didn't  
2 support. She makes an allegation that they  
3 supported or didn't support based on various  
4 contracts which she calls side agreements.  
5 Mr. Neilsen is exploring other possible rationale.  
6 It's essentially directed to Ms. Hixon's  
7 testimony.

8 MR. SMALL: I will show you a little bit  
9 of latitude on this, but if you don't get  
10 somewhere close to her testimony soon, I'm just  
11 going to ask her to not respond to the questions.  
12 I understood the link between Ms. Migden and the  
13 party. I understood the link between Ms. Bojko  
14 and some party because they worked for the OCC,  
15 but just bringing up documents anywhere in the  
16 case and asking her to explain their positions --

17 MR. NEILSEN: I'm not asking her to  
18 explain their positions. I'm asking her to  
19 confirm that that was a position made.

20 MR. SMALL: The documents can all be read  
21 for further content. I don't know what this  
22 witness -- To confirm that she can read, is that  
23 what you're asking here?

24 MR. NEILSEN: No. I'm trying to confirm  
25 that OCC also understands or this witness also

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1 understands the history of this proceeding and  
2 where this came from inasmuch as she uses the  
3 history of this proceeding to make her point on  
4 behalf of OCC.

5 MR. SMALL: The question is: Are you  
6 going to do anything more than ask her to confirm  
7 that that's what the documents say. The documents  
8 say that if they say that. I mean, she can read.

9 MR. NEILSEN: Okay. I will continue, and  
10 if you have further objections, I guess we'll hear  
11 them then.

12 BY MR. NEILSEN:

13 Q. Ms. Hixon, I am handing you comments of  
14 Energy America filed in Case No. 03-39-EL-ATA.  
15 Will you accept that Janine Migden filed those  
16 comments on March 4, 2003?

17 A. The document that you've handed me of  
18 March 4, 2003, comments of Energy America, the  
19 Certificate of Service is signed by Janine Migden.

20 Q. Ms. Hixon, you mentioned the opposition  
21 of the Ohio Manufacturer's Association in your  
22 testimony. Is it true that the Ohio  
23 Manufacturer's Association, or OMA, was  
24 represented by Sally Bloomfield, who also  
25 represented the City of Cincinnati, if you know?

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1 A. I do not know.

2 Q. Okay. You've indicated in your testimony  
3 that a stipulation and recommendation was filed in  
4 this proceeding on May 19, 2004, correct?

5 A. Page 6 on my testimony, Line 6, I  
6 indicate a stipulation was filed on May 19, 2004.

7 Q. Okay. I'm handing you a document in that  
8 proceeding. Is that the stipulation and  
9 recommendation that was filed on May 19, 2004?

10 A. The document that you've handed me is  
11 date stamped from docketing May 19, 2004, and is  
12 entitled "Stipulation and Recommendation".  
13 Without going through and checking every page, I  
14 would agree that, subject to check, that it is.

15 Q. Okay. Have you carefully reviewed this  
16 stipulation?

17 A. I have reviewed it. I don't know that I  
18 could say carefully.

19 Q. When did you review this?

20 A. I've reviewed it at various times.  
21 Probably once it was initially filed back in  
22 May of 2004, and I've reviewed it in the  
23 preparation of my testimony and probably times in  
24 between.

25 Q. Do you know if IEU Ohio communicated any

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1 practical reasons for its support of the  
2 stipulation?

3 MR. SMALL: Objection to the extent that  
4 you want to speculate on what IEU thinks or says.  
5 BY MR. NEILSEN:

6 Q. Ms. Hixon, will you turn to Page 2 of the  
7 stipulation at the bottom at Footnote No. 1?

8 A. I have it.

9 Q. Have you read that footnote?

10 A. Number one, yes.

11 Q. Do you agree that the footnote indicates  
12 that IEU Ohio's support is, practically speaking,  
13 guided by the relatively small size of the  
14 individual member accounts effected by the  
15 settlement?

16 MR. SMALL: Objection. It's just a  
17 document. Whether it says that or not can be  
18 determined from the document itself.

19 You can state your understanding of that  
20 paragraph.

21 THE WITNESS: What you've read is what it  
22 says.

23 BY MR. NEILSEN:

24 Q. Do you agree that practical reasons can  
25 affect the litigation posture of parties to a



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1 proceeding and how they react to settlement  
2 proposals?

3 A. Could you restate the question, please?

4 Q. Do you agree that there are practical  
5 reasons that may affect the litigation position of  
6 certain parties to a proceeding and how they may  
7 then react to settlement proposals offered in that  
8 proceeding?

9 A. Could you tell me what you mean by  
10 "practical reasons"?

11 Q. A party might change its position that it  
12 had at the outset of a proceeding based on  
13 circumstances that have arisen throughout a  
14 proceeding, that it otherwise may not be able to  
15 avoid, that may be better for it in some way or  
16 another?

17 A. I think from what you've explained to me,  
18 what I hear you saying is that parties take  
19 different positions in different cases for  
20 different reasons, and I can't disagree with that.

21 Q. Ms. Hixon, is it your understanding that  
22 the Ohio Supreme Court remanded the case in this  
23 proceeding back to the Commission as a result of  
24 the Court finding that the plan approved by the  
25 PUCO is in conflict with Rule 35 as you explained

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1 it in your testimony?

2 MR. SMALL: Objection to the extent that  
3 it calls for a legal conclusion, but you can  
4 explain your understanding.

5 THE WITNESS: Well, could you give me the  
6 reference where I say that the plan is in  
7 violation of Rule 35?

8 BY MR. NEILSEN:

9 Q. Beginning on Page 57 of your testimony,  
10 you explain your overall concerns regarding side  
11 agreements. And specifically that page at  
12 Footnote 89, you have a description of Rule 35.

13 A. Well, I guess you've answered my question  
14 of where did I say it is in violation because I  
15 think you said I didn't say that, but I at least  
16 reference Rule 35 in my discussion of the pages  
17 that you've described. In regards to the Supreme  
18 Court, the Supreme Court Order, I think, speaks  
19 for itself as to why it remanded this case.

20 Q. Could you explain what -- could you  
21 reexplain, then, your concerns with the concerns  
22 that you have described on Page 57 in answer to  
23 Question A57 regarding Rule 35?

24 A. Well, as stated in my testimony on  
25 Page 57, I mean, you're asking me to reexplain.

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1 At the bottom of the page, I indicate that the  
2 departure from the Commission's post-MDP pricing  
3 rules, which I refer to as Rule 35, should be  
4 reexamined in light of the revelation of the side  
5 agreements. In other words, the Commission now  
6 should look at the side agreements in relationship  
7 to their departure from those post-MDP pricing  
8 rules.

9 MR. SMALL: Dan, I'm sorry to interrupt  
10 you during your deposition, but I'm just going to  
11 have to take a few seconds to finish this up and  
12 I'll be back.

13 MR. COLBERT: We're off the record.

14 (Recess taken.)

15 BY MR. NEILSEN:

16 Q. Ms. Hixon, I'd like to talk about the  
17 bigger pictures situation in Ohio at the time that  
18 the stipulation was filed. Are you familiar with  
19 what Monongahela Power, or what I will refer to as  
20 Mon Power, was proposing to its Ohio customers in  
21 conjunction with its efforts to end its market  
22 development period?

23 A. I'm aware, generally.

24 Q. Do you agree that Mon Power pursued  
25 litigation in the Ohio Supreme Court and Federal

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1 District Court in an effort to require the Public  
2 Utilities Commission of Ohio to, quote, spot  
3 market wholesale power prices to nonresidential  
4 customers for purposes of meeting post-market  
5 development period polar pricing obligations?

6 A. I'm aware that litigation occurred, that  
7 Mon Power's litigation was related to ending the  
8 market development for nonresidential. I'm not  
9 aware of the specifics without checking and going  
10 back and reviewing the details that you've  
11 described.

12 Q. Are you aware that Mon Power claimed that  
13 the Ohio market development period rate caps were  
14 confiscatory because they prevented Mon Power from  
15 passing through the costs of generation supply it  
16 purchased from its affiliate to which Mon Power  
17 had transferred its generating assets?

18 MR. SMALL: Asked and answered, but you  
19 can repeat your recollection of the case.

20 THE WITNESS: I'm aware that Mon Power  
21 was attempting to charge certain prices or seeking  
22 PUCO approval for those prices for nonresidential  
23 to end their market development period, but the  
24 specifics as to their legal claim and the  
25 confiscatory, I am not.

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1 BY MR. NEILSEN:

2 Q. Is it your understanding that requiring  
3 an electric distribution utility, or EDU, to  
4 divest generating assets brings with it increased  
5 risk that the EDU may rightfully claim that the  
6 PUCO is preempted from blocking the recovery of  
7 the cost of generation supply or the cost of that  
8 generation supply is based on market prices  
9 charged pursuant to Federal Energy Regulatory  
10 Commission authorization?

11 MR. SMALL: Objection to the extent that  
12 that calls for a legal conclusion in the many,  
13 many different sections of that question. But to  
14 the extent that the witness understands it and can  
15 respond to it as a nonattorney, she can answer.

16 THE WITNESS: Since it was a lengthy  
17 question, could I have it read back?

18 (Question read back as requested.)

19 THE WITNESS: Mr. Neilsen, I'm sorry. I  
20 don't understand the question. Maybe the length  
21 of it is what's confusing to me.

22 BY MR. NEILSEN:

23 Q. I'll move on.

24 Do you know if Mon Power was successful  
25 in obtaining a Federal Court decision finding that

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1 SBC's rate caps are unconstitutional to the extent  
2 that the law does not permit the utility the  
3 opportunity to contest the rate cap on the grounds  
4 of the Constitution?

5 MR. SMALL: Objection. Asked and  
6 answered. She's already responded twice about the  
7 recollection, but you can respond to the question.

8 THE WITNESS: I am not aware of that.

9 BY MR. NEILSEN:

10 Q. Are you aware of whether or not the Mon  
11 Power situation prompted the introduction of  
12 legislation that was designed to provide the  
13 Public Utilities Commission of Ohio with authority  
14 to establish a rate stabilization plan in the  
15 event the utility did not propose a rate  
16 stabilization plan?

17 MR. SMALL: Objection to the extent that  
18 the question asks for an interpretation of  
19 authority under Ohio law and that it calls for a  
20 legal conclusion, but she can respond to her  
21 understanding of the situation.

22 THE WITNESS: I'm not aware of what  
23 legislation you're referring to; so, therefore, I  
24 don't know what prompted it.

25 BY MR. COLBERT:

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1 Q. The legislation I'm referring to is House  
2 Bill 14 introduced in the 126th General Assembly,  
3 Regular Session 2005, 2006. Are you familiar with  
4 that legislation?

5 A. I do not know if I've seen this  
6 legislation. I don't really know from what you've  
7 given me when it might have been introduced or  
8 what happened to it. I know that there was  
9 discussion of legislation, but I'm not sure that  
10 I've seen this (indicating).

11 Q. I would like to at least have this marked  
12 as IEU Ohio Deposition Exhibit A.

13

- - -

14 Thereupon, Deposition Exhibit A was  
15 marked for purposes of identification.

16

- - -

17 BY MR. NEILSEN:

18 Q. Ms. Hixon, did OCC support the rate  
19 stabilization plan for DP&L, that is Dayton Power  
20 & Light, that was submitted to the Public  
21 Utilities Commission of Ohio?

22 A. What plan are you referring to and what  
23 case and when?

24 Q. I don't have the case number with me.  
25 It's the first Dayton Power & Light rate

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1 stabilization plan. I believe it was filed in  
2 2002.

3 A. Well, without the specifics, I can say  
4 that I'm aware that Dayton Power & Light came to  
5 the Commission because their market development  
6 period was scheduled to end sooner than other  
7 companies. And that the OCC and other parties  
8 entered into an agreement that extended their  
9 market development period and provided other  
10 conditions beyond that, and the OCC did support  
11 it. I'm thinking it was an '02 case, but I can't  
12 be for sure, if that's what you're referring to.

13 Q. That is what I am referring to.

14 Do you know if that rate stabilization  
15 plan for DP&L continued the five percent  
16 residential rate reduction after the end of the  
17 market development period?

18 A. Given that there's so many provisions,  
19 without having it in front of me, I'm not a  
20 hundred percent sure, but subject to check, I  
21 believe it may have.

22 Q. Is it your view that a rate reduction for  
23 one class of customers while rates for other  
24 customers are increasing results necessarily in  
25 undo discrimination?



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1 A. Could you repeat the question, please?

2 Q. Is it your view that a rate reduction for  
3 one class of customers while rates for other  
4 classes of customers are increasing results in  
5 undo discrimination?

6 A. Not necessarily.

7 Q. Are you aware that the Public Utilities  
8 Commission of Ohio determined that it did not have  
9 authority to impose a rate stabilization plan on a  
10 utility in a finding and order in Case No.  
11 04-1047-EL-ATA on April 6, 2005?

12 MR. SMALL: Objection to the extent that  
13 it calls for a legal conclusion.

14 You can respond, to your understanding.

15 THE WITNESS: I'd have to see the order  
16 to know what you're referring to, if that is what  
17 the Commission said in its order.

18 BY MR. NEILSEN:

19 Q. Do you know if the Commission has ever  
20 said that in any order?

21 MR. SMALL: Same objection.

22 You can answer.

23 THE WITNESS: Tell me again what --

24 BY MR. NEILSEN:

25 Q. That the Public Utilities Commission of

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1 Ohio did not have authority to impose a rate  
2 stabilization plan on a utility?

3 A. Without reviewing the PUCO's order, I  
4 don't know if that language is what they used.

5 Q. Do you agree that the Public Utilities  
6 Commission of Ohio does not have authority to  
7 impose a rate stabilization plan on a utility?

8 MR. SMALL: Objection. That certainly  
9 calls for a legal conclusion.

10 You can state your understanding of the  
11 situation.

12 THE WITNESS: I guess my understanding of  
13 the situation is that during a period of time  
14 under which the electric utilities have dealt with  
15 rate stabilization plans, that there has been  
16 questions by different parties as to whether the  
17 PUCO has authority.

18 BY MR. NEILSEN:

19 Q. Okay. And if the PUCO does not have  
20 authority and if it is voluntary, wouldn't the  
21 rate stabilization plan approval or its acceptance  
22 depend on the utility actually accepting that  
23 plan?

24 MR. SMALL: Same objection as to legal  
25 conclusion.

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1           You can answer.

2           THE WITNESS: In your hypothetical, your  
3           premise is the Commission does not have authority  
4           to do something, then they can't do it. And,  
5           therefore, the only way it could get done is if  
6           somebody agreed to it.

7           BY MR. NEILSEN:

8           Q.    Would you agree that in a situation where  
9           the utility's consent is required to effectuate a  
10          rate stabilization plan, customers have, as a  
11          practical matter, very limited negotiating  
12          leverage regarding the terms and conditions of the  
13          rate stabilization plan?

14          MR. SMALL: Same objection.

15          To the extent that the premise depends on  
16          a legal conclusion, you can respond.

17          THE WITNESS: Could you give me the  
18          phrase "limited" that you used so that I  
19          understand what that means, please?

20          BY MR. NEILSEN:

21          Q.    Limited being that there is only a  
22          very -- the framework for which the customers  
23          would be able to negotiate or accept a plan has  
24          boundaries.

25          A.    And your premise is that the limitation

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1 of negotiations or acceptance is based on a  
2 consent required by the utility?

3 Q. Yes.

4 A. Well, beyond the caveat that I gave about  
5 the RSP and whether or not the Commission does or  
6 does not have authority or has stated that they do  
7 or do not have authority, the description that  
8 you've given says that in order for something to  
9 happen, an entity has to consent and that the  
10 entity is the utility. And that, therefore, the  
11 customers of the utility have a limited ability to  
12 accept or negotiate. That consent, if it exists  
13 and has to happen, could limit in some ways your  
14 ability, as a customer, to negotiate with the  
15 entity that seemingly, in your hypothetical, your  
16 premise is the only person or entity that can say  
17 yea or nea.

18 Q. Ms. Hixon, I would like to hand you a  
19 finding and order issued by the Commission in Case  
20 No. 04-1047-EL-ATA. If you could turn to Page 4,  
21 please, Paragraph 10 and read that, please.

22 A. I've read Paragraph 10.

23 Q. And do you agree that the  
24 second-to-the-last paragraph of Paragraph 10 on  
25 Page 4 states: The Commission cannot mandate the

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1 filing of an RSP?

2 MR. SMALL: Objection. You're asking her  
3 whether she can read that?

4 MR. NEILSEN: I'm asking her whether she  
5 agrees that that's what it says.

6 THE WITNESS: I agree that that is what  
7 it says.

8 BY MR. NEILSEN:

9 Q. If OCC is arguing that standard service  
10 offer, or SSO, prices should be based on a  
11 wholesale auction when the wholesale market has  
12 not developed and the utility must consent to a  
13 rate stabilization plan, would you agree that  
14 nonresidential customers may, as a practical  
15 matter, be motivated to seek a settlement that may  
16 not be as customer friendly as they may like?

17 MR. SMALL: Objection. You characterized  
18 that as OCC's position. It isn't stated anywhere.  
19 It isn't part of your testimony. It isn't even  
20 part of anybody else's testimony in this case.

21 BY MR. NEILSEN:

22 Q. With the clarification by counsel, would  
23 you have an answer to the question I just asked?

24 A. I'm going to need the question again,  
25 please.

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1 Q. If the OCC is arguing that standard  
2 service offer prices should be based on a  
3 wholesale auction when what the wholesale market  
4 has not developed and the utility must consent to  
5 a rate stabilization plan, would you agree that  
6 nonresidential customers may, as a practical  
7 matter, be motivated to seek a settlement that may  
8 not be as customer friendly as they may like, but  
9 nonetheless, manages the risk of worse results  
10 that they may attribute to OCC's recommendations?

11 MR. SMALL: I have an additional  
12 objection on the extent it's asking Ms. Hixon to  
13 speculate on what other parties would do, but you  
14 can answer.

15 THE WITNESS: The first part of your  
16 question says if OCC is arguing an auction for  
17 SSO. That's not my testimony. I'm not testifying  
18 as to what should be done in terms of how to  
19 determine the SSO. OCC witness Talbot is dealing  
20 with that. So, therefore, to answer the rest of  
21 the question, I don't have the basis.

22 BY MR. NEILSEN:

23 Q. Okay. Ms. Hixon, I'm handing you a copy  
24 of Ohio Consumer Counsel's Memorandum Contra to  
25 CG&E's ap for rehearing filed on November 8, 2004.

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1 MR. SMALL: This is the  
2 November 8, 2004 -- this is the old ap?

3 MR. NEILSEN: Yes, the old application  
4 for rehearing.

5 BY MR. NEILSEN:

6 Q. I'd like to turn to Page 3 and look at  
7 Footnote 3. Are you there?

8 A. Yes.

9 Q. Am I correct that in this footnote, OCC  
10 takes the position that the Public Utilities  
11 Commission never adopted the Stipulation filed in  
12 this case on May 19, 2004?

13 MR. SMALL: Objection. Again, you've  
14 just asked her whether she can read this document.  
15 The document --

16 MR. NEILSEN: I'm asking if that's what  
17 this footnote states as OCC's position.

18 MR. SMALL: All right. Object to the  
19 extent that it calls for a legal conclusion, but  
20 you can state your understanding.

21 THE WITNESS: Footnote 3 says, "CG&E's  
22 nomenclature regarding "reinstating" the  
23 stipulation is misplaced. For example, e.g.,  
24 Application of rehearing at 5. The Commission  
25 never adopted the Stipulation, so there is nothing

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1 to quote, unquote, reinstate."

2 MR. NEILSEN: Thank you. I would like to  
3 mark that Memorandum Contra as IEU Ohio Deposition  
4 Exhibit B.

5 - - -

6 Thereupon, Deposition Exhibit B was  
7 marked for purposes of identification.

8 - - -

9 BY MR. NEILSEN:

10 Q. Ms. Hixon, I am handing you a  
11 presentation presented by Janine Migden-Ostrander  
12 on June 1, 2006, to the Harvard Electricity Policy  
13 Group. I'd like to have that marked as IEU Ohio  
14 Exhibit C.

15 - - -

16 Thereupon, Deposition Exhibit C was  
17 marked for purposes of identification.

18 - - -

19 BY MR. NEILSEN:

20 Q. Are you familiar with this presentation?

21 A. And the question is....

22 Q. Have you seen this before? Are you  
23 familiar with it?

24 A. No, I've not seen it before, and no, I'm  
25 not familiar with it.



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1 Q. Would you agree that, as far as it states  
2 herein, that it is a representation by Janine  
3 Migden-Ostrander, the Ohio Consumers' Counsel?

4 MR. SMALL: Objection. She said she's  
5 not familiar with it.

6 Answer, if you can.

7 THE WITNESS: That's what's written on  
8 the front page.

9 BY MR. NEILSEN:

10 Q. Could you turn to Slide 7, please? It  
11 doesn't have numbers. It's the seventh slide.  
12 The top of the page that says: The Wholesale,  
13 quote, Nether World, end quote.

14 A. There's a couple that say that. Maybe  
15 you can go a little farther.

16 Q. The second page with that title.

17 A. Okay.

18 Q. Do you agree that the statement on  
19 Slide 7, the third bullet point that states: Ohio  
20 has seen wholesale auctions that have failed to  
21 generate acceptable bids?

22 MR. SMALL: Mr. Neilsen, the second page  
23 doesn't say that. Maybe we're a little bit  
24 confused.

25 THE WITNESS: I think I've located it.

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1 Does it begin with the bullet: News is full of  
2 stories?

3 BY MR. NEILSEN:

4 Q. Yes.

5 A. Okay. And your question is....

6 Q. Do you agree with the statement that  
7 suggests Ohio has seen wholesale auctions that  
8 have failed to generate acceptable bids?

9 A. I could agree with the statement that  
10 Ohio has seen wholesale auctions and failed to  
11 generate acceptable bids based on my knowledge of  
12 the First Energy wholesale bids that were not  
13 successful or did not result in acceptable bids.

14 Q. Okay. Can you turn the page, please, and  
15 read that slide? Can you tell me if you agree  
16 with the observations made on that slide?

17 A. I have a little trouble saying I agree or  
18 disagree given that they're not full sentences.  
19 For example, "reflects short term market prices."  
20 What's being referred to here? Since these seem  
21 to be bullet points related to something else, to  
22 say yeah, I agree with all of this, I think I'm  
23 missing the part that -- you know, what is it that  
24 reflects short-term market prices? What is it  
25 that does not provide incentives? So I don't

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1 think that they're statements that I can clearly  
2 say yes, I agree or disagree.

3 Q. I have the same question for the next  
4 slide.

5 A. Again, my answer would be the same.

6 Q. Okay. If you go to two slides after  
7 that, skip the next one, the top of the page says:  
8 What do we do now? Do you agree with the  
9 statement on the top of that -- the first bullet  
10 on that slide that states: Certainly retail  
11 compensation cannot succeed without a viable  
12 wholesale market?

13 A. Yes, I would agree with that.

14 Q. Okay. I'd like to turn back to your  
15 testimony, please, Page 60, Line 8. When you talk  
16 about the development of the market in your  
17 testimony there and throughout, again, at 63,  
18 Lines 4 and 5 and Page 66 and Page 68, are you  
19 talking about the retail market or the wholesale  
20 market?

21 A. I didn't catch all of your references,  
22 but I think if you turn to Page 61 of my testimony  
23 where I conclude the discussion that you've  
24 pointed out on Page 60, the concerns that I talk  
25 about in terms of market development are, in part,

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1 referenced at Lines 4 through 12 where the  
2 Commission speaks of the development of the retail  
3 market for generation in CG&E's territory.

4 So to the extent that the Commission was,  
5 in its May 2004 Stipulation, referring to the  
6 development of the retail market and in its  
7 November entry of the hearing referred to the  
8 development of the competitive market, I think  
9 they'd primarily be addressing retail.

10 Q. Okay. And I was using that as an  
11 example. The same question for in other areas,  
12 for example, on Page 66, Line 20.

13 A. Again, I'm primarily discussing the  
14 impact or the affect of what I've discussed in my  
15 testimony on a competitive market in CG&E's  
16 service territory, which would be retail.

17 Q. And Page 68, Line 2, I have the same  
18 question.

19 A. I'd be referring to the same competitive  
20 market.

21 Q. Okay. If there's no market, is it  
22 possible to distort the market?

23 A. I guess I'm going to ask you the same  
24 question you asked me, retail market in CG&E's  
25 retail service territory?

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1 Q. Right.

2 A. And you're asking me if there is no  
3 market, is it possible to distort the market?

4 Q. Yes.

5 MR. SMALL: Objection. Facts not in  
6 evidence.

7 You can answer.

8 THE WITNESS: Can you give me an idea of  
9 what you mean by "distort"?

10 BY MR. COLBERT:

11 Q. Isn't that a term that you use in your  
12 testimony?

13 A. Could you give me a reference?

14 Q. What does "distort" mean to you?

15 MR. SMALL: Objection to your question.  
16 She'll answer the questions that you ask, but tell  
17 her -- You have to formulate your own questions.  
18 She's not a dictionary. Tell her what you mean by  
19 "distort" and she'll answer your question.

20 MR. NEILSEN: Okay. For the purposes of  
21 this question, to negatively effect the purpose  
22 of -- and proposed function of a retail market, if  
23 there is no retail market, can a retail market be  
24 negatively effected?

25 THE WITNESS: Okay. Based on that

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1 definition of negatively effecting the purpose of  
2 the retail market, if the reason there is no  
3 market is because competition, let's say, is  
4 outlawed, that would result in no market. For  
5 example, prior to competition for electric in  
6 Ohio, there was no market because you could not  
7 have one by law, it's my understanding.

8 Therefore, I think it would be very difficult to  
9 distort if the market exists because it can't for  
10 legal reasons.

11 If a market doesn't exist for other  
12 reasons, but is legally allowed to exist but just  
13 doesn't happen or struggles or competition has not  
14 resulted, then yes, I think you can continue to  
15 have a negative effect on the purpose of that  
16 retail market, which could cause the market to  
17 continue to not exist. So I think the reasoning  
18 of why there is or is not a market is dependant  
19 upon whether or not you can distort that market.

20 BY MR. NEILSEN:

21 Q. Is it true that previously that the Ohio  
22 Consumers' Counsel and up until now the litigation  
23 position in this proceeding was that the  
24 Commission -- that the Commission require an  
25 auction of the standard service offer of prices?

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1 MR. SMALL: Objection to the extent it  
2 calls for a legal conclusion and OCC's position is  
3 contained in this testimony, but you can state  
4 your understanding of the situation.

5 THE WITNESS: You said our litigation  
6 position up to this point? What's "this point"?

7 BY MR. NEILSEN:

8 Q. Today.

9 A. Today.

10 Our litigation position up to this point  
11 in regards to an MBSSO is in Mr. Talbot's  
12 testimony, and I don't deal with that.

13 Q. Is it your understanding that the OCC is  
14 urging the Commission to issue a standard service  
15 offer price auction?

16 MR. SMALL: Same objection.  
17 You can answer.

18 THE WITNESS: It's in Mr. Talbot's  
19 testimony.

20 BY MR. NEILSEN:

21 Q. So you don't know if that is the Ohio  
22 Consumer Counsel's position?

23 A. If I had Mr. Talbot's testimony, I could  
24 tell you what he says and what his recommendation  
25 is. I don't think that the words that you used

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1 are what's in his testimony. That's my  
2 recollection.

3 Q. Okay. Are you familiar with the Midwest  
4 Independent System Operator?

5 A. I generally know what it is. I do not  
6 have expertise, really, to do that.

7 Q. Most of the time it's referred to as the  
8 MISO, correct?

9 A. I'm familiar with that term.

10 Q. Are you aware of whether or not the MISO  
11 has a generation reserve requirement?

12 A. No.

13 Q. Are you aware that the MISO has proposed  
14 an ancillary service market in a recent filing at  
15 the Federal Energy Regulatory Commission or FERC?

16 A. No.

17 MR. NEILSEN: That's all the questions I  
18 have. Thank you.

19 MR. SMALL: Let's go off the record for a  
20 second.

21 MR. COLBERT: Sure.

22 (Discussion held off the record.)

23 (Thereupon, Mr. Neilsen exited the  
24 deposition room.)

25 BY MR. COLBERT:



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1 Q. We had one question pending, and we'll do  
2 this before we break for lunch.

3 You were going to point me to a contract  
4 that allowed for reasons other than the  
5 counterparty being contracted with an unaffiliated  
6 CRES provider to not be a direct-serve contract.  
7 If it helps, you were going through a document  
8 that Mr. Neilsen couldn't hear about.

9 A. Is that leading the witness?

10 Q. No. No. It's just trying to help you  
11 get to the point to where we were.

12 A. Well, let's kind of start at the  
13 beginning in terms of what I think will fit your  
14 conditions. I'm not real clear, allowed reasons  
15 other than --

16 Q. Maybe I can help.

17 A. -- with a CRES -- I got a little  
18 confused.

19 Q. And maybe I can help. We're talking  
20 about the May through November contracts, and  
21 we're not talking about the contracts involving  
22 the City of Cincinnati, Cognis or Kroger, okay.  
23 Any of the other contracts -- As far as I'm aware,  
24 all of the other contracts involve direct-serve  
25 terms between DERS and the counterparty, with the

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1 exception of certain conditions when the  
2 counterparty is already taking service from an  
3 unaffiliated CRES provider.

4 MR. SMALL: Your reference to all the  
5 things that are in her testimony.

6 MR. COLBERT: Yes. I'm only talking  
7 about the agreements in her testimony.

8 THE WITNESS: My first qualification is  
9 in the initial question you didn't exclude Kroger.  
10 And that was going to be my example that I thought  
11 Mr. Neilsen might not be able to see.

12 BY MR. COLBERT:

13 Q. I thought I had. When I referred to  
14 retail grocer, I was trying to not offend  
15 Mr. Neilsen by --

16 A. Okay. Because I think that the Kroger  
17 agreement has provisions.

18 Q. I agree with you.

19 A. Okay. Thank you.

20 Q. You're welcome.

21 A. If you look at, for example, the  
22 Attachment 2 to my testimony.

23 Q. Which one is that?

24 A. The hospital's of May 19, 2004. It's  
25 Bates stamped 348 at Provision No. 1.

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1 Q. Okay. 348 and Provision No. 1.

2 A. Cinergy, who is referring to CRS, is  
3 making an offer to sell electric generation. As I  
4 said, I think previously that's an offer, not a  
5 provision.

6 Q. And your point is that they could reject  
7 the offer and continue on the MBSSO surface?

8 A. I have no knowledge of whether they could  
9 continue on with MBSSO or choose another one.

10 Q. Either one.

11 A. Then if you look at the agreement in  
12 Attachment 3 between Cinergy and the --

13 Q. Which Bates number are you on?

14 A. -- members of OEG, Page 327.

15 Q. Okay.

16 A. And continuing on 328, there seems to be  
17 options offered to the customers individually that  
18 they may purchase from Cinergy, which is CRS, that  
19 there are conditions under which they can -- when  
20 they can begin that service. There's conditions  
21 related to specific facilities or, alternatively,  
22 they could accept the MBSSO under Option B. And  
23 then there's numerous conditions under that as  
24 well in terms of time and specific customers.

25 Q. So what you're referring to, basically,

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1 is that the counterparty's customers have options  
2 here?

3 A. Yes.

4 Q. Okay. Fair enough.

5 MR. COLBERT: With that, we can go off  
6 the record.

7 (Discussion held off the record.)

8 (Recess taken.)

9 - - -

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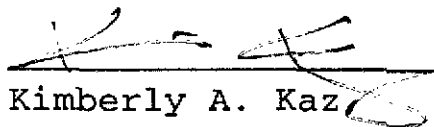
C E R T I F I C A T E

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 ) SS:  
County of Fairfield, )

I, Kimberly A. Kaz, Registered Professional  
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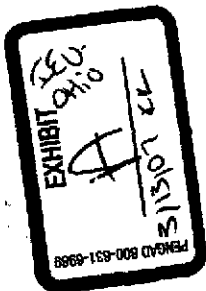
I further certify that I am neither attorney  
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Kimberly A. Kaz  
Registered Professional  
Reporter and Notary Public  
in and for the State of  
Ohio.

My Commission Expires:  
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As Introduced

126th General Assembly  
Regular Session  
2005-2006

H. B. No. 14

Representatives J. Stewart, Kearns, Miller, Aslanides, Woodard, Webster,  
Ujvagi, Garrison, Harthnett, C. Evans

A B I L L

To enact section 4928.141 of the Revised Code to  
further state policy under the Electric  
Restructuring Law by providing for implementation  
of rate stabilizations plans where there is  
insufficient, generation market development or a  
lack of effective competition in an electric  
utility's service area and ensuring against any  
undue competitive disadvantage between Ohio and  
regional customers of an electric utility or its  
affiliates, and to declare an emergency.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

Section 1. That section 4928.141 of the Revised Code be  
enacted as follows:

Sec. 4928.141. (A) In any proceeding initiating a  
market-based standard service offer under division (A) of section  
4928.14 of the Revised Code or a proposal to use a competitive  
bidding process under division (B) of that section, the public  
utilities commission shall determine if there is effective  
competition in retail electric generation service in the utility's  
service area, and if the development of a competitive retail

H. B. No. 14  
As Introduced

Page 2

generation market within that service area is sufficient, to  
effectuate the state policy specified in division (A) of section  
4928.02 of the Revised Code. The commission shall make that  
determination for each rate schedule and customer class of the  
utility using, to determine effective competition for retail  
electric generation service, the factors otherwise enumerated in  
division (D)(1) to (4) of section 4928.06 of the Revised Code.

(B) If it determines under division (A) of this section that  
there is not sufficient market development or effective  
competition in the supply of retail electric generation service to  
a specific customer class of the utility, the commission shall do  
both of the following:

(1) Encourage the electric utility to file a standard service  
offer under division (A) of section 4928.14 of the Revised Code  
that stabilizes the retail electric generation price for that  
customer class for a reasonable, prescribed period.

(2) By order containing such conditions regarding  
implementation as the commission may specify in the order, approve  
for the customer class, as a filing under section 4928.14 of the  
Revised Code, a rate stabilization plan that contains a retail  
electric generation service price for the customer class load that  
the commission determines is just and reasonable, which price the  
commission may establish administratively.

(C) In carrying out division (B) of this section:

(1) The commission shall not set a standard service offer  
price for retail electric generation service based on the  
day-ahead or hourly price posted by a regional transmission  
entity.

(2) The commission shall ensure that retail consumers in this  
state are not unduly competitively disadvantaged as a result of

50 differences between retail electric generation service prices for  
51 the Ohio customers of an electric utility and the prices available  
52 to similarly situated customers of the utility or any of its  
53 affiliates providing retail electric service within the same  
54 regional transmission entity.

55 (D)(1) Nothing in this section precludes a customer opting  
56 for a service offering priced on the basis of a regional  
57 transmission entity's posted day-ahead or hourly price.

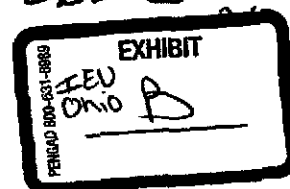
58 (2) Nothing in this section affects any rate stabilization  
59 plan application filed with the commission by an electric utility  
60 prior to November 1, 2004.

61 Section 2. This act is hereby declared to be an emergency  
62 measure necessary for the immediate preservation of the public  
63 peace, health, and safety. The reason for such necessity is to  
64 ensure that the act takes effect at the earliest possible time to  
65 address uncertainty regarding the electric prices and resulting  
66 revenues paid by Ohio retail electric customers after December 31,  
67 2005, and to protect Ohio retail customers against undue  
68 competitive disadvantage based on the price of generation service.

FILE

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Edn. B



BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of	)	
The Cincinnati Gas & Electric Company	)	
To Modify its Non-Residential Generation	)	
Rates to Provide for Market-Based Standard	)	Case No. 03-93-EL-ATA
Service Offer Pricing and to Establish a Pilot	)	
Alternative Competitively-Bid Service Rate	)	
Option Subsequent to Market Development	)	
Period	)	
In the Matter of the Application of The	)	
Cincinnati Gas & Electric Company for	)	
Authority to Modify Current Accounting	)	Case No. 03-2079-EL-AAM
Procedures for Certain Costs Associated	)	
with The Midwest Independent Transmission	)	
System Operator	)	
In the Matter of the Application of The	)	
Cincinnati Gas & Electric Company for	)	
Authority to Modify Current Accounting	)	Case No. 03-2081-EL-AAM
Procedures for Capital Investment in its	)	Case No. 03-2080-EL-ATA
Electric Transmission and Distribution	)	
System And to Establish a Capital	)	
Investment Reliability Rider to be Effective	)	
After the Market Development Period	)	

MEMORANDUM CONTRA OF THE  
OFFICE OF THE OHIO CONSUMERS' COUNSEL  
TO CINCINNATI GAS & ELECTRIC COMPANY'S  
APPLICATION FOR REHEARING

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**MEMORANDUM CONTRA OF THE  
OFFICE OF THE OHIO CONSUMERS' COUNSEL  
TO CINCINNATI GAS & ELECTRIC COMPANY'S  
APPLICATION FOR REHEARING**

**I. INTRODUCTION**

On September 29, 2004, the Public Utilities Commission of Ohio ("Commission") issued an Opinion and Order ("Order") in the above-captioned cases that contained rates and terms of service that differed in some respects from a Stipulation and Recommendation ("Partial Stipulation") filed by the Cincinnati Gas & Electric Company ("CG&E" or the "Company") and agreed to by some of the intervenors in these cases. The Office of the Ohio Consumers' Counsel ("OCC"), the Ohio Marketers Group and Constellation Power Source, Inc. as well as the

Company filed applications for rehearing of the Commission's Order on October 29, 2004. The OCC, pursuant to Ohio Adm. Code 4901-1-35, submits this Memorandum Contra to CG&E's Application for Rehearing.

CG&E's October 29, 2004 filing improperly ventures outside the statutory purpose of an application for rehearing and the Commission's authority on rehearing, as set forth in R.C.

4903.10:

Such application [for rehearing] shall be in writing and shall set forth specifically the ground or grounds on which the applicant considers the order to be unreasonable or unlawful. No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application.

CG&E asks the Commission to "either (I) reinstate the [Partial] Stipulation; (II) adopt the alternative proposal more fully described in the attached memorandum in support and attachments 1, 2, and 3, or, (III) acknowledge and approve CG&E's statutory right to implement its previously filed market-based stand service offer (MBSSO)."<sup>1</sup> CG&E's efforts to submit another post market development period ("post-MDP") application in the guise of an application for rehearing should be rejected as unlawful.

The new proposal by CG&E should be limited to seeking approval of a new plan that is subject to investigation by the Commission and all interested parties, subject to a hearing, and after briefing is concluded regarding the factual, policy and legal implications of the new proposal.<sup>2</sup> Nonetheless, the Company's proposals regarding three alternative routes will be addressed *seriatim* as part of this pleading.

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<sup>1</sup> CG&E Application for Rehearing at 2.

<sup>2</sup> R.C. 4903.09; R.C. 4909.18.

## II. ARGUMENT

### A. The Commission Should Not "Reinstate" the Partial Stipulation<sup>3</sup>

CG&E states twelve "assignments of error" that, in total, essentially state that the Commission should not have made any modifications to the Partial Stipulation.<sup>4</sup> The OCC's reasons for opposing the Partial Stipulation are amply stated in the OCC's Brief, Reply Brief and Application for Rehearing.<sup>5</sup> Separately, the Company argues that the "Commission's Order is unlawful on six counts." These matters will be addressed in this pleading.<sup>6</sup>

CG&E first argues that, "absent the consent of CG&E," the Commission may not "set the competitive retail electric service price that CG&E may offer consumers through its MBSSO."<sup>7</sup> The Commission previously rejected CG&E's argument in the context of the Commission's promulgation of competitive bidding rules.

[A]lthough the provisions of MBSSO and CBP provide for generation service, it is incorrect to state that these service offerings are not subject to the Commission's jurisdiction. Section 4928.14(A), Revised Code, specifically provides for MBSSO tariffs to be filed with the Commission under Section 4909.18, Revised Code, and Section 4928.14(B), Revised Code, requires the adoption of rules for the provision of CBP.<sup>8</sup>

<sup>3</sup> CG&E's nomenclature regarding "reinstating" the Stipulation is misplaced. E.g. Application for Rehearing at 5. The Commission never adopted the Stipulation, so there is nothing to "reinstate."

<sup>4</sup> CG&E Application for Rehearing at 5-8. As stated in the OCC's briefs in this case, the Stipulation contained many illegal provisions that the Commission should not approve. The OCC has argued that additional modifications are required by Ohio law. OCC Application for Rehearing (October 29, 2004).

<sup>5</sup> OCC Brief (June 22, 2004), OCC Reply Brief (July 2, 2004); OCC Application for Rehearing (October 29, 2004). The OCC opposed the Partial Stipulation on policy as well as legal grounds. See, e.g., OCC Application for Rehearing at 25 ("demand side management and demand response programs"). The OCC's arguments in its earlier pleadings are incorporated herein.

<sup>6</sup> CG&E Application for Rehearing at 23.

<sup>7</sup> Id.

<sup>8</sup> *In re Promulgation of Rules Pursuant to Section 4928.14, Revised Code*, Case No. 01-2164-BL-ORD, Entry on Rehearing at 2 (February 4, 2004) ("Rules Case 02-2164").

As cited by the Commission in Rules Case 01-2164, R.C. 4909.18 provides for Commission authority over an application by "any public utility desiring to establish any rate." CG&E itself relies on such Commission jurisdiction when this position suits its purposes. For example, CG&E asks the Commission to impose CG&E's plan to unreasonably raise rates while discouraging competition by making only a portion of rates associated with the Company's generation-related services bypassable. CG&E also proposes that the Commission "open a proceeding to determine the conditions under which an electric distribution utility may *purchase or build a generating facility* and recover the costs."<sup>9</sup> Subject matter jurisdiction may not be conferred or withdrawn by the "consent of CG&E" in total or in part, and may not be conferred or withdrawn by the Company when such jurisdiction is advantageous to CG&E. CG&E's own arguments in these cases support the Commission's earlier holding regarding jurisdiction.

Moreover, the General Assembly has not granted electric utilities the power of consent over the Commission's adjudication. When the General Assembly granted the power of consent, as in certain telephone utility ratemaking, the General Assembly was explicit.<sup>10</sup> Therefore, CG&E does not have the power of consent in this proceeding, as reflected in the principle of *expressio unius est exclusio alterius*.

In the absence of a statutory provision for Commission orders to be subject to CG&E's consent, CG&E is left with what is stated in Ohio law. The Ohio General Assembly provided for a rehearing process and an appeal process. An electric utility's consent is not part of the process: "the making of such an application shall not excuse any person from complying with the order,

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<sup>9</sup> CG&E Application for Rehearing at 5 (emphasis added).

<sup>10</sup> R.C. 4927.04(A)(1).

or operate to stay or postpone the enforcement thereof, without a special order of the commission."<sup>11</sup>

The Company's first argument on rehearing should be rejected.

Second, CG&E argues that R.C. 4928.02(G) prohibits the Commission from ordering the Company to "subsidize the market."<sup>12</sup> CG&E argues that the Order should not have made charges for the Company's generation-related services more bypassable and that the Commission may not order the Company to provide certain limited concessions that CG&E offered to settle these cases with favored signatories.<sup>13</sup> As stated in the OCC's briefs and its Application for Rehearing, non-bypassable charges for CG&E's generation-related services are illegal and anti-competitive.<sup>14</sup> The Commission's removal of non-bypassable charges for more customers is a step towards compliance with R.C. 4928.14, not a subsidy. On rehearing, the Commission should remove the remaining non-bypassable charges related to CG&E's generation-related services. The Commission should reject the Partial Stipulation that proposes a complex and illegal scheme that would limit competition after the end of the market development period.

Third, CG&E argues that the Order is confiscatory because it limits the Company's ability to recover costs. CG&E believes that it will incur costs that support the imposition of a "rate stabilization charge" ("RSC") and "annually adjusted component" ("AAC") charge that are contained in the Partial Stipulation.<sup>15</sup> These charges constitute the non-bypassable portion of the

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<sup>11</sup> R.C. 4903.10(B).

<sup>12</sup> Id. at 24.

<sup>13</sup> Id. at 25.

<sup>14</sup> See, e.g., OCC Brief at 51 (June 22, 2004); R.C. 4928.14.

<sup>15</sup> CG&E Application for Rehearing at 25-26.

standard service offer proposed by CG&E.<sup>16</sup> In reality, these charges cover the provision of generation-related services that are illegal and anti-competitive as argued directly above.

CG&E's also states in its third argument that the Commission "fail[ed] to permit CG&E to establish accounting deferrals for residential distribution costs and to extend the residential regulatory transition charges through December 31, 2010."<sup>17</sup> CG&E argues that a 1983 court case did not consider accounting deferrals to be a rate increase.<sup>18</sup> However, the Commission correctly based its decision on the electric restructuring legislation enacted in 1999 (sixteen years after the decision cited by CG&E) that imposed a freeze on electric rates.<sup>19</sup>

The "clear statutory authority" pointed to by CG&E<sup>20</sup> regarding regulatory transition charges, R.C. 4928.40, does not permit the Commission to order transition charges beyond those agreed to by CG&E and approved by the Commission in CG&E's electric transition plan ("ETP") cases. Such a change is illegal as a matter of contract law and collateral estoppel.<sup>21</sup> Also, no evidentiary record exists in these cases to support transition costs above those authorized by the Commission in CG&E's ETP cases. Moreover, it is disingenuous for the Company to agree to a provision in a settlement as part of a *quid pro quo* and then, years later, seek to unilaterally take back a concession. This creates an imbalance in the first case (in this situation, in the CG&E ETP cases) and shows a lack of good faith on the part of the Company. The Commission should not reward such attempt because regulatory approval would create significant uncertainty

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<sup>16</sup> The rate stabilization charge is bypassable for some customers under limited conditions. Stipulation at 7. The Order increases the potential number of customers who can bypass the charge (Order at 19), but does not eliminate the non-bypassable charge for any class of customers.

<sup>17</sup> CG&E Application for Rehearing at 26.

<sup>18</sup> Id., citing *Office of Consumers' Counsel v. Pub. Util. Comm.* 6 Ohio St. 3d 377, 378-379.

<sup>19</sup> Order at 34.

<sup>20</sup> CG&E Application for Rehearing at 26.

<sup>21</sup> See, e.g., OCC Brief at 20-24 (June 22, 2004).

regarding whether parties can rely on the terms of a settlement. Changes to a settlement should only occur if all parties agree to an amendment to that settlement. The Company may not turn back the clock on its ETP cases, and the Commission should firmly take this position.

Fourth, CG&E argues that the Commission decided these cases based on "evidence on 'rate shock' " that lies outside the record.<sup>22</sup> The Company's argument seems limited to 2005 charges that do not apply to residential customers.<sup>23</sup> However, the OCC is concerned that this fourth "count" again attempts to support CG&E's illegal scheme to collect a RSC and an AAC charge from all customers (i.e. including residential customers). The Company's standard service offer should be market-based -- as required by R.C. 4928.14 and supported by the OCC on numerous occasions<sup>24</sup> -- and not be based on the recovery of costs that CG&E claims based on its generation-related services. The Commission should not lose sight of the fact that CG&E's proposals would saddle customers with significant rate increases.

Fifth, CG&E claims that the Commission's Order "threatens CG&E with divestiture of its generation assets" and that the Company "is not bound by the Transition Plan Stipulation approved by the Commission in case no. 99-1658-EL-ETP."<sup>25</sup> The Company's fundamental, preposterous position appears to be that it can ignore Commission regulation and the Company's agreements whenever it suits CG&E! The Company crafted and executed the stipulation in its ETP case (the "Transition Plan Stipulation") that the Commission adopted, in principal part, in the ETP cases. *The Company committed to support the limitations placed in the Transition Plan Stipulation. The*

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<sup>22</sup> CG&E Application for Rehearing at 26-27.

<sup>23</sup> Order at 32. The CG&E Application for Rehearing contains few point citations to the Order causing a degree of imprecision in the Company's arguments.

<sup>24</sup> OCC Brief at 11-12 (June 22, 2004); OCC Reply Brief at 18-20 (July 2, 2004); OCC Application for Rehearing at 7-11 (October 29, 2004).

<sup>25</sup> CG&E Application for Rehearing at 27.



Company failed to object to the Commission's order in CG&E's ETP cases, and the Company has lost its right to appeal the order.<sup>26</sup> The Company is legally bound to the corporate separation plan that it agreed to in its ETP cases. While the Order in the above-captioned cases upholds many of the requirements contained in the CG&E's ETP cases, it is illegal to permit the Company to delay its corporate separation obligations indefinitely.<sup>27</sup>

The Company's corporate separation plan, established pursuant to the requirements of R.C. 4928.17, does not require "divestiture" of generation assets but requires the provision of generation and "wires" services through "fully separated affiliates."<sup>28</sup> The Company's corporate separation plan was established, in compliance with R.C. 4928.17(A)(3), to "ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business engaged in the business of supplying the competitive retail electric service \* \* \*."<sup>29</sup> The connection between CG&E's electric distribution utility and its generation functions lies at the heart of the problem with the Company's applications in these cases and the proposed Partial Stipulation. CG&E seeks the protection of the generation portion of its business by means of adding charges that are non-bypassable unless the customer agrees to the loss of essential distribution service. No other provider of generation service is likewise positioned. Enforcement of CG&E's corporate separation plan is required by the law and supports the policy goals stated in R.C. Chapter 4928.

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<sup>26</sup> R.C. 4928.10.

<sup>27</sup> OCC Application for Rehearing at 17-18 (October 29, 2004).

<sup>28</sup> The word "divestiture" or "divest" are not found in the Chapter 4928 statutes regarding corporate separation. That chapter requires the operation of certain parts of the utility business through separate affiliates.

<sup>29</sup> R.C. 4928.17 provides that, "beginning on the starting date of competitive retail electric service, no electric utility shall engage in this state \* \* \* in the businesses of supplying a noncompetitive retail electric service, or in the businesses of supplying a noncompetitive retail electric service and supplying a product or service other than retail electric service, *unless the utility implements and operates under a corporate separation plan that is approved by the public utilities commission under this section \* \* \*.*" (Emphasis added.) Compliance is not optional.

Sixth, CG&E states that R.C. 4909.18 provided the Commission with only six months to decide these cases and that the Company is entitled, pursuant to R.C. 4909.42, to "implement the MBSSO rates for non-residential consumers set forth in [CG&E's] January 10, 2003 application on January 1, 2005."<sup>30</sup> While the rates that CG&E threatens to implement are non-residential, the OCC is concerned that the Company may apply its faulty reasoning to residential charges at a later point in time.

R.C. 4909.18 does not require a decision within six months; it allows for such a decision "where practicable." Following CG&E's juggernaut of legal reasoning, the Company claims that the Commission's lacks subject matter jurisdiction in these cases,<sup>31</sup> claims that it made filings pursuant to the Commission's jurisdiction under R.C. 4909.18,<sup>32</sup> and finally claims that the reference in R.C. 4909.42 to filings pursuant to R.C. 4909.18 entitles the Company to impose rates other than those prescribed by the Commission in these cases.<sup>33</sup> R.C. 4909.42 does not support CG&E's tortured interpretation of the law. That section addresses a process for implementing rates if the Commission does not act within a prescribed period, as well as a mechanism to reconcile interim rate increases with the Commission's final order. As stated above, CG&E relies upon the jurisdiction of the Commission in these cases and again in its sixth "count." However, CG&E's various applications in these cases were not filed so as to conform to the requirements of R.C. 4909.18 regarding the substance of the filings or the notice requirements.<sup>34</sup> R.C. 4909.42 does not permit a public utility to "implement rates without refund," but states that a utility need not refund

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<sup>30</sup> CG&E Application for Rehearing at 28.

<sup>31</sup> Id. at 23-24.

<sup>32</sup> Id. at 27.

<sup>33</sup> Id. at 28.

<sup>34</sup> For example, CG&E has not provided the exhibits mentioned in R.C. 4909.18 or sought any waiver concerning those requirements.

amounts that "exceed the amounts authorized by the commission's final order." The Company must comply with the Commission's final order,<sup>35</sup> so there could be no amounts charged in 2005 that exceed the amounts finally authorized by the Commission.

CG&E has failed to support its assignments of error in its Application for Rehearing. The Commission should deny CG&E's application for rehearing and adjust the Order in these cases according to the matters raised by the OCC on rehearing.

B. The Commission Should Not Adopt CG&E's Alternative Proposal

A major portion of the Company's pleading is devoted to the description of yet another, "alternate" proposal by CG&E regarding post-MDP service. Such a proposal is not a proper part of an Application for Rehearing of an Order in a case that has been pending since 2003. The General Assembly prohibited the sort of surprise proposal that has been filed by CG&E.

The principal prohibition against CG&E's alternative is found in the legal requirement that an applicant must give the public notice of proposed rates and other proposals *at the outset of the case* -- not at the end of the case as CG&E has filed for its "alternative."<sup>36</sup> While CG&E's proposal might be properly made part of a new application for the approval of rates, with an opportunity for

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<sup>35</sup> R.C. 4903.25. A person who willfully fails to comply with a commission order is "guilty of a felony of the fifth degree." R.C. 4903.99.

<sup>36</sup> R.C. 4909.19; R.C. 4909.43(B).

hearing and other due processes, the Commission should be concerned (in any event) that the new proposal contains blatantly unlawful requests.<sup>37</sup>

CG&E's new proposal would eliminate the "special residential shopping incentive" provided in the Partial Stipulation,<sup>38</sup> impose a new "infrastructure maintenance fund" based on the legacy "little g" rate,<sup>39</sup> assess a new "system reliability tracker" using an uncapped flow-through mechanism,<sup>40</sup> continue restrictions on the bypassability of unjustified "provider of last resort" charges,<sup>41</sup> modify the charge for the "annual adjustment component" from the Partial Stipulation and from the Order,<sup>42</sup> and reject the Commission's recognition that CG&E costs can decrease to mitigate against cost increases that the Company proposes placing in the "annual adjustment component."<sup>43</sup> The OCC's preliminary analysis suggests that CG&E's new proposal would likely result in more than a 20 percent increase in "little g" for a non-shopping residential customer in 2006, before any consideration of increases in the "wires" portion of the bill that are proposed by

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<sup>37</sup> See, e.g., 4909.18. CG&E asks the Commission to consider on "rehearing" matters that have not had a hearing. R.C. 4903.10 states that the Commission "shall not upon such rehearing take any evidence that, with reasonable diligence, could have been offered upon the original hearing." CG&E is required to make its new proposals in a new application.

Also, the only party that has stated its agreement to the new terms is an affiliate of FirstEnergy Corp. FirstEnergy Solutions Corp. Memorandum in Support (November 4, 2004). Such weak agreement does not satisfy the Commission's standard, under Ohio Adm. Code 49901:1-35-02, of "substantial support." CG&E's concept that parties will show agreement with the alternative proposal in their own filings also contravenes the Commission's rules. There is no legal mechanism at this late stage of the case, in R.C. 4903.10 or elsewhere, for parties to support an alternative proposal stated in an application for rehearing. Ohio Adm. Code 4901-1-35(B) provides for parties to file a "memorandum *contra*" the rehearing application, not a memorandum in support as encouraged by CG&E.

<sup>38</sup> CG&E Application for Rehearing, Attachment 1 at 10.

<sup>39</sup> CG&E Application for Rehearing at 12.

<sup>40</sup> *Id.* at 13.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

the Company.<sup>44</sup> Such major changes to CG&E's proposal and to rates should be the subject of notice and investigation, including by parties to these cases who have a right to ample discovery,<sup>45</sup> as well as briefing regarding the legal deficiencies that are present in the new proposal.

The Company's new proposal contains an even more unusual addition that is not carefully explained. CG&E states:

CG&E also requests that the Commission open a proceeding to determine the conditions under which an electric distribution utility may purchase or build a generating facility and recover the costs of the purchase or build over the remaining life of the facility. Resolution of this issue is important to ensuring the provision of reliable electric service throughout Ohio.<sup>46</sup>

This component of CG&E's new plan -- represented by the Company as important to "reliable electric service throughout Ohio" -- violates the electric restructuring legislation in general, is the antithesis of the corporate separation statutes in particular, and offends the ratemaking statutes that were designed by the General Assembly to balance a utility's opportunity for profit with the protection of Ohio consumers. For example, the purpose of corporate separation is to "ensure that the utility will not extend any undue preference or advantage to any affiliate, division, or part of its own business."<sup>47</sup> CG&E's various plans all suffer from the defect that the Company seeks to extend

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<sup>44</sup> The ten-day period provided for memoranda contra applications for rehearing, stated under Ohio Adm. Code 4901-1-35(B), was not designed for and is not conducive to an in-depth analysis of proposed increases in rates. Information from discovery would be important to a more comprehensive evaluation. The OCC reserves the right to make more extensive comments on the impact that CG&E's new proposal will have on customers in the event that the Commission considers the Company's "alternate" proposal.

<sup>45</sup> R.C. 4903.082; Ohio Adm. Code 4901-1-16. No consideration should be given to CG&E's new proposal without ample discovery and a full hearing.

<sup>46</sup> CG&E Application for Rehearing at 5.

<sup>47</sup> R.C. 4928.17(A)(3).

an undue preference for its own generation. The Commission is a creature of statute and cannot rewrite Ohio law,<sup>48</sup> whether at CG&E's behest or otherwise.

C. CG&E Does Not Have The Right To Proceed Without Commission Approval

As stated above, R.C. 4909.42 does not authorize CG&E to implement the rates that it has proposed in these cases that conflict with the Commission's orders. Additionally, CG&E states that it intends to "implement its market prices for non-residential consumers on January 1, 2005, and its *distribution rate increase requested in Case No. 04-680-EL-AIR*, subject to refund, pursuant to R.C. 4909.42."<sup>49</sup> The distribution rate increases in Case No. 04-680-EL-AIR include increases for residential customers in 2006 and base those increases, in part, on distribution and transmission service rendered to residential customers during the 2001-2004 period.<sup>50</sup> The Commission has determined in the above-captioned cases that residential customers may not be charged more for distribution service until January 1, 2006, and that those increases may not include amounts to recover deferred costs for service rendered before that date.<sup>51</sup> Additionally, the *distribution rate* case in Case No. 04-680-EL-AIR was filed on June 15, 2004, and is proceeding on a completely different timeline than the above-captioned cases. R.C. 4909.42, even if applicable, would not permit distribution rate increases until after January 1, 2005.<sup>52</sup>

CG&E's argument favoring its "right to proceed" ignores the Company's violation of its obligations to provide competitive rates. R.C. 4928.14(B) states:

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<sup>48</sup> *Canton Storage and Transfer Co. v. Pub. Util. Comm.* (1995), 72 Ohio St.3d 1.

<sup>49</sup> CG&E Application for Rehearing at 28 (emphasis added).

<sup>50</sup> *In re CG&E Distribution Rate Increase*, Case No. 04-680-EL-AIR, Application at 3 (June 15, 2004).

<sup>51</sup> Order at 34.

<sup>52</sup> R.C. 4909.42 states that a proposed increase may go into effect "at the expiration of two hundred seventy-five days from the date of filing" (approximately nine months).

After that market development period, each electric distribution utility also shall offer customers within its certified territory an option to purchase competitive retail electric service the price of which is determined through a competitive bidding process.

The law requires that the Company offer customers the option to purchase power at a competitively bid rate. That competitive bid rate must be determined by a process that is approved according to the requirements of Ohio Adm. Code 4901:1-35. The rules provide that a "fixed-rate service for which bids are solicited shall be used as the initial service offer on and after the end of the market development period for residential and small general service customers who have not chosen otherwise \* \* \* ." <sup>53</sup> The Company has failed to make any application pursuant to the Commission's rules that require a fixed-rate service, the solicitation of bids, and the application of such service to customers who have not chosen another source of generation service. <sup>54</sup> Such an application was required by July 1, 2004. <sup>55</sup> CG&E may not proceed with only the rates that it wants without providing other, legally required rates that provide customers with the protection provided by the competitive marketplace.

CG&E's various proposals in these cases are noteworthy for their lack of attention to the competitive bidding process that is an integral part of post-MDP service under R.C. Chapter 4928. The only "reward" a winning bidder would obtain, under the bidding process proposed by CG&E in its applications, is a designation as the "winning bidder" on a website. <sup>56</sup> CG&E's "test bid" concept under the Partial Stipulation offers no prospect for bidders to actually gain a share

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<sup>53</sup> Ohio Adm. Code 4901:1-35-03, Appendix B.

<sup>54</sup> Instead, the Commission's Order approves a variable rate standard service offer for CG&E in the absence of a CG&E application for such a rate that complies with the documentation and notice requirements contained in Ohio Adm. Code 4901:1-13-03, Appendix A.

<sup>55</sup> Ohio Adm. Code 4901:1-35-03(A) and (C).

<sup>56</sup> January 2003 Application, Ex. C-3 to Exhibit 2 ("Request for Proposals"), Section 8.0 ("Notification of Customers").

of the CG&E market assures that any bid will be a failure. The Company's "alternate" proposal makes only fleeting reference to the bidding process when it states that CG&E's proposed "SRT process" would include purchased power "through bilateral contracts, requests for proposal, or auctions."<sup>57</sup> The Commission should reaffirm the emphasis that it placed on the competitive bidding process in the FirstEnergy post-MDP cases.

We believe that a CBP should be conducted to assure the Commission and all interested stakeholders that the charges for generation service under the ERRSP Stipulation Plan do not exceed long-term market prices that result from a CBP \* \* \* and find that the Applicants' proposal to measure the results of such a CBP against the generation charge provides no meaningful comparison to determine whether or not to end the ERRSP Stipulation Plan. Once a CBP has been conducted, such result can be provided to our Staff for its analysis of the appropriate comparison and the Commission can then determine whether to approve the winning bids or maintain the ERRSP Stipulation Plan.<sup>58</sup>

As quoted above, the Commission intends more that the "test bid" proposed by CG&E in the Partial Stipulation, but rather intends to use the results of the CBP process if the rates are found to be competitive. A comparison between any "rate stabilization plan" approved by the Commission in this case and the results of a competitive bidding process -- conducted on an annual basis as customer rates change on an annual basis -- is necessary to ensure a legitimate competitive bidding process as required under Ohio law.<sup>59</sup> The Commission should, at the least, insist upon these requirements for the CG&E competitive bidding process so that customers in the CG&E service territory are able to benefit from the lowest rates possible.

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<sup>57</sup> CG&E Application for Rehearing at 17.

<sup>58</sup> *In re FirstEnergy Post-MDP Service*, Case No. 03-2144-EL-ATA, Order at 15 (June 9, 2004).

<sup>59</sup> The OCC's position regarding an appropriate bidding process is located elsewhere in this docket. See, e.g., OCC Application for Rehearing at 16-17.




CG&E may not ignore its obligations and proceed with new rates without even making a legally required application for approval of an alternative set of rates that would protect consumers.

### III. CONCLUSION

CG&E's Application for Rehearing does not adequately support its assignments of error, should not include what amounts to a new application, and is defective in its attempted support for "self help" in the wake of the Commission's Order. CG&E's Application for Rehearing should be rejected in its entirety. Instead, the Commission should correct the errors described in the OCC's Application for Rehearing and otherwise develop the competitive market according to the General Assembly's protection for consumers against high prices such as those proposed by CG&E in these cases.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

It is hereby certified that a true copy of the foregoing Memorandum Contra to CG&E's Application for Rehearing was served via electronic U.S. Mail, this 8<sup>th</sup> day of November 2004.

  
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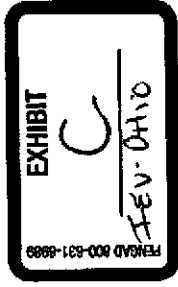
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1EV-Ohio Exh C



# Harvard Electricity Policy Group

## Forty-Third Plenary Session

Panel: "Wholesale and Retail Electricity Market Models:  
Will They Mesh Well or Cancel Each Other Out?"

Presented by:

**Janine Migden-Ostrander**  
**Office of the Ohio Consumers' Counsel**

June 1, 2006

# Is the “Sky now Falling”?

How do we address the perceived failures of retail and wholesale electric markets while ensuring adequate generating capacity going forward?

# Late 2004

- “Retail Competition is for Everyone”
- Main themes: competition can work for all customers; touted success of shopping in N. Ohio; advocated for a “portfolio approach” for the Standard Service Offer (SSO)

# A lull in retail shopping in Ohio

- Dramatic decline in retail shopping in N. Ohio since January 06
- Retail structural problems
  - \* Remnants of past regulatory decisions – e.g., unbundling; RTC
  - \* Rate Stabilization Plans (RSPs) – rate increases w/o the ability to bypass



# A lull in retail shopping in Ohio

- The “new regulation” of generation in Ohio
  - \* Under CGE’s RSP, distribution customers could be forced to pay for the purchase of a generating plant
  - \* AEP seeks pre-approval for construction/recovery of an IGCC plant
    - 100% CWIP and no cap on construction costs
  - \* No true corporate separation

# The retail “nether world” - Ohio

- Ohio retail consumers face a “gray” world somewhere between full regulation and full competition where only the utilities seemingly prosper
  - \* FE’s 1<sup>st</sup> Qtr 06 profit increased 38% even with a deferral of their increased fuel costs
  - \* Current rates are considered “sacred” but utilities increased costs are readily added in (without significant review) and recovery is guaranteed (through the nonbypassable restrictions imposed on the SSO customers)
  - \* No relief from competitive providers who can’t “compete” with flaws in retail structure and flawed wholesale market as well

# The wholesale “nether world”

- News is full of stories about short-term wholesale auctions resulting in large percentage increases to customers trapped on the SSO in a variety of restructured states

\* e.g., Maryland

\* OH has seen wholesale auctions that have failed to generate acceptable bids

# The Wholesale “Nether World”

- Reflects short-term market prices
- Does not provide incentives for construction of new baseload capacity
  - Scarcity problem:
    - Growth in demand
    - Plant retirements
      - Environmental regulations
      - Unit age
  - How do we finance new construction under deregulation?
    - Traditional financing
    - Consumers

# The wholesale “nether world”

- Litany of concerns with the state of wholesale market development in the Midwest
  - \* Dependence on a Uniform Clearing Price (in LMP markets) that often is based on sky-rocketing gas costs
  - \* Stalled Joint and Common Market
  - \* Lack of long-term transmission rate design for Midwest

# The wholesale “nether world”

- \* Lack of long-term bilateral contracts
- \* Increased transmission costs – both for RTO operations (including capacity markets that don’t guarantee new capacity) and transmission improvements
- \* And the list could go on!!!

# What do we do now?

- **Certainly retail competition cannot succeed without a viable wholesale market**
- \* Obviously, those of us who promoted retail competition dramatically underestimated the work that needed to be done to provide such wholesale markets

# What do we do now?

- First, and foremost, the work needed to fully develop the wholesale markets must be completed in a timely matter
- Second, the **Competitive Procurement of Generation (CPG)** must become a reality
  - \* Concept works whether retail price is determined through competition or by administrative (or regulated) means



# What do we do now?

- \* Focus on long-run supply and demand-side portfolios that are competitively-bid
- \* Establish resource diversity goals that satisfy your particular state's needs/goals
- \* Use a "laddered" approach that utilizes both short-run and long-run assets
- \* Develop creative tools to incent construction of new generation

# What do we do now?

- Benefits include:
  - \* promotion of wholesale competition;
  - \* incentives the construction of new baseload capacity while also using competitive forces to achieve the least-cost for this new generation;
  - \* promotes supply diversity;
  - \* enhances energy efficiency efforts

# What do we do now?

- Focus on further improvements to wholesale market; cost-effective transmission enhancements; and, the **CPG** will allow for customers to pay the lowest possible rates **in the long-run**
- In a “choice” state, such a focus also allows the final decision on whether retail competition should actually proceed (or retail regulation should return) to be postponed until a truly fair determination can be made

# What do we do now?

- In a regulated state, such a focus allows for the least-cost generation portfolio to be employed
- In the **short-run**, we may be forced to acknowledge that an immature wholesale market – itself a “work in progress”, will further exacerbate poor retail markets in “choice” states and result in higher SSO prices

\* Prices will go up in regulated states as well for many of the same reasons

# What do we do now?

- The OCC has been actively involved in the debate on wholesale market development and the removal of retail impediments and pledges to continue those efforts in the future
- At the same time, the OCC has committed to further developing the **CPG** concept (briefly discussed herein) in a generic and an Ohio-specific manner