

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
06-1068-EL-UNC
06-1069-EL-UNC
06-1085-EL-UNC

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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

Date: 11-10-08

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1 (This part of the transcript is
2 under seal)

PUCO

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3
4 MR. SMALL: The document turned
5 over to us, it was attached to a letter dated
6 December 7th, 2006 from Duke Energy. It
7 involves an agreement between Cincinnati Gas and
8 Electric, the predecessor of Duke Energy Ohio,
9 and the City of Cincinnati. That much I believe
10 was even docketed as far as there is such an
11 agreement being turned over to the OCC.

12 Upon review of this document it is
13 an amendment, it's an amendment to, and I am
14 looking at the agreement that was turned over to
15 us, and it's amendment to three existing
16 electricity agreements dated February 5th, 2004.
17 That is a quote.

18 Existing electricity agreements in
19 the time from February 5th, 2004 fit the
20 description as described in the December 7th
21 letter docketed with the Commission of
22 agreements entered into on or after January
23 26th, 2004. That is a quote from my discovery
24 requests and also from the letter that was

1 docketed by Duke Energy.

2 In other words, I have been given an
3 amendment which I can't read because I don't
4 know the underlying document that it is
5 amending, and the underlying three agreements
6 because I am reading this from the amendment,
7 the underlying three agreements also fit within
8 the confines of my discovery requests during
9 the main course of hearing this case.

10 With that said, and under the
11 Commission's rules there being the ability to
12 have oral motions when a status conference is
13 transcribed, the OCC moves to compel the company
14 to comply with the Hearing Examiner's November
15 29th entry requiring the company to turn over
16 agreements, side agreements, as even in this
17 case it fits within the company's confined idea
18 what it is required to turn over to OCC.

19 ATTORNEY EXAMINER: Mr. Colbert.

20 MR. COLBERT: Well, Your Honor, Mr.
21 Small raised this with me in an e-mail either
22 yesterday or the day before, and I promised him
23 to look into it. And after the flurry of
24 motions, of course, we have not been able to get

1 to it.

2 In theory I have no difficulty in
3 providing those agreements. What I can tell you
4 is that the amendment that, as he called it,
5 that he has, which we consider frankly a
6 separate agreement, is the only one with
7 the City of Cincinnati that was entered into
8 within the scope of the 03-93 proceedings.

9 ATTORNEY EXAMINER: What do you mean
10 by within the scope of?

11 MR. COLBERT: Well, it centered
12 around discussions with the City around the
13 03-93 proceeding. The 03-93 proceeding didn't
14 enter into any of the discussions regarding the
15 original base agreements. Having said that, I
16 don't have any problem from my standpoint of
17 providing it do all the parties. These are
18 agreements, of course, with a public entity.

19 I did represent that I needed to
20 talk to the City of Cincinnati about that, and I
21 have had one brief conversation making them
22 aware of Mr. Small's request, but have not had
23 an opportunity to discuss it with him.

24 And I certainly haven't had an

1 opportunity to locate the agreements.

2 I know that we have one. I am not certain that
3 we have the other one, but my guess is that we
4 can locate it. And if the City is in agreement
5 or has no objections we will make an effort to
6 do that and supply it to the parties.

7 Having said that, I have not had
8 that opportunity to talk to the City and they
9 may have objections. Now, Mr. O'Brien is here,
10 but I don't know whether he wishes to speak to
11 this on the record and, you know, I would
12 suggest that we have a couple of days to do
13 that. I would certainly like until Monday or
14 Tuesday given the deadlines you submitted for
15 filing motions tomorrow which we are busily
16 writing.

17 ATTORNEY EXAMINER: Did you wish to
18 speak to this on the record, or would you prefer
19 not to?

20 MR. O'BRIEN: If I may enter a
21 special appearance. Cincinnati withdrew from
22 the 03-93 proceeding and we have not reappeared.
23 But, our position is as a preliminary matter I
24 think the documents Mr. Small seeks to obtain

1 are really beyond the scope of the directions of
2 the Supreme Court.

3 Mr. Colbert has turned over the only
4 side agreement in the 03-93 case that was
5 entered into between the City and the company.
6 And the documents that Mr. Small seeks to obtain
7 relate to a completely independent matter, and
8 matter which long predates the 03-93 case, and
9 it deals with a separate subject.

10 The document Mr. Colbert has turned
11 over is completely self-executing, and it
12 contains all there is to involve the other
13 documents. There is really nothing -- I mean,
14 they did what they did and was done in the
15 context of negotiations of the RSP case.

16 So we don't think that simply
17 because we touched on another matter in our
18 agreement in the 03-93 case that suddenly opens
19 up the relevance of those discussions.

20 That being said, I can't represent
21 whether or not the City of Cincinnati would have
22 objection to turning over the documents.

23 ATTORNEY EXAMINER: May we glance at
24 the agreement?

1 MR. COLBERT: Sure.

2 ATTORNEY EXAMINER: That would help
3 us to understand what we are discussing.

4 MR. SMALL: I would point out
5 the reason why I have done this at this
6 particular instance rather than wait for Mr.
7 Colbert's response to my two e-mails where he
8 told me that his client would get back to me.
9 The problem is --

10 ATTORNEY EXAMINER: Just give us one
11 second. I am sorry. Go ahead.

12 MR. SMALL: The problem that I have
13 with the company's response is the same problem
14 that I heard just now which is it's up to
15 the City. It's not up to the City. It's
16 covered by the discovery request. What Mr.
17 Colbert told me coming in here was that he
18 didn't believe it was subject to the discovery,
19 but that he might be willing to turn it over if
20 the City of Cincinnati agreed.

21 It was the subject and does fall
22 within the discovery request. It was ordered by
23 this Commission to be turned over to the OCC,
24 and it's not up to the City of Cincinnati. Now,

1 I understand that it will be turned over to the
2 OCC under confidential conditions. Under our
3 confidentiality agreement. But it's not up to
4 the City whether they agree to hand it over.

5 That is certainly not what the
6 Supreme Court said. It was that the company
7 should have been commanded to turn over side
8 agreements, but only if the other party agreed
9 to it. And I point out that at the very
10 beginning of this agreement, I am sorry, you
11 have it and I don't, but I stated it is very
12 difficult to read this without the underlying
13 agreements. And it does say in quotes "The
14 aggravate generation rate shall be amended."

15 All right. That suggests to me that
16 we are looking at something that is relevant to
17 the 03-93 case. I believe we were at a hearing
18 and there was extensive briefing and so forth on
19 the generation rate to be offered by the
20 company.

21 Now, I don't know, I don't know
22 whether this is important to the OCC's case or
23 not. Discovery is linear and progressive. You
24 take something, you ask for something, you find

1 out whether it's interesting, you ask another
2 question. I can't determine whether this is
3 important to the case until I see it.

4 And that is the problem that I
5 brought to the attention of the Supreme Court,
6 the Supreme Court asked me what I was looking
7 for, in oral argument asked me what I was
8 looking for in these agreements. If I am never
9 given an agreement it's difficult to know what
10 kind of a case could be put on with those
11 mystical agreements.

12 So we have to get them. Mr. O'Brien
13 has made a representation about the nature of
14 these things. I can't tell that because I
15 haven't been given the underlying agreements.

16 MR. COLBERT: Well, if I can
17 respond, frankly the terms and conditions of
18 that particular agreement and the amount of
19 dollars involved are spelled out in the
20 agreement. As Mr. O'Brien indicated it's
21 self-executing. He also indicated the
22 underlying agreements which were entirely
23 separate are not related in subject matter to
24 the agreement which Mr. Small has.

1 And I don't think that it's fair to
2 say that any of the tens of thousands of
3 agreements that we have with various customers
4 and consumers alike, you know, service
5 agreements and other agreements, are
6 discoverable. They are not simply, you know,
7 all relevant. We did, we believe, fulfill the
8 intent of the Supreme Court's remand with the
9 only relevant agreement within the time period.

10 Again, while we believe that it's
11 outside the scope of the discovery and
12 irrelevant to the case, we are happy to in order
13 to expedite the process and to satisfy OCC and
14 any other parties that may be curious, we are
15 happy to confer with the City and see whether
16 they would agree to put it in. But we don't
17 believe that the discovery orders of the Court
18 or the discovery requests of OCC in the case
19 covers those underlying agreements. So, we
20 certainly believe that they are outside the
21 scope.

22 ATTORNEY EXAMINER: Looking at the
23 document that Mr. Small has, it clearly does
24 make reference to three prior agreements. And I

1 agree with him that it is very hard to tell from
2 the face of that document whether the
3 underlying agreements are related or important
4 or anything else. We are thinking that perhaps
5 an in camera review by us of the three
6 underlying documents might be a way for us to
7 try to make some determination of whether they
8 are part and parcel of the agreement that has
9 been provided to OCC.

10 MR. COLBERT: That is okay with us,
11 Your Honor.

12 ATTORNEY EXAMINER FARKAS: So why
13 don't you provide a copy of the agreement you
14 provided to OCC and the three agreements so then
15 we won't take their copy.

16 MR. SMALL: Let me understand this.
17 Am I getting the opportunity to look at these
18 three agreements as part of this review
19 process?

20 ATTORNEY EXAMINER: I think that is
21 an issue for us to decide is whether it then
22 goes to you.

23 MR. SMALL: I do have a problem with
24 it then because that is the gist of the Supreme

1 Court's ruling which is the internalistic
2 approach that we decide whether the OCC needs
3 this document in order to make its case. That
4 is not acceptable. And that is because
5 discovery should, you know, the rules of
6 discovery should be liberally construed. And
7 that phrase is in the Supreme Court's ruling and
8 here we are trying to constrain it.

9 ATTORNEY EXAMINER: Let me try and
10 clarify. Maybe I wasn't clear. I don't want to
11 try and -- I don't want us to decide whether OCC
12 needs the document. What we want to do is
13 merely look at it to see whether it is a part of
14 it. I think that when you made your motions to
15 compel you said, and I may not be using the
16 right words, that you believed that the three
17 underlying agreements are, No. 1, covered by
18 your original discovery request.
19 And No. 2, whether they are a part of this
20 agreement.

21 And we are not trying -- we don't
22 want to make a substantive decision about
23 whether you need it. You are right, the Supreme
24 Court already spoke to that. So we won't be

1 deciding if you need it. We want to decide
2 whether they are covered by your request, and
3 whether they are part of this agreement.

4 MR. SMALL: I have the December 7th
5 letter compiled by Duke with a direct quote of
6 my discovery request. "Copy of all agreements
7 between CG&E and a party to these consolidated
8 cases and all agreements between CG&E and an
9 entity that was at any time a party to these
10 consolidated cases." That covers the City of
11 Cincinnati.

12 ATTORNEY EXAMINER: Was there a time
13 limitation?

14 MR. SMALL: Yes, there is. That is
15 the critical part. That were entered into on or
16 after January 26th, 2004. Well, this agreement,
17 these agreements, are dated February 5th, 2004.
18 They fall within the time frame.

19 ATTORNEY EXAMINER: Let me see that.

20 MR. SMALL: Mr. Colbert quoted my
21 discovery request.

22 MR. COLBERT: Your Honor, if you
23 would like to see the discovery request and
24 the transcript on the record I have copies of

1 both of those.

2 ATTORNEY EXAMINER: Okay. Just a
3 minute.

4 MR. COLBERT: Certainly. It's up to
5 you.

6 ATTORNEY EXAMINER: Okay. If any of
7 your documents would shed additional light on it
8 we would be happy to look at those.

9 MR. COLBERT: I think the quote is
10 correct. I was just going to say I have the
11 actual documents from the case if you want to
12 see them.

13 ATTORNEY EXAMINER: Okay. All
14 right. This is a request for production of
15 documents and it reads "Please provide copies of
16 all agreements between CG&E and a party to these
17 consolidated cases (and all agreements between
18 CG&E and an entity that was at any time a party
19 to these consolidated cases) that were entered
20 into on or after January 26th, 2004."

21 And this was dated May 18th, 2004.
22 That was request No. 67. I am looking at the
23 transcript. This is page 8 of whatever day it
24 was. I think it was Volume II, but I am not

1 positive.

2 MR. SMALL: I can cut this short. I
3 just read the record. It's the very same
4 request.

5 ATTORNEY EXAMINER: It's exactly the
6 same language.

7 MR. COLBERT: There was some
8 discussion after that.

9 ATTORNEY EXAMINER: Yes. I recall.

10 MR. COLBERT: Yes.

11 ATTORNEY EXAMINER: And that is
12 quoted in this letter from Duke signed by you,
13 Mr. Colbert, to docketing, filed on December 7th
14 of this year. Yes. And this agreement that was
15 given to OCC makes reference, and this agreement
16 I should say itself is signed on June 14th of
17 the year 2004.

18 Then it makes reference to three
19 existing agreements dated February 5, 2004.
20 I presume all of those agreements are dated
21 February 5, 2004, Mr. Colbert?

22 MR. COLBERT: Yes.

23 ATTORNEY EXAMINER: And all of the
24 underlying agreements have that same date of

1 February 5?

2 MR. COLBERT: Well, frankly, I don't
3 know, Your Honor. We were under the impression
4 frankly, and that is why I was just asking Mr.
5 O'Brien, we were -- at least I was under
6 the impression that that is not the signature
7 date, and they were earlier than that. But, I
8 have not had an opportunity to review them.

9 We will, and certainly if they were
10 in the time period specified we will provide
11 them even without going through an in camera
12 inspection. Otherwise, we will need to have the
13 in camera process that you suggested. That is
14 fine with us.

15 ATTORNEY EXAMINER: All right.
16 Let's do this. Find the three agreements. If
17 the dates of those agreements, whether signature
18 date or effective date or any other date that
19 may be on them, is within the time period. I
20 mean, you just said the signature as if there
21 might be --

22 MR. COLBERT: When they were
23 executed.

24 ATTORNEY EXAMINER: I understand.

1 But, if the date is within the time period then
2 you have to provide them to OCC.

3 MR. COLBERT: Fair
4 enough.

5 ATTORNEY EXAMINER: If the date is
6 outside of the time period, but they are
7 nevertheless referenced in this document, then I
8 believe you should give them to us in camera and
9 we will look at them to determine whether we
10 believe that they are an integral part of this
11 document.

12 MR. COLBERT: Okay.

13 ATTORNEY EXAMINER: Okay. I will
14 give you that back. And this is yours. Okay.
15 Any other issues?

16 MR. SMALL: We have our dispute over
17 the side agreements. However, it's the only one
18 that I will make at the present time as an oral
19 motion. Obviously we are going to have some
20 motion work and so forth regarding the scope of
21 the case which will determine a lot as far as
22 what is discoverable.

23 ATTORNEY EXAMINER: Okay.

24 ATTORNEY EXAMINER FARKAS: Is that

1 the extent of confidential information?

2 MR. SMALL: Yes.

3 ATTORNEY EXAMINER FARKAS: We can go
4 back on the regular record.

5 - - -

6 (That concluded the sealed portion
7 of the transcript and Ms. Christensen returned
8 to the room)

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

RECEIVED-DOCKETING DIV
2007 FEB -5 PM 3:09

In the Matter of the Application of)
Duke Energy Ohio To Modify Its)
Market-Based Standard Service Offer.)

Case No. 06-986-EL-UNC

In the Matter of the Application of)
The Cincinnati Gas & Electric Company)
To Modify its Non-Residential Generation)
Rates to Provide for Market-Based Standard)
Service Offer Pricing and to Establish a Pilot)
Alternative Competitively-Bid Service Rate)
Option Subsequent to Market Development)
Period.)

Case No. 03-93-EL-ATA

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Certain Costs Associated)
with The Midwest Independent Transmission)
System Operator.)

Case No. 03-2079-EL-AAM

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Capital Investment in its)
Electric Transmission and Distribution)
System And to Establish a Capital)
Investment Reliability Rider to be Effective)
After the Market Development Period.)

Case No. 03-2081-EL-AAM
Case No. 03-2080-EL-ATA

In the Matter of the Application of)
Duke Energy Ohio, Inc. to Modify Its)
Fuel and Economy Purchased)
Power Component of Its Market-Based)
Standard Service Offer.)

Case No. 06-1068-EL-UNC

In the Matter of the Application of the)
Cincinnati Gas & Electric Company to)
Modify Its Fuel and Economy Purchased)
Power Component of Its Market-Based)
Standard Service Offer.)

Case No. 05-725-EL-UNC

In the Matter of the Application of)	
Duke Energy Ohio, Inc. to Adjust and Set its)	Case No. 06-1069-EL-UNC
System Reliability Tracker.)	

In the Matter of the Application of Duke)	
Energy Ohio, Inc. to Adjust and Set its)	Case No. 05-724-EL-UNC
System Reliability Tracker Market Price.)	

In the Matter of the Application of)	
Duke Energy Ohio, Inc.)	Case No. 06-1085-EL-UNC
To Adjust and Set the Annually Adjusted)	
Standard Service Offer.)	

**MOTION FOR
SUBPOENA DUCES TECUM
(UNREDACTED VERSION)**

Now comes the Office of the Ohio Consumers' Counsel ("OCC") and, pursuant to Ohio Adm. Code 4901-1-25, hereby respectfully moves the Public Utilities Commission of Ohio ("Commission" or "PUCO"), any commissioner, the legal director, the deputy legal director, or the attorney examiner assigned to this case to issue a subpoena *duces tecum* compelling Cinergy Corp. ("Cinergy," including any of its predecessor organizations), an affiliate of Duke Energy Ohio Inc.¹ ("Duke Energy," a party to all the above-captioned cases), to provide a witness or witnesses to appear for oral deposition as on cross-examination on February 14, 2007 at the offices of the OCC (10 W. Broad Street, 18th Floor, Columbus, Ohio 43215) at 11:00 a.m. (or other Ohio location as agreed to by the OCC for that date and time). The OCC asks that the deponent(s) be required to attend from day to day until the deposition(s) is completed to provide

¹ The affiliation is shown in certification regarding Duke Energy Retail Sales, LLC, located in Case No. 04-1323-EL-CRS.

testimony and information concerning agreements that involve Cinergy Corp. in connection with service to customers of Duke Energy. These documents may have an important bearing on the above-captioned cases, including the remand from the Ohio Supreme Court on November 22, 2006 in Case Nos. 03-93-EL-ATA et al. *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789. The deponent(s) should be knowledgeable in the aforementioned matters and the documents that are more fully described below. A deponent should have first-hand knowledge of (i.e. shall have participated in) the negotiations of the agreements.

The subpoena should also compel the deponent(s) to bring with him/her/them, and provide to OCC at 10:00 a.m. on said day and at said place, i) all documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) containing agreements as well as any and all agreements between Cinergy and [REDACTED]

[REDACTED] for the period January 1, 2000 to the date of the deposition(s),

ii) all documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) containing correspondence related to these agreements or pertaining to the aforementioned agreements (by way of example only, with [REDACTED] iii) all

² As an example of a change in ownership and name, [REDACTED]

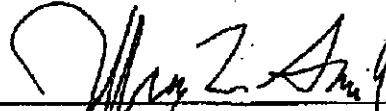
documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) related to electric service to [REDACTED] (including, but not limited to, electric service to [REDACTED] both parties to the above-captioned cases, iv) all documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) containing correspondence related to electric service to [REDACTED] and to the [REDACTED] (including, but not limited to, electric service to [REDACTED] pertaining to such electric service, v) all documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) containing agreements for electric service to customers of Duke Energy Ohio, Inc. not previously mentioned, and vi) all documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) containing correspondence related to the aforementioned agreements (i.e. in section (v)) for electric service to other customers of Duke Energy Ohio, Inc. or pertaining to such agreements for electric service. The period of time covered by the aforementioned materials should begin on January 1, 2000 and continue to the date of the examination.

Grounds for this Motion are set forth in the accompanying Memorandum in Support.

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Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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System And to Establish a Capital)	
Investment Reliability Rider to be Effective)	
After the Market Development Period.)	
 In the Matter of the Application of)	
Duke Energy Ohio, Inc. to Modify Its)	
Fuel and Economy Purchased)	Case No. 06-1068-EL-UNC
Power Component of Its Market-Based)	
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 In the Matter of the Application of the)	
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In the Matter of the Application of)	
Duke Energy Ohio, Inc.)	Case No. 06-1085-EL-UNC
To Adjust and Set the Annually Adjusted)	
Standard Service Offer.)	

MEMORANDUM IN SUPPORT

The OCC requests a subpoena, pursuant to Ohio Adm. Code 4901-1-25, to command Cinergy to provide a witness or witnesses to appear and to submit to oral deposition as on cross-examination on February 14, 2007 at the offices of the OCC (10 W. Broad Street, 18th Floor, Columbus, Ohio 43215) at 11:00 a.m. (or other Ohio location as agreed to by the OCC for that date and time) and attend from day to day until the deposition(s) is completed by the OCC in the above-captioned proceedings.

The above-captioned cases all involve Duke Energy's standard service charges. The agreements entered into by Duke Energy, directly or indirectly using Duke Energy's affiliated companies (including Cinergy), is expected to be central to the issue of side agreements that is the subject of the Ohio Supreme Court's recent remand of Case Nos. 03-93-EL-ATA, et.al. *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789. The side agreements figured prominently in the Court's recent decision, and were the subject of a November 29, 2006 Entry by the PUCO issued in

many of the above-captioned cases. Side agreements also figured prominently in a recent Complaint filed by a former Duke Energy employee John Deeds³ and where the subject matter of a previously issued subpoena regarding Duke Energy Retail Sales, LLC.⁴ Mr. Deeds claims that Duke Energy used side agreements to circumvent the requirement that Duke Energy properly charge its customers for electric service. The OCC has reason to believe, as the result of its previous discovery inquiries in these cases, that these side agreements involved [REDACTED] and the [REDACTED] both parties to the above-captioned cases, as well as [REDACTED] in an effort by Duke Energy and its affiliated companies to prevent public revelation of agreements that were connected with the litigation before the PUCO. A deponent knowledgeable about any agreements entered into by Cinergy, including their negotiation, will be able to provide in-depth information regarding these matters. The full participation of the deponent(s) in the examination will facilitate a full and complete development of the cases before the PUCO, including the ultimate record upon which the Commission will base its decision.

Additionally, the OCC requests the PUCO to command the deponent(s) designated by Cinergy to bring with him/her/them, for delivery to OCC at 10:00 a.m. on said day and at said place, i) all documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) containing agreements as well as any and all agreements between Cinergy and

[REDACTED] for the period

³ *Deeds v. Duke Energy Corporation et al.*, United States District Court, Southern District of Ohio (Western Division), Case No. 1:06CV835, Complaint (December 7, 2006).

⁴ Pursuant to subpoena, a deposition was conducted of a Duke Energy Retail Sales, LLC representative on January 9, 2007.

January 1, 2000 to the date of the deposition(s), ii) all documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) containing correspondence related to these agreements or pertaining to the aforementioned agreements (by way of example only, with [REDACTED]

[REDACTED] iii) all documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) related to electric service to [REDACTED] and to the [REDACTED] (including, but not limited to, electric service to [REDACTED] both parties to the above-captioned cases,

iv) all documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) containing correspondence related to electric service [REDACTED] and to the [REDACTED] (including, but not limited to, electric service [REDACTED] or pertaining

to such electric service, v) all documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) containing agreements for electric service to customers of Duke Energy Ohio, Inc. not previously mentioned, and vi) all documents in the possession or control of Cinergy (all

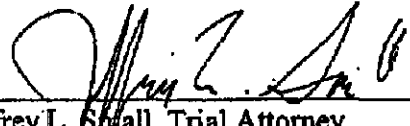
forms of documents, including hard copies of information stored on electronic media) containing correspondence related to the aforementioned agreements (i.e. in section (v)) for electric service to other customers of Duke Energy Ohio, Inc. or pertaining to such agreements for electric service. The period of time covered by the aforementioned materials should begin on January 1, 2000 and continue to the date of the examination.

00027

This information is central to understanding and addressing the issues related to Duke Energy's proposed standard service charges and the support that has been shown by some parties for Duke Energy's proposals in Case Nos. 03-93-EL-ATA et al.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL



Jeffrey L. Small, Trial Attorney
Ann M. Hotz
Larry S. Sauer
Assistant Consumers' Counsel

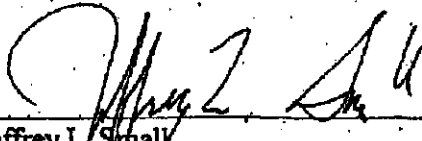
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00028

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Subpoena *Duces Tecum*, was served electronically (according to the Hearing Examiner's e-mail) the 5th day of February 2007.

The public version (i.e. redacted) was served on persons on the e-mail service list other than Duke Energy.



Jeffrey L. Small
Assistant Consumers' Counsel

00029

STATE OF OHIO
PUBLIC UTILITIES COMMISSION
180 EAST BROAD STREET
COLUMBUS, OHIO 43266-0573

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PUCO

Ted Strickland
GOVERNOR



THE PUBLIC UTILITIES COMMISSION OF OHIO
SUBPOENA DUCES TECUM

TO: Cinergy Corp.
c/o C T Corporation System, Statutory Agent
36 East Seventh Street, Suite 2400
Cincinnati, Ohio 44202

Upon application of Counsel for the Office of the Ohio Consumers' Counsel

("OCC"), Cinergy Corp. is hereby required to provide a witness or witnesses to appear for oral deposition on February 14, 2007 at the offices of the OCC (10 W. Broad Street, 18th Floor, Columbus, Ohio 43215) at 11:00 a.m. and submit to oral deposition as on cross-examination by the OCC regarding Case Nos. 06-986-EL-UNC, 03-93-EL-ATA, 03-2079-EL-AAM, 03-2081-EL-AAM, 03-2080-EL-ATA, 06-1068-EL-UNC, 05-725-EL-UNC, 06-1069-EL-UNC, 05-724-EL-UNC, and 06-1085-EL-UNC, all cases related to Duke Energy Ohio, Inc.'s standard service offer charges. The deponent(s) shall attend from day to day until the deposition(s) is completed to provide testimony and information concerning agreements that involve Cinergy Corp. in connection with service to customers of Duke Energy Ohio, Inc. The deponent(s) shall be knowledgeable in the aforementioned matters and the documents that are more fully described below. A deponent shall have first-hand knowledge of (i.e. shall have participated in) the negotiations of the agreements.

[REDACTED]


00031

hard copies of information stored on electronic media) containing agreements for electric service to customers of Duke Energy Ohio, Inc. not previously mentioned, and vi) all documents in the possession or control of Cinergy (all forms of documents, including hard copies of information stored on electronic media) containing correspondence related to the aforementioned agreements (i.e. in section (v)) for electric service to other customers of Duke Energy Ohio, Inc. or pertaining to such agreements for electric service. The period of time covered by the aforementioned materials should begin on January 1, 2000 and continue to the date of the examination.

The deponent(s) shall be knowledgeable regarding the aforementioned matters..

Dated at Columbus, Ohio, this 5th day of February, 2007.

BY:



TITLE:

Agency Examiner

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CONFIDENTIAL EXCERPTS
FROM THE DEPOSITION OF
CHARLES R. WHITLOCK
TUESDAY, JANUARY 8, 2007

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ORIGINAL

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A. That's typical of option agreements where somebody pays a premium to the writer of the option. The holder of the option pays a premium to the writer of the option.

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Q. (By Mr. Small) Back to the option agreements, who's authorized for DERS to pay out the amounts in the option agreements? Do you understand the question?

10

A. I believe I do.

11

Q. Okay.

12

13

A. Someone in Accounts Payable is authorized to process payments.

14

15

Q. Can you authorize a payment under the option agreement?

16

17

A. I believe I have authorized some payments, actually, in early-2006, so yes.

18

19

Q. How many people would have such authorization?

20

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A. I think for clarity I should say this, right, I mean, once the premium -- once the option agreement is reached, right, the calculation of the premium and the payment of that is really governed by the transaction and the actual payment is going to be

1 handled by Accounts Payable. And so I don't know how
2 many people can actually process the payment.

3 Q. All right. Let me go back to your
4 statement that you authorized payments in 2006. What
5 were you doing?

6 A. I was authorizing the payments.

7 Q. And that doesn't need to be done anymore?

8 A. No; the payments are calculated, right?
9 And then there's a signature saying, yeah, process
10 the payment, right? I don't know who all can do
11 that. I did that. I don't know who all can do that.

12 Q. People in Accounts Payable can do that.

13 A. I believe so. I don't know who all can.

14 Q. Those are Shared Services employees.

15 A. I think so.

16 MR. SMALL: I'm going to mark an exhibit
17 7.

18 (EXHIBIT MARKED FOR IDENTIFICATION.)

19 Q. Exhibit 7 is renewal application to the
20 Public Utilities Commission, again, certificate
21 number -- certificate case 04-1323-EL-CRS. I don't
22 see a date stamp on it, but the stamp at the bottom
23 says "October 3rd, 2006."

24 I'm going to direct your attention to

1 Exhibit C-3, it looks like this. It's about midway
2 through the document. And I'm starting with -- there
3 are actually many exhibits called C-3, so you have to
4 go to the first one.

5 That's fine, you're in the right place.

6 Now, I'm on an Exhibit C-3 that shows the
7 name Lon Mitchell at the top. Are you there?

8 A. Yes.

9 Q. Do you know who Mr. Mitchell is?

10 A. I do.

11 Q. Who is he?

12 A. He's the chief financial officer and
13 treasurer of Duke Energy Retail Sales, LLC.

14 Q. Would you give that to me again?

15 Chief --

16 A. It's actually on the document.

17 Q. Okay. Chief Financial Officer?

18 A. Yeah. I just read what it said.

19 Q. Very practical.

20 A. Thank you.

21 Q. Do you know Mr. Mitchell?

22 A. Help me with the word "know," right?

23 Q. I'm sorry?

24 A. Help me with the word "know."

1 Q. Well, the question is of the nature of
2 you're the president of DERS.

3 A. Yeah.

4 Q. This is the chief financial officer of
5 DERS. I think it's a natural question to ask whether
6 you know the chief financial officer of your
7 corporation.

8 A. Yeah, I know him.

9 Q. Okay. What are his responsibilities?

10 A. He does financial -- he keeps the
11 financial records and he does -- performs a treasury
12 function for DERS. He maintains the --

13 MR. PAHUTSKI: You've answered the
14 question.

15 THE WITNESS: Yeah.

16 Q. Is he a Shared Services employee?

17 A. I believe so.

18 Q. Does he provide financial record-keeping
19 functions for other Duke entities?

20 A. I don't know.

21 Q. Would you turn to the next page? You can
22 see here I have a balance sheet, December 31st,
23 2005, and we have some accounts receivables and
24 accounts payable by DERS. Do you see that?

1 A. I do.

2 Q. What documents or agreements govern the
3 intra-Duke affiliate transactions that are
4 represented by those balance sheet accounts?

5 A. I don't know.

6 Q. Is Mr. Mitchell the person who would
7 know?

8 A. I can't speak to what Mr. Mitchell knows
9 or doesn't know.

10 Q. Is there anybody besides Mr. Mitchell
11 that deals with the financial accounts of DERS?

12 A. In one of my previous questions I told
13 you that there were two individuals, Brian Savoy and
14 Mark Krabbe.

15 Q. Thank you for refreshing my memory. I
16 forgot about them.

17 A. That's fine.

18 Q. Let's move on to the income statements,
19 2005 is on the next page -- sorry, they're all
20 labeled C-3 -- and the following page is the budgeted
21 statement December 31st, 2006. Do you have those
22 two statements?

23 A. I do.

24 Q. Now, you said that DERS has no revenues,

1 has not had revenues in the past, correct?

2 A. I believe that's what I said. I'm not --
3 we should look at the transcription and see, I hope
4 that's the right word, "transcription," to see if
5 that's what I said.

6 Q. Between the two I see a very large
7 decrease in Administrative and General Expenses
8 between 2005 and 2006. Do you know what the reason
9 for that is?

10 A. I don't.

11 It's probably the allocation of time,
12 right? When I spend time as a Shared Service
13 employee and I spend time on DERS activities, I'll
14 take my -- my time will get processed through a, you
15 know, an intercompany accounting system, I don't know
16 what the name of it is, but it's probably -- probably
17 reflecting, at least the idea that the budget in 2006
18 said that there was going to be less time by Shared
19 Service employees being allocated to Duke Energy
20 Retail Sales. That's the only thing that I can
21 surmise from that.

22 Q. And "less time" means reduced level of
23 activities?

24 A. Just less time. Could also be that --

1 MR. PAHUTSKI: You've answered the
2 question.

3 THE WITNESS: \$285,000. I don't know.

4 (Discussion held off the record.)

5 Q. Now, the losses that are shown here, the
6 operating loss which was a little over \$14 million in
7 2005 and a little over \$22 million for the budgeted
8 statement for 2006, do you know how that is accounted
9 for on the books of the affiliated companies?

10 MR. PAHUTSKI: Objection; the question
11 assumes facts not established. There's been no
12 discussion about whether or not affiliated companies
13 have any relationship to these operating losses.

14 Q. Mr. Whitlock, in the filing to the Public
15 Utilities Commission you've seen, haven't you,
16 consolidated books for the affiliated companies?

17 A. I don't understand the question.

18 Q. Well, there are financial statements for
19 consolidated Duke entities or predecessors, not just
20 for their individual companies; isn't that correct?

21 A. You're going to have to repeat the
22 question. Sorry.

23 (Question read.)

24 A. Yes.

1 Q. Okay. And, again, when these losses are
2 consolidated in that fashion, what are they
3 consolidated with?

4 A. What accounts? I don't know.

5 Q. Do you know who would know? One of these
6 three accounting people that you mentioned?

7 A. I don't know if they would know.

8 Q. Okay. Back to the option premium which
9 is shown on both of these exhibits, both of these
10 income statements, one for 2005, one for 2006, 2005
11 there's \$13.8 million, in 2006, \$22.2 million.

12 MR. FARUTSKI: Let the record reflect
13 those are approximations.

14 MR. SMALL: Yeah, those are round-ups.
15 Proper round-ups.

16 Q. Do you know if there were any payments
17 before 2005?

18 A. No, but I don't think there were.

19 Q. Okay. What is the purpose of the
20 payments?

21 A. The purpose of the payments is so that
22 DERS has the ability to, if prices go lower, to put
23 load to these customers and serve them, actually
24 provide electricity and capacity at a predetermined

1 price. We bought a put option. And right now on the
2 financial statements all you see is the premium paid.

3 Q. And what do you mean by "right now"?

4 A. I was talking about C-3 that you saw,
5 basically in 2005 we didn't exercise the puts and
6 sell electricity at the strike price to any of the
7 customers that DERS has.

8 Q. And you didn't do it --

9 A. And in 2006 the budgeted statement of
10 income assumes the same thing.

11 Q. And putting aside the assumption, DERS
12 did not exercise those options during 2006.

13 A. That's true. They were out of the money.

14 Q. How does your corporation -- well, yours,
15 you're the president. How does the company survive
16 year after year with only losses, no revenues?

17 A. I mean, there are a lot of companies that
18 don't make money, right? We have two years of
19 business where we don't have revenues. I don't know
20 if that's, you know, we paid for options, those
21 options are not in the money. It would be foolish
22 for us to exercise those options, right? This
23 business vehicle is -- it's not -- there's days --
24 this company will make money some day, right? When

1 we compete in an auction and we win load in a
2 wholesale auction or we serve retail customers, we
3 will do it at a margin that produces margins.

4 Q. Yeah, that struck me. A little while
5 back you told me that DERS was formed because of
6 generation deregulation in order to provide the
7 ability to participate in retail auctions. Now,
8 these option payments are not in connection with any
9 retail auction, are they?

10 A. The option payments are with retail
11 customers.

12 Q. That wasn't the question. The question
13 is whether they're in connection with an auction.

14 A. I believe that, and we can go back to the
15 record, but I believe that I said that we were
16 talking about why Duke Energy Retail Sales was
17 created, and one of those -- one of those reasons was
18 to participate in wholesale auctions, and I believe
19 we talked about New Jersey and Illinois at the time.
20 Does that answer your question?

21 Q. Well, you said it was formed for that
22 purpose.

23 A. It was formed for a variety of purposes,
24 right? I mean, it can serve retail load in Ohio. It

1 could participate -- if we had an auction in Ohio, it
2 could participate in that auction. It did the -- it
3 could participate in the New Jersey auction. It
4 could participate in the Illinois auction.

5 If we chose to go to Texas, and I'm not
6 familiar with the laws in Texas, but if we had to
7 have a certified retail supplier, this is the entity
8 that we would use to participate in those auctions.
9 That's what I believe I said.

10 Q. Would you turn to Exhibit C-7 in what we
11 have as Exhibit 7?

12 MR. PAHUTSKI: Let the record reflect
13 that Mr. Small is still referring to Exhibit 7.

14 MR. SMALL: Whitlock Deposition Exhibit
15 7.

16 MR. PAHUTSKI: Thank you.

17 Q. And you are looking at the first full
18 page of content, that's what I'm going to ask you
19 about.
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10 Q. Mr. Whitlock, are you familiar with the
11 organization and the actual party in this case I
12 refer to as the 03-93 case on remand, the
13 organization called the Ohio Energy Group?

14 A. I'm more familiar with the agreements by
15 the counterparty terms as opposed to broad
16 categorizations, but if we go to a document, I can --

17 Q. Okay.

18 MR. COLBERT: Excuse me, Mr. Small. To
19 make sure, the documents that you're putting on the
20 chair back there, those are confidential documents to
21 be collected at some point?

22 MS. BOJKO: Yes.

23 MR. SMALL: I know.

24 MR. COLBERT: Thank you.

MR. SMALL: The problem is they appear to

1 be made as -- do you want to see one? They are
2 supposed to be two-sided documents, some of them are
3 one-sided, but I think we have enough two-sided ones
4 to do the job.

5 MR. COLBERT: We tried to provide the
6 whole thing.

7 MR. SMALL: It's our poor copying.

8 MR. COLBERT: I see.

9 MR. SMALL: I'll put them down here.

10 MR. COLBERT: I wanted to make sure they
11 wouldn't leave this place.

12 MR. SMALL: Say no more.

13 (EXHIBIT MARKED FOR IDENTIFICATION.)

14 Q. (By Mr. Small) And we have marked that as
15 Exhibit 10, and I haven't referred to an Exhibit 8 or
16 9 yet, but I may yet. Now, just a moment ago you
17 were talking about -- what I have here as Exhibit 10
18 is a document on one side called 2006 CRS Option
19 Payment Budget, on the reverse side appears to be
20 some -- the feature seems to be actuals through June
21 of 2005.

22 MR. COLBERT: Mr. Small, can you
23 reference a Bates number so we can follow?

24 MR. SMALL: Yes.

1 MR. COLBERT: Thank you.

2 MR. SMALL: Thank you, that's very
3 useful.

4 The page with the actuals on it is 517,
5 Bates stamp 517, and the page with the title
6 "2006 CRS Option Payment Budget" is Bates stamped
7 516.

8 MR. COLBERT: Thank you.

9 Q. (By Mr. Small) Now, I referred to OEG.
10 You said you were more familiar with the -- I'm
11 sorry, you were more familiar with what? I don't
12 want to mischaracterize it.

13 A. The counterparties.

14 Q. Counterparties, right. This document
15 appears to organize them into groups. Is it my
16 understanding that OEG, page 516, Bates stamped 516,
17 aggregates certain counterparties into groups of IEU,
18 OEG, and OHA, meaning -- let me start over again.

19 You understand that IEU is a membership
20 organization?

21 A. Not really.

22 Q. Okay. Do you understand the designation
23 "IEU," what that --

24 A. Is it industrial end-users? Is that

1 right?

2 Q. Energy users.

3 A. Okay.

4 Q. They're a party to the case.

5 A. Okay.

6 Q. And "OEG" stands for Ohio Energy Group,
7 and "OHA" is Ohio Hospital Association.

8 A. Okay.

9 Q. I only say that because they're parties
10 to the case.

11 A. Okay.

12 Q. What is your understanding of what these
13 rows are, IEU, OEG, and OHA?

14 A. That they're Industrial Energy Users,
15 Ohio Energy Group, and the Ohio Hospital Association,
16 is that what --

17 Q. How do you arrive at these numbers?

18 A. These look like 2006 CRS option
19 payment -- the budgeted option payments by those --

20 Q. Go ahead.

21 A. -- by those categories.

22 Q. And what are those categories? Who are
23 the payments being made to?

24 A. The payments are made to individual

1 counterparties.

2 Q. Are IEU, OEG, and OHA counterparties in
3 the terminology you're using?

4 A. No.

5 Q. So who are the counterparties?

6 A. That's where I'm going to have to -- the
7 hospitals are the hospitals that we have agreements
8 with, right? They're -- I mean, we provided the
9 documents.

10 Q. Okay.

11 A. All the hospitals. All the hospital
12 option payments for the put options that CRS has or
13 that DERS has would be delineated on that line, I
14 believe, right?

15 Q. Okay.

16 A. The OEG would be those customers that are
17 provided these documents that are the members of
18 those groups, the counterparties that are in those
19 groups would be summarized on this page. And then
20 the IEU would be the counterparties that are members
21 of that IEU group that we have option payments with.

22 Q. Okay. And these total on the sheet to
23 23,059,435. Do you see that on the 2006?

24 A. I do.

1 Q. And going back to Exhibit 7, do you
2 remember we did that C-3, the income statements?

3 A. Yeah.

4 Q. It's before.

5 A. Oh, C-3? I thought you said "C-7," I'm
6 sorry.

7 Q. C-3.

8 A. Okay.

9 Q. Now, I see a number for option premium
10 expense in the budgeted statement of 22,247,000; do
11 you see that?

12 A. What page of C-3 are you on? I'm sorry.

13 Q. Budgeted statement income for the year
14 ended December 31st, 2006.

15 A. Yep, I see that.

16 Q. And since they both appear to be budgets,
17 they should be -- they're comparable. In other
18 words, they're both budgets for 2006 option payments;
19 is that correct?

20 A. Yes.

21 Q. So nearly all of the budgeted -- I'm a
22 little bit confused. Why is the number for IEU, OEG,
23 and OHA larger than the number on Exhibit C-3?

24 A. I don't know.

1 Q. Are there option payments to any entities
2 that are not under the categories IEU, OEG, and OHA?

3 A. Yes.

4 Q. Okay. Do you know who the -- let's move
5 on to OEG in particular. Concerning OEG, do you know
6 who the members are that have option agreements with
7 DERS?

8 A. Again, I know the counterparties, it
9 would be helpful if you grouped them by the OEG,
10 OH -- I mean, I think I can probably do the hospital
11 because they have the hospital designation, right?
12 The IEU and OEG, it might be helpful if --

13 Q. Okay, let's mark this as an exhibit; 11.
14 (EXHIBIT MARKED FOR IDENTIFICATION.)

15 MR. BOEHM: Jeff, does that have a Bates
16 number?

17 MR. SMALL: Yes, it does. Exhibit 11 is
18 Bates stamped 320 through 326.

19 MR. BOEHM: Thank you.

20 MR. SMALL: Very good clarification. I
21 didn't have the documents earlier, so I'm not
22 organized according to Bates stamps.

23 Q. Do you see at the top the date November
24 22nd, 2004?

1 A. Yes.

2 Q. This is an agreement between DERS'
3 predecessor, CRS, and certain member organizations
4 that for the purposes of the 03-93 case were
5 identified as OEG members.

6 MR. SMALL: I hope I haven't gone too
7 far, David, but it was in your motion to intervene.

8 MR. BOEHM: I'm sorry? I didn't catch
9 it.

10 MR. SMALL: These are your members and
11 those were in your motion to intervene.

12 MR. BOEHM: Sure.

13 Q. Do you recognize these as counterparties
14 to option agreements?

15 A. I do.

16 Q. Now, I would turn to the last page, I
17 see --

18 (Discussion held off the record.)

19 Q. Would you turn to paragraph 7 of the
20 agreement? I'd forgotten this part of the question
21 and answer we just went through, but do you recognize
22 this as an agreement between what we've been calling
23 DERS, which includes CRS, and these identified
24 parties in the first paragraph? This is a DERS

1 contract, isn't it?

2 A. This agreement's been superseded.

3 Q. Let's just stick with this agreement.

4 A. Fair enough.

5 Q. Is this agreement with DERS?

6 A. Yes.

7 Q. Okay. Now if you could move to paragraph

8 7. In paragraph 7 there's a reference to Cincinnati
9 Gas & Electric Company's next distribution base rate
10 case; do you see that?

11 A. I do.

12 Q. There's an agreement there that says
13 "Such filing" -- and it's talking about a
14 cost-of-service study -- "shall include a rate
15 increase for rate TS for no more than zero dollars."
16 Do you see that?

17 A. I do.

18 Q. That's a provision that includes --
19 that's a provision involving Cincinnati Gas &
20 Electric which we've been otherwise referring to as
21 DE-Ohio. Why is that in a DERS contract?

22 A. I wasn't a party to negotiating these
23 contracts, so I couldn't tell you why it was in
24 there, but it seems odd to me because DERS could not

1 compel Cincinnati Gas & Electric Company to do
2 anything really other than to say -- to ask for that
3 filing, but they can't compel the Cincinnati Gas &
4 Electric Company to do anything.

5 Q. You said that this agreement had been
6 superseded. What agreement supersedes it?

7 A. It's superseded by the option agreements.

8 Q. Okay. That's the individual option
9 agreements with the counterparties that are
10 identified in the first paragraph of this agreement?

11 A. Yes.

12 MR. SMALL: All right, let's mark this as
13 Exhibit 12.

14 (EXHIBIT MARKED FOR IDENTIFICATION.)

15 Q. Now, we're going to be using Exhibit 11
16 and Exhibit 12. AK Steel is the first identified
17 counterparty in paragraph 1 of Exhibit 11, right?

18 A. Yes.

19 Q. And Exhibit 12, what is that document
20 Bates stamped 1 through 14?

21 A. That's the option agreement that DERS has
22 with [REDACTED] and it -- it's the put
23 option that DERS bought from [REDACTED].

24 Q. I just asked you what superseded the

1 agreements, Exhibit 11, and you said option
2 agreements. Is the option agreement shown on Exhibit
3 12, is that an example of what you were saying
4 supersedes the agreement in Exhibit 11?

5 A. Yes. It's in -- yes.

6 Q. Where did you see that? I think you --
7 where did you spot the superseding language?

8 A. 9.7 of the contract, of the option
9 payment contract.

10 I should also point out that these
11 agreements --

12 Q. I'm sorry?

13 A. These agreements actually terminate on
14 their own terms under I guess it's 12A, B, or C. I
15 think it's under 12B.

16 Q. Those paragraph numbers?

17 A. I'm sorry, it's page 5, Bates stamp 324.

18 Q. Go a little more slowly. I can't follow
19 you.

20 A. All right. Bates stamp 324.

21 MR. SMALL: 324? I'm on 11.

22 MR. PAHUTSKI: We're on the Exhibit 11,
23 Mr. Small.

24 MR. SMALL: Okay.

1 Q. I'm sorry. What was the number?

2 A. 324.

3 Q. Yes.

4 A. There's -- I think it's 12A where it
5 says, "This Agreement terminates after December
6 31st, 2008, or as follows," right?

7 Q. Yes.

8 A. Paragraph A.

9 Paragraph B, that the Public Utilities
10 Commission in that case, 03-93-EL-ATA, didn't issue
11 an entry on rehearing acceptable to Cinergy such that
12 it restores without substantial modification the
13 original Stipulation signed by the Parties or adopts
14 without substantial modification CG&E's alternative
15 proposal made in that application for rehearing. So
16 these agreements terminated under that clause.

17 Q. You're saying that the agreement that
18 I've marked as Exhibit 12 did not supersede it
19 because it terminated by other terms within the
20 agreement that's marked as Exhibit 11?

21 A. Eleven terminated and this agreement,
22 right, and -- Exhibit 11?

23 Q. Yes.

24 A. We had an option -- we had -- let me find

1 the language.

2 What was the question again, I'm sorry?

3 (Question read.)

4 A. It did supersede it, but Exhibit 11 was
5 also terminated on its own terms is the only point of
6 clarification that I was trying to raise.

7 Q. We'll go back to Exhibit 11.

8 A. Okay.

9 Q. First paragraph; did DERS enter into
10 option agreements with all of the counterparties that
11 are mentioned in that paragraph?

12 A. Yes.

13 Q. Are the terms, many terms of the
14 agreement in what's marked as Exhibit 11, is there a
15 general correspondence between those terms and the
16 terms of the option agreement, Exhibit 12?

17 A. No. One's an agreement to provide
18 electricity, the other one is an option agreement, so
19 no.

20 Q. But Exhibit 11 shows what the terms of
21 service would be under an option agreement; isn't
22 that correct?

23 A. No. It's not correct.

24 (Discussion held off the record.)

1 Q. There's an agreement with OEG, there's --
2 MR. PAHUTSKI: Objection. There's no
3 evidence --

4 MR. SMALL: Okay.

5 MR. PAHUTSKI: -- exhibits or anything
6 showing that OEG is a party to these agreements.

7 MR. SMALL: All right. There's an
8 agreement with counterparties that have been
9 identified in this case as members of OEG.

10 (EXHIBIT MARKED FOR IDENTIFICATION.)

11 Q. Mr. Whitlock, I'm going to go back to
12 Exhibit 11 and paragraph 2, option A. At the bottom
13 of that paragraph, it's labeled as option A, there's
14 a reference, the last words in that paragraph are
15 ". . . plus the IMF up to 4 percent of little g." Do
16 you see that?

17 A. I do.

18 Q. Do you know when the IMF was introduced
19 by DE-Ohio into the 03-93 case?

20 A. I don't.

21 Q. Is your previous statement regarding the
22 termination of this agreement by its own terms, was
23 that by your own reading of this document which I
24 have labeled as Exhibit 11?

1 A. Yes.

2 Q. Let's go back to paragraph 12. "If an
3 order in Case 03-93-EL-ATA is issued which is
4 acceptable to CG&E." There was an order in
5 03-93-EL-ATA that was acceptable to CG&E, wasn't
6 there?

7 A. I don't believe so.

8 Q. Well, in the FPP case that you're
9 testifying in, isn't that the FPP part of the
10 company's plan that was accepted by the Commission?

11 A. I believe it was modified, though. It's
12 my understanding that it was modified and that these
13 agreements were -- at any rate, these agreements are
14 superseded by these agreements, it says that in
15 9.7 --

16 Q. So you're saying regardless of whether
17 it's superseded by its own terms, it's superseded by
18 the --

19 A. Yes.

20 Q. -- option agreement.

21 A. Yes.

22 Q. All right. There are more than one
23 agreement with the same parties, and we'll get to
24 Exhibit 13 in a little bit. Sorry if we're out of

1 order.

2 MR. SMALL: Let's make this Exhibit 14.

3 (EXHIBIT MARKED FOR IDENTIFICATION.)

4 MR. PAHUTSKI: I'm sorry, this was
5 exhibit?

6 THE REPORTER: Fourteen.

7 MR. PAHUTSKI: Thank you.

8 MR. BOEHM: And what's the Bates number?

9 MR. SMALL: It's 327 to 332.

10 Q. (By Mr. Small) This agreement, let's
11 compare it with Exhibit 11. This agreement is also
12 with the same counterparties; is that correct?

13 A. No.

14 Q. Some of the same counterparties?

15 A. Yes.

16 Q. Does Exhibit 11 supersede -- does the
17 agreement shown in Exhibit 11 supersede the agreement
18 shown in Exhibit 14?

19 A. It does. It says that. The agreement
20 replaces and supersedes the terms and conditions of
21 the Agreement dated May 19th, 2004.

22 Q. Why was the agreement in Exhibit 11
23 executed? Why was that executed to supersede the
24 agreement in Exhibit 14?

1 A. I don't know. I wasn't a party to the
2 negotiating of these contracts, so I don't know
3 exactly.

4 Q. Were you involved in the creation in any
5 way of the option agreements, for instance, Exhibit
6 12?

7 A. I was not.

8 Q. Okay. I'm going to mark Exhibit 15 Bates
9 stamped 333.

10 (EXHIBIT MARKED FOR IDENTIFICATION.)

11 Q. Now, this agreement -- I'm sorry, this
12 document is dated April 4th, 2005, which is after
13 the option agreement; is that correct? Or let me go
14 back.

15 Are there option agreements with [REDACTED]
16 [REDACTED] which is the subject matter of this letter that
17 are dated prior to April 4th, 2005?

18 MR. PAHUTSKI: Correction for the record.
19 The letter refers to [REDACTED]

20 MR. SMALL: I'm sorry, [REDACTED]
21 [REDACTED]

22 MR. PAHUTSKI: Could you reread the
23 question, Mr. Small? I'm sorry, I lost it.

24 MR. SMALL: Let me start over again.

1 Q. Mr. Whitlock, is there a option agreement
2 between DERS and [REDACTED] and is there an option agreement
3 between DERS and [REDACTED] that predates April 4th, 2005?

4 A. [REDACTED]

5 Q. [REDACTED] I believe that's [REDACTED]

6 MR. PAHUTSKI: Mr. Small, if there is
7 such an agreement, it would be in the materials we
8 produced. Mr. Whitlock obviously is having
9 difficulty locating that, but if there is one, it
10 would be in the materials we produced.

11 MR. SMALL: This is kind of foundational.
12 I believe there is an agreement.

13 Q. The next question is going to be what is
14 the purpose of this April 4th, 2005, letter which
15 is Exhibit 15? If you can answer that without going
16 through the document book, that would be fine.

17 A. This agreement seems to amend the option
18 premium payment for realtime pricing customers.

19 Q. And would that be in a preexisting option
20 agreement?

21 A. I believe that [REDACTED]
22 the option agreements predated this letter.

23 Q. And that's when it's amended.

24 A. That's what it appears to me.

1 Q. Let's go to Exhibit 13.

2 MR. PAHUTSKI: Mr. Small, do you have
3 another copy of Exhibit 13?

4 Thank you.

5 Q. Mr. Whitlock, do you know the reason why
6 there are multiple agreements with certain parties in
7 this, as we've gone through Exhibits 11, 14, 15, and
8 the option agreement 12? You have Exhibit 12, don't
9 you?

10 A. I do.

11 Q. Okay. Do you know why there are multiple
12 agreements with these parties?

13 A. I don't.

14 Q. Did you have any part or play any role in
15 negotiating them?

16 A. I did not.

17 Q. When did your role start with the option
18 agreements? Was that just to process payments?

19 A. It was -- yeah. So it was in -- that was
20 the first thing that I did relative to the option
21 payments was to process the payments or approve
22 payments.

23 Q. Now, Exhibit 13, which starts at Bates
24 stamp 334, has an agreement and it mentions IEU in

1 this case; do you see that? The first paragraph.

2 A. I do.

3 Q. So these are -- the named parties are
4 members of IEU; is that your understanding?

5 A. I mean, the agreement says it's between
6 Cinergy Corp. through its agent Cinergy Retail Sales
7 and the Industrial Energy Users - Ohio, IEU - Ohio,
8 for the benefit of Marathon Ashland, Inc. and General
9 Motors, Inc. customers.

10 Q. So the agreement is with IEU.

11 A. I don't know what "further benefit"
12 means.

13 MR. PAHUTSKI: Objection. Objection. I
14 think that mischaracterizes what Mr. Whitlock just
15 testified to.

16 MR. SMALL: He just read it. I asked for
17 his interpretation.

18 MR. PAHUTSKI: Object in that it could
19 call for -- that calls for a legal conclusion as to
20 contract interpretation, and Mr. Whitlock's not an
21 attorney trained to interpret these contracts from a
22 legal perspective.

23 Q. Now, Mr. Whitlock, is this agreement in
24 effect?

1 A. No.

2 Q. And why not?

3 A. Because it was superseded by option
4 agreements with Marathon Ashland, Inc. and General
5 Motors, Inc.

6 The other thing that I should point out
7 is on page 338 that this agreement, again, has
8 termination clauses that says, you know, an A, B, and
9 a C that can be plainly read.

10 Q. And that was Bates stamp 338?

11 A. Yes, sir.

12 MR. SMALL: And let's mark this as
13 Exhibit 14.

14 MR. PAHUTSKI: What are we marking
15 Exhibit 14?

16 MR. SMALL: Sixteen.

17 (EXHIBITS MARKED FOR IDENTIFICATION.)

18 MR. NEILSEN: 341 is now Exhibit No. 16?

19 THE REPORTER: Yes.

20 MR. SMALL: Why, is there some confusion?

21 MS. BOUKO: It was not marked previously.

22 MR. NEILSEN: Okay, we were just talking
23 and the agreement you were just talking about with
24 the witness that was number --

1 MS. BOJKO: The November agreement, that
2 is Bates stamped 334.

3 MR. NEILSEN: Yes. That is exhibit
4 number what?

5 MR. SMALL: Thirteen.

6 MR. NEILSEN: Thirteen?

7 MS. BOJKO: Yes.

8 MR. NEILSEN: Thank you.

9 Q. (By Mr. Small) And No. 16 is an earlier
10 agreement?

11 MR. PANOTSKI: Can you clarify? Earlier
12 than what?

13 MR. SMALL: Earlier than the Exhibit 13
14 agreement.

15 A. It appears to be, yeah.

16 Q. Do you know why there were multiple
17 agreements?

18 A. I don't.

19 Q. Now, I have an option agreement as
20 Exhibit 17.

21 (EXHIBIT MARKED FOR IDENTIFICATION.)

22 Q. This is an option agreement involving
23 General Motors, and is it your understanding that
24 this superseded the earlier agreements with IEO and

1 members named therein?

2 MR. COLBERT: What Bates number are you
3 looking at now, Jeff?

4 MR. SMALL: Bates stamped 50 is Exhibit
5 No. 17.

6 MR. PAHUTSKI: Can you repeat the
7 question, Mr. Small?

8 (Question read.)

9 Q. And what I mean "members named therein,"
10 I mean General Motors was named in Exhibit 13 and 16.
11 So this would supersede the agreement with --
12 involving GM.

13 A. It does on Bates stamp 59, right, it
14 talks about "This Agreement supersedes and replaces
15 in its entirety the agreement between CRS and GM
16 dated November 8th, 2004."

17 Q. And, again, you didn't have anything to
18 do with negotiating or creating this, you came in at
19 the point where you were processing payments.

20 A. These were existing agreements.

21 Q. Okay. Does CRS have agreements with

22 [REDACTED]

23 A. Not to my knowledge.

24 Q. Have you ever heard of [REDACTED] He

1 would be legal counsel for them.

2 A. No.

3 Q. Have you in the -- and when I say "you,"
4 DERS --

5 A. Yes.

6 Q. -- have agreements with the city of
7 Cincinnati?

8 A. Yes.

9 No? No.

10 Q. All right.

11 MR. SMALL: I thought the answer was no,
12 but . . .

13 Q. Have you had dealings with Duke Realty
14 Corporation or with Howard Petricoff?

15 A. Not to my knowledge.

16 Q. Does DERS have any agreements with

17 [REDACTED]

18 A. Yes.

19 Q. And that was one of the OEG members?

20 That's all right, let's move on.

21 Does DERS have any agreement with [REDACTED]

22 A. No.

23 I think we provided the documents and all
24 the agreements that DERS's a party to.

1 Q. I'm just doing a little housekeeping
2 here.

3 A. That's fair.

4 Q. Have there been any agreements with DERS
5 with [REDACTED]

6 A. I don't know.

7 Q. Is there any agreement between DERS and
8 [REDACTED] or have you ever heard of

9 [REDACTED]
10 MR. PAHUTSKI: Objection; compound
11 question. Can you ask that twice?

12 Q. Is there any agreement between [REDACTED]
13 [REDACTED] and DERS?

14 MR. PAHUTSKI: Again, as Mr. Whitlock has
15 indicated earlier, agreements between DERS and
16 customers of Duke Energy - Ohio that are parties to
17 these proceedings have been provided in the documents
18 we provided today.

19 Q. Okay. Looks like your answer is "I don't
20 know," that I should look in the documents.

21 A. Yes. To both.

22 Q. Huh?

23 A. Yes to both. I don't know, and you
24 should look in the documents.

1 Q. Can you give an example -- there's a
2 statement in one of your pleadings, meaning DERS's
3 pleadings, that there are confidentiality clauses in
4 the requested documents. That would be these
5 requested documents that required DERS and
6 counterparties to seek to maintain the contract as
7 confidential? I'm actually reading that, quoting
8 that from one of the DERS pleadings in this case.

9 We've looked at several of these option
10 agreements, can you point to clauses where
11 confidentiality is requested? Do you know of any
12 provisions like that?

13 A. In 9.5. I'm on Bates 059.

14 Q. What exhibit number are you on?

15 A. I don't know. Exhibit 17.

16 Q. All right. Please.

17 A. General Motors.

18 Q. Bates stamped?

19 A. On Bates stamp 059, page 10 of the
20 agreement, Section 9.5 talks about confidentiality.

21 Q. Okay.

22 MR. PAHUTSKI: Mr. Small, we're
23 approaching 6 o'clock. Are we about to wrap up?

24 MR. SMALL: We are about to wrap up.

1 (EXHIBIT MARKED FOR IDENTIFICATION.)

2 MR. PAHUTSKI: Mr. Small, just for
3 convenience sake, are we through with exhibits up
4 through Exhibit 17 so Mr. Whitlock can just organize
5 this side of the table here?

6 MR. SMALL: I think so.

7 MR. PAHUTSKI: Thank you. So he just
8 needs to have in front of him at this point Exhibit
9 18?

10 MR. SMALL: Yes.

11 MR. PAHUTSKI: Thank you.

12 MR. SMALL: I may have to go back to one
13 in a little bit, but right now I'm going to ask about
14 18.

15 MR. COLBERT: 18 which is Bates stamp
16 number?

17 MR. SMALL: It's 347.

18 MR. COLBERT: Thanks.

19 Q. (By Mr. Small) Have you seen this
20 agreement before? Have you looked at this agreement
21 before?

22 A. I have seen it.

23 Q. Can you tell me who the hospitals are?
24 Is that a reference to the Ohio Hospital Association

1 which Mr. Sites is the attorney for?

2 A. I'm assuming that it's on Bates stamp
3 352, it's Exhibit 1 of the agreement.

4 Q. These are the hospitals.

5 A. I would assume. It says -- in fact, it
6 does, the first sentence, right. It says the
7 agreement -- attached agreement Exhibit 1.

8 Q. Very well, thank you.

9 A. You're welcome.

10 MR. SMALL: Exhibit 19.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 Q. Mr. Whitlock, this agreement superseded
13 the -- "this agreement" being Exhibit 19, superseded
14 the agreement shown in Exhibit 18?

15 A. Yes.

16 Q. And now I'm going to go to Exhibit 20,
17 Bates stamped 204.

18 (EXHIBIT MARKED FOR IDENTIFICATION.)

19 Q. Mr. Whitlock, the option agreement,
20 similar to the previous situations in Exhibit 20,
21 superseded the agreement in Exhibit 19, at least with
22 respect to [REDACTED]

23 A. Yes, I take it at 212, Bates stamp 212,
24 Section 9.7 of your Exhibit 20, it talks about this

1 agreement supersedes that agreement. And that also
2 in your Exhibit 19, that those agreements also
3 terminate for any of the following reasons, A, B, and
4 C on page 4, Bates stamped 356.

5 Q. I'm not -- where are you?

6 A. Your Exhibit 19.

7 Q. Yes.

8 A. I'm trying to -- I'm trying to keep track
9 of --

10 Q. Nineteen, okay. I'm on the wrong
11 exhibit.

12 A. Bates stamp 356, Exhibit 19.

13 Also talks about termination clauses for
14 the October 28th agreement.

15 Q. Okay. Let's go back to Exhibit 19 for a
16 second.

17 A. Okay.

18 Q. Paragraph 4, do you see the statement
19 about a \$50,000 payment to the Ohio Hospital
20 Association?

21 A. I do.

22 Q. Do you know what the payment's for?

23 A. I do not.

24 Q. Was there a payment made to the Ohio

1 Hospital Association in the amount of \$50,000?

2 A. I don't know, but if there was and this
3 agreement's been superseded, we should ask for the
4 money back. I'll check.

5 Q. I suppose it could have been made while
6 this was not superseded. Okay, I was just asking
7 whether the payment was made.

8 A. I don't know.

9 Q. You don't know.

10 Do you know whether that payment in any
11 way was carried over into the option agreement with
12 any of the hospitals?

13 MR. PAHUTSKI: Mr. Small, we're going to
14 ask that the option agreements speak for themselves.
15 If there is such a payment, they'll be self-evident
16 in those agreements.

17 MR. SMALL: Okay.

18 Q. Mr. Whitlock, if you would return to
19 Exhibit 13, Bates stamped 337.

20 A. Give me a second, would you please?

21 Q. Yeah.

22 A. Exhibit 13?

23 Q. Yes.

24 A. I have it.

1 Q. Bates stamped 337 and paragraph 4.

2 A. Yes.

3 Q. Do you see a statement about a
4 \$100,000 payment to the Industrial Energy Users -
5 Ohio?

6 A. I do.

7 Q. Do you know whether that -- what that
8 payment's for?

9 A. I do not.

10 Q. Do you know whether that payment was
11 made?

12 A. I'd answer it the same way as I answered
13 your previous question in the other agreement. No, I
14 don't know.

15 Q. And as far as the payments are concerned,
16 would that appear in the financial documents that
17 were produced today, invoices or something along
18 those lines?

19 A. If they were paid, they should have been
20 in there. If they were paid in 2005, it should have
21 showed up, right. But again, I don't think they --
22 this agreement was never active, right? It was
23 superseded. And so if we paid it, we should try to
24 get it back, I would contend, but we'll work on that.

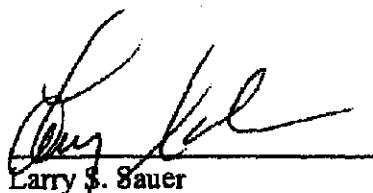
1 Sorry.

2 MR. SMALL: Let's just go off the record
3 for a moment.

4 (Discussion held off the record.)
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Deposition Transcript, Confidential Excerpts, Exhibits and Confidential Exhibits of Charles R. Whitlock* were served electronically on Paul Colbert, Counsel for Duke Energy, Werner Margard, III, Thomas McNamee and Stephen Reilly, Assistant Attorneys General and Scott Farkas, the Attorney Examiner on this case, on the 13th day of February, 2007.



Larry S. Sauer
Assistant Consumers' Counsel

2008 CRS Option Payment Budget

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total	2008
IEU														
OEG														
CHA														
Total	\$ 1,200,000	\$ 1,200,000	\$ 1,200,000	\$ 1,200,000	\$ 1,200,000	\$ 1,200,000	\$ 1,200,000	\$ 1,200,000	\$ 1,200,000	\$ 1,200,000	\$ 1,200,000	\$ 1,200,000	\$ 14,400,000	\$ 14,400,000

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DEPOSITION
EXHIBIT
#10
WIT LOCK

	January	February	March	April	May	June	July	August	September	October	November	December	Total
2005 Budget	\$ 792,000	\$ 822,000	\$ 828,000	\$ 800,000	\$ 870,000	\$ 948,000	\$ 1,044,000	\$ 978,000	\$ 852,000	\$ 820,000	\$ 820,000	\$ 10,945	
Actuals	\$ 772,160	\$ 768,286	\$ 1,173,006	\$ 754,575	\$ 821,669	\$ (1,723,009)	\$ (337,155)						
DVW Budget	\$ 772,160	\$ 768,286	\$ 1,173,006	\$ 754,575	\$ 821,669	\$ (1,723,009)	\$ (337,155)						
DVW Cumulative	\$ 772,160	\$ 1,540,446	\$ 2,713,452	\$ 3,468,027	\$ 4,289,696	\$ 2,566,687	\$ 2,229,532						

Indefinite Notice Fees: 1

\$ 21,025.4 \$ 17,934.4 \$ 903,838.3

1. Refunds not suggested, but included actuals

Please Note: \$2.65 M of June Payment has not been paid yet

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Agreement

This Agreement is between Cinergy Retail Sales, LLC (Cinergy), and AK Steel Corporation., Air Products & Chemicals, Inc., BP Products North America, Ford Motor Company, GE Aircraft Engines, and The Proctor and Gamble Co. (Customers), effective this 22nd day of November, 2004. This Agreement replaces and supersedes the terms and conditions of the Agreement dated May 19, 2004, between Customers and Cinergy (Parties). It is the intent of the Parties to this Agreement to bind the Customers and Cinergy to the terms and conditions set forth herein.

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.

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



1. The Parties expect that the Provider of Last Resort (POLR) charge of the Cincinnati Gas & Electric Co. (CG&E) will consist of these components: 1) Rate Stabilization Charge (RSC); 2) Annually Adjusted Component (AAC); 3) Infrastructure Maintenance Fund (IMF); and 4) System Reliability Tracker (SRT).
2. The Customers may, individually and on an individual account basis, select one of the following options for competitive retail electric service no later than December 15, 2004.

Option A

A. Beginning no earlier than January 1, 2005, and ending December 31, 2008, each Customer (except General Electric) may purchase competitive retail electric generation service from a Cinergy affiliated certified competitive retail electric service (CRES) provider at their current tariffed unbundled generation rate approved by the Commission in Case No. 99-1658-EL-ETP and also known as Big G, plus an amount equal to the quarterly adjusted fuel component (which shall not include any amount for emission allowances) of CG&E's price to compare component of its market-based standard service offer set forth by the Commission in Case No. 03-93-EL-ATA. Cinergy shall reimburse quarterly all Customers for all amounts actually paid to CG&E for the following items: 1) Regulatory Transition Charges (RTC); 2) RSC; 3) AAC; and 4) SRT. From January 1, 2005 through December 31, 2008, Cinergy shall also reimburse quarterly all Customers for any actual payment made to CG&E of the IMF in excess of 4% of little g. The effect of such reimbursement shall be that Customers will pay the unbundled generation rate, Big G, plus quarterly fuel increases (not including emission allowances) plus the IMF up to 4% of little g.

For any Customer who elects this Option A and has a CRES contract extending beyond January 1, 2005, but ending no later than December 31, 2005, Cinergy shall reimburse such Customer, during 2005 until the Customer begins service under this Option A no later than January 1, 2006, for the following items: 1) one half of the SRT actually paid; 2) and one half of the AAC actually paid; and 3) any IMF charge in excess of 4% of little g actually paid.

Beginning no earlier than January 1, 2005 and ending December 31, 2008, General Electric and P&G's Ivorydale and Healthcare Research Center facilities may purchase competitive retail electric service from a Cinergy affiliated CRES pursuant to the terms and conditions of their existing Service Agreements for Supply of Electric Energy with CG&E adjusted quarterly for fuel (with no cost for emission allowances). Cinergy shall reimburse quarterly General Electric and P&G for all amounts actually paid to CG&E for: 1) RTC; 2) RSC; 3) AAC; and SRT. Cinergy shall also reimburse quarterly General Electric and P&G for all IMF payments made to CG&E in excess of 4% of little g. P&G's BDH and CBL for the Ivorydale and Healthcare Research Center facilities are defined in their current RTP agreements and may be adjusted annually unless the parties agree otherwise.

Under this Option A, Cinergy may set off revenues collected for actual RTC, RSC, AAC, SRT, or IMF charges against any outstanding balance owed to Cinergy or CG&E.; or,

Option B

B. Each Customer may accept CG&E's market based standard service offer price, including the price to compare and POLR charges approved by the Commission in Case No. 03-93-EL-ATA and retain the right through December 31, 2008, to switch to a CRES under the terms and conditions of the Commission's Order. During any time between January 1, 2005, and December 31, 2008, when it is purchasing from a CRES under Option B, Cinergy shall reimburse quarterly each Customer amounts actually paid to CG&E for the following items: 1) 50% of RSC; 2) 50% of AAC; 3) 50% of SRT, and 4) any actual payment made to CG&E of the IMF in excess of 4% of little g. During January 1, 2005, through December 31, 2008, Customers choosing Option B must pay to Cinergy quarterly one half of the emission allowance component of the fuel component of the price to compare. Cinergy may set off revenues collected for actual RTC, RSC, AAC, SRT, or IMF charges against any outstanding balance owed to Cinergy or CG&E.

3. Under both Option A and Option B, this Agreement constitutes Customers' contract with a credit worthy CRES to provide firm generation service for their full capacity, energy and transmission requirements from January 1, 2005, through December 31, 2008, and satisfies to the maximum extent

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possible the requirements of Case No. 03-93-EL-ATA that the first 50% of eligible load by customer class to switch to a CRES shall not pay the RSC and shall not pay the AAC.

4. If, prior to December 31, 2008, any of the Customers add additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds a 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 peak load of three (3) MW or less; any accounts representing new load beyond the foregoing limit are not included under this Agreement.
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.
6. Cinergy will comply with all regulatory requirements necessary to be certified as a competitive retail electric service provider to offer competitive retail electric service to Customers as required by paragraph one (1) of this Agreement.
7. In the Cincinnati Gas & Electric Company's next distribution base rate case that results in a change in the Customers' rates, CG&E will file a cost of service study reflecting actual cost of service for all rate classes. Such filing shall include a rate increase for rate TS of no more than \$ 0.00. The Parties retain all legal rights in The Cincinnati Gas & Electric Company's next distribution base rate case, including but not limited to, rights to litigate and settle the case. The filing of the cost of service does not in any way constitute a guarantee regarding the outcome of the case. The Cincinnati Gas & Electric Company shall support the future distribution rider, proposed as Rider CIR, allocated based upon distribution net plant.
8. The Customers shall cause the Ohio Energy Group to support an Application for Rehearing filed by The Cincinnati Gas & Electric Company and/or OEG seeking reinstatement without

84

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modification of the Stipulation signed by The Cincinnati Gas & Electric Company and OEG or approval by the Commission without modification of CG&E alternative proposal submitted in its application for rehearing, in Case No. 03-93-EL-ATA, and any related litigation.

9. If a Customer had shopped for competitive generation and is subject to a minimum stay with CG&E that extends beyond January 1, 2005, then the minimum stay shall be waived and the Customer may elect under Paragraph 1 for service to be effective during 2005.
10. Nothing in this Agreement modifies or limits any settlement agreement reached by the Parties or their agents in Case No. 99-1658-EL-ETP.
11. The Parties agree to work in good faith to carry out the intent of Paragraph 1, including the development of CRES contracts with terms and conditions as similar as possible to the existing unbundled tariffs. Cinergy will not require surety bonds, deposits or other corporate guarantees under Paragraph 1.
12. If an order in Case No. 03-93-EL-ATA is issued which is acceptable to CG&E but which renders invalid or ineffective any provision of this Agreement to the economic detriment of the Customers, then Cinergy will provide the same economic value to the impacted Customer(s) through some other mutually acceptable process.

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

- A. The Commission, in Case No. 03-93-EL-ATA, and ongoing fuel cost recovery cases, fails to approve as part of the capped Provider of Last Resort Charge, a fuel cost recovery mechanism such that fuel costs equal the average embedded fuel costs for all consumers in The Cincinnati Gas & Electric Company service territory served by any Cinergy company.
- 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 substantial modification the original Stipulation signed by the Parties or adopts without

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substantial modification CG&E's alternative proposal made in its application for rehearing.

- C. 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.

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:

David F. Boehm, Esq. or
Michael L. Kurtz, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 2110
Cincinnati, Ohio 45202

To Cinergy:

James B. Gainer
Cinergy Services, Inc.
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 in a commercially practicable manner such as by check, ACH or wire transfer to the account designated by the payee from time to time.

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TRADE SECRET

Cinergy and the Customers shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third Parties regarding the enforcement or breach of this Agreement 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 Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

Entered into on this 22nd 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



David Boehm, Counsel
Michael L. Kurtz, Counsel
Boehm, Kurtz, & Lowry
36 East Seventh Street
Suite 2110
Cincinnati, Ohio 45202

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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
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Document Code _____

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DEPOSITION
EXHIBIT

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TRADE SECRET

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 AK Steel 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 [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] Delivery Point.

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TRADE SECRETARTICLE II
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] by 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] 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 AK Steel 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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TRADE SECRET

- 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] as additional load or accounts greater than [REDACTED] then 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 [REDACTED] 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 [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

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TRADE SECRET

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

4.2 Agreement Termination.

[REDACTED] Before termination of this Agreement, the Parties agree to use best efforts to fulfill the intent of this Agreement by negotiating amendments to this Agreement that put the Parties in substantially the same overall economic positions as created under the PUCO's Order dated November 23, 2004 in Case No. 03-93-EL-ATA and this Agreement.

- 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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TRADE SECRET

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, [REDACTED]

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

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

[REDACTED]
David F. Boehm, Esq.

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TRADE SECRET

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 of General Counsel
Date: MAY 2, 2005

[Redacted]
[Redacted]
[Redacted]
Date: 03/21/05

FORM APPROVED
[Signature]
ATTORNEY

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

The CRS option payments 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 [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	[REDACTED]					
DP						
DS						
TS						

DM only shows summer season rates

Plus [REDACTED]

Plus [REDACTED]

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TRADE SECRET**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) [REDACTED]

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:

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

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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

(a) 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 FUCO approved charges:

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

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TRADE SECRET

Exhibit C:

Customer Group: [REDACTED]
Customer Account List

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

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TRADE SECRET

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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TRADE SECRET

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"¹. 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

¹ 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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TRADE SECRET

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.

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) MVA 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.

CONFIDENTIAL PROPRIETARY
TRADE SECRET

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

CONFIDENTIAL PROPRIETARY
TRADE SECRET

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 & Norris
21 East State Street, 7th Floor
Columbus, Ohio 43260
(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.

CONFIDENTIAL PROPRIETARY
TRADE SECRET

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 5th 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.
Moses Wallace & Nurick LLC
211 East State Street
17th Floor
Columbus, Ohio 43215

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TRADE SECRET

Agreement

This Agreement is between Cinergy Retail Sales, LLC (Cinergy), and ~~Alk Steel Corporation, Alk Products & Chemicals, Inc., Ford Motor Company, GE Aircraft Engines, and The Procter and Gamble Co.~~ (Customers), effective this 19th day of May 2004. It is the intent of the Parties to this Agreement to bind the Customers to the terms and conditions set forth herein.

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.

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

1. The Customers may, individually and on an individual account basis, select one of the following options for competitive retail electric service no later than sixty (60) days after the Public Utilities Commission of Ohio's (Commission) Order in Case No. 03-93-EL-ATA or December 1, 2004, whichever comes first:

DEPOSITION
EXHIBIT

14

CONFIDENTIAL PROPRIETARY
TRADE SECRET

- a. Beginning January 1, 2005 and ending December 31, 2008, each Customer except ~~General Electric~~ may purchase competitive retail electric generation service from Cinergy at their current tariffed unbundled generation rate approved by the Commission in case no. 99-1658-EL-ETP and also known as Big G, plus an amount equal to the quarterly adjusted fuel component of The Cincinnati Gas & Electric Company's price to compare component of its market-based standard service offer approved by the Commission in case no. 03-93-EL-ATA, as such rate may be periodically approved by the PUCO. It is agreed that for any Customer who elects this option (a) and that elects to keep a competitive retail electric service contract extending beyond January 1, 2005, but ending no later than December 31, 2005, Cinergy shall reimburse such Customer ~~one half the annually adjusted component of the POLR during 2005~~ and the Customer shall begin service under this option (a) no later than January 1, 2006. Beginning January 1, 2005, ~~General Electric and P&G's Ivorydale and Healthcare Research Center facilities~~ may purchase through December 31, 2008 competitive retail electric service from Cinergy pursuant to the terms and conditions of its existing Service Agreement for Supply of Electric Energy with The Cincinnati Gas & Electric Company adjusted quarterly for fuel as noted above. ~~P&G's BDH and CBE for the Ivorydale and Healthcare Research Center facilities~~ as those terms are defined in their current RTP agreements, may be adjusted annually, unless the parties agree otherwise. Cinergy shall reimburse quarterly all Customers for actual ~~Regulatory Transition Charges, Rate Stabilization Charges, and the annually adjusted component of the Provider of Last Resort charges~~ paid to The Cincinnati Gas & Electric Company. The effect of such reimbursement shall be that Customers will pay the unbundled generation rate approved in Case No. 99-1658-EL-ETP ~~plus quarterly fuel increases~~. Cinergy may set off revenues collected for actual ~~Regulatory Transition Charges, Rate Stabilization Charges, and annually adjusted component of the Provider of Last Resort charges~~ paid against any outstanding balance owed to any Cinergy company; or,
- b. Each Customer may accept The Cincinnati Gas & Electric Company's market-based standard service offer price, ~~including the price to compare and provider of last resort charge~~, approved by the Commission in case no. 03-93-EL-

CONFIDENTIAL PROPRIETARY
TRADE SECRET

ATA, but retain the right through December 31, 2008, to switch to a competitive retail electric service provider under the terms and conditions of the Commission's order. Upon switching to a competitive retail electric service provider, Cinergy shall reimburse each such Customer ~~one-half of the annually adjusted component of the Provider of Last Resort charges (such charges do not include the Rate Stabilization Charge component of the Provider of Last Resort Charge)~~ thereafter paid to The Cincinnati Gas & Electric Company through December 31, 2008. If a Customer is taking service from a non-Cinergy affiliated competitive retail electric service provider on January 1, 2005, Cinergy shall reimburse such Customer for ~~one-half of the annually adjusted component of the Provider of Last Resort charges (such charges do not include the Rate Stabilization Charge component of the Provider of Last Resort Charge)~~ until December 31, 2005. If a Customer notifies Cinergy no later than 60 days after the order is issued in Case No. 03-93-EL-ATA or December 1, 2004 (whichever comes first) that it intends to purchase generation from a competitive retail electric service provider (including a Cinergy affiliated CRES) for the period January 1, 2005 thru December 31, 2008 then: a) Cinergy shall reimburse the Customer for ~~one-half of the annually adjusted component of the Provider of Last Resort charges for the period January 1, 2005 through December 31, 2008;~~ and b) this notice constitutes Customer's contract with a credit worthy CRES to provide firm generation service for its full capacity, energy and transmission requirements through December 31, 2008. Cinergy may set off revenues collected for ~~one-half of the annually adjusted component of the Provider of Last Resort charges~~ to be reimbursed to the applicable Customers against any outstanding balance owed to any Cinergy affiliated company. Customers choosing this option may switch from a non-Cinergy affiliated competitive retail electric service provider to Cinergy at the ~~market rate approved by the Commission in case no. 03-93-EL-ATA or the market rate offered by Cinergy, whichever is higher.~~

2. If, prior to December 31, 2008, any of the Customers add additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds a 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

CONFIDENTIAL PROPRIETARY
TRADE SECRET

cumulatively represents new 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 shall pay The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Commission.
4. Cinergy will comply with all regulatory requirements necessary to be certified as a competitive retail electric service provider to offer competitive retail electric service to Customers as required by paragraph one (1) of this Agreement.
5. In the Cincinnati Gas & Electric Company's next distribution base rate case that results in a change in the Customers' rates, CG&E will file a cost of service study reflecting actual cost of service for all rate classes. The Cincinnati Gas & Electric Company shall support the future distribution rider, proposed as Rider CIR, allocated based upon distribution net plant.
6. The Customers shall cause the Ohio Energy Group to support a Stipulation filed by The Cincinnati Gas & Electric Company and the Ohio Energy Group in case no. 03-93-EL-ATA.
7. If a Customer had shopped for competitive generation and is subject to a minimum stay with CG&E that extends beyond January 1, 2005, then the minimum stay shall be waived and the Customer may elect under Paragraph 1 for service to be effective January 1, 2005.
8. Nothing in this Agreement modifies or limits any settlement agreement reached by the Parties or their agents in Case No. 99-1658-EL-ETP.
9. The Parties agree to work in good faith to carry out the intent of Paragraph 1, including the development of CRES contracts with terms and conditions as similar as possible to the existing unbundled tariffs. Cinergy will not require surety bonds, deposits or other corporate guarantees under Paragraph 1.
10. If an order in Case No. 03-93-EL-ATA is issued which is acceptable to CG&E but which renders invalid or ineffective any provision of this Agreement to the economic detriment of the

Customers, then Cinergy will provide the same economic value to the impacted Customer(s) through some other mutually acceptable process.

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

- A. The Commission, in Case No. 03-93-EL-ATA, and ongoing fuel cost recovery cases, fails to approve as part of the capped Provider of Last Resort Charge, a fuel cost recovery mechanism such that fuel costs equal the average embedded fuel costs for all consumers in The Cincinnati Gas & Electric Company service territory served by any Cinergy company.
- B. The Commission, in Case No. 03-93-EL-ATA or a related case necessary to carry out the terms and conditions of this Agreement, issues an order unacceptable to Cinergy.
- C. 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.

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:

David F. Boehm, Esq. or
Michael L. Kurtz, Esq.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite 2110
Cincinnati, Ohio 45202

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To Cinergy:

James B. Gainer
Cinergy Services, Inc.
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 regarding the enforcement or breach of this Agreement 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 Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

Entered into on this 19th 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



David Boehm, Counsel
Michael L. Kurtz, Counsel
Boehm, Kurtz, & Lowry
36 East Seventh Street
Suite 2110
Cincinnati, Ohio 45202

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CINERGY.
SERVICES

139 East Fourth Street
P.O. Box 960
Cincinnati, OH 45201-0960

April 4, 2005

Mr. David F. Boehm
Attorney for the Ohio Energy Group
Boehm, Kurtz & Lowry
Attorneys at Law
36 East Seventh Street
Suite 1510
Cincinnati, OH 45202

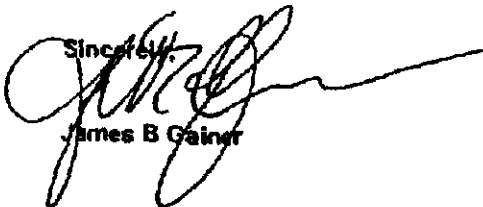
Re: Calculation of RTP Option Payments

Dear Dave:

As you are aware, in the course of negotiating the CRS option agreements with OEG members General Electric and P&G, it was agreed that the terms and conditions of their existing RTP would continue through December 31, 2008. More specifically with respect to GE, it was agreed that the CBL and BDH defined in the RTP would remain in effect for the entire term of the agreement provided there was no substantive increase in their load during the term of the agreement. While both parties have and continue to agree to this handling of the RTP accounts, I am writing on behalf of Cinergy Retail Sales with the purpose of clarifying and gaining written confirmation of the agreement that was reached with respect to the calculation of the option payments to be made quarterly by Cinergy Retail Sales to OEG members taking RTP service.

The Ohio Energy Group, on behalf of its members, and Cinergy Retail Sales, LLC (the Parties), hereby agree that under the Option Agreement dated January 20, 2005, between Cinergy Retail Sales, LLC and General Electric Company acting through GE Transportation (Option Agreement), the amount referred to as "Big G" will be calculated based upon the defined BDH and CBL for General Electric's RTP Account (Account 17462254-01). The parties also agree that all of the riders established in the CG&E rate stabilization plan, with the exception of Rider FPP, will be calculated based upon actual demand and energy consumption rather than the BDH and CBL defined in any RTP Agreement.

Please confirm your agreement to the above by signing and returning the duplicate copy of this letter.

Sincerely,

James B. Gainer


David F. Boehm
Attorney for the Ohio Energy Group

DEPOSITION
EXHIBIT

#15

WIT IT LOCK

333

CONFIDENTIAL PROPRIETARY
TRADE SECRET

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.

CONFIDENTIAL PROPRIETARY
TRADE SECRET

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 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

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

50-17

CONFIDENTIAL PROPRIETARY
TRADE SECRET

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.

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TRADE SECRET

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, 17th 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

CONFIDENTIAL PROPRIETARY
TRADE SECRET

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
17th Floor
Columbus, Ohio 43215

OPTION AGREEMENT

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TRADE SECRET

BY AND BETWEEN

CINERGY RETAIL SALES, LLC

AND

[REDACTED]

This Option Agreement (the "Agreement") is entered into as of this twentieth (20th) day of December 2004 (the "Effective Date") by and between Cinergy Retail Sales, LLC ("CRS") a Delaware limited liability company, and [REDACTED] company (each individually a "Party" or collectively the "Parties").

RECITALS

WHEREAS, [REDACTED]

territory of The Cincinnati Gas & Electric Company ("CG&E").

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, [REDACTED] desires to grant an option to CRS to provide electric service and CRS desires to provide electric service pursuant to the terms outlined herein;

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 ownership of ten (10) percent or more.

"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.

(C)7158-1

DEPOSITION
EXHIBIT

FF 17

WHITLOCK

Cinergy Corporate Records

04018280



Document Code

050

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TRADE SECRET

"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.

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

"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, with respect to a Transaction, that the only excuse for the failure to deliver Energy by CRS or the failure to receive Energy by [REDACTED] 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.

"Maximum Demand" means [REDACTED] combined maximum demand for all of [REDACTED] accounts listed on Exhibit C with The Cincinnati Gas & Electric Company as of January 1, 2005.

"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 [REDACTED] to the Delivery Point.

CONFIDENTIAL PROPRIETARY
TRADE SECRET

ARTICLE II OPTION

- 2.1 [REDACTED] currently receives its electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs rates, or will provide NOTICE by December 30, 2004 that it will take electric service from CG&E in accordance with applicable CG&E tariff requirements. [REDACTED] hereby grants to CRS the exclusive option, upon thirty (30) days notice, to serve 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").
- 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 month of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment"). CRS shall work in good faith with [REDACTED] to establish procedures so that the Option Payment is properly distributed to each applicable [REDACTED] account.
- 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 ^{exercise (AC)} exercises its option, the power sale agreement between CRS and [REDACTED] shall include, among others, the following terms:
- Energy Quantity and Type. CRS shall provide [REDACTED] with Firm, Full Requirements Energy and Capacity up to [REDACTED] Maximum Demand for all of its accounts as of January 1, 2003 ("Quantity"). If during the Term of the Agreement, [REDACTED] has additional load or accounts greater than [REDACTED], then such new load or account is not included within the terms of the Agreement and CRS shall have no obligation to provide Energy and Capacity to [REDACTED] above the Quantity set forth herein.
 - Transmission Service and Charges. Transmission service and charges 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. Unless otherwise agreed

CONFIDENTIAL PROPRIETARY
TRADE SECRET

b. [REDACTED] the transmission service charge shall be equal to transmission charges approved by the Public Utilities Commission of Ohio for the otherwise standard offer rate schedule applicable to each participating GM account or successors to such rate schedule.

- c. Contract Price. The Contract Price is set forth in Exhibits A and 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 Contract Price through the auspices of any regulatory body.
- e. Term. The term of the power sale agreement shall be through December 31, 2008 provided that [REDACTED]

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 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] within fifteen (15) days after the end of each calendar month. The payment shall be submitted to the following account or address:

[REDACTED]

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**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 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 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 [REDACTED]
- 6.3 Other Termination Events. [REDACTED]

[REDACTED]

**ARTICLE VII
LIMITATIONS; DUTY TO MITIGATE**

7.1 Indemnity CRS AGREES TO PROTECT, INDEMNIFY, HOLD HARMLESS AND DEFEND [REDACTED] ITS OFFICERS, DIRECTORS AND EMPLOYEES, AGAINST ALL ACTIONS, CLAIMS, DAMAGES, DEMANDS, SUITS AND OTHER LIABILITIES, INCLUDING ATTORNEY FEES AND OTHER EXPENSES OF LITIGATION ARISING OUT OF, IN WHOLE OR IN PART CRS'S EMPLOYEES, AGENTS AND SUBCONTRACTORS BREACH OF ANY TERM OF THIS CONTRACT, OR ANY ACT OR OMISSION IN THE PERFORMANCE OF THIS AGREEMENT.

[REDACTED] AGREES TO PROTECT, INDEMNIFY, HOLD HARMLESS AND DEFEND CRS, ITS OFFICERS, DIRECTORS AND EMPLOYEES, AGAINST ALL ACTIONS, CLAIMS, DAMAGES, DEMANDS, SUITS AND OTHER LIABILITIES, INCLUDING ATTORNEY FEES AND OTHER EXPENSES OF LITIGATION ARISING OUT OF, IN WHOLE OR IN PART [REDACTED] EMPLOYEES, AGENTS AND SUBCONTRACTORS BREACH OF ANY TERM OF THIS CONTRACT, OR ANY ACT OR OMISSION IN THE PERFORMANCE OF THIS AGREEMENT.

7.2 Limitation of Remedies, Liability and Damages. THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF. FOR BREACH OF ANY PROVISION OF THIS AGREEMENT FOR WHICH AN EXPRESS REMEDY OR MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY PROVIDED HEREIN, NEITHER PARTY SHALL BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES.

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BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE IS SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE LIQUIDATED DAMAGES CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

- 7.3 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 AND SHALL BE BROUGHT IN THE STATE AND FEDERAL COURTS LOCATED IN HAMILTON COUNTY 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 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 of 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 Buyer. 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 sixty (60) 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,

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conditions and risks of this Agreement.

- 9.2 Assignment. This Agreement shall be assignable by CRS without [REDACTED] consent provided such assignment is to any other direct or indirect subsidiary of Cinergy Corp. and provided that such direct or indirect subsidiary has an equivalent or higher credit rating than CRS. This Agreement shall be assignable by [REDACTED] without CRS' consent provided such assignment is to any other direct or indirect subsidiary of [REDACTED] and provided that such direct or indirect subsidiary has an equivalent or higher credit rating than [REDACTED]. 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

[REDACTED]

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- 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 supercedes and replaces in its entirety the agreement between CRS and [REDACTED] dated November 8, 2004. Nothing in this Agreement shall affect the terms and conditions agreed to by Cinergy and the Industrial Energy Users-Ohio pursuant to the agreement dated May 8, 2000 related to the settlement of certain issues in PUCO Case No. 99-1658-EL-BTP.

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]

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Vice President & General Counsel
Title: *Commercial Services Unit*

Date: *January 7, 2005*

Title: [REDACTED]

Date: *December 21, 2004*

As to clause 9.7:

CINERGY CORP.

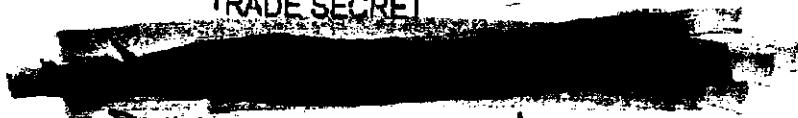
By: *[Signature]*

Title: *Vice President Regulatory and Legislative Strategy*

Date: *January 7, 2005*

508367

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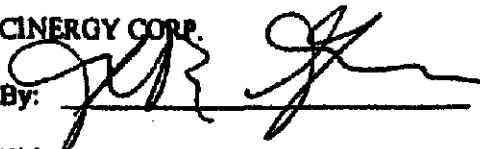
Title: _____

Date: _____

Date: DECEMBER 21, 2001

As to clause 9.7:

CINERGY CORP.

By: _____

Title: _____

Date: _____

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

The CRS option payment will be equivalent to the actual amount paid to The Cincinnati Gas & Electric Company for the following billing charges under its [REDACTED]

[REDACTED]

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EXHIBIT B:

Customer Group: [REDACTED]

CRS Generation Rates for former Rate DS Standard Service Customers

Net Monthly Bill

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

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

[REDACTED] Energy Retail Sales will reimburse the customer for any [REDACTED]

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Exhibit C:
Customer Group: [REDACTED]
Customer Account List

This agreement pertains to the following [REDACTED] accounts:

[REDACTED]

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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 19th day of May 2004. 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:

DEPOSITION
EXHIBIT
#19

WHITLOCK

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 kw/h, except that Jewish Hospital and Children's Hospitals 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 12/31/08 and the term of such generation arrangement will be designated by the Hospital accounts but will extend no longer than 12/31/08.
2. Cinergy shall reimburse the Hospitals for any rate stabilization charge (a component of the provider of last resort charge) 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 and ~~the Hospitals shall~~ actually paid quarterly through the term of this agreement.
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 12/31/08.
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.
9. The Hospitals shall cause the Ohio Hospital Association to support a Stipulation filed by The Cincinnati Gas & Electric Company and the Ohio Hospital Association, 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 or a related case necessary to carry out the terms and conditions of this agreement, fails to issue an order acceptable to Cinergy.
- 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, 15th Floor
Columbus, Ohio 43215-3620**

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 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 19th day of May:

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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., 15th Floor
Columbus, Ohio 43215-3620

Agreement Exhibit One

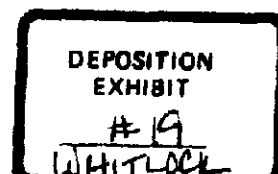
Bethesda North
Children's
Deaconess
Drake Center
Good Samaritan
Health Alliance (Jewish, Christ, Fort Hamilton, and University of
Cincinnati
Hospital)
McCollough
Mercy Fairfield
Mercy Franciscan
Mercy Health Partners
Mercy Hospital Clermont
Mercy Mt. Airey
Mercy Western Hills
Middletown Regional
Select Specialty Hospital
Shriners Burns Hospital Cincinnati
Summit Behavioral Healthcare
TriHealth

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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.



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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 ~~that 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

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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, 15th Floor
Columbus, Ohio 43215-3620

To Cinergy:

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

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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., 15th Floor
Columbus, Ohio 43215-3620

OPTION AGREEMENT

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BY AND BETWEEN

CINERGY RETAIL SALES, LLC

AND

~~2004~~ This Option Agreement (the "Agreement") is entered into as of this 15 day of January 2004 (the "Effective Date") by and between Cinergy Retail Sales, LLC ("CRS") a Delaware limited liability company, and [REDACTED] ("Counterparty"), a [REDACTED] corporation (each individually a "Party" or collectively the "Parties").

RECITALS

WHEREAS [REDACTED] is a member of the Ohio Hospitals Association and is located within the retail delivery service territory of The Cincinnati Gas & Electric Company ("CG&E").

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 Counterparty desire to establish terms and condition 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 ownership of ten (10) percent or more.

"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.

"Counterparty's Maximum Demand" means Counterparty's combined maximum demand for all

Cinergy Corporate Records

04016264



Document Code

204

DEPOSITION
EXHIBIT
20

WHITLOCK

of Counterparty's accounts as of January 1, 2005.

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"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.

"Contract Price" means the price in \$US as set forth in Exhibit B to be paid by Counterparty to CRS for the purchase of the Energy under this Agreement.

"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, with respect to a Transaction, that the only excuse for the failure to deliver Energy by CRS or the failure to receive Energy by the Counterparty is Force Majeure or the other Party's failure to perform.

"Full Requirements Energy" means, except as provided herein, that Counterparty shall purchase all of its retail Energy requirements for its facility from CRS and that Counterparty 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 Counterparty to the Delivery Point.

ARTICLE II OPTION

- 2.1 Counterparty currently receives its electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs rates or will provide notice that it

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will take electric service from CG&E in accordance with applicable CG&E tariff requirements. Counterparty hereby grants to CRS the exclusive option, upon thirty (30) days notice, to serve all of Counterparty's accounts and load set forth in Exhibit C, including any increases in accordance with Section 3.1, as of December 31, 2004 ("Option").

- 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 Counterparty granting CRS this option, CRS agrees to pay Counterparty each calendar year quarter of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment").
- 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, the power sale agreement between CRS and Counterparty shall include the following terms:
- a. Energy Quantity and Type. CRS shall provide Counterparty with Firm, Full Requirements Energy and Capacity up to [REDACTED] Maximum Demand for all of its accounts as of January 1, 2003 ("Quantity"). If during the Term of this Agreement, Counterparty has additional load or accounts greater than [REDACTED] then 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 Counterparty above 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. Charges will be assessed consistent with the otherwise applicable CG&E retail tariff rates and riders as they may be amended, from time to time, or any successor tariff.
 - c. Contract Price. The Contract Price is set forth in Exhibits A and B.
 - d. Change to Prices. As a retail sale, the power sale agreement is not subject to

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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 Counterparty shall seek to modify the Contract Price through the auspices of any regulatory body.

- e. Term. The term of the power sale agreement shall be through December 31, 2008.

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 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 Counterparty within thirty (30) days after the end of each calendar year quarter. The payment shall be submitted to the following account or address:

[insert account information]

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;

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- 6.1.2 the failure of the Defaulting Party to 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 fifteen (15) Business Days after written notice via certified mail 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 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 fifteen (15) Business Days after written notice via certified mail 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.
- 6.3 Other Termination Events. [REDACTED]

ARTICLE VII
LIMITATIONS; DUTY TO MITIGATE

- 7.1 Limitation of Remedies, Liability and Damages. THE PARTIES CONFIRM THAT THE EXPRESS REMEDIES AND MEASURES OF DAMAGES PROVIDED IN THIS AGREEMENT SATISFY THE ESSENTIAL PURPOSES HEREOF. FOR BREACH OF ANY PROVISION OF THIS AGREEMENT FOR WHICH AN EXPRESS REMEDY OR

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MEASURE OF DAMAGES IS PROVIDED, SUCH EXPRESS REMEDY OR MEASURE OF DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY, THE OBLIGOR'S LIABILITY SHALL BE LIMITED AS SET FORTH IN SUCH PROVISION AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. IF NO REMEDY OR MEASURE OF DAMAGES IS EXPRESSLY PROVIDED HEREIN, THE OBLIGOR'S LIABILITY SHALL BE LIMITED TO DIRECT ACTUAL DAMAGES ONLY, SUCH DIRECT ACTUAL DAMAGES SHALL BE THE SOLE AND EXCLUSIVE REMEDY AND ALL OTHER REMEDIES OR DAMAGES AT LAW OR IN EQUITY ARE WAIVED. UNLESS EXPRESSLY PROVIDED HEREIN, NEITHER PARTY SHALL BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, PUNITIVE, EXEMPLARY OR INDIRECT DAMAGES, LOST PROFITS OR OTHER BUSINESS INTERRUPTION DAMAGES, BY STATUTE, IN TORT OR CONTRACT, UNDER ANY INDEMNITY PROVISION OR OTHERWISE. IT IS THE INTENT OF THE PARTIES THAT THE LIMITATIONS HEREIN IMPOSED ON REMEDIES AND THE MEASURE OF DAMAGES BE WITHOUT REGARD TO THE CAUSE OR CAUSES RELATED THERETO, INCLUDING THE NEGLIGENCE OF ANY PARTY, WHETHER SUCH NEGLIGENCE IS SOLE, JOINT OR CONCURRENT, OR ACTIVE OR PASSIVE. TO THE EXTENT ANY DAMAGES REQUIRED TO BE PAID HEREUNDER ARE LIQUIDATED, THE PARTIES ACKNOWLEDGE THAT THE DAMAGES ARE DIFFICULT OR IMPOSSIBLE TO DETERMINE, OTHERWISE OBTAINING AN ADEQUATE REMEDY IS INCONVENIENT AND THE LIQUIDATED DAMAGES CONSTITUTE A REASONABLE APPROXIMATION OF THE HARM OR LOSS.

- 7.2 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 AND SHALL BE BROUGHT IN THE STATE AND FEDERAL COURTS LOCATED IN HAMILTON COUNTY 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 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 of 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 Buyer. 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 sixty (60) 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) there are no bankruptcy proceedings pending or being contemplated by it or, to its knowledge, threatened against it; (e) 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; (f) 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 (g) 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 Counterparty's 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 provided there is some form of confirmation that the receiving party actually received the notice. 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.

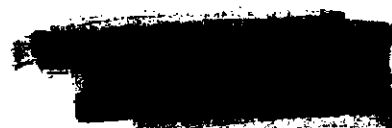
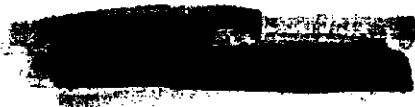
To CRS:

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

Phone - 513-287-2633
Fax__ 513-287-1902

To Counterparty:

Alternate:



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- 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 in its entirety the agreement between CRS and Counterparty dated October 28, 2004 and as well as any other settlement agreements between Counterparty and Cinergy Corp. or any other Cinergy entity related to PUCO Case No. 99-1658-EL-ETP. By signing this Agreement, Counterparty, CRS and Cinergy Corp. (on behalf of all Cinergy entities) agree to this provision.

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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

COUNTERPARTY

By: [Signature]

Title: VP General Counsel
Commercial Business Unit

Date: 1/25/05

Date: 1-05-05

As to clause 9.7:

CINERGY CORP.

By: [Signature]

Title: VP & Gen. Counsel

Date: Jan. 25, 2005

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

The CRS option payment will be equivalent to the actual amount paid to The Cincinnati Gas & Electric Company for the following billing charges under its:

Customer Group: [REDACTED]
(RTP Agreement)
Quarterly Option Payment Calculation

The CRS option payment will be equivalent to the following calculation:

Actual Amount paid to The Cincinnati Gas & Electric Company under its

Less the sum of following:

Plus**Plus**

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EXHIBIT B:

Customer Group: [REDACTED]

CRS Generation and Transmission Rates for former Rate DP Standard Service Customers

Net Monthly Bill

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 [REDACTED]
Additional kilowatts [REDACTED]

(b) Energy Charge

Billing Demand times 300 [REDACTED]
Additional kilowatt-hours [REDACTED]

[REDACTED]
Customer will pay monthly an amount equivalent to [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.

[REDACTED]
Energy Retail Sales will reimburse the customer for [REDACTED]
[REDACTED]

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

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

Generation Charges**(b) Demand Charge**

First 1,000 kilowatts [REDACTED]
Additional kilowatts [REDACTED]

(b) Energy Charge

Billing Demand times 300 [REDACTED]
Additional kilowatt-hours [REDACTED]

[REDACTED]
Customer will pay monthly an amount equivalent to [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.

[REDACTED]
Energy Retail Sales will reimburse the customer for [REDACTED]
[REDACTED]

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EXHIBIT B:**Customer Group:** [REDACTED]

CRS Generation Rates for Former Rate DP Real Time Pricing Customers
(Consistent with RTP Rider in effect prior to the Transition Case)

Net Monthly Bill

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

Real Time Pricing Program Charge [REDACTED]

Generation Charges**(c) Demand Charge**

First 1,000 kilowatts [REDACTED]

Additional kilowatts [REDACTED]

(b) Energy Charge

Billing Demand times 300 [REDACTED]

Additional kilowatt-hours [REDACTED]

Real Time Pricing Incremental Cost [REDACTED]

Universal Service Fund Charge [REDACTED]

Energy Fuel Component Charge [REDACTED]

[REDACTED]
Customer will pay [REDACTED] amount equivalent 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.

[REDACTED]
Cinergy Retail Sales will reimburse the customer for any [REDACTED]

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Exhibit C:
Customer Group: [REDACTED]
Customer Account List

This agreement pertains to the following [REDACTED] accounts:

[REDACTED]

Customer Group: [REDACTED]
Customer Account List (RTP Account)

This agreement pertains to the following [REDACTED] account:

[REDACTED]

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OCC EXHIBIT _____

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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PREPARED TESTIMONY

of

BETH E. HIXON

**ON BEHALF OF THE
OFFICE OF THE OHIO CONSUMERS' COUNSEL
10 West Broad St., Suite 1800
Columbus, OH 43215**

Date: March 9, 2007

TABLE OF CONTENTS

	<u>PAGE</u>
I. INTRODUCTION.....	1
II. PURPOSE OF TESTIMONY	3
III. CASE OVERVIEW -- POST-MDP SERVICE AND POST-MDP REMAND	4
IV. The Side Agreements	11
A. The Pre-PUCO Order Agreements.....	11
B. The Pre-Rehearing Agreements	30
C. The Option Agreements	48
V. THE IMPORTANCE OF THE SIDE AGREEMENT TO THIS CASE	56
A. Substantial Support for the Rate Plans	58
B. Market Development	59
C. Regulatory Problems	68
D. Exclusion of Parties and Customer Classes from Negotiations	69
VI. CONCLUSION	73

BEH – ATTACHMENTS
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- 1 Beth E. Hixon – Utility Testimony
- 2 May 19, 2004 Agreement between CRS and the Hospitals
- 3 May 19, 2004 Agreement between CRS and certain OEG members
- 4 May 28, 2004 Agreement between Cinergy Corp., through its agent CRS, and
IEU-Ohio
- 5 June 7, 2004 Agreement between Cinergy Corp. and **Cognis**
- 6 July 7, 2004 Agreement between CRS and **Kroger**
- 7 May 2004 Documents from OHA Response to OCC No. RP6
- 8 November 8, 2004 Agreement between CRS and the Hospitals
- 9 November 22, 2004 Agreement between CRS and certain OEG members

- 10 November 8, 2004 Agreement between Cinergy Corp., through its agent CRS,
and IEU-Ohio
- 11 October 28, 2004 Agreement between Cinergy Corp. and Cognis
- 12 November 22, 2004 Agreement between CRS and Kroger
- 13 Documents from OHA Response to OCC No. RP6
- 14 [REDACTED]ucher
- 15 [REDACTED]nvoice
- 16 November 2004 DERS Response to OCC Interrogatory No. RI51
- 17 Option Agreements
- 18 Chart of CRS Agreements
- 19 Requests for Payments
- 20 DE-Ohio Response to OCC Interrogatory No. RI 103
- 21 May 15, 2006 E-mail from J. Ziolkowski to J. Gomez
- 22 DERS Financial Statements
- 23 January 1, 2005 E-mail from S. Schrader to G. Ficke
- 24 [REDACTED]otification letters to CG&E

1 **I. INTRODUCTION**

2

3 **Q1. PLEASE STATE YOUR NAME, ADDRESS AND POSITION.**

4 **A1.** My name is Beth Hixon. My business address is 10 West Broad Street, Suite
5 1800, Columbus, Ohio 43215-3485. I am employed by the Office of the Ohio
6 Consumers' Counsel ("OCC" or "Consumers' Counsel") as Assistant Director of
7 Analytical Services.

8

9 **Q2. WOULD YOU PLEASE SUMMARIZE YOUR EDUCATIONAL AND**
10 **PROFESSIONAL HISTORY?**

11 **A2.** I received a Bachelor of Business Administration degree in accounting from
12 Ohio University in June 1980. For the period June 1980 through April 1982, I
13 was employed as an Examiner in the Field Audits Unit of the Ohio
14 Rehabilitation Services Commission ("ORSC"). In this position I performed
15 compliance audits of ORSC grants to, and contracts with, various service
16 agencies in Ohio.

17

18 In May 1982, I was employed in the position of Researcher by the OCC. In
19 1984, I was promoted to Utility Rate Analyst Supervisor and held that position
20 until November 1987 when I joined the regulatory consulting firm of Berkshire
21 Consulting Services. In April 1998, I returned to the OCC and have
22 subsequently held positions as Senior Regulatory Analyst, Principal Regulatory
23 Analyst and Assistant Director of Analytical Services.

1 **Q3. WHAT EXPERIENCE DO YOU HAVE IN THE AREA OF UTILITY**
2 **REGULATION?**

3 **A3.** In my positions with the OCC, and as a consultant with Berkshire Consulting
4 Services, I have performed analysis and research in numerous cases involving
5 utilities' base rates, fuel and gas rates and other regulatory issues. I have worked
6 with attorneys, analytical staff and consultants in preparation for, and litigation
7 of, utility proceedings involving Ohio's electric companies, the major gas
8 companies and several telephone and water utilities. At the OCC I also chair the
9 OCC's cross-functional internal electric and gas teams, participate and/or direct
10 special regulatory projects regarding energy issues and provide training on
11 regulatory technical issues.

12
13 **Q4. HAVE YOU PREVIOUSLY SUBMITTED TESTIMONY BEFORE**
14 **REGULATORY COMMISSIONS?**

15 **A4.** Yes. I have submitted testimony before the Public Utilities Commission of Ohio
16 ("PUCO" or "Commission") in the cases listed in Attachment 1. As shown on
17 this Attachment, I have also submitted testimony in a case before the Indiana
18 Utility Regulatory Commission.

19

1 **Q5. WHAT DOCUMENTS HAVE YOU REVIEWED IN THE PREPARATION OF**
2 **YOUR TESTIMONY?**

3 **A5.** I reviewed various documents from Duke Energy Ohio's Case No. 03-93-EL-
4 ATA and the cases consolidated with that case for hearing and decision in 2004.
5 ("Post-MDP Service Case") Since the Post-MDP Service Case began when the
6 regulated electric distribution utility now known as Duke Energy Ohio was
7 known as Cincinnati Gas & Electric I will refer to that utility in my testimony as
8 either Duke Energy Ohio ("DE-Ohio") or Cincinnati Gas and Electric. ("CG&E")
9 Documents from the Post-MDP Service Case which I reviewed include the
10 PUCO's December 9, 2003 Entry, September 29, 2004 Opinion and Order and
11 November 23, 2004 Entry on Rehearing and various CG&E filings in the case.
12 From the portion of the current case after the remand from the Supreme Court of
13 Ohio in 2006 ("Post-MDP Remand Case") I have reviewed responses to OCC
14 discovery issued after the Remand, documents provided pursuant to subpoenas by
15 the OCC and transcripts of depositions taken by the OCC.

16

17 **II. PURPOSE OF TESTIMONY**

18

19 **Q6. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS**
20 **PROCEEDING?**

21 **A6.** The purpose of my testimony is to bring to the attention of the Commission
22 certain side agreements and arrangements made by CG&E-affiliated companies
23 with CG&E customers who were parties to the Post-MDP Service Case or CG&E

1 customers who belonged to groups that were parties to the case ("Customer
2 Parties"). The side agreements were a part of CG&E's efforts to obtain support
3 for PUCO approval of a rate stabilization plan acceptable to CG&E. I
4 recommend the Commission review and take into consideration these side
5 agreements in this Post-MDP Remand Case.

6
7 **III. CASE OVERVIEW -- POST-MDP SERVICE AND POST-MDP REMAND**

8
9 ***Q7. WHEN DID THIS CASE COMMENCE?***

10 ***A7.*** PUCO Case No. 03-93-EL-ATA was initiated when CG&E filed an Application
11 on January 10, 2003 to modify its non-residential generation rates to provide for
12 market-based standard service offer pricing and to establish an alternative
13 competitive-bid service rate option subsequent to the market development period.
14 This 2003 CG&E proposal for a competitive bidding process ("CBP") and a
15 market-based standard service offer ("MBSSO") were collectively described as a
16 Competitive Market Option ("CMO").¹ Numerous parties and the Commission's
17 staff ("Staff") filed comments in March and April 2003 on CG&E's proposals.

18
19 On December 9, 2003, the Commission issued an entry that, among other things,
20 consolidated various pending matters regarding CG&E and requested that CG&E
21 file a "rate stabilization plan"² ("RSP") in keeping with the Commission's policy

¹ January 2003 Application at 1

² Entry at 5 (December 9, 2004).

1 statements regarding the post-MDP pricing of generation service by other utilities
2 in Ohio. In several electric cases, the PUCO established three goals for a rate
3 stabilization plan:

- 4 (1) rate certainty for consumers,
5 (2) financial stability for the utility and
6 (3) the further development of competitive markets³

7
8 ***Q8. WHAT WAS CG&E'S RESPONSE TO THE PUCO'S DECEMBER 2003***
9 ***REQUEST TO FILE AN RSP?***

10 ***A8.*** On January 26, 2004 CG&E filed an Electric Reliability and Rate Stabilization
11 Plan ("ERRSP") with the PUCO. CG&E asked the Commission to either (1)
12 adopt the Competitive Market Option filed by CG&E in January 2003, "consistent
13 with the language and intent of R.C. Chapter 4928," or (2) adopt the ERRSP
14 CG&E had just filed in January 2004, which contained rates for generation
15 service proposed by CG&E that included non-bypassable charges.⁴

16
17 ***Q9. HOW DID THE POST-MDP SERVICE CASE PROCEED AFTER JANUARY,***
18 ***2004?***

19 ***A9.*** Following CG&E'S filing of its ERRSP, numerous parties moved to intervene in
20 this proceeding, a procedural schedule was set by the Attorney Examiner and
21 discovery was conducted by parties. CG&E submitted pre-filed testimony on

³ First Energy, Case No. 03-1461-EL-UNC, Entry at 4-5 (September 23, 2003); Cincinnati Gas & Electric, Case No. 03-93-EL-ATA, Order at 15 (September 29, 2004).

⁴ January 2004 Application at 8.10 and 11.

1 April 15, 2004 in which it described a "revised ERRSP." Staff filed testimony on
2 April 22, 2004 and intervenors, including the OCC, filed testimony on May 6,
3 2004.

4
5 An evidentiary hearing began on May 17, 2004 but was subsequently delayed
6 when a stipulation was filed on May 19, 2004 ("Stipulation") in these cases that
7 described another plan of service ("ERRSP Stipulation Plan"). CG&E, the
8 PUCO's Staff, First Energy Solutions, Dominion Retail, Green Mountain Energy,
9 People Working Cooperatively, Communities for Action, Cognis, Kroger, the
10 Industrial Energy Users - Ohio ("IEU-Ohio"), the Ohio Energy Group ("OEG"),
11 and the Ohio Hospital Association ("OHA") executed the Stipulation. The IEU-
12 Ohio, OEG, and OHA are organizations whose members are major users of
13 electricity. The Ohio Marketers Group ("OMG," consisting of MidAmerican
14 Energy, Strategic Energy, Constellation Power Source, Constellation NewEnergy
15 and WPS Energy Services), PSEG Energy Resources, the National Energy
16 Marketers Association, Ohio Partners for Affordable Energy, the OCC and the
17 Ohio Manufacturers Association -- the latter two organizations representing broad
18 customer groups -- did not execute the Stipulation.

19
20 ***Q10. HOW DID THE FILING OF THIS STIPULATION IMPACT THE POST-***
21 ***MDP SERVICE CASE?***

22 ***A10.*** The parties who did not execute the Stipulation were permitted a very short period
23 during which they could inquire into the Stipulation by means of discovery. The

OCC sought copies of side agreements between CG&E and other parties to the Post-MDP Service Case, and CG&E refused to provide copies of such agreements. The first witness appeared at hearing on May 20, 2004 (based on pre-filed testimony not related to the Stipulation). The OCC began the hearing on May 20, 2004 with an oral Motion to Compel Discovery of the side-agreements. The Motion to Compel Discovery was denied.⁵

CG&E filed supplemental testimony on May 20, 2004 in support of the Stipulation, and Staff Witness Cahaan submitted testimony supporting the Stipulation on May 24, 2004. The OCC and OMG submitted testimony in opposition to the Stipulation on May 26, 2004. The hearing resumed on May 26, 2004 (after two days in recess) for the presentation of the testimony by witnesses for CG&E, the OCC, the OMG and the Staff.

Q11. WHAT WERE THE MAJOR POST-HEARING LANDMARKS IN THESE PROCEEDINGS?

A11. The Commission's Order in the Post-MDP Service Case was issued on September 29, 2004, which approved the May 19, 2004 Stipulation with modifications and conditions. Several parties, including CG&E and the OCC, filed applications for rehearing on October 29, 2004. CG&E asked the PUCO to either i) approve its original CMO proposal; ii) approve the May 19, 2004 Stipulation (i.e. unaltered by the PUCO); or iii) approve a new alternative proposal rate plan ("Alternative

⁵ Tr. Vol. II at 9 - 15.

1 Proposal"). This Alternative Proposal had an array of new and different charges
2 that had not been investigated or been subject to a hearing.

3
4 CG&E's Alternative Proposal was built on the four conditions placed by the
5 PUCO on the Stipulation in its September 29, 2004 Order and introduced new
6 charges and modified previously proposed charges. In a November 23, 2004 First
7 Entry on Rehearing, the PUCO adopted (in principal part) the Alternative
8 Proposal. The Commission ordered CG&E to make certain filings with the
9 PUCO before some of the rate increases provided for in the Alternative Proposal
10 could be placed into effect.

11
12 The OCC submitted its second application for rehearing, which was denied in a
13 Second Entry on Rehearing dated January 19, 2005. The Commission's last
14 action was an "Order on Rehearing" on April 13, 2005, that addressed the return
15 pricing methodology for nonresidential shopping customers.

16
17 The OCC filed a Notice of Appeal on May 23, 2005. After argument before the
18 Supreme Court of Ohio, the Court issued an opinion on November 22, 2006. The
19 Court decided that the PUCO erred by failing to compel the disclosure of side
20 agreements and erred by failing to properly support modifications to post-MDP
21 rates and made in its entry on rehearing.⁶ The Court remanded the case for
22 additional consideration by the Commission.

⁶ *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at *95
("Consumers' Counsel 2006").

1 An abbreviated timeline is illustrated by the chart below showing some of the key
 2 activities in the Post-MDP Service Case which I have discussed.

Post-MDP Service Case: DE-Ohio (CG&E) Case No. 03-93-EL-ATA et al.	
Date	Filing/Event/Activity
1/10/03	CG&E Competitive Market Option Application
3/03 & 4/03	Comments on CG&E's CMO
12/9/03	Entry requesting CG&E to file an RSP
1/26/04	CG&E Proposed CMO or ERRSP Application
3/9/04	Objections to CG&E proposed ERRSP
5/17/04	Evidentiary hearing begins
5/19/04	Stipulation between CG&E and parties filed
5/20/04	Evidentiary hearing
5/20/04	Supplemental Testimony of CG&E filed
5/24/04	Supplemental Testimony of PUCO Staff filed
5/26/04	Evidentiary Hearing
5/26/04	Supplemental Testimony of Intervenors filed
9/29/04	PUCO Opinion and Order
10/29/04	Applications for Rehearing (including CG&E's Alternative Proposal)
11/23/04	First Entry on Rehearing
12/27/04	Second Applications for Rehearing
1/19/05	Second Entry on Rehearing
4/13/05	Order on Rehearing on return pricing
5/23/05	OCC Notice of Appeal to Supreme Court
11/22/06	Supreme Court Order remanding to PUCO

1 ***Q12. WHAT HAS OCCURRED SUBSEQUENT TO THE SUPREME COURT'S***
2 ***NOVEMBER 2006 DECISION IN THIS CASE?***

3 ***A12.*** On November 29, 2006, the Attorney Examiner issued an Entry in the above-
4 captioned cases⁷ that provided for a "hearing . . . to obtain the record evidence
5 required by the court" and ordered that a prehearing conference be held on
6 December 14, 2006.⁸ The above-captioned cases were consolidated ("Post-MDP
7 Remand Case"). A procedural Entry was issued on February 1, 2007 that, among
8 other matters, set a cut-off date for discovery and a hearing date for March 19,
9 2007.

10

11 ***Q13. HAS THE OCC'S DISCOVERY REVEALED ANYTHING SIGNIFICANT***
12 ***THAT YOU BELIEVE SHOULD BE CONSIDERED BY THE***
13 ***COMMISSION?***

14 ***A13.*** Yes. The OCC's discovery activities in the Post-MDP Remand Case have
15 revealed the manner in which CG&E, using its affiliated companies and side
16 agreements never revealed in the Post-MDP Service Case hearings, was able to
17 eliminate the opposition by large users of electricity to CG&E's rate plan
18 proposals. My testimony discusses the many reasons the existence of these side
19 agreements is important for the Commission's consideration.

20

⁷ The Commission's November Entry did not include Case No. 06-1068-EL-UNC regarding proposed FPP rate increases for 2007. Case No. 06-1068-EL-UNC was added by the Attorney Examiner during the prehearing conference conducted on December 14, 2006.

⁸ November Entry at 3. ¶(7).

1 **IV. THE SIDE AGREEMENTS**

2

3 **A. THE PRE-PUCO ORDER AGREEMENTS**

4

5 ***Q14. WHAT ARE YOU REFERRING TO BY THE TERM "PRE-PUCO ORDER***
6 ***AGREEMENTS"?***

7 ***A14.*** I am using the term "Pre-PUCO Order Agreements" to refer to several agreements
8 made by CG&E-affiliated companies with Customer Parties to the Post-MDP
9 Service Case which were entered into prior to the PUCO's September 29, 2004
10 Order and which were also related to the May 19, 2004 Stipulation in this case.
11 The agreements were entered into during May through July 2004.

12

13 ***Q15. WHO WERE THE PARTIES TO THESE AGREEMENTS?***

14 ***A15.*** I am aware of five Pre-PUCO Order Agreements between CG&E-affiliated
15 companies and Customer Parties to the Post-MDP Service Case, as shown in the
16 table below and contained in noted Attachments to my testimony. In four of
17 these agreements, the CG&E-affiliated company known as Cinergy Retail Sales,
18 LLC was involved, acting in one agreement as an "agent" for Cinergy Corp. In
19 the fifth agreement, the CG&E-affiliated company was Cinergy Corp.

1

Pre-PUCO Order Agreements			
Date	Agreement between:	And:	Attachment
5/19/04	Cinergy Retail Sales, LLC	Hospitals	2
5/19/04	Cinergy Retail Sales, LLC	AK Steel, Air Products & Chemicals, Ford Motor, GE Aircraft Engines, Proctor & Gamble (members of the Ohio Energy Group (OEG))	3
5/28/04	Cinergy Corp through its agent, Cinergy Retail Sales, LLC	Industrial Energy Users-Ohio (IEU-Ohio) for Marathon and General Motors ⁹	4
6/7/04	Cinergy Corp.	Cognis	5
7/7/04	Cinergy Retail Sales, LLC	Kroger	6

2

3 **Q16. WHAT IS THE COMPANY KNOWN AS CINERGY RETAIL SALES, LLC?**

4 **A16.** Cinergy Retail Sales, LLC ("CRS") was formed on December 9, 2003 in the state
5 of Delaware by Cinergy Capital & Trading, Inc., which is a subsidiary of Cinergy
6 Investments, Inc. Cinergy Investments, Inc. is a subsidiary of Cinergy Corp.⁹ At
7 the time of these Pre-PUCO Order Agreements; CRS was not a Certified Retail
8 Electric Supplier in Ohio. CRS applied for certification with the PUCO on
9 August 23, 2004 and was issued certification on October 7, 2004 effective
10 September 23, 2004.¹⁰ At the time of its certification application, CRS indicated
11 that it was not currently serving any retail or wholesale customers, but that its

⁹ August 23, 2004 Application by Cinergy Retail Sales, LLC at Exhibits A-13 and A-14, Case No. 04-1323-EL-CRS.

¹⁰ October 7, 2004 Certificate 04-124(1) issued in Case No. 04-1323-EL-CRS.

1 principal business interest was providing gas and electric service to retail
2 customers.¹¹

3
4 In April 2006 CRS changed its name to Duke Energy Retail Sales, LLC
5 ("DERS").¹² DERS remained a subsidiary of Cinergy Capital & Trading, Inc.
6 Cinergy Capital & Trading, Inc. remained a subsidiary of Cinergy Investments,
7 Inc. whose parent company is Cinergy Corp. Duke Energy Corporation owns
8 Cinergy Corp. DERS did not serve any customers as of December 31, 2005 and
9 had neither Ohio intrastate sales of electricity nor gross receipts for 2005.¹³

10
11 ***Q17. HOW ARE THESE PRE-PUCO ORDER AGREEMENTS RELATED TO THE***
12 ***POST-MDP SERVICE CASE?***

13 ***A17.*** While each Pre-PUCO Order Agreement had specific terms and conditions, the
14 common threads among these five agreements between CG&E-affiliated
15 companies and CG&E customers who were parties to the Post-MDP Service Case
16 ("Customer Parties") are that each agreement dealt with the (1) provision of
17 generation service to Customer Parties during the proposed ERRSP period, (2)
18 reimbursement of proposed ERRSP charges to Customer Parties, (3) support by
19 Customer Parties for CG&E's Stipulation in the Post-MDP Service

¹¹ August 23, 2004 Application by Cinergy Retail Sales, LLC at Exhibit A-14, Case No. 04-1323-EL-CRS.

¹² May 30, 2006 DERS filing, Case No. 04-1323-EL-CRS.

¹³ 2005 Intrastate Annual Report filed by DERS with the PUCO on August 3, 2006.

Case and (4) termination provisions tied to the outcome in the Post-MDP Service Case.

Q18. UNDER THE STIPULATION WHICH THE CUSTOMER PARTIES AGREED TO SUPPORT PURSUANT THE PRE-PUCO ORDER AGREEMENTS, WHAT WERE CG&E'S PROPOSED MBSSO COMPONENTS?

A18. CG&E proposed the following MBSSO components in its ERRSP Stipulation Plan in May, 2004:

Market Based Standard Service Offer (MBSSO) Components CG&E Stipulation (May 19, 2004)		
9/29/04 PUCO Opinion & Order at 7-11		
	Residential (eff. 1/1/06)	Non-Res. (eff. 1/1/05)
Tariff Generation rate	Bypassable	Bypassable
Rate Stabilization Charge (RSC)	Bypassable for first 25% of load switching	Bypassable for first 25% of load switching
Annually Adjusted Component (AAC), including Emission Allowances (EA)	Non-bypassable	Non-bypassable
Fuel & Purchased Power (FPP)	Bypassable	Bypassable

Q19. HOW WERE THE PRE-PUCO ORDER AGREEMENTS RELATED TO THE PROVISION OF GENERATION DURING THE PROPOSED ERRSP PERIOD?

A19. In each Pre-PUCO Order Agreement, CG&E customers agreed to general and customer-specific terms and conditions related to their ability to purchase generation service during the period 2005 through 2008. As can be seen in all Agreements attached to my testimony, the provisions related to generation service during this time (and also provisions related to reimbursement of payments made

1 to CG&E) are quite detailed and sometimes specified terms according to when
 2 generation would be purchased from CRS, or from another competitive retail
 3 electric service ("CRES") provider. In addition, some Agreements have
 4 generation service terms for specific individual customers. Yet overall, each
 5 Agreement does deal with Customer Parties' generation service during the
 6 proposed ERRSP period, so I will present provisions which illustrate this. For
 7 example, under a provision in the May 19, 2004 Agreement between CRS and the
 8 Hospitals, beginning January 1, 2005, CRS would offer to sell retail electric
 9 generation service to the Hospitals at a:

10 fixed rate equal to the applicable tariff rate" of The Cincinnati
 11 Gas & Electric Company's unbundled generation rate in Case
 12 No. 99-1658-EL-ETP "~~less the regulatory transition charge~~
 13 ~~approved in the same case less one (1) mill per kwht~~ . . .¹⁴

14 The offer by CRS was an option to the Hospitals to accept anytime
 15 prior to December 31, 2008.

16
 17 ***Q20. DID THE PRE-PUCO ORDER AGREEMENTS CONTAIN***
 18 ***ARRANGEMENTS FOR CUSTOMERS TO BE REIMBURSED FOR***
 19 ***PORTIONS OF ERRSP CHARGES?***

20 ***A20.*** Yes. These Agreements contained provisions, under which Customer Parties
 21 would be reimbursed by CRS, or another CG&E-affiliated company, for portions
 22 of various ERRSP charges that CG&E was proposing at that time (i.e. May

¹⁴ Attachment 2 at Date Stamp 243, Provision 1.

1 through July 2004). As an example, under provisions in the May 19, 2004
2 Agreement between CRS and the Hospitals, during 2005 through 2008 CRS was
3 to reimburse the Hospitals for "any rate stabilization charge (a component of the
4 provider of last resort charge)"¹⁵ paid by the Hospitals to CG&E.

5
6 ***Q21. UNDER THE PRE-PUCO ORDER AGREEMENTS DID CUSTOMER***
7 ***PARTIES AGREE TO SUPPORT CG&E'S PROPOSED ERRSP?***

8 ***A21.*** Yes. Such support was obtained through these Pre-PUCO Order Agreements by
9 provisions under which Customer Parties, or groups to which they are members,
10 agreed to support CG&E's proposed ERRSP. In the May 19, 2004 Agreement
11 between CRS and the Hospitals, provision 9 states:

12 The Hospitals shall cause the Ohio Hospital Association to
13 support a Stipulation filed by The Cincinnati Gas & Electric
14 Company and the Ohio Hospital Association, in case no. [sic]
15 03- 93-EL-ATA and any related litigation.¹⁶

16 The Stipulation referenced in this provision refers to the Stipulation filed on May
17 19, 2004 in the Post-MDP Service Case.

18
19
20

¹⁵ Attachment 2 at Bate stamp 348, Provision 2.

¹⁶ Attachment 2 at Bate stamp 349, Provision 9.

1 ***Q22. WERE THE PRE-PUCO ORDER AGREEMENTS DEPENDENT UPON THE***
2 ***OUTCOME OF THE POST-MDP SERVICE CASE AS DECIDED BY THE***
3 ***PUCO?***

4 ***A22.*** Yes, the conditions under which these agreements would terminate were tied to
5 the PUCO's decision in the Post-MDP Service Case. For example, in the May 19,
6 2004 Agreement between CRS and the Hospitals, one condition under which the
7 agreement would terminate was:

8 The Public Utilities Commission of Ohio, in Case No. 03-93-
9 EL-ATA or a related case necessary to carry out the terms and
10 conditions of this agreement, fails to issue an order acceptable
11 to Cinergy.¹⁷

12 In this Agreement, the term "Cinergy" was used to refer to CRS.

13
14 ***Q23. YOU HAVE USED THE CRS AND HOSPITALS AGREEMENT AS AN***
15 ***EXAMPLE, HOW DID THE COMMON THREADS YOU DESCRIBE APPLY***
16 ***TO THE OTHER PRE-PUCO ORDER AGREEMENTS?***

17 ***A23.*** The terms and conditions in the other agreements did differ from the CRS and
18 Hospitals agreement, but the common threads can be seen in each agreement's
19 specific provisions. For the May 19, 2004 Agreement between the CRS and OEG
20 members, Customer Parties during 2005 through 2008 could choose from two
21 options for the provision of generation service. They could either (a) purchase
22 competitive retail electric generation service from CRS or (b) accept CG&E's

¹⁷ Attachment 2 at Bate stamp 549, at B.

1 MBSSO price as approved by the PUCO in the Post-MDP Service Case, but
2 retain rights to switch to competitive retail electric service providers.
3

4 CRS would reimburse the Customer Parties for portions of various proposed
5 ERRSP charges, depending on the generation option chosen. If option (a) (i.e.
6 generation from CRS) was chosen, then CRS would reimburse for "actual
7 Regulatory Transition Charges, Rate Stabilization Charges and the annually
8 adjusted component of the Provider of Last Resort charges paid to The Cincinnati
9 Gas & Electric Company."¹⁸ If, under option (b), a Customer Party accepted
10 CG&E's MBSSO but later switched to a CRES provider, CRS would reimburse
11 the Customer Party for "one-half of the annually adjusted component of the
12 Provider of Last Resort charges (such charges do not include the Rate
13 Stabilization Charge of the Provider of Last Resort charge)"¹⁹ that the Customer
14 Party paid to CG&E. Support by Customers Parties for CG&E's proposed
15 ERRSP through the Stipulation was also contained in this agreement:

16 The Customers shall cause the Ohio Energy Group to support a
17 Stipulation filed by The Cincinnati Gas & Electric Company
18 and the Ohio Energy Group in case no.(sic) 03-93-EL-ATA.²⁰
19

¹⁸ Attachment 3 at Bate stamp 328, Provision 1(a).

¹⁹ Attachment 3 at Bate stamp 329, Provision 1 (b).

²⁰ Attachment 3 at Bate stamp 330, Provision 6.

1 A provision tied to the outcome in the Post-MDP Service Case in this agreement
2 was similar to that in the Agreement between CRS and the Hospitals. The
3 agreement would terminate if:

4 The Commission, in Case No. 03-93-EL-ATA or a related case
5 necessary to carry out the terms and conditions of this

6 Agreement, issues an order unacceptable to Cinergy

7 Cinergy in this agreement refers to CRS. Another provision in the agreement tied
8 to the outcome in the Post-MDP Service Case depended on whether PUCO's
9 order in the Post-MDP Service Case was acceptable to the regulated electric
10 distribution company, CG&E:

11 If an order in Case No. 03-93-EL-ATA is issued which is
12 acceptable to CG&E but which renders invalid or ineffective
13 any provision of this Agreement to the economic detriment of
14 the Customers, then Cinergy [CRS] will provide the same
15 economic value to the impacted Customer(s) through some
16 other mutually acceptable process.²¹

17
18 ***Q24. WHAT PROVISIONS IN THE PRE-PUCO ORDER AGREEMENT WITH***
19 ***IEU-OHIO WERE RELATED TO THE FOUR AREAS YOU HAVE***
20 ***DESCRIBED AS COMMON THREADS?***

21 ***A24.*** Part of the terms and conditions in the May 28, 2004 Agreement between Cinergy
22 Corp, through its agent CRS, and IEU-Ohio for the benefit of certain CG&E

²¹ Attachment 3 at Page Stamp 130, Provision 19

customers, related to the provision of generation service to customers during 2005 through 2008. For customers that were currently purchasing generation from a CRES not affiliated with Cinergy Corp.; then CRS (or another Cinergy affiliated provider), would begin, no later than by January 1, 2006, to supply generation to those customers.²²

CRS would reimburse those customers for portions of proposed ERRSP charges and other CG&E charges they paid to CG&E, depending upon the year and depending on when customers purchased generation from CRS. For example, if customers began purchasing generation from CRS on January 1, 2005, they would be reimbursed by CRS for:

the as billed and actual full amount of the RTC, the as billed and actual full amount of any Rate Stabilization Charge, and half of the amount billed to Customers as the POLR component, actual paid to the Cincinnati Gas & Electric Company.

Beginning in 2006, those customers would be reimbursed for the full amount billed to them and paid to CG&E for RTC, Rate Stabilization Charges and half of the POLR component.²³

²² Attachment 4 at Bate stamp 342, Provision 1.

²³ Attachment 4 at Bate stamp 343, Provision 1.

Under Provision 7 of this May 28, 2004 Agreement:

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 reservations as IEU-Ohio has communicated to Cinergy.²⁴

The term "Cinergy" as used in this May 28, 2004 Agreement refers to Cinergy Corp. through its agent CRS.

A provision tied to the outcome in the Post-MDP Service Case in this May 28, 2004 Agreement with IEU-Ohio was similar to those in the Agreements between CRS and the Hospitals and OEG members. The agreement would terminate if:

The Commission, in Case No. 03-93-EL-ATA, fails to issue a final order acceptable to Cinergy [Cinergy Corp., through its agent CRS]²⁵

Q25. DID THE PRE-PUCO ORDER AGREEMENT WITH COGNIS CONTAIN PROVISIONS SIMILAR TO AGREEMENTS WITH THE HOSPITALS, OEG MEMBERS AND IEU-OHIO?

A25. Yes. The Pre-PUCO Order Agreement with **Cognis** did contain provisions dealing with (1) provision of generation service during the proposed ERRSP period, (2) reimbursement of proposed ERRSP charges, (3) support for CG&E's

²⁴ Attachment 4 at Page stamp 144, Provision 7

²⁵ Attachment 4 at Page stamp 144, at A.

1 May 2004 Stipulation in the Post-MDP Service Case and (4) termination
2 provisions tied to the outcome in the Post-MDP Service Case. However, the
3 Agreement with Cognis in some respects differed from the three Agreements I've
4 just discussed.

5
6 First, the June 7, 2004 Agreement is between Cinergy Corp. and Cognis. CRS is
7 not a party to the agreement and not mentioned in relationship to the provision of
8 competitive generation service. For generation service during the proposed
9 ERRSP period, Cognis agreed to purchase generation "pursuant to its current
10 tariff and pursuant to the Electric Reliability and Rate Stabilization Plan approved
11 by the Public Utilities Commission of Ohio."²⁶ Thus, during the proposed
12 ERRSP period Cognis would purchase generation from CG&E.

13
14 Second, under this Pre-PUCO Order Agreement, Cinergy Corp. would reimburse
15 Cognis for portions of the proposed ERRSP's annually adjusted component, for:

16 the first 4% of the annual adjusted component of Provider of
17 Last Resort Charges actually paid by Cognis during the
18 calendar year 2005; the first 8% paid in 2006; the first 12%
19 paid in 2007 and the first 16% actually paid in 2008.²⁷

20

²⁶ Attachment 5 at 1 (first page not numbered), Provision 1.

²⁷ Attachment 5 at 2, Provision 2.

CONFIDENTIAL - Hixon Testimony Case No. 03-93-EL-ATA

Provisions in this Pre-PUCO Order Agreement with Cognis related to support of CG&E's ERRSP and termination tied to the outcome of the Post-MDP Service Case were similar to those in the other three agreements I've discussed. Provision 5 of the June 7, 2004 Agreement provided:

Cognis shall support a Stipulation filed by The Cincinnati Gas & Electric Company and Cognis, in Case No. 03- 93-EL-ATA and any related litigation.²⁸

Provisions in this agreement also provided for termination if:

The Public Utilities Commission of Ohio, in case no. [sic] 03-93-EL-ATA, fails to issue an order acceptable to Cinergy. [Cinergy Corp]²⁹

Q26. DID THE PRE-PUCO ORDER AGREEMENT WITH KROGER CONTAIN PROVISIONS WITH THE COMMON THREADS YOU HAVE DESCRIBED IN THE OTHER AGREEMENTS?

A26. Yes, however, the Pre-PUCO Order Agreement with Kroger is quite different from and more complicated than the other four agreements. Yet despite the differences and complexity, the common threads I have identified are in this agreement with Kroger.

²⁸ Attachment 5 at 2, Provision 5.

²⁹ Attachment 5 at 2, at B.

CONFIDENTIAL - Hixon Testimony Case No. 03-93-EL-ATA

1 The July 7, 2004 Agreement between CRS and Kroger is predicated on the fact
2 that for some time Kroger had been purchasing generation from a retail
3 competitive provider, New Energy, which was purchasing its wholesale power to
4 supply Kroger from the Cinergy Operating Companies[CG&E & PSI Energy,
5 Inc.]³⁰. The agreements behind these retail and wholesale transactions are
6 referenced in the "WHEREAS" clauses of the July 7, 2004 Agreement shown in
7 Attachment 6 to my testimony.

8
9 I am aware that at the time of this agreement Kroger was concerned about certain
10 non-bypassable charges in CG&E's proposed ERRSP that Kroger might have to
11 pay. In his deposition on February 21, 2007, Mr. Denis George, Corporate
12 Energy Manager for Kroger, said Kroger was concerned they were going to pay
13 twice for capacity, once to their CRES provider and then also to CG&E under
14 charges proposed in the ERRSP. Mr. George said that under the arrangements
15 worked out in this July 7, 2004 Agreement with CRS, Kroger's concern
16 regarding the potential double charging of capacity were satisfied.

17
18 In the July 7, 2004 Agreement, terms and conditions relating to the provision to
19 Kroger of generation service and reimbursements to Kroger for portions of
20 ERRSP components are both set forth by year, 2005 through 2008. In 2005,
21 Kroger would continue to purchase generation from New Energy and "Cinergy

³⁰ The Cinergy Operating Companies are defined as "The Cincinnati Gas & Electric Company ("CG&E") and PSI, Energy, Inc." in the December 14, 2000 Confirmation Letter Agreement with New Energy

CONFIDENTIAL - Hixon Testimony Case No. 03-93-EL-ATA

1 [CRS] or any affiliate thereof shall reimburse Kroger quarterly for half of the
2 amount actually paid" of the annually adjusted component of the provider of last
3 resort charge to CG&E.³¹

4
5 In 2006 and 2007, Kroger was expected to continue to have New Energy as its
6 competitive provider, but if Kroger did not, options were provided. Kroger
7 could choose (1) a non-CRS affiliated CRES provider for whom the Cinergy
8 Operating Companies would provide wholesale power at the same price provided
9 to New Energy or (2) a Cinergy affiliated competitive provider who would
10 supply retail generation to Kroger at the same prices under the Cinergy
11 Operating Companies wholesale transaction with New Energy. "Cinergy [CRS]
12 or any affiliate thereof" would reimburse Kroger for half of the annually adjusted
13 component of the provider of last resort charge paid to CG&E.

14
15 In 2008, Kroger could choose a competitive provider, but CRS would have the
16 right of first refusal to provide generation to Kroger at the same rate as that
17 provider. Reimbursement to Kroger of half of the annually adjusted component
18 of the provider of last resort charge paid to CG&E would be made by "Cinergy
19 [CRS] or any affiliate thereof."

20
21 **Q27. DID KROGER AGREE TO SUPPORT CG&E'S ERRSP UNDER THE JULY**
22 **7, 2004 AGREEMENT?**

³¹ Attachment 6 at Date stamp 1175, Provision 1.

1 A27. Yes. Under Provision 8 of this Agreement Kroger was to support the May 19,
2 2004 Stipulation filed in the Post-MDP Service Case.

3

4 **Q28. COULD THE OUTCOME OF THE POST-MDP SERVICE CASE IMPACT**
5 **TERMINATION OF THIS PRE-PUCO ORDER AGREEMENT WITH**
6 **KROGER?"**

7 A28. Yes. A provision tied to the outcome of the Post-MDP Service Case, similar to
8 those in the other Pre-PUCO Order Agreements, was contained in the July 7,
9 2004 Agreement, calling for termination if an order "unacceptable to Cinergy
10 [CRS]" was issued by the PUCO³². In addition, a provision, similar to one in the
11 Agreement between CRS and the OEG members, depended on whether PUCO's
12 order in the Post-MDP Service Case was acceptable to CG&E:

13 If an order in Case No. 03-93-EL-ATA is issued which is
14 acceptable to CG&E but which renders invalid or ineffective
15 any provision of this Agreement to the economic detriment of
16 Kroger, then Cinergy [CRS] will provide the same economic
17 value to Kroger through some other mutually acceptable
18 process.³³

19

20 **Q29. COULD PROVISIONS IN THESE FIVE PRE-PUCO ORDER**
21 **AGREEMENTS HAVE IMPACTED CG&E?**

³² Attachment 6 at Bate stamp 1178, at B.

³³ Attachment 6 at Bate stamp 1177, Provision 11.

1 **A29.** Yes. While CG&E was not a named party to these agreements, several of the
2 agreements between CRS and Customer Parties included provisions in which
3 CG&E appears to have made commitments. Examples of such agreement
4 provisions that committed CG&E to an action, or lack of action, include:

- 5 1. "Cinergy [CRS] shall not amend the rates charged by The Cincinnati Gas
6 & Electric for dual feeds for load existing prior to December 31, 2004,
7 until at least December 31, 2008." (May 19, 2004 CRS Agreement with
8 Hospitals)³⁴
- 9 2. "Hospital purchasing generation service pursuant to existing tariff load
10 management riders as of December 31, 2004, may continue to purchase
11 generation service pursuant to such load management riders through
12 12/31/08" (May 19, 2004 CRS Agreement with Hospitals)³⁵
- 13 3. "In the Cincinnati Gas & Electric Rate Company's next distribution base
14 rate case that results in a change in Customers' rates, CG&E will file a
15 cost of service study reflecting actual costs of service for all rate classes.
16 The Cincinnati Gas & Electric Company shall support the future
17 distribution rider, proposed as Rider CIR, allocated based upon
18 distribution net plant." (May 19, 2004 CRS Agreement with OEG
19 members)³⁶

³⁴ Attachment 2 at Bate stamp 349, Provision 6.

³⁵ Attachment 2 at Bate stamp 349, Provision 7.

³⁶ Attachment 3 at Bate stamp 350, Provision 5.

4. "If a Customer has shopped for competitive generation and is subject to a minimum stay with CG&E that extends beyond January 1, 2005, then the minimum stay shall be waived" (May 19, 2004 Agreement with OEG members)³⁷

5. "The Cinergy Operating Companies [CG&E and PSI Energy, Inc.] shall exercise their Extension 1 and Extension 2 options under the December 14, 2000 Confirmation Letter Agreement to sell generation supply to New Energy, Inc. in 2006 and 2007 for resale to Kroger" (July 7, 2004 CRS Agreement with Kroger)³⁸

Q30. WAS CG&E INVOLVED IN NEGOTIATING THE PRE-PUCO ORDER AGREEMENTS THAT CRS AND CINERGY CORP. HAD WITH CUSTOMER PARTIES?

A30. I am aware that Mr. Greg Ficke, former President of CG&E, said in his deposition of February 29, 2007 that he was involved for CG&E in the process of the negotiations of agreements between CRS and other parties in the May, 2004 time frame. He also stated that in negotiating these May 2004 agreements there were a number of Cinergy Service employees that did work for a number of different affiliates, such as legal staff.

³⁷ Attachment 3 at Bate stamp 330, Provision 7.

³⁸ Attachment 6 at Bate stamp 1176, Provision 4

1 An illustration of CG&E's awareness of and involvement in the process that led
2 to the Pre-PUCO Order Agreements can be seen in documents provided to the
3 OCC from the Ohio Hospital Association (OHA). The OCC asked in discovery
4 for documents transmitted between DE-Ohio affiliated companies and the OHA
5 with references to RTC, FPP, RSC, AAC, IMF, SRT charges or the Insufficient
6 Return Notice Fee. Included in the responsive documents are the two e-mails
7 from May 2004 which indicate CG&E was involved in the discussions that
8 eventually led to the May 19, 2004 CRS Agreement with the Hospitals. In the
9 first e-mail, dated May 5, 2004, Mr. Joseph Kubacki communicates to Mr. James
10 Gainer and Mr. Paul Colbert about the "OHA CG&E Settlement Terms" and
11 attached a document with "OHA/CG&E Settlement Terms (5/5/04)." (In the
12 May 19, 2004 Agreement, Mr. Gainer was listed as the party to whom notice
13 should be sent for Cinergy [i.e. CRS] and Mr. Colbert signed agreement "on
14 behalf of Cinergy" as "Senior Counsel, The Cincinnati Gas & Electric
15 Company") The terms attached to the e-mail included the offer of a Cinergy
16 affiliated CRES to sell generation to OHA, reimbursement by Cinergy Corp. to
17 OHA for any RSC actually paid and that the offer was conditioned upon support
18 of the OHA for a Stipulation filed in CG&E's RSP case. In response to this May
19 5 e-mail, Mr. Gainer responded on May 6, 2004 with an e-mail that was copied
20 to Mr. Ficke.³⁹

³⁹ Attachment 7 - Ohio Hospital Association response to OCC No. RP6.

1 **Q31. OTHER THAN REIMBURSEMENT FOR PORTIONS OF ERRSP**
 2 **CHARGES YOU HAVE PREVIOUSLY DESCRIBED, DID THE**
 3 **AGREEMENTS PROVIDE FOR ADDITIONAL PAYMENTS TO ANY**
 4 **CUSTOMER PARTIES?**

5 **A31.** Provisions in two of the Pre-PUCO Order Agreements provided for payments to
 6 parties that had intervened on behalf of groups of large customers in the Post-
 7 MDP Service case. A provision in the May 19, 2004 Agreement between CRS
 8 and the Hospitals provided that, "Cinergy [CRS] shall pay the Ohio Hospital
 9 Association \$50,000 upon the issuance of final appealable order of the Public
 10 Utilities Commission of Ohio satisfactory to Cinergy."⁴⁰ Also upon issuance of
 11 such an order, CRS was to pay \$100,000 to IEU-Ohio "as compensation for legal
 12 services" under the May 28, 2004 Agreement between CRS and IEU-Ohio.⁴¹

13

14 **B. THE PRE-REHEARING AGREEMENTS**

15

16 **Q32. WHAT ARE THE "PRE-REHEARING AGREEMENTS"?**

17 **A32.** In order to distinguish a second group of agreements from the Pre-PUCO Order
 18 Agreements I have just discussed, I am using the term "Pre-Rehearing
 19 Agreements". These are agreements made by CG&E-affiliated companies with
 20 Customer Parties to the Post-MDP Service Case and entered into after the
 21 Commission's September 29, 2004 Order and prior to the PUCO's November 23,

⁴⁰ Attachment 2 at Bate stamp 348, Provision 4.

⁴¹ Attachment 4 at Bate stamp 343, Provision 3.

2004 Entry on Rehearing and which were also related to the CG&E's October 29, 2004 Alternative Proposal in this case.

Q33. WHO WERE THE PARTIES TO THESE AGREEMENTS?

A33. I am aware of five Pre-Rehearing Agreements between CG&E-affiliated companies and Customer Parties to the Post-MDP Service Case, as shown in the table below and contained in the noted Attachments to my testimony. Each of these Pre-Rehearing Agreements replaced and superseded the terms and conditions of the Pre-PUCO Agreements.

Pre-Rehearing Agreements			
Date	Agreement between:	And:	Attachment
11/8/04	Cinergy Retail Sales, LLC	Hospitals	8
11/22/04	Cinergy Retail Sales, LLC	AK Steel, Air Products & Chemicals, BP, Ford Motor, GE Aircraft Engines, Proctor & Gamble (members of the Ohio Energy Group (OEG))	9
11/8/04	Cinergy Corp through its agent, Cinergy Retail Sales, LLC	Industrial Energy Users-Ohio (IEU-Ohio) for Marathon and General Motors	10
10/28/04	Cinergy Corp.	Cognis	11
11/22/04	Cinergy Retail Sales, LLC	Kroger	12

Q34. WHY WAS THERE A SECOND SET OF AGREEMENTS THAT SUPERSEDED THE PRE-PUCO ORDER AGREEMENTS?

A34. The Pre-Rehearing Agreements were entered in to after the PUCO's September 29, 2004 Order which approved the Stipulation with modifications and conditions. Issuance of this PUCO Order in October, 2004 seems to have served as the impetus for these Pre-Rehearing Agreements. This can be seen through review of the provisions in these agreements, which now incorporated terminology from

CONFIDENTIAL - Hixon Testimony Case No. 03-93-EL-ATA

1 CG&E's recently PUCO-approved rate plan, such as infrastructure maintenance
2 fund and system reliability tracker. Also, in a new and different provision in these
3 agreements, Customer Parties committed to supporting CG&E's Application for
4 Rehearing in the Post-MDP Service Case. In addition, I aware that in depositions
5 of Mr. Ficke and Mr. Timothy Duff, both who were employees of Cinergy
6 Services⁴² and familiar with the agreements, have said that the PUCO not
7 accepting the Stipulation as filed did lead to these Pre-Rehearing Agreements.

8
9 **Q35. HOW ARE THE PRE-REHEARING AGREEMENTS RELATED TO THE**
10 **POST-MDP SERVICE CASE?**

11 **A35.** In a similar manner to the Pre-PUCO Order Agreements, each Pre-Rehearing
12 Agreement had specific terms and conditions, but again, common threads related
13 to the Post-MDP Service Case did exist among the agreements. Each agreement
14 dealt with the (1) provision of generation service to Customer Parties during the
15 proposed RSP period, (2) reimbursement of proposed RSP charges to Customer
16 Parties (3) support by Customer Parties for CG&E's Application for Rehearing in
17 the Post-MDP Service Case and (4) termination provisions tied to the outcome in
18 the Post-MDP Service Case.

19

⁴² "Prior to the merger between Cinergy Corp. and Duke Energy Corp. Cinergy Service, Inc. provided various administrative services to the Cinergy companies. Following the merger between Cinergy Corp. and Duke Energy Corporation in April 2006, Cinergy Services became Duke Energy Shared Services." Second Supplemental Testimony of DE-Ohio Witness Steffen (2.28.07) at 1.

1 **Q36. UNDER THE ALTERNATIVE PROPOSAL CONTAINED IN CG&E'S**
 2 **APPLICATION FOR REHEARING, WHICH THE CUSTOMER PARTIES**
 3 **AGREED TO SUPPORT UNDER THE PRE-REHEARING ORDER**
 4 **AGREEMENTS, WHAT WERE CG&E'S PROPOSED MBSSO**
 5 **COMPONENTS?**

6 **A36.** CG&E's proposed the following MBSSO components in its Alternative Proposal
 7 in October, 2004:

Market Based Standard Service Offer (MBSSO) Components CG&E Alternative Proposal (October 29, 2004) 11/23/04 Entry on Rehearing at 7 - 9		
	RES (effective 1/1/06)	Non-RES (effective 1/1/05)
Tariff Generation rate	Bypassable	Bypassable
Rate Stabilization Charge (RSC)	Bypassable for first 25% of load switching	Bypassable for first 50% of load switching
Annually Adjusted Component (AAC)	Bypassable for first 25% of load switching	Bypassable for first 50% of load switching
Fuel & Purchased Power (FPP), including Emission Allowances (EA)	Bypassable	Bypassable
Infrastructure Maintenance Fund (IMF)	Non-bypassable	Non-bypassable
System Reliability Tracker (SRT)	Non-bypassable	Non-bypassable

9
 10 **Q37. HOW WERE THE PRE-REHEARING AGREEMENTS RELATED TO THE**
 11 **PROVISION OF GENERATION DURING THE PROPOSED ERRSP**
 12 **PERIOD?**

13 **A37.** As was the case with the superseded agreements, in each Pre-Rehearing
 14 Agreements, CG&E customers agreed to general and customer-specific terms and
 15 conditions related to the purchase of generation service during the period 2005