

# LARGE FILING SEPERATOR SHEET

CASE NUMBER: 03-93-EL-ATA  
03-2079-EL-AAM  
03-2080-EL-ATA  
03-2081-EL-AAM  
05-724-EL-UNC  
05-725-EL-UNC

FILE DATE: 11-10-08

SECTION: 70817

NUMBER OF PAGES: 200

DESCRIPTION OF DOCUMENT: Conf. Release

electric rates were frozen, and the original plan was for all of the utilities to offer market-based rates following the end of the Market Development period. The Market Development period was scheduled to end no later than 12/31/05.

By 2003, the PUCO and other groups became concerned that the competitive electric retail market in Ohio was not sufficiently robust to prevent wild price swings under pure competition and market pricing. The problems in California and the subsequent Enron meltdown also colored their feelings. As a result, they asked the utilities to offer Rate Stabilization Plans in lieu of pure market pricing.

CG&E (Duke Energy Ohio) filed its RSP (known as the Electric Reliability and Rate Stabilization Plan, ERRSP) during the first half of 2004. A number of large customers, some represented by industry groups, intervened in the filing. CG&E's and the PUCO's goal was to obtain rapid approval of the RSP such that the new rates could go into effect on 1/1/2005. The interveners represented a roadblock, however. To eliminate this roadblock and prevent a formal hearing, CG&E negotiated special conditions with the interveners and ultimately reached agreements with them.

The original settlement agreement with the interveners called for Cinergy to form a "CRES" (Certified Retail Electric Supplier - the State of Ohio must certify all retail electric providers in terms of creditworthiness, etc.). The Cinergy CRES was to provide generation service for the interveners at pre-specified, contractual rates. At the last minute (i.e., December 2004), Cinergy's top management decided that the CRES settlement was too risky, and Cinergy essentially decided to not follow through with the contract. To prevent lawsuits for breach of contract, Cinergy entered into negotiations with each of the parties and agreed to make monthly or quarterly payments in lieu of offering generation service from the CRES.

So as you can see, the "CRES" customers are actually full-requirement customers of Duke Energy Ohio, but they receive payments from the Company instead of receiving generation service from the Cinergy CRES (the Cinergy CRES does not have any retail customers, but has at least \$22 million of expenses).

The payments for each group of the "CRES" customers differ from each other. Generally speaking, the contracts with each group specify that the customers belonging to that group will receive refunds of various RSP riders (e.g., Rider AAC, Rider FPP, Rider IMF, Rider SRT, etc.). Each month or quarter, I prepare statements that show the amount of money that is to be refunded to each customer, and the payments are made from the CBU's (non-regulated generation) budget.

These payments will last through December 2008 at which point the ERRSP will terminate.

By the way, the "CRES" customers include [REDACTED]

about \$22 million per year. [REDACTED]

That is why the payments total

Hope this helps.

Jim Ziolkowski  
Rate Services  
513 287-3337

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From: Watten, Don  
Sent: Thursday, May 11, 2006 3:08 PM  
To: Ziolkowski, Jim  
Subject: FW: CRES Payments

Jim,

Can you respond to Jon's question? You and Tim are the only ones I'm aware of who know this stuff.

From: Gomez, Jon  
Sent: Thursday, May 11, 2006 3:00 PM

To: Wathen, Don  
Subject: CRES Payments

01195

you have anything that tells or can you briefly describe the concept behind the CRES payments? We are budgeting  
und \$22M annually for this out of our non-native segment. How was that number derived, who does it go to, and does  
it last until the end of 2008? Just trying to get a little more educated on this. Thanks, Jon

Jon Gomez  
DEA Budgeting & Forecasting  
(317) 838-1653  
[jgomez@cinergy.com](mailto:jgomez@cinergy.com)

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01196

Ziolkowski, Jim

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From: Smith, Paul - Rates  
nt: Tuesday, August 01, 2006 8:08 PM  
to: Ziolkowski, Jim  
Cc: Storck, Don  
Subject: CRES Customer Rebates

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Jim -

For the proposed C&I rate increase in 2009 & 2010, please calculate the % of the increase that will be rebated to CRES customers. Jack recalls a number somewhere between 15-30%. Hopefully you can pinpoint a more specific number.

Thanks.

01197

Ziolkowski, Jim

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From: Storck, Don  
To: Ziolkowski, Jim  
Subject: FW: CRES Customer Rebates

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Lets discuss.

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From: Smith, Paul - Rates  
Sent: Tuesday, August 01, 2006 6:08 PM  
To: Ziolkowski, Jim  
Cc: Storck, Don  
Subject: CRES Customer Rebates

Jim -

For the proposed C&I rate increase in 2009 & 2010, please calculate the % of the increase that will be rebated to CRES customers. Jack recalls a number somewhere between 15-30%. Hopefully you can pinpoint a more specific number.

Thanks.

## Deposition Questions - Timothy Duff

Duke Energy Ohio Case No. 03-83-EL-ATA (Remand)											
AGREEMENTS											
From	Type	Date	Document	Super. Party 1	Party 2	Multiple?	Group	Ref No	Bag	End	
DEBS	Super Agr	5/28/04	Agreement	CRS		Y	IEU		341	348	
DEBS	Super Agr	11/8/04	Agreement	5/28/04 CRS		Y	IEU		334	340	
DEBS	Option Agr	12/20/04	Option Agreement	CRS			IEU	508367	50	54	
DEBS	Super Agr	5/28/04	Agreement	CRS		Y	IEU		341	348	
DEBS	Super Agr	11/8/04	Agreement	5/28/04 CRS		Y	IEU		334	340	
DEBS	Option Agr	12/20/04	Option Agreement	CRS			IEU	508368	32	49	
DEBS	Super Agr	5/19/04	Agreement	CRS		Y	OEG		327	332	
DEBS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DEBS	Option Agr	1/19/05	Option Agreement	CRS			OEG	508386	176	190	
DEBS	Super Agr	5/19/04	Agreement	CRS		Y	OEG		327	332	
DEBS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DEBS	Option Agr	2/2/05	Option Agreement	CRS			OEG	508388	1	14	
DEBS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DEBS	Option Agr	1/1/05	Option Agreement	CRS			OEG	508384	65	78	
DEBS	Super Agr	5/19/04	Agreement	CRS		Y	OEG		327	332	
DEBS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DEBS	Option Agr	1/12/05	Option Agreement	CRS			OEG	508380	133	145	
DEBS	Super Agr	5/19/04	Agreement	CRS		Y	OEG		327	332	
DEBS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DEBS	Option Agr	12/31/04	Option Agreement	CRS			OEG	508387	15	31	
DEBS	Super Agr	4/4/05	Letter re: 1/20/05 Agr	1/20/05 CRS		Y	OEG		333	333	
DEBS	Super Agr	4/4/05	Copy of Page 333	1/20/05 CRS		Y	OEG		386	386	
DEBS	Super Agr	5/19/04	Agreement	CRS		Y	OEG		327	332	
DEBS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DEBS	Option Agr	1/14/05	Option Agreement	CRS			OEG	508389	158	175	
DEBS	Super Agr	4/4/05	Letter re: 1/20/05 Agr	1/20/05 CRS		Y	OEG		333	333	
DEBS	Super Agr	4/4/05	Copy of Page 334	1/20/05 CRS		Y	OEG		386	386	
DEBS	Super Agr	5/18/04	Agreement	CRS		Y (a)	OHA		347	352	
DEBS	Super Agr	10/28/04	Agreement (signature 11/8/04)	5/19/04 CRS		Y (a)	OHA		353	357	
DEBS	Option Agr	1/25/05	Option Agreement	CRS			OHA	508381	220	238	
DEBS	Option Agr	1/25/05	Option Agreement	CRS			OHA	508372	191	203	
DEBS	Option Agr	12/30/04	Option Agreement	CRS			OHA	508373	306	318	
DEBS	Option Agr	12/28/04	Option Agreement	CRS			OHA	508369	237	250	
DEBS	Option Agr	1/25/05	Option Agreement	CRS			OHA	508371	204	220	
DEBS	Option Agr	12/30/04	Option Agreement	CRS			OHA	508379	292	305	
DEBS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508378	279	291	
DEBS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508374	79	91	
DEBS	Option Agr	12/28/04	Option Agreement	CRS			OHA	508377	265	278	
DEBS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508376	251	284	
DEBS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508375	105	118	
DEBS	Option Agr	1/11/05	Option Agreement	CRS			OHA	508382	119	133	
DEBS	Option Agr	1/14/05	Option Agreement	CRS			OHA	508380	146	158	
DEBS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508383	92	104	
DEBS	Super Agr	7/7/04	Superseded Agreement	12/14/00 CRS					1173	1179	
DEBS	Super Agr	11/22/04	Superseded Agreement	7/7/04 CRS					1180	1187	
DEBS	Agreement	11/9/05	Agreement	11/22/04 CRS					1188	1195	

DEPOSITION  
EXHIBIT  
#3  
Z10LKAWSK1

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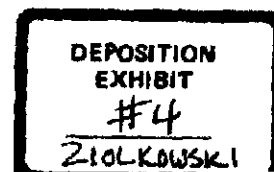
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### Agreement

This agreement is between Cinergy Corp. (Cinergy), through its agent Cinergy Retail Sales, LLC (CRS), and the Industrial Energy Users-Ohio (IEU-Ohio) for the benefit of Marathon Ashland, Inc., and General Motors, Inc., (Customers), effective this 8th day of November 2004. This Agreement replaces and supersedes the terms and conditions of the Agreement dated May 28th 2004, between IEU-Ohio and Cinergy. As to General Motors, Inc., this agreement is effective only to General Motors, Inc., West Chester Operation (GM). It is the intent of the parties to this agreement to bind the Customers to the terms and conditions set forth herein. The following is the entire agreement between CRS and IEU-Ohio (Parties); it may not be amended except by the written agreement of the parties.

This agreement is binding on the Parties regarding the subject matter herein and is to remain confidential among the Parties and may be released to non-parties only if ordered by a court or administrative agency of competent jurisdiction. If the issue of this agreement's confidentiality comes before a court or administrative agency of competent jurisdiction the party before such court or administrative agency shall immediately notify the other party. The Parties shall defend the confidentiality of this agreement. The Parties shall not circulate the agreement, or its existence, to any employee, agent, or assignee of the party unless such employee, agent, or assignee has a need to know for

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the purpose of effectuating the agreement. For purposes of this paragraph, the term Parties includes the Customers.

The Parties, for good consideration, agree to the following terms and conditions:

1. Beginning January 1, 2005, or at such later time as may be specified herein for any accounts of each Customer that may be presently receiving competitive retail generation service from a supplier not affiliated with Cinergy, CRS shall supply, on a full requirements basis, and each Customer shall purchase firm competitive retail electric generation service from CRS or another Cinergy affiliated competitive retail electric service provider designated by CRS. Any accounts of each Customer presently receiving competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall have the right to delay the start date of the above described supply relationship with CRS to a date specified by such Customer provided that such delay does not cause the supply relationship with CRS to commence later than January 1, 2006. The all requirements, firm, competitive retail generation supply provided by CRS to Customers shall be priced at the currently effective unbundled generation price specified in the otherwise applicable tariff schedule of The Cincinnati Gas & Electric Company for standard offer service, less an amount equal to the applicable Regulatory Transition Charge (RTC), the resulting specified price also known as "Little G"<sup>1</sup>. Compliant contracts to implement the above described service relationship between Customers and CRS shall be executed as soon as reasonably possible and shall terminate no later than December 31, 2008. Cinergy shall reimburse Customers for actual payments made to The Cincinnati Gas & Electric Company as follows: (1) From January 1, 2005 through December 31, 2005, any Customer purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall maintain the shopping credit structure (payment of Big G less the applicable shopping credit) approved by the Commission in case no. 99-1658-EL-ETP and Cinergy shall reimburse monthly such Customers for the rate stabilization charge component, and one half of the system reliability tracker component, of the Provider of Last Resort (POLR) charge paid to The Cincinnati

<sup>1</sup> The currently effective Little G rate shall mean the Little G rate in effect as of the date this agreement is signed.



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Gas & Electric Company; (2) from January 1, 2005, through December 31, 2005, Cinergy shall reimburse GM monthly the full amount billed to and paid by GM as the Regulatory Transition Charge paid to The Cincinnati Gas & Electric Company provided GM is purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider during such calendar year (3) beginning January 1, 2005, through December 31, 2005, for all Customers purchasing competitive retail electric service from a Cinergy affiliated competitive retail electric service provider, Cinergy shall reimburse monthly all such Customers for the as billed and actual full amount of the Regulatory Transition Charge, the as billed and actual full amount of any Rate Stabilization Charges, and one half the amount billed to Customers as the system reliability tracker component of the Provider Of Last Resort charge actually paid to The Cincinnati Gas & Electric Company; (4) beginning January 1, 2006, for Customers purchasing the above described competitive retail electric service from a Cinergy affiliated competitive retail electric service provider, Cinergy shall reimburse monthly all Customers for the full amount billed to and paid by Customers as the Regulatory Transition Charge, the full amount billed to and paid by Customers as Rate Stabilization Charge component, and one half the amount billed to Customers as the system reliability tracker component, of the Provider Of Last Resort charge actually paid to The Cincinnati Gas & Electric Company. Customers shall pay all remaining applicable market-based standard service offer charges including, but not limited to, the infrastructure maintenance fund component of the Provider of Last Resort charge. To the extent that Customers actually pay the infrastructure maintenance fund component of the Provider of last resort Charge, Cinergy shall reimburse, consistent with the reimbursement schedule contained herein, infrastructure maintenance fund payments in excess of 4% of little g. Nothing herein shall operate to limit the ability of each Customer to avoid all or such portion of any standard service offer charge that may be avoided by shopping customers. Cinergy and the Customers understand that: (1) this agreement was drafted based on the expectation that each Customer shall qualify as shopping customers so as to avoid all or such portion of any standard service offer charge that may be avoided by shopping customers; and, (2) as a shopping customer, each Customer shall not be billed any standard service offer charge that may be avoided by shopping customers.

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2. If, prior to December 31, 2008, the Customers add additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds the Customer's combined (all accounts) maximum demand as of January 1, 2005, such new load or accounts may receive the options and benefits accruing from participation in this agreement to the extent that, for each Customer, such new load or accounts cumulatively represents new annual peak load of three (3) MW or less; any accounts representing new load beyond the foregoing limit are not included under this agreement.
3. Customers purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall be deemed to have provided, through this agreement, such written notice as may be required prior to the end of such purchase contract so that the Customers may avoid any penalty or additional charge that may arise absent such notice upon returning to standard offer service provided by The Cincinnati Gas & Electric Company.
4. Cinergy shall pay the Industrial Energy Users-Ohio \$100,000.00 as compensation for legal services, upon the issuance of a final order of the Commission satisfactory to Cinergy.
5. This agreement has no application to The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Public Utilities Commission of Ohio. Customers shall pay the applicable transmission and distribution rates of The Cincinnati Gas & Electric Company as approved by the Commission, and/or if applicable, shall pay to Cinergy Retail Sales the applicable transmission charges equal to the transmission charges approved by the Public Utilities Commission of Ohio for Cincinnati Gas & Electric Company. Customers, or their appointed representative, retain all rights to participate in Commission and Federal Energy Regulatory Commission proceedings that may affect the rates, terms, or conditions of distribution and transmission service.
6. Nothing in this agreement shall affect the terms and conditions agreed to by Industrial Energy Users-Ohio on behalf of General Motors and Cinergy, pursuant to the agreement dated May 8, 2000 related to the settlement of certain issues in PUCO Case No. 99-1658-EL-ETP.

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7. Cinergy will comply with all regulatory requirements necessary to create an affiliated competitive retail electric service provider to supply competitive retail electric service to Customers as required by paragraph one (1) of this agreement.
8. The Industrial Energy Users-Ohio shall support a Stipulation filed by The Cincinnati Gas & Electric Company and the IEU-Ohio in Case No. 03-93-EL-ATA subject to such reservation as IEU-Ohio has communicated to Cinergy. The Customers shall cause the Industrial Energy Users-Ohio to support an Application for Rehearing filed by The Cincinnati Gas & Electric Company seeking reinstatement without modification of the Stipulation signed by The Cincinnati Gas & Electric Company and IEU-Ohio or approval by the Commission without modification of the CG&E alternative proposal submitted in its application for rehearing in Case No. 03-93-EL-ATA, and any related litigation.

This agreement terminates after December 31, 2008, or as follows:

- A. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to issue an order on rehearing acceptable to Cinergy such that it restores without modification the original Stipulation signed by the Parties or adopts without modification CG&E's alternative proposal made in its application for rehearing.
- B. A court or administrative agency of competent jurisdiction issues an order depriving the parties of the benefits of this agreement or otherwise voiding this agreement.
- C. Each Customer may individually terminate this agreement in its entirety, including its contract with the CRS, upon twelve (12) months written notice to CRS provided that such termination shall be effective for all Customer accounts and for this entire agreement.

Before termination of the agreement as provided in paragraphs A and B above, the parties agree to use best efforts to fulfill the intent of this agreement, by negotiating amendments to the agreement that provide the

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parties with substantially the same economic benefit for substantially the same consideration as contained in the original agreement.

All notices, demands, and statements to be given hereunder shall be given in writing to the parties at the addresses appearing herein below and will be effective upon actual receipt.

To Customers:

Samuel C. Randazzo, Esq.  
McNees, Wallace & Parrish  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 469-8000

To Cinergy:

Cinergy  
James B. Gainer  
139 East Fourth Street  
Cincinnati, OH 45202

or such other address as is provided in writing by the recipient from time to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and the Customers shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third parties including the government regarding the enforcement or breach of this agreement, including but not limited to, property damages, environmental damages, contract damages, fines, or penalties arising from or in connection with the provision or acceptance of competitive retail electric service arising from or in connection with the performance of this agreement.

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This agreement is for the exclusive benefit of the Parties and shall apply to successors and assigns of the affected Customers as well as Cinergy provided, as to the Customers, they continue to display substantially similar heat and usage characteristics as those that presently exist. The Parties shall not assign their rights or obligations under this agreement without the written consent of the non-assigning party and such written consent shall not be unreasonably withheld.


This agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

Entered into on the 14th day of November:

On behalf of Cinergy

On Behalf of the Customers

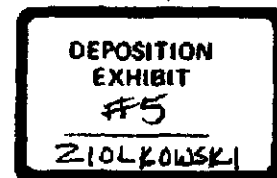
  
Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215

  
Samuel C. Randazzo, Esq.  
Moseley Wallace & Nurick LLC  
211 East State Street  
17th Floor  
Columbus, Ohio 43215

**Agreement**

This agreement is between Cinergy Corp. (Cinergy), through its agent Cinergy Retail Sales, LLC (CRS), and the Industrial Energy Users-Ohio (IEU-Ohio) for the benefit of Marathon Ashland, Inc., and General Motors, Inc., (Customers), effective this 28th day of May 2004. As to General Motors, Inc., this agreement is effective only to General Motors, Inc., West Chester Operation (GM). It is the intent of the parties to this agreement to bind the Customers to the terms and conditions set forth herein. The following is the entire agreement between CRS and IEU-Ohio (Parties); it may not be amended except by the written agreement of the parties.

This agreement is binding on the Parties regarding the subject matter herein and is to remain confidential among the Parties and may be released to non-parties only if ordered by a court or administrative agency of competent jurisdiction. If the issue of this agreement's confidentiality comes before a court or administrative agency of competent jurisdiction the party before such court or administrative agency shall immediately notify the other party. The Parties shall defend the confidentiality of this agreement. The Parties shall not circulate the agreement, or its existence, to any employee, agent, or assignee of the party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the agreement. For purposes of this paragraph, the term Parties includes the Customers.



1. Beginning January 1, 2005 or at such later time as may be specified herein for any accounts of each Customer that may be presently receiving competitive retail generation service from a supplier not affiliated with Cinergy, CRS shall supply, on a full requirements basis, and each Customer shall purchase firm competitive retail electric generation service from CRS or another Cinergy affiliated competitive retail electric service provider designated by CRS. Any accounts of each Customer presently receiving competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall have the right to delay the start date of the above described supply relationship with CRS to a date specified by such Customer provided that such delay does not cause the supply relationship with CRS to commence later than January 1, 2006. The all requirements, firm, competitive retail generation supply provided by CRS to Customers shall be priced at the currently effective unbundled generation price specified in the otherwise applicable tariff schedule for standard offer service less an amount equal to the applicable Regulatory Transition Charge (RTC), the resulting specified price also known as "Little G". Compliant contracts to implement the above described service relationship between Customers and CRS shall be executed as soon as reasonably possible and shall terminate no later than December 31, 2008. Cinergy shall reimburse Customers for payments made to The Cincinnati Gas & Electric Company as follows: (1) From January 1, 2005 through December 31, 2005, any Customer purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall maintain the shopping credit structure (payment of Big G less the applicable shopping credit) approved by the Commission in case no. 99-1658-EL-ETP and Cinergy shall reimburse monthly such Customers for half of the amount billed to Customers as the component of the Provider of Last Resort (POLR) charge paid to The Cincinnati Gas & Electric Company; (2) from January 1, 2005 through December 31, 2005, Cinergy shall reimburse GM monthly the full amount billed to and paid by GM as the RTC component paid to The Cincinnati Gas & Electric Company provided GM is purchasing competitive retail electric service from a non-Cinergy affiliated

<sup>1</sup> The currently effective Little G rate shall mean the Little G rate in effect as of the date this agreement is signed.

competitive retail electric service provider during such calendar year (3) beginning January 1, 2005, through December 31, 2005, for all Customers purchasing competitive retail electric service from a Cinergy affiliated competitive retail electric service provider, Cinergy shall reimburse monthly all such Customers for the as billed and actual full amount of the RTC, the as billed and actual full amount of any Rate Stabilization Charges, and half of the amount billed to Customers as the POLR component actually paid to The Cincinnati Gas & Electric Company; (4) beginning January 1, 2006, for Customers purchasing the above described competitive retail electric service from a Cinergy affiliated competitive retail electric service provider, Cinergy shall reimburse monthly all Customers for the full amount billed to and paid by Customers as the RTC, the full amount billed to and paid by Customers as Rate Stabilization Charges, and half of the amount billed to Customers as the POLR component actually paid to The Cincinnati Gas & Electric Company.

2. If, prior to December 31, 2008, the Customers add additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds the Customer's combined (all accounts) maximum demand as of January 1, 2005, such new load or accounts may receive the options and benefits accruing from participation in this agreement to the extent that, for each Customer, such new load or accounts cumulatively represents new annual peak load of three (3) MW or less; any accounts representing new load beyond the foregoing limit are not included under this agreement.
3. Customers purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall be deemed to have provided, through this agreement, such written notice as may be required prior to the end of such purchase contract so that the Customers may avoid any penalty or additional charge that may arise absent such notice upon returning to standard offer service provided by The Cincinnati Gas & Electric Company.
3. Cinergy shall pay the Industrial Energy Users-Ohio \$100,000.00 as compensation for legal services, upon the issuance of a final order of the Commission satisfactory to Cinergy.
4. Customers shall pay The Cincinnati Gas & Electric Company's otherwise applicable transmission and distribution rates as



approved by the Commission. Customers, or their appointed representative, retain all rights to participate in Commission and Federal Energy Regulatory Commission proceedings that may affect the rates, terms, or conditions of distribution and transmission service.

5. Nothing in this agreement shall affect the terms and conditions agreed to by Industrial Energy Users-Ohio on behalf of General Motors, and Cinergy, pursuant to the agreement dated May 8, 2000 related to the settlement of certain issues in PUCO Case No. 99-1658-EL-ETP.
6. Cinergy will comply with all regulatory requirements necessary to create an affiliated competitive retail electric service provider to supply competitive retail electric service to Customers as required by paragraph one (1) of this agreement.
7. The Industrial Energy Users-Ohio shall support a Stipulation filed by The Cincinnati Gas & Electric Company and the IEU-Ohio in Case No. 03-93-EL-ATA subject to such reservation as IEU-Ohio has communicated to Cinergy.

This agreement terminates after December 31, 2008, or as follows:

- A. The Commission, in Case No. 03-93-EL-ATA, fails to issue a final order acceptable to Cinergy.
- B. A court or administrative agency of competent jurisdiction issues an order depriving the parties of the benefits of this agreement or otherwise voiding this agreement.
- C. Each Customer may individually terminate this agreement in its entirety, including its contract with the CRS, upon twelve (12) months written notice to CRS provided that such termination shall be effective for all Customer accounts and for this entire agreement.

Before termination of the agreement as provided in paragraphs A and B above, the parties agree to use best efforts to fulfill the intent of this agreement, by negotiating amendments to the agreement that provide the parties with substantially the same economic benefit for substantially the same consideration as contained in the original agreement.

All notices, demands, and statements to be given hereunder shall be given in writing to the parties at the addresses appearing herein below and will be effective upon actual receipt:

**To Customers:**

Samuel C. Randazzo, Esq.  
McNees, Wallace & Nurick  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 469-8000

**To Cinergy:**

Cinergy  
James B. Gainer  
139 East Fourth Street  
Cincinnati, OH 45202

or such other address as is provided in writing by the recipient from time to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and the Customers shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third parties including the government regarding the enforcement or breach of this agreement, including but not limited to, property damages, environmental damages, contract damages, fines, or penalties arising from or in connection with the provision or acceptance of competitive retail electric service arising from or in connection with the performance of this agreement.

This agreement is for the exclusive benefit of the Parties and shall apply to successors and assigns of the affected Customers as well as

Cinergy provided, as to the Customers, they continue to display substantially similar load and usage characteristics as those that presently exist. The Parties shall not assign their rights or obligations under this agreement without the written consent of the non-assigning party and such written consent shall not be unreasonably withheld.

This agreement shall be governed by and construed in accordance with the laws of the State of Ohio.


Entered into on this 28th day of May:

On behalf of Cinergy

On Behalf of the Customers



Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215

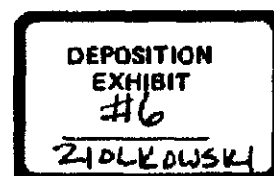


Samuel C. Randazzo, Esq.  
McNees, Wallace & Nurick  
21 East State Street  
17<sup>th</sup> Floor  
Columbus, Ohio 43215

**Agreement**

This agreement is between The Cinergy Retail Sales, LLC (Cinergy), and the hospitals shown on the attached agreement exhibit 1 incorporated by reference into this agreement (Hospitals), effective this 28th day of October 2004. This Agreement replaces and supersedes the terms and conditions of the Agreement dated May 19th 2004 between Hospitals and Cinergy. It is the intent of the parties to this agreement to bind Cinergy and the Hospitals to the terms and conditions set forth herein. The following is the entire agreement between Cinergy and the Hospitals (parties); it may not be amended except by the written agreement of the parties.

This agreement is binding on the parties regarding the subject matter herein and both the terms and existence of the agreement are to remain confidential among the parties and may be released to non-parties only if ordered by a court or administrative agency of competent jurisdiction. If any issue related to the confidentiality of this agreement comes before a court or administrative agency of competent jurisdiction the party before such court or administrative agency shall use best efforts to immediately notify the other party. The parties shall defend the confidentiality of this agreement. The parties shall not circulate the agreement, or disclose its existence, to any employee, agent, or assignee of the party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the agreement.



The parties, for good consideration, agree to the following terms and conditions:

1. Beginning January 1, 2005, and through December 31, 2008, Cinergy will offer to sell retail electric generation service to the Hospitals for all their CG&E accounts at a firm power, all-in, fixed rate equal to the applicable tariff rate of The Cincinnati Gas & Electric Company's unbundled generation rate approved by the Public Utilities Commission of Ohio (Commission) in case no. 99-1658-EL-ETP less the regulatory transition charge approved in the same case less one (1) mil per kwh, except that Jewish Hospital and Children's Hospital shall purchase competitive retail electric generation service from Cinergy at a rate equal to the real time pricing tariff rate and currently effective service agreement they are receiving from The Cincinnati Gas & Electric Company on December 31, 2004. The retail electric generation offer indicated above will be an option for Hospital accounts to accept anytime prior to December 31, 2008 and the term of such generation arrangement will be designated by the Hospital accounts but will extend no longer than December 31, 2008. The generation rate shall include a payment of amounts for emission allowances equal to the emission allowance cost CG&E is permitted to recover as part of its price to compare charge of the market-based standard service offer.
2. Cinergy shall reimburse the Hospitals for any rate stabilization charge (a component of the provider of last resort charge) actually paid to The Cincinnati Gas & Electric Company by the Hospitals purchasing competitive retail electric generation service from Cinergy pursuant to paragraph one (1) above. Cinergy shall reimburse rate stabilization charges actually paid quarterly through the term of this agreement. The Hospitals shall pay the infrastructure maintenance fund and the system reliability tracker. To the extent that hospitals actually pay the infrastructure maintenance fund component of the Provider of last resort Charge, CG&E shall reimburse, consistent with the reimbursement schedule contained herein, total infrastructure maintenance fund payments in excess of 4% of little g. The participating Hospitals will not pay the AAC (annually adjusted component) charges and any fuel adders that would apply to full service tariff customers.
3. If, prior to December 31, 2008, the Hospitals add additional load or accounts in The Cincinnati Gas & Electric Company's

certified territory, such new load or accounts may receive the options and benefits accruing from participation in this agreement to the extent that such new load or accounts represents new peak load of three (3) MW or less, except that new load relative to dual feeds shall be subject to the terms and conditions set forth in paragraph six (6) of this agreement.

4. Cinergy shall pay the Ohio Hospital Association \$50,000.00 upon the issuance of a final appealable order of the Public Utilities Commission of Ohio satisfactory to Cinergy.
5. The Hospitals shall comply with the terms and conditions of the order of the Public Utilities Commission of Ohio in case no. 03-93-EL-ATA including the payment of regulatory transition charges and provider of last resort charges except as set forth herein.
6. Cinergy shall not amend the rates charged by The Cincinnati Gas & Electric Company for dual feeds for load existing prior to December 31, 2004, until at least December 31, 2008. The Cincinnati Gas & Electric Company may amend its tariffs for dual feed where there is a significant increase in load or for new dual feed consumers pursuant to an application approved by the Public Utilities Commission of Ohio.
7. Hospitals purchasing generation service pursuant to existing tariff load management riders as of December 31, 2004, may continue to purchase generation service pursuant to such load management riders through December 31, 2008.
8. This agreement has no application to The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Public Utilities Commission of Ohio. Hospitals shall pay the applicable transmission and distribution rates of The Cincinnati Gas & Electric Company as approved by the Commission, and/or if applicable, shall pay to Cinergy Retail Sales the applicable transmission charges equal to the transmission charges approved by the Public Utilities Commission of Ohio for Cincinnati Gas & Electric Company.
9. The Hospitals shall cause the Ohio Hospital Association to support an Application for Rehearing filed by The Cincinnati Gas & Electric Company and/or the Ohio Hospital Association seeking to restore the Stipulation, without modification, signed by The Cincinnati Gas & Electric Company and the Ohio Hospital Association or seeking approval, without modification

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of the alternative proposal made by The Cincinnati Gas & Electric Company in its application for rehearing, in Case No. 03-93-EL-ATA, and any related litigation.

This agreement terminates after December 31, 2008, or upon the occurrence of any of the following:

- A. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to approve as part of the capped provider of last resort charge, a fuel cost recovery mechanism such that The Cincinnati Gas & Electric Company may recover fuel costs equal to the average costs for fuel consumed at The Cincinnati Gas & Electric Company's plants, and economy purchase power costs, for sales in The Cincinnati Gas & Electric Company's Certified Service Territory.
- B. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to issue an entry on rehearing acceptable to Cinergy such that it restores without modification the original Stipulation signed by the Parties or adopts without modification CG&E's alternative proposal made in its application for rehearing.
- C. Upon thirty (30) days written notice by either party upon the issuance of an order by a court or regulatory body of competent jurisdiction that substantially prevents either party from performing its obligations pursuant to this agreement.

All notices, demands, and statements to be given hereunder shall be given in writing to the parties at the addresses appearing herein below and will be effective upon actual receipt:

To the Hospitals:

Rick Sites, General Counsel  
155 East Broad Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215-3620

To Cinergy:

Cinergy  
James B. Gajner  
139 East Fourth Street  
Cincinnati, OH 45202

or such other address as is provided in writing by the recipient from time to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and OHA shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third parties including the government regarding the enforcement or breach of this agreement, including but not limited to, property damages, environmental damages, contract damages, fines, or penalties arising from or in connection with the provision or acceptance of competitive retail electric service arising from or in connection with the performance of this agreement.

This agreement is for the exclusive benefit of the parties and may not be assigned without the written consent of the non-assigning party.

This Letter Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

Entered into on this 8th day of November:

On behalf of Cinergy

On Behalf of the Hospitals



Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215



Rick Sites, General Counsel  
155 East Broad St., 15<sup>th</sup> Floor  
Columbus, Ohio 43215-3620



**OPTION AGREEMENT**

**BY AND BETWEEN**

**CINERGY RETAIL SALES, LLC**

**AND**

[REDACTED]

This Option Agreement (the "Agreement") is entered into as of this 2nd day of February, 2005 (the "Effective Date") by and between Cinergy Retail Sales, LLC ("CRS") a Delaware limited liability company, and [REDACTED] corporation (each individually a "Party" or collectively the "Parties").

**RECITALS**

**WHEREAS,** [REDACTED] and purchases electric power service from The Cincinnati Gas & Electric Company (CG&E) on metered accounts listed on Exhibit C.

**WHEREAS,** CRS has been certified by the Public Utilities Commission of Ohio as a Certified Retail Electric Supplier ("CRES") and has the authority to engage in the sale of electrical power at retail;

**WHEREAS,** CRS and [REDACTED] desire to establish terms and conditions for this option.

**NOW, THEREFORE,** for and in consideration of the mutual covenants contained herein, the Parties agree as follows:

**ARTICLE I  
DEFINITIONS**

The following definitions and any terms defined in this Agreement shall apply hereunder.

"Affiliate" means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, "control" means the direct or indirect

Cinergy Corporate Records  
04016280



Document Code \_\_\_\_\_

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DEPOSITION  
EXHIBIT

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ownership of ten (10) percent or more.

**"Base Contract Price"** means the price in \$US as set forth in Exhibit B to be paid by [REDACTED] to CRS for the purchase of Generation and Transmission service under this Agreement.

**"Business Day"** means a day on which Federal Reserve member banks in Ohio are open for business; and a Business Day shall open at 8:00 a.m. and close at 5:00 p.m. eastern prevailing time, unless otherwise agreed to by the Parties in writing.

**"Maximum Demand"** means [REDACTED] combined maximum annual demands for all of [REDACTED] accounts listed on Exhibit C with Cincinnati Gas & Electric ("CG&E") for the twelve months ending December 31, 2004.

**"Capacity"** has the meaning set forth in any Transmission Provider's tariff or MISO's transmission tariff, as amended from time to time, or as defined in any transmission tariff of a successor to MISO.

**"Defaulting Party"** shall have the meaning specified in Section 6.1.

**"Energy"** means electric energy of the character commonly known as three-phase, sixty hertz electric energy that is delivered at the nominal voltage of the Delivery Point, expressed in megawatt hours (MWh).

**"Event of Default"** shall have the meaning specified in Section 6.1.

**"FERC"** means the Federal Energy Regulatory Commission or any successor agency thereto.

**"Firm"** means that the only excuse for the failure to deliver Energy by CRS or the failure to receive Energy by [REDACTED] is Force Majeure or the other Party's failure to perform.

**"Full Requirements Energy"** means, except as provided herein, that [REDACTED] shall purchase all of its retail Energy requirements for its facility from CRS and that [REDACTED] shall not resell any of the Energy provided hereunder to any third party.

**"Interest Rate"** means, for any date the lesser of (a) two (2) percent over the per annum rate of interest equal to the prime lending rate ("Prime Rate") as may be published from time to time in the Federal Reserve Statistical Release H. 15; or (b) the maximum lawful interest rate.

**"MW"** means megawatt.

**"Term"** shall have the meaning specified in Article 4.1.

**"Transmission Providers"** means the entity or entities transmitting or transporting the Energy on behalf of CRS or [REDACTED]

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OPTION

- 2.1 [REDACTED] currently purchases its generation electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs or will provide notice by December 30, 2004 that it will purchase generation electric service from CG&E starting no later than December 31, 2005 in accordance with applicable CG&E tariff requirements. [REDACTED] hereby grants to CRS the exclusive option, upon thirty (30) days notice, to provide generation electric service for all of [REDACTED] accounts and load set forth in Exhibit C, including any increases in accordance with Section 3.1, as of December 31, 2004 ("Option"). In the event that an Electric Choice Insufficient Return Notice Fee is incurred by [REDACTED] due to switching back to CG&E standard tariffed service prior to January 31, 2005, an amount equivalent to said fee will be paid to [REDACTED] CRS.
- 2.2 CRS shall have the right to exercise this Option at any time during the Term of this Agreement.
- 2.3 In exchange for [REDACTED] granting CRS this option, CRS agrees to pay [REDACTED] each calendar year quarter of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment"). The Parties agree that if [REDACTED] defaults or is delinquent, after any applicable cure period, in any of its payments to any Cinergy affiliated company for any service provided to [REDACTED] then CRS has the right to offset the Option Payment due hereunder with any amounts that are owed by [REDACTED] to the Cinergy affiliated company.
- 2.4 [REDACTED]
- 2.5 If CRS exercises its Option, the Parties shall enter into a power sale agreement, including the terms set forth in Article III.

ARTICLE III  
CRS POWER CONTRACT TERMS

- 3.1 In the event CRS exercises its option, a power sale agreement between CRS and [REDACTED] will be negotiated. The power sale agreement shall include generally accepted terms and conditions relating to the sale of competitive retail electric generation service, including, among others, the following terms:

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- a. Energy Quantity and Type. CRS shall provide [REDACTED] with Firm, Full Requirements Energy and Capacity up to [REDACTED] Maximum Demand ("Quantity"). If during the Term of this Agreement [REDACTED] has additional load or accounts [REDACTED] such new load or account is not included within the terms of this Agreement and CRS shall have no obligation to provide Energy and Capacity to [REDACTED] have the Quantity set forth herein.
- b. Transmission Service and Charges. Transmission service will be provided in accordance with the open access transmission tariff of the Midwest Independent Transmission System Operator, Inc. or CG&E (or an affiliate on its behalf), whichever is applicable, as filed with the FERC and as it may be amended, from time to time, or any successor tariff.
- c. Base Contract Price. The Base Contract Price is set forth in Exhibit B.
- d. Change to Prices. As a retail sale, the power sale agreement is not subject to the jurisdiction of the FERC; nor shall either Party seek to have the FERC assert jurisdiction over the Agreement. However, to the extent that either the FERC or the Public Utilities Commission of Ohio asserts jurisdiction over the Agreement, the Parties agree that the Contract Price specified above is just and reasonable and consistent with the public interest. Neither CRS nor [REDACTED] shall seek to modify the Base Contract Price through the auspices of any regulatory body.
- e. Term. The term of the power sale agreement shall be through December 31, 2008.
- f. Credit. The power sale agreement will have terms and conditions as similar as possible to CG&E's existing unbundled tariffs. CRS will not require surety bonds, deposits or other corporate guarantees.
- g. Adjusted Base Contract Price. If CRS exercises this option, then the combined net generation cost paid to CRS and CG&E will be an amount equivalent to Big G, plus [REDACTED]. In addition, there will be transmission charges to be paid to CRS as set forth in Exhibit B.

ARTICLE IV  
TERM OF AGREEMENT

- 4.1 Agreement Term and Effective Date. This Agreement shall become effective upon execution by the Parties. This Agreement shall extend from January 1, 2005 through and

including December 31, 2008, unless terminated earlier in accordance with the terms of this Agreement ("Term").

4.2

- 4.3 After Termination. The applicable provisions of this Agreement shall continue in effect after termination thereof to the extent necessary to provide for final billing, billing adjustments and payments.

#### ARTICLE V BILLING

- 5.1 Payment. CRS shall submit the Option Payment to [REDACTED] by check or wire transfer within forty-five (45) days after the end of each calendar year quarter. The payment shall be submitted to an account or address designated by [REDACTED]

#### ARTICLE VI DEFAULTS AND REMEDIES

- 6.1 Events of Default. An "Event of Default" shall mean, with respect to a Party ("Defaulting Party"), the occurrence of any of the following:
- 6.1.1 any representation or warranty made by the Defaulting Party herein shall at any time prove to be false or misleading in any respect material to this Agreement;
  - 6.1.2 the failure of the Defaulting Party to materially perform any covenant set forth in this Agreement (except to the extent constituting a separate Event of Default,) and such failure is not cured within five (5) Business Days after written notice thereof to the Defaulting Party;
  - 6.1.3 the Defaulting Party consolidates or amalgamates with, merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or

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transferee entity fails to assume all of the obligations of such Party under this Agreement;

- 6.1.4 the failure to make when due, any payment required pursuant to this Agreement if such failure is not remedied within five (5) Business Days after written notice of such failure is given by the other Party; or
- 6.1.5 the Defaulting Party (i) files a petition or otherwise commences or acquiesces in a proceeding under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition is not withdrawn or dismissed within thirty (30) days after such filing, (ii) makes an assignment or any general arrangement for the benefit of creditors, (iii) otherwise becomes bankrupt or insolvent (however evidenced), (iv) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (v) is unable to pay its debts as they fall due.
- 6.2 Remedies upon an Event of Default. Upon the occurrence (and continuation beyond the applicable cure period) of an Event of Default with respect to a Defaulting Party, the Non-Defaulting Party shall have the right to terminate this Agreement and exercise all rights and remedies available to it in law or in equity.

ARTICLE VII  
DUTY TO MITIGATE

- 7.1 Duty to Mitigate. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

ARTICLE VIII  
GOVERNING LAW - DISPUTE RESOLUTION

- 8.1 Governing Law and Jurisdiction. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of Ohio.
- 8.2 Dispute Resolution. Any claim, controversy or dispute arising out of or relating to this Agreement, or the breach thereof, shall be resolved fully and finally by binding arbitration under the Commercial Rules, but not the administration, of the American Arbitration Association, except to the extent that the Commercial Rules conflict with this provision, in which event, this Agreement shall control. This arbitration provision shall not limit the

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right of either Party prior to or during any such dispute to seek, use, and employ ancillary, or preliminary or permanent rights and/or remedies, judicial or otherwise, for the purposes maintaining the status quo until such time as the arbitration award is rendered or the dispute is otherwise resolved. The arbitration shall be conducted in Cincinnati, Ohio and the laws of Ohio shall govern the construction and interpretation of this Agreement, except to provisions related to conflict of laws. Within ten (10) Business Days of service of a Demand for Arbitration, the parties may agree upon a sole arbitrator, or if a sole arbitrator cannot be agreed upon, a panel of three arbitrators shall be named. One arbitrator shall be selected by CRS and one shall be selected by [REDACTED]. A knowledgeable, disinterested and impartial arbitrator shall be selected by the two arbitrators so appointed by the parties. If the arbitrators appointed by the parties cannot agree upon the third arbitrator within ten (10) Business Days, then either Party may apply to any judge in any court of competent jurisdiction for appointment of the third arbitrator. There shall be no discovery during the arbitration other than the exchange of information that is provided to the arbitrator(s) by the Parties. The arbitrator(s) shall have the authority only to award equitable relief and compensatory damages, and shall not have the authority to award punitive damages or other non-compensatory damages. The decision of the arbitrator(s) shall be rendered within ninety (90) Business Days after the date of the selection of the arbitrator(s) or within such period as the Parties may otherwise agree. Each Party shall be responsible for the fees, expenses and costs incurred by the arbitrator appointed by each Party, and the fees, expenses and costs of the third arbitrator (or single arbitrator) shall be borne equally by the Parties. The decision of the arbitrator(s) shall be final and binding and may not be appealed. Any Party may apply to any court having jurisdiction to enforce the decision of the arbitrator(s) and to obtain a judgment thereon.

Notwithstanding the foregoing, the Parties may cancel or terminate this Agreement in accordance with its terms and conditions without being required to follow the procedures set forth in this Article.

#### ARTICLE IX MISCELLANEOUS

- 9.1 Representations and Warranties. On the Effective Date and on the date of entering into this Agreement, each Party represents and warrants to the other Party that: (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation and is qualified to conduct its business in each jurisdiction; (b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement and any other documentation relating to this Agreement; (c) the execution, delivery and performance of this Agreement and any other documentation relating to this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or similar provision applicable to it; (d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in

accordance with its terms; (e) there are no bankruptcy proceedings pending or being contemplated by it or, to its knowledge, threatened against it; (f) there is not pending or, to its knowledge, threatened against it or any of its affiliates any legal proceedings that could materially adversely affect its ability to perform its obligation under this Agreement or any other document relating to this Agreement; (g) no Event of Default or event which, with the giving of notice or lapse of time, or both, would constitute an Event of Default with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement or any other document relating to this Agreement or any Transaction; and (h) it is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether such Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, and is capable of assessing the merits of and understanding and understands and accepts, the terms, conditions and risks of this Agreement.

- 9.2 Assignment. This Agreement shall be assignable by CRS without the [REDACTED] consent provided such assignment is to any other direct or indirect subsidiary of Cinergy Corp. provided that such direct or indirect subsidiary has an equivalent or higher credit rating than CRS. Any other assignment by either Party of this Agreement or any rights or obligation hereunder shall be made only with the written consent of the other Party, which consent shall not be unreasonably withheld.
- 9.3 Notices. All notices, requests, statements or payments shall be made as specified below. Notices required to be in writing shall be delivered by letter, facsimile or other documentary form. Notice by regular mail shall be deemed to have been received three (3) Business Days after it has been sent. Notice by facsimile or hand delivery shall be deemed to have been received by the close of the Business Day on which it was transmitted or hand delivered (unless transmitted or hand delivered after close of normal business hours, in which case it shall be deemed to have been received at the close of the next Business Day). Notice by overnight or courier shall be deemed to have been received two (2) Business Days after it has been sent. A Party may change its addresses by providing notice of the same in accordance with this Section 9.3.

**To CRS:**

James B. Gainer  
139 East Fourth Street  
Cincinnati, OH 45202

Phone - 513-287-2633  
Fax - 513-287-1902

~~CONFIDENTIAL~~  
David F. Boehm, Esq.



Michael L. Kurtz, Esq.  
Boehm, Kurtz & Lowry  
36 E. Seventh Street, Suite 1510  
Cincinnati, Ohio 45202  
Ph: 513.421.2255 Fax: 513.421.2764

- 9.4 General. This Agreement constitutes the entire agreement between the Parties relating to the subject matter contemplated by this Agreement. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. No amendment or modification to this Agreement shall be enforceable unless set forth in writing and executed by both Parties. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). No waiver by a Party of any default by the other Party shall be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change will not otherwise affect the remaining lawful obligations that arise under this Agreement. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights contained herein shall survive the termination or expiration of this Agreement for three (3) years.
- 9.5 Confidentiality. Neither Party shall disclose the terms or conditions of this Agreement to a third party (other than the Party's employees, Affiliates, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or in connection with any court or regulatory proceeding applicable to such Party; provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.
- 9.6 Counterparts. This Agreement may be separately executed in counterparts each of which when so executed shall be deemed to constitute one and the same Agreement.
- 9.7 This Agreement supersedes and replaces the agreement between CRS and [REDACTED] dated November 22, 2004. During the term of this Agreement, it supersedes and replaces any other agreements between the Parties or their affiliates related to PUCO Case No. 99-1658-EL-ETP. Upon the termination of this Agreement, any other settlement agreements between the Parties or their affiliates related to PUCO Case No. 99-1658-EL-ETP shall be in full force and effect according to their original terms.

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The Parties have caused this Agreement to be executed by their duly authorized representatives in multiple counterparts as of the Effective Date.

CINERGY RETAIL SALES, LLC

By: [Signature]

Title: VP & GM Counsel

Date: MAY 2, 2005

By: [Redacted]

Title: [Redacted]

Date: 03/21/05

FORM APPROVED  
[Signature]  
ATTORNEY

**Exhibit A:****Customer Group: [REDACTED]  
Quarterly Option Payment Calculation**

The CRS option payment made quarterly for the period January 1, 2005 through December 31, 2008 or the date upon which the option is exercised whichever comes first, will be equivalent to the following calculation:

The actual amount paid by [REDACTED] to The Cincinnati Gas and Electric Company during the applicable calendar quarter under its [REDACTED]

Less the following amount:

Tariff Schedule	Demand Charge (\$ per kW)			Energy Charge (\$ per kWh)		
	First Step	Second Step	Additional	First Step	Second Step	Additional
DM <sup>1</sup>	[REDACTED]					
DP	[REDACTED]					
DS	[REDACTED]					
TS	[REDACTED]					

<sup>1</sup> DM only shows scheduled demand rates

Plus [REDACTED]

Plus [REDACTED]

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**EXHIBIT B:**

**Customer Group: [REDACTED]  
CRS Generation Rates for Former Rate DP Standard Service Customers**

**Net Monthly Generation And Transmission Bill Will Be The Following [REDACTED]**

Computed in accordance with the following charges. (Kilowatt of demand is abbreviated as kW and kilowatt-hours are abbreviated as kWh):

**Generation Charges**

**(a) Demand Charge**

First 1,000 kilowatts .....

Additional kilowatts .....

**(b) Energy Charge**

Billing Demand times 300 .....

Additional kilowatt-hours .....

**(c) Fuel Charge**

The Fuel Charge shall be equal to the [REDACTED]  
[REDACTED]

**Transmission Charges**

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CG&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

- (1) Network Transmission Services
- (2) MISO Schedule Charges
- (3) Net Congestion Charges

**EXHIBIT B:****Customer Group:** [REDACTED]**CRS Generation and Transmission Rates for Former Rate TS Standard Service Customers****Net Monthly Bill**

Computed in accordance with the following charges. (Kilovolt amperes are abbreviated as kVA and kilowatt-hours are abbreviated as kWh):

**Generation Charges****(b) Demand Charge**

First 50,000 KVA .....

Additional KVA .....

**(b) Energy Charge**

Billing Demand times 300 .....

Additional kilowatt-hours .....

**(d) Fuel Charge**

The Fuel Charge shall be equal to the [REDACTED]

**Transmission Charges**

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CG&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

- (4) Network Transmission Services
- (5) MISO Schedule Charges
- (6) Net Congestion Charges

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**Exhibit C:**

Customer Group: [REDACTED]  
Customer Account List

This agreement pertains to the following [REDACTED]  
[REDACTED]

Cinergy Retail Sales Handoff**1. Records**

- a. Paper files boxed at Jason Barker's Desk
- b. Computer files to be burned to CD and placed in box

**2. Regulatory Filings – Change Primary Contact**

- a. *General – I will remove my name from all filings as primary contact upon my departure. A replacement MUST be named to receive communications from state agencies, CG&E, vendors and customers.*

**b. Ohio****i. PUCO**

- 1. Any material changes in certification for Retail Generation Providers and Power Marketers must be reported to PUCO
  - a. Must change primary contact from J. Barker to someone else.
  - b. Attachment 2 of the Application must be amended again to reflect changes to current CRS officers. Foster Duncan is listed as President. Presumably Michael Cyrus should be relisted. The official slate of officers has yet to be changed by corporate.
- 2. Annual Certification of Intrastate Gross Revenue.
  - a. Reported as \$0.00 for 2004
  - b. For 2005 it will be reported as a negative dollar figure due to RSP Option Payments, which are booked by accounting as "contra-revenue" (i.e., negative revenue).

**ii. Ohio Consumer Counsel**

- 1. Requests certification of Intrastate Gross Revenues, presumably each year for the purpose of assessing a fee to run the OCC.
- 2. I certified the 2004 IGR as \$0.00

**c. Illinois****i. Illinois Commerce Commission**

- 1. Beth Fritsch is investigating requirements – Presumably duty to notify of material changes, including primary contact.

**d. CG&E**

- i. Only utility territory in which CRS is certified
- ii. Currently listed as active, but not serving customers
  - 1. Should change to inactive if CRS is not intending to serve so that customers don't call or email

**3. Contracts****a. RSP Option Payments**


- i. Tim Duff provides spreadsheet with option values on a monthly and quarterly basis (depending on the customer)

- ii. I authorize an RFP for payments under \$250,000; Dave Wozny authorizes payment > \$250,000 (generally only quarterly payments to [REDACTED])
  - 1. Duff to handoff task to Jim Ziolkowski after Q3 '05 payments
  - 2. Duff to streamline process to provide both spreadsheet and completed RFP/Wire transfer docs for Wozny's signature and forwarding to Accounts Payable.
  - 3. Bob Muench, a clerk in Accounts Payable, has handled these payments before and is a good resource for overcoming Accounts Payables' sometimes rigid documentation rules.
- b. ESG (EDI vendor)
  - i. \$1000/mo. minimum
  - ii. Two year term expiring 12/31/06
  - iii. Sec. 2.2 requires termination notice 90 days prior to expiration, otherwise contract automatically renews for one year.
- c. OATI (scheduling vendor)
  - i. Contract
    - 1. Twelve month term commencing 12/2/04
    - 2. Sec 5.01 - Automatic renewal for indefinite term unless terminated pursuant to Sec. 5.02
    - 3. Sec. 5.02 - 60 notice to terminate required
  - ii. Security Administration
    - 1. Alan Mok and Jason Barker own the common certificates
    - 2. Logon information written inside "OATP" folder in CRS Official Files (i.e., files from Jason Barker's desk).
    - 3. Alan will likely have to assist if OATI is actually ever used, to get the Barker certificate switched to the next person.
- d. Toll free phone number
  - i. Required by PUCO under terms of CRES certification
  - ii. Phone line / email answerable by J. Barker and J. Deeds
  - iii. Tim Schalk can connect/disconnect upon request
- e. Website
  - i. [www.cres.cinergy.com](http://www.cres.cinergy.com)
  - ii. Ginny Segbers in Creative Services set this up, I presume she can tear it down. Website should be taken offline if CRS is decertified by PUCO. I think there is regulation to have the site up to retain certification.



1 State of Ohio :  
2 County of HAMILTON : SS:

3 I, James E. Ziolkowski, do hereby certify that  
4 I have read the foregoing transcript of my deposition  
5 given on Tuesday, February 13, 2007; that together  
6 with the correction page attached hereto noting  
7 changes in form or substance, if any, it is true and  
8 correct.

9   
10 James E. Ziolkowski

11 I do hereby certify that the foregoing  
12 transcript of the deposition of James E. Ziolkowski  
13 was submitted to the witness for reading and signing;  
14 that after he had stated to the undersigned Notary  
15 Public that he had read and examined his deposition,  
16 he signed the same in my presence on the 23RD day  
17 of FEBRUARY, 2007.

18   
19 Notary Public

20 My commission expires \_\_\_\_\_



21 ANITA M. SCHAFER  
22 Notary Public, State of Ohio  
23 My Commission Expires  
24 November 4, 2009

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ERRATA SHEET

Please do not write on the transcript. Any changes in form or substance you desire to make should be entered upon this sheet.

**TO THE REPORTER:**

I have read the entire transcript of my deposition taken on the 21<sup>ST</sup> day of February, 2007, or the same has been read to me. I request that the following changes be entered upon the record for the reasons indicated. I have signed my name to the signature page and authorize you to attach the same to the original transcript.

Page	Line	Change	Reason
6	21-22	Supervisor of Regulatory Activities	Title (capitalization)
28	2	"applicability and" to "applicable"	grammar
29	5	"is" to "are"	"
48	22	delete "as"	redundant
55	20	"back" to "become"	

Date 3/1/07 Signature DE [Signature]

01235

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
	:		05-724-EL-UNC
	:		05-725-EL-UNC
	:		06-1068-EL-UNC
	:		06-1069-EL-UNC
	:		06-1085-EL-UNC

**CINERGY CORP.'S REPLY TO**  
**OCC'S MEMORANDUM CONTRA**  
**CINERGY CORP.'S MOTION FOR PROTECTIVE ORDER**

**CONFIDENTIAL VERSION**

The *Memorandum Contra Motions of Duke Energy Ohio, Inc., Duke Energy Retail Sales, Cinergy Corp., Ohio Hospital Association and Kroger for Protective Orders, and Motion for Prehearing Conference and Request for Expedited Ruling by the Office of the Ohio Consumers' Counsel*, filed March 13, 2007 in the above-captioned cases by the Ohio Consumers' Counsel ("OCC") (hereafter referred to as "OCC's Memo Contra"), is indicative of the manner in which OCC has pursued its goals in this matter. Cinergy Corp. ("Cinergy") submits that this Commission should grant OCC's Motion for a Prehearing Conference. The Commission should, however, also remain mindful of the gamesmanship in which OCC has engaged throughout these proceedings as it evaluates the credibility of any representation made by OCC at such a conference or during hearings on the merits.

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**I. OCC'S MOTION FOR A PREHEARING CONFERENCE, WHICH SIMPLY ECHOS SIMILAR REQUESTS FROM CINERGY AND OTHERS, SHOULD BE GRANTED.**

OCC reveals that its adamant opposition to all efforts by Duke Energy Ohio, Inc., ("DE-Ohio"), Duke Energy Retail Sales ("DERS"), Cinergy Corp. ("Cinergy") and other parties to these proceedings to obtain pre-hearing rulings regarding the admissibility of evidence and the protection of information belonging to those parties has been nothing but a sham, cynically engaged in for no apparent purpose except to maintain all parties' focus upon protecting their confidential business information from unlawful disclosure, and thus to distract them, to greater or lesser degree, from the substantive merits of these cases.

Cinergy finds it simply incredible that – after OCC repeatedly opposed the efforts of Cinergy, DE-Ohio, DERS, and others to obtain early rulings regarding the matters OCC now admits require attention prior to hearing – OCC would at the last conceivable moment pivot 180 degrees, and on the eve of the hearing, blithely demand that this Commission conduct a pre-hearing conference to address the identical issues Cinergy and others have been asking to be heard and determined – over OCC's determined opposition – for months.

Cinergy also cannot ignore, and therefore asks the Commission to note as well, that OCC filed its Motion for a Prehearing Conference within days of the beginning of this Commission's hearing and in conjunction with its Memoranda Contra Protective Agreements sought by Cinergy and affiliated entities *after* OCC first sought and received an extension of time in which to oppose the motions. No legitimate purpose exists for

this tactic which has severely – and successfully – abridged the response time available to Cinergy and others.

Cinergy obviously does not object to a pre-hearing conference that Cinergy, DE-Ohio and DERS have each requested several times during the course of this proceeding. Cinergy does object, however, to the brazen manner in which OCC has manipulated these proceedings, this Commission, its attorney examiners, and the parties.

Cinergy also objects to the fact that OCC alone has created the necessity for a pre-hearing conference in this matter. OCC first entered into protective agreements with Cinergy and other parties that it is now obvious OCC never intended to honor. Then, in breach of those agreements, (which require that OCC specifically indicate the information contained in thousands and thousands of pages produced to it during discovery that it believes is unavoidably public), OCC informed the parties that it intended to place *all documents and information provided to OCC* in the public record, thus prompting the motions for protective orders filed by Cinergy and others.

OCC now concedes in its Memo Contra those motions – without apology or even acknowledgement of its concession – that it violated the terms of its protective agreements when it issued the blanket notices in which it refuses to recognize any claims by any party that any information revealed to OCC is entitled to protection under Ohio law. OCC's concession consists of its *grudging identification* – at last – of specific documents that it asserts are not entitled to protection from disclosure under Ohio law.

Cinergy maintains that even OCC's *grudging identification* of these documents and information is not made in good faith. Instead, Cinergy asserts that OCC's position regarding the confidential information belonging to others, like its last moment

maneuvers, are motivated by reasons of OCC's perception of good politics, not its perception of good public policy.

As it relates to Cinergy, OCC's concession consists of its statement that it "desires to end any claim to confidentiality" regarding two documents that OCC has submitted to this Commission under seal, attached as exhibits 5 and 11 to the Confidential Testimony of OCC Witness Hixon. (OCC's Memo Contra at 20.) OCC has no basis for its position regarding these two contracts, as the only *evidence* regarding Cinergy's motivations for entering into the two contracts (hereafter referred to as the "Cinergy Contracts") plainly reveals that Cinergy entered into those agreements for legitimate business purposes that exist separate and apart from these proceedings.

Cinergy will on this occasion pick up the gauntlet thrown down by OCC.<sup>1</sup> Cinergy will demonstrate, first, that even if the Cinergy Contracts are admitted into evidence and thereby become "public records" of this Commission, this Commission is statutorily required to protect both from public disclosure under Ohio law. Second, Cinergy will show that neither document should be admitted into evidence in these proceedings in the first place, as neither is relevant to any issue before this Commission.

## **II. OHIO'S PUBLIC POLICY MANDATES THAT THIS COMMISSION PROTECT FROM PUBLIC DISCLOSURE TRADE SECRET INFORMATION BELONGING TO CINERGY.**

Ohio's trade secret law is not nearly as convoluted as OCC would have this Commission and others believe. Under Ohio law, the term "Trade secret" describes *all* information, in whatever form and however derived, that satisfies the following two statutory criteria:

---

<sup>1</sup> Cinergy intends as well to thoroughly reevaluate internal policies that allow it to voluntarily produce confidential information to the OCC in light of OCC's cavalier treatment of such information.

- (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.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

R.C. § 1333.61(D).

In order to give effect to the "bare bones" language of the statute, the courts of Ohio frequently rely upon six factors when evaluating claims of trade secrecy:

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;
3. The precautions taken by the holder of the trade secret to preserve its secrecy;
4. The value to the holder in having the information;
5. The amount of effort or money expended to obtain or develop the information; and
6. The amount of time and expense it would take for others to duplicate the information.

*Cf. Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-135 (Cuyahoga Cty 1983).

This Commission, of course, frequently recognizes that the contracts of even regulated entities must at times be protected from needless public disclosure. *Elyria Tel. Co.*, Case NO. 89-965-TP-AEC (Finding and Order, Sept. 21, 1989); *Ohio Bell Tel. Co.*, Case No. 890718-TP-ATA (Finding and Order, May 31, 1989); *Columbia Gas of Ohio, Inc.*, Case No 90-17-GA-GCR (Entry, Aug. 17, 1990).

In short, nothing about confidential information is remarkable in this proceeding except OCC's posture regarding such information. OCC does not assert that Cinergy's information does not meet the statutory test. OCC does not assert that Cinergy's information fails even one of the factors employed by the Courts. In fact, OCC does not

even assert that it has a good faith basis upon which to contest Cinergy's assertion that the Cinergy Contracts are its confidential business information.

OCC instead asserts that a different public policy trumps the protection of trade secrets. OCC claims that Ohio's public records act *requires* disclosure of the information belonging to Cinergy, as if this somehow justifies OCC's disavowal of its obligation to respect good faith claims of confidentiality. Indeed, OCC then points to this Commission's rules and to the protective "agreement" between itself and Cinergy and asserts on the basis thereof that it need have no basis to demand that Cinergy demonstrate that any information claimed to be a trade secret is in fact a trade secret.

OCC's public policy arguments are unavailing. Ohio's Trade Secret Act expresses a public policy choice to protect private information of economic significance to the owner of that information. Ohio's Public Records Act, R.C. § 149.011, expressly recognizes this policy, and directs state agencies to protect privately owned confidential information that happens to come into the agency's possession. Even assuming that, as OCC contends, the Cinergy Contracts were entered into for no other reason than to settle litigation before this Commission – a proposition that OCC knows is false and that Cinergy will demonstrate to be false herein – it is nonetheless still the public policy of the State of Ohio to protect that information. Moreover, it is the public policy of this State to encourage settlement of disputes. *White v. Brocaw* (1863), 14 Ohio St. 339, 346 ("If there is one thing which the law favors above another, it is the prevention of litigation, by the compromise and settlement of controversies."). OCC's "public policy" position is therefore both ridiculous and needlessly wasteful of resources, particularly where as here OCC asserts that it may ignore claims of confidentiality concerning the discovery



provided by entities such as DE-Ohio and DERS, which have produced volumes of records to OCC.

Turning to the two Cinergy Contracts: In the first instance, Cinergy's documents and information do not constitute a "public record" unless and until they are admitted into evidence. Section 149.43(A)(1) of the Ohio Revised Code, in relevant part, defines "public record" as "*records kept by any public office . . .*" According to Ohio 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.

Moyer, J., Interpreting Ohio's Sunshine Laws: A Judicial Perspective, 59 N.Y.U. ANN. SURV. AM. L. 247 (2003) (emphasis added). Thus, unless the records are admitted into evidence, the issue of public disclosure does not even arise.

This Commission should not be distracted by OCC's assertions that R.C. §149.011, Ohio's Public Records Act, makes it the duty of this Commission to place the Cinergy Contracts in the public record. Of course, it is true that that public records should be open for public review. Even so, R.C. § 149.011 expressly protects trade secrets contained within public records from public disclosure. OCC's belief that otherwise protected information ceases to deserve protection whenever OCC succeeds in entering that document into the record of proceedings before this Commission is simply absurd.

Finally, OCC tries to portray the Cinergy Contracts as existing in a vacuum that is related solely to proceedings before this Commission. The Cinergy Contracts actually demonstrate, however, why trade secrets deserve protection even in a public forum such as this Commission because Cinergy's interests in entering into the Cinergy Contracts (let alone the interests of the counterparty to those Contracts) reach well beyond the narrow issues affecting Cinergy's utility affiliate, CG&E, that are the subject of the cases before this Commission. As a result, the Cinergy Contracts serve as a means of demonstrating the wide range of economic benefits Cinergy pursues for the benefit of itself, its shareholders, the entire inter-related corporate structure that was Cinergy and that is now Duke Energy, and the community in which Cinergy is a corporate member. OCC, of course, is aware of these other interests. It simply finds them inconvenient to its purposes and so it refuses to acknowledge them. This Commission should not permit it to do so any longer.

On February 8, 2007, OCC obtained a subpoena from this Commission in which OCC demanded that Gregory Ficke, former President of CG&E and Vice President of Cinergy Corp., appear for deposition. On February 20, 2007, OCC deposed Mr. Ficke for approximately five and one half hours. During that deposition, OCC questioned Mr. Ficke regarding many topics, including the Cinergy Contracts, which OCC introduced as exhibits 15 and 16 to Mr. Ficke's deposition.

In response to OCC's questions, Mr. Ficke acknowledged that the interests of Cinergy include the interests of CG&E. He could not, and had no need to, deny this obvious fact. Mr. Ficke explained to OCC, however, that Cinergy had several additional incentives – completely unrelated to CG&E – that directly contributed to Cinergy's

decision to enter into the Cinergy Contracts. Relevant questions by OCC, and Mr. Ficke's responses to those questions, follow:

- Q. Now these documents, why were these documents entered into, [exhibits] 15 and 16?
- A. Well, I think from our standpoint the company, Cognis, agreed to support the stipulation and later our application for rehearing.

...

- Q. So isn't it connected -- isn't execution of exhibit 15 connected with the stipulation.
- A. Correct.

- Q. All right. And Exhibit 16 paragraph 5 refers to support of the application for rehearing. So wasn't Exhibit 16 executed in connection with Cognis's support for the ap. for rehearing?
- A. I think that's what I said, but if that's not what I said, that's what I meant to say.

- Q. **Is there any other purposes for these agreements, Exhibits 15 and 16?**
- A. Other than addressed on the face of the agreement, I do recall that during this time Cognis, which is a rather large employer, was undergoing a bargaining unit activity which was impacting their operations. They had been acquired by a foreign company which was placing a number of constraints upon their continued operation, and as a corporation I don't think we wanted to see such a prominent employer impacted negatively, and I do recall -- the only reason I bring it up is I do recall those circumstances being brought to my attention by Cognis and their rather precarious situation in terms of being able to continue to operate.

Cinergy Corp. had an interest, may still have a continuing interest, in providing energy to companies in the general vicinity of Cognis in terms of constructing and operating cogeneration plants and, in a sense, had a continuing interest in the vibrancy of that area, and I guess finally, just you know, as a corporate citizen had an interest in our customers continuing profitable operations.

...

- Q. Do you know why the agreement involved Cinergy Corp. without any reference to Cinergy Retail Sales?
- A. Well, there's not an option payment or an agreement to serve them, which was Cinergy Retail Sales' interest in those other agreements.

Thus, in a brief response to OCC's direct questions regarding the Cinergy Contracts, Mr. Ficke identified no fewer than five separate reasons why Cinergy, as an entity separate and apart from its utility affiliate, believed an agreement with Cognis was advantageous. Mr. Ficke first acknowledged that one of those reasons was Cinergy's natural interest in contributing to a resolution of the litigation involving CG&E then pending before this Commission. At the same time, however, Mr. Ficke also explained that Cinergy was also interested in pursuing cogeneration development opportunities with Cognis through still another, unregulated, affiliate.<sup>2</sup> Third, Cinergy was concerned regarding the economic viability of Cognis, a large customer of CG&E and a potential customer of other products and services provided by unregulated Cinergy entities. Fourth, Cinergy recognized that Cognis's prosperity has an impact upon the larger community in which Cinergy companies operate, including an impact upon employment levels that in turn will indirectly impact Cinergy operations.<sup>3</sup> Last, Mr. Ficke revealed that Cinergy is interested in promoting the economic viability of the area of Cincinnati in which Cognis is located, in recognition that a stronger economy within that area is likely to translate into stronger sales of Cinergy's products and services within that area.

The exchange quoted above also contains Mr. Ficke's reference to his understanding of economic interests now possessed by DERS in still other contracts to which Cinergy is not a party – an interest in securing options to provide electric power to customers of CG&E should those customers decide to "shop" for electric power.

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<sup>2</sup> Mr. Ficke was later asked questions in which he identified Tri Gen, a/k/a Cinergy Solutions as the specific Cinergy affiliates concerned with potential development of cogeneration. (Ficke Depo. at 76.)

<sup>3</sup> It should be obvious that increased unemployment in the Cincinnati area has both direct and indirect effects on demand for still other Cinergy-provided services, including electric power provided by CG&E.

The Cinergy Contracts, both on their face and as explained by Mr. Ficke, have both direct and indirect economic value to Cinergy. As Cinergy's entry into those contracts was motivated in large by concerns over Cinergy's place in competitive markets, it is unquestionably true that the Cinergy Contracts derive 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. The economic value of those contracts to Cognis and the potential competitive harm to Cognis of disclosure of those contracts is obvious.

Cinergy maintains that the Cinergy Contracts, related documents, and information derived by OCC therefrom are confidential business information that belongs to Cinergy and of course to the counterparty to the Cinergy Contracts. Mr. Ficke's responses to OCC's questions should leave no doubt in the minds of members of this Commission that the economic significance of those contracts to Cinergy and to the counterparty to the Cinergy Contracts is undeniable.

Furthermore, and although OCC has not even indicated that it challenges this fact, Cinergy takes reasonable steps to protect its information from disclosure to those who have no need to know the information – even within Cinergy and companies affiliated with Cinergy. Thus, even if admitted into evidence in these proceedings – and Cinergy will next demonstrate that they should not be admitted into evidence in these proceedings – the Cinergy Contracts undisputedly meet the test of R.C. § 1331.61(D) and are entitled to the protection of law afforded confidential information pursuant to that statute.

### III. THE CINERGY CONTRACTS ARE NOT PROPERLY ADMISSIBLE INTO EVIDENCE BECAUSE THEY ARE IRRELEVANT.

Relevance is of course the initial touchstone of all evidentiary determinations. Relevant evidence is admissible. Irrelevant evidence is not admissible. Ohio R. Evid. 402. Evidence is "relevant" if it has:

any tendency to make the existence of any fact *that is of consequence to the determination of the action* more probable or less probable than it would be without the evidence.

Ohio R. Evid. 401 (emphasis added).

OCC now joins Cinergy in seeking a pre-hearing conference at which to determine the use it may make of the Cinergy Contracts. This Commission should, therefore, demand that OCC explain *the* fundamental issue that the Duke entities have attempted to raise since this matter was remanded to this Commission by the Ohio Supreme Court – the relevance of the documents that OCC insists upon referring to as "side agreements" to *this Commission's determinations* of the issues within the underlying RSP case.

This Commission, the Commission staff, OCC, and all parties to the RSP case all know that the Cinergy Contracts have no relevance to the matters determined by this Commission because this Commission forged its own solutions to the RSP case. OCC posits that the agreements are relevant to the legitimacy of the bargaining between parties to the stipulation proposed to this Commission. This Commission, however, *rejected* the stipulation proposed by the parties. Without regard to the relevance of the Cinergy Contracts to the stipulation, it is undeniable that the stipulation is itself irrelevant to the Commission's solution. Similarly, OCC will posit that the Cinergy Contracts are relevant

to CG&E's Application for Rehearing. Again, however, this Commission chose *not* to adopt the positions CG&E pursued in its application for rehearing.

Moreover, the Cinergy Contracts also have no relevance to the rates paid by OCC's clients – the residential consumers of DE-Ohio power. The Cinergy Contracts are between Cinergy and a non-residential consumer of electric power within CG&E's certified territory. The Cinergy Contracts do not obligate DE-Ohio in any way. They contain terms running to and from Cognis and Cinergy –not to or from DE-Ohio. The Cinergy Contracts do not change the price Cognis pays to DE-Ohio in return for service or any component of that price. DE-Ohio receives exactly what this Commission approved it to receive. Thus, the Cinergy Contracts have no impact upon the revenues or expenses of DE-Ohio.

Finally, by the express terms of the earlier of the two Cinergy Contracts, when this Commission issued its entry rejecting the proposed stipulation supported by Cinergy and others, all legal obligations owed by Cinergy to Cognis under the Cinergy Contract ceased to exist. Similarly, after Cinergy and Cognis later renegotiated their agreement based upon the contents of CG&E's application for rehearing, this Commission's decision again resulted in an end to the legal obligations of the parties to one another. The fact that Cinergy elected to perform its agreement *despite the fact that Cinergy did not receive the consideration it anticipated* simply demonstrates that Cinergy concluded that the other factors favoring the agreement were alone sufficient.

The Cinergy Contracts have no relevance to this Commission's Finding and Order. The Cinergy Contracts have no relevance to this Commission's Entry on

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Rehearing issued November 23, 2004. As a result, the Cinergy Contracts are properly excluded from evidence in these proceedings.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Michael D. Dortch", written over a horizontal line.

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Attorneys for  
CINERGY CORP.



CERTIFICATE OF SERVICE

I certify that a copy of the public version of the foregoing was served electronically upon parties, their counsel, and others through use of the following email addresses this 15<sup>th</sup> day of March, 2007, and that a confidential version of the foregoing was served by the same means upon representatives of OCC and OMG based upon their execution of confidentiality agreements with Cinergy in this matter.

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CONFIDENTIAL

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BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the	:	
Consolidated Duke Energy Ohio, Inc.:	:	Case Nos. 03-93-EL-ATA
Rate Stabilization Plan Remand and :	:	03-2079-EL-AAM
Rider Adjustment Cases :	:	03-2081-EL-AAM
:	:	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 OHIO'S 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 Ohio, Inc., (DE-Ohio respectfully requests this honorable Public Utilities Commission of Ohio (Commission) grant DE-Ohio's 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 DE-Ohio, both through multiple subpoena duces tecum, and later through written discovery requests. The information requested by OCC consists of information held by DE-Ohio or other Parties such as Cinergy Corp.

(Cinergy), Ohio Hospital Association (OHA), Kroger, and Duke Energy Retail Sales consisting 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.

In the case of DE-Ohio specifically, the information consists of a denial by DE-Ohio that DE-Ohio is a party to the contracts, that it does not know the reasoning of the signatories to the contracts, and discusses that DERS had no obligation to enter the certain contract signed subsequent to the Commission's November 23, 2004, Entry on Rehearing. OCC is also seeking the public use of financial analysis performed by and for Cinergy regarding the impact of the MBSSO to Cinergy. DE-Ohio and OCC have signed several Protective Agreements during the course of these proceedings, which limited the manner in which OCC may use protected 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>1</sup>

On March 2, 2007, DE-Ohio filed its Motion for a Protective Order in the above styled proceeding, requesting this Commission to maintain the confidentiality of DE-Ohio's Trade Secret Information. Among the reasons supporting DE-Ohio's Motion was the fact that OCC's request was unreasonable in that it purported to make public every single

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

document provided to OCC, including confidential business transactions involving DERS, Cinergy, and counterparties, but not DE-Ohio. DE-Ohio's request to maintain the confidential status of this information was supported by a number of parties to the proceeding, including both DERS and Cinergy, as well as various other unaffiliated parties.

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>2</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 DE-Ohio continue to include interoffice communications, confidential commercial contracts, transactions occurring under those contracts, and terminated commercial contracts, all negotiated by various counterparties, but not DE-Ohio (Trade Secret Information).<sup>3</sup> DE-Ohio has however maintained information related to the transactions referenced above in its role as the incumbent utility required to provide various services to Competitive Retail Electric Service (CRES) providers. DE-Ohio is required to

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

maintain CRES provider information as confidential pursuant to O.A.C. 4901:1-20-16(G)(4)(d).<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 the public use of a substantial amount of information, more than four hundred pages, consisting of all of the confidential commercial contracts and internal correspondence. 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 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 ok, but if not, all information must be public. The Commission should not condone such inconsistent and manipulative conduct by OCC.

**ARGUMENT:**

- I. DE-Ohio's information, and the commercial contracts and transactions related thereto sought by OCC from DE-Ohio and others, are trade secrets under Ohio law.**

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<sup>4</sup> OHIO ADMIN. CODE ANN. § 4901:1-20-16(G)(4)(d) (Baldwin 2007).

<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).

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.
- (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

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<sup>6</sup> OHIO ADMIN. CODE ANN. § 4901-1-24 (Baldwin 2007) (emphasis added).  
<sup>7</sup> OHIO REV. CODE ANN. § 1333.61(D) (Banks Baldwin) (2005).

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 DE-Ohio's Motion, the protected material 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> DE-Ohio supports the arguments of DERS, Cinergy, and the counterparties to the various commercial contracts and terminated contracts that OCC seeks to make public, constitute Trade Secret Information maintained in a confidential manner. DE-Ohio also avers that its information discovered by OCC is a trade secret and otherwise protected by OCC rule absent authority to release such information by DERS, which authority has not been provided.<sup>12</sup>

Further, none of documents and information, including DE-Ohio's qualifies 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

<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).

<sup>12</sup> OHIO ADMIN. CODE ANN. § 4901:1-20-16(G)(4)(d) (Baldwin 2007).

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>13</sup>

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

<sup>13</sup> Moyer, J., Interpreting Ohio's Sunshine Laws: A Judicial Perspective, 59 N.Y.U. ANN. SURV. AM. L. 247 (2003) (Emphasis added).



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 release of information possessed by DE-Ohio regarding such transactions will also harm the competitive retail electric market including the counterparties to the DERS and Cinergy transactions.

DE-Ohio was not involved in the negotiation of the contracts at issue in these proceedings, including the terminated contracts, and has not been effected by those documents or influenced in any way by the counterparties thereto. All counterparties to the DERS and Cinergy contracts are paying DE-Ohio its full MBSSO price and DE-Ohio has not engaged in any transaction with its affiliates to create subsidies. In short DE-Ohio has performed as it is supposed to perform and its affiliates have engaged in arms length transactions with customers. There is no reason to make a public release of information in this case where similar information related to non-affiliated parties would not be released.

Further, one of the goals the Commission stated when it asked DE-Ohio to agree to a Rate Stabilization Plan MBSSO is the development of the competitive market. If this Commission permits confidential commercial contracts, and the information related thereto, 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 by purchasing options, and a right of first refusal, that may permit it to serve customers at prices mutually favorable to DERS and its customers. OCC's unwarranted malicious attacks may result in DERS's inability to compete in that market to the detriment of the market and the Commission's goal.

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. Grocery stores, gas stations, manufacturers, and hospitals, all compete in their various industries. 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>14</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>15</sup> All of the information that DE-Ohio provided falls into the category of sensitive information in a competitive

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<sup>14</sup> *In re North Coast Gas*, Case No. 06-1100-PL-AEC (Entry at 2) (February 7, 2007).

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

environment. Therefore, the Commission has express authority to maintain the confidentiality of information it received by it during the discovery process.<sup>16</sup> In this instance, OCC has not offered DE-Ohio 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. Each contract has a confidentiality provision pledging the counterparties to support efforts to maintain the confidentiality of the protected material.

**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 DE-Ohio's efforts to limit the dissemination of its Trade Secret Information given that OCC obtained copies of two confidential commercial contracts through a subpoena of John Deeds as well as through Discovery of the counterparties to the agreements.<sup>17</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

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<sup>16</sup> *Id.*

<sup>17</sup> See OCC Memorandum Contra at 6 and 11.

otherwise recognizable at law.<sup>18</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 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

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<sup>18</sup> Black's Law Dictionary, 259 (7<sup>th</sup> Ed. 2000).

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>19</sup> DE-Ohio's discovery discloses that OCC may have obtained the confidential information from Mr. Deed's attorney in June of 2006.<sup>20</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-employee.

The simple fact remains that there has been no finding of any wrongdoing by DE-Ohio regarding the transactions between DERS and Cinergy with counterparties. The Trade Secret Information consisting of the effective contracts and the related transactions were executed and

<sup>19</sup> OHIO R. PROF. COND. 3.3(b), 4.1(b) (2007).

<sup>20</sup> OCC's response to DE-Ohio's discovery Interrogatories 18, 19 requesting documents. *Attachment D.*

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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 DE-Ohio's confidential material upon OCC's unproven mischaracterizations and baseless conspiracy theories.

In its Memorandum Contra, OCC also attempts to justify public disclosure of the DERS and Cinergy contracts and terminated contracts and accompanying option payments as settlements related to these proceedings involving DE-Ohio.<sup>21</sup> Even if this were the case, which DE-Ohio wholly denies, there is nothing wrong with private confidential settlement discussions among parties, or non-parties, to a Commission proceeding 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>22</sup> Additionally, in this very case, as was discovered in the deposition of OCC's witness Ms. Hixon,<sup>23</sup> OCC engaged in confidential

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<sup>21</sup> OCC Memo Contra at 13.

<sup>22</sup> *Ohio Consumers' Counsel v. Pub. Util. Comm'n*, 110 Ohio St. 3d 394 (2006).

<sup>23</sup> Hixon deposition at 148-151.

settlement discussions with select Parties to the proceeding to the exclusion of DE-Ohio.<sup>24</sup> OCC also participated in settlement discussions with DE-Ohio to the exclusion of all other parties. In another case, the settlement of OCC's appeal of the Cinergy Duke Power merger case, OCC negotiated a public settlement with DE-Ohio but refused to permit Staff to attend or participate in negotiations.<sup>25</sup>

Moreover, as was also discovered during Ms. Hixon's deposition, in settlement of Case number 99-1658-EL-EPT, OCC and DE-Ohio entered into a confidential side bar agreement in which DE-Ohio agreed, among other things, to contribute \$500,000 to a customer education campaign targeted at residential consumers, which was managed in part by the OCC.<sup>26</sup> 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 DE-Ohio's Trade Secret Information, there is no evidence other than the baseless allegations by OCC that DERS' and Cinergy's contracts are anything but legitimate

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<sup>24</sup> See attachment A, affidavit of Jock Pitts and attached e-mails.

<sup>25</sup> DE-Ohio Merger settlement with OCC.

<sup>26</sup> See Attachment B.

business transactions. In fact, Ms. Hixon, in her deposition makes it clear that she is not alleging any corporate separation plan or code of conduct violation,<sup>27</sup> and makes no conclusions as to whether any of the Commission's affiliate rules have been violated.<sup>28</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.

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. DE-Ohio 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 DE-Ohio maintains its position that the information is irrelevant to the scope of the above styled proceedings, DE-Ohio has not prohibited OCC from using the information.

Arguments regarding relevancy and admissibility aside, should the Commission permit this information into evidence, DE-Ohio maintains

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<sup>27</sup> Hixon deposition at 185.

<sup>28</sup> *Id.* at 184-189.



that public policy dictates that DE-Ohio's, as well as all of the other parties', 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>29</sup>

As stated previously, this Commission has recognized the need to keep commercial terms, pricing, pricing structures and the like confidential.<sup>30</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 and Cinergy to be Parties in this proceeding in order to protect their interests. Any alleged burden, which DE-Ohio denies, is OCC's creation and should not be relieved at the expense of DE-Ohio or any other Party.

#### **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 confidential nature of information which OCC insists upon making public. While DE-Ohio is not opposed to the pre-hearing conference, the company does find it ironic that both DE-Ohio, DERS, and Cinergy, have requested time and time again that this Commission offer some guidance as to the scope of the hearing and the relevancy, treatment and

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<sup>29</sup>*Id.*<sup>30</sup>*In re North Coast Gas*, Case No. 06-1100-PL-AEC (Entry at 2) (February 7, 2007).

admissibility of evidence, while OCC has vehemently opposed any such request.

As stated above, DE-Ohio objects to OCC's attempts to use the administrative burden placed upon OCC in presenting its case as a justification to make Trade Secret Information public. OCC has created this situation through its unreasonable and oppressive attempts to make all Trade Secret Information public. 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>31</sup> DE-Ohio 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

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<sup>31</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (IEU-Ohio's Letter) (March 2, 2007).

in this proceeding.<sup>32</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 DE-Ohio's March 2, 2007, filing, as well as those contained in this Reply, DE-Ohio respectfully requests the Commission grant this Motion for Protective Order and prohibit the public disclosure of the Trade Secret Information.

Respectfully Submitted,



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<sup>32</sup> *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA *et. al.* (Constellation's Memorandum in Response) (March 9, 2007).

**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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PATRICK MAUE  
5005 MALLET HILL DRIVE  
CINCINNATI OH 45244  
Phone: 513-831-2800  
Fax: 513-831-0505

RICHARDS INDUSTRIES VALVE  
GROUP

LEE WOODURFF  
3170 WASSON ROAD  
CINCINNATI OH 45209  
Phone: 513-533-5600  
Fax: 513-871-0105

01274

**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 08-25-11

DENISE WILLIS, 5/13/04 5:53 PM -0400, CONFIDENTIAL Settlement Proposal

1

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

**DENISE WILLIS, 10/27/04 4:30 PM -0400, Confidential Settlement Communication in C****1**

Date: Wed, 27 Oct 2004 16:30:07 -0400

From: "DENISE WILLIS" &lt;WILLIS@occ.state.oh.us&gt;

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>, <srاندazzo@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>, <nhpetricoff@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)

**DENISE WILLIS, 11/3/04 5:38 PM -0500, Fwd: Confidential Settlement Communication i****1**

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)

Printed for "Mary W. Christensen" <mchristensen@columbuslaw.org>

**1**

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.

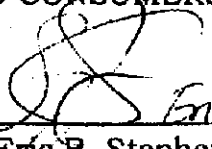
3. CG&E will contribute \$250,000 to the Ohio Department of Development (ODOD) over the next two years as requested by ODOD for development programs in the State. OCC agrees with and will not challenge deferral of the costs against the Transition Revenues that the Commission approves for recovery by 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 Stephens  
Eric B. Stephens, Legal Director  
Its Attorney

-----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

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>>> "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

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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

<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.

---

<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 by purchasing options, and a right of first refusal, that may permit it to serve customers at prices mutually favorable to DERS and customers. 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. The option contracts permit DERS to exercise its discretion to serve customers at a specific price. The right-of-first-refusal contracts permit DERS to serve a specific load at a market price during 2008. The terminated contracts constituted direct serve contracts whereby DERS was to serve specific load at a particular price. DERS agents and representatives conducted comprehensive analysis to determine the price in all of those agreements. Although the terminated contracts are not in effect, they did constitute the basis for the pricing of

the option contracts. 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. Grocery stores, gas stations, manufacturers, and hospitals, all compete in their various industries. 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

---

<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. Each contract has a confidentiality provision pledging the counterparties to support efforts to maintain the confidentiality of the protected material.

**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 contracts and terminated contracts and accompanying option payments as settlements related to these proceedings.<sup>20</sup> 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, OCC and DE-Ohio entered into a confidential side bar agreement in which DE-Ohio agreed, among other things, to contribute \$500,000 to a customer education campaign targeted at residential consumers, which

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<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.



was managed in part by the OCC.<sup>24</sup> 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. Pahlutski - 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).

**01301**

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01302

**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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01308

**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

DENISE WILLIS, 5/13/04 5:53 PM -0400, CONFIDENTIAL Settlement Proposal

1

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)

01311

DENISE WILLIS, 10/27/04 4:30 PM -0400, Confidential Settlement Communication in C

1

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>, <srاندazzo@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>, <mhpeticoff@vssp.com>, <wjairrey@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) (000F6CD6)

01312

DENISE WILLIS, 11/3/04 5:38 PM -0500, Fwd: Confidential Settlement Communication i

1

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

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.

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

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 2 (PDF /CARO) (000F849E)

Printed for "Mary W. Christensen" <mchristensen@columbuslaw.org>

1



01313

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.

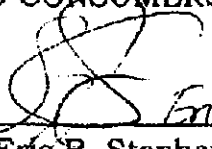
The above represents the entire Agreement between CG&E and OCC and may not be amended unless agreed to by both parties in writing. The undersigned hereby execute this Agreement and each represents that it is authorized to enter into this Agreement this 8th day of May, 2000.

THE CINCINNATI GAS & ELECTRIC COMPANY

By:   
Paul A. Colbert, Senior Counsel  
Its Attorney

01316

OHIO CONSUMERS' COUNSEL

By:  Eric Stephens  
Eric B. Stephens, Legal Director  
Its Attorney

01317

-----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:

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>>> "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

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, is OCC's  
16 alleged exclusion from some negotiations by  
17 DE-Ohio; is that correct? I believe that's at the  
18 bottom of the Page 56.

19 A. Well, I think you've added some  
20 commentary there, but exclusion of the OCC from  
21 negotiations, and a course of secret negotiations  
22 that resulted in support of the stipulation and  
23 the alternative proposal by parties who, due to  
24 those side agreements, would not bear the burden  
25 of the rate increases that were being proposed.

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. And if you look at Paragraph 2 on the  
21 bottom of Page 2 and Paragraph 3 at the top of  
22 Page 3, for various things then CG&E paid OCC a  
23 total of \$750,000 pursuant to this agreement; is  
24 that --

25 A. No.

1 Q. No?

2 A. I don't see that.

3 Q. I'm sorry. Two-hundred-and-fifty-

4 thousand of that went to the Ohio Department of

5 Development.

6 A. I don't see that it's to be paid to OCC

7 and I don't see that it was paid. I see an

8 agreement that some contribution was intended to

9 be made.

10 Q. Oh, okay. Fair enough.

11 You're saying that there's no indication

12 here that it was actually paid.

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 Eric Stephens, who was then the Legal

24 Director of Ohio Consumers' Counsel; is that

25 correct?

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 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 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 ---  
 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 Steve Schrader to Greg  
 7 Ficke and Julie Jansen and referring to someone  
 8 named Phil. Do you know who Julie Jansen is?  
 9 A. No, I don't.  
 10 Q. Do you know who Phil is?  
 11 A. I recollect that in Mr. Ficke's  
 12 deposition we asked him who Phil 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 Phil Cox?  
 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



MC GINNIS & ASSOCIATES, INC.  
614.431.1344 COLUMBUS, OHIO 800.498.2451

RECEIVED-DOCKETING DIV  
2007 MAR 16 PM 4:34  
BUCO

1 BEFORE  
2 THE PUBLIC UTILITIES COMMISSION OF OHIO  
3 - - -

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

Confidential

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

1 APPEARANCES:

2

3 ON BEHALF OF DUKE ENERGY OHIO, INC.:

4 Paul A. Colbert, Esq.

5 Associate General Counsel

6 Duke Energy Ohio

7 Duke Energy Corporation

8 155 East Broad Street - 21st Floor

9 Columbus, Ohio 43215

10 (614) 221-7551 Fax (614) 221-7556

11 paul.colbert@duke-energy.com

12

13 Rocco O. D'Ascenzo, Esq.

14 Counsel

15 Duke Energy Shared Services, Inc.

16 Duke Energy Corporation

17 139 East Fourth Street

18 Post Office Box 960

19 Room 2500, Atrium II

20 Cincinnati, Ohio 45201-0960

21 (513) 287-4326 Fax (513) 287-3810

22 rocco.d'ascenzo@duke-energy.com

23

24

25

MC GINNIS & ASSOCIATES, INC.  
614.431.1344 COLUMBUS, OHIO 800.498.2451

1 APPEARANCES (continued):

2

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

5 Janine Migden-Ostrander, Esq.

6 Ohio Consumers' Counsel

7 BY: Jeffrey L. Small, Esq.

8 Assistant Consumers' Counsel

9 10 West Broad Street - Suite 1800

10 Columbus, Ohio 43215-3485

11 (614) 466-8574 Fax (614) 466-9475

12 small@occ.state.oh.us

13 - - -

14

15 ALSO PRESENT:

16 Anita M. Schafer, Senior Paralegal, Duke  
17 Energy Shared Services, Inc.

18 - - -

19

20

21

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23

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25

MC GINNIS & ASSOCIATES, INC.  
614.431.1344 COLUMBUS, OHIO 800.498.2451

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2

## I N D E X

3

- - -

4

## WITNESS

PAGE

5

Beth Hixon

6

Examination (cont'd.) by Mr. Colbert

76

7

- - -

8

## EXHIBITS

MARKED

9

DE-Ohio Exhibit No. 1 -

80

10

Stipulation and Recommendation

11

DE-Ohio Exhibit No. 2 -

110

12

Pages 23 through 30 of the

13

deposition of Gregory C. Ficke

14

DE-Ohio Exhibit No. 3 -

111

15

Pages 31 through 42 of the

16

deposition of Gregory C. Ficke

17

DE-Ohio Exhibit No. 4 -

113

18

Pages 59 through 70 of the

19

deposition of Gregory C. Ficke

20

DE-Ohio Exhibit No. 5 -

129

21

Pages 34 through 37 of the

22

deposition of Gregory C. Ficke

23

DE-Ohio Exhibit No. 6 -

132

24

Pages 39 through 42 of the

25

deposition of Gregory C. Ficke

## 1 I N D E X

2 (continued)

3 - - -

4	EXHIBITS	MARKED
5	DE-Ohio Exhibit No. 7 -	133
6	Pages 66 through 73 of the	
7	deposition of Gregory C. Ficke	
8	DE-Ohio Exhibit No. 8 -	148
9	Letter dated 5-8-00	
10	DE-Ohio Exhibit No. 9 -	151
11	Supreme Court decision in	
12	No. 2005-0945	
13	DE-Ohio Exhibit No. 10 -	153
14	Affidavit of Jock J. Pitts	
15	DE-Ohio Exhibit No. 11 -	164
16	Interrogatory Answer	
17	DE-Ohio Exhibit No. 12 -	173
18	Form 1120 U.S. Corporation	
19	Income Tax Return - 2003	
20	DE-Ohio Exhibit No. 13 -	177
21	Form 1120 U.S. Corporation	
22	Income Tax Return - 2004	
23	DE-Ohio Exhibit No. 14 -	177
24	Form 1120 U.S. Corporation	
25	Income Tax Return - 2005	

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## I N D E X

(continued)

- - -

EXHIBITS

MARKED

DE-Ohio Exhibit No. 15 -

181

Ohio Administrative Code,

4901:1 Utilities

- - -

1 P R O C E E D I N G S

2 - - -

3 Tuesday, March 13, 2007

4 Afternoon Session

5 - - -

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

10 - - -

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

13

14

15

16

17

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21

22

23

24

25

1 (Confidential transcript under seal.)

2 - - -

3 CROSS-EXAMINATION (cont'd.)

4 BY MR. COLBERT:

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

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

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

14 Q. And that's precisely what I mean.

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

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

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



1 some of the components established in this MBSSO.

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

9 Q. Is it a reasonable concept in your  
10 opinion?

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

14 Q. Under what circumstances would you  
15 consider it reasonable?

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

24 Q. Well, let's take an example that if a  
25 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 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 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 Dan 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

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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.

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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. Constellation NewEnergy is not a  
19 counterparty to any of the agreements particularly  
20 involved with Kroger?

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 CRS and the two -- the two agreements

1 between CRS and Kroger, but I don't believe that  
2 Constellation NewEnergy 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 Constellation  
7 NewEnergy so that Constellation NewEnergy can  
8 supply Kroger at retail?

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

11 Q. Uh-huh.

12 A. -- I indicate that the July 7th agreement  
13 is between CRS and Kroger but it's predicated on  
14 the fact that Kroger had been purchasing  
15 generation from New -- the retail provider, New  
16 Energy, who was purchasing its wholesale supply  
17 from the Cinergy Operating Companies, and then I  
18 mention that in the whereas clauses there are  
19 transactions referenced. That's what I'm aware  
20 of.

21 Q. Well, have you reviewed the contracts  
22 between Cinergy Operating Companies and  
23 Constellation NewEnergy?

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

1 December 14th, 2000 confirmation letter agreement,  
2 the performance assurance agreement of the same  
3 date, the July 31st confirmation letter agreement,  
4 and the performance assurance agreement.

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 Ohio Manufacturers  
9 Association. 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 AK Steel, GM, Procter & Gamble, 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 Ohio Manufacturers Association?

20 A. No.

21 Q. So you don't know whether members of the  
22 Ohio Manufacturers Association 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



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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 Constellation NewEnergy, 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

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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 Constellation NewEnergy, 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

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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 New Energy 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 at May 19th, May 28th,  
13 June 7th and July 7th. 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 "new and different charges  
20 that had not been subject to a hearing".

21 What charges are you referring to?

22 A. My recollection is that the IMF charge  
23 was first introduced in the alternative proposal  
24 and the SRT was new in the alternative -- was  
25 newly introduced in the alternative proposal.

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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

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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

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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 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           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 May 19th, 2004 through  
16     November 23rd, 2004?

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 June 7th, Attachment 6 dated  
23     June -- July the 7th, then Attachments 8 and 9 and  
24     10, 11 and 12, all seem to have occurred before  
25     November 23rd, 2004.



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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 November 23rd, 2004?

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 November 23rd, 2004, and then finally, at the very  
16 bottom, there is a November 9th, 2005 agreement  
17 with Kroger.

18 Q. Okay. And do you know whether any of the  
19 contracts that were signed November 23rd, 2004 and  
20 earlier, with the exception of certain Kroger --  
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

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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.

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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.

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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. Okay. And do you believe that the option  
8 contracts represent competitive retail electric  
9 service?

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

12 THE WITNESS: I believe the option  
13 agreements are what they say they are, agreements  
14 under which CRS can exercise an option to serve.

15 BY MR. COLBERT:

16 Q. Yes. I'm asking your opinion whether  
17 that option to serve constitutes competitive  
18 retail electric service or not.

19 A. I do not know.

20 Q. If DERS exercised the options, would it  
21 then be providing competitive electric service, or  
22 would your opinion change under that circumstance?

23 A. I think the first question you asked me  
24 was whether or not this agreement was a CRES  
25 contract.

1 Q. Yes.

2 A. Now you're asking, I think, if they  
3 exercise their option would they be providing  
4 CRES, which I think are two different questions.

5 Q. I agree.

6 A. If they exercise their option according  
7 to this agreement, they have to enter into a power  
8 sale agreement. That power sale agreement, if it  
9 was to provide competitive retail electric service  
10 in Ohio, would have to abide by whatever rules are  
11 applicable in Ohio, so that's where an agreement  
12 would occur.

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 provision of generation  
20 service through 2008. 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. But by that, you mean through 2008?

25 A. Right.

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1 Q. And you're not suggesting that there's  
2 anything wrong with a provision to provide  
3 generation service to customers through 2008  
4 there, are you?

5 A. The statement that I'm making is that  
6 each of the agreements deals with generation  
7 service to customers during that period of time.

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. If you look at each of  
17 the agreements, the provision varied from customer  
18 to customer, whether the provision was under  
19 MBSSO, or CRS, or -- or anything like that. I  
20 describe each of those provisions.

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

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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 "Reimbursement of proposed ERRSP charges  
21 to customer parties"; is that correct? 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 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. If parties to a contract as the side  
24 agreements or contracts that we're discussing  
25 include -- base the price that they are agreeing



1 upon upon a price to be approved by the Commission  
2 so that an economic detriment or gain can occur to  
3 one of the parties if the Commission changes the  
4 price, does it make sense for the parties to  
5 support the price that they're going to use as a  
6 starting point or a baseline?

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, the baseline is  
17 something that hasn't already been set or  
18 determined and you're asking whether or not it  
19 makes sense to support something that's going to  
20 be used as a baseline, it may make sense to  
21 attempt to define the baseline. I guess that's  
22 what I'm getting back to is that as you've  
23 described it, there's a baseline that's undefined.  
24 It would make sense that if the contract was  
25 dependent upon a baseline that that baseline

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 May 19th and before November 23rd of 2004, what I  
6 would call, for the most part, the direct serve  
7 agreements, the baseline in those agreements would  
8 have been the MBSSO that the Commission had not  
9 yet approved. Is that a fair characterization?  
10 If you know.

11 A. I don't think I could agree with that.  
12 If you read the agreements, it is not clearly set  
13 out that a CRES provider is going to be providing  
14 service at this baseline based on something  
15 approved by the Commission. The language is more  
16 along the lines of, for example, the CRS contract  
17 with OEG members in Attachment 3 discusses how  
18 service would be provided based on unbundled  
19 tariff rates determined in the ETP. That seemed  
20 to be the baseline at that particular point.

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 as you have termed it in your testimony -- a  
2 reimbursement of particular components of what was  
3 in front of the Commission, such as the RSC, or  
4 the AAC, or the SRT?

5 A. Yes, that's what my testimony says,  
6 reimbursement of proposed RSP charges.

7 Q. Right.

8 And the -- So -- So the descriptions of  
9 what I would characterize as a -- as opposed to a  
10 reimbursement as a discount from the MBSSO price  
11 or, more specifically, from specific components of  
12 the MBSSO, doesn't tie back to the MBSSO that had  
13 yet to be approved until November 23rd, 2004?

14 A. The reimbursements do.

15 Q. They do? Okay.

16 A. But they aren't listed as discounts and  
17 they aren't described the way that you said.  
18 They're called reimbursements.

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

21 A. I just pointed out that it said  
22 reimbursements, not discounts; that's all.

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 some importance on the words.

2 A. No. I'm just saying it says reimburse  
3 instead of discount.

4 Q. Okay. The fourth commonality that you  
5 list is "Termination provisions tied to the  
6 outcome in the MDP Service Case". It's on Page 14  
7 at Lines 1 and 2.

8 A. Yes.

9 Q. Staying away from the contracts for a  
10 moment. In a purely theoretical point of view, as  
11 we were discussing baseline a minute ago, if  
12 the -- if the baseline was for some reason not  
13 adopted or was outside of an economic range of  
14 acceptability to the parties, would it make sense  
15 to have a termination clause that was tied to an  
16 unacceptable change in the baseline?

17 A. In a theoretical sense, if you had  
18 defined the baseline, it was -- or, if you had not  
19 defined the baseline and the baseline changed,  
20 parties might wish for agreements to change, sure.

21 Q. Uh-huh.

22 On Page 15, you talk about the market  
23 price the hospitals would have paid pursuant to  
24 their direct serve contract with DERS. I believe  
25 this is what you're still referring to as a

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1 pre-order side agreement in this case had that  
2 contract ever been effective.

3 Paragraph 5 of that contract required the  
4 hospitals to pay all POLR and regulatory  
5 transition charges; is that correct?

6 A. At Bates-stamped 348, the May 19th  
7 agreement does indicate the hospitals will comply  
8 with the terms and conditions of the order in  
9 03-93, including payment of regulatory transition  
10 charges and provider of last resort charges except  
11 as set forth herein.

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?

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1           A.     Well, the actions that are described are  
2     not economic in nature. If you look at No. 1 on  
3     Page 27, it indicates that rates will not be  
4     amended. I'm not familiar with dual feed. I  
5     don't know whether that is rates and terms of  
6     price conditions, so I can't say it's not economic  
7     or economic.

8                     The action to be taken in No. 2 in  
9     regards to being able to purchase through a load  
10    management rider could have economic impact, but I  
11    don't know.

12                    The action to be taken in No. 3 has to do  
13    with CG&E filing in their next rate case and  
14    positions that they would take.

15                    No. 4 is in regards to not being subject  
16    to a minimum stay. Again, to me, the action  
17    that's seen there is something that CG&E was  
18    involved with and, of course, the Cinergy  
19    Operating Companies exercise of their Extensions 1  
20    and 2, the action to be taken would have been by  
21    the operating companies.

22           Q.     Before I get back to the others, with  
23    No. 4, the minimum stay, do you know whether the  
24    Commission ordered that CG&E can't have minimum  
25    stay?

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. Going back to No. 1 for a second.

7 Just as an example, if DE-Ohio changed  
8 its rates for dual feeds, but CRS either -- if it  
9 was directly serving the customer, lowered its  
10 market price by the same amount that the utility  
11 increased its dual feeds or changed the amount of  
12 an option payment, if it had an option, that would  
13 leave or could leave the counterparty -- in this  
14 case you've referenced the hospitals -- in the  
15 same economic position that they would otherwise  
16 be in, couldn't it?

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 May 2004 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 MR. COLBERT: That's fine.

2 MR. SMALL: Shall we make this the second  
3 page of Exhibit 2?

4 MR. COLBERT: No. We'll make this  
5 Exhibit 3, but it contains Pages 31 through 42.

6 - - -

7 Thereupon, DE-Ohio Exhibit No. 3 was  
8 marked for purposes of identification.

9 - - -

10 BY MR. COLBERT:

11 Q. And at the top of Page 31, there are four  
12 more words to that answer that read "involved with  
13 the process"; is that correct?

14 A. Yeah, there's four more words there.

15 Q. Okay. And all I'm saying is, Mr. Ficke  
16 was expanding the term "negotiation" from merely  
17 sitting across the room talking to people. Is  
18 that your understanding of his answer?

19 A. In response to a question from Mr. Small  
20 about these people that you listed, he described  
21 it's how you define negotiations, and then he  
22 talks about that, yes.

23 Q. Uh-huh.

24 At the bottom of Page 35, OCC, Mr. Small,  
25 as you suggested a moment ago, asked Mr. Ficke if

1 there was a CG&E representative involved in the  
2 negotiating process; is that correct?

3 A. At the bottom of Page 35 and continuing  
4 on 36, yes, there is a question.

5 Q. Okay. And Mr. Ficke at the top of  
6 Page 36 identified himself; right?

7 A. Correct.

8 Q. He said, "I was involved in it".

9 A. Correct.

10 Q. Okay. And then on the same page,  
11 Mr. Small asked Mr. Ficke again if he was involved  
12 in the negotiations, and he responded that he was  
13 involved as a vice president of Cinergy Corp. and  
14 he was involved in the preparation and review of  
15 information and that there was no actual employee  
16 of CG&E involved at all. Is that a fair  
17 characterization?

18 A. On Page 36 in the answer, he indicates  
19 that in his role as vice president of Cinergy he  
20 was involved in preparation of information,  
21 reviewing information, those sorts of things.

22 Q. Uh-huh.

23 A. He then describes that an exclusively  
24 CG&E person, like someone working on a coal pile,  
25 that they weren't involved in those negotiations.

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1 Q. Yeah. And all I meant by that was, and  
2 maybe this will short-circuit some of what you  
3 were getting at here, throughout the depositions,  
4 as in the deposition with Mr. Ficke, there were a  
5 number of people that worked for Duke Energy  
6 Shared Services Corporation and Mr. Ficke was  
7 distinguishing there that there wasn't an employee  
8 from -- an actual CG&E employee. Is that your  
9 understanding of that, or recollection?

10 A. That's what he says in his answer, that  
11 there wasn't an employee.

12 Q. Okay. That's all I was asking.

13 MR. COLBERT: Mark this as DE-Ohio  
14 Exhibit 4.

15

- - -

16 Thereupon, DE-Ohio Exhibit No. 4 was  
17 marked for purposes of identification.

18

- - -

19 BY MR. COLBERT:

20 Q. Okay. At the bottom of Page 60,  
21 Mr. Small asking specifically about the  
22 negotiations of the May and November agreements  
23 talked about negotiation in the broader context  
24 that he was talking about further, I believe that  
25 we just discussed, and Mr. Ficke indicated that he

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 November  
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 --

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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 Mr. Jack  
18 Stefan?

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

22 Q. Okay. Are you generally aware that  
23 Mr. Stefan was Vice President of Rates, an  
24 employee of Cinergy Shared Services Corp., now  
25 known as Duke Energy Shared Services Corporation,

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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 Mr. Stefan's responsibility as  
5 Vice President of Rates, 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 Mr. Ziolkowski?

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.



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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

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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 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 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 OEG  
24 members was dependent on a Commission order  
25 acceptable to DE-Ohio. That provision, however,

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1 appears to allow adjustments among counterparties  
2 to the contracts, that is, DERS and -- yeah, the  
3 particular counterparty, AK Steel, whoever, to  
4 maintain the economic value of the contract in the  
5 event an MBSSO is approved changes the economic  
6 value to those counterparties.

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 Bates-stamped 320. It is Cinergy Retail Sales and  
20 AK Steel Air Products, et cetera, the 22nd day of  
21 November 2004. Do you have that agreement?

22 A. I have that.

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

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1 talk about the particular paragraph.

2 Somewhere in your testimony, I believe  
3 you characterize this Paragraph 12. Do you  
4 remember discussing that?

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. Yes, I explained that this is another  
10 provision which ties this agreement to the outcome  
11 of 03-93.

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. Lines 10 through 13, I indicate that a  
17 provision that was identical to the superseded  
18 agreement tied this agreement to the outcome  
19 depending on whether or not the PUCO's order was  
20 acceptable to CG&E.

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

23 Looking at that Paragraph 12 for a  
24 minute. The paragraph says that, "If an order in  
25 the 03-93 case is issued which is acceptable to

1 CG&E, but which renders invalid or ineffective any  
2 provision of this agreement to the economic  
3 detriment of the customers, then" --

4 MR. SMALL: I'm sorry. What agreement  
5 are you --

6 MR. COLBERT: She's got it, but it's the  
7 November -- it's Bates-stamped 324.

8 MR. SMALL: 3- what?

9 MR. COLBERT: 324 is the Bates stamp.

10 MR. SMALL: 324. Okay.

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. -- "then Cinergy and" -- Let me stop  
18 there for a second. Cinergy in this case is CRS,  
19 is that your understanding?

20 A. It's defined as such on the first page  
21 Bates-stamped 320.

22 Q. Right.

23 -- "will provide the same economic value  
24 to the customers."

25 So does this -- This provision triggers

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1 action between the counterparties to the contract  
2 based on both Commission action and the utility  
3 acceptance of it, but it -- it doesn't otherwise  
4 tie anything to the utility, does it?

5 A. I think it does what I said in my  
6 testimony, it ties this agreement to the outcome  
7 in the Post-MDP Service Case.

8 Q. Okay. On Page 43 of your testimony,  
9 Lines 6 through 11, you describe the payment  
10 structure by ~~Krogex~~ to DERS during 2005 and  
11 indicate that DERS will reimburse to ~~Kroger~~ a half  
12 of the SRT and AAC actually paid; is that right?

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

14 Q. Okay. And do you know, does the first 50  
15 percent of nonresidential load switch avoid paying  
16 the AAC?

17 A. As I show on Page 53 under the  
18 Commission's approved MBSSO for Duke Energy Ohio,  
19 the AAC for nonresidential could be bypassable for  
20 the first 50 percent of load switching subject to  
21 notice by customers of a CRES contract and the  
22 other provisions per the CG&E tariff.

23 Q. Okay.

24 A. That's what ended up -- The provisions  
25 that I'm talking about on Page 43 were in the



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1 agreement on 11-22.

2 Q. The Kroger -- The November Kroger  
3 agreement.

4 A. Right.

5 Q. Right.

6 A. And the Commission's order was the next  
7 day, on the 23rd.

8 Q. Uh-huh.

9 A. Okay. I just wanted to make sure I was  
10 right on the time.

11 Q. Yeah.

12 A. Okay.

13 Q. And if a nonresidential customer,  
14 consumer, agrees to stay off of DE-Ohio's MBSSO  
15 service through 2008 and signs the appropriate  
16 contract, do you know if they avoid payment of the  
17 SRT?

18 A. Well, as I state on, again, Page 53 on  
19 the table, I note that the SRT can be bypassed  
20 subject to notice, and the other provisions, the  
21 ones that you've described, I think generally  
22 describe those.

23 Q. Okay. Do you know whether Kroger avoided  
24 payment of the AAC and SRT?

25 A. Since I don't know what Kroger paid, no,

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1 I don't.

2 Q. Do you know when Kroger switched to a  
3 CRES provider?

4 A. From CG&E?

5 Q. Uh-huh.

6 A. No.

7 Q. Okay. During 2005, Kroger paid DERS the  
8 emission allowance component of the FPP pursuant  
9 to the contract or what you call -- the  
10 November 22nd document that you were just looking  
11 at; is that correct?

12 A. It's my understanding that during 2005  
13 Kroger did make payments pursuant to this  
14 November 2004 contract; however, I think late in  
15 2005, perhaps November, there was another  
16 agreement, which I do not discuss in my testimony.

17 Q. Uh-huh.

18 A. So for the period of time until that new  
19 contract superseded this one, payment would have  
20 been made pursuant to this is my understanding.

21 Q. Okay. You were present at the deposition  
22 of Mr. Denis George, weren't you?

23 A. Yes.

24 Q. And do you recall Mr. Small asking him  
25 about whether or not they had received payments

1 under the clause you reference, you know,  
2 regarding reimbursement of half of the SRT and AAC  
3 actually paid?

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

6 Q. Okay. You don't recollect Mr. George  
7 saying he didn't remember getting payments under  
8 that paragraph?

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

11 Q. Fair.

12 So do you know whether Kroger paid DERS  
13 the emission allowance component of the FPP and  
14 received no payments in return during 2000- -- and  
15 Kroger received no payments in -- or, yeah, Kroger  
16 received no payments in return during 2005?

17 A. If I can have one moment, please.

18 Q. Sure.

19 A. I can't speak for all of 2005, but if you  
20 look at my testimony at Page 48 and my  
21 Attachment 14, I am aware that -- not 14, I'm  
22 sorry -- Attachment 15, I am aware from seeing the  
23 invoices to Kroger that Kroger was invoiced and  
24 that the calculation to support that included  
25 one-half of the emission allowances and for some

1 of their accounts half of the system reliability  
2 tracker and half of the AAC were deducted from  
3 those amounts due.

4 Q. Okay.

5 A. That's my knowledge of the payments for  
6 2005 to and from Kroger.

7 Q. Okay. And you reference Page 48 of your  
8 testimony, so your conclusion was that it resulted  
9 in payments by Kroger net. 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 Kroger.

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

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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 And also on that page Mr. Ziolkowski  
16 responds that he was referring to serving large  
17 customers at a fixed price in a volatile market.  
18 Is that a fair representation?

19 A. Mr. Ziolkowski's response when asked,  
20 "What do you understand about the riskiness of the  
21 settlements? What did you mean by the settlement  
22 was too risky?", he responds, "I recall when I  
23 wrote this memo my understanding was that the  
24 contracts were risky to serve large industrials at  
25 a fixed price given the volatile market

1 conditions".

2 Q. And then Mr. Small asked Mr. Ziolkowski  
3 about a certain direct serve contract, that is, I  
4 guess Mr. -- well, Mr. Neilsen could have heard  
5 this anyway, but a contract involving Cinergy  
6 Corp. and IEU.

7 That would not be what we call an option  
8 contract; right? I think this would be a  
9 pre-rehearing -- what you call a pre-rehearing  
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. Well, it's Bates-stamped 334. We could  
14 tell you what... It's the November 8th contract  
15 between CRS and Industrial Energy Users for the  
16 benefit of Marathon Ashland and General Motors.

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 November 8th, 2004  
22 agreement between Cinergy Corp. and IEU.

23 BY MR. COLBERT:

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

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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 fixed price and nature  
5 that caused the risk that you referred to in your  
6 recent answer?", 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.

9 - - -

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.



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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 "...when I wrote that at the time I wrote this  
13 memo, I had never seen an actual option contract  
14 nor did I know that they had existed -- that they  
15 existed".

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 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 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

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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

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

4 Does the first reason, what you've marked  
5 Reason A there, I believe, have to do with the  
6 competitive bid process?

7 A. It has to do with waiver of the  
8 Commission's rules for post-MDP pricing for  
9 generation service, which I believe included  
10 certain provisions related to competitive bidding,  
11 but it's in a broader sense.

12 Q. The provision that you're referring to  
13 there, 4901:1-35-02(C) footnoted at 88 there, has  
14 to do with deviations from the rule based on  
15 substantial support and I believe has to do  
16 specifically with the competitive bid process,  
17 doesn't it?

18 A. At Page 58, Line 8, I quote that  
19 provision. "...the EDU may propose a plan for a  
20 standard service offer and/or competitive bidding  
21 process that varies from these rules where there  
22 is substantial support from a number of interested  
23 stakeholders".

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

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 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