

# LARGE FILING SEPERATOR SHEET

## CASE NUMBER:

Case Nos. 03-93-EL-ATA, 03-2079-EL-AAM, 03-2080-EL-ATA,  
03-2081-EL-AAM, 05-724-EL-UNC, 05-725-EL-UNC,  
06-1068-EL-UNC, 06-1069-EL-UNC & 06-1085-EL-UNC

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1/23/08

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5 OF 7

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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

IN THE MATTER OF THE CONSOLIDATED	)	
DUKE ENERGY OHIO, INC. RATE	)	Case Nos. 03-93-EL-ATA <i>et al.</i>
STABILIZATION PLAN REMAND AND	)	
RIDER ADJUSTMENT CASES	)	

**AFFIDAVIT OF JOCK J. PITTS**

STATE OF OHIO                    )  
  ) SS:  
COUNTY OF HAMILTON)

I, JOCK J. PITTS, being first duly cautioned and sworn, hereby state as follows:

1. I am the President of People Working Cooperatively, Inc. ("PWC"), a Cincinnati-based, Ohio non-profit corporation whose mission is to provide critical home repairs, including weatherization services, for the very low-income elderly and disabled homeowners residing in the Duke Energy-Ohio ("DE-O") service territory. PWC has been an intervenor in the earlier phase of this proceeding (referred to as the "DE-O RSP Case"), which resulted in an Opinion and Order by the Public Utilities Commission of Ohio ("PUCO") that was overturned by the Ohio Supreme Court on appeal and remanded to the PUCO for this second phase. I make this statement in response to *Duke Energy Ohio's FirstSet of Interrogatories and Requests for Production of Documents Propounded to PWC*.

2. In response to DE-O's Interrogatories 10-12, I was party to meetings with the Office of Consumers' Counsel ("OCC") and to several conference calls with representatives of the OCC during the course of the RSP Case, the purpose of which was to discuss the possibility of reaching a stipulation among the consumer and marketer parties. In particular, on April 13,

2004, I was present at a meeting at OCC's offices, attended by OCC personnel, representatives of the consumer parties and representatives of the marketer parties. Although the parties did not sign a written confidentiality agreement, OCC counsel asked at the beginning of the meeting to agree to keep the discussions held during the meeting confidential. Subsequent to the meeting, OCC counsel provided a proposed stipulation for the consumer and marketer parties' review, comment and agreement, with the proposed stipulation marked "CONFIDENTIAL SETTLEMENT OFFER MATERIAL (NOT FOR ANY OTHER USE)." All subsequent e-mail versions of the OCC proposal were similarly marked. While counsel for PWC was the addressee on e-mails from OCC and the parties participating in the negotiations with OCC, PWC counsel forwarded all communications from OCC to me personally.

3. PWC also engaged in settlement discussions with OPAE separately, although informed by its counsel that he was having similar discussions with other consumer parties. Again, no written confidentiality agreement was entered into. Rather, the parties agreed orally to keep the discussions held in pursuit of settlement of their consumer issues confidential.

Further Affiant sayeth naught.

  
Jock J. Pitts, President

SWORN TO AND SUBSCRIBED before me, a Notary public, this 12<sup>th</sup> day of March, 2007.

  
Notary Public

(SEAL)

STEFAN L. OLSON  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES 06-25-11

Date: Thu, 13 May 2004 17:53:42 -0400  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
To: <dboehmlaw@aol.com>, <drinebolt@aol.com>, <mkurtzlaw@aol.com>, <Dane.Stinson@BaileyCavalieri.com>, <SBLOOMFIELD@BRICKER.COM>, <tobrien@BRICKER.COM>, <broyer@brscolaw.com>, <Mchristensen@Columbuslaw.org>, <cgoodman@energymarketers.com>, <KorkoszA@FirstEnergyCorp.com>, <nmorgan@lascinti.org>, <srandazzo@mwncmh.com>, <RICKS@OHANET.ORG>, <shawn.leyden@pseg.com>, <Thomas.McNamee@puc.state.oh.us>, <bakahn@vssp.com>, <mhpeticoff@vssp.com>, <wjairey@vssp.com>  
Cc: "RANDY CORBIN" <CORBIN@occ.state.oh.us>, "BRUCE HAYES" <HAYES@occ.state.oh.us>, "BETH HIXON" <HIXON@occ.state.oh.us>, "ANN HOTZ" <HOTZ@occ.state.oh.us>, "RYAN LIPPE" <LIPPE@occ.state.oh.us>, "ROSS FULTZ" <FULTZ@occ.state.oh.us>, "DAWN REDMOND-TARKINGTON" <REDMOND@occ.state.oh.us>, "LARRY SAUER" <SAUER@occ.state.oh.us>, "JEFF SMALL" <SMALL@occ.state.oh.us>, "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
Subject: CONFIDENTIAL Settlement Proposal

Sent on behalf of Jeff Small:

The attached Settlement Proposal is being distributed to our regular service list. Please inform me if you believe that others should receive this material.

Jeff Small  
small@occ.state.oh.us

Denise Willis  
Case Team Assistant  
OCC  
willis@occ.state.oh.us

CONFIDENTIALITY NOTICE:

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Attachment converted: Macintosh HD:Proposal05-13-04.doc (WDBN/MSWD) (000E80D8)



Date: Wed, 27 Oct 2004 16:30:07 -0400  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
To: <dboehmlaw@aol.com>, <drinebolt@aol.com>, <mkurtzlaw@aol.com>, <Dane.Stinson@BaileyCavalieri.com>, <SBLOOMFIELD@BRICKER.COM>, <tobrien@BRICKER.COM>, <broyer@brscolaw.com>, <Mchristensen@Columbuslaw.org>, <cgoodman@energymarketers.com>, <KorkoszA@FirstEnergyCorp.com>, <nmorgan@lascinti.org>, <tschneider@mgsglaw.com>, <srandazzo@mwncmh.com>, <RICKS@OHANET.ORG>, <shawn.leyden@pseg.com>, <Thomas.McNamee@puc.state.oh.us>, <vern.margard@puc.state.oh.us>, <William.Wright@puc.state.oh.us>, <bakahn@vssp.com>, <mhpetricoff@vssp.com>, <wjairey@vssp.com>  
Subject: Confidential Settlement Communication in Case No. 03-93-EL-ATA

Please see the attached confidential settlement communication from Jeff Small in the above captioned case.

Please contact me if you have any trouble with this email.

Denise Willis  
Case Team Assistant  
OCC  
willis@occ.state.oh.us

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Attachment converted: Macintosh HD:SettlementComm10-27-04.pdf (PDF /CARO) (000F6CD5)  
Attachment converted: Macintosh HD:BulletResponses10-27-04.pdf (PDF /CARO) (000F6CD6)

Date: Wed, 03 Nov 2004 17:38:03 -0500  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
To: <Mchristensen@Columbuslaw.org>, <jpitts@pwchomerepairs.org>  
Subject: Fwd: Confidential Settlement Communication in Case No.  
03-93-EL-ATA

As promised during your discussion today with Janine and Bruce, please find attached the confidential settlement communication from OCC, dated October 27th. Please feel free to discuss these matters with Janine or Bruce.

Thank you.

Denise Willis  
Case Team Assistant  
OCC  
willis@occ.state.oh.us

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Date: Wed, 27 Oct 2004 16:30:07 -0400  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
Subject: Confidential Settlement Communication in Case No. 03-93-EL-ATA  
Mime-Version: 1.0  
Content-Type: multipart/mixed; boundary="=\_0828CDF5.B3D2BB21"

Please see the attached confidential settlement communication from Jeff Small in the above captioned case.

Please contact me if you have any trouble with this email.

Denise Willis  
Case Team Assistant  
OCC  
willis@occ.state.oh.us

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Attachment converted: Macintosh HD:SettlementComm10-27-04.pdf 2 (PDF /CARO) (000F849E)

Cinergy Corp.  
155 East Broad Street, 21st Floor  
Columbus, OH 43215  
Tel 614.221.7551  
Fax 614.221.7556  
pcolbert@cinergy.com

**PAUL A. COLBERT**  
Senior Counsel

**CINERGY.**

May 8, 2000

Mr. Robert S. Tongren  
Ohio Consumers' Counsel  
77 South High Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215

Re: PUCO Case No's. 99-1658-EL-ETP, 99-1659-EL-ATA, 99-1660-EL-ATA, 99-1661-EL-AAM, 99-1662-EL-AAM, and 99-1663-EL-UNC.

Dear Mr. Tongren:

Conditioned upon the settlement of all issues between the Office of the Ohio Consumers' Counsel (OCC) and The Cincinnati Gas & Electric Company (CG&E) in the above referenced cases, and a Commission final order adopting such settlement without material modification, CG&E agrees to enter into the following Agreement with the OCC:

1. To develop and implement, by July 1, 2001, a customer information database to track customer complaints associated with CG&E's electric and gas customers as stated below:
  - a. CG&E shall accept customer complaints through its call center, in person or in writing.
  - b. CG&E shall create and maintain a customer complaint coding system, interfaced with its CSS system, that enables CG&E to track and prepare periodic reports

regarding customer complaints by certified supplier and complaint classification.

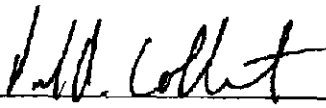
- c. CG&E shall electronically distribute incoming complaints to a CG&E representative, the OCC and the affected gas marketer or certified electric supplier. Nothing prohibits CG&E from providing this information to the PUCO.
  - d. CG&E shall document the actions taken by it or the subject gas marketer or certified electric supplier to resolve each complaint and log such actions into the tracking system.
  - e. The OCC shall have access and authority to log complaints into the tracking system.
  - f. CG&E may defer the costs of, but shall not seek cost recovery of the development of its tracking system other than through the RTC approved in its Transition Plan Case.
  - g. OCC agrees and will not challenge deferral of the costs against the Transition Revenues that the Commission approves for recovery by CG&E in the above referenced cases.
2. CG&E will contribute \$500,000 to a customer education campaign concerning customer choice jointly managed and designed by CG&E and OCC. Such contribution will be made within 30 days after the Final Order of the Commission in the above referenced cases. The campaign shall target residential customers in CG&E's certified territory. The goal of the campaign shall be to facilitate the implementation of competitive electric retail competition for residential customers in CG&E's certified territory in the most efficient manner practicable. OCC agrees and will not challenge deferral of the costs against the Transition Revenues that the Commission approves for recovery by CG&E in the above referenced cases. CG&E may defer the costs of, but shall not seek recovery of this contribution

other than through the RTC approved in its Transition Plan Case.

3. CG&E will contribute \$250,000 to the Ohio Department of Development (ODOD) over the next two years as requested by ODOD for development programs in the State. OCC agrees with and will not challenge deferral of the costs against the Transition Revenues that the Commission approves for recovery by CG&E in the above referenced cases. CG&E may defer the costs of, but shall not seek recovery of this contribution other than through the RTC approved in its Transition Plan.
4. CG&E agrees that OCC may review CG&E's Cost Allocation Manual (CAM). Prior to reviewing the CAM, CG&E and OCC shall execute a confidentiality agreement regarding the treatment of non-public information contained in the CAM. Such confidentiality agreement shall be executed no later than December 31, 2000.
5. Pursuant to a confidentiality agreement, CG&E agrees that the OCC may review the market monitoring information that CG&E must maintain pursuant to Commission Order and Ohio Administrative Code Section 4901:1-21-02. CG&E and OCC shall enter into such confidentiality agreement no later than December 31, 2000.

The above represents the entire Agreement between CG&E and OCC and may not be amended unless agreed to by both parties in writing. The undersigned hereby execute this Agreement and each represents that it is authorized to enter into this Agreement this 8th day of May, 2000.

THE CINCINNATI GAS & ELECTRIC COMPANY

By:   
Paul A. Colbert, Senior Counsel  
Its Attorney

OHIO CONSUMERS' COUNSEL

By:  \_\_\_\_\_

Eric B. Stephens, Legal Director  
Its Attorney

**OHIO CONSUMERS' COUNSEL, APPELLANT, v. PUBLIC UTILITIES COM-  
MISSION OF OHIO ET AL., APPELLEES.**

No. 2005-0945

**SUPREME COURT OF OHIO**

110 Ohio St. 3d 394; 2006 Ohio 4706; 853 N.E.2d 1153; 2006 Ohio LEXIS 2900

May 9, 2006, Submitted  
September 27, 2006, Decided

**PRIOR HISTORY:** APPEAL from the Public Utilities Commission, Nos. 03-2405-EL-CSS, 04-85-EL-CSS, and 03-2341-EL-ATA. Ohio Consumers' Counsel v. PUC, 109 Ohio St. 3d 1412, 2006 Ohio 1892, 846 N.E.2d 50, 2006 Ohio LEXIS 967 (2006)

**DISPOSITION:** Order affirmed.

**HEADNOTES:** *Public utilities -- Consolidated billing by electricity-distribution company -- Costs of billing for providers of competitive retail electric service -- Expenses caused by default of provider of competitive retail electric service.*

**COUNSEL:** Janine L. Migden-Ostrander, Ohio Consumers' Counsel, Jeffrey L. Small, and Larry S. Sauer, for appellant.

Jim Petro, Attorney General, Duane Luckey, Senior Deputy Attorney General, and Steven T. Nourse and William L. Wright, Assistant Attorneys General, for appellee, Public Utilities Commission of Ohio.

Faruki, Ireland & Cox, P.L.L., Charles J. Faruki, and Jeffrey S. Sharkey, for intervening appellee, the Dayton Power & Light Company.

Bell, Royer & Sanders Co., L.P.A., Barth E. Royer, and Judith B. Sanders, urging affirmance for amicus curiae, Dominion Retail, Inc.

**JUDGES:** O'DONNELL, J. MOYER, C.J., RESNICK, PFEIFER, LUNDBERG STRATTON, O'CONNOR and LANZINGER, JJ., *concur*.

**OPINION BY:** O'DONNELL

**OPINION:**

[\*394] [\*\*\*1155] O'DONNELL, J.

[\*\*P1] In this appeal, the Ohio Consumers' Counsel challenges an order issued by the Public Utilities Commission of Ohio ("PUCO") that approved a 2004 agreement between the Dayton Power & Light Company ("DP&L") and several other entities, Dominion Retail, Inc., Green Mountain Energy Company, Miami Valley Communications Council, and Industrial Energy Users-Ohio, each of which had questioned DP&L's efforts to recoup the cost of changing its billing practices after the General Assembly deregulated the retail electricity market in 1999.

[\*\*P2] The PUCO order at issue changed the way in which DP&L could recover its billing-system costs. For the reasons that follow, we affirm the PUCO's order.

**Facts**

[\*\*P3] DP&L incurred the \$ 18.8 million in billing-system costs at issue in this case because the statutes that deregulated electricity in Ohio required electric utilities to "unbundle" or separate the costs of electricity generation from the costs of electricity distribution. See R.C. 4928.10(C)(2) and 4928.35. As a result, DP&L developed new computer programs enabling the company to produce the type of customer bills that the statutes and PUCO regulations required in a deregulated electricity market.

[\*\*P4] In 2000, the PUCO approved DP&L's initial plan to charge "CRES providers" for the costs associated with the billing-system changes. A CRES provider is a provider of competitive retail electric service. See Ohio Adm.Code 4901:1-10-01(F) and 4901:1-21-01(A)(10). Both Dominion Retail, Inc. and Green [\*395] Mountain Energy Company -- which joined the 2004 agreement at issue -- are CRES providers.

[\*\*P5] In the competitive retail market for electricity established by the General Assembly in 1999, cus-

110 Ohio St.3d 394, \*; 2006 Ohio 4706, \*\*;  
853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

tomers have the option to choose to continue paying their original electricity provider for generation service or to select a CRES provider for that service. R.C. 4928.14. Regardless of which provider the customer selects, the electricity generated by the provider is delivered over wires owned and maintained by the electric utility, and that company can continue to charge for the delivery service.

[\*\*P6] The PUCO requires electric utilities such as DP&L that distribute electricity to offer "consolidated billing" to the CRES providers that want to offer competing electricity generation service to retail customers in the utility company's territory. Ohio Adm.Code 4901:1-10-29(G). See, also, Ohio Adm.Code 4901:1-10-01(D) ("Consolidated billing" means that a customer receives a single bill for electric services provided during a billing period" for both distribution services and generation services). Evidence in the record before us indicates that DP&L had to do substantial reprogramming of its computers to accommodate the new requirement that it offer a consolidated bill showing the unbundled charges incurred by any customer in its territory who chose to buy electricity generation service from a CRES provider while DP&L continued to provide electricity-distribution service to the customer.

[\*\*P7] [\*\*\*1156] In making its initial 2000 plan to charge CRES providers for the billing-system changes, DP&L calculated that it would have to charge \$ 4.76 for each consolidated bill it generated for a CRES provider to fully recover the costs of the billing changes. DP&L concluded that potential CRES providers in its territory would not be willing to pay such a high price for the production of each customer bill, so DP&L chose to charge CRES providers \$ 1.90 per bill under a one-year contract or \$ 1.56 per bill under a two-year contract.

[\*\*P8] The lesser amount did not satisfy CRES providers such as Dominion Retail and Green Mountain Energy Company, and as a result, Dominion filed a complaint with the PUCO in 2003, and Green Mountain then intervened to challenge the amount DP&L charged CRES providers for each consolidated customer bill DP&L generated for them. The Miami Valley Communications Council -- a regional council of governments interested in promoting competition in the retail electricity market -- likewise filed a complaint against DP&L with the PUCO in 2003 alleging that DP&L charged CRES providers excessive amounts for billing services.

[\*\*P9] The PUCO consolidated the cases and granted motions to intervene filed by the Consumers' Counsel and Industrial Energy Users-Ohio. At a hearing before the PUCO on these complaints, Dominion Retail and Miami Valley offered [\*396] evidence that the DP&L charges were "excessive and unreasonable," "dis-

courage[d] shopping," and constituted a "barrier to competition." Expert testimony presented by the Consumers' Counsel echoed those views, describing the charges to CRES providers as "a significant impediment to competition" that would "significantly decrease the savings a residential customer would expect to realize" from switching to a new provider of retail electric-generation service.

[\*\*P10] After several days of hearings before the PUCO in 2004, all parties except the Consumers' Counsel reached an agreement to change the way in which DP&L could recover the \$ 18.8 million in billing-related costs it had incurred from 1999 to 2001. The stipulation called for DP&L to charge CRES providers only \$ .20 per customer bill (to cover the cost of transmitting customer data electronically between DP&L and the CRES provider) and then -- beginning January 1, 2006 -- allowed DP&L to recover from all of its customers those costs of the billing-system changes that had been approved in an audit.

[\*\*P11] The stipulation also provided for DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of that CRES provider after reasonable efforts to recover from the CRES provider.

[\*\*P12] The Consumers' Counsel refused to join the stipulation. The PUCO considered the objections raised by the Consumers' Counsel but nonetheless approved the agreement in February 2005, concluding that a reasonable arrangement would benefit ratepayers and the public. The Consumers' Counsel filed an application for rehearing, but the PUCO denied that application. This appeal followed.

#### Standard of Review

[\*\*P13] "R.C. 4903.13 provides that a PUCO order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004 Ohio 6767, P50, 820 N.E.2d 885. The court will not reverse or modify a PUCO decision as to questions of fact if the decision was not manifestly against the weight [\*\*\*1157] of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004 Ohio 6896, 820 N.E.2d 921, P 29. The appellant bears the burden of demonstrating that the PUCO's decision is against the manifest weight of the evidence or is clearly unsupported by the record. Id.

[\*\*P14] Although the court has "complete and independent power of review as to all questions of law" in



110 Ohio St.3d 394, \*; 2006 Ohio 4706, \*\*;  
853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

appeals from the PUCO, *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 466, 469, 1997 Ohio 196, 678 N.E.2d 922, the court has explained [\*397] that it may rely on the expertise of a state agency like the PUCO in interpreting a law where "highly specialized issues" are involved "and where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370.

#### Analysis

*The Order Allowing DP&L to Charge Customers for the Billing-Related Changes Made by DP&L Is Reasonable*

[\*\*P15] The Consumers' Counsel contends first that the multiparty agreement approved by the PUCO is not beneficial to ratepayers and that it improperly deviates from DP&L's initial intention to recover from CRES providers rather than from consumers the \$ 18.8 million cost of reprogramming DP&L's computers to accommodate new billing practices mandated by the General Assembly when the competitive retail market for electricity was established in Ohio. The PUCO, DP&L, and Dominion Retail each counter those arguments, claiming that the PUCO's approval of the agreement was entirely reasonable.

[\*\*P16] This court applies a three-part test when evaluating the reasonableness of settlements approved by the PUCO: whether the settlement is a product of serious bargaining among capable, knowledgeable parties; whether the settlement, as a package, benefits ratepayers and the public interest; and whether the settlement package violates any important regulatory principles or practices. *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126, 1992 Ohio 122, 592 N.E.2d 1370. See, also, *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St. 3d 81, 82-83, 2002 Ohio 1735, 765 N.E.2d 862.

[\*\*P17] The Consumers' Counsel urges that the agreement in this case fails the second and third prongs of the test, alleging that consumers will pay costs under the agreement that DP&L initially planned to recover solely from CRES providers. To support its argument, the Consumers' Counsel points to a separate one-page sidebar agreement between DP&L and the Consumers' Counsel. In that sidebar agreement from June 2000, DP&L had agreed that it would "not seek recovery from residential customers" for costs associated with "billing system modifications" made by DP&L. The PUCO's failure to enforce that earlier agreement when DP&L and other parties presented their new agreement in October 2004 represented a "willful disregard of duty," according to the Consumers' Counsel.

[\*\*P18] However, the June 2000 sidebar agreement was never filed with or approved by the PUCO, and for that reason, the PUCO refused to consider it when weighing the reasonableness of the 2004 agreement, explaining that "[u]nderstandings among parties that are important enough that the parties wish to [\*398] have a means to bring them to the Commission's attention at a later time" should be [\*\*\*1158] brought "to the Commission for approval" when those understandings are reached. The PUCO has taken a similar approach in past cases, and we have approved that practice. See, e.g., *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004 Ohio 6767, P14-15, 820 N.E.2d 885 (approving the PUCO's refusal to consider side agreements that had not been incorporated into the agreement at issue); *Cookson Pottery v. Pub. Util. Comm.* (1954), 161 Ohio St. 498, 505, 53 O.O. 374, 120 N.E.2d 98, citing G.C. 614-17, the predecessor of R.C. 4905.31 (contracts between a public utility and its customers that are not filed with the PUCO "shall not be lawful"). R.C. 4905.31(E) provides that no financial arrangement between a public utility and consumers "is lawful unless it is filed with and approved by" the PUCO.

[\*\*P19] The PUCO's refusal, then, to consider the unapproved June 2000 sidebar agreement between the Consumers' Counsel and DP&L appears consistent with past practice and with the relevant statutory provision.

[\*\*P20] The PUCO also properly applied our three-part test for weighing the reasonableness of the October 2004 agreement at issue in this case. Ample evidence in the record supports the PUCO's conclusion that the agreement would be a "benefit to ratepayers and the public interest" and would "limit[] any negative impact on competition in DP&L's territory" by doing away with DP&L's initial plan to charge CRES providers up to \$ 1.90 for each consolidated electric bill prepared by the utility company.

[\*\*P21] As the PUCO noted in its order, "it is a benefit to the ratepayers and the public interest for the parties to these cases to agree to a per-bill fee that is substantially lower than DP&L currently charges." The PUCO also explained that the 2004 agreement is consistent with standard regulatory practices because other electric and gas utility companies have been allowed to recover from their customers the same kind of billing-related charges that the agreement calls for DP&L to recover from its customers.

[\*\*P22] The agreement also brings other benefits to the consumer. The reduced charges to CRES providers for each customer bill will lower any barrier that may have kept Dominion Retail and other competitors of DP&L from winning customers for retail electricity gen-

110 Ohio St. 3d 394, \*; 2006 Ohio 4706, \*\*;  
853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

eration service in DP&L's territory. And because all customers benefit from having greater choices in a competitive retail electricity market, the stipulation's removal of a significant barrier to the entry of new competitors in DP&L's territory benefits all customers in that area. As a result, as one witness testified, it is reasonable to ask all customers to pay for that benefit.

[\*\*P23] Upon review, we have concluded that the record supports the reasonableness of the PUCO's order approving the 2004 agreement and contains [\*399] sufficient probative evidence to justify the PUCO's factual findings that the agreement would benefit ratepayers and the public interest and would not violate any important regulatory principles or practices. The PUCO's decision finding the agreement reasonable is therefore not "manifestly against the weight of the evidence" and is not "so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (2000), 88 Ohio St. 3d 549, 555, 2000 Ohio 422, 2000 Ohio 423, 728 N.E.2d 371.

*The Order Allowing DP&L to Charge Customers for the Billing-Related Changes Made by DP&L Is Lawful*

[\*\*P24] The Consumers' Counsel further challenges the lawfulness of the [\*\*\*1159] PUCO's order, arguing that the PUCO should not have deviated from one of its own earlier orders and should have enforced various statutory requirements that apply to utility rate increases. We conclude that the PUCO properly rejected both arguments.

[\*\*P25] First, the Consumers' Counsel contends that in accordance with the PUCO's 2000 order, DP&L could not recover its billing-related costs from CRES providers before 2007. However, in *Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St. 3d 49, 50-51, 10 Ohio B. 312, 461 N.E.2d 303, we explained that the PUCO may change or modify earlier orders as long as it justifies any changes. The agreement reached by DP&L and the other parties in 2004, and approved by the PUCO in the proceedings below in 2005, created a new and entirely reasonable way for DP&L to recover the billing-related costs it had incurred between 1999 and 2001. As explained above, the record supported the change, and the PUCO fully explained its reasons for approving the agreement. The PUCO was not bound to adhere to an earlier arrangement that had created anticompetitive barriers to the entry of new CRES providers in DP&L's territory, and the PUCO's decision to remove those barriers by modifying an earlier PUCO order was not unlawful.

[\*\*P26] The Consumers' Counsel next contends that the statutory requirements for utility rate increases should have been followed in the proceedings below. Under the statute cited by the Consumers' Counsel, a

public utility seeking to change its existing rates for customers must "file a written application" with the PUCO and must prove at any hearing held on the request that it is "just and reasonable." R.C. 4909.18. The application for a rate increase must also be published by the PUCO in a newspaper in the utility company's territory, R.C. 4909.19, and public hearings must be held in large municipalities in the affected service area, R.C. 4903.083.

[\*\*P27] Those specific statutory provisions were not followed in this case, as the proposal that DP&L's customers pay for the expenses it incurred to reprogram [\*400] its computers between 1999 and 2001 to accommodate consolidated billing had emerged not from a formal rate-increase application but from the agreement between DP&L and the other parties in October 2004. Nonetheless, the agreement is valid, and the PUCO lawfully approved it in February 2005.

[\*\*P28] The agreement in this case was reached in an R.C. 4905.26 complaint proceeding, not an R.C. 4909.18 rate-increase proceeding (with all of the attendant procedural requirements cited by the Consumers' Counsel). That former statutory provision was cited by CRES provider Dominion Retail and by the Miami Valley Communications Council when they filed their separate complaints against DP&L to initiate the proceedings that led to the agreement at issue several months later. In its February 2005 order approving the parties' settlement agreement, the PUCO acknowledged that the agreement "arose in the context of a complaint case" rather than in a rate-increase proceeding.

[\*\*P29] We have repeatedly held that utility rates may be changed by the PUCO in an R.C. 4905.26 complaint proceeding such as this, without compelling the affected utility to apply for a rate increase under R.C. 4909.18. See, e.g., *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 347, 1997 Ohio 112, 686 N.E.2d 501 ("Pursuant to R.C. 4905.26 \* \* \*, the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that [\*\*\*1160] the rates charged by the utility are unjust and unreasonable"); *Allnet Communications Servs., Inc. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 115, 117, 512 N.E.2d 350 ("R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO. In fact, this court has held that reasonable grounds may exist to raise issues which might strictly be viewed as 'collateral attacks' on previous orders"); *Ohio Util. Co. v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 153, 157, 12 O.O.3d 167, 389 N.E.2d 483 (in an R.C. 4905.26 proceeding, the PUCO can "order[] that new rates be put in effect").

[\*\*P30] As R.C. 4905.26 itself provides, "any person, firm, or corporation," as well as the PUCO itself,

110 Ohio St.3d 394, \*; 2006 Ohio 4706, \*\*;  
853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

may file a complaint alleging that an existing or proposed utility rate or charge is unjust or unreasonable. That kind of allegation was raised by both Dominion Retail and the Miami Valley Communications Council in the proceedings below, each of which questioned the charges that DP&L imposed on CRES providers for consolidated-billing services. R.C. 4905.26 indicates that the parties to a complaint proceeding "shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses." No allegation exists that those requirements were not met in the proceedings below, and in fact the PUCO held several days of hearings on the complaints and heard from multiple witnesses, including a witness who testified on behalf of the Consumers' Counsel.

[\*401] [\*P31] Some of the testimony in the R.C. 4905.26 complaint proceeding before the PUCO in 2004 indicated that the PUCO's 2000 order -- which allowed DP&L to charge CRES providers for the computer-related consolidated-billing costs that it incurred between 1999 and 2001 -- was unreasonable and posed a barrier to the entry of new CRES providers in DP&L's service area. Testimony presented after most of the parties in the complaint proceeding reached their October 2004 agreement indicated that shifting the computer-related costs from CRES providers to DP&L's customers would foster competition in DP&L's service area by "mak[ing] it easier for CRES providers to offer savings to customers." Multiple witnesses also testified that the agreed resolution of the complaint proceeding was reasonable and appropriate. Relying on that evidence in the record, the PUCO approved the agreement in February 2005.

[\*\*P32] The PUCO acted lawfully. As noted above, this court has allowed the PUCO to impose new utility rates or to change existing rates in other R.C. 4905.26 complaint proceedings, and there is no dispute that the PUCO complied with all of the procedural requirements in the statute by holding a hearing and by allowing the parties to be represented by counsel and to compel the attendance of witnesses.

*The Portion of the PUCO's Order Giving DP&L Additional Protections in the Event of a CRES Provider's Default Is Also Reasonable and Lawful*

[\*\*P33] Although the Consumers' Counsel primarily focuses on the reasonableness and lawfulness of the PUCO decision permitting DP&L to charge its customers for the costs that DP&L incurred when it made software changes in order to produce unbundled consolidated customer bills, the Consumers' Counsel also challenges a provision of the PUCO order allowing DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of that CRES provider.

[\*\*P34] The PUCO and DP&L argue that the Consumers' Counsel should not be permitted to raise this issue because she did not first raise it in the application for [\*1161] rehearing before the PUCO. Those parties are correct in that R.C. 4903.10 states, "No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application." Yet the Consumers' Counsel *did* challenge the default recovery mechanism in the application for rehearing, and the PUCO addressed the issue in its order denying rehearing. The Consumers' Counsel has therefore properly raised the issue.

[\*\*P35] The default-recovery mechanism approved by the PUCO is unlawful according to the Consumers' Counsel because no statutory or regulatory provisions in Ohio expressly permit that kind of financial protection to be given to an [\*402] electricity distributor like DP&L. Notably, though, the Consumers' Counsel cites no statutory provisions that *disallow* the practice either.

[\*\*P36] R.C. 4928.08(B) requires CRES providers to "provid[e] a financial guarantee sufficient to protect customers and electric distribution utilities from default," and Ohio Adm.Code 4901:1-24-08(C) allows an electricity distributor (like DP&L) to "apply for relief" at the PUCO if a CRES provider fails to maintain such a guarantee. Those provisions -- the only ones cited by the Consumers' Counsel -- do not prevent the PUCO from approving the kind of additional financial protections given to DP&L to ensure that it will not incur losses when a CRES provider in its territory defaults.

[\*\*P37] As one witness testified before the PUCO about this so-called default recovery rider, it "establishes a reasonable and appropriate process for the recovery by DP&L of prudently incurred costs of a CRES provider default \* \* \* [and] will protect DP&L from costs that DP&L may incur to procure replacement power to serve customers who had been served by a defaulting CRES provider." Another witness testified that because DP&L does not select CRES providers (customers do), and because DP&L does not benefit from CRES providers' services (customers do), it is reasonable for the customers of a CRES provider to reimburse an electricity distributor such as DP&L for the out-of-pocket costs DP&L incurs when the CRES provider defaults. Testimony before the PUCO also indicated that similar default recovery mechanisms currently protect natural gas distributors.

[\*\*P38] The PUCO cited and agreed with all of that testimony, stating in its February 2005 order that the default recovery mechanism "is not prohibited by any current statute or rule" and is in fact "permissible under the current statutory system." The likelihood that DP&L will ever invoke the default recovery mechanism is

110 Ohio St. 3d 394, \*, 2006 Ohio 4706, \*\*;  
853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

small, the PUCO noted, but it is "a reasonable method to spread the risk of the competitive market."

[\*\*P39] The PUCO's findings as to the reasonableness of this particular provision of the 2004 agreement are supported by the record, and its legal conclusion that the provision is not unlawful is correct. The order, therefore, allowing DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of the CRES provider was both reasonable and lawful.

#### Conclusion

[\*\*P40] For the reasons explained above, the order of the PUCO that allowed DP&L (1) to shift from CRES providers to DP&L's customers the costs that DP&L incurred to update its computer software in order to provide consolidated customer bills for CRES providers in its territory and (2) to recover from a [\*403] CRES provider's customers any of DP&L's out-of-pocket costs

resulting from the default of the CRES provider was both reasonable and lawful. The PUCO fully explained the rationale [\*\*\*1162] for its order, evidence in the record supports the PUCO's decision, and the order is not inconsistent with any statutory or regulatory requirements. Therefore, the order of the PUCO is affirmed. n1

n1 In accordance with S.Ct.Prac.R. IX(8), the Consumers' Counsel filed a list of additional authorities before the oral argument in this case. That list of citations was timely filed, and we therefore deny the PUCO's and DP&L's motions to strike the list.

Order affirmed.

MOYER, C.J., RESNICK, PFEIFER, LUNDBERG  
STRATTON, O'CONNOR and LANZINGER, JJ., con-  
cur.

-----Original Message-----

From: JEFF SMALL [mailto:SMALL@occ.state.oh.us]  
Sent: Wednesday, June 21, 2006 3:56 PM  
To: Randolph H. Freking  
Subject: RE: CG&E

I don't understand your reference to an "Option Agreement," but I will take a look at the material if you like to fax it to 614-466-9475.

I am back in the office after being out last week. Did you file a complaint, and did you contact regulatory counsel?

Jeff

CONFIDENTIALITY NOTICE:

THIS COMMUNICATION IS INTENDED ONLY FOR THE PERSON OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED LEGAL, GOVERNMENTAL MATERIAL. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT, OR BELIEVE YOU ARE NOT, THE INTENDED RECIPIENT OF THIS COMMUNICATION, DO NOT READ IT. PLEASE REPLY TO THE SENDER ONLY, AND STATE THAT YOU HAVE RECEIVED THIS MESSAGE. THEN IMMEDIATELY DELETE THIS COMMUNICATION AND ALL COPIES OF THIS COMMUNICATION. THANK YOU.

>>> "Randolph H. Freking" <Randy@frekingandbetz.com> 06/21/06 4:31 PM  
>>>

Jeff

Could you look at the Option Agreement and give us your opinion?  
If  
so, I will fax it to you.

Randy  
Randolph H Freking  
Freking&Betz  
215 East Ninth Street  
Cincinnati, Ohio 45202  
513-721-1975  
randy@frekingandbetz.com

-----Original Message-----

From: JEFF SMALL [mailto:SMALL@occ.state.oh.us]  
Sent: Wednesday, June 07, 2006 11:54 AM  
To: Randolph H. Freking  
Subject: RE: CG&E

**BEFORE**

**THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the	:	Case Nos.	03-93-EL-ATA
Consolidated Duke Energy Ohio, Inc.:	:		03-2079-EL-AAM
Rate Stabilization Plan Remand and :	:		03-2081-EL-AAM
Rider Adjustment Cases	:		03-2080-EL-ATA
	:		05-725-EL-UNC
	:		06-1069-EL-UNC
	:		05-724-EL-UNC
	:		06-1068-EL-UNC
	:		06-1085-EL-UNC

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**DUKE ENERGY RETAIL SALES' REPLY TO THE OHIO CONSUMERS'  
COUNSEL'S MEMORANDUM CONTRA THE MOTIONS FOR  
PROTECTIVE ORDER OF DUKE ENERGY OHIO, DUKE ENERGY  
RETAIL SALES, CINERGY CORP., AND KROGER AND MEMORANDUM  
CONTRA THE MOTION FOR A PRE-HEARING CONFERENCE**

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**INTRODUCTION:**

Pursuant to O.A.C. 4901-1-24(A) Duke Energy Retail Sales (DERS) respectfully requests this honorable Public Utilities Commission of Ohio (Commission) grant DERS' request prohibiting the Ohio Consumers' Counsel (OCC) from publicly disclosing confidential material gathered through discovery in these proceedings.

As part of these proceedings, OCC sought discovery from DERS, both through multiple subpoena duces tecum, and later through written

discovery requests once DERS was granted intervention for the specific purpose of protecting its confidential material.<sup>1</sup>

The information requested by OCC consisted of confidential commercial contracts, terminated commercial contracts, business analysis, internal correspondence, financial analysis, business operations, and other related but sensitive and trade secret information necessitating a Protective Agreement. DERS and OCC signed such a Protective Agreement, which limited the manner in which OCC may use that material. By notice, OCC has indicated that it intends to use the "Protected Materials in these proceedings in *such a manner not provided for within the Protective Agreement.*"<sup>2</sup>

On March 2, 2007, DERS filed its Motion for a Protective Order in the above styled proceeding, requesting this Commission to maintain the confidentiality of DERS' Trade Secret Information. Among the reasons supporting DERS' Motion was the fact that OCC's request was unreasonable in that it purported to make every single document provided to OCC, including confidential business transactions of which DERS was a party, public. DERS' request to maintain the confidential status of this information was supported by a number of parties to the proceeding, including both Duke affiliated companies and various other unaffiliated parties to the proceeding.

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<sup>1</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Entry at 5) (February 28, 2007).

<sup>2</sup> OCC's notice to disclose sent to DERS at 1. (February 23, 2007) (emphasis added).

On March 13, 2007, OCC filed its Memorandum Contra the Motions for Protective Order, which among other things, appears to limit OCC's current public disclosure initiative to the specific attachments to the testimony of its witness Beth Hixon although OCC reserves the right to make public additional confidential information.<sup>3</sup> OCC has filed this information under seal in accordance with the Protective Agreements. The documents attached to Ms. Hixon's testimony, which constitute Trade Secret Information and which concern DERS continue to include interoffice communications, confidential commercial contracts, transactions occurring under those contracts, and terminated commercial contracts, all negotiated by DERS agents and various consumers (Trade Secret Information).<sup>4</sup>

Although OCC no longer seeks to make public all of the confidential information it collected through discovery, it continues to insist on a substantial amount of information, more than four hundred pages consisting of all of the confidential commercial contracts and internal correspondence being public. OCC has not advanced any reason for making the documents public other than its insistence that public policy demands such treatment and OCC supports such policy.<sup>5</sup> OCC's declaration of policy is in direct conflict with OCC's history and actions in this case. OCC has repeatedly signed confidential side

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<sup>3</sup> See, *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Memo Contra), (March 13, 2007 at 12).

<sup>4</sup> See BEH attachments 2,3,4,5,8,9,10,12,17,19,21.

<sup>5</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (OCC's Memo Contra at 8) (March 13, 2007).



agreements not filed with the Commission, excluded parties from settlement discussions, and required parties to maintain its settlement proposals as confidential, including in this proceeding. Apparently OCC's rule is that if you agree with OCC confidentiality is appropriate but if not all information must be public. The Commission should not condone such inconsistent and manipulative conduct by OCC.

**ARGUMENT:**

**I. DERS' commercial contracts and transactions are trade secrets under Ohio law.**

Ohio Administrative Code Section 4901-1-24(A) permits the Commission to issue a protective order that "[D]iscovery may be had only on specified terms and conditions;...*A trade secret or other confidential research, development, commercial, or other information not be disclosed or be disclosed only in a designated way....*"<sup>6</sup>

The definition of Trade Secret contained in R.C. 1333.61(D) is as follows:

"Trade secret" means information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

(1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

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<sup>6</sup> OHIO ADMIN. CODE ANN. § 4901-1-24 (Baldwin 2007) (emphasis added).

(2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>7</sup>

The Ohio Supreme Court has adopted the following factors as relevant to determining whether a document constitutes a trade secret:

(1) The extent to which the information is known outside the business;

(2) the extent to which it is known to those inside the business, i.e., by the employees;

(3) the precautions taken by the holder of the trade secret to guard the secrecy of the information;

(4) the savings effected and the value to the holder in having the information as against competitors;

(5) the amount of effort or money expended in obtaining and developing the information; and

(6) the amount of time and expense it would take for others to acquire and duplicate the information.<sup>8</sup>

As discussed in DERS' Motion, the Trade Secret Information is proprietary, confidential, and a trade secret, as that term is used in R.C. 1333.61. Trade secret information, such as that at issue here, is entitled to protection under Ohio's trade secrets act,<sup>9</sup> R.C. §1333.61, Ohio's "public records act,"<sup>10</sup> and under the federal Trade Secrets and Freedom of Information acts.<sup>11</sup> The various commercial contracts and terminated contracts that OCC seeks to make public constitute Trade Secret Information maintained by DERS and counterparties in a confidential manner.

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<sup>7</sup> OHIO REV. CODE § 1333.61(D) (Banks Baldwin)(2005).

<sup>8</sup> *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St. 3d 396 (Ohio 2000).

<sup>9</sup> *Id.*

<sup>10</sup> OHIO REV. CODE § 149.011 (Baldwin 2007).

<sup>11</sup> 18 U.S.C. § 1905 (2007); 5 U.S.C. 552(b)(4) (2007).

Further, DERS's documents and information do not even qualify as a "public record" unless and until admitted into evidence. Revised Code Section 149.43(A)(1), in relevant part, defines "public record" as "records kept by any public office . . . ." According to Chief Justice Thomas Moyer, "[T]he definition of a 'public record' must be read in conjunction with the term 'record.' Section 149.011(G) defines 'record' to include 'any document . . . created or received by or coming under the jurisdiction of any public office . . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.' Thus, *to the extent that an item does not serve to document the activities of a public office, it is not a public record.*"<sup>12</sup>

The following description of the information that OCC wishes to make public applies to each and every document identified by OCC. First, only those individuals acting on behalf of DERS, who have a legitimate business need-to-know, have access to, and are aware of the terms and conditions contained in the contracts and transactions. Second, the contracts, terminated contracts and related information attached to Ms. Hixon's testimony, are only known to the individual counterparties. They were not disseminated to third parties. Third, DERS and its agents maintained these contracts in a confidential manner, keeping them in separate files, accessible to only those few

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<sup>12</sup> Moyer, J., Interpreting Ohio's Sunshine Laws: A Judicial Perspective, 59 N.Y.U. ANN. SURV. AM. L. 247 (2003)(Emphasis added).

individuals who have a legitimate business access need. In fact, OCC has learned this through discovery.

Fourth, the Trade Secret Information has legitimate economic and commercial value to both DERS and the counterparties of the individual agreements. DERS is a certified competitive retail electric service (CRES) provider operating in a competitive market, it is not a regulated utility. Release of the terms and conditions of its contracts, and terminated contracts, not to mention its confidential business analysis, operational decisions, customer information, into the public and more offensively, to competitors, will not only harm DERS' business interests but will interfere with competition.

The contracts at issue, including the terminated contracts, were negotiated at arms length with the counterparties. DERS' agents performed proprietary analysis to determine pricing constructs and conditions upon which all forms of contracts were based. If disclosed, DERS' foresight into the energy markets and the value it places on serving individual customers will become apparent to its competitors, thereby putting DERS at a competitive disadvantage. DERS believes that it may be the only CRES provider purchasing long-term options in the competitive market and disclosure of such contracts may result in competitors copying DERS's business plan to DERS's detriment. This is particularly true if DERS is the only CRES provider that is required to release its contracts to competitors.

Further, one of the goals the Commission stated when it asked Duke Energy Ohio (DE-Ohio) to agree to a Rate Stabilization Plan MBSSO was the development of the competitive market. If this Commission permits confidential commercial contracts to be made public, in this or any other proceeding, such disclosure will have a chilling affect on participation in the market place by other CRES providers. DERS is making a serious effort to participate in the competitive retail electric market [REDACTED]

[REDACTED] OCC's unwarranted attacks may result in DERS's inability to compete in that market to the detriment of the market and the Commission's goal.

Fifth, as previously mentioned the commercial contracts and the other Trade Secret Information have measurable value to DERS and were derived through considerable effort beyond the negotiation with counterparties. [REDACTED]

[REDACTED] DERS agents and representatives conducted comprehensive analysis to determine the price in all of those agreements. [REDACTED]

[REDACTED] Therefore, their confidential status or trade secret nature is irrefutable.

The public disclosure of this information has broader ramifications with respect to the counterparties of these agreements and may place them at a competitive disadvantage within their own industries. [REDACTED]

[REDACTED]

[REDACTED] The contracts and operational transactions those businesses engage in are not widely disseminated or typically disclosed in a public fashion to competitors. Confidential commercial transactions allow those individual entities to maintain a competitive advantage within their respective markets.

The concept of keeping commercial contracts confidential is nothing new. The Commission has often afforded confidential treatment to commercial contracts between parties in competitive markets.<sup>13</sup> When it recently granted a protective order regarding terms in a competitive contract in *North Coast*, the Commission held "we understand that negotiated price and quantity terms can be sensitive information in a competitive environment."<sup>14</sup> All of the information that DERS provided falls into the category of sensitive information in a competitive environment. Therefore, the Commission has express authority to maintain the confidentiality of information it received by it during the

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<sup>13</sup> *In re North Coast Gas*, Case No. 06-1100-PL-AEC (Entry at 2) (February 7, 2007).

<sup>14</sup> *Id.*

discovery process.<sup>15</sup> In this instance, OCC has not offered DERS the option of redacting the confidential material. Redaction might be possible but would be difficult due to the large number of counterparties and the necessity for agreement among them. [REDACTED]

[REDACTED]

[REDACTED]

**II. The Commission should not be swayed by OCC's baseless allegations.**

In its Memorandum Contra, OCC attempts to justify its public disclosure initiative through allegations founded upon little more than inference and innuendo. For instance, OCC questions the secrecy of the information and DERS' efforts to limit the dissemination of its Trade Secret Information given that OCC obtained copies of two of the commercial contracts through a subpoena of John Deeds as well as through Discovery of the counterparties to the agreements.<sup>16</sup> OCC's claims in this regard are ridiculous.

First, of course the counter parties to respective contracts have their respective contracts. By definition, a contract is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.<sup>17</sup> This does not change the confidential or proprietary nature of the documents. DERS negotiated with the counterparties and executed the contracts with the individual

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<sup>15</sup> *Id.*

<sup>16</sup> See *OCC Memorandum Contra* at 6 and 11.

<sup>17</sup> Black's Law Dictionary, 259 (7<sup>th</sup> Ed. 2000).

counterparties. To claim that simply because OCC was able to get copies of a certain contract through a discovery request to a named counterparty to that agreement does change the confidential nature of the document. Otherwise, no contract would ever be considered confidential or a trade secret.

Second, the fact that a former employee absconded with confidential trade secret documents without the company's permission or knowledge also does not waive the confidential nature of the document. Mr. Deeds, during his tenure as a Cinergy Services employee and in his capacity as a DERS representative, was given access to the confidential information. As OCC discovered in the deposition of Mr. Deeds, Mr. Deeds had a legitimate business need to know about the contracts in the scope of his employment. As an employee of the company, Mr. Deeds was obligated to follow the company protocols including those related to maintaining corporate trade secrets, document treatment and retention. The fact that upon his departure from the company he improperly, and without the company's knowledge or permission, left with trade secret information does not change the status or ownership of the information. The information received by OCC from Mr. Deeds continues to belong to DERS and remains confidential. Arguably, OCC was under a duty to inform DERS, or an appropriate tribunal, that it was in receipt of confidential information misappropriated from its owner.<sup>18</sup> DE-Ohio's

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<sup>18</sup> OHIO R. PROF. COND. 3.3(b), 4.1(b) (2007).



discovery discloses that OCC may have obtained the confidential information from Mr. Deed's attorney in June of 2006.<sup>19</sup>

Mr. Deeds, as an ex-employee, remains bound by the confidentiality clauses in the agreement as well as the companies' protocols regarding the treatment of trade secret information. Likewise, OCC by way of the protective agreements executed as part of the discovery of the above captioned matter, is obligated not to disclose the information. To the extent that OCC acquired knowledge of the information from Mr. Deeds through a subpoena or through discussions with his attorney, OCC at the very least, had constructive notice of the improper methods in which this information was obtained. OCC should not be permitted to circumvent both its agreement and obligation to maintain confidential information and benefit through the improper and potentially illegal acts of an ex-company employee.

The simple fact remains that there has been no finding of any wrongdoing by DERS regarding its contracts. The Trade Secret Information consisting of the effective contracts and the related transactions were executed and occurred after the Commission issued its Entry on Rehearing establishing DE-Ohio's MBSSO market price. Those contracts have no bearing on the Commission's determination as to whether or not DE-Ohio's price was reasonable or a market price. This Commission should not base any determination of the confidentiality of

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<sup>19</sup> OCC's response to DE-Ohio's discovery at Interrogatory 18, & 19 requesting documents. *Attachment D.*

DERS' confidential commercial contracts upon OCC's unproven mischaracterizations and baseless conspiracy theories.

In its Memorandum Contra, OCC also attempts to justify public disclosure of the DERS [REDACTED]

[REDACTED] Even if this were the case, which DERS wholly denies, there is nothing wrong with such conduct as demonstrated by OCC's past conduct where it has engaged in confidential settlement agreements and exclusionary settlement negotiations.

In fact, OCC brought such an agreement to the attention of the Supreme Court of Ohio in its appeal of the Commission's approval of a change in The Dayton Power and Light Company's (DP&L) recovery of billing system costs.<sup>21</sup> Additionally, in this very case, as was discovered in the deposition of OCC's witness Ms. Hixon,<sup>22</sup> OCC engaged in confidential settlement discussions with select Parties to the proceeding to the exclusion of DE-Ohio.<sup>23</sup> Moreover, as was also discovered during Ms. Hixon's deposition, in settlement of Case number 99-1658-EL-EPT,

<sup>20</sup> OCC Memo Contra at 13.

<sup>21</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 110 Ohio St. 3d 394 (2006). Attachment C.

<sup>22</sup> Hixon deposition at 148-151.

<sup>23</sup> See attachment A, affidavit of Jock Pitts and attached e-mails.

[REDACTED] What is apparent, is that confidential side bar settlement agreements between parties to cases are common and constitute a necessary and recognized part of the litigation process. OCC engages in such processes when it suits its goals and criticizes others when it suits its goals. The Commission should admonish OCC for its mendacity and uphold public policy permitting such discussions and agreements in the interest of promoting settlements and judicial economy.

Regardless of the characterization of DERS' Trade Secret Information, there is no evidence other than the baseless allegations by OCC that DERS' contracts are anything but legitimate business transactions. In fact, Ms. Hixon, in her deposition makes it clear that she is not alleging any corporate separation plan violation,<sup>25</sup> and makes no conclusions as to whether any of the Commission's affiliate rules have been violated.<sup>26</sup>

**III. OCC will not be harmed by maintaining the confidential nature of the Trade Secret Information.**

As a general principal, confidential commercial contracts and related materials should not be freely placed into the public realm to the detriment of the signatories where there is no need for such disclosure. This is particularly true where such materials can be considered by the Commission, while under seal.

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<sup>24</sup> See Attachment B.

<sup>25</sup> Hixon deposition at 185.

<sup>26</sup> *Id.* at 184-189.

The Commission should not permit OCC to abuse its process to make information public that would not otherwise be public, particularly, as in these proceedings, where the information is irrelevant to the case and could not have influenced the outcome of the proceedings. DERS has provided the information to OCC and OCC has been permitted to use this information to formulate its opinions and file its testimony in the above styled proceeding. Although DERS maintains its position that the information is irrelevant to the scope of the above styled proceedings, DERS has not prohibited OCC from using the information.

Arguments regarding relevancy and admissibility aside, should the Commission permit this information into evidence, DERS maintains that public policy dictates that DERS' Trade Secret Information be maintained as confidential. OCC has not specified any public use of any document that it could not achieve under seal in the presentation of its case.<sup>27</sup>

As stated previously, this Commission has recognized the need to keep commercial terms, pricing, pricing structures and the like confidential.<sup>28</sup> OCC's argument that maintaining confidentiality will be a cumbersome exercise in the hearing of the above captioned matter should not carry the day. OCC's own actions have forced DERS to be a party in this proceeding in order to protect its interests. Any alleged burden, which DERS denies, is OCC's creation and should not be relieved at the expense of DERS.

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<sup>27</sup> *Id.*

<sup>28</sup> *In re North Coast Gas*, Case No. 06-1100-PL-AEC (Entry at 2) (February 7, 2007).

**IV. OCC's request for Rehearing.**

In its Memorandum Contra, OCC requests that the Commission hold another pre-hearing conference to discuss many issues, including but not limited to, order of witnesses, and the procedure to address the use and confidential nature of information which OCC insists upon making public. While DERS is not opposed to the pre-hearing conference, the company does find it ironic that both DERS and Duke Energy Ohio, Inc., have requested time and time again that this Commission offer some guidance as to the scope of the hearing and the relevancy, treatment and admissibility of evidence, while OCC has vehemently opposed any such request.

As stated above, DERS objects to OCC's attempts to use the administrative burden placed upon OCC in presenting its case as a justification to make DERS' Trade Secret Information public. OCC has created this situation through its unreasonable and oppressive attempts to make all Trade Secret Information public and bring new parties and irrelevant information into the case. This proceeding is not the first time that this Commission has had to address confidential information in an evidentiary hearing and is well equipped to do so in a reasonable and efficient manner. OCC's inconvenience is not an excuse.

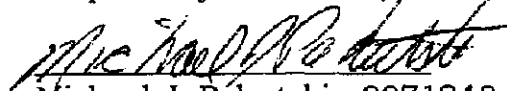
OCC is the only party seeking to make confidential, proprietary trade secret information public. In fact, many of the Parties, who are not affiliated with Duke Energy Corporation, have gone on record in support

of keeping information confidential, in direct opposition to OCC. For example, on March 2, 2007, Industrial Energy Users-Ohio (IEU-Ohio) filed a letter calling OCC's actions to the attention of the Commission, and implored the Commission to take a proactive stance to protect Trade Secret Information which if released could have a disastrous impact on the Ohio economy.<sup>29</sup> DERS wholly supports IEU-Ohio in this request. Even Constellation NewEnergy Inc. (Constellation) is not immune from the impact of OCC's dubious crusade, as Constellation is now forced to defend its own confidential commercial contracts from public disclosure in this proceeding.<sup>30</sup> This Commission should put an end to OCC's oppressive and harassing behavior so that the Parties can more fully focus on the real issues in the case.

**CONCLUSION:**

For the reasons set forth in DERS' March 2, 2007, filing, as well as those contained in this Reply, DERS respectfully requests the Commission grant this Motion for Protective Order and prohibit the public disclosure of the Trade Secret Information.

Respectfully Submitted,



Michael J. Pahutski - 0071248

Assistant General Counsel

Ariane S. Johnson - 0077236

Associate General Counsel

---

<sup>29</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (IEU-Ohio's Letter) (March 2, 2007).

<sup>30</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Constellation's Memorandum in Response) (March 9, 2007).

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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing was served electronically on the following parties this 15th day of March 2007.

  
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**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

IN THE MATTER OF THE CONSOLIDATED	)	
DUKE ENERGY OHIO, INC. RATE	)	Case Nos. 03-93-EL-ATA <i>et al.</i>
STABILIZATION PLAN REMAND AND	)	
RIDER ADJUSTMENT CASES	)	

**AFFIDAVIT OF JOCK J. PITTS**

STATE OF OHIO                    )  
  ) SS:  
COUNTY OF HAMILTON)

I, JOCK J. PITTS, being first duly cautioned and sworn, hereby state as follows:


1. I am the President of People Working Cooperatively, Inc. ("PWC"), a Cincinnati-based, Ohio non-profit corporation whose mission is to provide critical home repairs, including weatherization services, for the very low-income elderly and disabled homeowners residing in the Duke Energy-Ohio ("DE-O") service territory. PWC has been an intervenor in the earlier phase of this proceeding (referred to as the "DE-O RSP Case"), which resulted in an Opinion and Order by the Public Utilities Commission of Ohio ("PUCO") that was overturned by the Ohio Supreme Court on appeal and remanded to the PUCO for this second phase. I make this statement in response to *Duke Energy Ohio's First Set of Interrogatories and Requests for Production of Documents Propounded to PWC*.

2. In response to DE-O's Interrogatories 10-12, I was party to meetings with the Office of Consumers' Counsel ("OCC") and to several conference calls with representatives of the OCC during the course of the RSP Case, the purpose of which was to discuss the possibility of reaching a stipulation among the consumer and marketer parties. In particular, on April 13,

2004, I was present at a meeting at OCC's offices, attended by OCC personnel, representatives of the consumer parties and representatives of the marketer parties. Although the parties did not sign a written confidentiality agreement, OCC counsel asked at the beginning of the meeting to agree to keep the discussions held during the meeting confidential. Subsequent to the meeting, OCC counsel provided a proposed stipulation for the consumer and marketer parties' review, comment and agreement, with the proposed stipulation marked "CONFIDENTIAL SETTLEMENT OFFER MATERIAL (NOT FOR ANY OTHER USE)." All subsequent e-mail versions of the OCC proposal were similarly marked. While counsel for PWC was the addressee on e-mails from OCC and the parties participating in the negotiations with OCC, PWC counsel forwarded all communications from OCC to me personally.

3. PWC also engaged in settlement discussions with OPAC separately, although informed by its counsel that he was having similar discussions with other consumer parties. Again, no written confidentiality agreement was entered into. Rather, the parties agreed orally to keep the discussions held in pursuit of settlement of their consumer issues confidential.

Further Affiant sayeth naught.

  
Jock J. Pitts, President

SWORN TO AND SUBSCRIBED before me, a Notary public, this 12<sup>th</sup> day of March, 2007.

  
Notary Public

(SEAL)

STEFAN L. OLSON  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES 06-25-11

Date: Thu, 13 May 2004 17:53:42 -0400  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
To: <dboehmlaw@aol.com>, <drinebolt@aol.com>, <mkurtzlaw@aol.com>, <Dane.Stinson@BaileyCavalieri.com>, <SBLOOMFIELD@BRICKER.COM>, <tobrien@BRICKER.COM>, <broyer@brscolaw.com>, <Mchristensen@Columbuslaw.org>, <cgoodman@energymarketers.com>, <KorkoszA@FirstEnergyCorp.com>, <nmorgan@lascinti.org>, <srandazzo@mwncmh.com>, <RICKS@OHANET.ORG>, <shawn.leyden@pseg.com>, <Thomas.McNamee@puc.state.oh.us>, <bakahn@vssp.com>, <mhpetricoff@vssp.com>, <wjairey@vssp.com>  
Cc: "RANDY CORBIN" <CORBIN@occ.state.oh.us>, "BRUCE HAYES" <HAYES@occ.state.oh.us>, "BETH HIXON" <HIXON@occ.state.oh.us>, "ANN HOTZ" <HOTZ@occ.state.oh.us>, "RYAN LIPPE" <LIPPE@occ.state.oh.us>, "ROSS PULTZ" <PULTZ@occ.state.oh.us>, "DAWN REDMOND-TARKINGTON" <REDMOND@occ.state.oh.us>, "LARRY SAUER" <SAUER@occ.state.oh.us>, "JEFF SMALL" <SMALL@occ.state.oh.us>, "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
Subject: CONFIDENTIAL Settlement Proposal

Sent on behalf of Jeff Small:

The attached Settlement Proposal is being distributed to our regular service list. Please inform me if you believe that others should receive this material.

Jeff Small  
small@occ.state.oh.us

Denise Willis  
Case Team Assistant  
OCC  
willis@occ.state.oh.us

CONFIDENTIALITY NOTICE:

THIS COMMUNICATION IS INTENDED ONLY FOR THE PERSON OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED LEGAL GOVERNMENTAL MATERIAL. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT OR BELIEVE THAT YOU ARE NOT THE INTENDED RECIPIENT OF THIS COMMUNICATION, DO NOT READ IT. PLEASE REPLY TO THE SENDER ONLY AND INDICATE THAT YOU HAVE RECEIVED THIS MESSAGE, THEN IMMEDIATELY DELETE IT AND ALL OTHER COPIES OF IT. THANK YOU.

Attachment converted: Macintosh HD:Proposal05-13-04.doc (WDBN/MSWD)  
(000E80D8)



Date: Wed, 27 Oct 2004 16:30:07 -0400  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
To: <dboehmlaw@aol.com>, <drinebolt@aol.com>, <mkurtzlaw@aol.com>, <Dane.Stinson@BaileyCavalieri.com>, <SBLOOMFIELD@BRICKER.COM>, <tobrien@BRICKER.COM>, <broyer@brscolaw.com>, <Mchristensen@Columbuslaw.org>, <cgoodman@energymarketers.com>, <KorkoszA@FirstEnergyCorp.com>, <nmorgan@lascinti.org>, <tschneider@mgsglaw.com>, <srandazzo@mwncmh.com>, <RICKS@OHANET.ORG>, <shawn.leyden@pseg.com>, <Thomas.McNamee@puc.state.oh.us>, <vern.margard@puc.state.oh.us>, <William.Wright@puc.state.oh.us>, <bakahn@vssp.com>, <mhpetricoff@vssp.com>, <wjairey@vssp.com>  
Subject: Confidential Settlement Communication in Case No. 03-93-EL-ATA

Please see the attached confidential settlement communication from Jeff Small in the above captioned case.

Please contact me if you have any trouble with this email.

Denise Willis  
Case Team Assistant  
OCC  
willis@occ.state.oh.us

CONFIDENTIALITY NOTICE:

THIS COMMUNICATION IS INTENDED ONLY FOR THE PERSON OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED LEGAL GOVERNMENTAL MATERIAL. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT OR BELIEVE THAT YOU ARE NOT THE INTENDED RECIPIENT OF THIS COMMUNICATION, DO NOT READ IT. PLEASE REPLY TO THE SENDER ONLY AND INDICATE THAT YOU HAVE RECEIVED THIS MESSAGE, THEN IMMEDIATELY DELETE IT AND ALL OTHER COPIES OF IT. THANK YOU.

Attachment converted: Macintosh HD:SettlementComm10-27-04.pdf (PDF /CARO) (000F6CD5)  
Attachment converted: Macintosh HD:BulletResponses10-27-04.pdf (PDF /CARO) (000F5CD6)

Date: Wed, 03 Nov 2004 17:38:03 -0500  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
To: <mchristensen@columbuslaw.org>, <jpitts@pwchomerepairs.org>  
Subject: Fwd: Confidential Settlement Communication in Case No.  
03-93-EL-ATA

As promised during your discussion today with Janine and Bruce, please find attached the confidential settlement communication from OCC, dated October 27th. Please feel free to discuss these matters with Janine or Bruce.

Thank you.

Denise Willis  
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OCC  
willis@occ.state.oh.us

CONFIDENTIALITY NOTICE:

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Date: Wed, 27 Oct 2004 16:30:07 -0400  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
Subject: Confidential Settlement Communication in Case No. 03-93-EL-ATA  
Mime-Version: 1.0  
Content-Type: multipart/mixed; boundary="=\_0828CDF5.B3D2BB21"

Please see the attached confidential settlement communication from Jeff Small in the above captioned case.

Please contact me if you have any trouble with this email.

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CONFIDENTIALITY NOTICE:

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Attachment converted: Macintosh HD:SettlementComm10-27-04.pdf 2 (PDF /CARO) (000F849E)

OHIO CONSUMERS' COUNSEL, APPELLANT, v. PUBLIC UTILITIES COM-  
MISSION OF OHIO ET AL., APPELLEES.

No. 2005-0945

SUPREME COURT OF OHIO

110 Ohio St. 3d 394; 2006 Ohio 4706; 853 N.E.2d 1153; 2006 Ohio LEXIS 2900

May 9, 2006, Submitted  
September 27, 2006, Decided

**PRIOR HISTORY:** APPEAL from the Public Utilities Commission, Nos. 03-2405-EL-CSS, 04-85-EL-CSS, and 03-2341-EL-ATA. *Ohio Consumers' Counsel v. PUC*, 109 Ohio St. 3d 1412, 2006 Ohio 1892, 846 N.E.2d 50, 2006 Ohio LEXIS 967 (2006)

**DISPOSITION:** Order affirmed.

**HEADNOTES:** *Public utilities -- Consolidated billing by electricity-distribution company -- Costs of billing for providers of competitive retail electric service -- Expenses caused by default of provider of competitive retail electric service.*

**COUNSEL:** Janine L. Migden-Ostrander, Ohio Consumers' Counsel, Jeffrey L. Small, and Larry S. Sauer, for appellant.

Jim Petro, Attorney General, Duane Luckey, Senior Deputy Attorney General, and Steven T. Nourse and William L. Wright, Assistant Attorneys General, for appellee, Public Utilities Commission of Ohio.

Faruki, Ireland & Cox, P.L.L., Charles J. Faruki, and Jeffrey S. Sharkey, for intervening appellee, the Dayton Power & Light Company.

Bell, Royer & Sanders Co., L.P.A., Barth E. Royer, and Judith B. Sanders, urging affirmance for amicus curiae, Dominion Retail, Inc.

**JUDGES:** O'DONNELL, J. MOYER, C.J., RESNICK, PFEIFER, LUNDBERG STRATTON, O'CONNOR and LANZINGER, JJ., concur.

**OPINION BY:** O'DONNELL

**OPINION:**

[\*394] [\*\*\*1153] O'DONNELL, J.

[\*\*P1] In this appeal, the Ohio Consumers' Counsel challenges an order issued by the Public Utilities Commission of Ohio ("PUCO") that approved a 2004 agreement between the Dayton Power & Light Company ("DP&L") and several other entities, Dominion Retail, Inc., Green Mountain Energy Company, Miami Valley Communications Council, and Industrial Energy Users-Ohio, each of which had questioned DP&L's efforts to recoup the cost of changing its billing practices after the General Assembly deregulated the retail electricity market in 1999.

[\*\*P2] The PUCO order at issue changed the way in which DP&L could recover its billing-system costs. For the reasons that follow, we affirm the PUCO's order.

**Facts**

[\*\*P3] DP&L incurred the \$ 18.8 million in billing-system costs at issue in this case because the statutes that deregulated electricity in Ohio required electric utilities to "unbundle" or separate the costs of electricity generation from the costs of electricity distribution. See R.C. 4928.10(C)(2) and 4928.35. As a result, DP&L developed new computer programs enabling the company to produce the type of customer bills that the statutes and PUCO regulations required in a deregulated electricity market.

[\*\*P4] In 2000, the PUCO approved DP&L's initial plan to charge "CRES providers" for the costs associated with the billing-system changes. A CRES provider is a provider of competitive retail electric service. See Ohio Adm.Code 4901:1-10-01(F) and 4901:1-21-01(A)(10). Both Dominion Retail, Inc. and Green [\*395] Mountain Energy Company -- which joined the 2004 agreement at issue -- are CRES providers.

[\*\*P5] In the competitive retail market for electricity established by the General Assembly in 1999, cus-

110 Ohio St.3d 394, \*; 2006 Ohio 4706, \*\*;  
853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

tomers have the option to choose to continue paying their original electricity provider for generation service or to select a CRES provider for that service. R.C. 4928.14. *Regardless of which provider the customer selects, the electricity generated by the provider is delivered over wires owned and maintained by the electric utility, and that company can continue to charge for the delivery service.*

[\*\*P6] The PUCO requires electric utilities such as DP&L that distribute electricity to offer "consolidated billing" to the CRES providers that want to offer competing electricity generation service to retail customers in the utility company's territory. Ohio Adm.Code 4901:1-10-29(G). See, also, Ohio Adm.Code 4901:1-10-01(D) ("Consolidated billing" means that a customer receives a single bill for electric services provided during a billing period" for both distribution services and generation services). Evidence in the record before us indicates that DP&L had to do substantial reprogramming of its computers to accommodate the new requirement that it offer a consolidated bill showing the unbundled charges incurred by any customer in its territory who chose to buy electricity generation service from a CRES provider while DP&L continued to provide electricity-distribution service to the customer.

[\*\*P7] [\*\*\*1156] In making its initial 2000 plan to charge CRES providers for the billing-system changes, DP&L calculated that it would have to charge \$ 4.76 for each consolidated bill it generated for a CRES provider to fully recover the costs of the billing changes. DP&L concluded that potential CRES providers in its territory would not be willing to pay such a high price for the production of each customer bill, so DP&L chose to charge CRES providers \$ 1.90 per bill under a one-year contract or \$ 1.56 per bill under a two-year contract.

[\*\*P8] The lesser amount did not satisfy CRES providers such as Dominion Retail and Green Mountain Energy Company, and as a result, Dominion filed a complaint with the PUCO in 2003, and Green Mountain then intervened to challenge the amount DP&L charged CRES providers for each consolidated customer bill DP&L generated for them. The Miami Valley Communications Council -- a regional council of governments interested in promoting competition in the retail electricity market -- likewise filed a complaint against DP&L with the PUCO in 2003 alleging that DP&L charged CRES providers excessive amounts for billing services.

[\*\*P9] The PUCO consolidated the cases and granted motions to intervene filed by the Consumers' Counsel and Industrial Energy Users-Ohio. At a hearing before the PUCO on these complaints, Dominion Retail and Miami Valley offered [\*396] evidence that the DP&L charges were "excessive and unreasonable," "dis-

courage[d] shopping," and constituted a "barrier to competition." Expert testimony presented by the Consumers' Counsel echoed those views, describing the charges to CRES providers as "a significant impediment to competition" that would "significantly decrease the savings a residential customer would expect to realize" from switching to a new provider of retail electric-generation service.

[\*\*P10] After several days of hearings before the PUCO in 2004, all parties except the Consumers' Counsel reached an agreement to change the way in which DP&L could recover the \$ 18.8 million in billing-related costs it had incurred from 1999 to 2001. The stipulation called for DP&L to charge CRES providers only \$ .20 per customer bill (to cover the cost of transmitting customer data electronically between DP&L and the CRES provider) and then -- beginning January 1, 2006 -- allowed DP&L to recover from all of its customers those costs of the billing-system changes that had been approved in an audit.

[\*\*P11] The stipulation also provided for DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of that CRES provider after reasonable efforts to recover from the CRES provider.

[\*\*P12] The Consumers' Counsel refused to join the stipulation. The PUCO considered the objections raised by the Consumers' Counsel but nonetheless approved the agreement in February 2005, concluding that a reasonable arrangement would benefit ratepayers and the public. The Consumers' Counsel filed an application for rehearing, but the PUCO denied that application. This appeal followed.

#### Standard of Review

[\*\*P13] "R.C. 4903.13 provides that a PUCO order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004 Ohio 6767, P50, 820 N.E.2d 885. The court will not reverse or modify a PUCO decision as to questions of fact if the decision was not manifestly against the weight [\*\*\*1157] of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004 Ohio 6896, 820 N.E.2d 921, P 29. The appellant bears the burden of demonstrating that the PUCO's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.*

[\*\*P14] Although the court has "complete and independent power of review as to all questions of law" in

110 Ohio St.3d 394, \*, 2006 Ohio 4706, \*\*;  
853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

appeals from the PUCO, *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 466, 469, 1997 Ohio 196, 678 N.E.2d 922, the court has explained [\*397] that it may rely on the expertise of a state agency like the PUCO in interpreting a law where "highly specialized issues" are involved "and where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370.

#### Analysis

##### *The Order Allowing DP&L to Charge Customers for the Billing-Related Changes Made by DP&L Is Reasonable*

[\*\*P15] The Consumers' Counsel contends first that the multiparty agreement approved by the PUCO is not beneficial to ratepayers and that it improperly deviates from DP&L's initial intention to recover from CRES providers rather than from consumers the \$ 18.8 million cost of reprogramming DP&L's computers to accommodate new billing practices mandated by the General Assembly when the competitive retail market for electricity was established in Ohio. The PUCO, DP&L, and Dominion Retail each counter those arguments, claiming that the PUCO's approval of the agreement was entirely reasonable.

[\*\*P16] This court applies a three-part test when evaluating the reasonableness of settlements approved by the PUCO: whether the settlement is a product of serious bargaining among capable, knowledgeable parties; whether the settlement, as a package, benefits ratepayers and the public interest; and whether the settlement package violates any important regulatory principles or practices. *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126, 1992 Ohio 122, 592 N.E.2d 1370. See, also, *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St. 3d 81, 82-83, 2002 Ohio 1735, 765 N.E.2d 862.

[\*\*P17] The Consumers' Counsel urges that the agreement in this case fails the second and third prongs of the test, alleging that consumers will pay costs under the agreement that DP&L initially planned to recover solely from CRES providers. To support its argument, the Consumers' Counsel points to a separate one-page sidebar agreement between DP&L and the Consumers' Counsel. In that sidebar agreement from June 2000, DP&L had agreed that it would "not seek recovery from residential customers" for costs associated with "billing system modifications" made by DP&L. The PUCO's failure to enforce that earlier agreement when DP&L and other parties presented their new agreement in October 2004 represented a "willful disregard of duty," according to the Consumers' Counsel.

[\*\*P18] However, the June 2000 sidebar agreement was never filed with or approved by the PUCO, and for that reason, the PUCO refused to consider it when weighing the reasonableness of the 2004 agreement, explaining that "[u]nderstandings among parties that are important enough that the parties wish to [\*398] have a means to bring them to the Commission's attention at a later time" should be [\*\*\*1158] brought "to the Commission for approval" when those understandings are reached. The PUCO has taken a similar approach in past cases, and we have approved that practice. See, e.g., *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004 Ohio 6767, P14-15, 820 N.E.2d 885 (approving the PUCO's refusal to consider side agreements that had not been incorporated into the agreement at issue); *Cookson Pottery v. Pub. Util. Comm.* (1954), 161 Ohio St. 498, 505, 53 O.O. 374, 120 N.E.2d 98, citing G.C. 614-17, the predecessor of R.C. 4905.31 (contracts between a public utility and its customers that are not filed with the PUCO "shall not be lawful"). R.C. 4905.31(E) provides that no financial arrangement between a public utility and consumers "is lawful unless it is filed with and approved by" the PUCO.

[\*\*P19] The PUCO's refusal, then, to consider the unapproved June 2000 sidebar agreement between the Consumers' Counsel and DP&L appears consistent with past practice and with the relevant statutory provision.

[\*\*P20] The PUCO also properly applied our three-part test for weighing the reasonableness of the October 2004 agreement at issue in this case. Ample evidence in the record supports the PUCO's conclusion that the agreement would be a "benefit to ratepayers and the public interest" and would "limit[] any negative impact on competition in DP&L's territory" by doing away with DP&L's initial plan to charge CRES providers up to \$ 1.90 for each consolidated electric bill prepared by the utility company.

[\*\*P21] As the PUCO noted in its order, "it is a benefit to the ratepayers and the public interest for the parties to these cases to agree to a per-bill fee that is substantially lower than DP&L currently charges." The PUCO also explained that the 2004 agreement is consistent with standard regulatory practices because other electric and gas utility companies have been allowed to recover from their customers the same kind of billing-related charges that the agreement calls for DP&L to recover from its customers.

[\*\*P22] The agreement also brings other benefits to the consumer. The reduced charges to CRES providers for each customer bill will lower any barrier that may have kept Dominion Retail and other competitors of DP&L from winning customers for retail electricity gen-

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853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

eration service in DP&L's territory. And because all customers benefit from having greater choices in a competitive retail electricity market, the stipulation's removal of a significant barrier to the entry of new competitors in DP&L's territory benefits all customers in that area. As a result, as one witness testified, it is reasonable to ask all customers to pay for that benefit.

[\*\*P23] Upon review, we have concluded that the record supports the reasonableness of the PUCO's order approving the 2004 agreement and contains [\*399] sufficient probative evidence to justify the PUCO's factual findings that the agreement would benefit ratepayers and the public interest and would not violate any important regulatory principles or practices. The PUCO's decision finding the agreement reasonable is therefore not "manifestly against the weight of the evidence" and is not "so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (2000), 88 Ohio St. 3d 549, 555, 2000 Ohio 422, 2000 Ohio 423, 728 N.E.2d 371.

*The Order Allowing DP&L to Charge Customers for the Billing-Related Changes Made by DP&L Is Lawful*

[\*\*P24] The Consumers' Counsel further challenges the lawfulness of the [\*\*\*1159] PUCO's order, arguing that the PUCO should not have deviated from one of its own earlier orders and should have enforced various statutory requirements that apply to utility rate increases. We conclude that the PUCO properly rejected both arguments.

[\*\*P25] First, the Consumers' Counsel contends that in accordance with the PUCO's 2000 order, DP&L could not recover its billing-related costs from CRES providers before 2007. However, in *Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St. 3d 49, 50-51, 10 Ohio B. 312, 461 N.E.2d 303, we explained that the PUCO may change or modify earlier orders as long as it justifies any changes. The agreement reached by DP&L and the other parties in 2004, and approved by the PUCO in the proceedings below in 2005, created a new and entirely reasonable way for DP&L to recover the billing-related costs it had incurred between 1999 and 2001. As explained above, the record supported the change, and the PUCO fully explained its reasons for approving the agreement. The PUCO was not bound to adhere to an earlier arrangement that had created anticompetitive barriers to the entry of new CRES providers in DP&L's territory, and the PUCO's decision to remove those barriers by modifying an earlier PUCO order was not unlawful.

[\*\*P26] The Consumers' Counsel next contends that the statutory requirements for utility rate increases should have been followed in the proceedings below. Under the statute cited by the Consumers' Counsel, a

public utility seeking to change its existing rates for customers must "file a written application" with the PUCO and must prove at any hearing held on the request that it is "just and reasonable." R.C. 4909.18. The application for a rate increase must also be published by the PUCO in a newspaper in the utility company's territory, R.C. 4909.19, and public hearings must be held in large municipalities in the affected service area, R.C. 4903.083.

[\*\*P27] Those specific statutory provisions were not followed in this case, as the proposal that DP&L's customers pay for the expenses it incurred to reprogram [\*400] its computers between 1999 and 2001 to accommodate consolidated billing had emerged not from a formal rate-increase application but from the agreement between DP&L and the other parties in October 2004. Nonetheless, the agreement is valid, and the PUCO lawfully approved it in February 2005.

[\*\*P28] The agreement in this case was reached in an R.C. 4905.26 complaint proceeding, not an R.C. 4909.18 rate-increase proceeding (with all of the attendant procedural requirements cited by the Consumers' Counsel). That former statutory provision was cited by CRES provider Dominion Retail and by the Miami Valley Communications Council when they filed their separate complaints against DP&L to initiate the proceedings that led to the agreement at issue several months later. In its February 2005 order approving the parties' settlement agreement, the PUCO acknowledged that the agreement "arose in the context of a complaint case" rather than in a rate-increase proceeding.

[\*\*P29] We have repeatedly held that utility rates may be changed by the PUCO in an R.C. 4905.26 complaint proceeding such as this, without compelling the affected utility to apply for a rate increase under R.C. 4909.18. See, e.g., *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 347, 1997 Ohio 112, 686 N.E.2d 501 ("Pursuant to R.C. 4905.26 \* \* \*, the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that [\*\*\*1160] the rates charged by the utility are unjust and unreasonable"); *Allnet Communications Servs., Inc. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 115, 117, 512 N.E.2d 350 ("R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO. In fact, this court has held that reasonable grounds may exist to raise issues which might strictly be viewed as 'collateral attacks' on previous orders"); *Ohio Util. Co. v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 153, 157, 12 O.O.3d 167, 389 N.E.2d 483 (in an R.C. 4905.26 proceeding, the PUCO can "order[] that new rates be put in effect").

[\*\*P30] As R.C. 4905.26 itself provides, "any person, firm, or corporation," as well as the PUCO itself,

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853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

may file a complaint alleging that an existing or proposed utility rate or charge is unjust or unreasonable. That kind of allegation was raised by both Dominion Retail and the Miami Valley Communications Council in the proceedings below, each of which questioned the charges that DP&L imposed on CRES providers for consolidated-billing services. R.C. 4905.26 indicates that the parties to a complaint proceeding "shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses." No allegation exists that those requirements were not met in the proceedings below, and in fact the PUCO held several days of hearings on the complaints and heard from multiple witnesses, including a witness who testified on behalf of the Consumers' Counsel.

[\*401] [\*\*P31] Some of the testimony in the R.C. 4905.26 complaint proceeding before the PUCO in 2004 indicated that the PUCO's 2000 order -- which allowed DP&L to charge CRES providers for the computer-related consolidated-billing costs that it incurred between 1999 and 2001 -- was unreasonable and posed a barrier to the entry of new CRES providers in DP&L's service area. Testimony presented after most of the parties in the complaint proceeding reached their October 2004 agreement indicated that shifting the computer-related costs from CRES providers to DP&L's customers would foster competition in DP&L's service area by "mak[ing] it easier for CRES providers to offer savings to customers." Multiple witnesses also testified that the agreed resolution of the complaint proceeding was reasonable and appropriate. Relying on that evidence in the record, the PUCO approved the agreement in February 2005.

[\*\*P32] The PUCO acted lawfully. As noted above, this court has allowed the PUCO to impose new utility rates or to change existing rates in other R.C. 4905.26 complaint proceedings, and there is no dispute that the PUCO complied with all of the procedural requirements in the statute by holding a hearing and by allowing the parties to be represented by counsel and to compel the attendance of witnesses.

*The Portion of the PUCO's Order Giving DP&L Additional Protections in the Event of a CRES Provider's Default Is Also Reasonable and Lawful*

[\*\*P33] Although the Consumers' Counsel primarily focuses on the reasonableness and lawfulness of the PUCO decision permitting DP&L to charge its customers for the costs that DP&L incurred when it made software changes in order to produce unbundled consolidated customer bills, the Consumers' Counsel also challenges a provision of the PUCO order allowing DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of that CRES provider.

[\*\*P34] The PUCO and DP&L argue that the Consumers' Counsel should not be permitted to raise this issue because she did not first raise it in the application for [\*\*\*1161] rehearing before the PUCO. Those parties are correct in that R.C. 4903.10 states, "No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application..". Yet the Consumers' Counsel *did* challenge the default recovery mechanism in the application for rehearing, and the PUCO addressed the issue in its order denying rehearing. The Consumers' Counsel has therefore properly raised the issue.

[\*\*P35] The default-recovery mechanism approved by the PUCO is unlawful according to the Consumers' Counsel because no statutory or regulatory provisions in Ohio expressly permit that kind of financial protection to be given to an [\*402] electricity distributor like DP&L. Notably, though, the Consumers' Counsel cites no statutory provisions that *disallow* the practice either.

[\*\*P36] R.C. 4928.08(B) requires CRES providers to "provid[e] a financial guarantee sufficient to protect customers and electric distribution utilities from default," and Ohio Adm.Code 4901:1-24-08(C) allows an electricity distributor (like DP&L) to "apply for relief" at the PUCO if a CRES provider fails to maintain such a guarantee. Those provisions -- the only ones cited by the Consumers' Counsel -- do not prevent the PUCO from approving the kind of additional financial protections given to DP&L to ensure that it will not incur losses when a CRES provider in its territory defaults.

[\*\*P37] As one witness testified before the PUCO about this so-called default recovery rider, it "establishes a reasonable and appropriate process for the recovery by DP&L of prudently incurred costs of a CRES provider default \* \* \* [and] will protect DP&L from costs that DP&L may incur to procure replacement power to serve customers who had been served by a defaulting CRES provider." Another witness testified that because DP&L does not select CRES providers (customers do), and because DP&L does not benefit from CRES providers' services (customers do), it is reasonable for the customers of a CRES provider to reimburse an electricity distributor such as DP&L for the out-of-pocket costs DP&L incurs when the CRES provider defaults. Testimony before the PUCO also indicated that similar default recovery mechanisms currently protect natural gas distributors.

[\*\*P38] The PUCO cited and agreed with all of that testimony, stating in its February 2005 order that the default recovery mechanism "is not prohibited by any current statute or rule" and is in fact "permissible under the current statutory system." The likelihood that DP&L will ever invoke the default recovery mechanism is

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small, the PUCO noted, but it is "a reasonable method to spread the risk of the competitive market."

[\*\*P39] The PUCO's findings as to the reasonableness of this particular provision of the 2004 agreement are supported by the record, and its legal conclusion that the provision is not unlawful is correct. The order, therefore, allowing DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of the CRES provider was both reasonable and lawful.

#### Conclusion

[\*\*P40] For the reasons explained above, the order of the PUCO that allowed DP&L (1) to shift from CRES providers to DP&L's customers the costs that DP&L incurred to update its computer software in order to provide consolidated customer bills for CRES providers in its territory and (2) to recover from a [\*403] CRES provider's customers any of DP&L's out-of-pocket costs

resulting from the default of the CRES provider was both reasonable and lawful. The PUCO fully explained the rationale [\*\*\*1162] for its order, evidence in the record supports the PUCO's decision, and the order is not inconsistent with any statutory or regulatory requirements. Therefore, the order of the PUCO is affirmed. n1

n1 In accordance with S.Ct.Prac.R. IX(8), the Consumers' Counsel filed a list of additional authorities before the oral argument in this case. That list of citations was timely filed, and we therefore deny the PUCO's and DP&L's motions to strike the list.

Order affirmed.

MOYER, C.J., RESNICK, PFEIFER, LUNDBERG  
STRATTON, O'CONNOR and LANZINGER, JJ., con-  
cur.



-----Original Message-----

From: JEFF SMALL [mailto:SMALL@occ.state.oh.us]  
Sent: Wednesday, June 21, 2006 3:56 PM  
To: Randolph H. Freking  
Subject: RE: CG&E

I don't understand your reference to an "Option Agreement," but I will take a look at the material if you like to fax it to 614-466-9475.

I am back in the office after being out last week. Did you file a complaint, and did you contact regulatory counsel?

Jeff

CONFIDENTIALITY NOTICE:

THIS COMMUNICATION IS INTENDED ONLY FOR THE PERSON OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED LEGAL, GOVERNMENTAL MATERIAL. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT, OR BELIEVE YOU ARE NOT, THE INTENDED RECIPIENT OF THIS COMMUNICATION, DO NOT READ IT. PLEASE REPLY TO THE SENDER ONLY, AND STATE THAT YOU HAVE RECEIVED THIS MESSAGE. THEN IMMEDIATELY DELETE THIS COMMUNICATION AND ALL COPIES OF THIS COMMUNICATION. THANK YOU.

>>> "Randolph H. Freking" <Randy@frekingandbetz.com> 06/21/06 4:31 PM

>>>

Jeff

Could you look at the Option Agreement and give us your opinion?  
If  
so, I will fax it to you.

Randy  
Randolph H Freking  
Freking&Betz  
215 East Ninth Street  
Cincinnati, Ohio 45202  
513-721-1975  
randy@frekingandbetz.com

-----Original Message-----

From: JEFF SMALL [mailto:SMALL@occ.state.oh.us]  
Sent: Wednesday, June 07, 2006 11:54 AM  
To: Randolph H. Freking  
Subject: RE: CG&E

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

Consolidated Duke Energy )	Case Nos.
Ohio, Inc. Rate )	03-93-EL-ATA
Stabilization Plan Remand)	03-2079-EL-AAM
and Rider Adjustment )	03-2080-EL-ATA
Cases. )	03-2081-EL-AAM
	05-724-EL-UNC
	05-725-EL-UNC
	06-1068-EL-UNC
	06-1069-EL-UNC
	06-1085-EL-UNC

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

- - -

## 1 APPEARANCES:

2  
3 ON BEHALF OF DUKE ENERGY OHIO, INC.:

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22 rocco.d'ascenzo@duke-energy.com  
23  
24  
25

1

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2 It is stipulated by and among counsel for  
3 the respective parties herein that the deposition  
4 of Beth Hixon, a witness herein, called by the  
5 Duke Energy Ohio for cross-examination under the  
6 statute, may be taken at this time and reduced to  
7 writing in stenotype by the Notaries, whose notes  
8 may thereafter be transcribed out of the presence  
9 of the witness; that proof of the official  
10 character and qualification of the Notaries are  
11 waived; that the witness may sign the transcript  
12 of her deposition before a Notary other than the  
13 Notaries taking her deposition; said deposition to  
14 have the same force and effect as though the  
15 witness had signed the transcript of her  
16 deposition before the Notaries taking it.  
17  
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19  
20  
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22  
23  
24  
25

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## 1 APPEARANCES (continued):

2  
3 ON BEHALF OF THE RESIDENTIAL CONSUMERS OF DUKE  
4 ENERGY OHIO, INC.:

5 Janine Migden-Ostrander, Esq.  
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## 21 ALSO PRESENT:

22 Anita M. Schafer, Senior Paralegal, Duke  
23 Energy Shared Services, Inc.  
24  
25

## STIPULATIONS

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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

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

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

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

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.

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

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.

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.

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?

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

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

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

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

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.

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

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

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.

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.

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

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.



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:

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

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.

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?

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

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?

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

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

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

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.

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

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

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?

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

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

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

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.

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

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.

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

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:

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

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?

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

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.

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

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

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.

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.

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

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.

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.



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

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?

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,

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

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?

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

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: --

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

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.

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 ---

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,

## BEFORE

## THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

Consolidated Duke Energy )	Case Nos.
Ohio, Inc. Rate )	03-93-EL-ATA
Stabilization Plan Remand)	03-2079-EL-AAM
and Rider Adjustment )	03-2080-EL-ATA
Cases. )	03-2081-EL-AAM
	05-724-EL-UNC
	05-725-EL-UNC
	06-1068-EL-UNC
	06-1069-EL-UNC
	06-1085-EL-UNC

Continued confidential deposition of Beth Hixon, a witness herein, called by Duke Energy Ohio, Inc. for cross-examination under the statute, taken before me, Deborah J. Holmberg, Registered Merit Reporter and Notary Public in and for the State of Ohio, pursuant to notice and stipulations of counsel hereinafter set forth, at the offices of Ohio Consumers' Counsel, 10 West Broad Street, Suite 1800, Columbus, Ohio, on Tuesday, March 13, 2007, and concluding on the same day.

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 22  
 23  
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 25

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EXHIBITS MARKED  
DE-Ohio Exhibit No. 15 - 181  
Ohio Administrative Code,  
4901:1 Utilities

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(Confidential transcript under seal.)

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CROSS-EXAMINATION (cont'd.)

BY MR. COLBERT:

Q. Miss Hixon, just a couple preliminary questions before we get into the actual testimony.

Are you familiar with the term "baseline" as something used to determine a rate or a price?

A. I guess I'm familiar with the term "baseline" as it would be used as a starting point against which you measured something. I don't know if that's particularly in regard to a price or a rate, but that's my understanding of it.

Q. And that's precisely what I mean.

Is that a commonly used method to determine a price? For example, in this case with the MBSSO, the FPP has a baseline, I believe, of the old EFC rate determined in 1999. I was just using that as an example. I wasn't asking you to verify it.

A. I'm not sure I heard the question in that statement. I'm sorry.

Q. I was simply asking you whether using a baseline was a common method to establish either a regulated rate or a market price like those —

PROCEEDINGS

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Tuesday, March 13, 2007  
Afternoon Session

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MR. COLBERT: We're back on the record in the deposition of Beth Hixon and we've switched Court Reporters, but Miss Hixon is still sworn in from this morning.

---

(The following portion of the transcript is confidential and under seal.)

some of the components established in this MBSSO.

A. I wouldn't say that it's a common method to establish the things that you described. The concept of a baseline as a starting point for determining anything is a general concept, but to say that it's normally done for the components that you've talked about, no, I wouldn't agree with that.

Q. Is it a reasonable concept in your opinion?

A. It depends on what you're determining what the baseline is and what the purpose is that you're determining it for.

Q. Under what circumstances would you consider it reasonable?

A. I think it's just too vague of a concept to say it's reasonable under any particular circumstance. I'm not testifying about baselines at all, so I'm answering your question in the general sense of a baseline could be used to determine something, but until I know what the something is and what the baseline is, I can't tell you whether it's reasonable.

Q. Well, let's take an example that if a CRES provider offered a price to a customer using

1 an index as a baseline and said they would give  
2 the index, say, minus five percent, would that be  
3 a reasonable way of describing a price?

4 A. I don't think it's a test of  
5 reasonableness. It is a way of describing a  
6 price.

7 Q. Fair enough.

8 Okay. On Page 4, Lines 2 and 3 of your  
9 testimony --

10 MR. SMALL: I'm sorry, what page?

11 MR. COLBERT: Page 4, Lines 2 and 3.  
12 BY MR. COLBERT:

13 Q. You state that, "The side agreements were  
14 a part of CG&E's efforts to obtain support for  
15 PUCO approval of a rate stabilization plan  
16 acceptable to CG&E".

17 Is CG&E or its predecessor or it's now  
18 known as Duke Energy Ohio, are either of them a  
19 party to any of the side agreements?

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

23 THE WITNESS: From my review of the side  
24 agreements, while CG&E is not a named party, as  
25 you would look at the beginning of the agreement,

1 A. If you look at the names that are signed  
2 on each of the agreements, you will not find CG&E  
3 or DE-Ohio.

4 Q. Okay.

5 A. You will find your name for CG&E.

6 Q. Okay. Duke Energy Retail Sales and  
7 Cinergy Corp. are signatories to some of the  
8 agreements, are they not?

9 A. Yes. DERS in the -- in the form of its  
10 predecessor CRS, yes.

11 MR. COLBERT: Do you have a copy of the  
12 stip?

13 MR. SMALL: What stip?

14 MR. COLBERT: We're going to give it to  
15 you.

16 We're going to mark stipulation DE-Ohio  
17 Exhibit 1.

18 MR. SMALL: I think [REDACTED] gave us one.

19 MR. COLBERT: He gave you one, but he  
20 didn't mark it as an exhibit. You're welcome to  
21 this.

22 MR. SMALL: What are we marking this as?

23 MR. COLBERT: Duke Energy Ohio Exhibit 1.

24 ---

25 Thereupon, DE-Ohio Exhibit No. 1 was

1 and say it's between Party 1 and Party 2, as I've  
2 described in my testimony, I do think that it is  
3 related to CG&E and their efforts to obtain  
4 support either through CRS or other  
5 CG&E-affiliated companies.

6 BY MR. COLBERT:

7 Q. And we'll talk about your beliefs in that  
8 regard later, but are they a named party in any of  
9 the agreements?

10 A. As I said in my previous answer, even  
11 though they are not a named party, I still believe  
12 what I said in my answer.

13 Q. Okay. But they're not a named party?  
14 You believe that they may have somehow been  
15 involved, but they're not physically -- they're  
16 not a signatory to any of the agreements, are  
17 they?

18 MR. SMALL: Asked and answered. You have  
19 asked her whether they're a named party three  
20 times and her -- she's responded to you twice.

21 MR. COLBERT: Well, I don't think she's  
22 responded at all, frankly.

23 BY MR. COLBERT:

24 Q. Has -- Has CG&E or DE-Ohio signed as a  
25 party to any of the contracts?

1 marked for purposes of identification.

2 ---

3 BY MR. COLBERT:

4 Q. Miss Hixon, if you would turn to Page 6  
5 of your testimony. On Lines 7 through 11, I  
6 believe you list the parties that signed the  
7 May 19th, 2004 stipulation. Is that your  
8 understanding of the list of the parties there?

9 A. Yes, that's what I attempted to do.

10 Q. Okay. Now, of the parties that are  
11 listed there that signed the stipulation, First  
12 Energy Solutions, Dominion Retail, Green Mountain  
13 Energy, People Working Cooperatively, and  
14 Communities for Action, did not execute contracts  
15 with affiliates of DE-Ohio involving pricing, that  
16 is, any of what you call the side agreements that  
17 you have; is that correct?

18 A. I'm not aware of any agreements and they  
19 were not provided to us.

20 Q. Okay. So of the 11 signatories that you  
21 have listed there to the stipulation, six did not  
22 enter what you refer to as side agreements. Is  
23 that a correct count?

24 A. Why don't you name the six.

25 Q. Sure.

1 First Energy Solutions, Dominion Retail,  
2 Green Mountain Energy, People Working  
3 Cooperatively and Communities for Action, and  
4 staff. I'm sorry.

5 A. That would be six of the parties that I  
6 have no knowledge of side agreements and,  
7 therefore, are not presented in my testimony, yes.

8 Q. Okay. Now, there are also six parties on  
9 that page that you referenced that did not sign  
10 the stipulation; is that correct?

11 A. Those are the six parties that are  
12 referenced at Lines 13 through 17, yes.

13 Q. Okay. And do you know of any of those  
14 parties that are signatories to one or more of  
15 what you refer to as the side agreements?

16 A. I'm not aware of any side agreements as  
17 referenced in my testimony with those parties.

18 Q. [REDACTED] is not a  
19 counterparty to any of the agreements particularly  
20 involved with [REDACTED]?

21 A. Well, now you said, "counterparty", and I  
22 took party to mean the primary party.

23 Q. I mean anybody who signed it.

24 A. And I would have to look at the agreement  
25 between [REDACTED] and the two -- the two agreements

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]

5 Q. Okay. Thank you.

6 Of the organizations -- One of the  
7 organizations that you've listed that did not sign  
8 the stipulation is the [REDACTED]  
9 [REDACTED] Do you see that?

10 A. Yes.

11 Q. Okay. And some of the counterparties to  
12 the side agreements are various industrial  
13 companies, including, but not limited to,  
14 [REDACTED] and others; is  
15 that correct?

16 A. Yes.

17 Q. Have you done anything to check to see  
18 whether or how many of those counterparties belong  
19 to the [REDACTED]

20 A. No.

21 Q. So you don't know whether members of the  
22 [REDACTED] have signed any of  
23 the contracts; is that correct?

24 A. If I've not done the check, no, I don't.

25 Q. Okay. On Page 7 of your testimony, at

1 between [REDACTED] and [REDACTED] but I don't believe that  
2 [REDACTED] signed those, the ones  
3 that are attached to my testimony.

4 Q. Are you aware of any agreements that  
5 aren't attached to your testimony that involve  
6 wholesale supply contracts to [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9 A. If you look in my testimony when I  
10 discuss the first [REDACTED] agreement at Page 24 --

11 Q. Uh-huh.

12 A. -- I indicate that the [REDACTED] agreement  
13 is between [REDACTED] and [REDACTED] but it's predicated on  
14 the fact that [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED] That's what I'm aware  
20 of.

21 Q. Well, have you reviewed the contracts  
22 between [REDACTED]  
23 [REDACTED]

24 A. I have reviewed the documents referenced  
25 on Attachment 6 as -- Bates-stamped 1173 -- the

1 Lines 2 and 3, you indicate that, "CG&E refused to  
2 provide copies of such agreements".

3 Did DE-Ohio or its predecessor, CG&E,  
4 have any contracts with any party or a member of  
5 any party other than the City of Cincinnati and  
6 [REDACTED] as we previously  
7 discussed, at the time OCC made that request?

8 A. The only basis for answering that  
9 question that I would have is that Duke Energy  
10 Ohio has indicated the only agreements that they  
11 had were with the City of Cincinnati. To that  
12 extent, that's my knowledge.

13 Q. Okay. The stipulation was signed and  
14 docketed on May 19th of 2004; is that correct?

15 A. Yes.

16 Q. Do you know whether there were any  
17 contracts with any party other than the City of  
18 Cincinnati agreement dated prior to May 19th of  
19 2004?

20 MR. SMALL: I'm going to object to the  
21 extent that this has been asked and answered. You  
22 went through a previous series of questions having  
23 to do with CG&E being a party to contracts and  
24 this seems to be the same question over again.

25 MR. COLBERT: No. This is broader. I'm



1 asking whether any parties. This would include  
2 DE-Ohio, DERS, or Cinergy Corp.

3 THE WITNESS: Perhaps you could restate  
4 the question and start over.

5 BY MR. COLBERT:

6 Q. Sure.

7 Other than the City of Cincinnati  
8 contract with DE-Ohio's predecessor, CG&E, and the  
9 wholesale supply contracts between Cinergy on  
10 behalf of its operating companies and  
11 [REDACTED] were there any contracts  
12 with the counterparties that you refer to as side  
13 agreements between DE-Ohio, DERS, or Cinergy Corp.  
14 prior to May 19th, 2004?

15 MR. SMALL: I object to it. There was  
16 a -- She previously responded that it wasn't clear  
17 about CG&E being a counterparty to certain  
18 contracts, so she already answered that question.

19 MR. COLBERT: She hasn't answered any  
20 question with respect to the timing of the  
21 contracts, when they were entered.

22 MR. SMALL: Okay. I guess with respect  
23 to the timing, although the contracts are part --  
24 She referenced the attachments to her testimony,  
25 but you can go ahead and respond to the timing of

1 Q. Okay. What is your understanding of the  
2 IMF?

3 A. My understanding is to the extent of the  
4 company's application that it is an infrastructure  
5 maintenance fund, that under the alternative  
6 proposal it was to be nonbypassable and I believe  
7 was based or proposed to be a percentage based of  
8 little g.

9 Q. Do you have any knowledge of the purpose  
10 of the IMF in terms of why the company is asking  
11 for or has asked for compensation of the mechanism  
12 you described?

13 A. I have not reviewed the company's request  
14 for IMF, its justification, what it purports to  
15 recover or not recover, no, I've not done that.

16 Q. Do you know whether any DE-Ohio --  
17 Well, were you present at the original hearing in  
18 this case regarding the stipulation?

19 A. I'm not sure the end of your question  
20 goes with the first part, was I present at the  
21 hearing.

22 Q. Yes.

23 A. I don't believe so.

24 Q. Okay.

25 A. I don't recollect being there. What that

1 it.

2 THE WITNESS: Okay. I think the question  
3 is asking other than with the -- with CG&E and the  
4 City and CG&E through the [REDACTED] agreement,  
5 were there any other contracts with counterparties  
6 prior to May 19th, 2004.

7 BY MR. COLBERT:

8 Q. Uh-huh.

9 A. The side agreements that I'm aware of are  
10 the ones that are in my testimony and attached to  
11 my testimony, and the dates are shown in  
12 Attachments 2 and 3 and [REDACTED]  
13 [REDACTED] I'm not aware of any other  
14 agreements and none have been provided to us.

15 Q. Thank you.

16 On Page 8 of your testimony at Lines 1  
17 and 2, you indicate that the alternative proposal  
18 made by DE-Ohio as part of its application for  
19 rehearing contained [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 has to do with the stipulation, I wasn't sure what  
2 you meant by that.

3 Q. The original hearing -- At the original  
4 hearing, the company supported the stipulation  
5 that was filed in the case.

6 A. That's what you meant?

7 Q. That's what I meant.

8 A. Okay. No. I -- To the best of my  
9 recollection, I don't remember. It's been a  
10 while, but I don't think I attended that hearing.

11 Q. Okay. Have you reviewed the testimony  
12 and/or the transcripts in -- from that hearing?

13 A. I think I reviewed at least a couple  
14 pages in regards to the request that we discussed  
15 earlier that OCC had made. In regards to  
16 testimony -- in preparation for my testimony, I  
17 don't think I have reviewed that.

18 Q. Okay. What is your understanding of the  
19 SRT known as the system reliability tracker?

20 A. My understanding is that the system  
21 reliability tracker was proposed by CG&E in their  
22 alternative proposal as a nonbypassable charge. I  
23 know that this was not, as the IMF, a percentage  
24 of little g, instead certain types of costs  
25 related to system reliability were to be proposed

1 to be recovered.

2 Q. Do you know whether those costs were  
3 related to the purchase of planning reserves or  
4 what's also known as capacity reserves?

5 A. My general knowledge from reading the  
6 Commission's, for example, order in describing  
7 what the company had proposed, would be that I  
8 know those terms are related. I don't know about  
9 the calculation or I've not done an analysis of  
10 what the company proposed or has recovered through  
11 SRT.

12 Q. Okay. Do you know whether the Commission  
13 has approved a 15 percent reserve margin that is  
14 related to the SRT?

15 A. I know that a 15 percent reserve margin  
16 was discussed in the Commission's orders. I would  
17 have to check the orders to see if that had been  
18 approved.

19 Q. Okay. Do you know whether the company as  
20 part of the stipulation proposed a 17 percent  
21 reserve margin?

22 A. No, I don't.

23 Q. Do you know whether as part of the  
24 regulated company from the inception of the  
25 company Cinergy, that is, out of the CG&E/PSI

1 A. I think I'd be hard-pressed to say I've  
2 reviewed all the discovery. I've reviewed the  
3 discovery that I found relevant and pertinent to  
4 the issues that I was addressing in my testimony.

5 Q. And did that exclude information relative  
6 to the IMF and the SRT?

7 A. Well, I'm hard-pressed if I didn't review  
8 it to tell you what it included. So I can't tell  
9 you if I didn't review it.

10 Q. Okay. On Page 9 of your testimony you  
11 have a timeline. It doesn't include the contracts  
12 that you've been referring to as side agreements.  
13 We've discussed the contracts that were signed  
14 prior to the filing of May 19th, 2004. Which  
15 contracts were signed from [REDACTED]  
16 [REDACTED]

17 A. If you look at Page, I guess, little i of  
18 my testimony, the Table of Contents and  
19 Attachments, the agreements are listed and the  
20 dates are given.

21 So you can tell that after May of 2004,  
22 Attachment 5 dated [REDACTED] Attachment 6 dated  
23 [REDACTED], then Attachments 8 and 9 and  
24 10, 11 and 12, all seem to have occurred before  
25 [REDACTED]

1 merger, whether there was a settlement including  
2 OCC that prescribed CG&E to maintain a 17 percent  
3 reserve margin?

4 A. No, I don't.

5 Q. In the stipulation as part of the AAC --

6 MR. SMALL: You're referring to  
7 Exhibit 1?

8 MR. COLBERT: I'm referring to Exhibit 1.  
9 I'm sorry. I should have referred to it that way.

10 BY MR. COLBERT:

11 Q. Do you know whether there is -- Do you  
12 know the amount of revenue associated with  
13 capacity in the AAC?

14 A. No, I do not.

15 Q. Okay. Do you know whether the amount  
16 DE-Ohio has actually collected relating to  
17 capacity both for committing the Legacy CG&E  
18 capacity and for reserve capacity is more or less  
19 than the amount proposed in the stipulation?

20 A. Since I don't know the amount proposed in  
21 the stipulation nor the amount DE-Ohio's  
22 collected, no, I do not.

23 Q. Have you reviewed all of the discovery  
24 that was sent by DE-Ohio, DERS and Cinergy to OCC  
25 in this case?

1 Q. So basically Attachments 2 through 12.

2 A. I think that there's -- For example,  
3 Attachment 7 is a discovery response.

4 Q. Ah. Good point. Thank you.

5 A. Uh-huh.

6 Q. And what contracts were signed after  
7 [REDACTED]

8 A. If you look at Attachment 8 to my  
9 testimony, there's a table that lists all of the  
10 agreements that we've just discussed -- 18, excuse  
11 me, and I think if you look at all of the ones  
12 that are listed as option agreements, the dates  
13 are listed next to those, and a quick review tells  
14 me that none of those are dated prior to  
15 [REDACTED] and then finally, at the very  
16 bottom, there is a [REDACTED] agreement  
17 with [REDACTED]

18 Q. Okay. And do you know whether any of the  
19 contracts that were signed [REDACTED] and  
20 earlier, with the exception of certain [REDACTED] --  
21 no, City of Cincinnati contracts are still  
22 effective?

23 MR. SMALL: Objection to the extent that  
24 it calls for a legal conclusion regarding the  
25 effectiveness of a contract, but you can respond

1 concerning your understanding.

2 THE WITNESS: I know that the option  
3 agreements that I've identified and are contained  
4 in my testimony that are dated after November 23rd  
5 contain provisions that indicate they replace and  
6 supersede previous agreements, which I think cover  
7 the universe that you've described.

8 BY MR. COLBERT:

9 Q. I agree.

10 MR. COLBERT: Just for the record, and so  
11 we maybe can avoid the same objection over and  
12 over again, I'm not asking for her legal opinion  
13 as to any of this, merely her understanding, and  
14 she can respond as to that. If you would like a  
15 continuing objection, you can, and maybe that  
16 would short-circuit some of this.

17 MR. SMALL: It's a little bit awkward to  
18 have a continuing objection when we don't have a  
19 question pending, but it appears as though counsel  
20 understands that we're going to go through a  
21 series of questions and that Miss Hixon's  
22 responses are all subject to the same objection  
23 concerning legal conclusions and she'll be  
24 responding in that -- in that regard. Maybe you  
25 could tell us when we're out of such a period.

1 MR. COLBERT: Well, I mention it because  
2 I think it's throughout and I think Miss Hixon,  
3 you know, references a number of statutes and Ohio  
4 Administrative Code rules, et cetera, that I'm  
5 going to be asking about because they are in her  
6 testimony. So I'm certainly looking for responses  
7 to that based on her understanding, but also  
8 understand that you may continue to voice the same  
9 objection, so I'm simply recognizing that.

10 BY MR. COLBERT:

11 Q. Miss Hixon, on Page 13 of your testimony,  
12 you state that -- I believe this is at Line 8 --  
13 "DERS did not serve any customers as of  
14 December 31st, 2005".

15 Why are the counterparties to DERS  
16 contracts not customers in your view?

17 A. I think my reference to December 31st,  
18 2005 here is based on the information contained in  
19 their Intrastate Annual Report where they reported  
20 no sales of electricity, no gross receipts, and I  
21 believe I had a couple other sources for that.

22 My recollection is that in one of the  
23 renewal applications -- in the renewal application  
24 for DERS I believe a statement was made that they  
25 had no customers. I'd have to check that.

1 And then I think also in a couple of  
2 depositions, and I can't give you the transcript  
3 or the specifics, but I recollect a question being  
4 asked of whether or not DEO -- or, DERS had any  
5 customers, and I believe the answer was no.

6 So that's the basis of my opinion.

7 Q. [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 MR. SMALL: Objection. Asked and  
11 answered. We had that earlier in the deposition.

12 THE WITNESS: [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 BY MR. COLBERT:

16 Q. [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 A. I do not know.

20 Q. [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 A. [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 Q. Yes.

2 A. [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 Q. I agree.

6 A. [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 Q. Okay. At the bottom of Page 13 and the

14 top of Page 14 of your testimony, you list four

15 items that what you call prePUCO order side

16 agreements -- I call them contracts -- have in

17 common. Do you see that?

18 A. Yes.

19 Q. The first is the [REDACTED]

20 [REDACTED] Is that a fair

21 characterization of what you said?

22 A. Yes. I think I just phrased it "the

23 proposed ERRSP period".

24 Q. [REDACTED]

25 A. Right.

1 Q. And you're not suggesting that there's  
2 anything wrong with [REDACTED]  
3 [REDACTED]  
4 there, are you?

5 A. The statement that I'm making is that

6 [REDACTED]  
7 [REDACTED]  
8 I'm not in that statement making a  
9 judgment, because I don't provide any other  
10 details to say -- No, I'm not making a judgment at  
11 that point, no.

12 Q. Do you make a judgment at any point that  
13 a contract with a provision such as that is -- has  
14 a problem?

15 A. When you say "a provision such as that",  
16 this is a very broad term. [REDACTED]

17 [REDACTED]  
18 [REDACTED] -- or anything like that. I  
19 describe each of those provisions.

20 Then you asked if there's a -- if I have  
21 a problem with those provisions. I guess I have a  
22 concern with those provisions as they are part of  
23 the side agreements and something that I think the  
24 Commission should look at.

1 point for determining a price.

2 If a CRES provider used as a baseline, or  
3 what you said was a starting point, the MBSSO  
4 price approved by the Commission, is there  
5 anything wrong with that?

6 A. Subject to the rules that the Commission  
7 has about disclosure of pricing, which I'm not  
8 intimately familiar with, I think that a CRES  
9 supplier could define their own price.

10 Q. Okay. And they could define it in any  
11 way they chose as long as the customer agreed to  
12 the price and signed the contract; is that right?

13 A. Again, with the caveats that the price  
14 disclosure is pursuant to Commission rules. A  
15 CRES supplier who is going to provide generation  
16 could do that.

17 Q. Okay. Now, the third reason, the third  
18 commonality that you list there is "Support by  
19 Customer Parties for CG&E's Stipulation in the  
20 Post-Market Development Period Service Case". Do  
21 you see that? It continues on to Page 14.

22 A. I see that.

23 Q. [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 Q. Well, I certainly understand that's your  
2 recommendation and I'm trying to get a little bit  
3 of an understanding, for example, why you include  
4 that first provision in there.

5 Every CRES provider in the State that has  
6 a contract with a customer, whether they're  
7 affiliated with DE-Ohio or not, would be providing  
8 generation service to the customer party of their  
9 contract, would they not?

10 A. Every CRES would have a provision dealing  
11 with providing generation to the customer, yes.

12 Q. And by itself, there's nothing wrong with  
13 that. In fact, it would be, as we just discussed,  
14 universal to CRES providers that are actually  
15 providing service in Ohio; is that right?

16 A. By itself, there would be no problem with  
17 that. That's not what I'm describing here.

18 Q. I understand.

19 Now, the second provision that you have  
20 here is [REDACTED]

21 [REDACTED] I think I  
22 actually quoted it that time.

23 A. That's what it says.

24 Q. Okay. Now, earlier we discussed briefly  
25 the concept of a baseline, that is, a starting

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 A. Well, I guess what I'm asking first is,  
8 you mentioned the contracts or the side  
9 agreements. Are you saying specifically in these  
10 side agreements or are you just saying  
11 theoretically?

12 Q. I'm just saying theoretically. We can  
13 certainly talk about it in terms of a specific  
14 side agreement, if you wish, or a particular  
15 contract, if you wish. I'm flexible.

16 A. If, as you've defined it, [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 would -- you would attempt to define it.

2 Q. Uh-huh.

3 And, in fact, in the -- in the contracts

4 or side agreements that were entered into starting

5 [REDACTED] what I

6 would call, [REDACTED]

7 agree [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 If you know.

11 A. I don't think I could agree with that.

12 If you read the agreements, [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 So I don't think I could agree that the  
22 baseline that you're trying to describe was  
23 something that the Commission had yet to approve.

24 Q. Well, are there other terms and  
25 conditions in the same contract that talk about --

1 some importance on the words.

2 A. No. [REDACTED]

3 [REDACTED]

4 Q. Okay. The fourth commonality that you  
5 list is [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 A. Yes.

9 Q. Staying away from the contracts for a  
10 moment. [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 A. In a theoretical sense, [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 Q. Uh-huh.

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 A. [REDACTED]

6 [REDACTED]

7 Q. Right.

8 And the -- So -- [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 A. The reimbursements do.

15 Q. They do? Okay.

16 A. But they aren't listed as [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 Q. So you think there's significance in the

20 name?

21 A. I just pointed out that it [REDACTED]

22 [REDACTED]

23 Q. I'm not disagreeing with you. I'm saying

24 that as opposed to the function of what happens,

25 that is, you can perform the math, you're placing

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 A. [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 Q. Okay. And you don't know of any

13 counterparty to the contract that is not a DE-Ohio

14 affiliate that is not paying DE-Ohio all of the

15 approved charges by the Commission, do you?

16 A. I know nothing about what these parties

17 who are customers of DE-Ohio have paid to DE-Ohio.

18 Q. Okay.

19 A. I would -- No.

20 Q. Okay. Generally, when a customer enters

21 a contract with a CRES provider, you would expect

22 the customer to enter a contract for a lower price

23 than the one they are paying to their incumbent,

24 whether it's a utility or another CRES provider,

25 wouldn't you?

1 A. If the customer's goal was to save money  
 2 off of what they're currently paying, the answer  
 3 would be yes.  
 4 Q. And by customer goal, you mean they might  
 5 have other goals.  
 6 A. Sure.  
 7 Q. For example, service quality that might  
 8 influence them.  
 9 A. They could have other goals beside  
 10 service quality.  
 11 Q. Right. Reliability, whatever.  
 12 A. Green power.  
 13 Q. Green power. Sure.  
 14 On Page 27 and going over to Page 28 of  
 15 your testimony, you list five contract terms that  
 16 in your opinion appear to bind DE-Ohio to various  
 17 commitments.  
 18 Do you know whether it's possible that  
 19 DERS could satisfy those commitments through a  
 20 financial transaction with the applicable  
 21 counterparty?  
 22 A. No, I don't know.  
 23 Q. Are there any of the conditions that --  
 24 the five conditions that you list that are not  
 25 economic in nature?

1 A. Well, the actions that are described are  
 2 not economic in nature. [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 Q. [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

1 A. I don't recollect.  
 2 Q. So I guess that would mean you wouldn't  
 3 know when they ordered it?  
 4 A. I think I'd be pretty safe to say I  
 5 wouldn't know that if I don't remember.  
 6 Q. Okay. [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 A. I don't know whether your hypothetical  
 18 conditions would result in the same economic  
 19 value, but that's not what it -- the provision  
 20 provided for.  
 21 Q. I'm just asking what's possible.  
 22 A. I don't know whether that's possible or  
 23 not.  
 24 Q. Okay. At the bottom of Page 28 of your  
 25 testimony, starting on Line 14, you reference

1 Mr. Ficke, and you state that he was involved for  
 2 CG&E in the negotiation process of the contracts.  
 3 Do you see that?  
 4 A. Yes, I see that.  
 5 Q. And I notice that despite all of the  
 6 footnotes in your testimony, you didn't footnote  
 7 that. You attended the depositions. Was there a  
 8 particular reason that you didn't footnote that?  
 9 A. That would be advice of counsel.  
 10 Q. Did you have a particular passage of his  
 11 deposition in mind?  
 12 A. I recollect a series of questions about  
 13 the [REDACTED] agreements. I recollect a series of  
 14 questions addressing some of the types of  
 15 provisions that you and I just discussed that seem  
 16 to commit CG&E. And a question posed to Mr. Ficke  
 17 that in these agreements, given that these  
 18 provisions were in here, was there someone -- was  
 19 there a CG&E representative, and I recollect his  
 20 response that he said, "I was involved".  
 21 Q. Uh-huh.  
 22 Well, let's look at that. I'm going to  
 23 hand you what we're going to mark DE-Ohio  
 24 Exhibit 2, which is Pages 28 to 30 of Mr. Ficke's  
 25 deposition.

1 occasionally got e-mails from DERS. He said CRS  
2 representatives and from lawyers, but he didn't  
3 recall ever getting copies of option agreements,  
4 either drafts or final.

5 Is that -- Basically, he was saying that  
6 his involvement was pretty limited. Is that a  
7 fair characterization of his response?

8 A. I think his response speaks for itself.  
9 I don't know that I would say -- characterize that  
10 as limited.

11 Q. If you'd turn to Page 67 of that exhibit.  
12 It's the last page. Top left. OCC in its  
13 questioning characterized Mr. Ficke's statements  
14 as not specifically negotiating [REDACTED]  
15 agreements; is that correct?

16 MR. SMALL: Objection. OCC made no  
17 statements. Jeff Small made the statements.

18 BY MR. COLBERT:

19 Q. The question was by Mr. Small, was it  
20 not?

21 MR. SMALL: It was by Mr. Small, that's  
22 correct.

23 BY MR. COLBERT:

24 Q. So you didn't state it in a statement,  
25 you stated it in a question, is that --

1 and he's now a consultant?

2 A. I believe I read that in his testimony  
3 that he just filed in this case.

4 Q. In [REDACTED] responsibility as  
5 [REDACTED] do you know whether his  
6 group had any processing responsibilities  
7 regarding the DERS and Cinergy contracts or side  
8 agreements?

9 A. I don't know that his department  
10 necessarily had the responsibilities. I know from  
11 the depositions that people in his department were  
12 involved at different points related to processing  
13 and that in his testimony that he just filed he  
14 talked generally about he personally having some  
15 business use to deal with the agreements.

16 Q. But you don't know whether -- what  
17 responsibilities his group had as opposed to  
18 various individuals in his group where you've  
19 attended the depositions, such as [REDACTED]

20 A. From the depositions I've attended, it's  
21 not clear to me what his department's  
22 responsibility was.

23 MR. SMALL: Could we go off the record  
24 for just a second?

25 MR. COLBERT: Sure.

1 MR. SMALL: And it was Mr. Small.

2 MR. COLBERT: And it was Mr. Small,  
3 that's right.

4 THE WITNESS: Is there a question  
5 pending? If so, I forgot what it is.

6 MR. SMALL: I don't think so.

7 THE WITNESS: Okay.

8 BY MR. COLBERT:

9 Q. At the bottom of Page 66, just before --  
10 the answer just before Mr. Ficke in response to a  
11 question by Mr. Small said that he wasn't involved  
12 in the option agreements. Is that a fair  
13 characterization?

14 A. Mr. Ficke's answer says, "You know, not  
15 being involved in the option agreements...", and  
16 then he goes on from there, yes.

17 Q. Okay. Are you familiar with a [REDACTED]  
18 [REDACTED]

19 A. I've dealt with [REDACTED] in some  
20 matters -- regulatory matters with CG&E in the  
21 past.

22 Q. Okay. Are you generally aware that  
23 [REDACTED] was [REDACTED] an  
24 employee of Cinergy Shared Services Corp., now  
25 known as Duke Energy Shared Services Corporation,

1 (Recess taken.)

2 BY MR. COLBERT:

3 Q. Miss Hixon on Page 32 of your testimony,  
4 you list four items. I believe they're basically  
5 the same four items we previously discussed; is  
6 that correct?

7 A. Yes.

8 Q. Except this time they are in reference to  
9 the prehearing -- what you call the prehearing  
10 agreements?

11 A. Yes.

12 Q. Okay. And if I asked you the same  
13 questions about these four items, would your  
14 answers be the same?

15 A. I would give just one qualification. Of  
16 course, Item 3 in the first group related to  
17 support for the stipulation in May and this  
18 relates to support for the application for  
19 rehearing. That would be the only change.

20 Q. Fair enough.

21 MR. SMALL: I'm not sure. Did you  
22 misspeak? Did you say "prehearing"?

23 MR. COLBERT: Pre-rehearing. I  
24 apologize. You're right.

25 MR. SMALL: I was looking for prehearing

1 and I didn't --

2 MR. COLBERT: No, I misspoke. You're  
3 correct, it's pre-rehearing.

4 BY MR. COLBERT:

5 Q. On Page 33, you've got a table that shows  
6 the components of the MBSSO.

7 Can you tell me what you mean by the very  
8 first component you call a tariff generation rate?  
9 What is the tariff generation rate?

10 A. It's my understanding that under the  
11 stipulation and the alternative proposal a rate  
12 stabilization charge was created. That that rate  
13 stabilization charge was equal to 15 percent of  
14 little g and that the remaining 85 percent of  
15 little g became what I'm calling here tariff  
16 generation rate.

17 Q. And just for the record, would you define  
18 little g?

19 A. Little g would be CG&E's tariffed  
20 generation rates during the market development  
21 period.

22 Q. Not less RTC?

23 A. No, because RTC is a separate rider.  
24 Your tariff generation rate would have been  
25 little g; right?

1 rest of it, the remaining 85 percent, would become  
2 CG&E's tariff generation rate.

3 BY MR. COLBERT:

4 Q. On your table, under the system  
5 reliability tracker, you have nonbypassable for  
6 nonresidential customers.

7 A. Yes.

8 Q. Is that your understanding, that it's  
9 nonbypassable?

10 A. That, subject to check, was my  
11 understanding of what CG&E proposed in their  
12 alternative proposal.

13 Q. Okay.

14 A. And my source here was the Commission's  
15 entry on rehearing at 7 through 9 where the  
16 Commission characterized your proposal. Assuming  
17 the Commission characterized it and I read it  
18 correctly, that's my understanding.

19 Q. I think you're right. I was thinking --  
20 I misread it, what you were characterizing. Thank  
21 you.

22 On Page 39 of your testimony, you suggest  
23 that Paragraph 12 of the contract with various  
24 [REDACTED]  
25 [REDACTED]

1 Q. If that's your understanding, that's  
2 okay.

3 A. Well, let me -- let me....

4 MR. COLBERT: Can we go off the record  
5 for a second?

6 (Discussion held off the record.)

7 MR. COLBERT: Back on the record.

8 THE WITNESS: In regards to the  
9 description of little g as the tariff generation  
10 rate during the market development period, it's my  
11 understanding that for CG&E what during the ETP  
12 cases would have been characterized as big G,  
13 which included RTC, and for many companies their  
14 tariff generation rate during the MDP would have  
15 been big G minus RTC would be equal to little g,  
16 and that would have been their tariffed rate.

17 I do recollect that during the market  
18 development period there was -- for lack of a  
19 better word -- an implicit RTC, and so that,  
20 therefore, the tariff generation rate for CG&E  
21 would have been little g plus the RTC.

22 Going back to my table, still my  
23 understanding that that little g component was  
24 divided and proposed to be divided into  
25 two pieces, an RSC equal to 15 percent, and the

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 Is that consistent with your  
8 understanding of that provision?

9 MR. SMALL: Objection. First of all,  
10 he's misread the testimony in your initial  
11 statement about the quote that appears on Page 39.

12 You can reread that if you want, but you  
13 mischaracterized what that -- what that quote  
14 says. I don't know if you want to rephrase the  
15 question without that reference, but you misquoted  
16 it.

17 BY MR. COLBERT:

18 Q. Okay. I'm looking at the contract  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 Do you have that agreement?  
23 A. I have that.

24 Q. Okay. And I apologize for the confusion,  
25 because I think Mr. Small is right, somehow I got  
the wrong reference in your testimony, but we can



1 talk about the particular paragraph.

2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]

5 A. Yes, if you'll give me a moment.

6 Q. Okay. You're probably better at finding  
7 it than I am.

8 (Pause.)

9 A. [REDACTED]  
10 [REDACTED]  
11 [REDACTED]

12 Q. Which page of your testimony are you on?

13 A. At Page 39.

14 Q. This is Page 39. I'm sorry. I'm blind.  
15 Which lines are you looking at?

16 A. [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 Q. Thank you. I appreciate you pointing  
22 that out for me.

23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 MR. SMALL: I'm sorry. What agreement  
5 are you --

6 MR. COLBERT: [REDACTED]  
7 [REDACTED]

8 MR. SMALL: [REDACTED]  
9 MR. COLBERT: [REDACTED]

10 MR. SMALL: [REDACTED]  
11 MR. COLBERT: Do you have it?

12 MR. SMALL: What's the beginning? I just  
13 want to see the beginning of this.

14 MR. COLBERT: Sure.

15 MR. SMALL: Okay. I've got it.

16 BY MR. COLBERT:

17 Q. [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

20 A. [REDACTED]  
21 [REDACTED]

22 Q. Right.  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]

5 A. [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8 Q. [REDACTED]  
9 [REDACTED]  
10 [REDACTED]

11 [REDACTED]  
12 [REDACTED]

13 A. Yes, that's what I state.

14 Q. Okay. [REDACTED]  
15 [REDACTED]  
16 [REDACTED]

17 A. [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 Q. Okay.  
24 A. [REDACTED]  
25 [REDACTED]

26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

29 Q. Okay.  
30 A. [REDACTED]  
31 [REDACTED]

32 [REDACTED]  
33 [REDACTED]  
34 [REDACTED]

35 [REDACTED]  
36 [REDACTED]  
37 [REDACTED]

38 Q. [REDACTED]  
39 [REDACTED]  
40 [REDACTED]

41 A. Right.  
42 Q. Right.

43 A. And the Commission's order was the next  
44 day, on the 23rd.

45 Q. Uh-huh.  
46 A. Okay. I just wanted to make sure I was

47 right on the time.  
48 Q. Yeah.

49 A. Okay.  
50 Q. [REDACTED]  
51 [REDACTED]

52 [REDACTED]  
53 [REDACTED]  
54 [REDACTED]

55 [REDACTED]  
56 [REDACTED]  
57 [REDACTED]

58 A. [REDACTED]  
59 [REDACTED]  
60 [REDACTED]

61 [REDACTED]  
62 [REDACTED]  
63 [REDACTED]

64 Q. Okay.  
65 A. [REDACTED]  
66 [REDACTED]

67 [REDACTED]  
68 [REDACTED]  
69 [REDACTED]

70 [REDACTED]  
71 [REDACTED]  
72 [REDACTED]

1 [REDACTED]  
2 Q. Do you know when [REDACTED] switched to a  
3 CRES provider?

4 A. From CG&E?

5 Q. Uh-huh.

6 A. No.

7 Q. Okay. [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]  
11 [REDACTED]  
12 A. [REDACTED]

13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]

16 [REDACTED]  
17 Q. Uh-huh.  
18 A. [REDACTED]

19 [REDACTED]  
20 [REDACTED]

21 Q. Okay. You were present at the deposition  
22 of [REDACTED] weren't you?

23 A. Yes.

24 Q. And do you recall Mr. Small asking him  
25 about whether or not they had [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]

4 A. I can't say that I recollect that  
5 specific question and answer.

6 Q. [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9 A. I at this point in time don't remember  
10 that, no.

11 Q. Fair.

12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]

15 [REDACTED]  
16 [REDACTED]  
17 A. If I can have one moment, please.

18 Q. Sure.

19 A. [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

25 [REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]

4 Q. Okay.

5 A. That's my knowledge of the payments for  
6 [REDACTED] and from [REDACTED].

7 Q. Okay. And you reference Page 48 of your  
8 testimony [REDACTED]

9 [REDACTED] On Line 19, I believe.

10 A. Yes, the evidence that I've seen says  
11 that.

12 Q. Okay.

13 A. I would also note Attachment 76 -- I'm  
14 sorry, Footnote 76, Attachment 16, we requested  
15 from DERS whether or not payments were made  
16 pursuant to that contract and DERS said payments  
17 were made by [REDACTED].

18 Q. Okay. If you'll turn to Page 54 of your  
19 testimony. You reference, I think, on Line 13 a  
20 history related to the option agreement set forth  
21 by Jim Ziolkowski, a Duke Energy Shared Services  
22 employee in the Rates Department; is that right?

23 A. Yes, I reference that.

24 Q. Okay. And are you referring specifically  
25 to an e-mail written by Mr. Ziolkowski that is

1 Attachment 21 to your testimony?

2 A. Yes.

3 MR. COLBERT: We'll mark this as DE-Ohio  
4 Exhibit 5.

5 ---

6 Thereupon, DE-Ohio Exhibit No. 5 was  
7 marked for purposes of identification.

8 ---

9 BY MR. COLBERT:

10 Q. On Page 35, Mr. Small asked  
11 Mr. Ziolkowski what he meant by the term risky.  
12 Do you see that? It's at the top of Page 35.

13 A. I see that at Lines 2 through 4.

14 Q. Uh-huh.

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]

18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

24 [REDACTED]  
25 [REDACTED]

1 [REDACTED]  
 2 Q. [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 That would not be what we call an option  
 8 contract; right? I think this would be a  
 9 pre-hearing -- what you call a pre-hearing  
 10 contract; is that correct?

11 A. Well, subject to check, which we can do,  
 12 because it's Exhibit 4 to this deposition.

13 Q. [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]

17 MR. SMALL: Just for the record, that's  
 18 Exhibit 10 to her testimony.

19 MR. COLBERT: That's fine.

20 THE WITNESS: The agreement that's  
 21 referenced here is the [REDACTED]  
 22 agreement between [REDACTED] and [REDACTED]

23 BY MR. COLBERT:

24 Q. Okay. And Mr. Small asked whether there  
 25 was something in the pricing of that contract that

1 caused risk, and Mr. Ziolkowski answered that he  
 2 didn't know; is that right?

3 A. Mr. Small asked, "Is there something in  
 4 this agreement which is a [REDACTED]"

5 [REDACTED]  
 6 [REDACTED] and Mr. Ziolkowski said he did  
 7 not -- "I don't know".

8 Q. Okay. And, in fact, in subsequent  
 9 questioning, Mr. Ziolkowski indicated that he  
 10 hadn't performed any risk analysis and he knew of  
 11 no one else who had performed a risk analysis; is  
 12 that correct?

13 A. He was asked, "Did you ever do any  
 14 analysis on this?", and his response was, "No".

15 Q. And then there was more thereafter  
 16 continuing to the top of Page 36; isn't that  
 17 right?

18 A. Well, I think the question at the bottom  
 19 of Page 34 -- I'm sorry, 35 to 36, "Did you, and  
 20 specifically with respect to the risk you referred  
 21 to in your e-mail" -- versus risk in this  
 22 particular agreement -- "did you discuss that  
 23 feature of the CRES settlements with anyone else  
 24 in the company?" He said, "No".

25 Q. Yes. And he said that he didn't remember

1 who had decided that the contracts were too risky;  
 2 right? And there was a question about whether  
 3 that was someone in the rate department, and he  
 4 said, "Possibly, yes"; right?

5 A. That's his answer on Page 36.

6 ---  
 7 Thereupon, DE-Ohio Exhibit No. 6 was  
 8 marked for purposes of identification.

10 MR. SMALL: Your earlier ones were marked  
 11 as being Ficke exhibits, but these things are not.  
 12 You need to say what they are.

13 MR. COLBERT: Sure. I'm sorry. This is  
 14 Page 39 to 42 of Mr. Ziolkowski's deposition  
 15 transcript, and I believe this is in the  
 16 confidential portion of it, as we're still under  
 17 seal here.

18 MR. SMALL: Yes. Could we go off the  
 19 record for a second?

20 (Discussion held off the record.)

21 BY MR. COLBERT:

22 Q. On Page 40, Mr. Small asks Mr. Ziolkowski  
 23 about option agreements. Do you see that?

24 A. Can you give me a line number, please?  
 25 Because no, I don't see it.

1 Q. Yes. I'm looking at where it's  
 2 appropriate, but I think starting on Page 6 -- or,  
 3 Page 6 -- or, Line 6. I'm sorry.

4 A. Okay.

5 Q. There's a series of questions that  
 6 follows.

7 A. I see that.

8 Q. Okay. And Mr. Ziolkowski responded that  
 9 he had never seen an option agreement; is that  
 10 right? I believe that's Line 17.

11 A. He says at Lines 17 -- 16, 17 and 18,  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]

16 ---  
 17 Thereupon, DE-Ohio Exhibit No. 7 was  
 18 marked for purposes of identification.  
 19 ---

20 BY MR. COLBERT:  
 21 Q. Okay. Exhibit 7, DE-Ohio Exhibit 7, is  
 22 Pages 66 through 73 of Mr. Ziolkowski's deposition  
 23 transcript.

24 At Page 69 of the transcript, Mr. Small  
 25 asked Mr. Ziolkowski how the payments were

1 accurately processed if he was not familiar with  
2 the contracts. Do you see that?  
3 A. I see at Line 13 in the middle of the  
4 question, "...how did you know that your  
5 calculations were accurate if you didn't have the  
6 underlying agreements or you were unfamiliar with  
7 the underlying agreements?"

8 Q. Uh-huh.

9 And Mr. Ziolkowski responded with a  
10 number of things regarding a -- ending on Page 70  
11 referencing a monthly report that was generated  
12 automatically. Do you see that?

13 A. I see the statement about each month a  
14 report was generated, but that's quite a few  
15 questions after the question that you started  
16 with.

17 Q. Well, they're all related, are they not?  
18 I mean, take a minute to read them. I think it's  
19 a sequence.

20 MR. SMALL: I've been patient about this,  
21 but we're spending a huge amount of time asking  
22 the witness whether she can read a transcript. I  
23 haven't heard a question for 15 minutes here that  
24 have anything to do with her knowledge other than  
25 that she can read a transcript.

1 objections are ridiculous and we're certainly  
2 going to compare this to what she has stated in  
3 her testimony, and we think that it shows that in  
4 a number of areas her testimony is an inaccurate  
5 representation of what the deposition witnesses  
6 said and we're certainly entitled to do that.

7 I certainly don't need you to tell me  
8 what deposition questions are ridiculous or not.  
9 Now, we're trying to get through this and we're  
10 doing it in an orderly manner. This is the last  
11 one, I believe, of the questions that refer to any  
12 of the transcripts.

13 BY MR. COLBERT:

14 Q. Did you read the series of questions from  
15 the bottom of Page 69 -- or, Line 11 of 69 through  
16 Line 21 of Page 70?

17 A. I've read that.

18 Q. Okay. Would you agree that those  
19 questions are a series of questions regarding the  
20 accuracy of the calculations made monthly by  
21 Mr. Ziolkowski?

22 A. The question on Page 69, Lines 11 through  
23 16, deals with the accuracy. The question  
24 beginning on Page (sic) 24 and those continuing on  
25 Page 70 ask additional questions about the

1 MR. COLBERT: No, I think, actually, this  
2 is the last one.

3 MR. SMALL: Well, this is the last one of  
4 what? You haven't asked a question of the  
5 witness. You're just asking her to read a  
6 transcript.

7 MR. COLBERT: I'm asking her whether she  
8 thinks these are accurate characterizations of  
9 what the witnesses said.

10 MR. SMALL: And she is just saying that  
11 this is what the words say on the piece of paper.

12 MR. COLBERT: And that's fine with us.

13 MR. SMALL: We don't need an expert  
14 witness to read to DE-Ohio's attorney.

15 MR. COLBERT: Well, DE-Ohio does, so  
16 we're going to ask that --

17 MR. SMALL: Well, if this continues,  
18 we'll end the deposition.

19 MR. COLBERT: As I said, this was the  
20 last question in this.

21 MR. SMALL: This is the last ridiculous  
22 question, is that what you're telling me? It  
23 doesn't help very much. It's a ridiculous  
24 question that she can read what's in a transcript.

25 MR. COLBERT: Mr. Small, I think your

1 information used, the nature of demand and energy,  
2 the accounts, and anything else that was needed  
3 for your work.

4 Q. Okay. And Mr. Ziolkowski received his  
5 information from, as he says, a monthly --  
6 Well, each month a report was generated  
7 automatically. And he goes on with that answer.  
8 You can add anything to that that you wish.

9 A. I don't see that he says he received a  
10 report. He says that each month a report was  
11 generated automatically with these accounts that  
12 showed demand and energy. I don't see him saying  
13 he received that or who he received it from. It's  
14 not clear.

15 And then if you go on down Page 70, he  
16 talks about those reports being generated on a  
17 network. He talks about pulling the information  
18 up and putting it into Excel into their  
19 calculations, so I don't know that he received it  
20 as much as he went out and got it. And I'm not  
21 sure whether the monthly report he's referring to  
22 is where he got the information or what he  
23 generated. It's not real clear.

24 Q. Okay. Thank you.

25 On Page 56 of your testimony, you list

1 four reasons why the contracts that we've been  
2 discussing for some time should be considered by  
3 the Commission.

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 A. [REDACTED]  
8 [REDACTED]  
9 [REDACTED]

10 [REDACTED]  
11 [REDACTED]

12 Q. The provision that you're referring to  
13 there, [REDACTED]

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]

17 [REDACTED]  
18 A. [REDACTED]

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 [REDACTED]  
23 [REDACTED]

24 Q. Do you know if that's the entirety of the  
25 rule?

1 deals with that.

2 Q. Okay. Are you familiar with the results  
3 of various auction and RFP processes in different  
4 states?

5 A. No, not really.

6 Q. New Jersey? Maryland? Illinois?

7 A. I know that auctions have occurred there.  
8 I know that in some states prices have been set by  
9 them, but as to the specifics and the states and  
10 what those results are, I don't.

11 Q. Do you know generally in direction  
12 whether prices have increased after the auctions  
13 or RFPs have gone into effect as opposed to  
14 decreasing?

15 A. Since I don't know in what states the  
16 prices have been set by auction, no, I don't.

17 Q. Okay. Your second reason is the  
18 impediment of the development of the competitive  
19 retail electric service market as a result of the  
20 contracts. Do I understand that correctly?

21 A. My second reason on Page 56 is that the  
22 Commission should consider the side agreements in  
23 light of the fact that they've impeded market  
24 development.

25 Q. Do any of the contracts involve

1 A. I know it's not the entirety because it's  
2 not a capitalized quote.

3 Q. Thank you.

4 Do you have a recommendation for a  
5 competitive bid process?

6 A. No. The recommendations that I have are  
7 in my testimony. The recommendations in regards  
8 to what the MBSSO should or should not be are in  
9 Mr. Talbot's testimony.

10 Q. And you consider the competitive bid  
11 process part of the MBSSO?

12 A. To the extent that the MBSSO, market  
13 based standard service offer, is post-MDP pricing  
14 for generation service. Well, I may have  
15 misspoken using the term "MBSSO". I think the  
16 term I should have used is simply standard service  
17 offer and/or competitive bidding as the rule says.  
18 That was probably a slip of my tongue.

19 Q. Actually, I think you were right. I  
20 believe it is part of the MBSSO. It's not tricky.

21 A. It's post-MDP generation pricing that I'm  
22 concerned with. My testimony doesn't address what  
23 that pricing --

24 Q. How it's derived?

25 A. How it should be derived. Mr. Talbot

1 residential customers?

2 A. No.

3 Q. And DERS is a certified competitive  
4 retail electric service provider now; is that  
5 correct?

6 A. Now, yes.

7 Q. Okay. So most of the contracts that  
8 we're talking about here are contracts between a  
9 certified competitive retail electric provider and  
10 consumers.

11 A. Well, I think I better have you define  
12 "most of the contracts we're talking about here".

13 Q. I'm talking about all of -- all of the  
14 DERS -- all of the DERS contracts, I guess. Don't  
15 need to talk about what's excluded.

16 A. Well, as my testimony has explained,  
17 there's different agreements at different points  
18 in time. At some point in time DERS or its  
19 predecessor was not yet certified as a CRES in  
20 Ohio.

21 In addition, I believe we've had  
22 discussion where I do not make the judgment as to  
23 whether these agreements are CRES contracts.

24 In addition, some of the agreements are  
25 between Cinergy Corp. One of the -- Two of the

1 agreements are between Cinergy Corp. and a  
2 customer, and Cinergy Corp. as you've told me is  
3 not a CRES.

4 With those caveats, I mean, that's my  
5 understanding of the agreements.

6 Q. You have several times during our  
7 conversation raised the issue that there was a  
8 time when CRS was not a -- was not certified.

9 What's the significance of your statement  
10 in that regard?

11 A. Well, most recently you asked me whether  
12 or not it was a contract between a CRES provider  
13 and I distinguished whether or not that entity at  
14 that time was a CRES. That's why I made that  
15 statement.

16 Q. You mean at the time the contracts were  
17 signed?

18 A. Yes.

19 Q. Okay.

20 A. Because that's what you asked.

21 Q. Do you know when CRS started preparing  
22 for its certification process?

23 MR. SMALL: Objection. Calls for her to  
24 respond to what your company was doing.

25 To the extent you can, answer that.

1 MR. COLBERT: To the extent she knows.

2 THE WITNESS: I do not know when CRS  
3 began preparations for certification in Ohio.

4 BY MR. COLBERT:

5 Q. The market development period began  
6 January 1st of 2001, is that your understanding?

7 A. Yes.

8 Q. And do you know whether CRES providers  
9 generally started signing up -- signing up  
10 customers prior to that date and prior to the time  
11 they were certified in preparation to begin giving  
12 service January 1st, 2001?

13 A. I do not know.

14 Q. Do you know whether any consumer started  
15 taking service from CRES providers on January 1st,  
16 2001?

17 A. I have no personal knowledge and I cannot  
18 think of anyplace where I've seen something that  
19 would tell me the answer to that.

20 Q. Okay.

21 A.

22 Q. Are there other regulatory problems  
23 besides those listed that you had in mind for  
24

1 No. C?

2 A. I discuss them on Page -- beginning on  
3 Page 68.

4 Q. Okay.

5 A. As I describe it on Lines 13 and 14, that

6 Q. Are you aware of any consumers that  
7 sought service from DERS that were -- that asked  
8 for -- for a contract that were turned down?  
9 A. No.  
10 Q. Do you know whether there are any  
11 additional contracts besides the ones that you  
12 have discovered?  
13 A. I'm not aware of any contracts that DERS  
14 or its predecessor had with any other customers  
15 other than the ones that were provided to us.  
16 Q. If you were to learn that DERS had had

17 other inquiries subsequent to these and had given  
18 an option contract at each request, that is, had  
19 never turned down a request for an option  
20 contract, would that change your opinion?

21 A. My opinion of what?

22 Q. I guess what I'm having trouble with is  
23 that you're giving me a hypothetical, I assume,  
24 that there were additional offers made or asked  
25 for and that DERS never turned them down to other  
customers, and I have no basis to even think that  
that occurred, given that everything that I see  
about DERS tells me that they have no customers  
and that the expenses associated with option  
payments in their financial statements are related  
to the agreements that were given to us. So I'm  
having trouble making that assumption.

Q. Well, that's an interesting statement you  
just made.  
Did you do any financial analysis to  
determine whether the option payments that are  
contained in the various financial statements that  
you've received from DERS are exclusively related  
to the contracts that you've received?  
A. You asked if I did any analysis. I did

1 not do any other analysis. I know that in the  
2 deposition of Mr. Savoy there were a series of  
3 questions in regards to what was in the financial  
4 statements and that he was not aware of any  
5 other -- My recollection is that he was not aware  
6 of any other customers that they had other than  
7 the agreements that we were discussing. So that's  
8 the basis of my understanding.

9 Q. I'll ask you the theoretical again.

10 If the basis for your understanding is  
11 mistaken, if in every instance that -- Well, let  
12 me back up before I ask that question.

13 You made one other assumption. You made  
14 assumptions that DERS offered these contracts as  
15 opposed to consumers, customers, coming to DERS  
16 and requesting service. Is that your belief of  
17 what has happened here?

18 A. No. I didn't make that assumption. I  
19 think in responding to your question I said either  
20 DERS offered or people asked for. I assumed it  
21 would come either way.

22 Q. Okay. I may have misheard it then.

23 With that clarification, if the basis of  
24 your assumption is mistaken so that in each  
25 instance where DERS has been approached to provide

1 Q. Was DERS or Cinergy a party to these  
2 proceedings prior to the Commission's  
3 November 23rd, 2004 entry on rehearing?

4 A. No, I don't believe they were.

5 ---

6 Thereupon, DE-Ohio Exhibit No. 8 was  
7 marked for purposes of identification.

8 ---

9 BY MR. COLBERT:

10 Q. This is DE-Ohio Exhibit 8. It is a side  
11 agreement between CG&E and OCC dated May 8th,  
12 2000.

13 Are you familiar with this agreement?

14 A. Is this the agreement provided to Duke  
15 Energy Ohio in OCC's second response to the second  
16 set of discovery in this case?

17 Q. No. I confess I'm not sure what  
18 agreement that was. This was never filed.

19 MR. SMALL: Pardon?

20 MR. COLBERT: This agreement --

21 MR. SMALL: I know. But she's looking at  
22 a document for discovery without attachments.  
23 This would have been an attachment if -- had it  
24 been provided.

25 THE WITNESS: Okay.

1 a contract, it has provided such a contract on  
2 terms negotiated with the customers, would that  
3 change your opinion regarding the discriminatory  
4 aspect of these contracts?

5 A. No, I do not believe so. I believe that  
6 the side agreements as presented here are related  
7 to the Post-MDP Service Case and for all the  
8 reasons that I've discussed in my testimony are  
9 related to obtaining generation pricing plans  
10 proposed by Duke Energy Ohio that were acceptable  
11 and in exchange offering benefits to certain  
12 customer parties, and that those customer parties  
13 as a result received benefits or economic value  
14 that discriminated against other consumers.

15 Q. The final reason, Reason No. 4, [REDACTED]

16 [REDACTED]  
17 [REDACTED] believe that's at the  
18 bottom of the Page 56.

19 A. Well, I think you've added some  
20 commentary there, [REDACTED]

21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 MR. SMALL: Is that our document or  
2 DE-Ohio's document?

3 THE WITNESS: Yes, that's ours.

4 I'm sorry. I misspoke. I was thinking  
5 that this was somehow provided in discovery.

6 BY MR. COLBERT:

7 Q. I don't believe so.

8 A. No. I totally -- I'm sorry.

9 Q. We would have if you had asked, but I  
10 don't believe that --

11 A. I'm sorry. Could you ask the question  
12 again, please?

13 Q. Are you familiar with this agreement?

14 A. I may have seen it at one time. I am not  
15 more than generally familiar with it.

16 Q. Okay. Do you recognize the cases,  
17 99-1658, et cetera, as being DE-Ohio's, then  
18 CG&E's transition plan case?

19 A. Yes. 99-1658-EL-ETP.

20 Q. [REDACTED]

21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

25 A. No.

1 Q. No?  
 2 A. I don't see that.  
 3 Q. I'm sorry. [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 A. [REDACTED]  
 7 [REDACTED] I see an  
 8 agreement that some contribution was intended to  
 9 be made.  
 10 Q. Oh, okay. Fair enough.  
 11 [REDACTED]  
 12 [REDACTED]  
 13 A. Right.  
 14 Q. Do you know whether it was actually paid?  
 15 A. I have no knowledge of that.  
 16 Q. Okay. In Paragraphs 4 and 5, do you see  
 17 references to confidentiality agreements?  
 18 A. Uh-huh.  
 19 Q. Okay. And do you know whether those  
 20 confidentiality agreements were ever executed?  
 21 A. I don't remember. I don't know.  
 22 Q. And the last page, the agreement is  
 23 signed by [REDACTED]  
 24 [REDACTED]  
 25 correct?

1 A. That's his signature and the title, yes.  
 2 Q. And to your knowledge, were these -- was  
 3 this agreement ever made public? Was it ever  
 4 filed at the Commission?  
 5 A. I don't believe it was ever filed at the  
 6 Commission. I don't know whether it was ever made  
 7 public or not.  
 8 Q. Okay.  
 9 MR. SMALL: Did we make that an exhibit?  
 10 MR. COLBERT: Yes, Exhibit 8.  
 11 ---  
 12 Thereupon, DE-Ohio Exhibit No. 9 was  
 13 marked for purposes of identification.  
 14 ---  
 15 BY MR. COLBERT:  
 16 Q. Handing you now what we're marking as  
 17 Exhibit 9, DE-Ohio Exhibit 9. This is a Supreme  
 18 Court case that was --  
 19 MR. SMALL: This is a Supreme Court  
 20 decision.  
 21 MR. COLBERT: I'm sorry.  
 22 BY MR. COLBERT:  
 23 Q. Well, Supreme Court decision, that's  
 24 right, that among other things references an  
 25 agreement between DP&L and OCC that OCC, I

1 believe, has litigated in several venues.  
 2 Are you familiar with the agreement that  
 3 I'm referencing?  
 4 A. Can you show me in the order where it  
 5 references the agreement?  
 6 Q. If you look at Paragraph 17 on Page 3, it  
 7 refers to "...a separate one-page sidebar  
 8 agreement between DP&L and the Consumers' Counsel.  
 9 In that sidebar agreement from June 2000, DP&L..."  
 10 A. Yes, I see that.  
 11 Q. Are you familiar with that agreement?  
 12 A. Yes.  
 13 Q. Okay. And that was an agreement between  
 14 OCC and DP&L that was also not filed at the  
 15 Commission and was not made public; is that  
 16 correct?  
 17 A. It was not filed at the Commission, but  
 18 it clearly was made public.  
 19 Q. When was it made public?  
 20 A. I don't know the initial date that it was  
 21 made public.  
 22 Q. Was it made public in 2000 when it was  
 23 signed?  
 24 A. I don't think so.  
 25 Q. Do you know was there a confidentiality

1 clause attached to the agreement?  
 2 A. I do not remember.  
 3 Q. Do you know whether OCC happened to find  
 4 the agreement sometime later after Mr. Tongren  
 5 left as Consumers' Counsel when looking through  
 6 its files?  
 7 A. No, I don't know that.  
 8 Q. You don't know. Okay.  
 9 ---  
 10 Thereupon, DE-Ohio Exhibit No. 10 was  
 11 marked for purposes of identification.  
 12 ---  
 13 BY MR. COLBERT:  
 14 Q. Handing you what is marked as DE-Ohio  
 15 Exhibit 10. This is several documents. It's an  
 16 affidavit of Mr. Jock Pitts of PWC with certain  
 17 attached e-mails, although I will note that the  
 18 e-mails, there are some, it has been represented  
 19 to us, missing pieces, because of the  
 20 confidentiality provision OCC -- or, OCC -- PWC  
 21 did not feel it appropriate to reveal the contents  
 22 of the discussions, but in these very cases OCC  
 23 apparently held settlement discussions that both  
 24 excluded DE-Ohio and other parties from those  
 25 discussions and made settlement proposals.



1 Were you a participant in those  
2 discussions?  
3 A. May I have a few minutes to read this?  
4 Q. Yes.  
5 (Pause.)  
6 A. Okay. I think the question you had is  
7 whether I was involved in those discussions.  
8 Q. Uh-huh.  
9 A. I heard your description of the  
10 discussions. While I may not be aware of them in  
11 the sense of the representation that you've given,  
12 I am aware that OCC had discussions with parties  
13 about this case and that I at times was asked to  
14 participate or attend those discussions and, in  
15 fact, as, for example, the May 13th, 2004 e-mail  
16 was cc'd to me. That's my knowledge.  
17 Q. Well, let's look at the May 13th, 2004  
18 e-mail for a minute.  
19 That e-mail, the subject of which was  
20 "Confidential Settlement Proposal" sent by,  
21 apparently, your counsel, Mr. Small --  
22 MR. SMALL: It doesn't say that.  
23 MR. COLBERT: I think the subject line  
24 says, "Confidential Settlement Proposal".  
25 MR. SMALL: Doesn't say I sent it.

1 MR. COLBERT: I believe right below that  
2 it says, "Sent on behalf of Jeff Small".  
3 MR. SMALL: On behalf of. Doesn't mean I  
4 sent it.  
5 BY MR. COLBERT:  
6 Q. Okay. On the "To" line it has first  
7 [REDACTED] Do you know who that might be?  
8 A. I think it's [REDACTED]  
9 Q. And who does -- Who did he represent in  
10 the case?  
11 A. I know he at least represented some of  
12 the members of [REDACTED]  
13 Q. Okay. And the next one is  
14 [REDACTED] Do you know who that is?  
15 A. I believe it's [REDACTED]  
16 Q. And did he represent a party in the case  
17 or was he a party in the case?  
18 A. Subject to check of who represented who,  
19 I think he represented in this particular case  
20 [REDACTED]  
21 Q. And who are they? Are you familiar with  
22 the group, what do they do?  
23 A. I am familiar that they represent  
24 interests at times related to community --  
25 Q. Action agencies?

1 A. -- community action agencies, yes, but  
2 beyond that, I don't know specifically who they  
3 are in this service territory.  
4 Q. Do you know whether Miss -- the current  
5 Consumers' Counsel, Miss Migden-Ostrander, was  
6 prior to becoming Consumers' Counsel on OPAC's  
7 board?  
8 A. I don't know.  
9 Q. Do you know who [REDACTED]?  
10 A. I think it's probably [REDACTED] who's an  
11 attorney.  
12 Q. And do you know who he represented in  
13 this case?  
14 A. I know from my current involvement that  
15 he represents [REDACTED]  
16 Q. How about [REDACTED]  
17 [REDACTED]  
18 A. I'm familiar with the name. I don't know  
19 who he represents.  
20 Q. Could it have been the [REDACTED]  
21 A. I don't know.  
22 Q. Don't know.  
23 [REDACTED] and I notice  
24 [REDACTED]  
25 A. I know that Sally Bloomfield from my

1 current involvement represents the [REDACTED]  
2 [REDACTED]  
3 Q. Do you know who else she's represented in  
4 this case?  
5 A. No. But I believe earlier you asked me  
6 if I knew whether she represented another party,  
7 and I didn't know then, and I still don't know.  
8 Q. You don't know if she represented the  
9 [REDACTED]  
10 A. I don't recollect.  
11 Q. How about the City of Cincinnati?  
12 A. Without checking counsel of record in  
13 this case, I really don't know.  
14 Q. Okay. [REDACTED] do you know  
15 who that is?  
16 A. I assume it's [REDACTED] and I do not  
17 know who he represented.  
18 Q. [REDACTED] Do you  
19 know who that is?  
20 A. Well, I believe that [REDACTED]  
21 name is at the bottom with her e-mail, and that  
22 she has represented [REDACTED]  
23 Q. [REDACTED]  
24 A. I don't know that.  
25 Q. [REDACTED]

1 A. I believe that's [REDACTED] at  
 2 [REDACTED]  
 3 Q. By that you mean that's who he  
 4 represented in the case?  
 5 A. That's the only [REDACTED]  
 6 know in this case.  
 7 Q. [REDACTED] do you know who  
 8 that is?  
 9 A. I suspect the name [REDACTED] stands for  
 10 [REDACTED] but I'm not sure who he represented  
 11 in this case.  
 12 Q. Okay. [REDACTED]  
 13 A. I assume that is [REDACTED]  
 14 Q. [REDACTED]  
 15 A. I don't know who that is.  
 16 Q. Okay. [REDACTED] doesn't give you a hint?  
 17 A. I don't know who that is. I could guess  
 18 if you want me to.  
 19 Q. No, that's okay. You don't need to  
 20 guess.  
 21 A. Okay.  
 22 Q. [REDACTED] do you know who  
 23 that was?  
 24 A. No.  
 25 Q. [REDACTED]

1 Q. Okay. Well, is DE-Ohio there anywhere?  
 2 Do you see anybody from the company?  
 3 A. Not that I know that that's their e-mail,  
 4 no.  
 5 Q. All right. And so OCC was holding  
 6 settlement discussions with parties and excluding  
 7 the company from those discussions. Is that your  
 8 understanding? And maybe other parties.  
 9 A. I know from this e-mail that there's a  
 10 settlement proposal being distributed. I don't  
 11 know whether the company -- I don't know what  
 12 contact was made or not made with the company and  
 13 I don't know how those discussions occurred based  
 14 on what's here in front of me.  
 15 Q. Do you see any contact with the company  
 16 in any of these documents?  
 17 A. Assuming that none of the e-mails that I  
 18 don't know are the company --  
 19 Q. Right.  
 20 A. -- no.  
 21 Q. And on the second e-mail page, which was  
 22 an e-mail from Denise Willis, who apparently is a  
 23 Case Team Assistant, the indication is that the  
 24 attached confidential settlement communication is  
 25 from Jeff Small. Do you see that?

1 A. I believe that's one of the Attorney  
 2 General's for the staff in this case.  
 3 Q. For the staff.  
 4 [REDACTED] do you know?  
 5 A. No.  
 6 Q. How about [REDACTED] om?  
 7 A. I think that's [REDACTED]  
 8 Q. Do you know who he represented in the  
 9 case?  
 10 A. He represented, I believe, the [REDACTED]  
 11 [REDACTED] this case.  
 12 Q. And [REDACTED] do you know who  
 13 that is? [REDACTED] I'm sorry. I said it  
 14 wrong.  
 15 A. No, I don't.  
 16 Q. And the rest of the names under the cc  
 17 column are all OCC employees, or were at the time?  
 18 A. Yes.  
 19 Q. Okay. And are there any parties missing  
 20 from the list that we've just gone through that  
 21 you are aware of in the case?  
 22 A. I'd have to go back and compare the list,  
 23 and since I didn't know what -- some of the people  
 24 who they represented, I don't think that would be  
 25 a complete comparison.

1 A. It says, "Please see the attached  
 2 confidential settlement communication from Jeff  
 3 Small in the above captioned case".  
 4 Q. Now, given your concerns about having  
 5 exclusionary settlement discussions and secret  
 6 negotiations, why would OCC exclude parties from  
 7 settlement discussions and why would they make any  
 8 settlement offer confidential? Shouldn't these  
 9 things be done in an open and public manner?  
 10 A. You asked about two or three questions.  
 11 You want to divide them up?  
 12 Q. Why did OCC make any settlement  
 13 communication and/or offer confidential?  
 14 A. I don't know.  
 15 Q. But it is your position that settlement  
 16 discussions should be made in public and all of  
 17 the information should be available to everybody;  
 18 is that correct?  
 19 A. I don't think I make that recommendation.  
 20 Could you point to that in my testimony where I  
 21 recommend that?  
 22 Q. Well, a criticism that you are -- you  
 23 appear to make on Page 56 is exclusion of the OCC  
 24 from negotiations and a course of secret  
 25 negotiations that resulted in support for the

1 stipulation and for CG&E's alternative proposal.  
 2 Now, apparently, in the case of your  
 3 settlements, you didn't get agreement with parties  
 4 that resulted in support, but it appears that OCC  
 5 tried. You could change it to exclusion of the  
 6 company from negotiations and a course of secret  
 7 negotiations by OCC. Wouldn't the same criticism  
 8 apply, the same concern?

9 A. I think my clarification was where in my  
 10 testimony do I recommend that? I don't see that  
 11 in my testimony.

12 Q. I'm not asking about a recommendation.

13 A. Okay.

14 Q. I'm asking about your fourth area of  
 15 concern.

16 A. Well, my fourth area of concern, as you  
 17 look at Pages 69 through 70, discusses the

18 [REDACTED]  
 19 the presentation to the Commission, which as it  
 20 says on Page 70, [REDACTED]

21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]

25 Q. Right.

1 informed, subsequently informed, whether or not  
 2 settlement was provided to the company.

3 You've given one piece of information in  
 4 regards to this. So I cannot comment as to  
 5 whether or not the characterization that you're  
 6 making is correct.

7 Q. I'm going to hand you what's marked  
 8 DE-Ohio Exhibit 11 -- or, will be marked.

9 ---

10 Thereupon, DE-Ohio Exhibit No. 11 was  
 11 marked for purposes of identification.

12 ---

13 BY MR. COLBERT:

14 Q. This is an interrogatory question  
 15 delivered to OCC in these proceedings asking for  
 16 all agreements, written or oral, et cetera,  
 17 including confidentiality agreements.

18 Why were the confidentiality agreements,  
 19 oral or otherwise, that we've just discussed in  
 20 this case requested by OCC of other parties not  
 21 provided; do you know?

22 THE WITNESS: Would you reread the  
 23 question for me, please?

24 (Question read back as requested.)

25 THE WITNESS: I do not know. The answer

1 A. And --

2 Q. Go ahead. I'm sorry.

3 A. No.

4 Q. Really, I didn't mean to cut you off.  
 5 Are you done?

6 A. Uh-huh.

7 Q. Okay. Even assuming, which, obviously,  
 8 the company disagrees, but even assuming all of  
 9 your characterizations to be true, that these  
 10 were -- these contracts were somehow connected to  
 11 the utility, to DE-Ohio, let alone to the case,  
 12 which we certainly don't think they were, doesn't  
 13 it seem a bit inconsistent to be concerned about  
 14 the exclusion of OCC and a course of secret  
 15 negotiations when OCC was engaging in the same  
 16 practice itself and had, in fact, engaged in the  
 17 same practice over many years on many agreements  
 18 through different Consumers' Counsels?

19 A. Well, as far as your last statement, many  
 20 years and many Consumers' Counsels, I cannot  
 21 comment on that, that's very broad and not  
 22 specific, but in this particular instance, to the  
 23 extent that you're saying that these are secret  
 24 negotiations, I don't have anything before me that  
 25 tells me whether the company was informed or not

1 was prepared by counsel.

2 MR. SMALL: I object inasmuch as we  
 3 haven't looked at any confidentiality agreements.  
 4 I don't even understand what you're talking about.

5 MR. COLBERT: The affidavit and the  
 6 e-mails that we just discussed referenced  
 7 requirements by OCC that parties keep confidential  
 8 the terms and conditions of settlement discussions  
 9 discussed with them.

10 MR. SMALL: Well, it's not a  
 11 confidentiality agreement.

12 MR. COLBERT: I don't agree. I think  
 13 that's an oral confidentiality agreement, but if  
 14 that's the reason why it wasn't given to us,  
 15 that's fine. Just asking.

16 BY MR. COLBERT:

17 Q. On Page 58 of your testimony, starting at  
 18 Line 18, you say, "...the fundamental effect of  
 19 the side agreements was to insulate those large  
 20 customers from the rate increases proposed in the  
 21 stipulation filed in May 2004..."

22 Yet, during [REDACTED]  
 23 [REDACTED] that  
 24 correct, my reading of your testimony? Is that  
 25 your understanding?

1 A. Again, I'm not sure of what the total  
2 transactions were between [REDACTED] and some CG&E  
3 affiliate in regards to that agreement. [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]

8 I think you may have asked whether their  
9 rates went up.

10 Q. I simply asked whether [REDACTED] paid more  
11 than --

12 A. Okay.

13 Q. -- was required of them --

14 A. Than was required of them.

15 Q. -- had they stayed on the MBSSO. It's a  
16 rephrasing of the question.

17 A. Well, I don't think [REDACTED] was on the  
18 MBSSO.

19 Q. No, they weren't. That's true.

20 A. So I don't know whether they paid more or  
21 not.

22 Q. In the first part of your answer, you  
23 said the only knowledge you had was various  
24 invoices, et cetera, that you had received in the  
25 case. That was the basis of your conclusions as

1 to DE-Ohio?

2 A. I think we asked some general discovery  
3 about the agreements and their impact on any  
4 DE-Ohio-affiliated company, but I don't have those  
5 with me, but that would have covered DE-Ohio.

6 Q. Do you know -- In that information, did  
7 you receive any information regarding -- regarding  
8 revenues flowing to DE-Ohio from counterparties to  
9 these -- to any of what you call the side  
10 agreements?

11 A. Well, I'm not 100 percent sure. I don't  
12 recollect any description of revenues flowing from  
13 any of these customer parties to DE-Ohio.

14 Q. Okay. Did you receive any information  
15 regarding revenues flowing from DERS to DE-Ohio?

16 A. [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]

20 I also recollect that on DERS' financial  
21 balance sheet at 12-31-05 there's both an accounts  
22 receivable and accounts payable to affiliates and  
23 to what extent DE-Ohio may be involved in that I  
24 don't remember, but to be inclusive, that's what I  
25 remember.

1 to [REDACTED]

2 A. Uh-huh.

3 Q. But you didn't really know because you  
4 didn't know -- at least as I understand it, you  
5 didn't know whether that information was complete  
6 or, you know, all of the payments made one way or  
7 the other during the course of the year. Did I  
8 understand that correctly?

9 A. I'm telling you I only know what I have  
10 from the information provided by DERS and DE-Ohio,  
11 and that's it.

12 Q. So can you state -- Well, what is your  
13 knowledge of transactions between the parties  
14 regarding the other contracts? Have you seen  
15 invoices and have you -- Well, let's start there.  
16 Have you seen invoices?

17 A. I believe provided with [REDACTED]  
18 deposition subpoena were hundreds of pages of  
19 documentation related to requests for payment and  
20 payments made under the agreements. I know that  
21 [REDACTED] and [REDACTED] processed those and I  
22 believe indicated that they -- at least [REDACTED]  
23 probably indicated the payments had been made.

24 Q. And did you ask and/or receive any  
25 information about payments made by those companies

1 Q. Okay. And outside of -- And I believe it  
2 came in the discussion of the income statements  
3 and balance sheets you're talking about now.  
4 Outside of the receivable adjustment related to  
5 taxes, which didn't include any actual transfer of  
6 revenue, are you aware of any revenues flowing  
7 from DE-Ohio to DERS?

8 A. Well, I disagree with your  
9 characterization of the accounts receivable. I  
10 think that taxes were part of that discussion, but  
11 I'm not sure if it was complete, because there was  
12 also accounts payable affiliates, but your  
13 question is whether or not revenue -- I have any  
14 information about revenue going from DE-Ohio to  
15 DERS.

16 Q. Yes.

17 A. I don't recollect anything.

18 Q. Okay. The DERS contracts that we  
19 referred to as option contracts, you referred to,  
20 I think, as option side agreements, those -- [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 A. Look at Page 50 of my testimony. I  
24 indicate that under each option agreement [REDACTED]  
25 [REDACTED]

1 [REDACTED]  
 2 [REDACTED]  
 3 Q. Now known at DERS.  
 4 A. Yes.  
 5 Q. Okay. [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 THE WITNESS: Could you read the  
 10 question, please?  
 11 (Question read back as requested.)  
 12 THE WITNESS: I don't know.  
 13 BY MR. COLBERT:

14 Q. [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]  
 23 A. [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

1 Q. Well, almost [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 A. You'll have to restate the question. I  
 6 don't understand it.  
 7 Q. [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 A. [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 Q. Well, I didn't say anything about  
 16 customer parties.  
 17 A. I'm sorry.  
 18 Q. That's okay.  
 19 A. I do not understand.  
 20 Q. That's all right. That's all right.  
 21 We'll move on.  
 22 Maybe I can ask it a different -- a  
 23 simpler, different way, actually.  
 24 [REDACTED]  
 25 [REDACTED]

1 [REDACTED]  
 2 A. No. [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 The side agreements may or may not have  
 11 resulted [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 Q. Has any customer told you that that's why  
 15 they signed the stipulation. [REDACTED]  
 16 [REDACTED]  
 17 A. No.  
 18 Q. On Page 63 of your testimony, you state  
 19 that the option contracts use DE-Ohio as a profit  
 20 center while DERS reimburses customers on behalf  
 21 of DE-Ohio and operates at a loss. Is that a  
 22 correct characterization?  
 23 A. That's what it states.  
 24 Q. Yeah.  
 25 I'm going to hand you what we're marking

1 as DE-Ohio Exhibit 12.  
 2 ---  
 3 Thereupon, DE-Ohio Exhibit No. 12 was  
 4 marked for purposes of identification.  
 5 ---  
 6 (Recess taken.)  
 7 (Discussion held off the record.)  
 8 MR. COLBERT: The parties have had an  
 9 off-the-record discussion at which they have  
 10 decided to unseal the record through the end of  
 11 Mr. Neilsen's cross-examination in the deposition  
 12 this morning. Thereafter, the deposition will be  
 13 under seal.  
 14 MR. SMALL: OCC agrees.  
 15 BY MR. COLBERT:  
 16 Q. Miss Hixon, I have handed you what's been  
 17 marked as DE-Ohio Exhibit 12. As we discussed  
 18 earlier, you have an accounting background, is  
 19 that -- that's correct, isn't it?  
 20 A. That's my education, yes.  
 21 Q. And are you familiar with what this type  
 22 of document is, an 1120?  
 23 A. I recognize it for what it says, a U.S.  
 24 Corporation Income Tax Return, but I have never  
 25 dealt with such.

1 Q. Okay. Are you generally familiar with  
2 income statements and balance sheets?

3 A. Yes.

4 Q. Okay. If you will turn to the third page  
5 in, not double-sided, just -- Yeah, keep going.  
6 There you go. That page. Thank you.

7 MR. SMALL: I'm sorry. We've got a  
8 marked Page 3. It's not that page?

9 MR. COLBERT: No. It's the page with the  
10 "Combined, Combination Elimination, Adjustments  
11 and Cinergy Corp."

12 MR. SMALL: Upper left-hand corner,  
13 "Cinergy Corp."?

14 MR. COLBERT: Yeah, and "Consolidated  
15 Schedules" right below that.

16 MR. SMALL: Yes. "1120, Page 1"?

17 MR. COLBERT: Yes, that's correct.

18 BY MR. COLBERT:

19 Q. This is Page 1 of the consolidated  
20 schedules and on the following pages, if you'll  
21 turn the page, you'll see income statements for  
22 each of the separate then Cinergy affiliates. If  
23 you look at the bottom of the page that is  
24 Line 30, we won't go into special deductions and  
25 NOL deductions and all that, but Line 30 you'll

1 A. And that each of those represents a  
2 corporation?

3 Q. Each of them does represent a  
4 corporation. Subject to -- The combined totals,  
5 frankly, would be in the column marked "Combined"  
6 There are some double-counting of numbers through  
7 various companies due to things like service  
8 company allocations, administrative expenses,  
9 et cetera, that's the eliminations column, but,  
10 yeah, I'm just asking you to count the number of  
11 companies that had a taxable loss. The sheets go  
12 across the bottom. Yeah, the companies are  
13 identified across the bottom, if that's what  
14 you're -- I see one page somehow got cut off,  
15 but....

16 (Pause.)

17 A. Okay. Given that the document just says  
18 Statement 5 and Statement 6, something's been cut  
19 off and a whole page is missing --

20 Q. Here's the original.

21 A. -- I would assume that each of those  
22 are --

23 Q. That's correct.

24 A. -- individual corporations based on your  
25 representation --

1 see where it says, "Taxable Income", and you'll  
2 notice that some of the figures are positive and  
3 some of the figures are negative.

4 Given your understanding of income  
5 statements, would you agree with me that the  
6 negative figures indicate a taxable income loss?

7 A. Having not seen this document and not  
8 knowing what their use of a negative connotes,  
9 in general you would expect that a negative or a  
10 minus sign would be a net loss.

11 Q. Would you accept, subject to check, that  
12 it is? I mean, we could get a calculator and --

13 A. No. That's fine. I'm just telling you  
14 I'm not familiar with this document --

15 Q. Sure.

16 A. -- but in general you would expect that  
17 to be the case.

18 Q. Okay. If you would, take a minute, there  
19 are a few pages there, although I don't think it  
20 will take very long, would you count the number of  
21 corporations that have a loss?

22 A. Am I being asked to assume that the sum  
23 of all the ones in the back are what's coming  
24 forward?

25 Q. Well, I mean --

1 Q. They are.

2 A. -- and of all the numbers, my best  
3 estimate at a quick look is over 35 companies.

4 Q. I came up with 36. Would you accept that  
5 subject to check?

6 A. Subject to check, have a negative before  
7 them on Line 30 for taxable income.

8 Q. Okay. Fair enough.

9 MR. COLBERT: Let me have both of the  
10 others. No point in prolonging this; right?

11 Will you mark these Exhibits 14 (sic)  
12 and 15 (sic), DE-Ohio exhibits?

13 ---

14 Thereupon, DE-Ohio Exhibit Nos. 13  
15 and 14 were marked for purposes of  
16 identification.

17 ---

18 BY MR. COLBERT:

19 Q. Trying to short-circuit this a little  
20 bit.

21 Do you see the same types of income  
22 statements here that you saw with the 2003 1120?

23 A. Similar. I don't know that they're  
24 identical.

25 Q. They are. They're for different years,

1 so the numbers are different.  
 2 A. I mean, I don't know if the corporations  
 3 are identical or not.  
 4 Q. They aren't. Corporations come and go,  
 5 so they aren't.  
 6 A. Okay.  
 7 Q. Would you accept, subject to check, in  
 8 2004 there are 44 corporations that show a loss  
 9 and in 2005 there are 41?  
 10 A. Subject to check.  
 11 Q. Sure. You can keep that and check, so  
 12 that will work.  
 13 In Exhibit 13, would you turn to -- It's  
 14 the last piece of paper, but on the inside page.  
 15 It has Cinergy Retail Sales as the third company  
 16 in. It's next to Cinergy Capital & Trading. Do  
 17 you see that?  
 18 MR. SMALL: We're on Exhibit 14?  
 19 THE WITNESS: Is that 2004?  
 20 MR. COLBERT: 2004. Yeah, I think it's  
 21 Exhibit 13. I'm sorry. It's the last page, Jeff,  
 22 just on the inside of it.  
 23 MR. SMALL: Second to the last page in  
 24 the packet?  
 25 MR. COLBERT: Yeah. It's got 433 at the

1 bottom of the page and a 12. 433 and then  
 2 Statement 12.  
 3 THE WITNESS: Uh-huh.  
 4 BY MR. COLBERT:  
 5 Q. Do you see Cinergy Retail Sales?  
 6 A. Yes.  
 7 Q. Okay. And do you note that it has a [REDACTED]  
 8 [REDACTED]  
 9 A. Assuming that those are dollars, yes.  
 10 Q. And do you see next to it Cinergy Capital  
 11 & Trading, Inc. has [REDACTED]  
 12 [REDACTED]  
 13 A. Yes.  
 14 Q. Okay. Do you -- Is it your opinion that  
 15 CG&E is the profit center for all of these  
 16 companies that are showing losses?  
 17 A. No.  
 18 Q. Okay. And you think DERS is distinct  
 19 because of the contracts that you call side  
 20 agreements; is that correct?  
 21 A. I think that my testimony deals with the  
 22 option agreements and the side agreements and that  
 23 my testimony is that through the option agreements  
 24 DE-Ohio's treated as a profit center and its  
 25 affiliate operates at a loss. That's what I've

1 testified.  
 2 Q. And somehow, though, that loss is  
 3 distinguished from all the other losses of all the  
 4 other corporations for which CG&E is not a profit  
 5 center?  
 6 A. My testimony doesn't deal with that. My  
 7 testimony deals with the side agreements.  
 8 Q. On Page 65 of your testimony, you discuss  
 9 OAC Section 4901:1-20-16 at length and in various  
 10 parts. Do you see that?  
 11 A. I see that.  
 12 Q. Okay. Are you familiar with  
 13 4901:1-20-16(G)(3) that prohibits affiliate  
 14 financial transactions that obligate the  
 15 affiliated utility?  
 16 MR. SMALL: With regard to this, maybe we  
 17 can -- I assume you're going to ask a series of  
 18 questions having to do with this portion of her  
 19 testimony?  
 20 MR. COLBERT: Well, this one actually  
 21 doesn't. She didn't testify to (G)(3). I was  
 22 going to go through each part.  
 23 MR. SMALL: To keep the flow of things  
 24 going, I will state an objection to the extent the  
 25 answers call for a legal opinion, but she will

1 state her understanding of these provisions  
 2 according to your questions, and we'll just have a  
 3 continuing objection on this section of questions.  
 4 MR. COLBERT: As we previously noted, I  
 5 believe we have a continuing objection on the  
 6 record regarding that. I just didn't see how it's  
 7 avoidable given that she has a sizable amount of  
 8 her testimony related to it.  
 9 THE WITNESS: Could you reask the  
 10 question, please?  
 11 MR. COLBERT: Sure.  
 12 MR. SMALL: I'm not sure there was a  
 13 question pending.  
 14 MR. COLBERT: There was, but I'll restate  
 15 it.  
 16 BY MR. COLBERT:  
 17 Q. Are you familiar with 4901:1-20-16(G)(3),  
 18 which has to do with the prohibition of affiliate  
 19 financial transactions that obligate the  
 20 affiliated utility? If it would help, we can mark  
 21 as Exhibit 15 a copy of 4901:1-20-16. I brought a  
 22 copy.  
 23 ---  
 24 Thereupon, DE-Ohio Exhibit No. 15 was  
 25 marked for purposes of identification.

1 ---  
 2 MR. SMALL: This is the entire section.  
 3 MR. COLBERT: Yes.  
 4 MR. SMALL: What portion did you --  
 5 MR. COLBERT: We're (G)(3) on Page 2, (a)  
 6 through (f).  
 7 THE WITNESS: I'm familiar with it in  
 8 that I have seen it, I've read it, and that you've  
 9 pointed out to me that it deals with financial  
 10 arrangements.  
 11 BY MR. COLBERT:  
 12 Q. Do you know whether any -- any financial  
 13 transaction involving DERS or Cinergy is contrary  
 14 to anything in (G)(3), (a) through (f)?  
 15 A. I've done no investigation of all of the  
 16 financial arrangements by DERS and Cinergy -- And  
 17 I assume by Cinergy you mean Cinergy Corp.  
 18 Q. I did. I meant Cinergy Corp. Thank you.  
 19 A. -- in regards to these rules, so I have  
 20 no opinion.  
 21 Q. Okay.  
 22 MR. SMALL: Is this an exhibit or you  
 23 just handed it to her for a reference?  
 24 MR. COLBERT: Yes, it's an exhibit.  
 25 MR. SMALL: Okay. This was 15 then?

1 MR. COLBERT: Yes.  
 2 BY MR. COLBERT:  
 3 Q. We'll get back to that in a minute, so  
 4 you may want to keep it handy.  
 5 On Page 64 (sic) of your testimony, you  
 6 discuss an e-mail from [REDACTED] to [REDACTED]  
 7 [REDACTED] and referring to someone  
 8 named [REDACTED]. Do you know who [REDACTED] is?  
 9 A. No, I don't.  
 10 Q. Do you know who [REDACTED] is?  
 11 A. I recollect that in Mr. Ficke's  
 12 deposition we asked him who [REDACTED] was. I don't  
 13 remember the name. I believe he indicated he was  
 14 a board -- a member of the board, but I don't  
 15 remember which board.  
 16 Q. All right. Would it help you if I  
 17 represented he was a member of both the Cinergy  
 18 Corporation board and now the Duke Energy  
 19 Corporation board?  
 20 A. You can represent that. I don't think  
 21 that's what Mr. Ficke said at the time.  
 22 Q. Would it help your memory if I said his  
 23 name was [REDACTED]?  
 24 A. I've told you what I've remembered.  
 25 Q. That's fine. I was just trying to help.

1 Do you know whether it's unusual for a  
 2 holding company with many subsidiaries to perform  
 3 financial analyses of transactions across multiple  
 4 corporate entities?  
 5 A. I've not worked for a holding company, so  
 6 I don't know.  
 7 Q. Going back to Page 65 and our OAC section  
 8 here. You start with 4901:1-20-16(A) regarding  
 9 corporate separation.  
 10 Do you know whether DE-Ohio has an  
 11 approved corporate separation plan?  
 12 A. I believe that they are required to have  
 13 a corporate separation plan approved in their ETP  
 14 cases. There may have been conditions or waivers  
 15 subsequently or at that time placed upon it, but  
 16 my general understanding is that they should.  
 17 Q. Okay. Do you know whether the approved  
 18 corporate separation plan determines the  
 19 methodology for certain financial transactions  
 20 between DE-Ohio and affiliates?  
 21 A. I have not looked at their approved  
 22 corporation separation plan, but given the  
 23 corporate separation rules that -- a copy that you  
 24 provided me, I think you could identify what is  
 25 required.

1 Q. Well, I can. I was asking you a specific  
 2 question about the actual plan, but you haven't  
 3 looked --  
 4 A. I have not seen it.  
 5 Q. Okay. Going to Section (D) regarding  
 6 cross-subsidies, which is No. 2 -- Well, before we  
 7 do that, having not seen it, you're not alleging  
 8 any specific violation of the corporate separation  
 9 plan?  
 10 A. No. As my testimony says, I'm asking the  
 11 Commission to conduct an investigation to  
 12 determine and examine the transactions of the  
 13 utility and the affiliate for the reasons that I  
 14 state in my testimony.  
 15 Q. And you believe those reasons rise to the  
 16 level that we might have done something wrong?  
 17 A. I think they rise to the level that they  
 18 should be brought to the Commission's attention  
 19 for their consideration.  
 20 Q. You don't think they've been brought to  
 21 the Commission's attention? You don't think the  
 22 Commission is aware of this with all the pleadings  
 23 that have gone back and forth?  
 24 A. Given that the Supreme Court said that  
 25 the case had to be remanded back and that this



1 wasn't before the PUCO for their consideration,  
2 no, I don't think the Commission is aware.

3 Q. Okay. Regarding Section (D) of the rule,  
4 that -- that involves cross-subsidies and the  
5 independent operation of a utility and affiliate  
6 employees.

7 Did OCC discover financial transactions  
8 between DE-Ohio and DERS such that one subsidized  
9 the other?

10 A. Again, as I said in my testimony, I  
11 reached no conclusions as to whether or not these  
12 rules have been violated by the activities that we  
13 have discussed. I've presented those activities  
14 and raised the concern that the Commission should  
15 investigate to determine that.

16 Q. You then discuss Section (G)(1)(c), which  
17 refers to and embodies (G)(4) through the use of  
18 shared employees.

19 The only shared employees identified in  
20 these proceedings as involved in -- Well, the only  
21 shared employees identified in these proceedings  
22 involved in the contracts are [REDACTED]

23 You identified [REDACTED]

24 Is there a specific violation that you  
25 are alleging? Let's start with the attorneys of

1 Q. So that would be true of the remainder of  
2 the sections of the rule that you discussed?

3 A. Yes. There's nowhere in here that I say  
4 a violation has occurred.

5 Q. Okay. Ask you one more question about  
6 that just at the end, since complaints are so  
7 prevalent. You reference Section (G)(4)(j)  
8 applying to emergency situations and complaint  
9 procedures. I was surprised you included that  
10 one.

11 A. Hold on.

12 Q. Okay. I'll wait. Tell me when you're  
13 ready.

14 (Pause.)

15 A. I'm sorry. I don't see that.

16 Q. No. I got it wrong. It's (k). No,  
17 that's shared employees. We've covered that. I  
18 apologize. I got the wrong section.

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 A. [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

1 [REDACTED]  
2 A. Again, I am not alleging any specific  
3 violation of these rules. I am recommending to  
4 the Commission that they review the activities and  
5 the transactions and the conduct of the utility  
6 and its affiliates to determine whether or not  
7 there have been any violations.

8 Q. And do you know whether [REDACTED]  
9 made any economic decisions regarding the  
10 contracts on behalf of DERS?

11 A. No, I don't know that.

12 Q. Okay. You next reference Section  
13 (G)(4)(e), which I believe has to do with tie-in  
14 arrangements.

15 Did OCC discover any occurrence of any  
16 service offered by DE-Ohio, tariffed or otherwise,  
17 that requires the consumer to take service from  
18 any affiliate as a condition of service?

19 A. My answer would be the same to the other  
20 rules that you've cited and asked whether or not I  
21 found a violation. I did not conduct an  
22 investigation to determine whether or not there  
23 were violations of these rules. I reviewed the  
24 agreements, I've raised the concerns, and I've  
25 presented them to the Commission.

1 [REDACTED]  
2 [REDACTED]  
3 Q. Okay. [REDACTED]  
4 [REDACTED]  
5 A. No, I don't know that.  
6 Q. Okay. [REDACTED]  
7 [REDACTED]  
8 [REDACTED]

9 MR. SMALL: I'm sorry. Could we have  
10 that read back?

11 (Question read back as requested.)

12 MR. SMALL: Objection. It calls for a  
13 legal conclusion. You may state your  
14 understanding.

15 THE WITNESS: I'm not aware of such a  
16 statute.

17 BY MR. COLBERT:

18 Q. Okay. Are you aware that OCC agreed in  
19 the transition plan stipulation that  
20 nonresidential consumers should pay the  
21 residential consumers RTC for 2009 and 2010?

22 A. If you can provide a document. I do not  
23 recollect that.

24 Q. Okay. Are you aware that residential  
25 consumers don't pay any RTC in 2009 and 2010?

1 A. It's my recollection that the residential  
 2 RTC ends in 2008 because the company had proposed  
 3 originally for it to -- originally in this  
 4 proceeding to continue past that time, so yes, I  
 5 am aware that they don't pay after 2008.  
 6 Q. Do you know whether OCC met separately  
 7 with DE-Ohio during settlement discussions in  
 8 these proceedings?  
 9 A. I don't know.  
 10 Q. Do you know whether OCC turned down a  
 11 substantial settlement offer from DE-Ohio in these  
 12 proceedings?  
 13 MR. SMALL: Asked and answered. If you  
 14 don't know about the negotiations, you can't know  
 15 about settlements.  
 16 MR. COLBERT: I'll let her answer that.  
 17 THE WITNESS: Since I don't know whether  
 18 OCC met separately with DE-Ohio, I don't know  
 19 anything about whether or not an offer was made or  
 20 not made.  
 21 BY MR. COLBERT:  
 22 Q. Well, DE-Ohio and OCC certainly  
 23 participated in settlement discussions together in  
 24 large groups.  
 25 A. But you asked if they had met separately.

1 Q. Uh-huh.  
 2 A. I do not remember participating in any  
 3 settlement discussions between DE-Ohio and OCC  
 4 regarding the merger.  
 5 Q. Okay. Is a CRES provider permitted to  
 6 reach one accommodation or contract with one  
 7 consumer and a different accommodation or contract  
 8 with another consumer?  
 9 A. You're asking me to go back to my  
 10 understanding of CRES providers' contracts. As  
 11 long as they're compliant with the PUCO rules,  
 12 they can have different versions of contracts,  
 13 different prices in contracts, so to that extent,  
 14 yes.  
 15 Q. Okay. Do you know whether OCC approached  
 16 DERS about a contract for service of any type for  
 17 residential customers or any other purpose?  
 18 A. In this proceeding?  
 19 Q. At any time.  
 20 A. I'm not aware of -- I don't know whether  
 21 OCC approached DE-Ohio in regards to service.  
 22 Q. I asked DERS.  
 23 A. DERS.  
 24 Q. It's okay.  
 25 A. I'm sorry.

1 Q. I did. And then I asked a separate  
 2 question whether you knew whether OCC turned down  
 3 a substantial settlement offer that might have  
 4 been made either separately or in a large group.  
 5 A. I don't know.  
 6 Q. You don't know.  
 7 Okay. By the way, we talked earlier  
 8 about several agreements that OCC had participated  
 9 in. Are you aware of a settlement between DE-Ohio  
 10 and OCC regarding the OCC's appeal of the merger  
 11 between Cinergy and Duke?  
 12 A. I'm generally aware that OCC had  
 13 participated in litigation in the merger case,  
 14 applied for rehearing, and may have noticed an  
 15 appeal. I believe the appeal was withdrawn. The  
 16 extent to whether a settlement or agreement was  
 17 made in that, I'm not aware.  
 18 Q. Okay. So you didn't participate in or --  
 19 and you don't know specifically about those  
 20 settlement discussions or the result?  
 21 A. I participated in no settlement  
 22 discussions related to the DE-Ohio merger, no.  
 23 Q. Okay. I'm talking about settlement  
 24 discussions with OCC regarding OCC's appeal.  
 25 A. Of the merger.

1 Q. It's all right.  
 2 A. No, I don't know.  
 3 Q. Okay. Do you know whether the current  
 4 Consumers' Counsel has informed her staff of  
 5 settlement discussions that she's had in this  
 6 case?  
 7 A. I'm aware as to whether she's informed  
 8 me. I don't know as to other staff.  
 9 Q. Has she informed you?  
 10 A. No.  
 11 MR. COLBERT: I think that's all I have.  
 12 (Conclusion of confidential portion.)  
 13  
 14  
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 25

1 (Public record resumed.)  
 2 (Signature not waived.)  
 3 ---  
 4 (Thereupon, the deposition was concluded  
 5 at 5:34 o'clock p.m. on Tuesday, March  
 6 13, 2007.)  
 7 ---  
 8  
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1 AFFIDAVIT  
 2 ---  
 3 STATE OF \_\_\_\_\_, )  
 4 ) SS:  
 5 COUNTY OF \_\_\_\_\_, )  
 6 Beth Hixon, having been duly placed under  
 7 oath, deposes and says that:  
 8 I have read the transcript of my  
 9 deposition taken on Tuesday, March 13, 2007, and  
 10 made all necessary changes and/or corrections as  
 11 noted on the attached correction sheet, if any.  
 12  
 13  
 14  
 15 \_\_\_\_\_  
 16 Beth Hixon  
 17 Placed under oath before me and  
 18 subscribed in my presence this \_\_\_\_\_ day of  
 19 \_\_\_\_\_, \_\_\_\_\_.  
 20  
 21  
 22 \_\_\_\_\_  
 23 Notary Public  
 24 My Commission Expires: \_\_\_\_\_  
 25

FILE

45

CONFIDENTIAL SETTLEMENT DOCUMENT

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

PUCO

In the Matter of the Application )  
of The Cincinnati Gas & Electric )  
Company to Modify its Non- )  
Residential Generation Rates to )  
Provide for Market-Based ) Case No. 03-93-EL-ATA  
Standard 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 )  
Procedures for Certain Costs Associated ) Case No. 03-2079-EL-AAM  
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 )  
Procedures for Capital Investment in its ) Case No. 03-2081-EL-AAM  
Electric Transmission And Distribution ) Case No. 03-2080-EL-ATA  
System And to Establish a Capital )  
Investment Reliability Rider to be )  
Effective After the Market Development )  
Period )

STIPULATION AND RECOMMENDATION

Rule 4901-1-30, Ohio Administrative Code (O. A. C.) provides that  
any two or more parties to a proceeding may enter into a written  
stipulation covering the issues presented in such a proceeding. The  
purpose of this document is to set forth the understanding and

EXHIBIT

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Duke Energy Ohio  
DO-1 D:\H3-13-01

agreement of the Parties who have signed below (Parties)<sup>1</sup> and to recommend that the Public Utilities Commission of Ohio (Commission) approve and adopt this Stipulation and Recommendation (Stipulation), which resolves all of the issues raised by The Cincinnati Gas & Electric Company's applications in these cases.

This Stipulation is supported by adequate data and information; represents a just and reasonable resolution of the issues raised in these proceedings; violates no regulatory principle or precedent; and is the product of lengthy, serious bargaining among knowledgeable and capable Parties in a cooperative process, encouraged by this Commission and undertaken by the Parties representing a wide range of interests, including the Commission's Staff,<sup>2</sup> to resolve the aforementioned issues. While this Stipulation is not binding on the Commission, it is entitled to careful consideration by the Commission. For purposes of resolving certain issues raised by these proceedings, the Parties stipulate, agree and recommend as set forth below.

Except for dispute resolution purposes, neither this Stipulation, nor the information and data contained therein or attached, shall be

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<sup>1</sup> The support of the signatories to this Stipulation, does not affect, and is not binding upon, their position in any other case. The signatories retain all legal rights to participate and litigate in other proceedings. Further, the support of the Industrial Energy Users-Ohio (IEU-Ohio) as a signatory to this Stipulation, does not affect, and is not binding upon, its position in any other case. IEU-Ohio's support is, practically speaking, guided by the relatively small size of the individual member accounts affected by the settlement and shall not be construed or applied to indicate IEU-Ohio's views on settlement packages or litigation positions in other cases involving larger and more energy intensive manufacturing operations.

<sup>2</sup> Staff will be considered a party for the purpose of entering into this Stipulation by virtue of O.A.C. Rule 4901-1-10(c).

cited as precedent in any future proceeding for or against any Party, or the Commission itself. This Stipulation and Recommendation is a reasonable compromise involving a balancing of competing positions, and it does not necessarily reflect the position which one or more of the Parties would have taken if these issues had been fully litigated.

This Stipulation is expressly conditioned upon its adoption by the Commission, in its entirety and without modification. Should the Commission reject or modify all or any part of this Stipulation or impose additional conditions or requirements upon the Parties, the Parties shall have the right, within 30 days of issuance of the Commission's order, to either file an application for rehearing. Upon the Commission's issuance of an Entry on Rehearing that does not adopt the Stipulation in its entirety without modification, any Party may terminate and withdraw from the Stipulation by filing a notice with the Commission within 30 days of the Commission's order on rehearing. Upon such notice of termination or withdrawal by any Party, pursuant to the above provisions, the Stipulation shall immediately become null and void.

All the Signatory Parties fully support this Stipulation and urge the Commission to accept and approve the terms hereof.

WHEREAS, all of the related issues and concerns raised by the Parties have been addressed in the substantive provisions of this Stipulation, and reflect, as a result of such discussions and compromises by the Parties, an overall reasonable resolution of all such issues. This

Stipulation is the product of the discussions and negotiations of the Parties, and is not intended to reflect the views or proposals which any individual party may have advanced acting unilaterally. Accordingly, this Stipulation represents an accommodation of the diverse interests represented by the Parties, and is entitled to careful consideration by the Commission;

WHEREAS, this Stipulation represents a serious compromise of complex issues and involves substantial benefits that would not otherwise have been achievable; and

WHEREAS, the Parties believe that the agreements herein represent a fair and reasonable solution to the issues raised in these proceedings designed to set the market-based standard service offer price for competitive retail electric service after the end of the market development period through December 31, 2008;

NOW, THEREFORE, the Parties stipulate, agree and recommend that the Commission make the following findings and issue its Opinion and Order in these proceedings in accordance with the following:

1. The Parties agree that the market development period ends for non-residential consumers on December 31, 2004.
2. The Parties agree that the market development period ends for residential consumers on December 31, 2005.
3. The Parties agree upon a non-by-passable Provider of Last Resort charge made up of two components: (1) the rate stabilization

charge, as described in paragraph four (4) of this Stipulation; and (2) an annually adjusted component for maintaining adequate capacity reserves and to recover costs associated with homeland security, taxes, environmental compliance, and emission allowances. The Provider of Last Resort charge shall be effective for non-residential consumers beginning January 1, 2005, and residential consumers beginning January 1, 2006. CG&E shall implement the annually adjusted component of the Provider of Last Resort charge for all consumers beginning January 1, 2005, at its annual option through: (1) an automatic annual increase of 6% of little g; or (2) an increase of 8% of little g that CG&E must demonstrate by documenting actual costs for homeland security, taxes, environmental compliance, and emission allowances. Increases to the annually adjusted component of the Provider of Last Resort charge are cumulative. CG&E shall, however, waive collection of the annually adjusted component of the Provider of Last Resort charge for residential consumers in 2005, and calculate the charge effective January 1, 2006, as if CG&E had instituted an increase of 5% of little g in 2005. Further, CG&E shall limit the incremental annual increase for residential consumers to 6% effective January 1, 2006, to no more than 7% effective January 1, 2007, and to no more than 8% effective January 1, 2008. If, in any year, CG&E elects option two (2), it



shall demonstrate annual and cumulative costs above the baseline of costs included in CG&E's unbundled rates approved by the Commission in Case No. 99-1658-EL-ETP for the calendar year 2000 and the calculation of such charges and costs shall be subject to Staff audit and verification. Cost recovery for reserve capacity shall be subject to the limits described in this paragraph three (3) and recovered at the formula rate set forth at page 6 of the attached Stipulation Exhibit 1. CG&E hereby elects option two (2) for 2005. The Parties agree that the schedules attached as Stipulation Exhibit 1 demonstrate that CG&E has actual costs in excess of 8% of little g and therefore, may recover 8% of little g as the annually adjusted component of the Provider of Last Resort charge from non-residential consumers beginning January 1, 2005.

4. The Parties agree upon a non-by-passable rate stabilization charge (RSC) as set forth in Stipulation Exhibit 3, effective January 1, 2005, for all non-residential consumers, and effective January 1, 2006, for all residential consumers, as a component of the Provider of Last Resort charge, except that such charge will be an avoidable component of the price to compare for the first 25% of load in each consumer class to switch to a competitive retail electric service provider or governmental aggregator subject to the following conditions:

- A. The ability to bypass the Rate Stabilization Charge component of the Provider of Last Resort Charge is effective January 1, 2005, for all non-residential consumers (except shopping consumers defined in paragraph 11, who retain their shopping credit through December 31, 2005, and pay their applicable unbundled generation rate approved by the Commission in Case No. 99-1658-EL-ETP, which includes the Regulatory Transition Charge and Rate Stabilization Charge component of the Provider of Last Resort Charge, and is effective January 1, 2006, for all residential consumers; and
- B. The first 25% of eligible load, by consumer rate class, to switch to a competitive retail electric service provider shall not pay the rate stabilization charge. All consumers in the remaining 75% of load, by consumer rate class, shall pay the rate stabilization charge. CG&E shall calculate 25% of the load by consumer class in the same manner as it calculates switched load pursuant to its transition plan stipulation approved by the Commission in Case No 99-1658-EL-ETP; and
- C. CG&E shall establish and maintain a queue of switched consumers by load, effective January 1, 2005, such that as the load of one consumer returns to CG&E's market-based

standard service offer rate the applicable load of the next consumer in the queue shall move into the first 25% of switched load in the applicable consumer class, in order, until 25% has been achieved; and

- D. To qualify to by-pass the rate stabilization charge, a non-residential consumer must enter a contract with a credit worthy CRES provider to provide firm generation service through December 31, 2008, or a non-residential consumer may provide CG&E an assurance that it will purchase competitive retail electric generation service from a competitive retail electric service provider by signing an agreement with CG&E to return to CG&E only at (1) the highest purchase power costs incurred by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month; or (2) the highest cost generation dispatched by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month. If a non-residential consumer provides a contract, such contract must satisfy the full capacity, energy, and transmission requirements associated with the consumer. The applicable non-residential consumer must provide a minimum of 90-days notice to CG&E of the effective date of the contract, and may provide notice to CG&E beginning

October 1, 2004. The applicable non-residential consumer must provide CG&E evidence of the required contract containing all of the terms specified above, at the time of notice. All loads of consumers seeking to avoid the rate stabilization charge must be in the first 25% of the load of the applicable consumer class at the time that contract notice is given to CG&E. All consumers, including those already switched, may give such notice and shall be placed in the queue for avoidance of the rate stabilization charge at the time notice is given. To calculate 25% of the load by consumer class CG&E shall count all switched consumers receiving shopping credits and consumers having given the required notice and with the required contract. Consumers that present CG&E with an acceptable contract as described above, must sign a contract with CG&E agreeing that if their contracting CRES provider defaults the consumer may only return to service from CG&E at the market rate, or, if no generation is available, be subject to disconnection. Such consumers waive their statutory right to Provider of Last Resort service. No human needs or public welfare consumer, as that term is defined by the Commission in Case No. 85-800-GA-COI, shall be subject to the disconnection requirements contained herein. Human needs and public

welfare consumers include, but are not limited to, hospitals and schools. The market rate shall vary monthly and be the higher of: (1) the highest purchase power costs incurred by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month; or (2) the highest cost generation dispatched by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month. Each month CG&E shall determine the applicable market rate for each consumer who shall pay that rate until they switch to a competitive retail electric service provider or December 31, 2008, whichever is sooner.

- E. None of the restrictions or requirements set forth in Paragraph 4(D) of this Stipulation shall apply to residential consumers, other than any applicable tariffed minimum stay or exit fee provisions. Residential consumers may bypass the Rate Stabilization Charge if they are in the first 25% of residential load as determined by order and receipt by CG&E of a proper Direct Access Service Request (DASR). DASRs for residential consumers served under existing contracts with a competitive retail electric service provider as of January 1, 2006 shall be considered received as of their original receipt date. Residential consumers returning to CG&E due to the default of their contracting competitive retail electric service

provider or upon expiration of their contract shall be served at CG&E's market-based standard service offer rate.

5. Subject to Federal Energy Regulatory Commission (FERC) approval of the proposed Midwest Independent Transmission System Operator (MISO) Day 2 tariffs, and on-going FERC regulation, load-serving entities may rely upon CG&E's reserve capacity to meet their reserve capacity (but not energy) requirements for loads served within CG&E's Certified Service Territory.<sup>3</sup> If the FERC approves the proposed MISO tariffs with substantial modification relevant to this provision, the parties agree to work in good faith to implement this provision. This Stipulation shall not constitute a state requirement for reserve capacity as defined by the proposed MISO day two tariffs at proposed Sheet No. 816, FERC Electric Tariff, Third Revised Volume No. 1. Each load-serving entity shall remain responsible for its energy purchases, procurement of ancillary services, and East Central Area Reliability Coordination Agreement reserve requirements.<sup>4</sup>
6. The Parties agree that CG&E may establish accounting deferrals representing the difference between CG&E's current revenue

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<sup>3</sup> It is the parties intent that this provision of the stipulation shall constitute a contract through which market participants may rely upon CG&E's reserve capacity to ensure compliance with an RTO's or state's reliability obligations, as defined by the proposed MISO day 2 tariffs at FERC Docket No. ER04-691, proposed Sheet No. 813, FERC Electric Tariff, Third Revised Volume No. 1.

<sup>4</sup> Original Sheet 810, Section 68 (Compliance with Existing State and Reliability Resource Organization Requirements), Module E (Resource Adequacy) of the MISO's filed Energy Markets Tariff (EMT). The East Central Area Reliability Coordination Agreement Document No. 2, Daily Operating Reserve.

requirement on the net capital investment related to CG&E's distribution business less the revenue requirement on its capital investment related to CG&E's electric distribution business approved by the Commission in Case No. 92-1464-EL-AIR, from July 1, 2004, through December 31, 2005. CG&E shall implement a rider for recovery of the accounting deferrals, effective January 1, 2006, and amortized over five (5) years. The accounting deferrals are set forth in the attached Stipulation Exhibit 2, and will be supported by the Company's filings in Case No. 04-680-EL-AIR. Stipulation Exhibit 2 shall set the amount of deferrals for the period of July 1, 2004 through December 31, 2004. CG&E shall update the amount of deferrals on Stipulation Exhibit 2 to be established and recovered for the period of January 1, 2005 through December 31, 2005 pursuant to the distribution rate case to be filed in 2005. The Parties hereby recommend that the Commission approve the accounting deferrals in this case. The Parties further recommend that the Commission approve a rate design for the recovery of the deferrals in CG&E's next electric distribution base rate case.

7. The Parties agree that CG&E will withdraw its pending distribution base rate case, Case No. 04-680-EL-AIR; will file a distribution base rate case with rates to be effective January 1, 2006; and that

increased distribution rates shall not be effective before January 1, 2006.

8. The Parties agree that CG&E's market-based standard service offer shall consist of two components, a price to compare component and a Provider of Last Resort component. The price to compare represents that portion of the market-based standard service offer that consumers switching to a competitive retail electric service provider may avoid paying to CG&E. CG&E shall set the price to compare component of its market-based standard service offer, as set forth in Column E of the attached Stipulation Exhibit 3, plus fuel and economy power purchases. The rate stabilization charge shall be part of the price to compare for the first 25% of switched load by consumer class, as set forth in paragraph 4 above, and a component of the Provider of Last Resort charge for the remaining 75% of switched load by consumer class. The Transmission cost riders described below shall be charged only to CG&E's market-based standard service offer consumers and are therefore, part of the price to compare.
9. Before December 31, 2004, CG&E shall establish a tariff applicable to first 25% of residential load to purchase competitive retail electric generation service from a competitive retail electric service provider and to residential consumers served by competitive retail electric service providers not affiliated with CG&E, such that the



applicable residential consumers receive a bill credit per kwh. The bill credits shall be limited to a total of no more than \$ 7,000,000.00 for the period of January 1, 2006, through December 31, 2008, and no more than \$3,000,000 in any calendar year. <sup>5</sup>

10. The Parties agree that CG&E shall establish transmission cost riders for non-residential consumers beginning January 1, 2005, and residential consumers beginning January 1, 2006, to recover as a pass-through charge, all Midwest Independent Transmission System Operator and Federal Energy Regulatory Commission approved transmission and ancillary service rates and charges. The first rider shall recover transmission and ancillary service costs including, but not limited to, all tariffed charges incurred by CG&E on behalf of its retail consumers under the applicable Open Access Transmission Tariff. These Open Access Transmission Tariff charges currently include the Midwest Independent Transmission System Operator's Schedule 9 - Network Integration Service, Schedule 10 - Administrative Adder, Schedule 10 - FERC, and Schedule 18 - Sub-Regional Rate Adjustment, as well as Cinergy's Open Access Transmission Tariff ancillary service charges. When the Midwest Independent Transmission System Operator's Day 2 markets become effective, it will implement Schedule 16 - Financial Transmission Rights Administrative

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<sup>5</sup> CG&E agrees to work in good faith with the parties to draft and implement tariff language establishing the credit mechanism in Stipulation paragraph nine (9) prior to December 31, 2004.

Service Cost Recovery Adder, and Schedule 17 - Energy Market Support Administrative Service Cost Recovery Adder. All Midwest Independent Transmission System Operator's tariffed charges will be included in these riders. The second rider will recover, through a tracking mechanism, all direct and indirect transmission congestion costs, other wholesale energy market costs and congestion-related charges that CG&E pays to a third party, including the Midwest Independent Transmission System Operator, for CG&E to provide transmission service for standard service offer consumers, including energy costs, congestion costs, losses, and financial transmission rights (FTR) costs (while crediting back FTR revenues). The tracker will also recover MISO costs not covered by a schedule, such as uplift costs. These costs, which are not currently known or measurable, will be assessed to CG&E by the applicable RTO, or otherwise approved by FERC. When such costs are first incurred, CG&E will defer them until it can file for recovery of these costs with the Commission through a tracker. The transmission cost riders shall only be charged to consumers taking generation service from CG&E.

11. The Parties agree that shopping credits for all non-residential consumers shall end on December 31, 2004, and for residential consumers on December 31, 2005, except non-residential consumers that are switched on December 31, 2004, shall receive

the applicable shopping credit set forth in CG&E's transition plan stipulation approved by the Commission in Case No. 99-1658-EL-ETP and percentage of income payment plan consumers shall be eligible to receive shopping credits as set forth in paragraph 18 herein. Beginning on January 1, 2005, switched non-residential consumers shall pay the applicable Provider of Last Resort charge, and beginning January 1, 2006, residential consumers shall pay the cumulative year-two Provider of Last Resort charge, as set forth in paragraph three (3) above.

12. The Parties agree that the regulatory transition charge, as set forth in Stipulation Exhibit 4, remains a non-by-passable charge. The regulatory transition charge shall remain effective for all consumers, including residential consumers, through December 31, 2010.
13. The Parties agree that the Commission may determine and implement a competitive bidding process to test CG&E's price to compare, defined as the price to compare for the first 25% of load of each consumer class to switch to a CRES provider, against the market price. If the price to compare is significantly different than the bid price, either the Commission or CG&E may begin discussions with all Parties to continue, amend, or terminate this Stipulation.

14. The Parties agree that CG&E does not have an obligation to transfer generating assets to an Electric Wholesale Generator by December 31, 2004. CG&E has no plans to transfer generating assets to any party, other than those plans already announced. If CG&E has any plans to transfer generating assets it shall provide the Commission with written notice 60-days before the transfer of any such asset to any entity. Approval of this Stipulation shall constitute approval of an amendment to CG&E's Corporate Separation Plan with respect to the transfer of its electric generating assets in accordance with R. C. 4928.17(D).
15. The Parties agree that CG&E shall calculate the by-passable fuel cost component of the price to compare by using the average costs for fuel consumed at CG&E's plants, and economy purchase power costs, for all sales in CG&E's Certified Service Territory. CG&E shall adjust its fuel costs quarterly and shall calculate the fuel costs to be part of the price to compare by using a baseline of the fuel costs approved by the Commission in Case No. 99-103-EL-EPC. Beginning January 1, 2006, CG&E shall also calculate its fuel cost to account for voltage differentials among consumers on different rate schedules. In no instance shall fuel costs amending the price to compare be less than \$ 0.00. Fuel used by CG&E's plants, and economy purchased power obtained, to serve The Union Light, Heat and Power Company load shall remain part of

the calculation of average fuel and purchase power costs until CG&E's Power Sales Agreement, Rate Schedule FERC No. 56, is terminated.

16. The Parties agree that CG&E shall extend its existing contracts for weatherization and energy assistance, pursuant to contract changes made in conjunction with the Cinergy Community Energy Partnership board, through December 31, 2008.
17. The Parties agree that CG&E shall implement a residential Demand Side Management tracker, set initially at \$ 0.00. Program content shall be determined by CG&E working with Cinergy Community Energy Partnership, and Staff. CG&E shall apply for Commission approval of any proposed demand side management program and rider level.
18. CG&E shall enter into good faith discussions with the Ohio Department of Development to establish an annual arrearage crediting program for percentage of income payment program consumers. The Parties intend that the initial arrearage credit will be for the entirety of existing arrearages already recovered by CG&E, without condition, and to occur on or about December 31, 2004. Thereafter, an agreed upon arrearage crediting program shall credit arrearages already recovered by CG&E, shall retain applicable arrearages necessary to enforce current and future disconnection rules in an effort to limit the amount of arrearages,

and shall require percentage of income payment program consumers to timely pay their required percentage of income payment before they may receive a credit. If this program is approved CG&E will develop, in concert with Cinergy Community Energy Partnership, a demand side management education and energy efficiency program to educate percentage of income payment plan consumers of the opportunities available pursuant to an approved arrearage crediting program. CG&E shall also permit percentage of income payment plan consumers to receive the residential shopping credit approved by the Commission in Case No. 99-1658-EL-ETP through December 31, 2005, for the first 25% of residential load to switch to a competitive retail electric service provider conditioned upon the inclusion of such consumers toward the first 25% of residential load to switch. Implementation of these programs is conditioned upon the agreement of the Ohio Department of Development and cost recovery of the arrearages by CG&E.

19. The Parties agree that CG&E shall maintain the 5% generation rate decrease for residential consumers on CG&E's market-based standard service unless CG&E's collection of regulatory transition charges from residential consumers is not extended through December 31, 2010, in which case the residential 5% generation

decrease shall end effective immediately or January 1, 2005, whichever is later.

20. CG&E will file a Motion to Dismiss Ohio Supreme Court Case Nos. 03-1207, 03-2034, and 04-563, will cease prosecution before the Commission of any case based on its assertion that the requirements imposed on competitive retail electric service providers with respect to collateral requirements and supplier agreements apply to governmental aggregators, and will not assert this same argument in the future in any proceeding or in any dealings with governmental aggregators.
21. This Stipulation does not amend or supersede any provision of the Stipulation approved by the Commission in Case No. 99-1658-EL-ETP, except as expressly stated herein.

The Signatory Parties recommend and request that the Commission make the following findings of fact and conclusions of law in its Opinion and Order approving this Stipulation as fully described above:

Findings of fact:

1. The market-based standard service offer proposed herein, and the individual components thereof, are set at a rate such that it is not free service or service provided for less than actual cost for the purpose of destroying competition.

2. The market-based standard service offer proposed by CG&E does not give an undue or unreasonable advantage or preference to any consumer or subject any consumer to undue or unreasonable prejudice or disadvantage.
3. That portion of the market-based standard service offer proposed by CG&E to be charged to all consumers as the Provider of Last Resort charge is just and reasonable and consists of those components necessary for CG&E to provide a reliable generation supply to consumers such that it may fulfill its statutory obligation to serve.
4. CG&E has achieved twenty percent (20%) switching or effective competition in each non-residential consumer class.
5. The market-based standard service offer price, and individually the price to compare and the Provider of Last Resort components, represent the price of competitive retail electric generation service from a willing seller to willing buyers.
6. Effective competition exists for all consumer classes, as of the end of the Market Development Period for each respective consumer class, if CG&E adheres to the terms and conditions of this Stipulation.
7. Pursuant to the findings of fact set forth in paragraphs four, five, and six above, the market development period ends for all non-



residential consumer classes on December 31, 2004, and the residential consumer class on December 31, 2005.

8. The Electric Reliability and Rate Stabilization Plan stipulated to herein accomplishes generally the same market option for customers as the competitive bid process required by R. C. 4928.14(B) and no competitive bid option other than contained herein is therefore required.
9. It is just and reasonable that CG&E establish, and recover through a rider amortized over five years beginning January 1, 2006, accounting deferrals equal to the revenue requirement from July 1, 2004, through December 31, 2005, on net capital investment related to CG&E's distribution business.
10. It is just and reasonable that CG&E establish mechanisms to recover costs as follows: (1) Transmission Cost Riders to recover, in an annual proceeding as described in the application, changes in transmission costs assessed to CG&E by the applicable regional transmission organization or otherwise approved by the Federal Energy Regulatory Commission; and (2) a Demand-Side Management Cost Rider to recover the development and implementation costs for energy efficiency and load management programs agreed upon by the Cinergy Community Energy Partnership board and approved by the Commission, in an annual proceeding as described in the application.

11. It is just and reasonable for CG&E to continue to fund and recover in base rates energy efficiency programs, as approved in Case No. 99-1658-EL-ETP through December 31, 2008, or as approved by the Commission in CG&E's next distribution base rate case.
12. It is just and reasonable for CG&E to have no obligation to transfer ownership of its generation assets.
13. CG&E's collection of regulatory transition revenues from residential consumers for the period of January 1, 2009, through December 31, 2010, does not represent an increase of the charge recovering revenue requirements associated with the recovery of previously approved regulatory assets.
14. This Stipulation is supported by adequate data and information; violates no regulatory principle or precedent; and is the product of lengthy, serious bargaining among knowledgeable and capable parties representing a wide range of interests, including the Commission's Staff.

Conclusions of Law:

1. CG&E's market-based standard service offer and competitive bid process, as set forth herein, comply with R. C. Title 49, including but not limited to, R. C. Sections 4928.02, 4928.03, 4928.05, and 4928.14.
2. CG&E's market-based standard service offer, including the price to compare and Provider of Last Resort charge, is consistent with R.

C. Title 49, including but not limited to, Division B of R. C. 4905.33 and R. C. 4905.35.

3. The deferral and recovery of accounting deferrals equal to the revenue requirement from July 1, 2004, through December 31, 2005, on net capital investment related to CG&E's distribution business, is consistent with the frozen rates during the market development period required generally by R. C. Chapter 4928 and specifically by R. C. 4928.34(A)(6).
4. The approval and implementation of: (1) Transmission Cost Riders to recover, as described in the application, changes in transmission costs approved by FERC including those costs assessed to CG&E by the applicable regional transmission organization; and (2) a Demand-Side Management Cost Rider to recover the development and implementation costs for energy efficiency and load management programs agreed upon by the Cinergy Community Energy Partnership board and approved by the Commission, as described in the application, is consistent with the Commission's ratemaking authority set forth in R. C. Title 49, including, but not limited to, R. C. 4909.15, 4909.17, 4909.18, and 4909.19.
5. The end of the market development period for each consumer class, pursuant to the factual findings set forth in this Opinion and

Order, is in compliance with R. C. Title 49, including but not limited to, R. C. 4928.40.

6. The approval that CG&E may maintain ownership of its generation assets is in compliance with R. C. Chapter 4928 generally, including, but not limited to, R. C. 4928.17, 4928.18, 4928.31, and 4928.34.
7. CG&E's collection of regulatory transition revenues from residential consumers for the period of January 1, 2009, through December 31, 2010, is in compliance with R. C. 4928.40.


The undersigned hereby stipulate and agree and each represents that it is authorized to enter into this Stipulation and Recommendation this 19th day of May, 2004.

Respectfully submitted,



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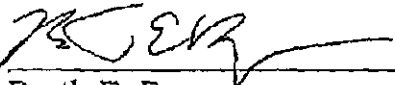
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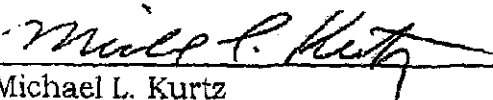
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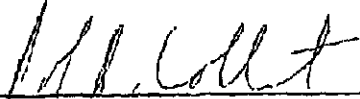
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Stipulation and Recommendation was sent by electronic mail to all parties of record and listed below this 19<sup>th</sup> day of May, 2004.

  
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THE CINCINNATI GAS & ELECTRIC COMPANY  
Summary of POLR Charge  
Year 2005

	<u>Amount</u>
Emission Allowances	\$ 11,030,529
Environmental Compliance	42,748,169
Homeland Security	837,275
Taxes	0
Reserve Margin	<u>52,898,560</u>
Total Costs to Be Recovered	<u>\$ 107,614,533</u>
Little g Revenue for the Twelve Months Ended December 31, 2003	<u>\$ 752,156,346</u>
Percent Increase in POLR, Before Cap	<u>14.28%</u>

**THE CINCINNATI GAS & ELECTRIC COMPANY**  
**POLR Charge Calculation**  
**Emission Allowances**

	(July 2003 - Jan 2004) <u>7 Months Actual</u>	(February - June 2004) <u>5 Months Budget</u>	<u>Total</u>
Emission Allowances Account 509	\$ 7,750,000	\$ 6,410,000	\$ 14,160,000
Total Emission Allowances	<u>\$ 7,750,000</u>	<u>\$ 6,410,000</u>	<u>\$ 14,160,000</u>
 Total kWh Generated & Purchased for Period	 <u>10,777,000,000</u>	 <u>7,458,000,000</u>	 <u>18,235,000,000</u>
EA Cost per Kwh	0.000718	0.000860	0.000777
EAs Included in EFC Rate Frozen on October 6, 1999			<u>0.000126</u>
Change in EA Cost per Kwh			<u>0.000651</u>
Total kWh Sales			18,957,000,000
Amount to Be Recovered			<u>\$ 11,030,529</u>

**THE CINCINNATI GAS & ELECTRIC COMPANY**  
**POLR Charge Calculation**  
**Calculation of Revenue Requirement on Environmental Compliance Cost Increase**  
**In Excess of Year 2000**

STIPULATION EXHIBIT 1

<u>Return on Environmental Plant</u>	<u>As of</u> <u>12/31/2000</u>	<u>Activity</u>	<u>As of</u> <u>6/30/2004</u>	<u>Amount to Be</u> <u>Recovered</u>
Original Cost	\$ 459,948,529		\$ 459,948,529	
2001 Additions (East Bend)		\$ 48,726	48,726	
2002 Additions (MF 8)		31,861,127	31,861,127	
2003 Additions (MF 7)		35,672,604	35,672,604	
2004 Additions (thru June) (EB, Stuart, Zimmer)		87,478,556	87,478,556	
	<u>\$ 459,948,529</u>	<u>\$ 155,061,015</u>	<u>\$ 615,009,544</u>	
Reserve for Depreciation	\$ (190,580,960)	\$ (32,135,633)	\$ (222,716,593)	
2001 Additions		(4,415)	(4,415)	
2002 Additions		(1,841,573)	(1,841,573)	
2003 Additions		(1,030,938)	(1,030,938)	
2004 Additions (thru June)		0	0	
	<u>\$ (190,580,960)</u>	<u>\$ (35,012,559)</u>	<u>\$ (225,593,519)</u>	
Net Book Value	\$ 269,367,569	\$ 120,048,456	\$ 389,416,025	
Construction Work in Progress at 12/31/2003		140,737,941	140,737,941	
2004 Additions (thru June)		35,184,187	35,184,187	
Total Environmental Plant	<u>\$ 269,367,569</u>	<u>\$ 295,970,584</u>	<u>\$ 565,338,153</u>	
Pre-tax Return at 14.22%	\$ 38,304,068		\$ 80,381,085	
<u>Environmental O&amp;M Expenses</u>				
Operation & Maintenance				
Year 2000	4,898,585			
July through December, 2003			1,305,839	
January through June, 2004			1,089,058	
Annualized Depreciation	9,198,971		12,300,191	
Kentucky Property Tax (East Bend Additions)			63,620	
Total Revenue Requirement	<u>\$ 52,401,624</u>		<u>\$ 95,149,793</u>	<u>\$ 42,748,169</u>

**THE CINCINNATI GAS & ELECTRIC COMPANY**  
**POLR Charge Calculation**  
**Homeland Security Revenue Requirement**  
**Twelve Months Ended June 30, 2004**

	<u>Information Technology</u>	<u>Cyber Security</u>	<u>Physical Security</u>	<u>Total</u>
<u>Return on Capital Expenditures</u>				
Original Cost	\$ 136,865	\$ 269,572	\$ 204,260	\$ 610,687
Reserve for Depreciation	0	0	0	0
Net Plant	<u>\$ 136,865</u>	<u>\$ 269,572</u>	<u>\$ 204,260</u>	<u>\$ 610,687</u>
Pre-tax Return at 14.22%	\$ 19,462	\$ 38,333	\$ 29,044	\$ 86,840
<u>Operation &amp; Maintenance Expenses</u>				
Operation & Maintenance	555,374	60,620	71,250	687,144
Annualized Depreciation (at 10%)	13,687	26,957	20,425	61,069
Annualized Property Taxes	498	981	743	2,222
Amount to Be Recovered	<u>\$ 589,021</u>	<u>\$ 126,791</u>	<u>\$ 121,462</u>	<u>\$ 837,275</u>

Note: All Homeland Security Costs are incremental to the year 2000.



STIPULATION EXHIBIT 1

THE CINCINNATI GAS & ELECTRIC COMPANY  
POLR Charge Calculation  
Taxes  
Twelve Months Ended June 30, 2004

There are no known Tax changes for this POLR calculation period.

STIPULATION EXHIBIT 1

THE CINCINNATI GAS & ELECTRIC COMPANY  
POLR Charge Calculation  
Reserve Margin  
Twelve Months Ended June 30, 2004

Projected 2005 Peak MW (Switched & Non-switched) (1)	4,862 MW
Required Reserve Margin of 17%	826.54 MW
Peaking Unit Capital Cost (2)	\$ 64.00 per kw-year
Capital Cost of Reserve Margin	<u>\$ 52,898,560</u>

- (1) CG&E's current summer generating capacity is 5,333 MW. The projected capacity to serve The Union Light, Heat and Power Company in 2005 is 874 MW. The remaining 4,459 MW is available to meet CG&E's peak load.
- (2) Annualized installed cost of a Peaking Unit using EPRI TAG costs.

**Stipulation Exhibit 2,**  
**Increase in Distribution Revenue Requirements**  
**(On Net Distribution-Related Capital Investment) (\$000)**

**The Cincinnati Gas & Electric Co.**

	Case No. <u>99-1658-EL-ETP</u>	<u>Current</u>	Difference
1 Distribution Rate Base	\$617,076	\$838,520	\$219,444
2 Rate of Return (Debt Return Only)			<u>6.84%</u>
3 Required Operating Income			\$15,010
4 Depreciation	22,070	36,741	14,671
5 <u>Property Taxes</u>	<u>32,387</u>	<u>48,856</u>	<u>16,469</u>
6 Sub-Total (lines 3+4+5)			\$46,150
7 <u>Revenue Conversion Factor</u>			<u>1.0124</u>
8 Increase in Annual Revenue Requirement			<u>\$48,722</u>

Stipulation Exhibit 3 The Cincinnati Gas & Electric Company  
Stipulation And Recommendation

Rate Schedule	Proposed ERSF Rates					
	"Big G"	"Little G"	Rider RTC	RSC	"G"	POLR <sup>†</sup>
	A ¢ per kWh	B = A - C ¢ per kWh	C ¢ per kWh	D = 15% X B ¢ per kWh	E = B - D ¢ per kWh	F = % X B ¢ per kWh
<b>Rate RS, Residential Service</b>						
Summer, First 1000 kWh	5.0664	4.4180	0.6484	0.6627	3.7553	0.2209
Summer, Additional kWh	6.3534	5.5978	0.7556	0.8397	4.7581	0.2799
Winter, First 1000 kWh	5.0664	4.4180	0.6484	0.6627	3.7553	0.2209
Winter, Additional kWh	2.0546	1.8669	0.3877	0.2500	1.4189	0.0833
<b>Rate ORH, Optional Residential Service With Electric Space Heating</b>						
Summer, First 1000 kWh	4.7202	3.9442	0.7760	0.5916	3.3526	0.1972
Summer, Additional kWh	5.6310	4.7296	0.9044	0.7090	4.0176	0.2363
Winter, First 1000 kWh	4.7200	3.9440	0.7760	0.5916	3.3524	0.1972
Winter, Additional kWh	2.5057	2.0417	0.4640	0.3083	1.7354	0.1021
Winter, kWh greater than 150 times demand	1.6156	1.2770	0.3386	0.1918	1.0855	0.0639
<b>Rate TD, Optional Time-of-Day Rate</b>						
Summer, On-Peak kWh	10.6570	9.0079	1.6491	1.3512	7.6567	0.4504
Summer, Off-Peak kWh	1.6734	1.3156	0.3578	0.1973	1.1183	0.0858
Winter, On-Peak kWh	8.4072	7.0811	1.3261	1.0622	6.0189	0.3541
Winter, Off-Peak kWh	1.6739	1.3161	0.3578	0.1974	1.1187	0.0858
<b>Rate DS, Service at Secondary Distribution Voltage</b>						
First 1000 kW (\$ per kW)	\$ 7.6574	\$ 7.6574	-	\$ 1.1486	\$ 6.5088	\$ 0.6126
Additional kW (\$ per kW)	\$ 6.0574	\$ 6.0574	-	\$ 0.9086	\$ 5.1488	\$ 0.4846
Billing Demand Times 300	2.8568	1.9576	0.8992	0.2306	1.6640	0.1586
Additional kWh	1.6366	1.6266	0.0100	0.2440	1.3826	0.1301
<b>Rate GS-FL, Optional Unmetered For Small Fixed Loads</b>						
kWh Greater Than or Equal to 540 Hours	7.1760	6.5041	0.6719	0.9756	5.5285	0.5203
kWh Less Than 540 Hours	8.1484	7.4765	0.6719	1.1215	6.3550	0.5981
<b>Rate EH, Optional Rate For Electric Space Heating</b>						
All kWh	3.3405	2.6686	0.6719	0.4003	2.2683	0.2135
<b>Rate DM, Secondary Distribution Service, Small</b>						
Summer, First 2800 kWh	7.0728	5.8562	1.2166	0.8784	4.9778	0.4685
Summer, Next 3200 kWh	1.8173	1.4952	0.3221	0.2243	1.2709	0.1196
Summer, Additional kWh	0.9004	0.6620	0.2484	0.0978	0.5542	0.0522
Winter, First 2800 kWh	5.6302	4.6480	0.9822	0.6972	3.9508	0.3718
Winter, Next 3200 kWh	1.8172	1.4969	0.3203	0.2245	1.2724	0.1196
Winter, Additional kWh	0.8633	0.6191	0.2442	0.0929	0.5262	0.0495

Stipulation Exhibit 3 The Cincinnati Gas & Electric Company  
Stipulation And Recommendation

Rate Schedule	Proposed ERRSP Rates					
	"Big G"	"Little G"	Rider RTC	RSC	"G"	POLR <sup>1</sup>
	A \$ per kWh	B = A - C \$ per kWh	C \$ per kWh	D = 15% X B \$ per kWh	E = B - D \$ per kWh	F = % X B \$ per kWh
<b>Rate DP, Service at Primary Distribution Voltage</b>						
First 1000 kW (\$ per kW)	\$ 6.9150	\$ 6.9150	-	\$ 1.0373	\$ 5.8778	\$ 0.5532
Additional kW (\$ per kW)	\$ 5.4550	\$ 5.4550	-	\$ 0.8180	\$ 4.6368	\$ 0.4364
Billing Demand Times 300	2.8898	2.2048	0.6850	0.3307	1.8741	0.1764
Additional kWh	1.7782	1.7682	0.0100	0.2652	1.5030	0.1415
<b>Rate TS, Service at Transmission Voltage</b>						
First 50,000 kVA (\$ per kVA)	\$ 8.3830	\$ 8.3830	-	\$ 1.2575	\$ 7.1256	\$ 0.6706
Additional kVA (\$ per kVA)	\$ 6.0430	\$ 6.0430	-	\$ 0.9065	\$ 5.1366	\$ 0.4834
Billing Demand Times 300	1.9994	1.4404	0.5590	0.2161	1.2243	0.1152
Additional kWh	1.6481	1.6381	0.0100	0.2457	1.3924	0.1310
<b>Rate SL, Street Lighting Service</b>						
All kWh	3.1094	2.8804	0.2290	0.4321	2.4483	0.2304
<b>Rate TL, Traffic Lighting Service</b>						
All kWh	1.9148	1.6858	0.2290	0.2529	1.4329	0.1349
<b>Rate OL, Outdoor Lighting Service</b>						
All kWh	3.1094	2.8804	0.2290	0.4321	2.4483	0.2304
<b>Rate NSU, Street Lighting Service for Non-Standard Units</b>						
All kWh	3.1094	2.8804	0.2290	0.4321	2.4483	0.2304
<b>Rate NSP, Private Outdoor Lighting for Non-Standard Units</b>						
All kWh	3.1094	2.8804	0.2290	0.4321	2.4483	0.2304
<b>Rate SC, Street Lighting Service - Customer Owned</b>						
All kWh	1.3749	1.1459	0.2290	0.1719	0.9740	0.0917
<b>Rate SE, Street Lighting Service - Overhead Equivalent</b>						
All kWh	3.1094	2.8804	0.2290	0.4321	2.4483	0.2304
<b>Rate UOLS, Unmetered Outdoor Lighting Electric Service</b>						
All kWh	1.4148	1.1858	0.2290	0.1779	1.0079	0.0949

Notes:

<sup>1</sup> The 2005 POLR increase is 8% of "Little g" for non-residential rate schedules. For residential rate schedules, a 5% increase is shown; however, per the terms of this stipulation, the 2005 POLR increase for residential customers will not be collected in 2005, but will be included in the cumulative amount to be collected in 2006.

The Cincinnati Gas & Electric Company  
139 East Fourth Street  
Cincinnati, Ohio 45202

Sheet No. 84.1  
~~Cancels and Supersedes~~  
Sheet No. 84  
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**RIDER RTC**

**REGULATORY TRANSITION CHARGE RIDER**

**APPLICABILITY**

Applicable to all jurisdictional retail customers in the Company's electric service area.

**CHARGE**

The Regulatory Transition Charges detailed below are applicable ~~after the end of the Market Development Period January 1, 2005 for non-residential customers~~, except that they will not apply to those ~~non-residential~~ customers taking their energy from a Certified Supplier at the end of the Market Development Period until either the customer resumes energy procurement from CG&E or December 31, 2005, whichever is earlier. ~~The Regulatory Transition Charges detailed below are applicable to residential customers January 1, 2006.~~ All applicable kWh are subject to the Regulatory Transition Charge. See Section VI, Item 7 of the Electric Service Regulations for the definition of the term "Market Development Period."

~~For residential customers, these rates are effective until December 31, 2008.~~ For all other customers, these rates are effective through December 31, 2010.

Tariff Sheet

RTC (cents per kilowatt-hour)

Rate RS, Residential Service

Filed pursuant to an Entry dated November 21, 2000 in Case No. 99-1658-EL-ETP03-93-EL-ATA before the Public Utilities Commission of Ohio.

Issued: December 13, 2000

Effective: February 2, 2001

Issued by Gregory C. Ficker, Joseph Hale, Jr., President

The Cincinnati Gas & Electric Company  
139 East Fourth Street  
Cincinnati, Ohio 45202

Sheet No. 84.1  
~~Cancels and Supersedes~~  
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Page 2 of 2

Summer, First 1000 kWh	0.6484
Summer, Additional kWh	0.7556
Winter, First 1000 kWh	0.6484
Winter, Additional kWh	0.3877
Rate ORH, Optional Residential Service With Electric Space Heating	
Summer, First 1000 kWh	0.7760
Summer, Additional kWh	0.9044
Winter, First 1000 kWh	0.7760
Winter, Additional kWh	0.4840
Winter, kWh greater than 150 times demand	0.3386
Rate TD, Optional Time-of-Day Rate	
Summer, On-Peak kWh	1.6491
Summer, Off-Peak kWh	0.3578
Winter, On-Peak kWh	1.3281
Winter, Off-Peak kWh	0.3578
Rate DS, Service at Secondary Distribution Voltage	
Billing Demand Times 300	0.8992
Additional kWh	0.0100
Rate GS-FL, Optional Unmetered For Small Fixed Loads	
kWh Greater Than or Equal to 540 Hours	0.6719
kWh Less Than 540 Hours	0.6719

Filed pursuant to an Entry dated ~~November 21, 2000~~ in Case No. ~~99-1658-EL-ETP~~ 03-93-EL-ATA before  
the Public Utilities Commission of Ohio.

Issued: December 13, 2000

Effective: ~~February 2, 2001~~

Issued by ~~Gregory C. Ficker~~ Joseph Hale, Jr., President

The Cincinnati Gas & Electric Company  
139 East Fourth Street  
Cincinnati, Ohio 45202

Sheet No. 84.1  
~~Cancels and Supersedes~~  
Sheet No. 84  
Page 3 of 2

**CHARGES (Contd.)**

Tariff Sheet

RTC (cents per kilowatt-hour)

Rate EH, Optional Rate For Electric Space Heating All kWh	0.6719
Rate DM, Secondary Distribution Service, Small	
Summer, First 2800 kWh	1.2166
Summer, Next 3200 kWh	0.3221
Summer, Additional kWh	0.2484
Winter, First 2800 kWh	0.9822
Winter, Next 3200 kWh	0.3203
Winter, Additional kWh	0.2442
Rate DP, Service at Primary Distribution Voltage	
Billing Demand Times 300	0.6850
Additional kWh	0.0100
Rate TS, Service at Transmission Voltage	
Billing Demand Times 300	0.5590
Additional kWh	0.0100
Rate SL, Street Lighting Service	
All kWh	0.2290
Rate TL, Traffic Lighting Service	
All kWh	0.2290
Rate OL, Outdoor Lighting Service	
All kWh	0.2290
Rate NSU, Street Lighting Service for Non-Standard Units	
All kWh	0.2290
Rate NSP, Private Outdoor Lighting for Non-Standard Units	
All kWh	0.2290
Rate SC, Street Lighting Service - Customer Owned	
All kWh	0.2290
Rate SE, Street Lighting Service - Overhead Equivalent	
All kWh	0.2290
Rate UOLS, Unmetered Outdoor Lighting Electric Service	
All kWh	0.2290

Filed pursuant to an Entry dated November 21, 2000 in Case No. 99-1658-EL-ETP03-93-EL-ATA before  
the Public Utilities Commission of Ohio.

Issued: December 13, 2000

Effective: February 2, 2001

Issued by Gregory C. Flick - Joseph Hale, Jr., President



23

1 settlement, and as a result, you know, that process  
2 proceeded and we ultimately did enter into a  
3 settlement agreement with a lot of the parties.

4 But it was done in the Commission offices  
5 with all parties' awareness and, for the most part,  
6 all parties' attendance.

7 Q. Do you know what the reference is in both  
8 of these e-mails to the new item 5?

9 A. No.

10 Q. Down in the second e-mail, the one  
11 from -- by the way, do you know who [REDACTED]  
12 is?

13 A. I know the name.

14 Q. Is he with the [REDACTED]

15 A. I don't know that he's with the [REDACTED]  
16 [REDACTED] but I do recognize the name.

17 Q. Where do you recognize the name from?

18 A. I probably heard it before.

19 Q. Do you know [REDACTED]

20 A. I recognize the name. Don't think I've  
21 met either one of the two, although I may have been  
22 in large meetings with them.

23 Q. Do you recognize him as associated with  
24 the [REDACTED]

24

1 A. I wouldn't -- I couldn't -- without this  
2 I couldn't have told you that. If you would have  
3 mentioned the name and asked me who they worked for,  
4 I couldn't have told you, but seeing this in context  
5 it doesn't surprise me that they're with the [REDACTED] but  
6 I would have had to have something to jog my memory.

7 Q. In your previous response, and I go back  
8 to the second portion of this, it's actually a second  
9 e-mail, the [REDACTED], it states "Note that  
10 number 5 was added this afternoon at the behest of  
11 one of our members, but it will not be a deal  
12 breaker." Do you see that?

13 A. Yes.

14 Q. Do you believe this was part of the --  
15 that appears to be a statement between the [REDACTED] and  
16 CG&E. Is this part of the public process of  
17 negotiating?

18 A. I have no idea what they're talking about  
19 here. I can't characterize it.

20 Q. It is part of the settlement discussions  
21 that you mentioned, though. Wouldn't you agree?  
22 Even without knowing what No. 5 was.

23 A. I don't recall this whole No. 5 issue  
24 coming up. I don't recall what it was. I don't

25

1 recall how it was resolved. I just don't remember  
2 the substance of it. It doesn't look to be very  
3 important.

4 Q. All right. I'm going to mark Exhibit 5.

(EXHIBIT MARKED FOR IDENTIFICATION.)

6 Q. Exhibit 5 is [REDACTED]  
7 [REDACTED] it's an agreement between Cinergy Retail Sales,  
8 oftentimes abbreviated CRS, and, as it states, [REDACTED]  
9 [REDACTED] dated around [REDACTED]. Have you  
10 seen this document before?

11 A. I'm sure that I've seen it.

12 Q. Now turning to what's marked as Bates  
13 stamp 349. Throughout this deposition I will tend to  
14 use these numbers rather than the numbers on the  
15 documents, 349 is at the bottom right.

16 A. That's fine.

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]

21 A. Yes.

22 Q. Were you aware of this agreement of the  
23 [REDACTED]  
24 [REDACTED]

26

1 A. Yes.

2 Q. When did you become aware of that?

3 A. Would have been in the time frame of this  
4 agreement, so it would be in [REDACTED]

5 Q. And how did that come to your attention?

6 A. By reading the document I suppose.

7 Q. And how did you come by the document?

8 A. I don't recall the delivery method.

9 Q. Were agreements of this type that dealt  
10 with support of the stipulation in 03-93 routinely  
11 brought to your attention? Would you have seen those  
12 types of documents in this time frame?

13 A. In this time frame, sure.

14 Q. So there were other agreements that you  
15 saw, not just this [REDACTED]  
16 agreement.

17 A. Much like those that you showed me in  
18 your Exhibit No. 3.

19 Q. Did you see what's marked as Exhibit 5 or  
20 drafts of it before this agreement was executed?

21 A. I may have.

22 Q. [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

27

29

1 A. Yes.  
2 Q. And were those negotiations that resulted  
3 in the agreements such as that shown on Exhibit 5,  
4 were those part of a public process that involved all  
5 the parties to the 03-93 case?  
6 A. No.  
7 Q. I'm going to mark Exhibit 6.  
8 (EXHIBIT MARKED FOR IDENTIFICATION.)  
9 Q. Let's set Exhibit 6 aside for a second.  
10 If you could pick up Exhibit 2. Do you have that?  
11 A. Uh-huh.  
12 Q. Okay. You may want to find a more  
13 comfortable position, I'm going to ask a few  
14 questions about Exhibit 2 again.  
15 I'd like to direct your attention to what  
16 is numbered as Bates stamped 330, section 5 which  
17 states that [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

28

30

1 A. Yes.  
2 Q. When were you informed of a provision  
3 [REDACTED]  
4 [REDACTED]  
5 A. I don't recall.  
6 Q. You were a witness in the Cincinnati  
7 Gas & Electric distribution rate case; is that  
8 correct?  
9 A. That case was settled.  
10 Q. Not really the question. I asked -- oh,  
11 I see.  
12 A. I'm thinking out loud. I don't recall  
13 being on the stand.  
14 Q. I see.  
15 A. I have to go back and think whether I  
16 submitted testimony. I believe -- I think I did.  
17 Q. I understand. So you filed -- you had  
18 prefiled testimony but did not take the stand.  
19 A. I believe that's right.  
20 Q. Okay.  
21 A. Sometimes I do testify in cases, other  
22 times I don't. I believe in that one my plan was to  
23 testify.  
24 Q. And were you aware that there were

1 commitments made in agreements such as that shown in  
2 Exhibit 2 regarding the manner [REDACTED]  
3 [REDACTED]  
4 A. I think I was generally aware of it, and  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED], something to that effect. Is this really  
8 any -- does it really cause us any problem? Is it  
9 something that we were going to do anyway? And I  
10 believe that that was the case. It wasn't something  
11 that was binding us in any way because it was what we  
12 were going to do in any event.  
13 Q. So do you believe that CG&E fulfilled  
14 the, for lack of a better word, dictates of that  
15 paragraph 5?  
16 A. I don't think that this could dictate  
17 what we did or didn't do. My belief is that this is  
18 how we were approaching the case in any event.  
19 Q. All right. Really my question is did the  
20 provisions of paragraph 5, did that actually come to  
21 pass?  
22 A. I don't know.  
23 Q. Who in the CG&E and affiliated companies  
24 negotiated these agreements?

1 A. There were a number of lawyers involved.  
2 There were representatives from Cinergy Retail Sales  
3 that were involved.  
4 Q. And who would that be?  
5 A. [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 Q. That would be a person who's listed as  
10 the contact person in the Commission's docketing?  
11 A. That could be.  
12 [REDACTED]  
13 A. That's it.  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 Q. And that was with the negotiations.  
19 A. Either with the -- and it depends how you  
20 define "negotiations." I mean, there's a lot of  
21 preparation for negotiations which a lot of people  
22 are involved in. They aren't all involved in sitting  
23 across the table if that's how you're defining  
24 "negotiations." I was more defining people that were

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1 involved with the process.

2 Q. Okay.

3 MR. SMALL: Let's go off the record for a  
4 second.

5 (Discussion held off the record.)

6 MR. SMALL: Back on the record.

7 Q. Back to Exhibit 2, page Bates stamped 330  
8 which you have in front of you, [REDACTED]

9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 see that?

14 A. Uh-huh. Yes.

15 Q. What corporate entity [REDACTED]  
16 [REDACTED] That would be Cincinnati  
17 Gas & Electric Company; is that correct?

18 A. I'm not sure.

19 Q. Are you familiar with the minimum stay  
20 requirements?

21 A. Generally. Generally.

22 Q. Okay. [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

32

1 [REDACTED] is that correct?

2 A. Yes.

3 Q. So it would be [REDACTED]  
4 [REDACTED] do you agree?

5 A. I assume so. I don't know. And I don't  
6 recall this provision to be honest with you.

7 Q. And just to wrap things up, when you say  
8 not familiar with this provision, not familiar with  
9 that provision in this agreement or in any other  
10 agreement? Or are you familiar with that kind of  
11 agreement in some other agreement?

12 A. No, I'm not -- I don't recall being  
13 familiar with this portion of this document and what  
14 the ramifications were of it. I just don't recall  
15 it.

16 Q. You don't recall any -- just to make  
17 sure, [REDACTED]

18 [REDACTED]  
19 A. No. [REDACTED]  
20 [REDACTED]

21 Q. At any time.

22 A. I don't recall that, no.

23 Q. Now if you could move down to paragraph  
24 10 which goes between page Bates stamped 330 and 331,

33

1 and it refers to an order being issued in 03-93, and  
2 to quote, [REDACTED] Do you see  
3 that?

4 A. Yes.

5 Q. Did CG&E -- remember that this is an  
6 agreement in a [REDACTED] time frame. [REDACTED]

7 [REDACTED]  
8 [REDACTED]

9 A. We submitted it for rehearing, so I would  
10 say it was found to be not acceptable.

11 Q. Were there communications between -- [REDACTED]  
12 [REDACTED]  
13 [REDACTED]

14 A. Our filing for rehearing was public.

15 Q. So are you saying that the communications  
16 within your own organization would depend on people  
17 being aware of filings at the PUCO?

18 A. I don't recall specifically informing  
19 Cinergy Retail Sales. I do believe that they knew it  
20 since the filing was a public filing.

21 Q. And I believe you also said that the same  
22 legal people who represented Cincinnati Gas &  
23 Electric also represented CRS; is that correct? You  
24 mentioned Mr. Colbert just a few moments ago.

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1 A. Sure, they work for a number of different  
2 affiliates.

3 Q. So if the same people were informed --  
4 were involved, CRS would just know that fact; is that  
5 correct?

6 MR. DORTCH: Objection. Go ahead and  
7 answer if you can.

8 A. I don't know. I mean, I believe what  
9 you're saying, but just because one person knows it  
10 I'm not sure that I can say with certainty that  
11 somebody else does.

12 Q. Now, that paragraph refers to, and I'm  
13 over here on Bates stamp 331. [REDACTED]

14 [REDACTED]  
15 [REDACTED] Do you see that?

16 A. Right.

17 Q. Are you aware of a process of -- and I  
18 get the word [REDACTED] in this instance, it says a --  
19 [REDACTED] are the last three  
20 words of that paragraph. [REDACTED]

21 [REDACTED]  
22 [REDACTED]

23 A. No.

24 Q. Is your response meant to state that you

**EXHIBIT**

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1 were unaware of any negotiations with the members of  
2 the [REDACTED] after [REDACTED]

3 A. No.

4 Q. Okay. All right. If I understand that  
5 response, you are aware that there were additional  
6 negotiations with the members of the -- [REDACTED]

7 [REDACTED]  
8 A. Yeah. Back to your Exhibit 3, those  
9 agreements are after this time frame, and I was aware  
10 of those agreements.

11 Q. Okay. And are you saying that those  
12 were -- the agreements that were after the May time  
13 frame and that are shown on Exhibit 3 did not result  
14 from the provision on paragraph 10?

15 A. I don't believe that they did.

16 Q. You stated that you were not aware of --

17 MR. SMALL: Let's go off the record.

18 (Discussion held off the record.)

19 MR. SMALL: Let's go back on the record.

20 Q. A little while ago you mentioned who were  
21 several individuals that were involved in negotiating  
22 agreements between CRS and other parties in the May  
23 time frame. Was there a CG&E representative involved  
24 in that process considering all the provisions in

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1 this, for instance, Exhibit 5 that relate to  
2 Cincinnati Gas & Electric Company?

3 A. I was involved in it.

4 Q. Okay. Anybody else besides you? You  
5 were involved in the negotiations of these  
6 agreements; is that correct?

7 A. I was involved in preparations of  
8 information, reviewing information, those sorts of  
9 things in my role as a vice president of Cinergy  
10 Corp. I guess if you're asking for someone involved  
11 in the negotiations who is exclusively a CG&E  
12 employee, you know like maybe some of the workers on  
13 the coal pile at some of the stations, they're CG&E  
14 employees, they only work for a CG&E plant, I don't  
15 think there was anybody involved in the negotiations  
16 that was like that.

17 Q. So the only people who would be in some  
18 way connected with CG&E would be you as President and  
19 also legal counsel that represented more than one  
20 corporation.

21 A. Yeah, and there were a number of Cinergy  
22 Services folks that did work for a number of the  
23 affiliates. And Legal is a good example of that,  
24 being Cinergy Services and doing work for a number of

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1 different affiliates.

2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]

5 A. I don't know what their classification  
6 is, but I would not be surprised if they were Cinergy  
7 Services employees.

8 Q. Were you referring to anybody besides  
9 that group of Cinergy Services, Inc. employees that  
10 would have been involved in the process of  
11 negotiating those agreements?

12 A. I'm sorry, was I referring to?

13 MR. SMALL: Let's have it reread.

14 (Record read.)

15 A. No, although I just -- I don't mean for  
16 that to be an exhaustive list. I didn't want you to  
17 think that I had exhausted the list of people that  
18 would have been involved from time to time.

19 Q. Those are the people you could think of.

20 A. Off the top of my head, yeah.

21 Q. Okay. I want to mark 6.

22 MR. DORTCH: You marked Exhibit 6.

23 Q. Okay, then I'll return to Exhibit 6.

24 A. Done with Exhibit 2?

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1 Q. Yes.

2 Now, Exhibit 6 I may have mentioned is  
3 Bates stamped 320 to 326 and, again, involves Cinergy  
4 Retail Sales and a group of corporations that I think  
5 we just recently saw, the same corporations as shown  
6 on the top of [REDACTED] This agreement is in the  
7 [REDACTED] Have you seen this  
8 document before?

9 A. I believe that I've probably seen it,  
10 yes.

11 Q. And when did you first see this document?

12 A. Around the time frame that is referenced  
13 in the first paragraph; [REDACTED]

14 Q. Okay. Would you turn to Exhibit 3 again,  
15 that was the list of agreements? And you'll note the  
16 pattern that I mentioned earlier, there are  
17 agreements in the [REDACTED] and then below them  
18 oftentimes there is something listed in the [REDACTED]  
19 [REDACTED] Do you see the [REDACTED] agreements, for  
20 instance the second line --

21 A. Yes.

22 Q. -- and the fifth line? Did you see other  
23 agreements in the [REDACTED] similar to that  
24 which is shown on Exhibit 6?

39

1 A. Yes.  
 2 Q. And are the ones that are shown on  
 3 Exhibit 3 for the [REDACTED] time frame, have you seen  
 4 those documents?  
 5 A. I can't say that I've seen every one of  
 6 them.  
 7 Q. Are you generally familiar with those  
 8 documents?  
 9 A. Generally familiar, yeah.  
 10 Q. And you're generally familiar in the same  
 11 way that you're generally familiar with Exhibit 6?  
 12 A. Yes.  
 13 Q. I mentioned that Exhibit 2 and Exhibit 6  
 14 have the same parties. [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 MR. DORTCH: Objection. There's about  
 20 three questions there, Jeff.  
 21 MR. SMALL: Let's have it read back.  
 22 MR. DORTCH: Okay.  
 23 (Question read.)  
 24 Q. I think that's one question. Forget

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1 number of attorneys that were involved in dealing  
 2 with those. And as I mentioned before, there were a  
 3 lot of folks internally that had their eyes on the  
 4 pros, cons, and other impacts associated with  
 5 entering into these agreements.  
 6 Q. Would they generally be the same  
 7 individuals that you identified earlier. [REDACTED]  
 8 [REDACTED]  
 9 A. Sure.  
 10 Q. Are you familiar with a [REDACTED]  
 11 A. Yeah.  
 12 Q. Was he involved in this process?  
 13 A. [REDACTED] helped --  
 14 Q. That's [REDACTED]  
 15 A. [REDACTED] To the  
 16 extent that [REDACTED] was involved, [REDACTED] was on  
 17 his staff and was involved, sure.  
 18 Q. And you mentioned that you were, at least  
 19 in background terms, were involved in the [REDACTED]  
 20 agreements; was that also your involvement in the  
 21 [REDACTED] agreements? I think you --  
 22 A. I would say it was similar, yeah.  
 23 Q. Okay. I'm going to mark Exhibit 7.  
 24 (EXHIBIT MARKED FOR IDENTIFICATION.)

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1 about the superseded part, but the real question is  
 2 did the [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]  
 5 A. [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 I didn't connect it to that specific term  
 13 that you were referring to. I guess I was involved  
 14 at a higher level. I didn't connect it to that term.  
 15 Q. So at a high level the, as you mentioned,  
 16 [REDACTED]  
 17 [REDACTED]  
 18 that --  
 19 A. Yes.  
 20 Q. Okay. Who was involved in negotiating  
 21 those agreements in the [REDACTED]  
 22 [REDACTED]  
 23 A. I would say it was primarily -- these  
 24 organizations were represented by counsel. We had a

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1 MR. SMALL: Let's go off the record for a  
 2 second.  
 3 (Discussion held off the record.)  
 4 MR. SMALL: Let's go back on the record.  
 5 Q. Mr. Ficke, [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 A. I'm sure that I have.  
 11 Q. And did you see it in generally the time  
 12 frame that's indicated in the first paragraph?  
 13 A. Yes.  
 14 Q. I'll point out that this document has two  
 15 different dates on it, it says [REDACTED] on  
 16 the last page and [REDACTED] on the front page,  
 17 but they're close in time. When you answered that  
 18 you saw it in this general time frame, you saw it  
 19 generally in the [REDACTED]  
 20 A. Yes.  
 21 Q. Now, I direct your attention to page  
 22 number Bates stamped 355, paragraph 9 on that page.  
 23 It goes over to 356. That paragraph refers to the  
 24 [REDACTED]

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1 [REDACTED] were negotiating and, in fact, entered into  
2 what I called option agreements.

3 Q. Right. And when you refer to [REDACTED]  
4 you're referring to the parties in the column labeled  
5 Party 2 and the agreements that are listed as option  
6 agreements.

7 A. Correct.

8 Q. When did you become aware of the --  
9 generally aware of the agreements that you referred  
10 to on [REDACTED] the option agreements?

11 A. Around the time frame that they were  
12 signed.

13 Q. [REDACTED]

14 A. Yes.

15 Q. And how did you become aware of those  
16 agreements?

17 A. It would have either been through e-mail  
18 or hallway conversation, a letter. I don't recall  
19 how, but it could have been any one of those.

20 Q. And are you familiar with the individuals  
21 who worked on drafting the option agreements?

22 A. Not firsthand, although I would have  
23 assumed that [REDACTED] would have  
24 been involved in that drafting.

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1 A. [REDACTED] I occasionally got  
2 e-mails from the Cinergy Retail Sales representatives  
3 or from the lawyers as things were going on. I don't  
4 recall ever getting a copy of the option agreements  
5 either drafts or finals. And I think that just  
6 speaks to my level of involvement during that  
7 particular time frame.

8 Q. The time frame you're talking about is  
9 the end of [REDACTED]

10 A. Correct.

11 Q. And do you know why a third round of  
12 negotiations were undertaken with customers such as  
13 [REDACTED] which is shown on [REDACTED]

14 A. I believe that the previous agreements,  
15 the [REDACTED] agreements, would have been voided by  
16 the Commission's action.

17 Q. And how is that connected with the option--  
18 agreements that were dated around [REDACTED]

19 A. I don't know that it is connected.

20 Q. Well, my question was why were the  
21 agreements -- third round of negotiations undertaken,  
22 and your response was that others' second round was  
23 voided. I don't think that's responsive to my  
24 question which is: Why was a third round of

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1 Q. Would it have included the other  
2 individuals that you mentioned earlier as having been  
3 involved in the [REDACTED]

4 A. Yeah. You asked about the drafting  
5 specifically here, but with regard to the entire  
6 agreement, the individuals that I mentioned that were  
7 representing Cinergy Retail Sales of course would  
8 have guided the drafting of these option agreements.

9 Q. Okay. How about [REDACTED] who you  
10 mentioned earlier?

11 A. You know, I would ask -- I would ask [REDACTED]  
12 that question. I am not aware of his level of  
13 involvement with the option agreements, because I  
14 wasn't involved. I knew he was involved in the  
15 others because I was involved in those, but I don't  
16 know to what extent he was involved in the option  
17 agreements.

18 Q. So you're more involved in the  
19 negotiations over the [REDACTED] agreements and  
20 not involved in negotiating or -- when you say  
21 "negotiating," I'm talking about the broader context  
22 that you were talking about, preparing and background  
23 and so forth, you were more involved in the [REDACTED]  
24 [REDACTED]

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1 negotiations and agreements undertaken?

2 MR. DORTCH: Objection; question was  
3 asked and answered.

4 MR. SMALL: Well, the question wasn't  
5 answered, so . . .

6 A. The only thing that I can speculate is  
7 that the Cinergy Retail Sales was interested in the  
8 option and the customers were interested in, you  
9 know, selling that option.

10 Q. Previously, and I'll refer to Exhibit 6,  
11 we had a discussion about the [REDACTED] agreements and  
12 this particular agreement has to do with members of  
13 the [REDACTED] Is it your understanding that  
14 the agreements about this time, those agreements that  
15 we showed in Exhibit 3, were all pretty much the same  
16 agreement, general terms and conditions?

17 MR. DORTCH: Objection; documents speak  
18 for themselves, and there's a whole lot of agreements  
19 there and not all of them have been shown to the  
20 witness, but --

21 MR. SMALL: I'm asking for his general  
22 understanding since he doesn't know the particulars  
23 of any agreements.

24 Q. Do you have a general understanding

**EXHIBIT**

12 (Pages 59 to 62)

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1 whether those were patterned after a --

2 A. My understanding is that they were all  
3 different.

4 MR. SMALL: Let's go off the record for a  
5 second.

6 (Discussion held off the record.)

7 MR. SMALL: Back on the record.

8 Q. I have here in front of me, I'm not going  
9 to make this an exhibit, but I have here in front of  
10 me a [REDACTED] agreement between Cinergy Corp. and  
11 [REDACTED] I'm going  
12 to ask you to read the -- or familiarize yourself  
13 with the bottom of 338 and the top of 339 where it  
14 states [REDACTED]  
15 [REDACTED]  
16 [REDACTED] so forth and  
17 so on.

18 MR. SMALL: Counselor, if you would like  
19 to look at that, I think you have copies of it.

20 Q. Let's mark this as an exhibit. And I'm  
21 going to do this out of order because it's one of my  
22 upcoming exhibits. Exhibit 14.

23 (EXHIBIT MARKED FOR IDENTIFICATION.)

24 Q. So we're on Exhibit 14 --

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1 MR. DORTCH: It's the same document we  
2 were just looking at.

3 MR. SMALL: Yes, it's the same document I  
4 just handed you.

5 Q. And at the bottom of page Bates stamped  
6 338 and the top of 339.

7 MR. DORTCH: Go ahead and take your time,  
8 Greg, to read that.

9 A. I don't know if you want to go off the  
10 record or not, but I did have one question maybe so I  
11 can help everyone.

12 MR. SMALL: I don't know where he's  
13 going.

14 MR. DORTCH: I don't either.

15 Q. Is it concerning the documents or my  
16 question?

17 A. Yes.

18 Q. Okay.

19 A. Is this one of the agreements that's on  
20 your Exhibit No. 3?

21 Q. Yes, I believe it is.

22 A. Okay. That was my question.

23 Q. I saw you looking at Exhibit 3. Yes, I  
24 believe you can find it under [REDACTED]

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1 A. And the only reason I was confused is  
2 because [REDACTED] under the other one it  
3 says [REDACTED] So is this --

4 Q. The agreement I put before you is not an  
5 agreement with [REDACTED] or with [REDACTED] it's with [REDACTED]

6 A. So is it on this list? That was my  
7 question.

8 Q. Oh, I'm sorry.

9 A. Is there one with [REDACTED] one with [REDACTED]  
10 and a separate one with [REDACTED]

11 Q. I believe on Exhibit 3 it would be shown  
12 as [REDACTED] it's the second line, [REDACTED] as an --  
13 agreement.

14 A. It's shown twice on there, then, one's  
15 for [REDACTED] and one's for [REDACTED] but one  
16 and the same document.

17 Q. Yes.

18 A. That's my question.

19 Q. And that's the reason why the same date,  
20 yes.

21 A. Gotcha, okay. Now I understand what I'm  
22 looking at.

23 Q. So Exhibit 3 was put together by company  
24 and it doesn't mean that there are that many

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1 agreements.

2 A. I understand.

3 MR. DORTCH: And by "company" you mean --

4 MR. SMALL: By Party 2.

5 MR. DORTCH: You're referring to the --

6 MR. SMALL: By Party 2.

7 MR. DORTCH: -- "Party 2" and not by "the  
8 companies" meaning the Cinergy companies.

9 MR. SMALL: I'm not going to further  
10 confuse it because I don't understand that, but I  
11 think the witness is clear, so . . .

12 A. You would think.

13 Okay.

14 Q. The question is, did the option  
15 agreements result from following through with  
16 revisions that are shown at the bottom of 338 and the  
17 top of 339. [REDACTED]

18 [REDACTED] Is that the  
19 reason why the option agreements were entered into?

20 A. You know, not being involved in the  
21 option agreements I guess I can't really say from my  
22 personal participation; however -- however, when the  
23 [REDACTED] agreements were, for lack of a better term,  
24 voided by the Commission's actions, you know, the

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1 option agreements then came into being, so -- but I  
2 wasn't at the table negotiating those.

3 Q. Okay. Earlier you stated that the,  
4 although you weren't specifically negotiating the  
5 [REDACTED] agreements when the [REDACTED] ones were, I think  
6 the word you used was probably "voided" in that  
7 instance too, that your high level of understanding  
8 was that the [REDACTED] ones were entered into as a  
9 result of the [REDACTED] ones being voided, is that also the  
10 case here, that despite the fact you weren't involved  
11 in the negotiation of the option agreement, that your  
12 high-level understanding is they replaced the  
13 [REDACTED] agreements?

14 MR. DORTCH: Objection; form of the  
15 question. Go ahead and answer that if you can.

16 A. This is a little bit different because a  
17 new provision was inserted, you know, the existence  
18 of an option under these contracts, and whether it  
19 was exactly the same or not, I mean I guess I would  
20 have had to have been party to those discussions to  
21 really answer your question from firsthand knowledge.

22 Q. All right, I'll mark the next exhibit.

23 A. Excuse me, are we done with 12?

24 Q. We're done with 12 but we will return to

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1 14, so why don't you just keep the 14 out. Yes. I  
2 think you've done that right.

3 A. Twelve was the option agreement.

4 Q. Right. I'm marking Exhibit 13.

5 (EXHIBIT MARKED FOR IDENTIFICATION.)

6 Q. Now, we just looked -- Exhibit 14 we just  
7 looked at, a [REDACTED] Exhibit 13  
8 Bates stamped [REDACTED] is the [REDACTED]  
9 agreement with [REDACTED] as shown in the first paragraph.  
10 Now if you could turn to section 3 of that, of  
11 Exhibit 13.

12 A. Section?

13 Q. 343, Bates stamped 343 and section 3,

14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]

17 A. Yes.

18 Q. Do you know what --

19 A. That's the second No. 3, actually.

20 Q. Yes. Which is probably the reason why it  
21 got confused there for a second. Yes, it's the  
22 second No. 3.  
23 [REDACTED]  
24 [REDACTED]

MR. DORTCH: Objection.

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1 [REDACTED]  
2 Q. What [REDACTED] were those?

3 A. I don't know what particular documents,  
4 what particular work. I don't know.

5 Q. Do you know whether these payments were  
6 made to [REDACTED]

7 A. I don't know. I mean, firsthand  
8 knowledge, no, I don't know.

9 Q. Do you know as a result of seeing  
10 reports, spreadsheets, financial statements  
11 indirectly?

12 A. No. I would have not seen a line item --  
13 for this kind of a small payment.

14 Q. [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]

18 A. I couldn't say for sure. Not that I  
19 recall.

20 Q. Okay. Let's turn to Exhibit 14 which I  
21 believe you already have. Exhibit 13 was a [REDACTED]  
22 agreement. Exhibit 14 is the [REDACTED]  
23 agreement. [REDACTED] again,  
24 there appears -- this time there's only one paragraph

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1 [REDACTED]  
2 [REDACTED] if  
3 I asked you the same questions I asked you regarding  
4 Exhibit 13, would your responses be the same?

5 A. Yes.

6 Q. I'm going to refer to Exhibit 5. It's  
7 quite a ways back in your packet so I have, for your  
8 convenience, I have that agreement again but I'm not  
9 going to relabel it, but this is Exhibit 5. And  
10 that's Bates stamped 347 through 352.

11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED] If I  
16 asked -- this is a [REDACTED] agreement. If I asked  
17 the same questions that I had regarding the [REDACTED]  
18 agreement with [REDACTED] would your responses be the same?  
19 Maybe we should go through it.

20 Are you familiar with the --

21 A. Yes.

22 Q. [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

A. Right. Now that I've looked at this, I



1 A. Yes.  
 2 Q. Your understanding of the relationship;  
 3 okay.  
 4 Exhibit 6 dated close to [REDACTED] it's  
 5 [REDACTED], and Exhibit 6 is Bates stamped  
 6 353 through 357. And that's with, well, it refers to  
 7 [REDACTED] do you see that?  
 8 A. Yes.  
 9 Q. And is that another one of these  
 10 [REDACTED] agreements that you were referring to in  
 11 your e-mail? [REDACTED]  
 12 [REDACTED]  
 13 A. I believe I was referring to this  
 14 agreement also.  
 15 Q. You can set those aside.  
 16 A little bit further down in your e-mail,  
 17 the same paragraph, third full paragraph, and this is  
 18 sort of in the middle of that paragraph, it says,  
 19 "The CRES settlement was too risky." Do you see  
 20 that?  
 21 A. Yes.  
 22 Q. By "CRES settlement" you are referring to  
 23 the entering into agreements of the nature of  
 24 Exhibits 4, 5, and 6; is that correct?

1 A. Yes.  
 2 Q. What do you understand about the  
 3 riskiness of the settlements? What did you mean by  
 4 the settlement was too risky?  
 5 A. I recall when I wrote this memo my  
 6 understanding was that the contracts were risky  
 7 [REDACTED]  
 8 [REDACTED]  
 9 Q. Would you turn back to Exhibit 4 -- I  
 10 apologize for asking you to turn that back in -- 334,  
 11 starts with Bates stamp 334? And that's an agreement  
 12 involving Cinergy Corp. and [REDACTED] and mentions [REDACTED]  
 13 [REDACTED]. Is there something in  
 14 this agreement which is a [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 A. I don't know.  
 18 Q. You haven't analyzed the agreement that I  
 19 put in front of you, Exhibit 4?  
 20 A. No.  
 21 Q. Did you ever do any analysis on this?  
 22 A. No.  
 23 Q. Did you, and specifically with respect to  
 24 the risk that you referred to in your e-mail, did you

1 discuss that feature of the CRES settlements with  
 2 anyone else in the company?  
 3 A. No. I just at the time I wrote this  
 4 quick memo I recalled someone mentioning, and I don't  
 5 even remember who, saying that someone had decided  
 6 that the contracts were too risky.  
 7 Q. Was that somebody in the Rate department?  
 8 Somebody in close proximity to your work?  
 9 A. Possibly, yes.  
 10 Q. Do you recall any analysis that was  
 11 performed by your group or any others regarding the  
 12 likely outcomes of moving forward with the CRES  
 13 settlements? Some kind of risk analysis or anything  
 14 of that nature?  
 15 A. No, I don't.  
 16 Q. All right. A little further down in your  
 17 memo, same paragraph, you stated that -- it states --  
 18 that "Cinergy entered into negotiations with each of  
 19 the parties." Do you see that?  
 20 A. Yes.  
 21 Q. What's your understanding about an  
 22 additional round of negotiations?  
 23 A. Well, I recall that the [REDACTED]  
 24 contracts contain a clause that required Cinergy

1 Retail Services to renegotiate with these CRS  
 2 customers, this group of customers, if --  
 3 Q. Your term is "CRS" here? CRS customers?  
 4 A. Yes, the CRS.  
 5 Q. Meaning [REDACTED]  
 6 [REDACTED]  
 7 [REDACTED] I'm going to object.  
 8 MR. SMALL: I'm not trying to be  
 9 difficult, I'm just trying to distinguish CRS from  
 10 CRES here.  
 11 [REDACTED] No; I understand. I  
 12 appreciate that. But I think that you're confusing  
 13 the time line because at least at this point there  
 14 are no option agreements. You haven't reached that  
 15 in the time line.  
 16 MR. SMALL: Okay.  
 17 [REDACTED] That's all. I'm trying to  
 18 prevent that confusion.  
 19 MR. SMALL: Why don't we start over again  
 20 and, I didn't mean to interrupt your answer, just  
 21 that terminology of CRES and CRS is sometimes  
 22 difficult to deal with, so why don't we have the  
 23 question read back and you can respond to it again.  
 24 (Record read.)

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1 A. I had seen the [REDACTED] agreements,  
2 but I had never seen any option agreements, nor did I  
3 even know that they existed.

4 Q. But you were aware that there were  
5 references, for instance in e-mails and so forth, to  
6 [REDACTED]

7 A. I had oftentimes seen the term and used  
8 the term "[REDACTED]"

9 Q. And did you connect them with this next  
10 round of negotiations that you mentioned here, that  
11 Cinergy entered into negotiations with each of the  
12 parties? Did you connect those two things?

13 A. My job -- my job each month and each -  
14 quarter in 2006 was to [REDACTED]  
15 [REDACTED] and I  
16 assume that something had gone on during late-2004,  
17 but I wasn't a party to those negotiations, so I  
18 didn't know what, and -- [REDACTED]

18 Q. Have you ever seen this agreement which  
19 we've labeled as Exhibit 7?

20 A. No.

21 Q. Is it your understanding, and here I'm  
22 referring back to your e-mail where it says "entered  
23 into negotiations with each of the parties and [REDACTED]  
24 [REDACTED] is it your

22 Q. And is it your understanding, I think  
23 that's close to what you state in the next paragraph,  
24 it says, starting with the word "so," "but they

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1 understanding that the next round of negotiations  
2 resulted in agreements with large customers?

3 A. It was my understanding that agreements  
4 resulted, but I did not know the nature -- the exact  
5 nature of those agreements.

6 Q. All right. You refer to not knowing the  
7 exact nature of the agreements, but earlier you  
8 referred to option agreements and option payments; do  
9 you remember that?

10 A. Yes.

11 Q. So you did know the general nature of the  
12 agreements.

13 A. [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]

19 Q. Do I understand it, then, that you  
20 understood that, as you state, Cinergy entered into  
21 negotiations with the large customers, and you also  
22 understood that [REDACTED]  
23 [REDACTED]  
24 [REDACTED]

1 receive payments," referring here to CRES customers,  
2 "but they receive payments from the company instead  
3 of receiving generation service from the Cinergy  
4 CRES." So your response was about calculating the  
5 amounts of those payments in lieu of generation  
6 service to the Cinergy -- from a Cinergy CRES; is  
7 that correct? Those were the payments that you were  
8 calculating.

9 A. Those are the payments that I'm  
10 calculating, yes.

11 [REDACTED] Mr. Small, if I might  
12 inquire, are you done asking about specific  
13 agreements? If you are, I have no objection to this  
14 part of the questioning and the e-mail becoming  
15 public.

16 MR. SMALL: Well, I'm not sure I'm done.

17 [REDACTED] Okay. Fair enough.

18 MR. SMALL: Just pause it here for a  
19 second. Collecting my thoughts.

20 [REDACTED] was just trying to  
21 minimize the portion under seal, that's all.

22 MR. SMALL: Let's go off the record for  
23 just a moment.

24 (Discussion held off the record.)

1 which to base --

2 A. And the second-to-last sentence also, the  
3 sentence says "Because the contracts were created by  
4 CRS ... the agreements were not made public," I  
5 have no knowledge of that.

6 Q. Okay.

7 A. I was not a party.

8 Q. All right. Does that do it?

9 A. (Witness nods head.)

10 Q. That was a "yes."

11 A. Yes.

12 Q. All right, I'm going to ask you to read  
13 paragraph 8 and I'll ask the same question, whether  
14 there's anything in paragraph 8 that you disagree  
15 with. Take your time.

16 [REDACTED] Jeff, before the witness  
17 answers, I'm going to state a continuing objection.  
18 We're not here to confirm or deny the Deeds  
19 complaint; this isn't a deposition about that. I'll  
20 let him answer this next question. You know, if  
21 we're going to go down this road paragraph by  
22 paragraph, at some point, frankly, I'm going to  
23 instruct him not to answer.

24 MR. SMALL: We're only concerned with --

1 I'm only concerned with paragraphs 7 and 8 and they  
2 do concern the rate stabilization plan, and I don't  
3 intend on getting into the Deeds complaint as a  
4 wrongful discharge. We're not here for that today.

5 [REDACTED]: You may answer.

6 A. Regarding paragraph 8, I was never a  
7 party to any of the discussions or negotiations or  
8 the stipulation agreements or all that, so I cannot  
9 say that I agree with or disagree with any of this  
10 because I was not a party.

11 Q. Okay. You can set that aside.

12 MR. SMALL: Let's go off the record for a  
13 second.

14 (Discussion held off the record.)

15 Q. All right. Would you pull out Exhibit 2  
16 again? Bates stamp 646, it's in the memo that you  
17 wrote that we've gone through extensively, the  
18 paragraph that starts "The original settlement  
19 agreement." Do you see that?

20 A. Yes.

21 Q. About midway through that paragraph you  
22 refer to Cinergy's top management. Do you see that?

23 A. Yes.

24 Q. Who's that a reference to? Who is

1 Cinergy's top management as you refer to in this  
2 e-mail?

3 A. When I wrote this, I was -- I didn't  
4 really know who exactly I was referring to, but  
5 somebody -- but people at the senior vice president  
6 level who had the ability to say that the contract  
7 was not going to be followed through with.

8 Q. Okay.

9 A. But I didn't have anybody specifically in  
10 mind.

11 Q. When you're referring to the senior vice  
12 president level, are you referring to the Cinergy  
13 organization or to CG&E? Really the question is who  
14 is at the senior vice president level?

15 A. Could you restate that last question?

16 Q. You referred to people -- you said that  
17 your e-mail refers to people at the senior vice  
18 president level and I'm asking who those people would  
19 be. For instance, would that include Mr. Ficke?

20 A. That would.

21 Q. Okay. And what was his position?

22 A. Well, he was president of CG&E. When I  
23 wrote this memo, though, this was just a quick

24 five-minute memo and I wasn't differentiating between

1 this vice president or that vice president, all I  
2 knew was that somebody up on high said that we're not  
3 going to follow through with this contract. So I  
4 didn't have anybody specifically in mind.

5 Q. Did you have any organization in mind,  
6 though?

7 A. No.

8 Q. Just somebody in the Cinergy-affiliated  
9 companies.

10 A. Somebody up on high, yes.

11 Q. Okay. During the period of time you  
12 said, and we've discussed it extensively, that you  
13 did calculations, these spreadsheet calculations, how  
14 did you know that your calculations were accurate if  
15 you didn't have the underlying agreements or you were  
16 unfamiliar with the underlying agreements?

17 A. We used the model that [REDACTED] prepared,  
18 and he passed it on to us, and for 2006 he had  
19 already been using it in 2006 -- in 2005, he used it  
20 in 2006, and the customers weren't complaining, and  
21 so we just continued using that model. And so  
22 that's -- we just, we made the assumption that  
23 everything was working correctly.

24 Q. All right. And what information did you

1 need in order to update your spreadsheet? Was that  
2 customer information?

3 A. Each month we would get customer  
4 information.

5 Q. Of the nature of demand and energy usage?

6 A. Yes.

7 Q. From a variety of accounts? For  
8 instance, if a customer has multiple accounts?

9 A. Yes.

10 Q. Anything else that you needed for your  
11 work?

12 A. Each month a report was generated  
13 automatically with these accounts that showed demand,  
14 energy -- I'm actually not sure about demand, but  
15 energy, and would also show various MBSSO components,  
16 for example, generation, rider AAC, rider IMF  
17 revenues for that account for that month and so  
18 forth. And from that, then, [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 Q. Okay. And when you generated reports,  
23 who did those reports go to?

24 A. The report appears on a network. The

1 basic data appears in a file on one of our network  
2 drives and then at first [REDACTED] and when I took over  
3 the job, me, and now [REDACTED] we would pull that  
4 info up and bring it into Excel into our  
5 calculations.

6 Q. I'm referring to the output. When you've  
7 done your calculations and so forth, where do those  
8 reports go?

9 A. Those reports stay within Rates in a  
10 three-ring binder. We make hard copy printouts.

11 Q. They're transmitted to [REDACTED] or  
12 somebody who deals with CRS matters; isn't that  
13 right? I mean, there must be something that goes  
14 outside the Rate department.

15 A. As we discussed previously, we take the  
16 output from those reports, from those calculations,  
17 and take the data and put them into another  
18 spreadsheet file which is set up in the form of a  
19 request for payment, we print all that out, and then  
20 hand carry it, hard copies, over to [REDACTED] or  
21 the appropriate person in [REDACTED] group for  
22 signature.

23 Q. Do you know whether any of this material  
24 goes out to the customers?

1 A. Occasionally some customers request the  
2 detail behind their payment. They're not satisfied  
3 with just receiving a check, and they want to know  
4 the detail behind the payment.

5 Q. And what do you do in that instance?

6 A. Comply with the customer's request.

7 Q. And is that -- was that your task when  
8 you were doing these calculations?

9 A. Yes.

10 Q. How does the customer make contact with  
11 you to say that they want to question a calculation  
12 or want more information? Do they know that -- while  
13 you were doing the calculations did they know to  
14 contact you?

15 A. Yes.

16 Q. And would you respond, then, directly to  
17 the customer?

18 A. Yes.

19 Q. And none of those instances raised a  
20 question of whether the calculations were being done  
21 properly. You provided the documentation and  
22 everybody was satisfied.

23 A. That's correct.

24 Q. Since you joined -- since January 1998,

1 and I pick that point as when you said you joined the  
2 Rate department and you worked for Cinergy Services,  
3 since that time have you filled out time sheets to  
4 allocate your time to one or another organization  
5 within the, first the Cinergy organization, later the  
6 Duke organization?

7 A. Our time reporting is done only by  
8 exception.

9 Q. Exception meaning for vacations and that  
10 type of thing?

11 A. Vacations and that type of thing. And  
12 also if we had some long-term special project, for  
13 example, you might do an exception report.

14 Q. Have you ever done an allocation of time  
15 for instance to CRS or DERS, Cinergy Retail Sales or  
16 Duke Energy Retail Sales?

17 A. No.

18 Q. That is -- do you fill out -- let me  
19 summarize. I think what I understand is you said  
20 it's only done by exception, so at the end of the  
21 week or pay period or whatever you don't hand in  
22 anything if there have been no exceptions.

23 A. That's correct.

24 Q. Do you know how your time gets allocated

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**CINERGY.**

May 8, 2000

Mr. Robert S. Tongren  
Ohio Consumers' Counsel  
77 South High Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215

Re: PUCO Case No's. 99-1658-EL-ETP, 99-1659-EL-ATA, 99-1660-EL-ATA, 99-1661-EL-AAM, 99-1662-EL-AAM, and 99-1663-EL-UNC.

Dear Mr. Tongren:

Conditioned upon the settlement of all issues between the Office of the Ohio Consumers' Counsel (OCC) and The Cincinnati Gas & Electric Company (CG&E) in the above referenced cases, and a Commission final order adopting such settlement without material modification, CG&E agrees to enter into the following Agreement with the OCC:

1. To develop and implement, by July 1, 2001, a customer information database to track customer complaints associated with CG&E's electric and gas customers as stated below:
  - a. CG&E shall accept customer complaints through its call center, in person or in writing.
  - b. CG&E shall create and maintain a customer complaint coding system, interfaced with its CSS system, that enables CG&E to track and prepare periodic reports

**EXHIBIT**

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regarding customer complaints by certified supplier and complaint classification.

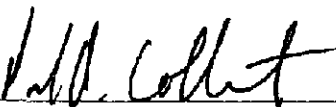
- c. CG&E shall electronically distribute incoming complaints to a CG&E representative, the OCC and the affected gas marketer or certified electric supplier. Nothing prohibits CG&E from providing this information to the PUCO.
  - d. CG&E shall document the actions taken by it or the subject gas marketer or certified electric supplier to resolve each complaint and log such actions into the tracking system.
  - e. The OCC shall have access and authority to log complaints into the tracking system.
  - f. CG&E may defer the costs of, but shall not seek cost recovery of the development of its tracking system other than through the RTC approved in its Transition Plan Case.
  - g. OCC agrees and will not challenge deferral of the costs against the Transition Revenues that the Commission approves for recovery by CG&E in the above referenced cases.
2. CG&E will contribute \$500,000 to a customer education campaign concerning customer choice jointly managed and designed by CG&E and OCC. Such contribution will be made within 30 days after the Final Order of the Commission in the above referenced cases. The campaign shall target residential customers in CG&E's certified territory. The goal of the campaign shall be to facilitate the implementation of competitive electric retail competition for residential customers in CG&E's certified territory in the most efficient manner practicable. OCC agrees and will not challenge deferral of the costs against the Transition Revenues that the Commission approves for recovery by CG&E in the above referenced cases. CG&E may defer the costs of, but shall not seek recovery of this contribution

other than through the RTC approved in its Transition Plan Case.

3. CG&E will contribute \$250,000 to the Ohio Department of Development (ODOD) over the next two years as requested by ODOD for development programs in the State. OCC agrees with and will not challenge deferral of the costs against the Transition Revenues that the Commission approves for recovery by CG&E in the above referenced cases. CG&E may defer the costs of, but shall not seek recovery of this contribution other than through the RTC approved in its Transition Plan.
4. CG&E agrees that OCC may review CG&E's Cost Allocation Manual (CAM). Prior to reviewing the CAM, CG&E and OCC shall execute a confidentiality agreement regarding the treatment of non-public information contained in the CAM. Such confidentiality agreement shall be executed no later than December 31, 2000.
5. Pursuant to a confidentiality agreement, CG&E agrees that the OCC may review the market monitoring information that CG&E must maintain pursuant to Commission Order and Ohio Administrative Code Section 4901:1-21-02. CG&E and OCC shall enter into such confidentiality agreement no later than December 31, 2000.

The above represents the entire Agreement between CG&E and OCC and may not be amended unless agreed to by both parties in writing. The undersigned hereby execute this Agreement and each represents that it is authorized to enter into this Agreement this 8th day of May, 2000.


THE CINCINNATI GAS & ELECTRIC COMPANY

By: 

Paul A. Colbert, Senior Counsel  
Its Attorney

OHIO CONSUMERS' COUNSEL

By: \_\_\_\_\_

 Eric Stephens

Eric B. Stephens, Legal Director  
Its Attorney



OHIO CONSUMERS' COUNSEL, APPELLANT, v. PUBLIC UTILITIES COM-  
MISSION OF OHIO ET AL., APPELLEES.

No. 2005-0945

SUPREME COURT OF OHIO

110 Ohio St. 3d 394; 2006 Ohio 4706; 853 N.E.2d 1153; 2006 Ohio LEXIS 2900

May 9, 2006, Submitted  
September 27, 2006, Decided

**PRIOR HISTORY:** APPEAL from the Public Utilities Commission, Nos. 03-2405-EL-CSS, 04-85-EL-CSS, and 03-2341-EL-ATA. Ohio Consumers' Counsel v. PUC, 109 Ohio St. 3d 1412, 2006 Ohio 1892, 846 N.E.2d 50, 2006 Ohio LEXIS 967 (2006)

**DISPOSITION:** Order affirmed.

**HEADNOTES:** *Public utilities -- Consolidated billing by electricity-distribution company -- Costs of billing for providers of competitive retail electric service -- Expenses caused by default of provider of competitive retail electric service.*

**COUNSEL:** Janine L. Migden-Ostrander, Ohio Consumers' Counsel, Jeffrey L. Small, and Larry S. Sauer, for appellant.

Jim Petro, Attorney General, Duane Luckey, Senior Deputy Attorney General, and Steven T. Nourse and William L. Wright, Assistant Attorneys General, for appellee, Public Utilities Commission of Ohio.

Faruki, Ireland & Cox, P.L.L., Charles J. Faruki, and Jeffrey S. Sharkey, for intervening appellee, the Dayton Power & Light Company.

Bell, Royer & Sanders Co., L.P.A., Barth E. Royer, and Judith B. Sanders, urging affirmance for amicus curiae, Dominion Retail, Inc.

**JUDGES:** O'DONNELL, J. MOYER, C.J., RESNICK, PFEIFER, LUNDBERG STRATTON, O'CONNOR and LANZINGER, JJ., concur.

**OPINION BY:** O'DONNELL

**OPINION:**

[\*394] [\*\*\*1155] O'DONNELL, J.

[\*\*P1] In this appeal, the Ohio Consumers' Counsel challenges an order issued by the Public Utilities Commission of Ohio ("PUCO") that approved a 2004 agreement between the Dayton Power & Light Company ("DP&L") and several other entities, Dominion Retail, Inc., Green Mountain Energy Company, Miami Valley Communications Council, and Industrial Energy Users-Ohio, each of which had questioned DP&L's efforts to recoup the cost of changing its billing practices after the General Assembly deregulated the retail electricity market in 1999.

[\*\*P2] The PUCO order at issue changed the way in which DP&L could recover its billing-system costs. For the reasons that follow, we affirm the PUCO's order.

**Facts**

[\*\*P3] DP&L incurred the \$ 18.8 million in billing-system costs at issue in this case because the statutes that deregulated electricity in Ohio required electric utilities to "unbundle" or separate the costs of electricity generation from the costs of electricity distribution. See R.C. 4928.10(C)(2) and 4928.35. As a result, DP&L developed new computer programs enabling the company to produce the type of customer bills that the statutes and PUCO regulations required in a deregulated electricity market.

[\*\*P4] In 2000, the PUCO approved DP&L's initial plan to charge "CRES providers" for the costs associated with the billing-system changes. A CRES provider is a provider of competitive retail electric service. See Ohio Adm.Code 4901:1-10-01(F) and 4901:1-21-01(A)(10). Both Dominion Retail, Inc. and Green [\*395] Mountain Energy Company — which joined the 2004 agreement at issue — are CRES providers.

[\*\*P5] In the competitive retail market for electricity established by the General Assembly in 1999, cus-

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tomers have the option to choose to continue paying their original electricity provider for generation service or to select a CRES provider for that service. R.C. 4928.14. Regardless of which provider the customer selects, the electricity generated by the provider is delivered over wires owned and maintained by the electric utility, and that company can continue to charge for the delivery service.

[\*\*P6] The PUCO requires electric utilities such as DP&L that distribute electricity to offer "consolidated billing" to the CRES providers that want to offer competing electricity generation service to retail customers in the utility company's territory. Ohio Adm.Code 4901:1-10-29(G). See, also, Ohio Adm.Code 4901:1-10-01(D) ("Consolidated billing" means that a customer receives a single bill for electric services provided during a billing period" for both distribution services and generation services). Evidence in the record before us indicates that DP&L had to do substantial reprogramming of its computers to accommodate the new requirement that it offer a consolidated bill showing the unbundled charges incurred by any customer in its territory who chose to buy electricity generation service from a CRES provider while DP&L continued to provide electricity-distribution service to the customer.

[\*\*P7] [\*\*\*1156] In making its initial 2000 plan to charge CRES providers for the billing-system changes, DP&L calculated that it would have to charge \$ 4.76 for each consolidated bill it generated for a CRES provider to fully recover the costs of the billing changes. DP&L concluded that potential CRES providers in its territory would not be willing to pay such a high price for the production of each customer bill, so DP&L chose to charge CRES providers \$ 1.90 per bill under a one-year contract or \$ 1.56 per bill under a two-year contract.

[\*\*P8] The lesser amount did not satisfy CRES providers such as Dominion Retail and Green Mountain Energy Company, and as a result, Dominion filed a complaint with the PUCO in 2003, and Green Mountain then intervened to challenge the amount DP&L charged CRES providers for each consolidated customer bill DP&L generated for them. The Miami Valley Communications Council -- a regional council of governments interested in promoting competition in the retail electricity market -- likewise filed a complaint against DP&L with the PUCO in 2003 alleging that DP&L charged CRES providers excessive amounts for billing services.

[\*\*P9] The PUCO consolidated the cases and granted motions to intervene filed by the Consumers' Counsel and Industrial Energy Users-Ohio. At a hearing before the PUCO on these complaints, Dominion Retail and Miami Valley offered [\*396] evidence that the DP&L charges were "excessive and unreasonable," "dis-

courage[d] shopping," and constituted a "barrier to competition." Expert testimony presented by the Consumers' Counsel echoed those views, describing the charges to CRES providers as "a significant impediment to competition" that would "significantly decrease the savings a residential customer would expect to realize" from switching to a new provider of retail electric-generation service.

[\*\*P10] After several days of hearings before the PUCO in 2004, all parties except the Consumers' Counsel reached an agreement to change the way in which DP&L could recover the \$ 18.8 million in billing-related costs it had incurred from 1999 to 2001. The stipulation called for DP&L to charge CRES providers only \$ .20 per customer bill (to cover the cost of transmitting customer data electronically between DP&L and the CRES provider) and then -- beginning January 1, 2006 -- allowed DP&L to recover from all of its customers those costs of the billing-system changes that had been approved in an audit.

[\*\*P11] The stipulation also provided for DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of that CRES provider after reasonable efforts to recover from the CRES provider.

[\*\*P12] The Consumers' Counsel refused to join the stipulation. The PUCO considered the objections raised by the Consumers' Counsel but nonetheless approved the agreement in February 2005, concluding that a reasonable arrangement would benefit ratepayers and the public. The Consumers' Counsel filed an application for rehearing, but the PUCO denied that application. This appeal followed.

#### Standard of Review

[\*\*P13] "R.C. 4903.13 provides that a PUCO order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004 Ohio 6767, P50, 820 N.E.2d 885. The court will not reverse or modify a PUCO decision as to questions of fact if the decision was not manifestly against the weight [\*\*\*1157] of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004 Ohio 6896, 820 N.E.2d 921, P 29. The appellant bears the burden of demonstrating that the PUCO's decision is against the manifest weight of the evidence or is clearly unsupported by the record. Id.

[\*\*P14] Although the court has "complete and independent power of review as to all questions of law" in

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appeals from the PUCO, *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 466, 469, 1997 Ohio 196, 678 N.E.2d 922, the court has explained [\*397] that it may rely on the expertise of a state agency like the PUCO in interpreting a law where "highly specialized issues" are involved "and where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370.

#### Analysis

##### *The Order Allowing DP&L to Charge Customers for the Billing-Related Changes Made by DP&L Is Reasonable*

[\*\*P15] The Consumers' Counsel contends first that the multiparty agreement approved by the PUCO is not beneficial to ratepayers and that it improperly deviates from DP&L's initial intention to recover from CRES providers rather than from consumers the \$ 18.8 million cost of reprogramming DP&L's computers to accommodate new billing practices mandated by the General Assembly when the competitive retail market for electricity was established in Ohio. The PUCO, DP&L, and Dominion Retail each counter those arguments, claiming that the PUCO's approval of the agreement was entirely reasonable.

[\*\*P16] This court applies a three-part test when evaluating the reasonableness of settlements approved by the PUCO: whether the settlement is a product of serious bargaining among capable, knowledgeable parties; whether the settlement, as a package, benefits ratepayers and the public interest; and whether the settlement package violates any important regulatory principles or practices. *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126, 1992 Ohio 122, 592 N.E.2d 1370. See, also, *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St. 3d 81, 82-83, 2002 Ohio 1735, 765 N.E.2d 862.

[\*\*P17] The Consumers' Counsel urges that the agreement in this case fails the second and third prongs of the test, alleging that consumers will pay costs under the agreement that DP&L initially planned to recover solely from CRES providers. To support its argument, the Consumers' Counsel points to a separate one-page sidebar agreement between DP&L and the Consumers' Counsel. In that sidebar agreement from June 2000, DP&L had agreed that it would "not seek recovery from residential customers" for costs associated with "billing system modifications" made by DP&L. The PUCO's failure to enforce that earlier agreement when DP&L and other parties presented their new agreement in October 2004 represented a "willful disregard of duty," according to the Consumers' Counsel.

[\*\*P18] However, the June 2000 sidebar agreement was never filed with or approved by the PUCO, and for that reason, the PUCO refused to consider it when weighing the reasonableness of the 2004 agreement, explaining that "[u]nderstandings among parties that are important enough that the parties wish to [\*398] have a means to bring them to the Commission's attention at a later time" should be [\*\*\*1158] brought "to the Commission for approval" when those understandings are reached. The PUCO has taken a similar approach in past cases, and we have approved that practice. See, e.g., *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004 Ohio 6767, P14-15, 820 N.E.2d 885 (approving the PUCO's refusal to consider side agreements that had not been incorporated into the agreement at issue); *Cookson Pottery v. Pub. Util. Comm.* (1954), 161 Ohio St. 498, 505, 53 O.O. 374, 120 N.E.2d 98, citing G.C. 614-17, the predecessor of R.C. 4905.31 (contracts between a public utility and its customers that are not filed with the PUCO "shall not be lawful"). R.C. 4905.31(E) provides that no financial arrangement between a public utility and consumers "is lawful unless it is filed with and approved by" the PUCO.

[\*\*P19] The PUCO's refusal, then, to consider the unapproved June 2000 sidebar agreement between the Consumers' Counsel and DP&L appears consistent with past practice and with the relevant statutory provision.

[\*\*P20] The PUCO also properly applied our three-part test for weighing the reasonableness of the October 2004 agreement at issue in this case. Ample evidence in the record supports the PUCO's conclusion that the agreement would be a "benefit to ratepayers and the public interest" and would "limit[] any negative impact on competition in DP&L's territory" by doing away with DP&L's initial plan to charge CRES providers up to \$ 1.90 for each consolidated electric bill prepared by the utility company.

[\*\*P21] As the PUCO noted in its order, "it is a benefit to the ratepayers and the public interest for the parties to these cases to agree to a per-bill fee that is substantially lower than DP&L currently charges." The PUCO also explained that the 2004 agreement is consistent with standard regulatory practices because other electric and gas utility companies have been allowed to recover from their customers the same kind of billing-related charges that the agreement calls for DP&L to recover from its customers.

[\*\*P22] The agreement also brings other benefits to the consumer. The reduced charges to CRES providers for each customer bill will lower any barrier that may have kept Dominion Retail and other competitors of DP&L from winning customers for retail electricity gen-

110 Ohio St.3d 394, \*; 2006 Ohio 4706, \*\*;  
853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

eration service in DP&L's territory. And because all customers benefit from having greater choices in a competitive retail electricity market, the stipulation's removal of a significant barrier to the entry of new competitors in DP&L's territory benefits all customers in that area. As a result, as one witness testified, it is reasonable to ask all customers to pay for that benefit.

[\*\*P23] Upon review, we have concluded that the record supports the reasonableness of the PUCO's order approving the 2004 agreement and contains [\*399] sufficient probative evidence to justify the PUCO's factual findings that the agreement would benefit ratepayers and the public interest and would not violate any important regulatory principles or practices. The PUCO's decision finding the agreement reasonable is therefore not "manifestly against the weight of the evidence" and is not "so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (2000), 88 Ohio St. 3d 549, 555, 2000 Ohio 422, 2000 Ohio 423, 728 N.E.2d 371.

*The Order Allowing DP&L to Charge Customers for the Billing-Related Changes Made by DP&L Is Lawful* ...

[\*\*P24] The Consumers' Counsel further challenges the lawfulness of the [\*\*\*1159] PUCO's order, arguing that the PUCO should not have deviated from one of its own earlier orders and should have enforced various statutory requirements that apply to utility rate increases. We conclude that the PUCO properly rejected both arguments.

[\*\*P25] First, the Consumers' Counsel contends that in accordance with the PUCO's 2000 order, DP&L could not recover its billing-related costs from CRES providers before 2007. However, in *Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St. 3d 49, 50-51, 10 Ohio B. 312, 461 N.E.2d 303, we explained that the PUCO may change or modify earlier orders as long as it justifies any changes. The agreement reached by DP&L and the other parties in 2004, and approved by the PUCO in the proceedings below in 2005, created a new and entirely reasonable way for DP&L to recover the billing-related costs it had incurred between 1999 and 2001. As explained above, the record supported the change, and the PUCO fully explained its reasons for approving the agreement. The PUCO was not bound to adhere to an earlier arrangement that had created anticompetitive barriers to the entry of new CRES providers in DP&L's territory, and the PUCO's decision to remove those barriers by modifying an earlier PUCO order was not unlawful.

[\*\*P26] The Consumers' Counsel next contends that the statutory requirements for utility rate increases should have been followed in the proceedings below. Under the statute cited by the Consumers' Counsel, a

public utility seeking to change its existing rates for customers must "file a written application" with the PUCO and must prove at any hearing held on the request that it is "just and reasonable." R.C. 4909.18. The application for a rate increase must also be published by the PUCO in a newspaper in the utility company's territory, R.C. 4909.19, and public hearings must be held in large municipalities in the affected service area, R.C. 4903.083.

[\*\*P27] Those specific statutory provisions were not followed in this case, as the proposal that DP&L's customers pay for the expenses it incurred to reprogram [\*400] its computers between 1999 and 2001 to accommodate consolidated billing had emerged not from a formal rate-increase application but from the agreement between DP&L and the other parties in October 2004. Nonetheless, the agreement is valid, and the PUCO lawfully approved it in February 2005.

[\*\*P28] The agreement in this case was reached in an R.C. 4905.26 complaint proceeding, not an R.C. 4909.18 rate-increase proceeding (with all of the attendant procedural requirements cited by the Consumers' Counsel). That former statutory provision was cited by CRES-provider Dominion Retail and by the Miami Valley Communications Council when they filed their separate complaints against DP&L to initiate the proceedings that led to the agreement at issue several months later. In its February 2005 order approving the parties' settlement agreement, the PUCO acknowledged that the agreement "arose in the context of a complaint case" rather than in a rate-increase proceeding.

[\*\*P29] We have repeatedly held that utility rates may be changed by the PUCO in an R.C. 4905.26 complaint proceeding such as this, without compelling the affected utility to apply for a rate increase under R.C. 4909.18. See, e.g., *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 347, 1997 Ohio 112, 686 N.E.2d 501 ("Pursuant to R.C. 4905.26 \* \* \*, the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that [\*\*\*1160] the rates charged by the utility are unjust and unreasonable"); *Allnet Communications Servs., Inc. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 115, 117, 512 N.E.2d 350 ("R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO. In fact, this court has held that reasonable grounds may exist to raise issues which might strictly be viewed as 'collateral attacks' on previous orders"); *Ohio Util. Co. v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 153, 157, 12 O.O.3d 167, 389 N.E.2d 483 (in an R.C. 4905.26 proceeding, the PUCO can "order[] that new rates be put in effect").

[\*\*P30] As R.C. 4905.26 itself provides, "any person, firm, or corporation," as well as the PUCO itself,

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853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

may file a complaint alleging that an existing or proposed utility rate or charge is unjust or unreasonable. That kind of allegation was raised by both Dominion Retail and the Miami Valley Communications Council in the proceedings below, each of which questioned the charges that DP&L imposed on CRES providers for consolidated-billing services. R.C. 4905.26 indicates that the parties to a complaint proceeding "shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses." No allegation exists that those requirements were not met in the proceedings below, and in fact the PUCO held several days of hearings on the complaints and heard from multiple witnesses, including a witness who testified on behalf of the Consumers' Counsel.

[\*401] [\*\*P31] Some of the testimony in the R.C. 4905.26 complaint proceeding before the PUCO in 2004 indicated that the PUCO's 2000 order -- which allowed DP&L to charge CRES providers for the computer-related consolidated-billing costs that it incurred between 1999 and 2001 -- was unreasonable and posed a barrier to the entry of new CRES providers in DP&L's service area. Testimony presented after most of the parties in the complaint proceeding reached their October 2004 agreement indicated that shifting the computer-related costs from CRES providers to DP&L's customers would foster competition in DP&L's service area by "mak[ing] it easier for CRES providers to offer savings to customers." Multiple witnesses also testified that the agreed resolution of the complaint proceeding was reasonable and appropriate. Relying on that evidence in the record, the PUCO approved the agreement in February 2005.

[\*\*P32] The PUCO acted lawfully. As noted above, this court has allowed the PUCO to impose new utility rates or to change existing rates in other R.C. 4905.26 complaint proceedings, and there is no dispute that the PUCO complied with all of the procedural requirements in the statute by holding a hearing and by allowing the parties to be represented by counsel and to compel the attendance of witnesses.

*The Portion of the PUCO's Order Giving DP&L Additional Protections in the Event of a CRES Provider's Default Is Also Reasonable and Lawful*

[\*\*P33] Although the Consumers' Counsel primarily focuses on the reasonableness and lawfulness of the PUCO decision permitting DP&L to charge its customers for the costs that DP&L incurred when it made software changes in order to produce unbundled consolidated customer bills, the Consumers' Counsel also challenges a provision of the PUCO order allowing DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of that CRES provider.

[\*\*P34] The PUCO and DP&L argue that the Consumers' Counsel should not be permitted to raise this issue because she did not first raise it in the application for [\*\*\*1161] rehearing before the PUCO. Those parties are correct in that R.C. 4903.10 states, "No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application." Yet the Consumers' Counsel *did* challenge the default recovery mechanism in the application for rehearing, and the PUCO addressed the issue in its order denying rehearing. The Consumers' Counsel has therefore properly raised the issue.

[\*\*P35] The default-recovery mechanism approved by the PUCO is unlawful according to the Consumers' Counsel because no statutory or regulatory provisions in Ohio expressly permit that kind of financial protection to be given to an [\*402] electricity distributor like DP&L. Notably, though, the Consumers' Counsel cites no statutory provisions that *disallow* the practice either.

[\*\*P36] R.C. 4928.08(B) requires CRES providers to "provid[e] a financial guarantee sufficient to protect customers and electric distribution utilities from default," and Ohio Adm.Code 4901:1-24-08(C) allows an electricity distributor (like DP&L) to "apply for relief" at the PUCO if a CRES provider fails to maintain such a guarantee. Those provisions -- the only ones cited by the Consumers' Counsel -- do not prevent the PUCO from approving the kind of additional financial protections given to DP&L to ensure that it will not incur losses when a CRES provider in its territory defaults.

[\*\*P37] As one witness testified before the PUCO about this so-called default recovery rider, it "establishes a reasonable and appropriate process for the recovery by DP&L of prudently incurred costs of a CRES provider default \* \* \* [and] will protect DP&L from costs that DP&L may incur to procure replacement power to serve customers who had been served by a defaulting CRES provider." Another witness testified that because DP&L does not select CRES providers (customers do), and because DP&L does not benefit from CRES providers' services (customers do), it is reasonable for the customers of a CRES provider to reimburse an electricity distributor such as DP&L for the out-of-pocket costs DP&L incurs when the CRES provider defaults. Testimony before the PUCO also indicated that similar default recovery mechanisms currently protect natural gas distributors.

[\*\*P38] The PUCO cited and agreed with all of that testimony, stating in its February 2005 order that the default recovery mechanism "is not prohibited by any current statute or rule" and is in fact "permissible under the current statutory system." The likelihood that DP&L will ever invoke the default recovery mechanism is

110 Ohio St. 3d 394, \*, 2006 Ohio 4706, \*\*;  
853 N.E.2d 1153, \*\*\*; 2006 Ohio LEXIS 2900

small, the PUCO noted, but it is "a reasonable method to spread the risk of the competitive market."

[\*\*P39] The PUCO's findings as to the reasonableness of this particular provision of the 2004 agreement are supported by the record, and its legal conclusion that the provision is not unlawful is correct. The order, therefore, allowing DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of the CRES provider was both reasonable and lawful.

#### Conclusion

[\*\*P40] For the reasons explained above, the order of the PUCO that allowed DP&L (1) to shift from CRES providers to DP&L's customers the costs that DP&L incurred to update its computer software in order to provide consolidated customer bills for CRES providers in its territory and (2) to recover from a [\*403] CRES provider's customers any of DP&L's out-of-pocket costs

resulting from the default of the CRES provider was both reasonable and lawful. The PUCO fully explained the rationale [\*\*\*1162] for its order, evidence in the record supports the PUCO's decision, and the order is not inconsistent with any statutory or regulatory requirements. Therefore, the order of the PUCO is affirmed. n1

n1 In accordance with S.Ct.Prac.R. IX(8), the Consumers' Counsel filed a list of additional authorities before the oral argument in this case. That list of citations was timely filed, and we therefore deny the PUCO's and DP&L's motions to strike the list.

Order affirmed.

MOYER, C.J., RESNICK, PFEIFER, LUNDBERG  
STRATTON, O'CONNOR and LANZINGER, JJ., con-  
cur.

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

IN THE MATTER OF THE CONSOLIDATED )  
DUKE ENERGY OHIO, INC. RATE ) Case Nos. 03-93-EL-ATA *et al.*  
STABILIZATION PLAN REMAND AND )  
RIDER ADJUSTMENT CASES )

**AFFIDAVIT OF JOCK J. PITTS**

STATE OF OHIO )  
 ) SS:  
COUNTY OF HAMILTON)

I, JOCK J. PITTS, being first duly cautioned and sworn, hereby state as follows:

1. I am the President of People Working Cooperatively, Inc. ("PWC"), a Cincinnati-based, Ohio non-profit corporation whose mission is to provide critical home repairs, including weatherization services, for the very low-income elderly and disabled homeowners residing in the Duke Energy-Ohio ("DE-O") service territory. PWC has been an intervenor in the earlier phase of this proceeding (referred to as the "DE-O RSP Case"), which resulted in an Opinion and Order by the Public Utilities Commission of Ohio ("PUCO") that was overturned by the Ohio Supreme Court on appeal and remanded to the PUCO for this second phase. I make this statement in response to *Duke Energy Ohio's First Set of Interrogatories and Requests for Production of Documents Propounded to PWC*.

2. In response to DE-O's Interrogatories 10-12, I was party to meetings with the Office of Consumers' Counsel ("OCC") and to several conference calls with representatives of the OCC during the course of the RSP Case, the purpose of which was to discuss the possibility of reaching a stipulation among the consumer and marketer parties. In particular, on April 13,


**EXHIBIT**

DE-OHIO  
NO. 10 3-13-09


2004, I was present at a meeting at OCC's offices, attended by OCC personnel, representatives of the consumer parties and representatives of the marketer parties. Although the parties did not sign a written confidentiality agreement, OCC counsel asked at the beginning of the meeting to agree to keep the discussions held during the meeting confidential. Subsequent to the meeting, OCC counsel provided a proposed stipulation for the consumer and marketer parties' review, comment and agreement, with the proposed stipulation marked "CONFIDENTIAL SETTLEMENT OFFER MATERIAL (NOT FOR ANY OTHER USE)." All subsequent e-mail versions of the OCC proposal were similarly marked. While counsel for PWC was the addressee on e-mails from OCC and the parties participating in the negotiations with OCC, PWC counsel forwarded all communications from OCC to me personally.

3. PWC also engaged in settlement discussions with OPAC separately, although informed by its counsel that he was having similar discussions with other consumer parties. Again, no written confidentiality agreement was entered into. Rather, the parties agreed orally to keep the discussions held in pursuit of settlement of their consumer issues confidential.

Further Affiant sayeth naught.

  
Jock J. Pitts, President

SWORN TO AND SUBSCRIBED before me, a Notary public, this 12<sup>th</sup> day of March, 2007.

  
Notary Public

(SEAL)

STEFAN L. OLSON  
NOTARY PUBLIC, STATE OF OHIO  
MY COMMISSION EXPIRES 06-25-11



Date: Thu, 13 May 2004 17:53:42 -0400  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
To: <dboehmlaw@aol.com>, <drinebolt@aol.com>, <mkurtzlaw@aol.com>, <Dane.Stinson@BaileyCavalieri.com>, <SBLOOMFIELD@BRICKER.COM>, <tobrien@BRICKER.COM>, <broyer@brscolaw.com>, <Mchristensen@Columbuslaw.org>, <cgoodman@energymarketers.com>, <KorkoszA@FirstEnergyCorp.com>, <nmorgan@lascinti.org>, <srاندazzo@mwncmh.com>, <RICKS@OHANET.ORG>, <shawn.leyden@pseg.com>, <Thomas.McNamee@puc.state.oh.us>, <bakahn@vssp.com>, <mhpeticoff@vssp.com>, <wjairey@vssp.com>  
Cc: "RANDY CORBIN" <CORBIN@occ.state.oh.us>, "BRUCE HAYES" <HAYES@occ.state.oh.us>, "BETH HIXON" <HIXON@occ.state.oh.us>, "ANN HOTZ" <HOTZ@occ.state.oh.us>, "RYAN LIPPE" <LIPPE@occ.state.oh.us>, "ROSS PULTZ" <PULTZ@occ.state.oh.us>, "DAWN REDMOND-TARKINGTON" <REDMOND@occ.state.oh.us>, "LARRY SAUER" <SAUER@occ.state.oh.us>, "JEFF SMALL" <SMALL@occ.state.oh.us>, "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
Subject: CONFIDENTIAL Settlement Proposal

Sent on behalf of Jeff Small:

The attached Settlement Proposal is being distributed to our regular service list. Please inform me if you believe that others should receive this material.

Jeff Small  
small@occ.state.oh.us

Denise Willis  
Case Team Assistant  
OCC  
willis@occ.state.oh.us

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(000E80D8)

Date: Wed, 27 Oct 2004 16:30:07 -0400  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
To: <dboehmlaw@aol.com>, <drinebolt@aol.com>, <mkurtzlaw@aol.com>, <Dane.Stinson@BaileyCavalieri.com>, <SBLOOMFIELD@BRICKER.COM>, <tobrien@BRICKER.COM>, <broyer@brscolaw.com>, <Mchristensen@Columbuslaw.org>, <cgoodman@energymarketers.com>, <Korkosza@FirstEnergyCorp.com>, <nmorgan@lascinti.org>, <tschneider@mgsglaw.com>, <srandazzo@mwncmh.com>, <RICKS@OHANET.ORG>, <shawn.leyden@pseg.com>, <Thomas.McNamee@puc.state.oh.us>, <vern.margard@puc.state.oh.us>, <William.Wright@puc.state.oh.us>, <bakahn@vssp.com>, <mhpetricoff@vssp.com>, <wjairey@vssp.com>  
Subject: Confidential Settlement Communication in Case No. 03-93-EL-ATA

Please see the attached confidential settlement communication from Jeff Small in the above captioned case.

Please contact me if you have any trouble with this email.

Denise Willis  
Case Team Assistant  
OCC  
willis@occ.state.oh.us

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Attachment converted: Macintosh HD:BulletResponses10-27-04.pdf (PDF /CARO) (000F6CD6)

Date: Wed, 03 Nov 2004 17:38:03 -0500  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
To: <Mchristensen@Columbuslaw.org>, <jpitts@pwchomerepairs.org>  
Subject: Fwd: Confidential Settlement Communication in Case No.  
03-93-EL-ATA

As promised during your discussion today with Janine and Bruce, please find attached the confidential settlement communication from OCC, dated October 27th. Please feel free to discuss these matters with Janine or Bruce.

Thank you.

Denise Willis  
Case Team Assistant  
OCC  
willis@occ.state.oh.us

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Date: Wed, 27 Oct 2004 16:30:07 -0400  
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>  
Subject: Confidential Settlement Communication in Case No. 03-93-EL-ATA  
Mime-Version: 1.0  
Content-Type: multipart/mixed; boundary="=\_0828CDF5.B3D2BB21"

Please see the attached confidential settlement communication from Jeff Small in the above captioned case.

Please contact me if you have any trouble with this email.

Denise Willis  
Case Team Assistant  
OCC  
willis@occ.state.oh.us

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**PREPARED BY: Counsel**

15. Provide and describe all agreements between OCC and any Party to the above proceedings or any member or affiliate of a Party to the proceedings. Agreements include written or oral terms agreed upon by the participants and include, but are not limited to, protective agreements, confidentiality agreements, agreements to support or oppose any item or position, and any other commitments made among the counterparties.

**RESPONSE:** See General Objection Nos. 1, 3, and 5. Nonetheless, without waiving these objections, OCC states that Protective Agreements have been executed between the OCC and the following entities: Duke Energy; Duke Energy Retail Sales, LLC; Cinergy Corp.; and the Ohio Hospital Association. The former three agreements were executed with counsel who serve Duke Energy, and are readily available to Duke Energy. The Ohio Hospital Association agreement is attached.

**PREPARED BY: Counsel**

16. Provide any analysis by OCC or its employees, agents, contractors, experts, or persons regarding the auctions and retail or wholesale competitive prices in Ohio and any other states including, but not limited to, New Jersey, Maryland, New York, Maine, Massachusetts, Michigan, Illinois, Texas, and Georgia.

**RESPONSE:** See General Objection Nos. 1, 2, 3, 5, and 7. Nonetheless, without waiving these objections, OCC states that it has filed testimony, comments and/or other pleadings in Commission proceedings related to this subject matter regarding electricity, which are located on the Commission's website. For example, see Case Nos. 03-2144-EL-ATA, 04-1371-EL-ATA, 05-936-EL-ATA, 06-1112-EL-UNC, 04-169-EL-UNC, 06-1153-EL-UNC, 04-1047-EL-ATA, 03-93-EL-ATA, et al., 05-276-EL-AIR, 02-2779-EL-ATA, et al., 01-2164-EL-ORD, and 05-376-EL-UNC. Additionally, general information

Form **1120**Department of the Treasury  
Internal Revenue Service**U.S. Corporation Income Tax Return**For calendar year 2003 or tax year beginning \_\_\_\_\_, 2003, ending \_\_\_\_\_  
▶ Instructions are separate. See page 20 for Paperwork Reduction Act Notice.

OMB No. 1545-0123

**2003****A Check if a:**Consolidated return  
(attach Form 951)

Name

**Cinergy Corp.****B Employer identification number****31-1385023****2** Personal holding co.  
(attach Sch. PH)

Number, street, and room or suite no. (If a P.O. box, see page 7 of instructions.)

**139 East Fourth Street****C Date incorporated****06/30/1993****3** Personal service corp.  
(as defined in Regulations  
sec. 1441-3(c) -  
see instructions)

City or town, state, and ZIP code

**Cincinnati, OH****45202****D Total assets (see page 8 of instructions)****E Check applicable boxes:**

(1)

Initial return

(2)

Check for

(3)

Check for

(4)

Check for

(5)

Check for

(6)

Check for

(7)

Check for

(8)

(9)

**REDACTED**

Paid

Preparer's  
signature ▶Preparer's  
Use OnlyFirm's name (or  
yours if self-employed),  
address, and ZIP code ▶**DE-04-0**  
**EX-110-13**  
**DH-3-13-07**Check  
if self-  
employed ☐

Preparer's SSN or PTIN

EIN

Phone no.

**U.S. Corporation Income Tax Return**

DMS No. 1545-0122

**2004**

For calendar year 2004 or tax year beginning \_\_\_\_\_, ending \_\_\_\_\_  
▶ See separate instructions.

<b>A Check if:</b> 1 Consolidated return (attach Form 951) <input checked="" type="checkbox"/> <b>X</b> Personal holding co. (attach Sch. PH) <input type="checkbox"/> 3 Personal service corp. (see instructions) <input type="checkbox"/> 4 Schedule M-3 required (attach Sch. M-3) <input checked="" type="checkbox"/> <b>X</b>		<b>Use IRS label:</b> <b>Name</b> <b>Cinergy Corp.</b> Number, street, and room or suite no. (if a P.O. box, see page 9 of instructions). <b>Other-wise, print or type.</b> <b>139 East Fourth Street</b> <b>City or town, state, and ZIP code</b> <b>Cincinnati, OH 45202</b>	<b>B Employer identification number</b> <b>31-1385023</b> <b>C Date incorporated</b> <b>06/30/1993</b> <b>D Total assets (see page 8 of instructions)</b>
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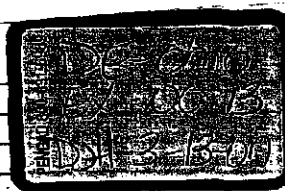
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
(1)

REDACTED

Preparer shown below  
(see instructions) ☐ Yes ☐ No

Check if self-employed <input type="checkbox"/>	Preparer's SSN or PTIN
EN	
Phone no.	



**Preparer's Use Only**  
signature   
Firm's name (or yours if self-employed), address, and ZIP code

Form **1120**  
Department of the Treasury  
Internal Revenue Service

**U.S. Corporation Income Tax Return**

For calendar year 2005 or tax year beginning \_\_\_\_\_, ending \_\_\_\_\_

OMB No. 1545-0023

**2005**

▶ See separate instructions.

<b>A Check if:</b>		<b>Use</b>	<b>Name</b>	<b>B Employer identification number</b>
1 Consolidated return (attach Form 951)	<input checked="" type="checkbox"/>	IRS label	Cinergy Corp.	31-1385023
2 Personal holding co. (attach Sch. PH)	<input type="checkbox"/>	Other-	Number, street, and room or suite no. If a P.O. box, see instructions.	<b>C Date incorporated</b>
3 Personal service corp. (see instructions)	<input type="checkbox"/>	wise,	139 East Fourth Street	06/30/1993
4 Schedule M-3 required (attach Sch. M-3)	<input checked="" type="checkbox"/>	print or type.	City or town, state, and ZIP code	<b>D Total assets (see instructions)</b>
			Cincinnati, OH 45202	

E Check if:

REDACTED

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4901:1 UTILITIES  
Chapter 4901:1-20 Transition Plan of Electric Utility

OAC Ann. 4901:1-20-16 (Anderson 2006)

4901:1-20-16 Corporate separation.

(A) Purpose and scope Electric utilities are required by section 4928.17 of the Revised Code, to file with the commission an application for approval of a proposed corporate separation plan. The rule provides that all the state's electric utility companies must meet the same standards so a competitive advantage is not gained solely because of corporate affiliation. This rule should create competitive equality, preventing unfair competitive advantage and prohibiting the abuse of market power. Generally, this rule applies to the activities of the regulated utility and its transactions with its affiliates. However, to ensure compliance with this rule, examination of the books and records of other affiliates may be necessary. Compliance with paragraph (G)(4) of this rule shall begin immediately. Compliance with the remainder of this rule shall coincide with the start date of competitive retail electric service, January 1, 2001, unless extended by commission order for an electric utility pursuant to division (C) of section 4928.01 of the Revised Code.

(B) Definitions

(1) "Affiliates" are companies that are related to each other due to common ownership or control. The affiliate standards shall also apply to any internal merchant function of the electric utility whereby the electric utility provides a competitive service.

(2) "Electric utilities" are as defined in division (A)(11) of section 4928.01 of the Revised Code.

(3) "Fully allocated costs" are the sum of direct costs plus an appropriate share of indirect costs. For purposes of this rule, the term "fully allocated costs" shall have the same meaning as the term "fully loaded embedded costs" as that term appears in division (A)(3) of section 4928.17 of the Revised Code.

(4) "Employees" are all full-time or part-time employees of an electric utility or its affiliates, as well as consultants, independent contractors or any other persons performing various duties or obligations on behalf of or for an electric utility or its affiliate.

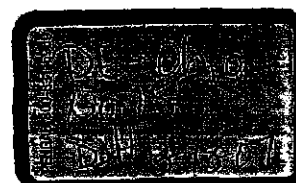
(5) "Competitive supplier" means any entity or entities, including aggregators, brokers, and marketers, offering to supply electricity or energy-related goods or services at retail, by sale or otherwise, within the service territory of the electric utility.

(6) "Customer" means any entity that is the ultimate retail consumer of goods and services.

(C) Beginning on the starting date of competitive retail electric service, no electric utility shall supply in this state, either directly or through an affiliate, a noncompetitive retail electric service and a competitive retail electric service (or a noncompetitive retail electric service and a product or service other than retail electric service) unless under a commission-approved corporate separation plan.

(D) Cross-subsidies between an electric utility and its affiliates are prohibited. An electric utility's operating employees and those of its affiliates shall work/function independently of each other.

(E) Electric utilities that structurally separate regulated electric utility business from nonregulated business and that certify to the commission on an annual basis that there is no sharing of employees and that there are no unregulated transactions between the electric utility and the unregulated affiliate, may be granted exemptions from certain audit requirements.





(F) This rule applies to all affiliate transactions and shared services. Transactions made in accordance with rules or regulations approved by the federal energy regulatory commission, securities and exchange commission, and the commission, which rules the electric utility shall maintain in its cost allocation manual (CAM) and file with the commission, shall provide a rebuttable presumption of compliance with the costing principles contained in this rule. Upon a showing of reasonable grounds for complaint, the electric utility has the burden of proof to demonstrate compliance with approved transactional costing rules or regulations.

(G) Electric utilities are required by section 4928.17 of the Revised Code to file an application for approval of a proposed corporate separation plan. The proposed plans shall include provisions relating to the following:

(1) Structural safeguards

(a) An electric utility shall place a copy of the minutes of each board of directors meeting in the CAM in accordance with paragraph (J) of this rule, where it shall be maintained for a minimum of three five years.

(b) An electric utility may not share employees with any affiliate, if the sharing, in any way, violates paragraph (G)(4) of this rule. An electric utility shall maintain in the CAM a copy of the job description of each shared employee (except for shared consultants and shared independent contractors). The electric utility shall maintain in the CAM a list of the names of and job summaries for shared consultants and shared independent contractors. An electric utility shall ensure that all shared employees appropriately record and charge their time based on fully allocated costs. An electric utility shall add to the CAM a copy of all transferred employees' previous and new job descriptions.

(c) Electric utilities and their affiliates that provide services to customers within the electric utility's service territory shall function independently of each other and shall not share facilities and services if such sharing in any way violates paragraph (G)(4) of this rule.

(d) During an interim period, an electric utility has the burden of establishing "good cause" for selecting an interim functional separation plan (as opposed to a structural separation). The interim plan shall provide a detailed timeline for progression to full structural separation and shall be subject to periodic commission staff review at the staff's discretion.

(2) Separate accounting Each electric utility and its affiliates shall maintain, in accordance with generally accepted accounting principles and an applicable uniform system of accounts, books, records, and accounts that are separate from the books, records, and accounts of its affiliates.

(3) Financial arrangements Except as the commission may approve, the financial arrangements of an electric utility are subject to the following restrictions:

(a) Any indebtedness incurred by an affiliate shall be without recourse to the electric utility.

(b) An electric utility shall not enter into any agreement with terms under which the electric utility is obligated to commit funds to maintain the financial viability of an affiliate.

(c) An electric utility shall not make any investment in an affiliate under any circumstances in which the electric utility would be liable for the debts and/or liabilities of the affiliate incurred as a result of actions or omissions of an affiliate.

(d) An electric utility shall not issue any security for the purpose of financing the acquisition, ownership, or operation of an affiliate.

(e) An electric utility shall not assume any obligation or liability as a guarantor, endorser, surety, or otherwise with respect to any security of an affiliate.

(f) An electric utility shall not pledge, mortgage, or use as collateral any assets of the electric utility for the benefit of an affiliate.

(4) Code of conduct

(a) The electric utility shall not release any proprietary customer information (e.g., individual customer load profiles or billing histories) to an affiliate, or otherwise, without the prior authorization of the customer, except as required by a regulatory agency or court of law.

(b) On or after the effective date of this rule, the electric utility shall make customer lists, which include name, address, and telephone number, available on a nondiscriminatory basis to all nonaffiliated and affiliated certified retail

electric competitors transacting business in its service territory, unless otherwise directed by the customer. This paragraph does not apply to customer-specific information, obtained with proper authorization, necessary to fulfill the terms of a contract, or information relating to the provision of general and administrative support services.

(c) Employees of the electric utility's affiliates shall not have access to any information about the electric utility's transmission or distribution systems (e.g., system operations, capability, price, curtailments, and ancillary services) that is not contemporaneously and in the same form and manner available to a nonaffiliated competitor of retail electric service.

(d) Electric utilities shall treat as confidential all information obtained from a competitive supplier of retail electric service, both affiliated and nonaffiliated, and shall not release such information unless a competitive supplier provides authorization to do so, or unless the information was or thereafter becomes available to the public other than as a result of disclosure by the electric utilities.

(e) The electric utility shall not tie (nor allow an affiliate to tie) or otherwise condition the provision of the electric utility's regulated services, discounts, rebates, fee waivers, or any other waivers of the electric utility's ordinary terms and conditions of service, including but not limited to tariff provisions, to the taking of any goods and/or services from the electric utility's affiliates.

(f) The electric utility shall ensure effective competition in the provision of retail electric service by avoiding anti-competitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa.

(g) The electric utility, upon request from a customer, shall provide a complete list of all suppliers operating on the system, but shall not endorse any suppliers nor indicate that any supplier will receive preference because of an affiliate relationship.

(h) The electric utility shall ensure retail electric service consumers protection against unreasonable sales practices, market deficiencies, and market power. Employees of the electric utility or persons representing the electric utility shall not indicate a preference for an affiliated supplier. All electric utilities shall, at a minimum, provide information in their transition filings so as to enable the commission to determine whether they have met their burden of proof to satisfy this paragraph as it relates to joint advertising between the electric utility and an affiliate, joint marketing activities between the electric utility and an affiliate, and the use of the name and logo of the electric utility.

(i) The electric utility shall provide comparable access to products and services related to tariffed products and services and specifically comply with the following: (i) An electric utility shall be prohibited from unduly discriminating in the offering of its products and/or services;

(ii) The electric utility shall apply all tariff provisions in the same manner to the same or similarly situated entities, regardless of any affiliation or nonaffiliation;

(iii) The electric utility shall not, through a tariff provision, a contract, or otherwise, give its affiliates preference over nonaffiliated competitors of retail electric service or their customers in matters relating to any product and/or service;

(iv) The electric utility shall strictly follow all tariff provisions;

(v) Except to the extent allowed by state law, the electric utility shall not be permitted to provide discounts, rebates, or fee waivers for any state regulated monopoly service; and

(vi) Violations of this rule shall be enforced and subject to the disciplinary actions described in divisions (C) and (D) of section 4928.18 of the Revised Code.

(j) Shared representatives or shared employees of the electric utility and affiliated competitive supplier shall clearly disclose upon whose behalf their representations to the public are being made.

(k) Notwithstanding paragraph (G)(4) of this rule, in a declared emergency situation, an electric utility may take actions necessary to ensure public safety and system reliability. The electric utility shall maintain a log of all such actions that do not comply with paragraph (G)(4) of this rule, which log shall be subject to review by the commission.

(5) Complaint procedure The electric utility shall establish a complaint procedure for the issues concerning compliance with this rule. All complaints, whether written or verbal, shall be referred to the general counsel of the utility or

their designee. The legal counsel shall orally acknowledge the complaint within five working days of its receipt. The legal counsel shall prepare a written statement of the complaint that shall contain the name of the complainant and a detailed factual report of the complaint, including all relevant dates, companies involved, employees involved, and the specific claim. The legal counsel for the electric utility shall inform the complainant that the complainant has the right to submit a written characterization of the complaint and the facts supporting it for entry into the CAM. If the complainant desires to submit such a written characterization, the legal counsel for the electric utility shall include that characterization in the CAM. The legal counsel shall communicate the results of the preliminary investigation to the complainant in writing within thirty days after the complaint was received, including a description of any course of action that was taken. The legal counsel for the electric utility shall inform the complainant that the complainant has the right to submit a response to the results of the preliminary investigation and/or action taken by the electric utility for entry into the CAM. If the complainant desires to submit such a written response, the legal counsel for the electric utility shall include that response in the CAM. The legal counsel shall keep a file in the CAM, in accordance with paragraph (J) of this rule, of all such complaint statements for a period of not less than five years. This complaint procedure shall not in any way limit the rights of a party to file a complaint with the commission.

(H) Additional transition plan content requirements for a corporate separation plan

(1) A description and timeline of all planned education and training, throughout the holding company structure, to ensure that electric utility and affiliate employees know and can implement the policies and procedures of this rule.

(2) A copy of a policy statement to be signed by electric utility and affiliate employees who have access to any nonpublic electric utility information, which indicates that they are aware of, have read, and will follow all policies and procedures regarding limitation on the use of nonpublic electric utility information. The statement will include a provision stating that failure to observe these limitations will result in appropriate disciplinary action.

(3) A description of the internal compliance monitoring procedures and the methods for corrective action for compliance with this rule.

(4) A detailed description outlining how the electric utility and its affiliates will comply with this rule, except paragraph (K) of this rule. The format shall list the rule and then provide the description. For example: Corporate separation paragraph (G)(1)(b) of this rule - an electric utility may not share employees with any affiliate, if the sharing, in any way violates paragraph (G)(4) of this rule.

- Detailed description of compliance.

(5) Each electric utility shall make available for commission staff review the initial CAM, the contents of which are set forth in paragraph (J) of this rule.

(6) A detailed listing of the electric utility's electric services and the electric utility's transmission and distribution affiliates' electric services.

(I) Access to books and records

(1) The commission staff has the authority to examine books, accounts, and/or other pertinent records kept by an electric utility or its affiliates as they may relate to the businesses for which corporate separation is required under section 4928.17 of the Revised Code.

(2) The commission staff may investigate such electric utility and/or affiliate operations and the interrelationship of those operations at the commission staff's discretion. In addition, the employees and officers of the electric utility and its affiliates shall be made available for informational interviews, at a mutually agreed time and place, as required by the commission staff to ensure proper separations are being followed.

(3) If such employees, officers, books, and records cannot be reasonably made available to the commission staff in the state of Ohio, then upon request of the commission staff, the appropriate electric utility or affiliate shall reimburse the commission for reasonable travel expenses incurred.

(J) Cost allocation manual

(1) Each electric utility's affiliate, which provides products and/or services to the electric utility and/or receives products and/or services from the electric utility, shall maintain information in the CAM, documenting how costs are allocated between the electric utility and affiliates and the regulated and nonregulated operations.

- (2) The CAM will be maintained by the electric utility.
  - (3) The CAM is intended to ensure the commission that no cross-subsidization is occurring between the electric utility and its affiliates.
  - (4) The CAM will include:
    - (a) An organization chart of the holding company, depicting all affiliates, as well as a description of activities in which the affiliates are involved;
    - (b) A description of all assets, services, and products provided to and from the electric utility and its affiliates;
    - (c) All documentation including written agreements, accounting bulletins, procedures, work order manuals, or related documents, which govern how costs are allocated between affiliates;
    - (d) Information on employees who have either transferred from the electric utility to an affiliate or are shared between the electric utility and an affiliate and shall be consistent with paragraph (G)(1)(b) of this rule.
    - (e) A log of all complaints brought to the utility regarding this rule; and
    - (f) Board of director minutes.
  - (5) The method for charging costs and transferring assets shall be based on fully allocated costs.
  - (6) The costs should be traceable to the books of the applicable corporate entity.
  - (7) The electric utility and affiliates shall maintain all underlying affiliate transaction information for a minimum of five years.
  - (8) Following approval of a corporate separation plan, an electric utility shall send to the director of the utilities department of the commission (or their designee) every six months a summary of any changes in the CAM.
  - (9) The electric utility shall designate an employee who will act as a contact for the commission staff, when seeking data regarding affiliate transactions, personnel transfers, and the sharing of employees. The electric utility shall update the commission of changes in the contact.
- (K) Commission staff audits
- (1) The commission staff will perform an audit of the CAM in order to ensure compliance with this rule.
  - (2) In order to facilitate meaningful data collection, the initial engagement shall cover the first twelve months after the starting date of competitive retail electric service.
  - (3) Audits will be at the commission staff's discretion, but will attempt to follow a biennial schedule, unless otherwise ordered by the commission.
  - (4) During an interim functional separation period, additional audits may be required and an external auditor selected and managed by the commission may conduct the audit.

#### History

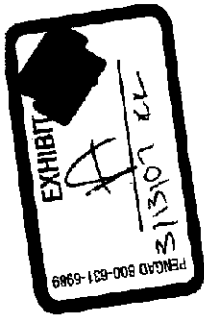
Eff 3-10-00; 10-23-04

Rule promulgated under: RC 111.15

Rule authorized by: RC 4928.06

Rule amplifies: RC 4928.17, 4928.18, 4928.31(A)(2), 3928.34(A)(8)

R.C. 119.032 review dates: 08/02/2004 and 11/30/2008



As Introduced

126th General Assembly  
Regular Session  
2005-2006

H. B. No. 14

Representatives J. Stewart, Kearns, Miller, Aslanides, Woodard, Webster,  
Ujvagi, Garrison, Hartnett, 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  
divisions (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.

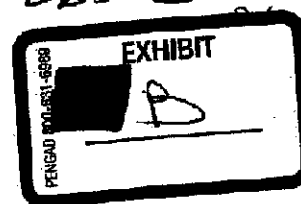
(D)(1) Nothing in this section precludes a customer opting  
55 for a service offering priced on the basis of a regional  
56 transmission entity's posted day-ahead or hourly price.

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

Section 2. This act is hereby declared to be an emergency  
61 measure necessary for the immediate preservation of the public  
62 peace, health, and safety. The reason for such necessity is to  
63 ensure that the act takes effect at the earliest possible time to  
64 address uncertainty regarding the electric prices and resulting  
65 revenues paid by Ohio retail electric customers after December 31,  
66 2003, and to protect Ohio retail customers against undue  
67 competitive disadvantage based on the price of generation service.  
58

FILE

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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**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	)	
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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**

**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.

---

<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-EL-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.*