

1       BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

2                       - - -

3 In the Matter of the       :  
4 Application of Duke       :  
5 Energy Ohio for Approval :  
6 of an Electric Security :  
7 Plan; for Approval to     :  
8 Amend Accounting Methods; :  
9 for Approval of a       :  
10 Certificate of Public     : Case Nos. 08-920-EL-SSO  
11 Convenience and         :       08-921-EL-AAM  
12 Necessity to Establish an :       08-922-EL-UNC  
13 Unavoidable Capacity    :       08-923-EL-ATA  
14 Charge(s); and for     :  
15 Approval to Amend its   :  
16 Tariff.                 :

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19  
20                       PROCEEDINGS

21 before Ms. Jeanne Kingery and Mr. Scott Farkas,  
22 Hearing Examiners, at the Public Utilities Commission  
23 of Ohio, 180 East Broad Street, Room 11-C, Columbus,  
24 Ohio, called at 9:00 a.m. on Monday, November 10,  
25 2008.

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27  
28                       ARMSTRONG & OKEY, INC.

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3 Mr. Rocco D'Ascenzo  
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Duke Energy Corporation  
9 By Ms. Catherine E. Heigel  
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10 Charlotte, North Carolina 28202

11 On behalf of Duke Energy-Ohio.

12 Janine L. Migden-Ostrander  
Ohio Consumers' Counsel  
13 By Ms. Ann M. Hotz  
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17 of Duke Energy.

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6 Columbus, Ohio 43216-1008

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8 Constellation Commodity Energy Group,  
9 Integrys Energy Services and Direct  
10 Energy.

11 Christensen, Christensen, Donchatz,  
12 Kettlewell & Owens, LLP  
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16 On behalf of People Working  
17 Cooperatively.

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25 Affordable Energy.

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27 Mr. Barth E. Royer  
28 33 South Grant Avenue  
29 Columbus, Ohio 43215-3927

30 On behalf of Ohio Environmental Council

20           and Dominion Retail, Inc.

21           McNees, Wallace & Nurick

By Mr. Samuel C. Randazzo

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On behalf of the Industrial Energy

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14 On behalf of Commercial Group.

15 Sheryl Creed Maxfield, First Assistant  
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24 On behalf of the Staff of the Public  
25 Utilities Commission.

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23

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1 Monday Morning Session,

2 November 10, 2008.

3 - - -

4 EXAMINER KINGERY: Let's go on the  
5 record. The Public Utilities Commission of Ohio has  
6 called for hearing at this time and place Case Nos.  
7 08-920, 08-921, 08-922, 08-923, In the Matter of the  
8 Application of Duke Energy-Ohio for Approval of an  
9 Electric Security Plan and Other Related Captions.

10 My name is Jeanne Kingery. This is Scott  
11 Farkas, and we are the attorney-examiners who have  
12 been appointed to hear this case.

13 Let us begin at this point with the  
14 appearances of parties. Mr. Colbert.

15 MR. COLBERT: Yes, on behalf of Duke  
16 Energy-Ohio, Paul Colbert, Amy Spiller, Elizabeth  
17 Watts and Rocco D'Ascenzo, 1555 Broad Street, and,  
18 I'm sorry, and Catherine Heigel, 155 East Broad  
19 Street, Columbus, Ohio 43215.

20 EXAMINER KINGERY: Thank you.

21 We'll just go around the table, go ahead.

22 MS. CHRISTENSEN: On behalf of People

23 Working Cooperatively, the law firm of Christensen,

24 Christensen, Donchatz, Kettlewell & Owens, Mary W.

25 Christensen. Thank you.

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1           MR. YURICK: Good morning. On behalf of  
2 the Kroger Company, the law firm of Chester, Willcox  
3 & Saxbe, John W. Bentine, Mark S. Yurick. That's  
4 Y-u-r-i-c-k, and Matthew White, 65 East State Street,  
5 Columbus.

6           MR. McNAMEE: On behalf of the staff of  
7 the Public Utilities Commission of Ohio, Sheryl,  
8 S-H-E-R-Y-L, Creed, C-r-e-e-d, Maxfield,  
9 M-a-x-f-i-e-l-d, First Assistant Attorney General,  
10 Duane L. Luckey, Chief, Public Utilities Section,  
11 William L. Wright and I am Thomas W. McNamee,  
12 assistant attorneys general, 180 East Broad Street,  
13 Columbus, Ohio.

14           MR. PETRICOFF: On behalf of  
15 Constellation NewEnergy, Constellation Commodity  
16 Energy Group, Integrys Energy Services and Direct  
17 Energy, the law firm of Vorys, Sater, Seymour &  
18 Pease, M. Howard Petricoff and Stephen M. Howard, 52  
19 East Gay Street, Columbus, Ohio.

20 MR. BOEHM: On behalf of the Ohio Energy  
21 Group, the law firm of Boehm, Kurtz & Lowery, David  
22 Boehm and Michael Kurtz, 37 East Seventh Street  
23 Cincinnati, Ohio 45202.

24 MS. WUNG: On behalf of the Commercial  
25 Group, which includes Wal-Mart Stores East, Sam's

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1 Club East, Macy's, the law firm of McDermott, Will &  
2 Emery, Grace C. Wung, 600 Thirteenth Street,  
3 Washington, DC, 20005.

4 MS. HOTZ: On behalf of the Residential  
5 Consumers of Duke Energy-Ohio, the Ohio Consumers'  
6 Counsel, Janine Migden Ostrander, by Ann M. Hotz,  
7 Michael E. Idzkowski, that's I-D-Z-K-O-W-S-K-I,  
8 Jeffrey L. Small, Jacqueline Lake Roberts, 10 West  
9 Broad Street, Columbus, Ohio 43215. Thank you.

10 MS. MOONEY: On behalf of Ohio Partners  
11 for Affordable Energy, David C. Rinebolt and Colleen  
12 L. Mooney, 231 West Lima Street, Findlay, Ohio.

13 MR. ROYER: Thank you, your Honor. On  
14 behalf of the Ohio Environmental Council and Dominion  
15 Retail, Inc., Barth Royer of the firm of Bell & Royer  
16 Co., LPA, 33 South Grant Avenue, Columbus, Ohio.

17 MR. CLARK: Good morning. On behalf of  
18 the Industrial Energy Users-Ohio, the law firm of  
19 McNees, Wallace & Nurick, Samuel C. Randazzo, Joseph

20 M. Clark, 21 East State Street, Columbus, Ohio 43215.

21

22 MR. O'BRIEN: On behalf of the City of

23 Cincinnati, Bricker & Eckler, LLP by Thomas J.

24 O'Brien, 100 South Third Street, Columbus, Ohio

25 43215.

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1           EXAMINER KINGERY: Great. Thank you very  
2 much.

3           Mr. Colbert, you may call your first  
4 witness.

5           MR. COLBERT: Before I call the first  
6 witness, your Honor, if it might be appropriate to  
7 move into evidence the various exhibits for those  
8 that we will not be calling.

9           First I would mark Joint Exhibit 1 as the  
10 Stipulation that has been filed in the case and would  
11 reserve moving that in until after cross-examination  
12 is concluded.

13           The application itself is marked as  
14 DE-Ohio Exhibit 20 and the testimony, direct  
15 testimony of Tony Adcock is DE-Ohio Exhibit 1; Todd  
16 Arnold is DE-Ohio Exhibit 2; James Gainer, DE-Ohio  
17 Exhibit 3. We've already marked -- well, Daniel  
18 Jones who will be called as a witness is DE-Ohio  
19 Exhibit 4 and that we would reserve until after

20 cross-examination moving in.

21 The direct testimony of Christopher

22 Kiergan is DE-Ohio Exhibit 5; James Lefeld, DE-Ohio

23 Exhibit 6; Sandra Meyer, DE-Ohio Exhibit 7.

24 We would note for the record that we

25 filed a letter withdrawing the testimony of DE-Ohio

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1 Witness Northrup, so that exhibit will not be marked  
2 or admitted.

3 We would mark the testimony of Judah Rose  
4 as DE-Ohio Exhibit 8, as we've previously stated.  
5 DE-Ohio Witness Ted Schultz's direct testimony is  
6 marked as Exhibit 9 and will not be moved in until  
7 after cross-examination. DE-Ohio Witness Paul Smith,  
8 his direct testimony is Exhibit 10 and will not be  
9 moved until after cross-examination. DE-Ohio Witness  
10 Richard Stevie is Exhibit 11 and also will not be  
11 moved in until after cross-examination.

12 DE-Ohio Witness Don Wathen, direct  
13 testimony of Don Wathen is Exhibit 12, and we would  
14 move that in. Testimony of Charles Whitlock is  
15 Exhibit 13; testimony of Barry Wood is Exhibit 14;  
16 supplemental of Paul Smith is Exhibit 15 and we would  
17 wait to move that until after cross-examination;  
18 supplemental of Ted Smith is 16 and we will wait to  
19 move that in, or Ted Schultz, I'm sorry, until after

20 cross-examination.

21 Supplemental of Dick Stevie is 17, we

22 would wait to move that in until cross-examination;

23 and the supplemental of Paul Smith is 18 and we

24 will --

25 EXAMINER KINGERY: You said the

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1 supplemental of Paul Smith is 15.

2 MR. COLBERT: I'm sorry, second

3 supplemental --

4 EXAMINER KINGERY: Thank you.

5 MR. COLBERT: -- is 18. And I believe,

6 your Honor, that is all, and with that I would move

7 Exhibits 1 through 3 into evidence, 5 through 7 into

8 evidence. I would move 8 into evidence, 12 through

9 14 into evidence, and Exhibit 20 we'll wait until

10 after cross-examination because that's the

11 application itself.

12 EXAMINER KINGERY: Are there any

13 objections -- oh, there is no 19?

14 MR. COLBERT: Nineteen has to do with

15 confidential versions of Chris Kiergan's testimony.

16 I mean, we can mark that as a separate exhibit. It

17 was filed under seal so 19 would be the confidential

18 version of Mr. Kiergan's testimony, and Mr. Stevie's

19 testimony Attachment 4 is a corrected version that

20 would be 21. Oh, that is also consolidated as an  
21 exhibit with the confidential of Kiergan, so if it's  
22 all right, we would mark those both as 19.

23 EXAMINER KINGERY: Is that attachment  
24 also confidential?

25 MR. COLBERT: No, that's been released.

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1 EXAMINER KINGERY: So 19 is one  
2 confidential item and one nonconfidential item.

3 MR. COLBERT: Yes, that's correct.

4 EXAMINER FARKAS: Is the Stevie  
5 Attachment 4, is that supplemental, is that --

6 MR. COLBERT: I'm sorry, it's all public.  
7 I'm told it's all public.

8 EXAMINER KINGERY: No, he's asking  
9 whether that's an attachment to the original  
10 testimony or the supplemental.

11 MR. COLBERT: It's an attachment to the  
12 original testimony.

13 EXAMINER KINGERY: Okay. So it is to  
14 No. 11.

15 MR. COLBERT: Yes. But there is no  
16 confidential attachment.

17 EXAMINER KINGERY: Okay. And are you  
18 moving Exhibit 21 also in at this point? That's what  
19 you're talking about -- no, I'm sorry, you

20 consolidated. Nineteen.

21 MR. COLBERT: Yes, we would move 19 in as

22 well. Thank you.

23 EXAMINER KINGERY: Okay. Are there

24 objections to any of that?

25 MR. RANDAZZO: Your Honor, I don't

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1 believe we have an objection, but I need to  
2 understand the offer. Is the offer being done in  
3 support of the settlement? In other words, if we  
4 have the testimony go in and we do not cross those  
5 witnesses, the offer would be without prejudice in  
6 the event that we should have to return to litigate  
7 on other issues.

8 MR. COLBERT: The purpose of the  
9 testimony is to show the compromise to the  
10 Stipulation, so yes, it's in support of the  
11 Stipulation, Sam.

12 MR. RANDAZZO: And nobody would be  
13 waiving cross-examination in the --

14 MR. COLBERT: That's correct. If  
15 somebody wants us to produce a witness, we'll produce  
16 anybody that anyone wants to cross.

17 MR. RANDAZZO: At that subsequent time.

18 MR. COLBERT: Well, the hearing -- yes,  
19 but --

20           EXAMINER KINGERY: We're having a hearing  
21   today on the Stipulation, and so if it turns out that  
22   the Commission does not adopt the Stipulation and we  
23   have to get actual testimony on the underlying  
24   application, we understand that no one is waiving  
25   cross-examination.

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1 MR. RANDAZZO: Thank you, your Honor.

2 MR. COLBERT: That's correct.

3 EXAMINER KINGERY: Okay. With that, are  
4 there any other questions or objections?

5 (No response.)

6 EXAMINER KINGERY: Hearing none, we will  
7 admit Exhibits 1, 2, 3 -- these are all DE-Ohio  
8 exhibits, 5, 6, 7, 8, 12, 13, 14, and 19, because we  
9 are not admitting -- we don't have a motion yet on  
10 the underlying testimony by Mr. Stevie, I think we  
11 should not admit 19 yet.

12 MR. COLBERT: That's fine, your Honor.

13 EXAMINER KINGERY: We'll wait until after  
14 cross-examination on that.

15 (EXHIBITS ADMITTED INTO EVIDENCE.)

16 EXAMINER KINGERY: Okay. You may call  
17 your first witness.

18 MR. COLBERT: Thank you, your Honor.

19 With that, DE-Ohio would call Paul Smith.

20 EXAMINER KINGERY: Raise your right hand.

21 (Witness sworn.)

22 EXAMINER KINGERY: You may be seated.

23 - - -

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1 PAUL SMITH

2 being first duly sworn, as prescribed by law, was  
3 examined and testified as follows:

4 DIRECT EXAMINATION

5 By Mr. Colbert:

6 Q. Mr. Smith, do you have a copy of your  
7 testimony in front of you that is marked as DE-Ohio  
8 18, Exhibit 18, as your second supplemental  
9 testimony?

10 A. I do.

11 Q. Okay. And, Mr. Smith, do you have --  
12 well, can you state your name and your work address  
13 for the record?

14 A. Yes. My name is Paul Smith, my work  
15 address is 139 East Fourth Street, Cincinnati, Ohio.

16 Q. And, Mr. Smith, do you have any changes,  
17 clarifications, or amendments to your testimony?

18 A. I do have a few changes and I have a  
19 clarification as well.

20 Q. Would you please describe the changes and  
21 clarification?

22 A. The changes are located beginning on page  
23 13, line 8, following the word "OCC" I need to insert  
24 "comma, and it is my opinion, comma" on line 9.

25 MR. RANDAZZO: Please go slow. Go ahead.

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1           A. On line 9, the sentence that begins  
2 specifically "It was discussed," I need to insert  
3 "comma, and it is my opinion."

4           On line 14, after the word  
5 "acceptable" --

6           EXAMINER KINGERY: Unacceptable?

7           THE WITNESS: "Unacceptable." Very good,  
8 sorry.

9           A. -- insert the phrase "in my opinion and."

10           And then on page 14, line 3, beginning  
11 with "parties agreed," after that I'd like to insert  
12 "comma, and it is my opinion, comma." And on the  
13 same page, line 8, the sentence that begins "all  
14 parties," prior to that I'd like to insert the words  
15 "It is my opinion."

16           EXAMINER FARKAS: Prior to that or after?

17           THE WITNESS: Prior to. So the sentence  
18 would begin "It is my opinion, and all parties."

19           Those are all the changes and

20 corrections.

21 Q. Do you want to describe the clarification

22 you have?

23 MR. COLBERT: Your Honor, for the

24 clarification, it's a short paragraph. We have

25 copies of that for you and all the parties so that

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1 it's easier to follow.

2 EXAMINER KINGERY: Thank you.

3 Q. Mr. Smith, would you like to read the  
4 clarification into the record, please?

5 A. Be glad to. To clarify my testimony, "In  
6 my testimony at pages 13 and 14, I inadvertently gave  
7 the impression that, except for OCC, there was  
8 unanimity among the parties regarding the ability and  
9 advisability of residential governmental aggregation  
10 customers bypassing the Rider SRA-SRT and receiving a  
11 shopping credit. I would like to clarify that  
12 statement and indicate that several parties did not  
13 express a position on that issue and some parties  
14 expressed the view that all generation related  
15 charges should be available for all shopping  
16 customers."

17 EXAMINER KINGERY: You said "available"?

18 MR. COLBERT: Avoidable.

19 THE WITNESS: Avoidable. I suppose

20 nothing should be avoidable.

21 "Ultimately the ability to bypass the

22 Rider SRA-SRT and the shopping credit was resolved as

23 part of the Stipulation, which represents a series of

24 compromises from each of the party's litigation

25 positions. The Stipulation states that each

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1 provision of the Stipulation is not specifically  
2 endorsed by each signatory party standing alone, but  
3 that as a package it is supported by all the  
4 signatory parties. It was my intent simply to  
5 reference that for purposes of settlement, all  
6 parties are in agreement regarding the treatment of  
7 residential governmental aggregation customers as  
8 prescribed in the Stipulation except for OCC."

9 MS. HOTZ: Your Honor, at this time OCC  
10 moves to strike portions of Duke Exhibit 18, please.  
11 This morning we filed a copy --

12 MR. COLBERT: Your Honor, if I may, OCC,  
13 we're happy to have them make their motion to strike,  
14 but we were not yet offering Mr. Smith for  
15 cross-examination.

16 EXAMINER KINGERY: Let's let them finish  
17 their direct first and then we'll take your motion.

18 MS. HOTZ: All right.

19 MR. COLBERT: Thank you.

20 Q. (By Mr. Colbert) Mr. Smith, have you also  
21 been contacted by one or more of the parties  
22 regarding small changes to -- nonsubstantive changes  
23 to the Stipulation itself, and do you have an errata  
24 sheet with those changes?

25 A. I do.

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1 Q. You do.

2 MR. COLBERT: Your Honor, if it pleases  
3 the attorney-examiners, we would pass out an errata  
4 sheet to the Stipulation. We don't believe that any  
5 of these represent any substantive change at all, but  
6 they have been pointed out by staff and a couple of  
7 the parties, so we have that for everybody detailing  
8 the changes and page numbers.

9 We also have a few limited copies of an  
10 actual redline of the Stipulation which we could  
11 produce and we would be happy to e-mail to all  
12 parties or copy for distribution later, but the  
13 errata sheet contains each change.

14 EXAMINER KINGERY: Are you planning to  
15 either docket this or docket a redline or make this  
16 be an exhibit? We need to do something so it's in  
17 the record.

18 MR. COLBERT: No; that's right, your  
19 Honor, we would propose to mark this as DE-Ohio

20 Exhibit 22.

21 EXAMINER KINGERY: 21?

22 MR. COLBERT: No, 22 I thought.

23 EXAMINER KINGERY: We don't have a 21.

24 MR. COLBERT: Twenty-one.

25 EXAMINER KINGERY: Okay.

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1 MR. COLBERT: And file it as an  
2 attachment to Mr. Smith's testimony.

3 EXAMINER KINGERY: It will be so marked.

4 MR. COLBERT: Thank you.

5 (EXHIBIT MARKED FOR IDENTIFICATION.)

6 MR. COLBERT: I see Mr. Randazzo;  
7 otherwise, Mr. Smith can go through each change.

8 EXAMINER KINGERY: Yes.

9 MR. RANDAZZO: Might I inquire why this  
10 wasn't submitted to the parties before we got here on  
11 Monday morning?

12 MR. COLBERT: Well, it wasn't completed  
13 until this morning, and in fact there's one change to  
14 this, but the contact with the parties has been  
15 constant and this is as fast as we could produce it,  
16 Sam.

17 EXAMINER KINGERY: Do you need some time  
18 to look over these?

19 MR. RANDAZZO: I have no idea, your

20 Honor. We were here this morning prepared to do  
21 cross-examination on stuff that we've seen. We  
22 haven't seen it. I'm willing to take representations  
23 seriously from counsel that they're nonsubstantive,  
24 but apparently there's a change to the changes. But  
25 we need to have an opportunity to look at this and

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1 it's -- this, to me, is an unfortunate thing. I  
2 don't understand why it is that we're getting this at  
3 this hour.

4 EXAMINER KINGERY: If you need some time  
5 before you cross-examine, we can certainly take a  
6 brief recess.

7 MR. RANDAZZO: Your Honor, I can't tell  
8 whether we need time based upon the document that  
9 we've been handed with 11 changes to the settlement  
10 document that was previously filed in this  
11 proceeding.

12 MR. COLBERT: We can give him a redline  
13 if that would be helpful.

14 MR. RANDAZZO: It would have been helpful  
15 if we would have gotten it last week.

16 MS. HOTZ: Your Honor, as a signatory  
17 party I am astounded by these changes.

18 EXAMINER KINGERY: Why don't we allow  
19 people 15 minutes at least to look at the changes and

20 understand whether or not they are of --

21 MR. COLBERT: Could we take one minute

22 and maybe we'll resolve it quickly?

23 EXAMINER KINGERY: Okay. Let's go off

24 the record.

25 (Off the record.)

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1 EXAMINER KINGERY: Let's go back on the  
2 record.

3 Mr. Colbert, I understand you are at this  
4 point withdrawing the errata sheet.

5 MR. COLBERT: We are. We will withdraw  
6 the errata sheet for the Stipulation and move ahead  
7 with the Stipulation as submitted. And with that,  
8 Mr. Smith is available for cross-examination.

9 EXAMINER KINGERY: Thank you.

10 MS. HOTZ: Your Honor.

11 EXAMINER KINGERY: Yes.

12 MS. HOTZ: OCC would like to move to  
13 strike portions of Paul Smith's second supplemental  
14 testimony.

15 MS. CHRISTENSEN: Excuse me, could we ask  
16 Ann to speak up? Can you use the mic? The fan's on.  
17 It makes it hard.

18 MS. HOTZ: OCC would like to move to  
19 strike portions of Paul Smith's second supplemental

20 testimony. We filed this motion earlier this morning  
21 and, let's see, the first provision begins on page 10  
22 starting at line 11 through line 13, and the basis  
23 for that is that it is not admissible evidence as  
24 revelations of statements made during compromise  
25 under Ohio Administrative Code 4890:1-26(E), the Ohio

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1 Rule of Evidence 408. It's also contrary to the  
2 parol evidence rule and the hearsay rule.

3 And then beginning on page 12 --

4 EXAMINER KINGERY: Let's stop for a  
5 second and deal with that one.

6 Mr. Colbert, did you want to respond?

7 MR. RANDAZZO: Your Honor, for the  
8 record, we would support OCC's motion.

9 MR. COLBERT: Your Honor, for the record,  
10 the Commission has a long-standing history of using a  
11 three-part test to determine the advisability and  
12 support for partial stipulations such as the one  
13 before us.

14 Over the years there has been significant  
15 contention, of course, about what constitutes each of  
16 the parts of the three-part test. Now, Mr. Smith was  
17 a participant, direct participant, in all of the  
18 negotiations to the Stipulation so there's no hearsay  
19 issue here. He is speaking of his own knowledge.

20 Nor did he reveal the particular positions of any  
21 particular party or, you know, any details of the  
22 settlement negotiations, so we don't believe that  
23 there's been any breach of confidentiality in terms  
24 of the settlement process here.

25 He is simply giving his opinion of what

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1 went on and the compromises that were reached as part  
2 of the support for the three-part test, that we don't  
3 believe that it violates any of the Ohio statutes and  
4 is properly supportive given the development of the  
5 support for the three-part test.

6 MS. HOTZ: Yes, your Honor. He is not  
7 supposed to be revealing what was discussed during  
8 periods of compromise at all. It's going to  
9 discourage people from expressing their views during  
10 compromise. Statements should not be made like this  
11 in testimony to -- just to protect the Stipulation  
12 process.

13 So OCC believes that this is also in  
14 violation of the parol evidence rule. The  
15 Stipulation should be interpreted on its language. A  
16 witness should not be coming in and interpreting a  
17 Stipulation. It's okay if he addresses the  
18 provisions and explains why they meet the three-prong  
19 test, but he shouldn't be talking about what parties

20 were saying during the settlement negotiations.

21 Thank you.

22 MR. RANDAZZO: Your Honor, if I might, it

23 would be one thing if the witness was talking about

24 the compromise relative to the litigation positions

25 of the parties that have been expressed and helping

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1 the Commission see the result of the settlement as a  
2 balance between competing positions.

3 This testimony, and there are other  
4 examples that I'm sure we're going to talk about in a  
5 moment, is not designed to do that. It's designed to  
6 prop up the settlement based upon compromises that  
7 are referenced in the testimony but relate to the  
8 face of the document.

9 So I think it is impermissible testimony  
10 because it refers to the exchange of ideas and views  
11 in the settlement process rather than talking about  
12 the merit of the settlement relative to litigation  
13 positions.

14 EXAMINER KINGERY: We're going to grant  
15 the motion to strike. The sentence beginning with  
16 "This provision" will be stricken.

17 MS. HOTZ: The second motion to strike  
18 starts on page 12, on line 20, and extends through  
19 page 13 to line 15, and again, this language is in

20 violation of Ohio Administrative Code 4901:1-26(E)  
21 and Ohio Rule of Evidence 408 as revelations of  
22 statements made during compromise. It's also  
23 contrary to the parol evidence rule and parts of it  
24 are contrary to the hearsay rule.

25 MR. RANDAZZO: Your Honor, we would

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1 likewise join.

2 EXAMINER KINGERY: Yes. Go ahead.

3 MR. COLBERT: Your Honor, this I would

4 break into two parts because I think there are two

5 different issues here. On page 12 starting at line

6 20, the sentence "OCC does not," through the end of

7 that answer at line 2 on the next page simply

8 discusses the footnote that is in the Stipulation

9 itself, No. 11, and is not part of the settlement

10 discussion, isn't conjecture. The footnote we

11 believe to be clear. And while -- keep in mind this

12 was filed of course before OCC's testimony was filed.

13 While it's become clear they have a dispute over that

14 interpretation, Mr. Smith's testimony on the matter

15 should not be stricken relative to settlement

16 discussions or anything else. That's clearly based

17 on the direct language in the Stipulation itself.

18 We --

19 MS. HOTZ: Your Honor, we dispute that.

20 EXAMINER KINGERY: Let's let Mr. Colbert  
21 finish his argument and then I'll ask you for your  
22 opinion again.

23 MS. HOTZ: All right.

24 MR. COLBERT: Regarding the remainder of  
25 the stricken portion, page 13 through line 15, you

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1 know, this is a little bit different than the prior  
2 language that was stricken. This discusses what was  
3 actually decided by the stipulating parties as  
4 reflected in the Stipulation, and with the changes  
5 that Mr. Smith made on the stand this morning makes  
6 it clear that it is reflecting his opinion as what is  
7 in -- you know, what the various interests and  
8 benefits and detriments of the policy are as opposed  
9 to the interests, opinions, detriments and policies  
10 discussed in the Stipulation.

11           And that indeed was the very purpose of  
12 the change that Mr. Smith made. So with that change  
13 that is expressing his own opinion, we don't believe  
14 it violates anything regarding settlement  
15 discussions.

16           EXAMINER KINGERY: Let me just read it  
17 over again for a second.

18           Yes, go ahead.

19           MS. HOTZ: The first section that Paul

20 was referring to, 12 and 13, about OCC's beliefs is  
21 definitely a violation of the parol evidence rule. I  
22 mean, not only was it inaccurate, but it's an  
23 interpretation of the Stipulation which shouldn't be  
24 permitted into evidence. I mean, the Stipulation  
25 should be read through its language, and Mr. Smith is

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1 not an attorney. He should not be interpreting  
2 language beyond the language in the Stipulation.

3 And with regard to the second section,  
4 all these changes, and it is my opinion, do not  
5 strike anything. It continues to say "it was decided  
6 by all stipulating parties"; "this issue was  
7 thoroughly discussed during negotiations," and, you  
8 know, it's just full of discussions about what  
9 happened during the negotiations which shouldn't be  
10 permitted in testimony.

11 EXAMINER KINGERY: Yes.

12 MR. COLBERT: Your Honor, just one quick  
13 concluding word here. Regarding the first part, this  
14 is a hearing about the Stipulation itself and  
15 interpretations of the Stipulation are permitted.

16 Regarding the second part, certainly  
17 Mr. Smith is allowed to reference, indeed almost  
18 required by the three-part test to reference the  
19 settlement discussions that occurred among parties.

20 The fact that he's referencing the discussions  
21 occurred is of no consequence. It's the content of  
22 those discussions I believe that OCC is objecting to.  
23 Relating to the first -- the success of the first  
24 motion to strike, that, we understand. This isn't  
25 that case.

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1           EXAMINER KINGERY: Mr. Randazzo, you look  
2 like you wanted one more comment.

3           MR. RANDAZZO: Well, your Honor, I'll  
4 just say that to the extent that this testimony stays  
5 in, I would suggest to you from an administrative  
6 standpoint there is almost no question that we cannot  
7 ask on cross-examination about what individual  
8 parties said during the negotiations and what  
9 positions they expressed as a result of the dialogue.

10           So I support OCC's motion. If this stuff  
11 stays in, the proceedings at the Commission will be  
12 in a mess from here to eternity.

13           EXAMINER KINGERY: Ms. Mooney, do you  
14 have something to say?

15           MS. MOONEY: Your Honor, I just wanted to  
16 point out in the past OPAAE's been the victim of  
17 Duke's "what was said in settlement negotiations" on  
18 brief, not just in -- not in testimony, and I would  
19 like to point out that you could also admonish Duke

20 not to put in their briefs anything that happened in  
21 the settlement negotiations the same way.

22 MR. ROYER: If your Honor please, just a  
23 thought on this. I share the concern as voiced by  
24 the parties about what's in the testimony in terms of  
25 what happened at settlement negotiations, but it

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1 seems to me that the motion to strike could be  
2 limited to eliminate those references and still allow  
3 for Mr. Smith's testimony --

4 EXAMINER KINGERY: You're brilliant.  
5 That's what we were just going to rule.

6 MR. ROYER: -- as to his opinions to  
7 stand.

8 MR. COLBERT: Your Honor, we'd agree to  
9 that, and if it cuts short things on the last motion  
10 to strike on page 14, we would agree to strike from  
11 the word "all" through the word "recognized" so  
12 that --

13 EXAMINER KINGERY: What lines are you on?

14 MR. COLBERT: Line 8 at page 14 through  
15 line 9 on page 14, which is the last motion to  
16 strike. That would make it read "It is my opinion  
17 that because the potential risks," so it would  
18 eliminate the language "All Parties to the  
19 Stipulation, excluding OCC, recognized," which I

20 think does precisely what you and Mr. Royer were just  
21 discussing.

22 MR. RANDAZZO: Your Honor, I don't think  
23 it solves the problem. You cannot speak to the state  
24 of mind of individual parties in settlement. The  
25 settlement stands on its four legs by itself. You

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1 can't boost its value by referencing what individual  
2 parties recognized or did not recognize. The  
3 question is are they knowledgeable. Once you're done  
4 with that, you've satisfied the criteria. The  
5 settlement needs to stand on its own.

6 EXAMINER KINGERY: The Commission does  
7 look at benefits of the Stipulation to various users,  
8 to various customers, and I don't have a problem with  
9 testimony that talks about the witness's opinion of  
10 the benefits of a Stipulation.

11 Now, you were just saying something about  
12 page 14, but the motion we were looking at I believe  
13 was the last two lines of page 12 through line 15 of  
14 page 13.

15 MR. COLBERT: Yes, your Honor.

16 EXAMINER KINGERY: And you referenced  
17 page 14.

18 MR. COLBERT: Yes, your Honor, on the  
19 written motion that OCC handed out, the third -- do

20 you not have it?

21 EXAMINER KINGERY: We don't have that.

22 MS. HOTZ: Here, let me give you a copy.

23 MR. COLBERT: I'm sorry. I had

24 thought -- I'm sorry.

25 EXAMINER KINGERY: Okay.

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1 MR. COLBERT: I was just trying to cut --

2 EXAMINER KINGERY: Well, what we were

3 going to propose -- or rule at this point is on page

4 12, the sentence beginning on line 20 with "OCC does

5 not," we would strike that sentence. Then the

6 question and answer beginning on page 13, I'm not

7 sure if the question will need to be revised once you

8 revise the language in 13, but what we're discussing

9 is striking from the beginning on line 5 with "This

10 issue" up until the newly added language starting "It

11 is my opinion." He can leave in what his opinion is.

12 You may need some of those words ahead of

13 time, but I'm going to leave that to you to figure

14 out.

15 MR. COLBERT: Okay.

16 EXAMINER KINGERY: And then again in the

17 next sentence, "Specifically, it was discussed and"

18 would have to come out, so that the sentence would

19 begin "It is my opinion." And then the last sentence

20 beginning on line 13 has to be stricken.

21 MS. HOTZ: Your Honor, OCC does not

22 believe that -- OCC does believe that the Stipulation

23 supports OCC's position because of the footnote,

24 footnote 11 -- I believe that's footnote 11 -- of the

25 Stipulation allows OCC to carve out the provision to

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1 litigate. So we believe that the Stipulation does  
2 support our opinion.

3 EXAMINER KINGERY: You can ask that in  
4 cross. I mean, I'm not saying that what he has said  
5 in his testimony is necessarily in agreement with  
6 your belief, just a question of whether it's  
7 appropriate testimony.

8 MR. RANDAZZO: Your Honor, if I might,  
9 the question is on line 3, "Does the Stipulation  
10 and/or" -- whatever that means -- "the other  
11 stipulating parties support the OCC's position"?  
12 This is a question that is directed at speaking on  
13 behalf of other parties who have agreed on the face  
14 of the Stipulation that this issue is going to be  
15 litigated.

16 EXAMINER KINGERY: I absolutely agree,  
17 and that's why I said in my remarks that the question  
18 might also have to be revised. If he's going to give  
19 testimony as to his opinion of the benefits of the

20 Stipulation, we don't have a problem with having  
21 testimony on the benefits. We do have a problem with  
22 having testimony about what was said during  
23 negotiations, and that's why we're striking the  
24 language about the negotiations.

25 So if the question can be appropriately

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1 revised, that's fine, but his opinion is not going to  
2 be an answer to the question as written, which is I  
3 believe your point.

4 MR. RANDAZZO: Exactly, thank you.

5 MR. COLBERT: And, your Honor, we would  
6 revise it to state: "In your opinion does the  
7 Stipulation support the OCC's position?" I think  
8 that probably accomplishes our purpose.

9 EXAMINER KINGERY: Okay. Are we clear on  
10 this motion?

11 MS. HOTZ: No, I'm not sure exactly.

12 EXAMINER KINGERY: Okay.

13 MS. HOTZ: So the question is: "In your  
14 opinion, does the Stipulation and/or the other  
15 stipulating parties support the OCC's position"?

16 EXAMINER KINGERY: No, I believe he  
17 revised it to "In your opinion, does the Stipulation  
18 support the OCC's position?"

19 MS. HOTZ: Okay. And then what's left is

20 "No, it does not."

21 EXAMINER KINGERY: No, I believe we took

22 that sentence out.

23 MR. COLBERT: You took the sentence

24 starting with the word "this" out.

25 EXAMINER KINGERY: I'm sorry, you are

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1 correct. So the "they" will have to be modified if  
2 you want it to make any sense.

3 MR. COLBERT: We can just say "no."

4 EXAMINER KINGERY: Fine, "no" will be  
5 good. "No."

6 Then the next sentence is out up until  
7 "It is my opinion," which was newly added language.

8 MR. COLBERT: Right.

9 EXAMINER KINGERY: Then the next sentence  
10 starting with "Specifically" is stricken until you  
11 get to "It is my opinion," which was also newly added  
12 language.

13 MS. HOTZ: So the first sentence is "No."

14 The second sentence is: "It is my opinion that  
15 similar terms would not be in the best interest."

16 That's the second sentence? And then the third  
17 sentence is "Specifically, it is my opinion"?

18 EXAMINER KINGERY: "Specifically" was  
19 also out.

20 MS. HOTZ: Okay. "It is my opinion that

21 the benefit to residential consumers."

22 EXAMINER KINGERY: Yes.

23 MS. HOTZ: And that's all in.

24 EXAMINER KINGERY: Yes. And then the

25 last sentence is stricken.

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1 MS. HOTZ: Okay.

2 Your Honor, I'm not exactly sure that

3 it's up to Mr. Smith to determine what the

4 Stipulation says and what it doesn't. I still think

5 stating "In my opinion does the Stipulation support

6 the OCC position" is parol evidence and I don't think

7 it should be admissible. I think it should be -- I

8 don't think it should be admissible. I think it's

9 interpreting a Stipulation, and I don't think he

10 should be doing that.

11 EXAMINER KINGERY: I think this is

12 talking about what the benefits are in his opinion of

13 the Stipulation, not what it means.

14 MS. HOTZ: Maybe the question should say

15 "What are the benefits in the Stipulation?"

16 EXAMINER KINGERY: Well, I don't want to

17 get into too much revising his testimony at this

18 point. We're already going pretty far in hacking up

19 words here and there, so we'll leave it at this

20 point.

21 Did you have a further motion to strike?

22 MS. HOTZ: The last motion to strike Paul

23 already addressed. It's on page 14, lines 8 through

24 12, and I believe that this is, again, testimony

25 about other parties' positions and beliefs and should

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1 be struck.

2 EXAMINER KINGERY: Yes.

3 MR. COLBERT: Just to repeat the offer I  
4 made before, and in the spirit of the discussion we  
5 just had, we would propose to delete from the word  
6 "all" through the word "recognized" so that it -- I'm  
7 sorry -- from the word "and" through the word  
8 "recognized" so that it simply reads "it is my  
9 opinion that because the potential risks," et cetera.  
10 And I think that that solves the issue that we've  
11 been discussing.

12 EXAMINER KINGERY: Does that resolve the  
13 issue for you?

14 MS. HOTZ: I suppose.

15 EXAMINER KINGERY: Okay. We will then  
16 revise it as you proposed.

17 MR. COLBERT: Thank you.

18 EXAMINER KINGERY: Anything else?

19 MS. HOTZ: Again on this clarification of

20 Paul Smith's second supplemental testimony, Exhibit

21 21, in the middle of the paragraph, let's see, it

22 would be the third sentence, it starts with

23 "Ultimately."

24 EXAMINER FARKAS: What page? I'm sorry.

25 MS. HOTZ: It's his clarification.

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1 EXAMINER KINGERY: Yes.

2 MS. HOTZ: Begins with "Ultimately, the  
3 ability to bypass the Rider SRA-SRT and the shopping  
4 credit was resolved as part of the Stipulation." I  
5 think the footnote indicates very clearly that it was  
6 not.

7 MR. COLBERT: It says at the end "except  
8 for OCC." That it was in fact resolved among all the  
9 parties except for OCC and, of course, IEU-Ohio who  
10 is not party to the Stipulation at all.

11 MS. HOTZ: Well, I think this is a  
12 violation of the parol evidence rule also because  
13 it's interpreting the Stipulation to mean something  
14 that it does not clearly say on the language, your  
15 language.

16 MR. RANDAZZO: Your Honor, this is the  
17 first time I've encountered this process so excuse  
18 me, but in the Stipulation it specifically says that  
19 positions that are identified in the settlement are

20 not designed to indicate what a party would have done  
21 had the issues been litigated, and now we're getting  
22 interpretations from the company on positions that  
23 were taken on individual issues when the face of the  
24 settlement itself says that is not what the  
25 settlement indicates. It's a compromise based upon

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1 the package.

2 And, again, I think that we are in a

3 very, very dangerous area here.

4 EXAMINER KINGERY: I'm questioning

5 whether this clarification is necessary anymore at

6 all since we have substantially changed the testimony

7 on pages 13 and 14 that it refers to. It starts out

8 with Mr. Smith suggesting that he had given an

9 impression of unanimity among parties. I don't

10 believe that we do that anymore.

11 MR. COLBERT: We'll withdraw it.

12 EXAMINER KINGERY: Thank you.

13 Ms. Hotz, would you like to begin

14 cross-examination?

15 MR. COLBERT: Your Honor, I'm sorry.

16 There is one -- and I apologize. There is one

17 matter. We withdrew the errata sheet, which is fine.

18 There was one substitution in the errata sheet that

19 has to do with the city of Cincinnati Attachment 5,

20 and I do think that the new Attachment 5 has to go in  
21 for the city. This is a procedural substitution. It  
22 literally changes nothing.

23 Basically what the new Attachment 5 does  
24 is to maintain in the attachment the economic --  
25 proposed economic development contract to be filed

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1 before the Commission at a later date and withdraws  
2 the language around the streetlighting, that is,  
3 DE-Ohio's acquisition of certain streetlights,  
4 et cetera. And the reason it does that is to permit  
5 the city to go through a procedure for approval in  
6 designing the Stipulation. The streetlight position  
7 is also remaining exactly the same, just not as prior  
8 to the Stipulation, but I believe it's -- all that is  
9 required is disclosure to all the parties. So we've  
10 disclosed the transaction, and I don't believe  
11 there's any change other than that.

12 But the city does need that change on  
13 Attachment 5, so if there's no objection to that,  
14 we're okay.

15 EXAMINER KINGERY: Any objections to  
16 that?

17 MR. RANDAZZO: Your Honor --

18 MR. McNAMEE: No.

19 MR. RANDAZZO: Your Honor, this whole

20 process is entirely improper. We object.

21 EXAMINER FARKAS: Is there a

22 particular -- do you have this revised version?

23 MR. COLBERT: Yeah, we do, and we can

24 pass out the revised version.

25 EXAMINER KINGERY: Why don't we pass it

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1 out at this point, let people have time during the  
2 day to look at it. We can consider it again at the  
3 end of the day.

4 MR. RANDAZZO: That would help, your  
5 Honor. Thank you.

6 MR. COLBERT: That would be fine. That  
7 would give us an opportunity to talk to the city as  
8 well.

9 EXAMINER KINGERY: Is there anything  
10 else, or can we start with cross-examination?

11 MR. RANDAZZO: Your Honor, for purposes  
12 of the record, and I don't want to make this any  
13 worse than it's been, but everybody seems to agree  
14 upon the witness's testimony in certain areas, except  
15 the witness at this point based upon the record, and  
16 so I think it might be useful to at least inquire of  
17 the witness as to whether or not he will accept the  
18 changes that have been kindly worked out for him  
19 during this process.

20 THE WITNESS: Certainly.

21 EXAMINER KINGERY: Thank you.

22 Ms. Hotz, you may begin.

23 - -

24 -

25 CROSS-EXAMINATION

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1 By Ms. Hotz:

2 Q. Good morning, Mr. Smith.

3 A. Good morning.

4 Q. It would be easier for governmental

5 aggregators to find a rate that would benefit

6 residential customers if aggregation residential

7 customers would avoid the SRA-SRT, correct?

8 A. I'm sorry, Ann, Ms. Hotz, do you mind?

9 Q. Need it louder?

10 A. I do. Sorry.

11 Q. It would be easier for governmental

12 aggregators to find a rate that would benefit

13 residential customers if aggregation residential

14 customers would avoid the SRA-SRT, correct?

15 A. No. I would disagree with that.

16 Q. And on what basis do you disagree?

17 A. Because I think it would go to what price

18 then would they pay if they would return to service

19 once that market offering was made, and if they were

20 to return at the 115 percent, such as nonresidential,  
21 or higher, a higher market price potentially, that  
22 would disadvantage those aggregators.

23 Q. So you think that the return price that  
24 an aggregation customer would face would have an  
25 effect on whether or not a marketer would offer a

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1 rate, a particular rate?

2 A. I absolutely believe it would impact the  
3 take rate for customers accepting that offer, and the  
4 issue there would be the -- in this particular case  
5 the SRA -- the SRT component is roughly about  
6 1 percent of a customer's bill. If a customer has to  
7 come back a year later and pay a 15 percent market  
8 price over and above the SSO, there's no -- I don't  
9 understand why a customer would accept getting a  
10 one-year 1 percent benefit in exchange for being  
11 exposed to the risk of two additional years at a  
12 15 percent premium. There are no customers that  
13 would accept that risk, or very few certainly.

14 Q. How do you know that no customers would  
15 accept that risk?

16 A. Let me ask you if you had a 30-year  
17 mortgage and I gave you a 1 percent discount on your  
18 interest rate in the first year but the next 29 years  
19 I'm going to give you a 15 percent premium to that

20 rate, higher rate, why would you accept that? The  
21 economics of that would not be acceptable to  
22 customers. I'd be shocked if any customer accepted  
23 that.

24 Q. I'm not asking you about what customers  
25 would accept and what they wouldn't accept. I'm

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1 asking you about the price that an aggregator could  
2 get from a marketer. Don't you think that it would  
3 be easier for a governmental aggregator to get a rate  
4 that would benefit customers from a marketer if they  
5 didn't have to pay the SRA-SRT and they got a  
6 6 percent shopping credit?

7 A. If you're to assume that they would come  
8 back at the SSO and all other costs and risks were  
9 the same, I would certainly agree with you. But  
10 that's not the way the market is developed. That's  
11 not what our nonresidential customers face, and,  
12 unfortunately, therefore I don't think the SRT is  
13 that significant an issue. 1 percent of the bill is  
14 not enough to change the market offerings.

15 Q. Do you know of any governmental  
16 aggregators who are providing electric aggregation  
17 service in the Duke service territory?

18 A. I do not.

19 Q. Under Duke's proposal any customer who

20 shops during the ESP period will have to return to  
21 115 percent of the standard service offer price,  
22 correct?  
23 A. Any nonresidential that signs a waiver  
24 that he will stay off of our SSO through the ESP  
25 period, yes, with those conditions he can return.

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1 Q. So even if a customer leaves the standard  
2 service offer the first year, say on January 1st,  
3 2009, and after that first year tells Duke that it  
4 intends to return the third year or on January 1st,  
5 2011, that customer will have to pay 115 percent of  
6 the standard service offer price, correct?

7 A. You're exactly correct. That's the way  
8 it works today under the RSP. That's the way it will  
9 continue tomorrow under the ESP.

10 Q. Okay. So does notice have anything to do  
11 with why a customer would have to pay 115 percent?

12 A. No. The 115 percent is the market -- the  
13 future market price, so notice has nothing to do with  
14 it.

15 Q. The main difference between active  
16 management of the fuel and purchased power portfolio  
17 and management of the fuel and purchased power  
18 portfolio whether they were decided in electric fuel  
19 component cases is that Duke adjusts its position

20 daily or more frequently rather than quarterly,

21 correct?

22 A. That's exactly correct.

23 Q. Isn't it true that the market price of

24 anything varies from time to time depending on supply

25 and demand?

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1           A. Absolutely. Could be higher or lower. I  
2 would agree with all commodities that's true.

3           MS. HOTZ: That's all I have. Thank you.

4           EXAMINER KINGERY: Thank you.

5           Mr. Randazzo.

6           MR. RANDAZZO: Thank you, your Honor.

7                         - - -

8                         CROSS-EXAMINATION

9 By Mr. Randazzo:

10          Q. Good morning, Mr. Smith.

11          A. Good morning.

12          Q. I have a few questions for you. As I  
13 understand the Stipulation that's been submitted, the  
14 ESP application of the company is the foundation for  
15 the Stipulation, and what is being recommended in the  
16 Stipulation is that be approved except where modified  
17 by the Stipulation.

18          A. Exactly, paragraph 1, that's correct.

19          Q. All right. And either as part of your

20 testimony or as part of the Stipulation you've not  
21 identified -- you've not provided a redline of what  
22 your ESP would look like as a result of integrating  
23 the Stipulation's outcome with your application; is  
24 that correct?

25 A. You're correct.

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1 Q. Now, you also in the settlement that's  
2 been filed, and it's at page 37 in paragraph 32, it  
3 says that in the event that the Commission develops  
4 rules in the two referenced cases there, that  
5 "DE-Ohio shall conform to the Commission's ESP  
6 rules."

7 A. That's correct.

8 Q. All right. Now, does that mean that the  
9 settlement will conform to the rules?

10 A. I would expect there may be provisions to  
11 the settlement that might need to be modified  
12 slightly. I do not expect a wholesale change in the  
13 settlement, if that's what you're implying.

14 Q. In the event that there is a conflict  
15 between the rules that are ultimately adopted in  
16 terms of the settlement, what controls?

17 A. The rules.

18 Q. All right. Now, you say in your  
19 supplemental testimony that the supplemental --

20 second supplemental testimony that the settlement --  
21 there's only one party opposing the settlement, and  
22 that's not correct, is it?

23 A. One party that signed the Stipulation has  
24 a single issue regarding the Stipulation. There are  
25 several parties that did not sign the Stipulation.

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1 Q. Okay. And the parties that did not sign,  
2 were they knowledgeable parties as well?

3 A. Typically, yes.

4 Q. Just checking.

5 Now, in your second supplemental  
6 testimony, and in fact all of your testimony, there's  
7 no specific reference to section 13b of the  
8 settlement which is on page 20, I believe; is that  
9 correct?

10 A. Nothing specifically references that  
11 paragraph of the Stipulation, that's correct.

12 Q. Okay. And prior to you preparing your  
13 testimony you knew that there were objections to the  
14 language in that paragraph, correct?

15 A. I think along the way there were  
16 objections to all paragraphs, and ultimately there  
17 was an agreement and a balancing of the interests  
18 that came to the Stipulation, so there could have  
19 been issues taken with any paragraph at any point in

20 time.

21 Q. Now, would you answer my question? With

22 regard to section 13b, before you testified here

23 today you knew there were objections from

24 nonsignatory parties to the language in that

25 paragraph, correct?

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1 A. Yes.

2 Q. So you chose not to address those  
3 objections in your prepared testimony, correct?

4 A. The testimony does not address it. I  
5 don't know that I selectively chose not to address  
6 it.

7 Q. All right, I'll accept that distinction.  
8 The fact of the matter is that you knew about the  
9 objections to the language and your testimony does  
10 not address the objections.

11 A. My testimony does not, that's correct.

12 Q. Is there anybody else that addresses the  
13 objections that were raised in the language in that  
14 paragraph?

15 A. No. Again, I think the Stipulation then  
16 supports the original application, and that  
17 particular paragraph would be supported by the  
18 testimony of Dr. Stevie and Mr. Schultz in the  
19 original application.

20 Q. Okay. Did Dr. Stevie or Mr. Schultz  
21 recommend the result that's in paragraph 3b, if you  
22 know?

23 A. We would have counseled with them before  
24 Duke Energy-Ohio accepted the Stipulation.

25 Q. Mr. Smith, I'm going to ask that you

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1 respond to the questions that I ask you or we're  
2 going to be here a long time. Did the testimony that  
3 was prefiled by the two gentlemen you just referenced  
4 recommend the result that is currently in section 13b  
5 of the settlement?

6 A. I guess I will need to read their  
7 testimony and read the Stipulation to -- if you'd  
8 like to take the time, I'd be glad to read them both  
9 and compare them.

10 Q. I thought you -- you haven't read their  
11 testimony at this point?

12 A. It's been several months, but I'll be  
13 glad to look at them again.

14 Q. You reference Mr. Stevie's testimony in  
15 your second supplemental testimony.

16 A. Correct.

17 Q. Can you go to the settlement and  
18 specifically Attachment 1?

19 A. I have it.

20 Q. Okay. And this is the overview of the  
21 various pricing provisions that are embedded in the  
22 settlement document; is that correct?

23 A. These are the components of the price  
24 structure, that's correct.

25 Q. All right. Now, you have it -- with

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1 regard to the generation piece, there's an avoidable  
2 generation charge and an unavoidable generation  
3 charge, correct?

4 A. That's correct.

5 Q. Now, there are also transmission and  
6 distribution related charges. Where in the various  
7 charges would costs associated with compliance with  
8 the portfolio requirements in Senate Bill 221 go?

9 A. I'm unfamiliar with the term "portfolio."

10 Q. You know that Senate Bill 221 has  
11 requirements related to renewables, alternative  
12 energy, demand response, and energy efficiency.

13 A. Correct.

14 Q. Okay. And if I would call those  
15 "portfolio requirements," would that be all right?

16 A. It would.

17 Q. Okay. Now, using the jargon that we just  
18 agreed upon, where would the costs associated with  
19 compliance with portfolio requirements reside within

20 these charges?

21 A. They would end up in various buckets, so  
22 the energy efficiency component is listed down under  
23 the energy efficiency, and then in parenthetical  
24 DR-SAW, which is where the energy efficiency  
25 component would be.

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1           Renewables to the extent they're in the  
2 form of energy charges, purchased power, that type  
3 thing, they would come through up at the top,  
4 Avoidable, Price-to-Compare. And then under the  
5 second bullet, Fuel, Purchased Power & Emission  
6 Allowances, so the PTC-FPP is where the energy  
7 efficiency deferrals would come to.

8           Q. How about capacity?

9           A. Right now that's kind of a vague area.

10          We had proposed a separate tracker for the capacity  
11 charges. It was withdrawn.

12          Q. Well, you've got it within the settlement  
13 you're purchasing capacity from -- for reliability  
14 purposes from the hospital, right?

15          A. Correct. I apologize. I thought you  
16 were referring to newly dedicated capacity.

17          Typical short-term capacity will come  
18 through what's termed the unavoidable generation here  
19 under the System Resource Adequacy, SRA, capacity or

20 market capacity purchases, so SRA-SRT, yes, is where  
21 they currently are recoverable.

22 Q. And if you know, what in Senate Bill 221  
23 allows you to make that an unavoidable charge?

24 MR. COLBERT: I'm going to object, your  
25 Honor. He's asking for a legal interpretation from a

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1 witness that is not here for that purpose.

2 EXAMINER KINGERY: Sustained. I

3 sustained that.

4 MR. RANDAZZO: Okay, thank you.

5 Q. Would you regard compliance with the law  
6 to be an important regulatory principle?

7 A. Generally, yes.

8 Q. Just generally? Do you know of any  
9 exceptions to that?

10 A. I know of none, but I'm sure there  
11 potentially in the future could be one.

12 Q. So we'll operate on the assumption that  
13 generally you agree that compliance with the law is  
14 an important regulatory principle.

15 In order to then know whether or not the  
16 settlement that's been submitted in this proceeding  
17 violates no important regulatory principle, you'd  
18 have to know what the law says, wouldn't you?

19 A. Yes. We've got a very good legal team

20 that would take care of that and make sure that it

21 complies with the law.

22 Q. So during the course of your preparing

23 your testimony and preparing for a hearing today, you

24 were not charged with the responsibility of forming

25 an opinion regarding the legality and, therefore, the

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1 legality of provisions in the settlement for purposes  
2 of determining whether or not the settlement violates  
3 any important regulatory principles; is that correct?

4 MR. COLBERT: Your Honor, I'm going to  
5 object again. He's asking for a legal opinion.  
6 Certainly, you know, he's had -- the witness has had  
7 advice from counsel in terms of whether it complies,  
8 but also this line of questioning derives from a  
9 funding mechanism that we've withdrawn, which was  
10 unavoidable capacity charge for newly dedicated  
11 capacity, including renewables. So it's not part of  
12 the Stipulation at this point and this, again, is not  
13 a legal witness.

14 EXAMINER KINGERY: We're going to  
15 overrule the objection.

16 THE WITNESS: Can you repeat the  
17 question?

18 Q. Let me try to shorten it up. Would you  
19 agree, sir, that to the extent the settlement

20 contained provisions that are unlawful, that it would

21 therefore violate important regulatory principles?

22 A. Yes.

23 Q. If we could go back to the Stipulation,

24 Attachment 1, please. Within the System Resource --

25 or, excuse me, Unavoidable Generation Charges, you've

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1 got Capacity Dedication as a component. Do you see  
2 that?

3 A. I do.

4 Q. Otherwise known as the SRA-CD. And you  
5 identify both in the settlement and in your  
6 supplemental -- second supplemental testimony certain  
7 costs related to the Beckjord station; am I correct?

8 A. Correct.

9 Q. And are those costs in the SRA-CD  
10 component?

11 A. Recovery of those costs is considered in  
12 the CD, that's correct.

13 Q. And are you aware of any requirements  
14 where an electric distribution utility is recovering  
15 costs associated with a specific unit of this type,  
16 whether there are any requirements associated with  
17 ensuring that the benefits that are derived from the  
18 costs follow the costs?

19 A. I'm sorry, do you mind repeating that?

20 Q. Yeah. I'm trying to avoid phrasing this  
21 in the terms of Senate Bill 221. Do you have a copy  
22 of the legislation by any chance?

23 A. I do not with me.

24 I have it.

25 Q. Were you advised by counsel at all

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1 regarding any requirements associated with making  
2 sure that benefits that may be derived as a result of  
3 expenditures traceable to a specific generating  
4 plant?

5 MR. COLBERT: Your Honor, I'm going to  
6 object. Now he's -- Mr. Randazzo is inquiring into  
7 privileged communications and, frankly, the  
8 direction --

9 MR. RANDAZZO: I'll withdraw the  
10 question.

11 Q. Let me just ask you this way: You've  
12 identified certain costs associated with the Beckjord  
13 unit that are going to be recovered through this  
14 capacity dedication component, correct?

15 A. Well, yeah. We probably need to expand  
16 on that slightly.

17 Q. Yes or no, please.

18 A. Yes, but.

19 Q. Go ahead.

20       A. To expand on that slightly, the price and  
21 the rate of the capacity dedication charge is  
22 unchanged from 2008 through the 2011 period,  
23 therefore, it's difficult to say that those costs are  
24 specifically recoverable through that rate in that  
25 they're not incurred currently. The rate's not

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1 changing. There is an accounting treatment that's  
2 afforded by the paragraph you're referring to.

3           So are those costs recoverable? Yes. It  
4 says we are incurring the costs and it is an  
5 unavoidable charge, but the rate itself is not  
6 changing from the present RSP rate to the rate that  
7 we're going to charge under the ESP.

8           Q. Well, I appreciate your additional  
9 language. It really doesn't have anything to do with  
10 my question, however, so we'll -- for whatever it's  
11 worth to you, I'll allow you to --

12           A. Thank you.

13           Q. -- proceed.

14           You have not identified in your testimony  
15 or the settlement what happens with any benefits that  
16 may be derived from the incurrence of those costs; is  
17 that correct?

18           A. I think we stated that the benefit of it  
19 was the ongoing operation of the Beckjord unit for

20 the next three years. So there's a pretty obvious  
21 stated benefit there, and I think that most people  
22 would understand what those benefits would be.

23 Q. Your benefit is constrained to the term  
24 of the ESP; is that correct?

25 A. That is correct.

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1 Q. Okay. And you haven't identified the  
2 benefits that might be associated with incurring  
3 those costs as those benefits relate to the period of  
4 time beyond the three years.

5 A. I wasn't aware that anyone assumed that  
6 that unit would still be running beyond the ESP  
7 period.

8 Q. So the question that I raised was you  
9 haven't identified any benefits beyond a three-year  
10 term that might be associated with incurring those  
11 costs.

12 A. We identified no costs or benefits beyond  
13 the three-year term.

14 Q. Let me try it again. You identify costs  
15 that are going to be incurred for the Beckjord unit  
16 during the ESP three-year term, correct?

17 A. And the associated benefit, correct,  
18 during the ESP.

19 Q. During the ESP. You do not identify any

20 benefits associated with the Beckjord unit beyond the  
21 three-year term; is that correct?

22 A. Yeah. Just hopefully we can get aligned  
23 here. The Stipulation addresses --

24 Q. Please, if would you, I don't mind you  
25 explaining, but if you would answer my question and

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1 then explain.

2 A. Okay. Possibly. The issue is the  
3 Stipulation addresses the costs, and it has  
4 associated benefits during the ESP. It doesn't  
5 address the costs nor the benefits post-ESP. So I  
6 think I'm saying yes to your question that there  
7 are -- it doesn't identify the benefits, nor does it  
8 identify the costs associated with the post-ESP  
9 period.

10 Q. All right. Are there other places where  
11 the settlement calls for capacity related payments,  
12 generation related payments to DE-Ohio?

13 A. Certainly generation related payments are  
14 throughout what's listed on Attachment 1, the  
15 avoidable, the price to compare, as well as the  
16 unavoidable, the system resource adequacy section.  
17 Those are all generation related.

18 Q. On page 9 of the settlement, paragraph  
19 10, the settlement begins to address eligible

20 capacity purchases.

21 A. I see that.

22 Q. Are those capacity purchases bypassable

23 or nonbypassable costs?

24 A. These are nonbypassable for residential.

25 They're bypassable for nonresidential that sign a

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1 waiver that the customer will stay off and not return  
2 to the SSO during the remainder of the ESP period.

3 Q. And this provision allows for costs  
4 associated with units that are owned or operated by  
5 DE-Ohio to be recovered through that mechanism?

6 A. Yeah. Correct. Not the legacy assets,  
7 but assets that have never been used and useful to  
8 serve DE-Ohio's native load, that's correct.

9 Q. You used the term "used and useful" just  
10 now. Of what significance is that to you?

11 A. To me that would identify those assets  
12 that were not a part of the transition plan that was  
13 filed in 1999 and part of the generation rate, the  
14 unbundled generation rate at that point in time.

15 Q. If you know, are those words words that  
16 appear in Senate Bill 221 anywhere; if you know?

17 A. "Used and useful"?

18 Q. Yeah.

19 A. I don't know.

20 Q. And with regard to those, what I think  
21 you called the nonlegacy generating assets, certain  
22 generating assets are identified in the settlement as  
23 being assets that DE-Ohio will be able to transfer;  
24 is that correct?

25 A. Correct.

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1 Q. Page 24 of the settlement identifies at  
2 the bottom of the page incentives that are available  
3 to DEO Ohio; is that correct?

4 A. Yes; related to the Save-A-Watt, the  
5 energy efficiency recovery mechanism.

6 Q. And is the return on investment cap, is  
7 that a return on equity, or is it just a return --  
8 percentage return that's applied to the program  
9 costs?

10 A. It's a return on the investment, so the  
11 total program cost, total investment.

12 Q. So the actual costs of the programs would  
13 be increased by the percentage adders that are  
14 identified here?

15 A. No. The mechanism itself has built in a  
16 margin to it, an avoided cost. This becomes a cap to  
17 that particular formula.

18 Q. But the avoided cost calculation includes  
19 the incentive, right?

20       A. The avoided cost, in loose terms, is part  
21 of the incentive, that's correct.

22       Q. Well, without the incentive the actual  
23 cost of the programs would be less, correct?

24       A. If we performed the programs. We may not  
25 choose to perform them so I don't know.

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1 Q. So yes with that qualification?

2 A. I think that was an "I don't know."

3 Q. The settlement -- strike that.

4 If we could come back to the Beckjord  
5 generating station, it's page 29, paragraph 16 of the  
6 settlement, and as I understand the settlement and  
7 your testimony, the \$15 million that is described in  
8 this paragraph, paragraph 16, is going to allow for a  
9 continued operation of the generating station.

10 A. Efficient operation, that's correct.

11 Q. Well, it says "continued operation of the  
12 station," doesn't it?

13 A. Right. I think the unit perhaps would  
14 have continued operating. Our problem becomes if  
15 we'd run it much longer without putting additional  
16 investment, I'm not sure it would run long or well,  
17 so it may not have lasted through the three-year  
18 period.

19 Q. And will this be a capital expenditure,

20 the \$15 million?

21 A. No.

22 Q. No?

23 A. These are solely operating and

24 maintenance expenses.

25 Q. And then the operating and maintenance

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1 expense is being recovered through the SRA-CD?

2 A. Correct. They're deferred into it and  
3 they're amortized over the three years, so yes.

4 Q. And page 34, paragraph 26 is the  
5 paragraph that describes the generating units for  
6 which you are seeking through this settlement  
7 permission to transfer; is that correct?

8 A. That's correct.

9 Q. And if the Commission were to approve  
10 this settlement, that would be deemed, according to  
11 this provision, as approval of the transfer; is that  
12 correct?

13 A. That would be my understanding, yes.

14 Q. Now, paragraph 27, page 34, compares the  
15 as-filed ESP as modified by the Stipulation to what  
16 would otherwise apply under section 4928.142. Do you  
17 see that?

18 A. I do.

19 Q. And I take it you're familiar with

20 section 4928.142.

21 A. I've read it.

22 Q. Do you have an opinion as to whether or

23 not the ESP as modified by the settlement is more

24 favorable in the aggregate as compared to what would

25 happen under 4928.142?

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1           A. I do. Similar to our original, our  
2 original pricing we found to be more favorable, the  
3 pricing of the Stipulation is lower than that  
4 original application, so I think to continue that  
5 line of thought I would expect the Stipulation and  
6 Duke believed the Stipulation to be more favorable.

7           Q. Okay. You have not provided in your  
8 testimony any quantitative analysis in support of  
9 that comparison, have you?

10          A. Yeah, that was provided in the testimony  
11 of Mr. Judah Rose.

12          Q. Let me try it again. You have not  
13 provided any quantitative analysis to show the  
14 effects of the ESP as modified by the Stipulation.

15          A. That's correct.

16          Q. So the comparison that Judah Rose  
17 describes is a comparison between the as-filed ESP  
18 and the alternative under 4928.142.

19          A. Right. He would have compared the

20 original application, which in total had, I'll throw  
21 out, a 6 percent increase in year one, the settlement  
22 calls for a 2 percent increase in year one. If the  
23 6 percent increase was under the market price, then  
24 obviously a 2 percent would be under that same market  
25 price. I agree.

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1 Q. Now, with regard to paragraph 28, which  
2 is on page 35 and continues, deals with excess  
3 earnings, do you know if this is a subject that the  
4 Commission intends to address by rule?

5 A. I believe they will.

6 Q. And so consistent with our prior  
7 discussion, if the Commission issues a rule in this  
8 area, the rule would supersede the settlement?

9 A. We would need to make sure that the  
10 Stipulation conforms to the rule, I think that's  
11 correct.

12 Q. Okay. So -- I asked the question badly.  
13 If there's a conflict between a rule issued by the  
14 Commission in this area and the settlement, the rule  
15 will control; is that correct?

16 A. That's my understanding.

17 Q. Now, in various places in your testimony  
18 you talk about the compromise that is reflected in  
19 the settlement, but you do not describe the

20 settlement relative to the litigation positions that

21 were identified by the parties; is that correct?

22 A. That's correct.

23 MR. RANDAZZO: That's all I have. Thank

24 you very much.

25 EXAMINER KINGERY: Thank you.

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1 MR. RANDAZZO: Thank your Honor.

2 EXAMINER KINGERY: Mr. Royer, you are not  
3 a signatory.

4 MR. ROYER: I am on behalf of Ohio  
5 Environmental Council.

6 EXAMINER KINGERY: But not on behalf of  
7 Dominion.

8 MR. ROYER: Correct. But I have no  
9 questions in either event.

10 EXAMINER KINGERY: Is there anyone else  
11 who is not a signatory who I've missed that would  
12 like to cross-examine?

13 (No response.)

14 EXAMINER KINGERY: Okay. Any redirect?

15 MR. COLBERT: Can we take about five  
16 minutes, your Honor?

17 EXAMINER KINGERY: Let's take ten  
18 minutes, have our break now and then come back for  
19 that.

20 MR. COLBERT: Thank you.

21 (Recess taken.)

22 EXAMINER KINGERY: Let's go back on the  
23 record.

24 MR. COLBERT: Your Honor, we have no  
25 redirect for Mr. Smith.

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1 EXAMINER KINGERY: Thank you. You may  
2 step down.

3 THE WITNESS: Thank you.

4 EXAMINER KINGERY: You may call your next  
5 witness.

6 MR. COLBERT: Thank you, your Honor. At  
7 this time Duke Energy Ohio would call Mr. Dan Jones.

8 EXAMINER KINGERY: Raise your right hand,  
9 please.

10 (Witness sworn.)

11 EXAMINER KINGERY: You may be seated.

12 - - -

13 DANIEL L. JONES

14 being first duly sworn, as prescribed by law, was

15 examined and testified as follows:

16 DIRECT EXAMINATION

17 By Mr. Colbert:

18 Q. Good morning, Mr. Jones.

19 A. Good morning, Mr. Colbert.

20 Q. Mr. Jones, do you have in front of you  
21 your direct testimony that's now marked as DE-Ohio  
22 Exhibit 4?

23 A. Yes, I do.

24 Q. And can you please state your name and  
25 business address for the record?

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1       A. My name is Daniel L. Jones. Business  
2 address, 139 East Fourth Street, Cincinnati, Ohio  
3 45202.

4       Q. And, Mr. Jones, was this testimony  
5 prepared under your direction and supervision?

6           EXAMINER KINGERY: Yes, it was.

7       Q. And, Mr. Jones, do you have any  
8 amendments or changes to your testimony?

9       A. Just one small change. Page 6, line 17,  
10 it's right before the conclusion to my testimony, the  
11 first rider that's mentioned there says "Rider  
12 PTC-BE," it's actually BG, base generation. That's  
13 the only revision.

14       Q. Thank you, Mr. Jones.

15           MR. COLBERT: With that, your Honor,  
16 Mr. Jones is available for cross-examination.

17           EXAMINER KINGERY: Thank you.

18           Go off the record for one second.

19           (Discussion off the record.)

20 EXAMINER KINGERY: Let's go back on the

21 record.

22 MR. COLBERT: Thank you, your Honor.

23 EXAMINER KINGERY: Ms. Hotz.

24 MS. HOTZ: Thank you.

25 - - -

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1                   CROSS-EXAMINATION

2   By Ms. Hotz:

3       Q.  Is it morning still?  Good morning,

4   Mr. Jones.

5       A.  Good morning.

6       Q.  Now, you work in the area of Duke

7   Energy-Ohio that's responsible for the operational

8   support to CRES providers; is that correct?

9       A.  That's correct, and also to gas

10  suppliers.  Our business center operates both our gas

11  and electric customer choice programs.

12       Q.  And how long have you been in that

13  position?

14       A.  Since customer choice began in Ohio, I

15  was on the transition teams that formed that

16  department back in 1999, and electric customer choice

17  became operational 1/1/01.

18       Q.  Duke charges electric CRES suppliers more

19  to bill for rates that are a percentage off of the

20 standard service offer rather than for flat rates;

21 isn't that true?

22 A. Maybe I should explain what's in our

23 tariff. Tariff 20, the certified supplier tariff,

24 has in it four billing options for certified

25 suppliers. Those four options are nonvolumetric

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1 rate, which is basically you can charge your customer  
2 a hundred dollars a month, it's a flat fee per month;  
3 the second is a volumetric rate, which if a supplier  
4 wants to charge their customer 8 cents a  
5 kilowatt-hour, we can put that 8 cents into our  
6 billing system; the third option is a tiered rate to  
7 put both demand charges and energy charges into  
8 steps, you know, the first so many kW of demand a  
9 certain amount, the next additional kW at another  
10 amount, that type of thing, so that's the tiered  
11 rate. And then finally there is an on and off peak  
12 option if you follow the meters on our system for on  
13 and off peak hours.

14 Q. What if a CRES supplier wants to charge  
15 customers a percentage off of the standard service  
16 offer?

17 A. According to our tariff that is a  
18 nonstandard rate request, and the way we proceed with  
19 that is to get an estimate from our IT department as

20 to how to implement that, what it would take to place  
21 that into our billing system, and the current fee for  
22 doing that is \$75 an hour for the IT time, and  
23 actually that's lower. It needs to be updated in our  
24 electric tariffs. In our gas tariffs that rate is  
25 now \$125 per hour for that IT team.

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1 Q. So you would charge a CRES supplier how  
2 much now?

3 A. Today's tariff says \$75 per hour for the  
4 IT time.

5 Q. Okay. Has Duke ever refused to provide  
6 any electric CRES providers lists of customers in its  
7 service territory?

8 A. Not to my knowledge.

9 Q. What does a CRES provider have to do to  
10 get a list?

11 A. Well, they make a request, it can be  
12 through telephone or e-mail to our certified supplier  
13 business center, the area that I am responsible for.  
14 There are actually three different types of lists on  
15 the electric side of the company. You can get the  
16 preenrollment list, which has all customers who have  
17 not opted off of that list. There's a bill insert  
18 that goes out four times a year, a quarterly bill  
19 insert that lets customers know that that list

20 exists, and if you don't want your name on it, they

21 can opt off the list by calling our call center.

22           So that one is available to electric

23 suppliers, basically all the customers in our service

24 territory except those who have opted off, that's

25 available for \$150. It can be burned onto a CD for

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1 the suppliers, and we've actually found a way to  
2 actually exchange information over the internet to a  
3 supplier's website if they have that technology to do  
4 so.

5         The other two type lists are more in the  
6 governmental aggregation area. We can provide a zip  
7 code list on zip codes specified by the certified  
8 supplier. That list is \$400 for a specified zip code  
9 list. If you want a best-efforts boundary verified  
10 list for governmental aggregation, the cost of that  
11 is \$1,200.

12         Basically the difference between the  
13 governmental aggregation list and the standard  
14 preenrollment list is that the governmental  
15 aggregation lists have account numbers on them  
16 because that's how the governmental aggregator has to  
17 submit their enrollments knowing all the account  
18 numbers because they have not solicited each of those  
19 customers individually to get their account numbers.

20 Q. Are there governmental aggregators  
21 providing electric service in the Duke service  
22 territory at this time?

23 A. No, there are not.

24 Q. How many governmental aggregators have  
25 ever provided electric service in the Duke service

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1 territory?

2 A. There was one electric governmental  
3 aggregator since the beginning of our customer choice  
4 program on the electric side.

5 Q. And who is that?

6 A. Village of Indian Hill.

7 Q. How much does Duke charge CRES providers  
8 to bill for them?

9 MR. COLBERT: I'm going to object at this  
10 point, your Honor. OCC's opposition to the  
11 Stipulation in this case is limited to footnote 11  
12 dealing with bypassability for residential  
13 governmental aggregation customers and the shopping  
14 credit. We've been going some time now asking  
15 questions about our business center and the services  
16 it provides to CRES providers without tying it at all  
17 to that particular issue.

18 MS. HOTZ: Your Honor, my questions go to  
19 the feasibility of aggregators providing service in

20 the Duke service territory and the avoidability issue

21 is part of that, as is the additional costs that go

22 to it, and I'm asking questions about additional

23 costs so that we can show how important it is that

24 aggregators be able to avoid certain of the riders.

25 EXAMINER KINGERY: We're going to allow

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1 the question.

2 MS. HOTZ: Could you read the question  
3 again, please?

4 (Record read.)

5 A. Okay. There is -- that's also addressed  
6 in our tariffs. The utility consolidated billing  
7 that we actively provide today is what's called rate  
8 ready billing, and what rate ready billing is, the  
9 suppliers give us their rates and we place it into  
10 the billing system so when the meters are read, we've  
11 got a beginning read, an ending read. We can bill  
12 the Duke Energy distribution charges. We can also  
13 bill the suppliers' charges based on the fact that  
14 that number is already in our system. So that's rate  
15 ready billing.

16 The other type of billing that we have  
17 prepared for based on our settlement of our  
18 transition plan back in '99 was bill ready billing.  
19 There is a fee for bill ready billing. There is no

20 fee for rate ready billing. Bill ready billing is  
21 when we send the usage out to the supplier, they  
22 actually structure the format of the bill within  
23 certain constraints and then send that back to us via  
24 EDI, electronic data interchange, and that basically  
25 picture that they provide us is placed into a

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1 supplier area on our bill.

2 But to this point no one has actively  
3 billed any customers under bill ready billing, and  
4 there are fees listed for each type of customer bill.  
5 If it's residential, commercial, industrial, or other  
6 public authority, there are certain fees that we  
7 charge for bill ready billing on a per-bill basis.

8 Q. So there's a variety of fees.

9 A. Well, four fees for bill ready billing  
10 depending on whether the bill is residential,  
11 commercial, industrial, or other governmental  
12 authority.

13 Q. How much are the fees for residential  
14 customers?

15 A. I would have to refer to the tariff to  
16 find that, but I think, you know, from what I recall,  
17 I mean, they're all -- I mean this is from vague  
18 memory, like under 20 cents a bill. They're probably  
19 less than that, but I would need to look at the

20 tariff.

21 MS. HOTZ: That's all I have. Thank you.

22 EXAMINER KINGERY: Thank you.

23 Mr. Randazzo.

24 MR. RANDAZZO: No questions. Thank you.

25 EXAMINER KINGERY: Mr. Royer?

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1 MR. ROYER: No questions.

2 EXAMINER KINGERY: Any redirect?

3 MR. COLBERT: No redirect, your Honor.

4 EXAMINER KINGERY: You may step down.

5 Thank you.

6 You may call your next witness.

7 MR. COLBERT: Yes, your Honor. At this

8 time DE-Ohio would call Mr. Theodore Schultz to the

9 stand and Ms. Heigel will present him.

10 (Witness sworn.)

11 EXAMINER KINGERY: You may be seated.

12 You may proceed when you're ready.

13 MS. HEIGEL: Thank you.

14 - - -

15 THEODORE E. SCHULTZ

16 being first duly sworn, as prescribed by law, was

17 examined and testified as follows:

18 DIRECT EXAMINATION

19 By Ms. Heigel:

20 Q. Mr. Schultz, would you please state your

21 name and address for the record.

22 A. Theodore Schultz, 526 South Church

23 Street, Charlotte, North Carolina.

24 Q. And by whom are you employed and in what

25 capacity?

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1           A. By Duke Energy, and I am the vice  
2 president of energy efficiency.

3           Q. Did you cause to be prefiled in this case  
4 direct testimony consisting of 28 pages and one  
5 exhibit which has been previously marked as DE-Ohio  
6 Exhibit No. 9?

7           A. I did.

8           Q. Did you also cause to be prefiled  
9 supplemental testimony in this case consisting of  
10 four pages and two exhibits which has been previously  
11 marked as DE-Ohio Exhibit 16?

12          A. Yes, I did.

13          Q. And do you have any changes or  
14 corrections to make to your testimony, either your  
15 direct or supplemental at this time?

16          A. I do not.

17                MS. HEIGEL: Mr. Schultz is available for  
18 cross-examination.

19                EXAMINER KINGERY: Thank you.

20 Ms. Hotz.

21 MS. HOTZ: None.

22 EXAMINER KINGERY: Mr. Randazzo.

23 MR. RANDAZZO: Just a few questions.

24 - - -

25 CROSS-EXAMINATION

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1 By Mr. Randazzo:

2 Q. With regard to your direct testimony,  
3 page 6, there in the answer to the only question that  
4 appears on that page you talk about Rider DR-SAW.

5 A. I do.

6 Q. And that rider is maintained in the  
7 settlement document that's been filed; is that  
8 correct?

9 A. Yes. The rider was -- Mr. Smith talked  
10 about the rider in the settlement document.

11 Q. Is that rider a bypassable or  
12 nonbypassable?

13 A. I believe that rider is nonbypassable.

14 Q. Now, page 10 and 11 of your testimony,  
15 direct again, you talk about the implementation  
16 flexibility that you believe is a desirable thing for  
17 purposes of energy efficiency; am I correct?

18 A. Yes.

19 Q. And there you say that, in the middle of

20 page 10, that you need to be careful to make sure  
21 that programs are not so prescriptive that they  
22 inhibit the ability to customize and personalize  
23 offers; is that correct?

24 A. Yes.

25 Q. Now, you also -- have you read the

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1 settlement?

2 A. I have.

3 Q. At page 24 of your direct testimony you  
4 begin to address what is referred to as the opt-out.

5 A. Yes.

6 Q. Is that correct? And that section of  
7 your testimony goes to the proposal that was included  
8 as part of the ESP the company filed, correct?

9 A. Yes; the original filing in July.

10 Q. Right. And you are not offering any  
11 testimony on the settlement; is that correct?

12 A. I'm not offering any additional testimony  
13 other than here on the stand.

14 MR. RANDAZZO: That's all I have, thank  
15 you.

16 EXAMINER KINGERY: Thank you.

17 Mr. Royer.

18 MR. ROYER: No questions.

19 EXAMINER KINGERY: Any redirect?

20 MS. HEIGEL: No, thank you.

21 EXAMINER KINGERY: Thank you. You may

22 step down. Thank you.

23 THE WITNESS: Thank you.

24 EXAMINER KINGERY: You may call your next

25 witness.

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1 MS. HEIGEL: Next witness would be

2 Dr. Richard Stevie.

3 Should we determine as a preliminary

4 matter whether anyone has any cross-examination for

5 Dr. Stevie?

6 EXAMINER KINGERY: Yes. Does anyone have

7 cross-exam for him?

8 MR. RANDAZZO: Just a couple of questions

9 along the lines of Mr. Schultz.

10 EXAMINER KINGERY: That's fine.

11 (Witness sworn.)

12 EXAMINER KINGERY: You may sit down.

13 Thank you.

14 - - -

15 RICHARD G. STEVIE, PH.D.

16 being first duly sworn, as prescribed by law, was

17 examined and testified as follows:

18 DIRECT EXAMINATION

19 By Ms. Heigel:

20 Q. Dr. Stevie, would you please state your

21 full name and business address for the record?

22 A. Yes. My name is Richard G. Stevie. My

23 business address is 139 East Fourth Street,

24 Cincinnati, Ohio 45202.

25 Q. And by whom are you employed, and in what

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1 capacity?

2 A. I'm employed by Duke Energy Business  
3 Services as managing director of customer market  
4 analytics.

5 Q. Thank you. And did you cause to be  
6 prefiled in this docket certain direct testimony  
7 consisting of 33 pages and four exhibits which have  
8 been previously marked as DE-Ohio Exhibit No. 11?

9 A. Yes.

10 Q. Did you also cause to be prefiled in this  
11 docket certain supplemental testimony consisting of  
12 ten pages, seven exhibits, which we have previously  
13 marked as DE-Ohio Exhibit 17?

14 A. Yes.

15 Q. And do you have any changes or  
16 corrections to make to either of those pieces of  
17 testimony at this time?

18 A. Only to point out that in the original  
19 prefiled testimony I think it was mentioned as part

20 of Exhibit 19 that there's a new Attachment RGS-4.

21 Q. Thank you, Dr. Stevie.

22 MS. HEIGEL: He is available for

23 cross-examination.

24 EXAMINER KINGERY: Thank you.

25 Ms. Hotz, you indicated you have no

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1 questions at this time?

2 MS. HOTZ: I don't have any.

3 EXAMINER KINGERY: Okay. Mr. Randazzo.

4 - - -

5 CROSS-EXAMINATION

6 By Mr. Randazzo:

7 Q. Dr. Stevie, your testimony that has been  
8 filed -- strike that.

9 Have you read the settlement?

10 A. Yes.

11 Q. The testimony that has been prefiled with  
12 the Commission does not address any of the terms of  
13 the settlement; is that correct?

14 A. My testimony does not address any of the  
15 terms of the settlement that the -- the prefiled  
16 testimony.

17 Q. And with regard to the requirements in  
18 Senate Bill 221 which you address, start to address  
19 at page 10 of your direct testimony --

20 A. Yes.

21 Q. -- it's my understanding that based on

22 this testimony that DE-Ohio has commissioned a market

23 potential study to evaluate what can be achieved

24 relative to the energy efficiency and demand response

25 targets that are included in that legislation. Do I

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1 correctly understand your testimony?

2 A. Yes. We have commissioned a market  
3 potential study that is due to be completed in  
4 December of this year.

5 Q. And you say on page 11 that the results  
6 will be incorporated in future filings. Future  
7 filings in this case, or where will they be  
8 incorporated?

9 A. It's my understanding, and I think this  
10 will be dependent upon the ultimate resolution of the  
11 Commission rules, but each company is required to  
12 file what I will term a compliance report or  
13 compliance filing showing how it is meeting the  
14 benchmarks that are established in the legislation,  
15 and that information I would expect would be used in  
16 that compliance filing.

17 Q. Have you retained outside assistance in  
18 developing the market potential study?

19 A. Yes. We retained Forefront Economics to

20 prepare the market potential study.

21 Q. And you describe what a market potential

22 study is in your testimony; am I correct?

23 A. Yes.

24 Q. And can you tell me why you found it

25 necessary to retain outside assistance for purposes

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1 of conducting the market potential study?

2 A. Well, one of the main issues with regard  
3 to -- in my view, one of the main issues with regard  
4 to the legislation is what is the level of  
5 cost-effective energy efficiency that is achievable  
6 in the marketplace. And using that as, say, for want  
7 of a better term, an alternate benchmark of what can  
8 be achieved, I think that would be useful information  
9 to the Commission in establishing what is realistic  
10 with regard to the benchmarks in the legislation.

11 And so we retained an outside firm to  
12 give us their perspective on it. It's a firm that's  
13 been used -- that has been retained in other  
14 jurisdictions by other parties across the country.

15 Q. Would you regard that firm as a firm  
16 having expert knowledge in this area?

17 A. Yes.

18 MR. RANDAZZO: I believe that's all I  
19 have. Thank you very much.

20 EXAMINER KINGERY: Thank you.

21 Mr. Royer.

22 MR. ROYER: No questions.

23 EXAMINER KINGERY: Any redirect?

24 MS. HEIGEL: No, your Honor.

25 EXAMINER KINGERY: Thank you. You may

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1 step down. Thank you.

2 MR. COLBERT: Your Honor, at this time we  
3 would do two things. One is in regard to  
4 Mr. Stevie's testimony. As I previously noted, we  
5 had filed a letter saying that we would withdraw  
6 testimony that was in support of the transfer of  
7 certain assets. Mr. Stevie's testimony from page 5,  
8 line 9, to page 11, line 2, would be withdrawn. That  
9 has to do with the load forecast. It was not the  
10 subject of Mr. Randazzo's cross-examination.

11 With that exception, we would move into  
12 evidence DE-Ohio Exhibit 4, the testimony of Dan  
13 Jones; DE-Ohio Exhibit 11, the direct of Dr. Richard  
14 Stevie; DE-Ohio 15, the supplemental of Paul Smith,  
15 DE-Ohio -- I'm sorry, I skipped DE-Ohio 9, the direct  
16 of Mr. Ted Schultz; 16, the supplemental of  
17 Mr. Schultz; 17, the supplemental of Dr. Richard  
18 Stevie; 18, the second supplemental of Mr. Smith; 19,  
19 the two documents relating to Mr. Kiergan and

20 Mr. Stevie's testimony; 20, the application, and

21 we've withdrawn 21 and 22.

22 EXAMINER KINGERY: Did you intend to skip

23 over Exhibit 10?

24 MR. COLBERT: No. I'm sorry. Exhibit 10

25 as well, the direct of Mr. Smith. I thought I had

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1 said that, but if I missed it . . .

2 EXAMINER KINGERY: All right. Does  
3 anyone have any objections to that motion? Yes.

4 MR. RANDAZZO: I just want to make sure.  
5 There was nothing in the list on Joint Exhibit 1.

6 EXAMINER KINGERY: No, there was not.

7 MR. COLBERT: Well, and I'm sorry, I  
8 would move Joint Exhibit 1, the Stipulation.

9 EXAMINER KINGERY: Now there is.

10 MR. RANDAZZO: With that errata, we would  
11 object to the admission of Joint Exhibit 1 and more  
12 specifically section 13b of that document.

13 MR. COLBERT: I'm sorry, I didn't hear  
14 you, Sam.

15 MR. RANDAZZO: We object to the  
16 settlement and more -- admission of the settlement as  
17 Joint Exhibit 1, and more specifically, section 13b.

18 EXAMINER KINGERY: And you're objecting  
19 to 13b on substantive grounds?

20 MR. RANDAZZO: On both procedural and  
21 substantive.

22 MR. COLBERT: Your Honor, we think that  
23 they've been fully supported. The Stipulation has  
24 been signed by a number of parties. Mr. Randazzo is  
25 offering testimony on 13b and --

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1           MR. RANDAZZO: We will not offer the  
2 testimony if my motion is granted.

3           MR. COLBERT: Well, fair enough. But we  
4 think that it has been properly supported. We don't  
5 believe there's a procedural issue here nor a legal  
6 issue or a factual issue, for that matter, so we  
7 would oppose the motion.

8           EXAMINER KINGERY: Mr. Randazzo, what is  
9 the procedural concern on 13b?

10          MR. RANDAZZO: There's no witness that  
11 spoke to this. Mr. Smith punted to Mr. Stevie.  
12 Mr. Stevie didn't speak to this, didn't speak to the  
13 settlement. Mr. Schultz didn't speak to the  
14 settlement. There's been no witness offered on this  
15 language.

16          MR. COLBERT: Your Honor, if I may. As  
17 we stated at the beginning of the hearing this  
18 morning, the testimony that was being offered by all  
19 of the parties, including Mr. Schultz and Mr. Stevie

20 as well as Mr. Smith, was in support of the  
21 Stipulation to demonstrate a compromise as to that,  
22 and that of course includes paragraph 13b.

23 The application position and the  
24 testimony was indeed different than 13b, and we  
25 believe, frankly, that that testimony supports it in

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1 combination with Mr. Smith's testimony regarding the  
2 process of how the entire Stipulation, including 13b,  
3 was reached.

4 EXAMINER KINGERY: We believe that it's  
5 premature at this point to rule on the motion to  
6 admit the Stipulation as we have not yet had all of  
7 the witnesses who may testify in support thereof, so  
8 we will reserve judgment on that particular motion.

9 Are there any objections to the admission  
10 of any of the remainder of the exhibits covered by  
11 this motion?

12 MS. HOTZ: No.

13 EXAMINER KINGERY: All right. Then we  
14 will be admitting Duke Exhibits 4, 9, 10, 11, 15, 16,  
15 17, 18, and 19. And we have yet to consider Joint  
16 Exhibit 1. We also have yet to consider the revised  
17 Attachment 5 we discussed earlier.

18 (EXHIBITS ADMITTED INTO EVIDENCE.)

19 EXAMINER KINGERY: I didn't say 20.

20 We'll also be admitting 20.

21 MR. COLBERT: Thank you, your Honor.

22 (EXHIBIT ADMITTED INTO EVIDENCE.)

23 EXAMINER KINGERY: At this point would

24 staff like to go next in support of the Stipulation,

25 or would you prefer to defer until the --

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1           MR. McNAMEE: We can certainly go now if  
2 it would be more expedient for the other witnesses to  
3 go now. We can do that as well.

4           MR. RANDAZZO: It would be my expectation  
5 that those parties speaking in support of the  
6 settlement would be required to put their affirmative  
7 case on before we respond.

8           MR. McNAMEE: That's fine.

9           EXAMINER KINGERY: Let's go forward.

10          MR. McNAMEE: Staff would call Tamara  
11 Turkenton.

12          EXAMINER KINGERY: Raise your right hand.

13          (Witness sworn.)

14          EXAMINER KINGERY: You may be seated.

15                         - - -

16                         TAMARA S. TURKENTON

17 being first duly sworn, as prescribed by law, was

18 examined and testified as follows:

19                         DIRECT EXAMINATION

20 By Mr. McNamee:

21 Q. Can you state and spell your name for the  
22 record, please?

23 A. Tamara Turkenton, T-u-r-k-e-n-t-o-n.

24 Q. By whom are you employed and in what  
25 capacity?

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1 A. Public Utilities Commission of Ohio,  
2 public utilities administrator.

3 Q. What is your business address?

4 A. 180 East Broad, Columbus, Ohio 43215

5 MR. McNAMEE: Your Honor, at this time  
6 staff would like to have marked for identification as  
7 Staff Exhibit 1 a multipage document denominated  
8 Prefiled Testimony of Tamara S. Turkenton docketed in  
9 this case October 31st, 2008.

10 EXAMINER KINGERY: It will be so marked.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 Q. Ms. Turkenton, do you have before you  
13 what's been marked for identification as Staff  
14 Exhibit 1?

15 A. I do.

16 Q. What is it?

17 A. My prefiled testimony in this case.

18 Q. Was it prepared by you or under your  
19 direction?

20 A. It was.

21 Q. Do you have any corrections to be made to

22 this document this morning?

23 A. I do. I have one minor correction.

24 Q. What is it?

25 A. It is on page 7 at line 8. It says

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1 "during the ESP." That should be "during the RSP,"  
2 rate stabilization period.

3 Q. With that correction are the contents of  
4 what's been marked for identification as Staff  
5 Exhibit 1 true to the best of your knowledge and  
6 belief?

7 A. They are.

8 Q. If I were to ask you the questions that  
9 are contained within what's been marked for  
10 identification as Staff Exhibit 1 here again this  
11 morning, would your answers be as represented  
12 therein?

13 A. They would.

14 Q. Do you adopt what's been marked for  
15 identification as Staff Exhibit 1 as your prefiled  
16 testimony in this case?

17 A. I do.

18 MR. McNAMEE: The witness is available  
19 for cross.

20 EXAMINER KINGERY: Thank you.

21 Ms. Hotz.

22 MS. HOTZ: No thank you.

23 EXAMINER KINGERY: Mr. Randazzo.

24 MR. RANDAZZO: Just a couple of

25 questions.

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1                   - - -

2                   CROSS-EXAMINATION

3   By Mr. Randazzo:

4       Q.   Your testimony that has been prefiled  
5   does not address specifically section 13b of the  
6   settlement; is that correct?

7       A.   It does not.

8       Q.   And as I asked of Mr. Smith, you were  
9   aware there were objections to that paragraph, that  
10   section of the settlement, section 13b, prior to  
11   preparing your testimony, correct?

12      A.   Yes, I was aware.

13      Q.   Now, on page 5 of your testimony,  
14   question No. 9, you were asked the question: "Does  
15   the Stipulation violate any important regulatory  
16   principle?"  Would your answer there be yes if the  
17   settlement violated Ohio law?

18      A.   It would be yes if it was found to be  
19   unlawful.

20 Q. Good answer.

21 Is it also your understanding that to the

22 extent that there is a conflict between a rule

23 adopted by the Commission in final form and the

24 settlement, that the rule will control?

25 A. Yes. The rule would prevail per the

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1 Stipulation.

2 Q. Would it be your understanding that the  
3 rule would prevail regardless of what the Stipulation  
4 says?

5 MR. McNAMEE: Objection.

6 EXAMINER KINGERY: Sustained.

7 MR. RANDAZZO: That's all I have. Thank  
8 you very much.

9 EXAMINER KINGERY: Thank you.

10 Mr. Royer.

11 MR. ROYER: No questions.

12 EXAMINER KINGERY: Mr. McNamee, do you  
13 have any redirect?

14 MR. McNAMEE: No redirect. And staff  
15 would move the admission of Staff Exhibit 1.

16 EXAMINER KINGERY: Any objections?

17 It will be admitted.

18 (EXHIBIT ADMITTED INTO EVIDENCE.)

19 EXAMINER KINGERY: And you may step down.

20 Thank you very much.

21 Let's go off the record.

22 (Discussion off the record.)

23 (At 11:48 a.m. lunch recess was taken

24 until 1:30 p.m.)

25

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2 November 10, 2008.

3 - - -

4 EXAMINER KINGERY: Let's go back on the  
5 record. I believe at this point we have a pending  
6 motion on the admission of the Stipulation in the  
7 record and we are prepared to rule on that and we  
8 will admit the Stipulation.

9 (EXHIBIT ADMITTED INTO EVIDENCE.)

10 EXAMINER KINGERY: So I guess at this  
11 point we are ready for either OCC's witness or IEU's  
12 witness. Who wants to go first?

13 MR. RANDAZZO: We can go. That would be  
14 fine.

15 EXAMINER KINGERY: That's great.

16 MR. RANDAZZO: I'd ask that Mr. Kevin  
17 Murray be called to the stand and be sworn as a  
18 witness in this proceeding.

19 (Witness sworn.)

20 EXAMINER KINGERY: You may be seated.

21 MR. RANDAZZO: For the benefit of the

22 Bench and the parties we will be just offering and

23 discussing with Mr. Murray what has been prefiled as

24 his supplemental testimony. Mr. Murray filed

25 testimony originally in the case. This testimony,

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1 the supplemental testimony, is focused on the  
2 settlement. In the event that -- the unfortunate  
3 event that we would have to come back, our  
4 understanding is we would have the ability to deal  
5 with whatever issues may need to be dealt with at  
6 that time.

7 EXAMINER KINGERY: Yes, that's true.

8 - - -

9 KEVIN M. MURRAY

10 being first duly sworn, as prescribed by law, was  
11 examined and testified as follows:

12 DIRECT EXAMINATION

13 By Mr. Randazzo:

14 Q. Mr. Murray, would you state your name and  
15 your business address for the record, please?

16 A. My name is Kevin Murray. My business  
17 address is McNees, Wallace & Nurick, LLC, 21 East  
18 State Street, 17th Floor, Columbus, Ohio 43215.

19 Q. Mr. Murray, did you prepare supplemental

20 testimony and have that filed in this proceeding?

21 A. Yes, I did.

22 MR. RANDAZZO: Your Honor, I would ask

23 that Mr. Murray's supplemental testimony which was

24 filed in this proceeding on November the 5th be

25 designated as IEU-Ohio Exhibit No. 1.

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1 EXAMINER KINGERY: It will be so marked.

2 (EXHIBIT MARKED FOR IDENTIFICATION.)

3 Q. Mr. Murray, do you have a copy of what  
4 has been designated as IEU-Ohio Exhibit No. 1 in  
5 front of you?

6 A. Yes, I do.

7 Q. Is that your supplemental testimony that  
8 we just spoke of a moment ago?

9 A. Yes, it is.

10 Q. Do you have any changes or corrections  
11 that you would like to make to that testimony,  
12 Mr. Murray?

13 A. No.

14 Q. Mr. Murray, if I were to ask you the  
15 questions that are set forth in that document, IEU  
16 Exhibit No. 1, would the answers you would give here  
17 today be the same as set forth therein?

18 A. Yes, they would.

19 MR. RANDAZZO: Your Honor, I would offer

20 what has been marked for identification purposes as  
21 IEU-Ohio Exhibit No. 1 subject to cross-examination  
22 and make Mr. Murray available for any  
23 cross-examination.

24 EXAMINER KINGERY: Thank you very much.

25 Duke?

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1 MS. HEIGEL: Yes, your Honor. As a  
2 preliminary matter I would like to make a motion to  
3 strike certain portions of Mr. Murray's testimony.

4 EXAMINER KINGERY: All right.

5 MS. HEIGEL: I'll go through those.  
6 Beginning on page 3, lines 12 through 18 of  
7 Mr. Murray's testimony, it is Duke Energy-Ohio's  
8 position that Mr. Murray is admitting that the  
9 purpose of his testimony is to render a legal opinion  
10 regarding the ultimate issue in the case which is  
11 beyond his expertise in this matter, therefore, would  
12 ask that those lines be stricken.

13 EXAMINER KINGERY: Are you an attorney?

14 THE WITNESS: No, I am not.

15 EXAMINER KINGERY: Mr. Randazzo.

16 MR. RANDAZZO: Yes, your Honor,  
17 Mr. Murray acknowledges he is not an attorney on page  
18 4. The testimony that is the subject of the motion  
19 to strike, however, deals with whether or not the

20 Stipulation and Recommendation dealing with -- which  
21 on its face deals with section 4928.66 is  
22 inconsistent with the criteria that the Commission  
23 has used to evaluate settlements. Mr. Murray  
24 expresses the view that the settlement violates an  
25 important regulatory principle.

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1 MS. HEIGEL: Which Duke Energy-Ohio would  
2 submit to you is a legal conclusion.

3 EXAMINER KINGERY: We're going to allow  
4 this testimony in with the understanding that it is  
5 not a legal conclusion.

6 MS. HEIGEL: Thank you.

7 Next lines would be on page 4, line 21,  
8 through page 5, line 2, the sentence starting "I  
9 describe the potential regulatory consequences."

10 EXAMINER KINGERY: Same objection?

11 MS. HEIGEL: Same objection, evidence  
12 rule 702.

13 EXAMINER KINGERY: And once again we will  
14 deny that motion to strike.

15 MS. HEIGEL: Okay.

16 EXAMINER KINGERY: With the  
17 understanding, of course, that he is not an attorney.

18 MS. HEIGEL: Thank you.

19 Moving on to page 6 of Mr. Murray's

20 testimony, lines 17 through 18, I would reiterate the  
21 same objection, that the question here as well as the  
22 answer on lines 19 through 21, the question calls for  
23 Mr. Murray to provide a legal conclusion which he's  
24 not qualified to make. The answer given provides a  
25 legal conclusion for which he's not qualified.

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1           EXAMINER KINGERY: Same resolution, we'll  
2 allow the testimony.

3           MS. HEIGEL: On page 7, lines 4 through  
4 12, again, same objection, evidentiary rule 702, this  
5 calls for Mr. Murray to make a legal conclusion and  
6 he purports to provide a legal conclusion.

7           MR. ROYER: I'm sorry, Ohio Environmental  
8 Council would join in that one.

9           EXAMINER KINGERY: We're going to have  
10 the same resolution on this one. Once again, we  
11 understand that the witness is not an attorney. To  
12 the extent that this calls for a legal conclusion,  
13 he's not telling us about the law.

14          MS. HEIGEL: Thank you.

15          The next objection I would raise is also  
16 on page 7, lines 15 through 23, same evidentiary rule  
17 702 purporting to offer a legal conclusion which is  
18 beyond the witness's expertise.

19          EXAMINER KINGERY: And we'll make the

20 same ruling.

21 MS. HEIGEL: Thank you.

22 The next objection I have is on page 8,

23 lines 6 through 9, also evidentiary rule 702

24 objection, the witness is providing a legal

25 conclusion which is beyond his expertise.

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1           EXAMINER KINGERY: To the extent that  
2 that calls for a legal conclusion we'll recognize  
3 that the witness is not a lawyer, but we will allow  
4 the sentence in.

5           MS. HEIGEL: Thank you.

6           The last objection I have is on page 9,  
7 lines 4 through 7. Duke Energy-Ohio believes this  
8 question calls for the witness to disclose  
9 information provided in furtherance of compromise  
10 negotiations and that his answer constitutes an  
11 improper disclosure of information to be provided in  
12 compromise discussions, and to quote Mr. Randazzo  
13 from this morning, if this stuff stays in, the  
14 proceedings at the Commission will be a mess from  
15 here to eternity.

16           EXAMINER KINGERY: Mr. Randazzo.

17           MR. RANDAZZO: Your Honor, this is simply  
18 what I've already explained through  
19 cross-examination, whether or not there was any

20 identification of concerns that were communicated to  
21 the parties previously. And it's not -- we're not  
22 talking about what other parties said or anything  
23 during the course of the negotiations from a  
24 substantive standpoint. We're trying to procedurally  
25 identify the fact that we have identified the

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1 objections that we have had to 13b to the parties  
2 previously, just in the interest of fairness.

3           The record already reflects that point so  
4 if you take this question and answer out, the record  
5 will stand as it currently is. I don't think this is  
6 the type of thing where you're talking about or  
7 speaking about the substantive positions the parties  
8 had on their merits. It is procedural in nature.

9           EXAMINER KINGERY: We recognize that this  
10 testimony only discusses IEU's own concerns and  
11 position in negotiations, but it nevertheless does  
12 talk about negotiations so we will strike it. So we  
13 will be striking lines 4 through 7 on page 9.

14           MS. HEIGEL: Thank you.

15                           - - -

16                           CROSS-EXAMINATION

17 By Ms. Heigel:

18           Q. Good afternoon, Mr. Murray.

19           A. Good afternoon.

20 Q. We met on Friday, if you recall, at your  
21 deposition. I believe you testified in your  
22 supplemental testimony that the purpose of your  
23 testimony is to discuss IEU's position relative to  
24 section 13b of the Stipulation; is that correct?

25 A. Is there something in my testimony that

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1 you're referring to?

2 Q. Sure. On page 3 you were asked: "What  
3 is the purpose of your testimony?" And you answered:  
4 "More specifically, I explain why section 13b. . ."

5 A. That's correct.

6 Q. And it is also your testimony, is it not,  
7 that IEU does not support -- neither supports or  
8 opposes the balance of the Stipulation?

9 A. I've taken no position with respect to  
10 the balance of the Stipulation.

11 Q. In fact, I believe I asked you at your  
12 deposition "Do you have an opinion on the balance of  
13 the Stipulation?" And do you remember what your  
14 answer was?

15 A. My recollection was my answer was no, I  
16 have no opinion.

17 Q. Mr. Murray, I believe you also testified  
18 in your deposition that you have some familiarity  
19 with Senate Bill 221; is that correct?

20 A. That's correct.

21 Q. And the energy efficiency benchmarks that  
22 are contained in that newly codified legislation; is  
23 that correct?

24 A. That's correct.

25 Q. For purposes of ease I'm going to refer

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1 you to page 5 of your testimony. On lines 8 through  
2 17 you actually set forth a particular provision of  
3 the statute, Section 4928.66(A)(2)(c). Do you see  
4 where that is in your testimony?

5 A. Yes.

6 Q. And this section sets out the mercantile  
7 customer exemption from the electric distribution  
8 utilities rate rider for energy efficiency and demand  
9 response, does it not?

10 A. Yes.

11 MS. HEIGEL: At this time, your Honor,  
12 Duke Energy-Ohio would offer to stipulate that the  
13 company agrees that any mercantile customer may apply  
14 to the Commission to offer its customer sided demand  
15 response energy efficiency or peak demand reduction  
16 capabilities to the electric distribution utility as  
17 part of a reasonable arrangement that is submitted to  
18 the Commission pursuant to Section 4905.31 of the  
19 statute dealing with reasonable arrangements.

20 Q. Mr. Murray, do you know --

21 MR. RANDAZZO: Might I inquire what that

22 is directed to?

23 MS. HEIGEL: It's just an acknowledgment

24 by the company that mercantile customers are entitled

25 to make an application pursuant to the provision that

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1 he has set forth in his testimony.

2 MR. RANDAZZO: Are you testifying now, or  
3 what is the significance of the comment?

4 MS. HEIGEL: I'm sorry. It's subject to  
5 (A)(2)(d), that they can make that application. I'm  
6 not seeking to testify. I'm merely stipulating to  
7 what's in the statute.

8 MR. RANDAZZO: Well, I'm pleased that  
9 you're willing to stipulate to what the law says, but  
10 I'm not sure what role it has in this proceeding, and  
11 I'm trying to determine that so I can determine  
12 whether to move to strike your offer.

13 MS. HEIGEL: If you'd like to move to  
14 strike, that's fine. I was trying to --

15 MR. RANDAZZO: I will move to strike.

16 MS. HEIGEL: We'll consent to that.

17 EXAMINER KINGERY: All right.

18 Q. (By Ms. Heigel) Mr. Murray, do you know  
19 whether the energy efficiency demand response and

20 peak demand reduction effects of mercantile customer

21 sided programs are included in the electric utility's

22 benchmark prior to exemption?

23 A. I'm not sure I understand your question.

24 Q. In determining the benchmarks for which a

25 utility will be held for purposes of meeting the

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1 energy efficiency and demand reduction targets, do  
2 you know whether the effects of the programs that  
3 customers such as your members have done will be  
4 reflected in that baseline?

5 A. That's an issue that I believe will be  
6 addressed by the rules that the Commission's required  
7 to promulgate in order to implement that section of  
8 the law. It's my understanding that existing energy  
9 efficiency measures, peak demand reduction measures  
10 that are in place prior to the effective date of  
11 SB 221 are allowed to be counted, so that  
12 mathematical possibility is something that certainly  
13 has to be reflected.

14 Q. Thank you.

15 And do you know whether a mercantile  
16 customer is required to commit for integration into  
17 the electric distribution utility's programs its  
18 energy efficiency, demand response, et cetera, if it  
19 receives an exemption?

20           A.  Yeah, that's my understanding of the  
21  provision in the statute, that in order to apply for  
22  one exemption you must commit those capabilities  
23  toward the EDU's obligation.

24           Q.  Thank you.

25           MR. RANDAZZO:  Mr. Murray, could you

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1 speak up, please?

2 THE WITNESS: Sure.

3 Q. And do you know whether there are any  
4 specific criteria set out in the statute by which an  
5 application for exemption --

6 MR. McNAMEE: His battery just died.

7 EXAMINER KINGERY: Let's go off the  
8 record for a minute.

9 (Off the record.)

10 EXAMINER KINGERY: Let's go back on the  
11 record.

12 MS. HEIGEL: Thank you.

13 Q. (By Ms. Heigel) I believe I was in the  
14 process of asking you whether you knew whether the  
15 statute provided any specific criteria by which an  
16 application for exemption would be judged by the  
17 Commission.

18 A. Not that I recall.

19 Q. Mr. Murray, in your deposition I asked

20 you the question: "What criteria do you think the  
21 Commission should use to determine eligibility for  
22 exemption?" And you answered: "I believe that that  
23 is an issue that customer -- the Commission will need  
24 to address in a case-by-case basis." Do you recall  
25 that question and answer?

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1 A. Yes.

2 Q. If IEU's position's accepted by the  
3 Commission and a customer can obtain a partial  
4 exemption, are you proposing, then, that the customer  
5 would not pay the full amount of the DR-SAW rider?

6 A. No. What I have suggested in my  
7 testimony -- bear with me here, I'll find it.

8 Q. Sure. Take your time.

9 A. Beginning on page 9 and continuing  
10 through page 12 I talk about the -- my interpretation  
11 of a provision in section 13b that would foreclose a  
12 mercantile customer from seeking a waiver if they  
13 weren't able to produce the same proportional energy  
14 efficiency improvement or peak demand reduction  
15 obligation that the electric distribution utility is  
16 obligated to under law.

17 And what I have suggested, that for  
18 customers to commit their capability, whatever it may  
19 be, and I'm suggesting that committing the capability

20 that's even less than a proportionate obligation has  
21 value, that in exchange for committing that -- there  
22 needs to be some value proposition in it for the  
23 customer.

24           And resolving what that value proposition  
25 is can be something that's addressed on a

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1 case-by-case basis in the context of a reasonable  
2 arrangement presented to the Commission. So in that  
3 context, it may be reasonable for a full waiver, a  
4 partial waiver, or no waiver at all. It needs to be  
5 addressed on a case-by-case basis.

6 Q. And so would that not then lead to the  
7 creation of essentially a special rate for each of  
8 these -- or the potential for the creation of a  
9 special rate for each of these special arrangements?  
10 Would you agree?

11 A. I'm not sure what you mean by "special  
12 rate" in this context. A reasonable arrangement in a  
13 contract, it may or may not have a consequence as to  
14 the specific electric rate the customer's paying.

15 Q. Correct. But there is a possibility that  
16 it could result in a different rate.

17 A. A reasonable arrangement is for the  
18 purposes of providing something other than standard  
19 terms and conditions.

20 Q. Thank you.

21 Mr. Murray, can you tell me, what's the  
22 energy consumption threshold for -- to qualify as a  
23 mercantile customer in the statute?

24 A. It is annual consumption of 700,000  
25 kilowatt-hours per year.

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1 Q. And do you have any idea how many  
2 customers might qualify as mercantile customers  
3 statewide?

4 A. No.

5 Q. Would it surprise you to learn that 1,771  
6 customers in Duke Energy-Ohio's service territory  
7 alone qualify as mercantile customers?

8 MR. RANDAZZO: I object to the question,  
9 no foundation in the record for that.

10 EXAMINER KINGERY: Can you provide a  
11 foundation, please?

12 MS. HEIGEL: Withdraw the question.

13 Q. Did you, Mr. Murray, perform any analysis  
14 to determine what costs might be associated with your  
15 proposal for partial exemption such as measurement  
16 and verification costs associated with all those  
17 impacts going back to 1998?

18 A. You're going to have to --

19 Q. I'll break that up.

20 A. -- break the question into a couple

21 pieces.

22 Q. Did you perform any analysis as to the

23 cost of IEU's partial exemption proposal?

24 A. No.

25 Q. Would you agree there will be costs

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1 associated with measuring and verifying the impacts  
2 that mercantile customers have achieved from 1998  
3 forward?

4 A. There may be.

5 Q. The IEU members that are located in Duke  
6 Energy-Ohio's service territory are General Motors  
7 and Marathon Petroleum; is that correct?

8 A. That's correct.

9 Q. And do you know if they are currently  
10 doing energy efficiency programs?

11 A. Is your question specific to their  
12 facilities in Duke Energy's service territory?

13 Q. That is correct, yes.

14 A. I do not know.

15 Q. And do you know whether these companies  
16 are measuring and verifying any program impacts they  
17 might have?

18 MR. RANDAZZO: I object; beyond the scope  
19 of the testimony and irrelevant.

20 EXAMINER KINGERY: We're going to allow

21 the question.

22 THE WITNESS: If I could have the

23 question reread.

24 (Record read.)

25 A. Again, was your question specific to the

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1 facilities in the Duke Energy service territory?

2 Q. My question is specific to General Motors  
3 and Marathon Petroleum.

4 A. Within Duke's service territory or not?

5 Q. I'm sorry, yes, within Duke's service  
6 territory.

7 A. I do not know.

8 Q. Mr. Murray, do you know whether Senate  
9 Bill 221 provides for any penalties or forfeitures  
10 for electric distribution utilities for failure to  
11 meet the benchmarks?

12 A. I believe it does, but I'd have to look  
13 at the statute to refresh my memory.

14 Q. Would you agree, subject to check, that  
15 Section 4928.66(C) provides for such forfeiture?

16 MR. RANDAZZO: Your Honor, I object. I  
17 think we've got -- now the witness is being asked to  
18 agree on statutory language and what it means, and I  
19 think this is beyond the scope of his testimony.

20 EXAMINER KINGERY: I'm going to allow the  
21 question.

22 THE WITNESS: Could I have the question  
23 reread?

24 (Record read.)

25 MR. RANDAZZO: Your Honor, if I may, the

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1 same qualification that you allowed in his testimony.

2 EXAMINER KINGERY: Absolutely. We  
3 understand.

4 MR. RANDAZZO: Fine.

5 EXAMINER KINGERY: The witness is not an  
6 attorney.

7 MR. RANDAZZO: Thank you.

8 EXAMINER KINGERY: These are not legal  
9 conclusions.

10 MR. RANDAZZO: Thank you.

11 A. As I've previously indicated, my  
12 recollection is that there are penalties for  
13 noncompliance. Whether or not they're in that  
14 specific section, I'd have to review the legislation.

15 Q. And I believe it's been your view  
16 expressed here today and previously in your  
17 deposition that addressing the customers' commitments  
18 in most cases will likely occur through a reasonable  
19 arrangement approved by this Commission; is that

20 correct?

21 A. That's my expectation.

22 Q. If a customer were to fail to meet its

23 integration commitment under such a special

24 arrangement, would IEU support a provision in

25 contract allowing the electric distribution utility

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1 to allow the non -- to add the noncompliance penalty

2 to the customer's bill?

3 THE WITNESS: Could I have the question

4 reread again?

5 (Record read.)

6 A. I don't know that I can testify for IEU

7 as to that specific question. In my opinion, whether

8 or not a customer meets the capabilities that it has

9 committed to provide toward an EDU's portfolio

10 obligation, the consequences for not doing so could

11 certainly be addressed as part of the terms and

12 conditions of reasonable arrangement that they enter.

13 MR. RANDAZZO: Mr. Murray, would you pull

14 the microphone closer to you, please?

15 THE WITNESS: Okay.

16 Q. I'm going to ask the question again. In

17 your opinion, would that be a reasonable provision to

18 have in a contract?

19 A. Yes.

20           Q. Mr. Murray, in your supplemental  
21 testimony -- and this was all relative to having my  
22 motions overruled for legal conclusion. I will  
23 embark down that path subject to -- without waiving  
24 that objection.

25           You testified that section 13b of the

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1 company's Stipulation was inconsistent with the  
2 Commission's criteria that the Stipulation not  
3 violate an important regulatory principle as well as  
4 the law; is that correct?

5 A. That's correct.

6 Q. And some of your opinions on the law were  
7 formed from talking to your counsel, were they not?

8 A. That's correct.

9 Q. I believe you also testified that you are  
10 aware of the rulemaking that is ongoing, and the case  
11 number on that is 08-888-EL-ORD.

12 A. I'm aware of it.

13 Q. In fact, when I asked you in your  
14 deposition how customers in your view should commit  
15 their energy efficiency and demand response  
16 capabilities to the utility, you answered: "That's  
17 an issue that I think is going to have to be  
18 addressed by the rules issued by the Commission." Is  
19 that correct?

20 A. That's correct.

21 Q. However, you have not had any significant

22 involvement in the comments filed by IEU in that

23 proceeding, have you?

24 A. Not significant.

25 Q. Mr. Murray, you're not a lawyer. I

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1 believe we've established that; is that correct?

2 A. I believe that's stated in my testimony.

3 Q. So, Mr. Murray, is it your view that the

4 Commission should value your opinion over those who

5 are more closely involved in the rulemaking and the

6 lawyers who will actually brief this case?

7 MR. RANDAZZO: I object to the question.

8 EXAMINER KINGERY: On what grounds?

9 MR. RANDAZZO: How is it relevant to

10 anything, asking the witness how he should rank his

11 opinion relative to other witnesses?

12 EXAMINER KINGERY: I'll allow the

13 question.

14 A. My opinion as to what?

15 Q. As to whether or not the Stipulation

16 complies with regulatory principles and laws.

17 MR. RANDAZZO: I object. The focus of

18 this witness's testimony is section 13b. He did not

19 address the balance -- he specifically says he's not

20 addressing the balance of the Stipulation.

21 EXAMINER KINGERY: Can you rephrase the  
22 question?

23 MS. HEIGEL: Sure.

24 Q. Mr. Murray, in your opinion should the  
25 Commission value your opinion on section 13b of the

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1 Stipulation over those who are more actively involved  
2 in the rulemaking proceeding and the lawyers who  
3 would brief this case?

4 MR. RANDAZZO: I object. There is  
5 absolutely no opinion offered in this record but  
6 Mr. Murray's on section 13b, so if the suggestion  
7 that somehow we're going to have an opinion offered  
8 through the briefing process that deals with this  
9 subject, I think it's an inappropriate suggestion. I  
10 object.

11 EXAMINER KINGERY: Would you please  
12 clarify who he is to be comparing his opinion  
13 against?

14 MS. HEIGEL: If he could clarify his  
15 opinion over those such as Mr. Stevie, Mr. Schultz,  
16 Mr. Smith, others who have testified in this case.

17 EXAMINER KINGERY: And this is his  
18 opinion on 13b?

19 MS. HEIGEL: Right. I narrowed it to 13b

20 of the Stipulation.

21 EXAMINER KINGERY: I'll allow the witness

22 to answer the question.

23 A. My recollection is there's nothing in the

24 testimony of Mr. Smith, Mr. Stevie, or Mr. Schultz,

25 that specifically addresses section 13b in the

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1 Stipulation, so I think my opinion is the only  
2 opinion the Commission has to rely upon.

3 MS. HEIGEL: We have nothing further.

4 EXAMINER KINGERY: Thank you.

5 All right, at this point we're going to  
6 go on, just go right around the table looking for  
7 cross-examination.

8 MS. CHRISTENSEN: No questions your  
9 Honor.

10 MR. YURICK: No questions. Thank you,  
11 your Honor.

12 EXAMINER KINGERY: Mr. McNamee.

13 MR. McNAMEE: No questions, your Honor.

14 MR. KURTZ: No questions, your Honor.

15 MS. HOTZ: No.

16 MR. ROYER: Thank you, your Honor.

17 - - -

18 CROSS-EXAMINATION

19 By Mr. Royer:

20 Q. I'd like you to direct your attention --  
21 by the way, thank you for the use of your coat at  
22 lunch, which I accidentally stole from him.  
23 A. I thought that ruled out any  
24 cross-examination.  
25 Q. I thought I'd grown because the sleeves

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1 were now up to here.

2           Direct your attention to page 5. And  
3 understanding that you're not a lawyer and  
4 understanding I'm not asking to reveal anything you  
5 may have learned in discussions with your counsel,  
6 but do you have an opinion as to whether there's a  
7 significance to be attached to the fact that the --  
8 in the quote on line 11 --

9           A. Excuse me, I'm having difficulty hearing  
10 you.

11          Q. I'm sorry. Better?

12          A. Yes.

13          Q. Okay. Let me start over then.  
14 Recognizing that you're not a lawyer and not asking  
15 you to reveal any conversations with your counsel  
16 that may have influenced your opinion regarding these  
17 matters, do you believe that there's any significance  
18 to be attached to the fact that the third line of the  
19 quote which appears on line 11 of your testimony

20 speaks and uses the term "may" rather than "shall"?

21 A. It's permissive.

22 Q. And "shall" would be mandatory, in your

23 view?

24 A. Yes.

25 Q. All right. And then on page 8, line 3,

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1 you state that you believe the language is somewhat  
2 confusing because it suggests that the exemption  
3 "shall" be available to customers. What do you find  
4 confusing about that?

5 A. You pointed me to page 8 of my testimony  
6 and I'm --

7 Q. I'm sorry, page 6, line 3. Thanks.

8 A. The language is confusing because "shall"  
9 in this context is -- would compel the waiver, but if  
10 you read the intent -- or, if you read the language  
11 in section 13b, what it actually does is remove the  
12 opportunity to seek a waiver for any customer that  
13 meets the definition of mercantile customer but is  
14 less than the 3-megawatt threshold.

15 Q. Isn't it common in, for example, utility  
16 tariffs to have statements of eligibility and then go  
17 on to have provisions that specify certain  
18 qualifications that must be met? In other words, you  
19 have a tariff available to customers of certain

20 voltage levels, but then there may also be provisions

21 that say that they have to do other things? Isn't

22 that -- that's not unusual, is it?

23 A. I've seen tariffs that have language to

24 that effect.

25 Q. Okay. Now, I believe counsel for the

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1 company asked you if you were familiar with -- or if  
2 you knew the number of additional customers -- well,  
3 maybe that wasn't the exact question so let me start  
4 over.

5 Do you know how many additional customers  
6 would be added or would have the exemption available  
7 if the threshold was moved to the statutory standard  
8 for mercantile customers from 3 megawatts?

9 A. I have no idea.

10 Q. Would it be an important concern to you  
11 from the standpoint of administering this program if  
12 there were, for example, hundreds of additional  
13 customers that could file applications with the  
14 Commission?

15 A. That's a policy judgment that I think the  
16 legislature would have had to take into account when  
17 they enacted the law.

18 Q. The Commission shouldn't consider that?

19 A. The Commission's got to follow the law.

20 Q. Now, on page 7 of your testimony you  
21 identify two of the three-part test for approval of  
22 the Stipulation by the Commission; is that right?

23 A. Yes.

24 Q. And there's a third prong to that test.

25 A. Yes.

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1 Q. And what is that, if you know?

2 A. I don't recall.

3 Q. Would it refresh your recollection if I

4 were to suggest that it was whether the Stipulation

5 was the product of serious bargaining among capable

6 and knowledgeable parties?

7 A. I remember that. Yes, it does.

8 Q. Okay. Without asking you to reveal any

9 of the specifics of the settlement discussions in

10 this case, do you believe that three-part test has

11 been met -- that third prong of the test is met?

12 A. I recognize that the parties to the

13 negotiations were knowledgeable.

14 Q. And, in fact, in Mr. Schultz's earlier

15 testimony he had recommended a 25-megawatt threshold;

16 is that right?

17 MR. RANDAZZO: I object. No foundation.

18 MR. ROYER: It's in the witness's

19 testimony.

20 MR. RANDAZZO: Well, there were various  
21 recommendations.

22 MR. ROYER: Hang on.

23 Q. On page 8 of your testimony at the  
24 sentence beginning on line 17, you state:

25 "Mr. Schultz corrected his testimony such that the

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1 option to opt out was limited to a single site or  
2 aggregated load of 25 MW." Is that correct?

3 A. That's what my testimony says.

4 Q. And that testimony's been admitted into  
5 the record in this case; is that right?

6 A. Mr. Schultz's testimony?

7 Q. Yes.

8 A. I believe it has.

9 Q. All right. So the fact that there is  
10 something other, some lower threshold than has been  
11 included in the Stipulation, doesn't that suggest to  
12 you that was the result of serious bargaining among  
13 parties?

14 A. I think you perhaps are misreading my  
15 testimony. What I tried to point out in my testimony  
16 relative to the 25-megawatt threshold is it's  
17 unrelated to section 13b of the Stipulation.

18 Q. Well, the original threshold was 3  
19 megawatts or the Stipulation threshold was

20 3 megawatts; is that right?

21 MR. RANDAZZO: Objection. 3 megawatts

22 relative to what? What this section of the testimony

23 is dealing with is what the company proposed in its

24 application relative to what used to be called Rider

25 DSM.

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1 MR. ROYER: All right. Withdrawn.

2 Q. On page 10 of your testimony you give an  
3 example of a 5 percent -- that the company has an  
4 obligation to produce a 5 percent reduction in  
5 electricity usage during an annual calendar period.

6 Do you see that example?

7 A. Yes.

8 Q. Is there any such requirement in section  
9 4928.66 of the Revised Code?

10 A. I would have to go back and look at the  
11 specific benchmarks each year. I picked an arbitrary  
12 number to make the example easy to understand, which  
13 may or may not correspond with the provision in the  
14 statute.

15 Q. Are you aware that in the first year the  
16 savings requirement using the three-year average is  
17 3/10 of 1 percent of the total?

18 A. Again, I'd have to go back and look at  
19 the statute.

20 Q. This is purely by example and you're not  
21 trying to tie this in any way to any actual  
22 benchmarks.

23 A. Exactly.

24 Q. Now, are any -- let's see. I believe you  
25 indicated in response to an earlier question from

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1 counsel for the company that there are two IEU-Ohio  
2 members that are actually served by Duke; is that  
3 right?

4 A. Correct.

5 Q. Do you know, are those -- are one or both  
6 of those members also a member of the Ohio  
7 Manufacturers Association?

8 A. I don't know.

9 Q. Now, I'd like to return to page 5 for a  
10 minute and your discussion of the statute. Is it  
11 your reading of the statute that the utility is  
12 required to integrate a customer's self directed -- a  
13 mercantile's self-directed program into its energy  
14 efficiency plans -- program?

15 MR. RANDAZZO: Could I have the question  
16 restated, please, or read back?

17 MR. ROYER: I'll restate it.

18 Q. Is it your understanding that the  
19 statutory provision you set out on page 5 of your

20 testimony, that under that provision an electric  
21 utility is required to permit a mercantile customer  
22 to integrate its program into -- with the utility's  
23 own capability?  
24 A. There are some other provisions in other  
25 sections of the statute, not the section that I've

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1 quoted here in my testimony, that talk about  
2 efforts -- facilitating efforts by a mercantile  
3 customer to commit their energy efficiency. So  
4 there's certainly language in the statute that  
5 encourages a particular consequence. I don't know  
6 that it's a mandate.

7 Q. Well, if it's the case that it's not  
8 mandatory, then isn't all this irrelevant?

9 A. I don't think so.

10 Q. Well, if the utility is satisfied that it  
11 can comply with the statutory benchmarks without  
12 offering an exemption to customers for their own  
13 self-directed programs, does the utility have an  
14 obligation to integrate that program and  
15 grant opt-out from the rider just because the  
16 customer asks for it?

17 MR. RANDAZZO: I object to the form of  
18 the question. Nobody has testified in this  
19 proceeding that the utility has an obligation to

20 grant an exemption. This is about who is eligible to  
21 seek an exemption. I object to the form of the  
22 question.

23 MR. ROYER: If your Honor please, the  
24 statutory benchmarks under 4928.66 are the  
25 responsibility of the electric utility. I'm asking

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1 if it's his reading of the statute that that means  
2 that a mercantile customer on its own initiative is  
3 -- that otherwise meets the qualifications, is  
4 automatically eligible for the exemption or whether  
5 something more need be shown.

6 EXAMINER KINGERY: Objection overruled.

7 THE WITNESS: Could I have the question  
8 reread?

9 (Record read.)

10 A. I don't know.

11 Q. Now, the last clause of that sentence  
12 indicates that the exemption may be granted "if the  
13 commission determines that the exemption reasonably  
14 encourages such customers to commit those  
15 capabilities to those programs. . ."

16 Are you suggesting that any level of  
17 savings, therefore, should qualify the customer for  
18 the exemption?

19 A. What I have testified about is that any

20 level of savings, in theory, should create the  
21 opportunity for the customer to seek the waiver.  
22 Whether or not the waiver is for 100 percent, some  
23 portion of less than a hundred percent, or zero, is  
24 something the Commission will need to address on a  
25 case-by-case basis.

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1 Q. I'm trying to find out what your  
2 interpretation of this last clause is. If a  
3 customer, if a mercantile customer who files an  
4 application with the Commission and offers to change  
5 one light bulb for a more energy efficient light  
6 bulb, should the customer be able to prosecute that  
7 application on the grounds that the exemption from  
8 the rider has encouraged it to do it?

9 A. I think those types of applications would  
10 be dismissed pretty rapidly by the Commission.

11 Q. Well, what standard -- why would -- under  
12 what you said in your testimony, what standard would  
13 the Commission allow to do that?

14 A. It needs to look at each individual case  
15 and make a determination as to whether or not they're  
16 reasonable based on the judgment of the Commission.

17 Q. Whether the exemption was, what, what  
18 reasonably encouraged the customer to do it?

19 A. The Commission is going to be looking at

20 the totality of the reasonable arrangement and making  
21 a determination whether or not the arrangement in  
22 totality is reasonable.

23 Q. Now, you're using the term "reasonable  
24 arrangements" here but I'm -- it's your  
25 understanding, is it not, that there can be

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1 reasonable arrangements between the utility and the  
2 mercantile customer that don't involve exemptions  
3 from the rider; is that right?

4 A. That's correct.

5 Q. Okay. So, again, I'd ask what is the  
6 standard, then, for determining whether the customer  
7 qualifies for the exemption?

8 A. I stated I think the Commission's going  
9 to have to make that determination on a case-by-case  
10 basis.

11 Q. Is 1 percent savings enough?

12 MR. RANDAZZO: I object. It's  
13 argumentative at this point.

14 MR. ROYER: Well, your Honor, one of the  
15 concerns that we have about this is that this  
16 case-by-case approach is all fine in theory, but we  
17 have lots of customers out there that may be eligible  
18 for this thing, and we're very concerned that the  
19 Commission would be very reluctant to deny requests

20 for large industrial customers under these sorts of  
21 proceedings, and that's why a bright-line test has  
22 been included in the Stipulation.

23 I'm just trying -- all I'm trying to do  
24 is find out if there is some standard between --  
25 whether there is some standard or some level between

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1 the utility's required benchmark and what the  
2 customer must show at which point Mr. Murray would  
3 say: Okay, cut it off.

4 EXAMINER KINGERY: I'm going to allow the  
5 question.

6 A. I have suggested that given this  
7 provision in the legislation is new, it doesn't make  
8 any sense, from my perspective, to put in place  
9 prescriptive standards without having any real world  
10 experience. If the Commission were to view the world  
11 as I see it and suddenly be confronted with 10,000  
12 applications to change a light bulb, it could  
13 certainly look at that situation at that point in  
14 time and modify its rules accordingly to get rid of  
15 the problem.

16 Q. Well, then -- okay. All right.

17 Now, industrial customers that are making  
18 prudent business decisions would undertake energy  
19 efficiency programs on their own hook if they

20 believed it was financially in their interest to do

21 so, correct?

22 A. Generally, yes.

23 Q. So if you had a program that had a very

24 short payback and achieved significant savings, you

25 would expect the industrial customer to undertake

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1 that whether or not there was a provision for an  
2 opt-out from the rider, correct?

3 A. The companies generally have an internal  
4 rate of return that they use to value whether or not  
5 to make capital expenditures, assuming access to  
6 capital is not an issue. As long as you meet the  
7 rate of return I would assume that's a project  
8 they'll undertake.

9 Q. And there would be projects at the  
10 company that might produce savings but the company  
11 would not be willing to undertake in the absence of  
12 some incentives; would that be fair?

13 A. That's one possibility.

14 Q. And some of those incentives could come  
15 from the company's own energy efficiency programs,  
16 could they not?

17 MR. RANDAZZO: Objection. What do you  
18 mean by "company's own energy efficiency programs"?

19 MR. ROYER: Well, the company under

20 section 4928.66 is required to implement energy  
21 efficiency programs. Those are something different  
22 than the self-directed programs that we've been  
23 talking about here.

24 MR. RANDAZZO: I object to the form of  
25 the question. Statutorily there's no difference.

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1           MR. ROYER: Well, this may be a matter  
2 for brief, but I certainly dispute that. You've got  
3 energy -- you've got mandatory energy efficiency  
4 benchmarks that must be met by the EDUs. You've got  
5 below a provision that says that the savings from  
6 qualified mercantile customers can be integrated into  
7 those programs, so by definition they're two  
8 different things.

9           I don't know if there was -- if that's  
10 responsive to anything, but would you like to swear  
11 me in? I'd be glad to testify.

12          MR. RANDAZZO: I would like to swear you  
13 in.

14          EXAMINER KINGERY: Without trying to  
15 address what the statute means, we will allow the  
16 question.

17          THE WITNESS: At this point I'm going to  
18 have to have the question reread or rephrased.

19          Q. (By Mr. Royer) An electric distribution

20 utility's energy efficiency program could include

21 incentives to -- incentive to customers to

22 participate in those programs; could it not?

23 A. Yes.

24 Q. Okay. And that could influence the

25 willingness of a customer to undertake an energy

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1 efficiency measure.

2 A. Yes.

3 Q. Because if they need -- if the payback  
4 for doing it on their own wasn't sufficient, that  
5 might be enough to nudge them over the top to  
6 undertake it, right?

7 A. Yes.

8 Q. Okay. And, similarly, I think you  
9 discussed with counsel for the company the utility,  
10 apart from its energy efficiency programs, is also  
11 free to enter into reasonable arrangements with its  
12 customers that could provide for a variety of  
13 benefits along those lines, correct?

14 A. Yes.

15 Q. So the only question, then, is once  
16 you've run through -- once you've run through those  
17 options, then if the mercantile has decided not to  
18 engage in either of those, then the question is  
19 whether the exemption for the rider will be enough to

20 make it -- will be enough to make the customer

21 undertake the program. Yes?

22 A. You're going to have to rephrase that

23 question for me to make sense.

24 Q. I'll withdraw it.

25 MR. ROYER: That's all I have. Thank

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1 you.

2 EXAMINER KINGERY: Thank you.

3 Mr. Randazzo, any redirect?

4 MR. RANDAZZO: No redirect.

5 EXAMINER KINGERY: Thank you. You may

6 step down.

7 Ms. Hotz.

8 MS. HOTZ: OCC calls Mr. Wilson Gonzalez.

9 EXAMINER KINGERY: I'm sorry.

10 MR. RANDAZZO: Yes, your Honor, I'm

11 sorry, I would re-move IEU Exhibit No. 1.

12 EXAMINER KINGERY: Remove it or re-move?

13 MR. RANDAZZO: No. But your

14 clarification is an important one, your Honor. I

15 would ask that you admit what has already been moved

16 as IEU Exhibit No. 1.

17 EXAMINER KINGERY: Any objections?

18 MS. HEIGEL: No objections.

19 EXAMINER KINGERY: It will be admitted.

20 (EXHIBIT ADMITTED INTO EVIDENCE.)

21 EXAMINER KINGERY: I believe we also need

22 too eventually, Mr. McNamee, a motion to admit

23 Staff's Exhibit 1.

24 MR. McNAMEE: Oh.

25 EXAMINER KINGERY: While we're cleaning

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1 that up.

2 MR. McNAMEE: I thought I already did.

3 Staff moves the admission of Staff Exhibit 1.

4 EXAMINER KINGERY: If we already did, I

5 apologize. It is now in.

6 (EXHIBIT ADMITTED INTO EVIDENCE.)

7 (Witness sworn.)

8 EXAMINER KINGERY: You may be seated.

9 - - -

10 WILSON GONZALEZ

11 being first duly sworn, as prescribed by law, was

12 examined and testified as follows:

13 DIRECT EXAMINATION

14 By Ms. Hotz:

15 Q. Mr. Gonzalez, will you please state your

16 name and work address for the record?

17 A. Wilson Gonzalez, 10 West Broad Street,

18 Columbus, Ohio 43215.

19 Q. Did you prepare testimony and file it in

20 the docket in this proceeding?

21 A. Yes, I did.

22 MS. HOTZ: OCC would like to have marked

23 as OCC Exhibit No. 1 Mr. Gonzalez's testimony.

24 EXAMINER KINGERY: It will be so marked.

25 (EXHIBIT MARKED FOR IDENTIFICATION.)

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1 MS. HOTZ: Does anybody need a copy of

2 it?

3 Q. Do you have a copy of your testimony

4 before you?

5 A. Yes, I do.

6 Q. Was the testimony prepared by you?

7 A. Yes, it was.

8 Q. Do you have any corrections to make to

9 your testimony?

10 A. No.

11 Q. If you were asked the same questions that

12 are on your testimony today, would you have the same

13 answers?

14 A. Yes, I would.

15 MS. HOTZ: Mr. Gonzalez is available for

16 cross.

17 EXAMINER KINGERY: Thank you very much.

18 Start with Duke.

19 MS. SPILLER: Your Honor, thank you. Amy

20 Spiller on behalf of Duke Energy-Ohio. And before  
21 embarking on cross-examination I would move to strike  
22 portions of Mr. Gonzalez's prefiled testimony. And  
23 if I may generally begin with a discussion of the  
24 overarching objection that pertains to many portions  
25 of the testimony, I will then apply it to the

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1 specific testimony at issue.

2           Most relevant to this testimony, your  
3 Honor, is evidence rule 702(B) which speaks of expert  
4 witnesses and more particularly -- particularly their  
5 skill, training, and ability to testify on the  
6 subject matter of their testimony.

7           In here, your Honor, Mr. Gonzalez  
8 throughout his testimony has set forth legal  
9 conclusions and he is not an attorney, but  
10 Mr. Gonzalez goes beyond simply interpreting and  
11 giving us his interpretation of Senate Bill 221, he  
12 actually restates those opinions that have been  
13 shaped and formed by his counsel.

14           Indeed, in his testimony, his deposition  
15 testimony, he did admit that he was careful to  
16 reference each statement dealing with the statute as  
17 being informed by OCC counsel, so he is not qualified  
18 as an expert to render legal opinions nor is he  
19 competent to restate the opinions and legal

20 conclusions that may, in fact, be held by his

21 attorney.

22 Turning specifically to the testimony at

23 issue, I would begin, your Honor, with that testimony

24 beginning on page 6, line 5, through line 15.

25 Therein Mr. Gonzalez restates his counsel's

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1 confirmation of interpretations of Ohio law and Ohio  
2 policy with respect to regulatory principles  
3 concerning rates and the fact that those rates should  
4 be nondiscriminatory.

5 EXAMINER KINGERY: Ms. Hotz.

6 MS. HOTZ: Your Honor, it's clear that he  
7 identifies where he got his information. He is not  
8 attempting to adopt it as a legal expert. He is  
9 attempting to tie in that legal perception into his  
10 professional economics opinion how it would apply as  
11 a factual matter.

12 EXAMINER KINGERY: Mr. Gonzalez, I'd like  
13 to clarify what your answer means. In the second  
14 sentence, the one beginning "OCC counsel has  
15 confirmed," I want to understand whether the only  
16 thing that OCC counsel confirmed for you is what's  
17 said in that sentence, and then beginning on line 8  
18 where you say "Contrary to Ohio's policy," that is  
19 your opinion from there to the end of the paragraph.

20 THE WITNESS: Yes, I agree with your

21 characterization.

22 EXAMINER KINGERY: Okay. We're going to

23 have to treat this the same way as we treated the

24 last witness. We understand that Mr. Gonzalez is not

25 an attorney and this is not a legal opinion, so where

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1 he says -- he makes a statement about what his  
2 counsel has confirmed for him, that's a statement of  
3 his counsel's telling him what the law is, and then  
4 the remainder of the paragraph appears to be his  
5 nonlawyer opinion of the meaning -- the application  
6 of that statutory provision to the situation at hand.

7 MS. SPILLER: And, your Honor, for sake  
8 of expediency, could we have that standing  
9 instruction throughout this testimony, or would you  
10 like me to continue page by line throughout the  
11 testimony wherein Mr. Gonzalez sets forth the  
12 understandings and/or confirming statements of his  
13 counsel?

14 EXAMINER KINGERY: Why don't we for the  
15 purposes of the record let you go ahead and identify  
16 the sections you're concerned about, and as long as  
17 they are the same issue, we will have the same  
18 ruling.

19 MS. SPILLER: Very good, thank you.

20           The next, your Honor, would be on page 6

21   beginning on line 17 ending on line 19, midway

22   through that sentence, please.

23           EXAMINER KINGERY: Okay. You can just

24   keep listing them. That will be fine.

25           MS. SPILLER: Yes, ma'am.

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1           Turning to page 9, beginning on line 9  
2 toward the latter part of that sentence -- or, I'm  
3 sorry, that line, the statement that begins "These  
4 benefits" ending on line 12.

5           If we turn to page 10, beginning on line  
6 17, the last word on that line, "OCC," continuing on  
7 through the beginning portion of line 20 ending  
8 "Amended Senate Bill 221."

9           Your Honor, with respect to the testimony  
10 that is set forth on page 11 of Mr. Gonzalez's  
11 prefiled testimony, the objection here is not only  
12 that he is providing opinion and analysis of Senate  
13 Bill 221, but that certain statutory provisions are  
14 irrelevant to his testimony, namely, Revised Code  
15 Section 4928.20 (I), which discusses past phased-in  
16 rates and charges. As Mr. Gonzalez has admitted,  
17 Duke Energy's application for an ESP does not concern  
18 phased-in rates or charges.

19           And then RC 4928.20 (J), which discusses

20 stand-by charges and, as Mr. Gonzalez has  
21 acknowledged, Duke Energy does not charge for  
22 stand-by service.

23 And I don't know if Ms. Hotz would care  
24 to speak to that objection as it is different.

25 MS. HOTZ: I think that the relevance of

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1 those provisions is in Mr. Gonzalez's page 12 after  
2 he describes those where he says, "As these three  
3 sections demonstrate, the General Assembly directs  
4 the Commission to take into consideration how  
5 nonbypassable generation charges affect viability of  
6 governmental aggregation."

7 EXAMINER KINGERY: We'll deny that motion  
8 to strike.

9 MS. SPILLER: Your Honor, if I may  
10 advance ahead and then come back simply to close the  
11 loop on those opinions that concern or was shaped by  
12 legal counsel, page 12, the testimony beginning on  
13 line 21 and ending on line 22, "as noted above"  
14 concludes that sentence.

15 The other objection that I have, if we  
16 remain on page 12, actually starts on page 6 and  
17 carries through page 13, line 7, and in this  
18 particular portion of his testimony Mr. Gonzalez is  
19 speaking --

20 EXAMINER KINGERY: You said starts on

21 page 6?

22 MS. SPILLER: I'm sorry, page 12, line 6.

23 EXAMINER KINGERY: Line 6, thank you.

24 MS. SPILLER: "It is also clear that

25 residential." The objection, your Honor, continues

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1 through page 13, line 7, and in this portion of his  
2 testimony Mr. Gonzalez is proposing something new and  
3 different beyond that which was specifically reserved  
4 for litigation by the OCC in footnote 11.

5 That footnote specifically concerned only  
6 the avoidability or unavailability of SRA-SRT charges  
7 and a shopping credit. Yet in his testimony  
8 Mr. Gonzalez has a new and different proposal, that  
9 concerning the return of residential governmental  
10 aggregation customers at one of two prices, which  
11 would be at their option, one of those being a market  
12 price.

13 This particular issue was not reserved  
14 for litigation and, more significantly your Honor,  
15 Mr. Gonzalez did not render any testimony to provide  
16 guidance with respect to what this market price might  
17 be, did not as a purported expert perform any sort of  
18 detailed analysis, study, or examination that would  
19 in any way assist you, the fact-finders, with respect

20 to that issue, and for those reasons his testimony

21 fails to measure up to what would be expert

22 testimony.

23 MS. HOTZ: Your Honor.

24 EXAMINER KINGERY: Ms. Hotz.

25 MS. HOTZ: The return provision of the

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1 rates that shopping -- the return provision of  
2 shopping customers is very central to the  
3 avoidability of these riders and is central to what  
4 was carved out in the footnote 11 of the Stipulation.  
5 And it's certainly been brought up repeatedly by the  
6 company in their discussions about whether or not  
7 avoidability is a good idea, and so OCC believes it's  
8 central to that footnote.

9 MS. SPILLER: Your Honor, if I may  
10 briefly respond to that. If, in fact, this point was  
11 so central and was, in fact, discussed previously,  
12 there should have been provision for it within the  
13 Stipulation. The footnote that was specifically  
14 requested by OCC and contained within the document,  
15 that appears on page 32 of the Stipulation, is quite  
16 specific and quite limited.

17 And, in fact, there was a provision  
18 within the body of the Stipulation itself concerning  
19 residential governmental aggregation customers

20 returning within the three-year period and not at any

21 sort of premium price.

22 So certainly the groundwork and the

23 opportunity was there to include this language. It

24 was not included, and I think now it is inappropriate

25 for Mr. Gonzalez to offer testimony on it.

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1 MS. HOTZ: Your Honor, the provision that  
2 addresses residential customers has nothing to do  
3 with the provision that Mr. Gonzalez is testifying  
4 on. And Mr. Smith repeatedly in his testimony today  
5 would not address the bypassability of the riders  
6 without discussing the return rate, and I think it's  
7 very unfair for the company now to say they aren't  
8 interrelated.

9 EXAMINER KINGERY: Motion's denied. Do  
10 you have any further?

11 MS. SPILLER: Just cross-examination,  
12 your Honor.

13 EXAMINER KINGERY: All right.

14 - - -

15 CROSS-EXAMINATION

16 By Ms. Spiller:

17 Q. Mr. Gonzalez, how are you this afternoon?

18 A. Fine, thank you.

19 Q. Good. It was discussed briefly during

20 the motions that we just had that you are not an

21 attorney, are you, sir?

22 A. No, I'm not.

23 Q. And the scope of your testimony in this

24 matter is limited to the narrow issue of whether

25 residential governmental aggregation customers should

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1 be able to bypass Rider SRA-SRT charges and receive a  
2 shopping credit, correct?

3 A. We just had a whole discussion about how  
4 the issue of what customers -- at what rate customers  
5 return is also relevant in this particular -- this  
6 particular proceeding and my testimony.

7 Q. And you did review certain documents,  
8 Mr. Gonzalez, in preparing your prefiled testimony  
9 for this matter, correct?

10 A. Yes, I did.

11 Q. And of the documents that you identified,  
12 sir, can you please itemize those documents that  
13 mention the ability of residential governmental  
14 aggregation customers avoiding the Rider SRA-SRT  
15 charges and receiving the shopping credit?

16 A. There's nothing in the Stipulation at  
17 this time.

18 Q. Any of the documents that you reviewed,  
19 sir, do they mention that?

20 A. Can you ask that question again?

21 Q. Sure. Of the documents that you

22 reviewed, can you delineate or list those documents

23 that mention the ability of residential governmental

24 aggregation customers avoiding Rider SRA-SRT and

25 receiving a shopping credit?

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1           A. No; but that was the issue at play.

2           Q. And as I understand your prefiled  
3 testimony, Mr. Gonzalez, it is your opinion that Duke  
4 Energy's residential customers should be allowed to  
5 participate in governmental aggregation opportunities  
6 under similar conditions as those afforded  
7 nonresidential customers, correct?

8           A. That's what I state on page 3 of my  
9 testimony, yes.

10          Q. And the proposal, Mr. Gonzalez, in the  
11 Stipulation wherein nonresidential customers are able  
12 to avoid Rider SRA-SRT and receive a shopping credit  
13 you believe is unfair, correct?

14          A. I state that it isn't fair that  
15 residential customers are not allowed a similar  
16 offering, yes.

17          Q. And in your opinion this notion of  
18 unfairness exists because there is no compelling  
19 reason to extend rider bypassability and shopping

20 credits only to nonresidential governmental

21 aggregation customers, correct?

22 A. Generally speaking, I'm interested in

23 having the same benefits available to residential

24 customers.

25 Q. And in your opinion, sir, there's no

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1 compelling reason to offer a different proposal to  
2 nonresidential customers of governmental aggregation,  
3 correct?

4 A. It wasn't made clear in the Stipulation.

5 Q. Well, sir, I'm asking your opinion on  
6 whether or not -- I'm asking your opinion, sir, on  
7 why you believe this notion of unfairness exists.  
8 And from your deposition on Friday you told me that  
9 there was no compelling reason to offer this  
10 proposal, the bypassability of rider charges and a  
11 shopping credit just to nonresidential customers,  
12 correct?

13 A. I would say yes, there is no basis in my  
14 testimony for -- it doesn't appear to be any basis  
15 for that.

16 Q. Thank you, sir.

17 The compelling reasons, Mr. Gonzalez,  
18 that you shared with me during your deposition that  
19 may justify offering different arrangements to

20 different customer classes included cost, correct?

21 A. Yeah. That's a big bucket of --

22 Q. Public policy.

23 A. -- cost of service.

24 Q. I'm sorry.

25 A. Yeah, cost of service generally and

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1 policies.

2 MS. HOTZ: Your Honor, I object to this  
3 use of depositions in this manner. I think  
4 depositions are intended to be used only for  
5 impeachment purposes rather than for including  
6 evidence in the hearing.

7 MS. SPILLER: Your Honor, I will rephrase  
8 the question.

9 EXAMINER KINGERY: Thank you.

10 Q. Mr. Gonzalez, in your opinion, compelling  
11 reasons that would justify offering different  
12 arrangements to different customer classes include  
13 cost, public policy, logistics, potential emergent or  
14 emergency situations, and risk, correct?

15 A. I believe those were some general  
16 categories, but it may not be limited to that.

17 Q. With respect to cost, that category as  
18 you've just testified, sir, includes everything  
19 related to the cost of service, fuel cost, ancillary

20 cost, load factor, cost for delivery and

21 transmission, correct?

22 A. Generally speaking, yes.

23 Q. And in your opinion, Mr. Gonzalez, cost

24 is one of the most compelling reasons that would

25 justify offering different arrangements to different

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1 customer classes, correct?

2 A. That's one that's been used in the past  
3 to justify the differentials between the rates of  
4 different customers.

5 Q. But, sir, in your opinion it's one of the  
6 strongest reasons, correct?

7 A. It's a strong reason.

8 Q. Mr. Gonzalez, you do agree that the costs  
9 to serve residential customers are not identical to  
10 the costs to serve nonresidential customers, correct?

11 A. That's correct.

12 Q. And although the costs to serve these two  
13 customer classes are not identical, and you have  
14 identified costs as one of the most compelling  
15 reasons to justify arrangements for different  
16 customer classes, you have not performed any detailed  
17 economic analytics on the financial implications of  
18 the proposal set forth in your testimony, correct?

19 A. I've looked at the economics of the

20 proposal from the residential aggregation point of

21 view.

22 Q. Sir, let's talk about the economics that

23 you reviewed. You calculated a back-of-the-envelope

24 calculation with respect to the annual charge of the

25 proposed Rider SRA-SRT, correct?

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1           A. I tried to develop what a savings  
2 estimate would be per customer of a residential  
3 aggregator who bypassed both the SRT -- SRA-SRT rider  
4 and the 6 percent shopping credit.

5           Q. And with respect to the shopping credit,  
6 you relied upon testimony from Paul Smith provided in  
7 his deposition, correct?

8           A. I used the number that was in one of the  
9 rider sheets that was made available.

10          Q. You did not examine or assess the impacts  
11 that governmental aggregation could have on Duke  
12 Energy-Ohio's system reliability, correct?

13          A. I didn't do an economic analysis of that,  
14 but I -- if Duke Energy-Ohio's in the market, they're  
15 involved in asset management so it would be available  
16 to accurately manage the situation that came up.

17          Q. Sir, but again, my question was specific.  
18 You did not examine or assess the impacts that  
19 governmental aggregation could have on Duke

20 Energy-Ohio's system reliability, correct?

21 A. Well, I didn't do any economic analysis,  
22 like I said. I understand that Duke is involved in  
23 the market purchasing capacity when it needs it or  
24 liquidating positions as the market calls for and as  
25 demand and supply fundamentals dictate.

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1 Q. Mr. Gonzalez, so that I'm clear, you did  
2 not examine or assess the impacts that governmental  
3 aggregation would have on Duke Energy's system  
4 reliability, correct? Sir, it's a yes or no  
5 question.

6 A. No. But I don't believe an analysis was  
7 conducted for or filed on nonresidential government  
8 aggregation either.

9 Q. Sir, you did not examine or assess the  
10 number of potential governmental aggregators within  
11 Duke Energy-Ohio's service territory, correct?

12 A. I know how many -- I have an idea of the  
13 magnitude, the relative magnitude of the number of  
14 government entities that have passed ordinances to be  
15 able to do government aggregation. It's a very small  
16 number.

17 Q. But you did not offer any prefilled  
18 testimony on that issue, did you, sir?

19 A. No, I did not.

20 Q. And you did not examine or assess the  
21 number of potential residential governmental  
22 aggregation customers within Duke Energy-Ohio's  
23 service territory, correct?

24 A. I did look at some of the townships, what  
25 kind of money utilizations they had and which ones

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1 had passed an ordinance and would be immediately able  
2 to undertake some type of government aggregation.

3 Q. Sir, you did not offer any prefiled  
4 testimony on that, did you?

5 A. No, I did not.

6 Q. And you did not examine or assess the  
7 number of those residential customers who would be  
8 interested in governmental aggregation, correct?

9 A. That would be something that you would  
10 ask the governmental aggregator, not me.

11 Q. You did not quantify, Mr. Gonzalez, the  
12 costs necessary to fully educate residential  
13 customers on the risks of returning to Duke  
14 Energy-Ohio's system at a price higher than its  
15 proposed ESP-SSO price, correct?

16 A. While I didn't explicitly do that type of  
17 analysis, I don't think it's a trackable type cost.

18 Q. But you didn't mention those costs within  
19 your prefiled testimony, correct?

20 A. No, I didn't.

21 Q. And, Mr. Gonzalez, you bring up this

22 notion of returning to Duke Energy-Ohio's system or

23 to Duke Energy's Ohio system at market price, but you

24 have not proposed any specific calculation of what

25 that market price might be, correct?

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1           A. No. Any calculation would just be an  
2 estimate at this point subject to change.

3           Q. But you didn't even bother, sir, to put  
4 those estimates within your prefiled testimony, did  
5 you?

6           A. No, I felt the issue was -- this was more  
7 public policy type issue that we just -- that didn't  
8 require -- I didn't feel compelled to put a market  
9 price, you know, necessary to put a market price  
10 that's going to change. I thought the issue was  
11 whether the customers should have the option of  
12 joining the governmental aggregation without having  
13 to pay the rider and shopping credit.

14          Q. And, Mr. Gonzalez, if you could kindly  
15 turn to page 11 of your testimony, please. And  
16 beginning on line 11 of page 11 you reference Revised  
17 Code Section 4928.20(J), correct?

18          A. That's correct.

19          Q. And that particular section of Senate

20 Bill 221 discusses the market price, correct?

21 A. Yes, it does.

22 Q. And the market price is an extensive list

23 of charges and costs, correct?

24 A. Yes.

25 Q. Everything from capacity and energy

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1 charges, charges related to power supply through the  
2 RTO or regional transmission organization, correct?

3 A. Yes.

4 Q. Transmission ancillary services,  
5 congestion, settlement, administrative charges,  
6 correct?

7 A. I don't have the Act, that particular  
8 part of it, but that sounds familiar. We went over  
9 it Friday.

10 Q. Thank you, sir.

11 In connection with your prefiled  
12 testimony, Mr. Gonzalez, you did not review any prior  
13 cases because you do not recall any situations in  
14 which residential governmental aggregation customers  
15 could avoid certain charges in exchange for the risk  
16 of returning to the public utility at a higher price,  
17 correct?

18 A. That's correct.

19 Q. Mr. Gonzalez, Duke Energy-Ohio cannot

20 refuse to serve customers including governmental

21 aggregation customers, correct?

22 A. Generally speaking.

23 Q. And you have no opinion, sir, on the

24 additional costs that could result under the OCC's

25 proposal as set forth in your testimony because of

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1 Duke Energy's requirement to serve as the provider of  
2 last resort, correct?

3 A. It would go up depending on the notice it  
4 got. It would go out and procure -- use management  
5 to procure resources needed and charge the customer  
6 for the cost of that resource.

7 Q. So you have no opinion nor have you  
8 offered any testimony on what those costs may be,  
9 correct?

10 A. I have an opinion.

11 Q. It's not set forth in your testimony, is  
12 it, sir?

13 A. It would be market price.

14 Q. But, again, sir, there is no detail, even  
15 a financial inkling, as to what that market price  
16 might be as set forth in your testimony, correct?

17 A. As set forth in my testimony, that's  
18 correct, but I am --

19 Q. Thank you, sir.

20 A. -- aware that market prices have been

21 going down, especially at the Cinergy hub.

22 MS. SPILLER: Your Honor, I'm going to

23 move to strike the last portion of that testimony as

24 nonresponsive to the question.

25 MS. HOTZ: I think it was very relevant

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1 to the question and it answered the question.

2 MS. SPILLER: The question --

3 MS. HOTZ: You asked him to provide you  
4 with a market price.

5 MS. SPILLER: No.

6 MS. HOTZ: A more specific market price.

7 MS. SPILLER: The question was simply  
8 that his testimony did not reflect any information on  
9 the market price. It was a question that elicited a  
10 yes or no response.

11 EXAMINER KINGERY: May I have the  
12 question read back, please?

13 (Record read.)

14 EXAMINER KINGERY: We're going to grant  
15 the motion to strike.

16 MS. SPILLER: Thank you, your Honor.

17 Q. (By Ms. Spiller) Mr. Gonzalez, you did  
18 not quantify the overall financial risk to which  
19 residential customers would be exposed under OCC's

20 proposal as set forth in your testimony, correct?

21 A. Except to state that the risk is come

22 back at a market price.

23 Q. Sir, for purposes of clarifying the

24 record, the proposal for which I'm speaking is your

25 proposal that begins on page 12 and 13 of your

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1 testimony wherein you discuss this option of  
2 returning at the market price or 115 percent of the  
3 ESP SSO, correct?

4 A. That's correct.

5 Q. Okay. Thank you, sir.

6 Mr. Gonzalez, you did not quantify the  
7 overall financial risk to customers of Duke  
8 Energy-Ohio who do not switch to a governmental  
9 aggregator because others may leave and then return  
10 to Duke Energy-Ohio's system, correct?

11 A. Can you repeat that.

12 Q. Sure. Maybe I'll break it down into  
13 parts. For purposes of this question, sir, I would  
14 like for you to consider the customers of Duke  
15 Energy-Ohio who do not switch to a governmental  
16 aggregator. With respect to those specific  
17 customers, sir, you did not quantify the overall  
18 financial risk to them because others may leave and  
19 then return to Duke Energy-Ohio's system, correct?

20           A. No. But I stated in my testimony that  
21   governmental aggregation in and of itself can force  
22   some discipline on Duke's rates going forward, so to  
23   that extent, that's a positive benefit for customers  
24   that stay on Duke.

25           Q. Sir, in connection with that statement,

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1 as well as your other opinions in your prefiled  
2 testimony, you haven't prepared any written or  
3 electronic analysis or spreadsheets to support your  
4 conclusions, correct?

5 A. Well, I haven't proposed any spreadsheets  
6 or numerical analysis. It's a theoretical -- it's a  
7 theoretical construct that if you have competition in  
8 the market, that will discipline the parties that are  
9 providing that particular service. So it's a  
10 fundamental, I would say a fundamental notion of  
11 competition.

12 MS. SPILLER: Your Honor -- I'm sorry,  
13 Mr. Gonzalez -- I would again move to strike the  
14 answer as nonresponsive to the extent the question  
15 was whether or not he had prepared a spreadsheet or  
16 other written or electronic analysis.

17 MS. HOTZ: Your Honors, this Commission  
18 has a tradition of allowing witnesses to explain  
19 their yes and no answers. I have rarely ever heard a

20 witness required to answer in yes or no in these

21 hearings. Thank you.

22 EXAMINER KINGERY: We believe that this

23 answer was responsive and we will allow the answer.

24 MS. SPILLER: Thank you, your Honor.

25 Q. Mr. Gonzalez, you did not examine the

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1 potential reliability impact to residential  
2 governmental aggregation customers if there is a  
3 large scale governmental aggregation in Duke  
4 Energy-Ohio's certified territory, correct?

5 A. I did not specifically, but there's  
6 language in my testimony that speaks of the impending  
7 recession, and to the extent that the impending  
8 recession will cut back the utility's demand and make  
9 the market more supply oriented, I think it speaks to  
10 that particular issue.

11 Q. And you did not examine the potential  
12 financial impact to energy and capacity prices in  
13 MISO if there is large scale governmental aggregation  
14 in Duke Energy-Ohio's certified territory, correct?

15 A. Could you reread that, please? Can you  
16 restate that?

17 Q. Certainly. You did not examine the  
18 potential financial impact to energy and capacity  
19 prices in MISO if there is large scale governmental

20 aggregation in Duke Energy-Ohio's certified

21 territory, correct?

22 A. No. But again, I would expect that given

23 the trajectory of the economy, I think there's

24 pricing -- I would expect pricing over the term of

25 the ESP to come down.

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1 Q. And, Mr. Gonzalez, because you clarified  
2 today that your testimony is largely theoretical and  
3 you did not perform any detailed economic analytics,  
4 sir, with all due respect you're guessing at whether  
5 OCC's proposal would promote competition in Ohio,  
6 aren't you?

7 A. As I discuss -- I would dispute that. As  
8 I discussed in my testimony, the back-of-the-envelope  
9 analysis that you referred to earlier. I would say  
10 for \$40 per customer, you get an aggregation of  
11 50,000 customers, you have \$2 million over three  
12 years. That's \$6 million potential savings for an  
13 aggregation community. I think that's something that  
14 we should not close the option out on.

15 Q. But, sir, not even that mathematical  
16 proposition that you just explained was set forth in  
17 your prefiled testimony, was it, sir?

18 A. It wasn't set forth in my prefiled  
19 testimony.

20 Q. Mr. Gonzalez, you do not know whether any  
21 supplier could procure adequate and reliable service  
22 at a cost less than Duke Energy's proposed -- Duke  
23 Energy-Ohio's proposed ESP SSO offer, correct?

24 A. Well, I've talked to parties interested  
25 in governmental aggregation and some feel there's a

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1 small window, and given the economy and given the --  
2 if you were able to bypass both the SRA-SRT and a  
3 6 percent shopping credit, that would lead them to  
4 look at that proposition more favorably.

5 Q. But, sir, you don't know whether any  
6 supplier could procure adequate reliable service at a  
7 cost less than Duke Energy-Ohio's proposed ESP SSO  
8 offer, correct?

9 A. I don't know personally, but I don't see  
10 why that supply couldn't be gotten by a government  
11 aggregator. I think in the FirstEnergy case, for  
12 example, there's I guess a memorandum of  
13 understanding or contract with FPO, so there's  
14 interest in the state in governmental aggregation.

15 Q. But Mr. Gonzalez, you are not a  
16 governmental aggregator, correct?

17 A. No, I'm not.

18 Q. And, sir, governmental aggregators have  
19 their own metrics of what it would take for them to

20 move forward with governmental aggregation, correct?

21 A. That's correct. But, you know, when I

22 worked at -- I worked with AEP, and I did a large

23 scale, from '96 to '98, a large scale analysis on

24 their mass market when they were looking to get into

25 the East Ohio service territory and Columbia Gas

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1 territory, so I did look at metrics for being either  
2 a CRES provider and/or being a -- aligning from a  
3 supplier side with a governmental aggregation union.

4 Q. Sir, even though you knew those metrics  
5 existed from your prior experience, you did not  
6 discuss and/or develop them within your prefiled  
7 testimony here, correct?

8 A. Generally speaking, I did mention two  
9 crucial elements, which is any bypassable charges  
10 that a customer would not have to pay and a shopping  
11 credit, those are two key metrics to any analysis of  
12 aggregation.

13 Q. Mr. Gonzalez, in your opinion,  
14 nonresidential customers are not better able to  
15 respond to an increase in their electricity costs,  
16 correct?

17 A. Oh, my testimony there is that they can  
18 respond, but as I noted in deposition, if you have a  
19 manufacturing and industrial customer that's on the

20 brink, very competitive world markets, then, you  
21 know, they come back at a market price that's higher,  
22 they could be out of business, you know, just as easy  
23 as the residential customers.

24 Q. Mr. Gonzalez, to be clear, you do not  
25 believe that a nonresidential customer is better able

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1 to respond to an increase in their electric costs

2 than a residential customer, correct?

3 A. What I'm saying is just because a

4 business customer, industrial customer, is -- may be

5 more savvy, may be more savvy, you know, in that

6 sense they're still facing a very -- they can -- they

7 could experience very severe consequences to coming

8 back to the market, which can be as critical as going

9 bankrupt, so . . .

10 And let me follow that up with

11 residential customers deal with risk all the time.

12 There's a gas, you know, GCR which changes monthly,

13 very volatile. They deal with it. The gas prices,

14 they work with it. In fact, even the company's

15 proposing their AMI program which will trigger in the

16 future time differentiated rates, dynamic rates which

17 may have a large risk, so, you know, risk is being

18 introduced.

19 And I think for that segment of the

20 residential class, either through aggregation or when  
21 they make their decision, they should -- you know,  
22 unless it's an informed decision, they should be able  
23 to handle it. This notion that we have to protect  
24 or -- protect them from saving money to me seems a  
25 little bit overspent. Sorry for the . . .

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1 Q. So if we could, sir, return to the  
2 nonresidential customers and their ability or lack  
3 thereof to better respond to an increase in electric  
4 rates again, sir, so that I'm clear, you do not  
5 believe that they are better able to respond to those  
6 increases in costs as opposed to residential  
7 customers, correct?

8 A. I believe that as a whole that class  
9 would probably in some way, you know, everything else  
10 being equal may have a better idea of that. But if  
11 the governmental aggregation, if the customer is  
12 informed and makes a decision with their eyes open  
13 and, like I stated earlier, they're making decisions  
14 every day, you know, what kind of car do I purchase  
15 given the trajectory of gas prices, I think a  
16 residential customer and through a residential, you  
17 know, through a governmental aggregation would be  
18 able to handle that type of situation.

19 MS. SPILLER: Your Honor, may I approach

20 the witness?

21 EXAMINER KINGERY: You may.

22 Q. Mr. Gonzalez, I'm sure you remember just

23 on Friday I took your deposition.

24 A. Yes, I do.

25 Q. And you were at our offices across the

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1 street, correct?

2 A. Yes.

3 Q. You were sworn in before a court

4 reporter, correct?

5 A. Yes.

6 Q. And, Mr. Gonzalez, if you could turn to

7 page 87, and, sir, beginning on line 23 I asked you:

8 "Do you think a residential customer is better able

9 to respond to an increase in their electric cost than

10 a residential customer?"

11 Line 1 of page 88 you responded: "No, I

12 don't believe so." Correct?

13 MS. CHRISTENSEN: Could we have that

14 question reread, please.

15 EXAMINER KINGERY: I believe you misread

16 the quote.

17 Q. "Do you think a nonresidential customer

18 is better able to respond to an increase in their

19 electric cost than a residential customer?" Your

20 answer, sir, was: "No, I don't believe so."

21 A. If you read the rest of my statement, I

22 state -- I was objecting that you can't make a

23 general -- it's almost like we have an ironclad rule

24 or a general blanket statement like that, and I give

25 the example where a manufacturer could actually be in

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1 a lot more trouble than a residential customer, any  
2 individual residential customer coming back to the  
3 market price.

4 Q. Mr. Gonzalez, you have also stated in  
5 this hearing today that there is no compelling reason  
6 to offer rider bypassability and shopping credits  
7 only to nonresidential governmental aggregation  
8 customers, correct?

9 A. Yes. I believe in essence, yes.

10 Q. And despite the absence, in your opinion,  
11 of a compelling reason to differentiate between  
12 customer classes, that's exactly what the OCC's  
13 proposal is intended to do, correct?

14 A. Can you restate that, please?

15 MS. SPILLER: Can you read that back,  
16 please?

17 (Record read.)

18 A. In what way? In what way?

19 Q. Well, sir, your proposal is that is not

20 that which is set forth in the Stipulation concerning  
21 nonresidential governmental aggregation customers,  
22 correct?

23 A. Is that the issue of coming back to the  
24 lower of the 115 of the ESP SSO versus the market  
25 price?

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1 Q. Yes, sir.

2 A. In that narrow respect, yes.

3 Q. And just so the record is clear, your  
4 proposal is actually, sir, Mr. Gonzalez, it is the  
5 OCC's proposal as described in your testimony,  
6 correct?

7 MS. HOTZ: Could you read that, please?

8 MS. SPILLER: I'll restate.

9 Q. I had simply, sir, referred to your  
10 proposal for clarification of the record. I would  
11 like to clarify that that is actually the OCC's  
12 proposal as set forth in your testimony, namely,  
13 returning at market price or 115 percent of the  
14 proposed ESP SSO price simply differentiating you  
15 from OCC.

16 A. What's stated in my testimony, my  
17 testimony is my opinion. OCC speaks through its  
18 brief.

19 MS. SPILLER: Thank you, sir.

20 I don't have anything further, your

21 Honor.

22 EXAMINER KINGERY: Thank you.

23 Anything?

24 MS. CHRISTENSEN: No questions your

25 Honor.

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1 MR. KURTZ: Just a couple, your Honor.

2 EXAMINER KINGERY: Thank you.

3 - - -

4 CROSS-EXAMINATION

5 By Mr. Kurtz:

6 Q. Good afternoon, Mr. Gonzalez.

7 A. Good afternoon.

8 Q. Basically, a nonresidential customer who  
9 shops and doesn't pay the SRA-SRT comes back at what  
10 price? Let me say it this way, they come back --

11 A. 115 of the ESP SSO.

12 Q. -- 115 percent of the ESP price.

13 A. Correct.

14 Q. Okay. Now, your proposal is that for a  
15 residential customer who shops and doesn't pay the  
16 SRA-SRT pays the lower of --

17 A. Correct.

18 Q. -- ESP or market; is that right?

19 A. Correct.

20 Q. So your proposal would give the  
21 residential customers a better deal than the  
22 commercial and the industrial customers because they  
23 would come back at the lower of and the commercial  
24 and industrial would come back at 115 percent of ESP;  
25 is that right?

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1 A. That's correct.

2 Q. Why is that reasonable?

3 A. I think it's a better -- it's a better  
4 deal for the residential customer.

5 Q. I understand. But why is that reasonable  
6 compared to commercial and industrial customers who  
7 would pay simply the 115 percent?

8 A. I think I could probably make a clear  
9 argument that for the nonresidential customers you  
10 might be interested in certain certainty and you  
11 might want to cap that increase so you would take the  
12 115 percent. A residential customer, you know, we'll  
13 take the market price, especially if the market seems  
14 to be, at least over the three-year period, may be on  
15 a downward trajectory.

16 Q. I don't understand. Are you changing  
17 your testimony? Are you saying that a returning  
18 residential would pay market?

19 A. I'm saying the lower of market or 115.

20 Q. So that would always be better than

21 paying 115 percent, wouldn't it?

22 A. Yes, it would.

23 Q. Okay. Do you have the Stipulation in

24 front of you or handy?

25 A. Yes, I do.

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1 Q. This footnote 11 where the OCC has carved  
2 out the issues that it was not agreeing to, do you  
3 have that in front of you? Do you see footnote 11?

4 A. I'm looking for it.

5 Q. Page 32.

6 A. Yes, I do.

7 Q. Okay. It says the OCC would carve out  
8 "the issue of bypassability of charges and shopping  
9 credits for residential government aggregation  
10 customers." Did I read that right?

11 A. Yes, you did.

12 Q. Okay. Where would anybody -- how would  
13 anybody reading that footnote, that carved out  
14 footnote, know that the OCC was also going to address  
15 the comeback rate, the lower of 115 percent or  
16 market?

17 MS. HOTZ: Your Honor, I object. We've  
18 already addressed this issue. The company is unable  
19 to divorce that issue from -- the bypassability issue

20 from the return price issue themselves. This

21 question is, again, contrary to the idea that --

22 EXAMINER KINGERY: I believe we've had

23 either a motion to strike or objection but we never

24 had testimony from this witness on the issue so I

25 will allow the question.

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1 Q. Do you remember the question?

2 A. Yes, I remember the question. It's clear

3 to me, and I think from reading the testimony of both

4 the staff and the company, that there's a quid pro

5 quo that if you're going to bypass the SRA-SRT and

6 get a shopping credit, you're going to return at

7 market price or some configuration of that. So yeah,

8 I can't divorce both.

9 Q. So the market price is not addressed in

10 the footnote, you would agree with that, wouldn't

11 you?

12 A. It's implicit in that footnote.

13 Q. Okay. Where is returning at the lower of

14 115 percent or market? Is that implicit in this

15 also?

16 A. As the footnote states, we're carving

17 this whole area out. We're carving out. We're

18 extracting from the Stipulation, so . . .

19 Q. That's your answer?

20 A. Yes.

21 MR. KURTZ: That's it, your Honor, thank

22 you.

23 EXAMINER KINGERY: Thank you.

24 Mr. Royer?

25 MR. ROYER: No questions.

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1 EXAMINER KINGERY: Mr. Randazzo?

2 MR. RANDAZZO: Not a one, thank you.

3 EXAMINER KINGERY: Any redirect?

4 MS. HOTZ: Could I talk to him, please?

5 EXAMINER KINGERY: Yes. You can take

6 five minutes.

7 (Recess taken.)

8 EXAMINER KINGERY: Let's go back on the

9 record. Ms. Hotz.

10 MS. HOTZ: No redirect. Thank you, your

11 Honor.

12 EXAMINER KINGERY: Thank you very much.

13 The witness may step down.

14 THE WITNESS: Sorry about that.

15 EXAMINER KINGERY: I understand there are

16 no further witnesses at this point. You do have

17 testimony to move?

18 MS. HOTZ: Oh, yes. I move to admit OCC

19 Exhibit 1 into the record.

20 EXAMINER KINGERY: Any objections?

21 MS. SPILLER: No, your Honor.

22 EXAMINER KINGERY: It will be admitted.

23 (EXHIBIT ADMITTED INTO EVIDENCE.)

24 EXAMINER KINGERY: The only other thing

25 we have remaining was the revised Attachment 5 which

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1 I believe was from this morning and people were going  
2 to look at that.

3 MR. COLBERT: Yes, your Honor.

4 Mr. Randazzo, do you have any objection  
5 to it?

6 MR. RANDAZZO: No, no objection.

7 MR. COLBERT: Thank you. We would move  
8 that.

9 EXAMINER KINGERY: And it will be  
10 admitted, and that was an attachment to the  
11 Stipulation as I recall.

12 MR. COLBERT: Yes. It's an attachment to  
13 the Stipulation.

14 EXAMINER KINGERY: Okay.

15 (EXHIBIT ADMITTED INTO EVIDENCE.)

16 EXAMINER KINGERY: Are you planning to  
17 make that be an exhibit or are you going to docket  
18 it? We can make it be an exhibit, that would be  
19 easiest.

20 MR. COLBERT: Yes, so I believe that's DE

21 Ohio 22? Twenty-three?

22 EXAMINER KINGERY: Did you have a 22 at

23 some point that was withdrawn?

24 MR. COLBERT: Yes, it was withdrawn.

25 EXAMINER KINGERY: Okay, so this will be

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1 23.

2 MR. COLBERT: That's correct.

3 (EXHIBIT MARKED FOR IDENTIFICATION AND  
4 ADMITTED INTO EVIDENCE.)

5 EXAMINER KINGERY: Thank you. All right.

6 At this point let's go off the record and discuss a  
7 briefing schedule.

8 (Discussion off the record.)

9 EXAMINER KINGERY: Let's go back on the  
10 record. Having discussed the briefing schedule off  
11 the record, we have determined that initial briefs in  
12 this matter will be due on Monday, November 17; reply  
13 briefs will be due on Wednesday, November 26 at  
14 2:00 o'clock in the afternoon. Service should be  
15 made electronically on the parties. We didn't  
16 discuss whether you also want mail service.

17 MS. CHRISTENSEN: I was going to ask,  
18 your Honor, whether we can forego mail service and we  
19 should still file copies with Docketing?

20           EXAMINER KINGERY: You need to file paper  
21 copies with Docketing because this is not an  
22 electronic filing case, but unless anybody wants  
23 paper copies served on you, we will allow you to  
24 forego the mail service on parties so you need only  
25 file the docketed copy by mail or in person. And as

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1 I mentioned off the record, you are welcome to forego  
2 the recitation of the history of the proceedings.

3 With that, there being nothing further to  
4 come before us today, this case is submitted on the  
5 record and we are adjourned.

6 (The hearing concluded at 3:38 p.m.)

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1                    CERTIFICATE

2            I do hereby certify that the foregoing is a  
3 true and correct transcript of the proceedings taken  
4 by me in this matter on Monday, November 10, 2008,  
5 and carefully compared with my original stenographic  
6 notes.

7                    \_\_\_\_\_  
8                    Maria DiPaolo Jones, Registered  
9                    Diplomate Reporter, CRR and Notary  
                     Public in and for the State of  
                     Ohio.

10  
11 My commission expires June 19, 2011.

12 (MDJ-3295)

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