

FILE

In the Matter of the Application of Duke Energy Ohio, et al.
Stephen J. Baron

10-2586-EL-SSO
December 23, 2010

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application)
of Duke Energy Ohio for Approval)
of a Market Rate Offer to Conduct)
a Competitive Bidding Process)
for Standard Service Offer)
Electric Generation Supply,)
Accounting Modifications, and)
Tariffs for Generation Service.)

 ORIGINAL

Case No.:
10-2586-EL-SSO

- - -

DEPOSITION OF
STEPHEN J. BARON
DECEMBER 23, 2010
11:30 A.M.

KING & SPALDING, LLP
1180 PEACHTREE STREET
ATLANTA, GEORGIA

REPORTED BY:

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CCR-B-1372

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DEPOSITION

DESCRIPTION

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EXHIBITS

(No Exhibits Marked)

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

2

3

4 STEPHEN J. BARON,
5 being first duly sworn, was examined and
6 testified as follows:

7 EXAMINATION

8 BY MS. WATTS:

9 Q. Good morning, Mr. Baron. How are you
10 today?

11 A. I'm doing fine.

12 Q. I hope it's warmer in Atlanta than it
13 is in Ohio.

14 A. It probably is. It's cold for Atlanta
15 but it's a beautiful day.

16 Q. Well, starting into the questions, I
17 wanted to ask you a little bit about your
18 education. You've provided a fairly
19 comprehensive vitae here and I just wondered
20 if there's any additional degrees or any
21 additional information that's not included in
22 that document?

23 A. No, I think that's comprehensive and
24 complete.

25 Q. Mr. Baron, have you ever written any
papers dealing with issues related to

1 competition or antitrust?

2 A. I've definitely not written any papers
3 related to antitrust, and I suspect that's
4 also true with competition. And when I say
5 papers, I'm including talks before
6 organizations or things of that nature.

7 Q. And would you consider yourself an
8 expert with regard to either of those issues?

9 A. I would consider myself an expert with
10 regard to competitive issues in the electric
11 utility industry. I've participated, I've
12 been participating and involved in electric
13 utility matters for over 30 years and I have
14 testified extensively in proceedings in a
15 number of states related to competitive
16 issues, retail access, standard service offer
17 issues and so forth.

18 Q. Okay. Perhaps we'll revisit that
19 again. You listed some testimony that you
20 have given at the Federal Energy Regulatory
21 Commission; is that a complete list or are
22 there any additional ones?

23 A. To the best of my knowledge it's a
24 complete list.

25 Q. And Mr. Baron, you're not an attorney,

1 correct?

2 A. That's correct.

3 Q. And did you have any involvement in
4 drafting Senate Bill 221 in Ohio?

5 A. No.

6 Q. In your vitae you listed testimonies
7 where -- in quite a few cases, and I'm
8 wondering if any of those testimonies were in
9 states where generation is deregulated other
10 than Ohio?

11 A. Yes.

12 Q. And which would those be?

13 A. I've testified extensively in
14 Pennsylvania, I've testified in Connecticut,
15 and specifically in proceedings involving the
16 implementation of retail access in
17 Pennsylvania. As I've listed all -- I think
18 all of the testimony and cases that I was in.
19 I was involved in almost every single one of
20 the electric utility restructuring proceedings
21 in Pennsylvania that implemented retail
22 access. I've been involved in a number of
23 standard service offer proceedings in
24 Pennsylvania, as well as in Ohio. And I was
25 involved as I said in Connecticut in a number

1 of cases as well related to those issues.

2 Q. Okay. So I've heard you mention
3 Pennsylvania and Connecticut. Are there any
4 other states?

5 A. I have testified in Virginia in the
6 last two years on issues related to I guess a
7 new regulatory regime that followed a plan, it
8 was the subsequent plan to the implementation
9 of retail access. Oh, and also I did testify
10 in Maryland, in Baltimore Gas and Electric
11 proceedings related to retail access.

12 If you want, I can take a look at my
13 testimony experience and see if I missed
14 anything, but to the extent that I have, they
15 are all listed in my exhibit SJB-1.

16 Q. Okay. So other than what's in that
17 exhibit, there wouldn't be anything
18 additional?

19 A. That's correct.

20 Q. Do any of those states have a
21 regulatory structure that is similar to
22 Ohio's?

23 A. I -- well, similar in the sense that
24 Pennsylvania is closer to Ohio in terms of its
25 regulation than Louisiana is, for example,

1 because Louisiana is not -- there is no retail
2 access in Louisiana. The structure in Ohio
3 with -- especially as determined by SB 221, it
4 obviously is unique to Ohio, so it just really
5 depends on how specific you are in your
6 question. In a broad basis, all states that
7 have retail access are similar in some manner.
8 There obviously are unique features in the
9 Ohio legislation and implementation.

10 Q. And which features specifically would
11 you refer to as unique in Ohio?

12 A. Well, SB 221 in particular and the
13 establishment or the requirement for a utility
14 to provide standard service offer energy under
15 an ESP or an MRO.

16 Q. Your vitae indicates that you
17 testified on behalf of Gulf States at the FERC
18 regarding impact on its system during a
19 merger?

20 A. Could you refer me to the item that
21 you're speaking of, at least what page?

22 Q. One moment. It's on page 10 of 21.
23 It's testimony that you provided in April of
24 1993.

25 A. Yes, that was on behalf of the

1 Louisiana Public Service Commission, but it
2 did involve a merger between Gulf States
3 utilities and the Entergy system.

4 Q. Okay. Well, that's helpful because
5 perhaps I misunderstood the nature of -- where
6 it says utility, I thought that was your
7 client --

8 A. No, that was -- I'm sorry, I
9 interrupted you. No, the utility designation
10 just indicates the nature of the case. The
11 party is the party that I represented.

12 Q. Okay. When you're describing your
13 areas of expertise to others, what would you
14 say are your concentrations?

15 A. I would say economics as applied to --
16 and particularly as applied to the electric
17 utility industry, regulatory policy issues as
18 applied to the electric gas utility industry
19 and to some extent, at least in the past, the
20 telephone -- regulated telephone industry;
21 specific areas would include economic
22 analysis, financial analysis, revenue
23 requirement issues, cost allocation issues,
24 rate design, planning analyses related to
25 economic decisions that -- reviewing economic

1 decisions that utilities have engaged in,
2 issues related to the implementation of retail
3 access, standard service offer evaluations.
4 I've testified in the past on specific plans
5 that utilities have offered for competitive
6 bid processes to acquire standard service
7 offers. I've been testifying I guess for 30
8 years so it has been quite a few issues.

9 Q. Mr. Baron, do you have a Notice of
10 Deposition available to you there today?

11 A. The court reporter has it. Yes, I've
12 got it now.

13 Q. And have you seen that document prior
14 to today?

15 A. Yes.

16 Q. And did you bring with you any
17 documents in response to that notice?

18 A. Yes, and I've got documents that I
19 have relied on. I believe I sent counsel for
20 OEG a Zip file that contains all of the
21 documents. I don't know that I have -- so I
22 didn't bring copies to provide to the court
23 reporter today but those can be made available
24 instantly.

25 MS. WATTS: Mr. Kurtz, did you

1 distribute those?

2 MR. KURTZ: I thought that they
3 went out. I don't know.

4 MS. WATTS: I've not seen them.
5 Sometimes they go to different people at Duke
6 Energy, but so far as I know we've not
7 received them.

8 MR. KURTZ: His work papers we're
9 talking about? Is that right, Elizabeth?

10 MS. WATTS: Whatever he's provided
11 in response to the Notice of Deposition.

12 MR. KURTZ: Well, I'll have to
13 check after the deposition. I assumed it went
14 out to you, I don't know.

15 BY MS. WATTS:

16 Q. So Mr. Baron, you filed testimony in
17 this case on behalf of the Ohio Energy Group,
18 correct?

19 A. Yes.

20 Q. And what did you do to prepare for
21 today's deposition?

22 A. Primarily, I reviewed my testimony, I
23 reviewed some of the documents that I relied
24 on and just -- you know, just maybe to help
25 things along, the documents that I relied on

1 to prepare my testimony were basically
2 comprised of the company's filing, its
3 testimony, copy of Senate Bill 221, the
4 Commission's rules, and some orders of the
5 Federal Energy Regulatory Commission primarily
6 that I cited in my testimony.

7 Q. Are there any orders from the FERC
8 that you referred to or relied upon that are
9 not cited in the testimony?

10 A. It's possible, yes, and that was on
11 the list. Those were the documents that I
12 sent. They were basically the company's --
13 the Commission's order and -- excuse me, the
14 FERC's order in ER 10-1562, some of the
15 pleadings of Duke Energy and I believe the
16 Midwest ISO transmission owners. I did review
17 some -- let's see -- FERC order in -- that I
18 believe I cited in my testimony, it was a 2008
19 order on market rates. I'm trying to, I
20 believe I have got that with me. Let me see
21 if I can get the exact name.

22 Yes, it was order -- FERC Order 697-A,
23 order on rehearing and clarification, market
24 based rates for wholesale sales of electric
25 energy, capacity and ancillary services by

1 public utilities. And in addition, there were
2 some references in that order that the FERC
3 included in its footnotes, and I reviewed some
4 of those decisions as well, including U.S.
5 Supreme Court decision in Nantahla v.
6 Thornburg.

7 Q. Anything else you want to include?

8 A. A U.S. Supreme Court decision in
9 Mississippi Power v. Mississippi Ex Rel.
10 Moore. But I think that pretty much
11 constitutes what I looked at.

12 Q. Did you happen to review any of the
13 testimony you submitted on behalf of the Ohio
14 Energy Group in the FirstEnergy Utility's
15 request for market rate offer?

16 A. No, did I not, not in preparation for
17 this deposition or recently.

18 Q. And aside from your counsel, did you
19 speak with anyone to prepare your testimony in
20 this case?

21 A. No.

22 Q. Do you have any summaries or
23 memorandum or documents related to this case
24 aside from your testimony?

25 A. No, just communications with counsel

1 for OEG.

2 Q. With regard to your work at J. Kennedy
3 and Associates, what specific issues do you
4 provide consulting services for?

5 A. Well, I think the best way, it's
6 really the areas that I listed I think in one
7 of your prior questions about the areas of my
8 expertise, and probably the most succinct
9 answer would be the area -- the subject column
10 in my Exhibit SJB-1. Those are the areas that
11 I have provided expert testimony on in various
12 state regulatory proceedings, the Federal
13 Energy Regulatory Commission and in courts,
14 including the U.S. Bankruptcy Court.

15 Q. With respect to this particular case,
16 Mr. Baron, this Duke Energy Ohio case, on page
17 4 of your testimony in this case you list
18 three significant issues that you're
19 testifying upon. Are those all of the issues
20 that you're covering in your testimony?

21 A. Yes, I believe that's a fair summary.
22 I'm not going -- I can't sit here and tell you
23 that obviously in three paragraphs that I've
24 identified every single point that I might
25 have made in my 21 pages of testimony. But

1 that's a fair summary.

2 Q. In respect of your testimony, you do
3 not oppose the market rate offer structure in
4 Ohio generally, do you?

5 A. As a policy matter, no. I'm focussing
6 on Duke Energy Ohio's filing with regard to
7 it's request to -- under the MRO statute.

8 Q. And is the Ohio Energy Group offering
9 any witness who will testify that the market
10 rate offer structure should be rejected by the
11 Commission?

12 A. Not that I'm aware of, but you may
13 have to ask Mr. Kurtz that question.

14 Q. But to your knowledge, there is no
15 such witness, correct?

16 A. Yes, to my knowledge, that's correct,
17 I'm not aware of any such witness.

18 Q. And Mr. Baron, you're not disputing
19 that Duke Energy Ohio's proposed competitive
20 bidding process is open, fair and transparent,
21 correct?

22 A. I have not addressed that so an
23 honest -- I haven't really -- I looked at the
24 testimony but I'm really not offering any
25 opinion on that one way or the other. I

1 simply haven't addressed it. So in strict
2 answer to your question, I'm not offering
3 testimony support either finding that it meets
4 the requirements of the statute or does not.
5 I'm simply not addressing it.

6 Q. And to your knowledge, is the Ohio
7 Energy Group offering any witness with regard
8 to that issue as to whether Duke Energy Ohio's
9 proposed bidding process is open, fair and
10 transparent?

11 A. Not to my knowledge.

12 Q. And you're not disputing that the
13 designated auction manager for Duke Energy
14 Ohio's competitive bidding process is
15 independent, are you?

16 A. I'm not addressing that.

17 Q. And Ohio Energy Group is not as far as
18 you know offering any witness in this
19 proceeding who will dispute the designation of
20 Charles River Associates as independent,
21 correct?

22 A. That's correct. To the best of my
23 knowledge, I am the only witness on behalf of
24 the Ohio Energy Group in this case.

25 Q. And Mr. Baron, you're not disputing

1 that the PJM Interconnection LLC is an
2 independent RTO approved by the FERC, correct?

3 A. I'm not offering any testimony on
4 that, correct.

5 Q. And you're not aware that Ohio Energy
6 Group is offering any witness with regard to
7 that issue?

8 A. That's correct.

9 Q. And you're aware, are you not, that
10 PJM has an independent market monitor?

11 A. I am aware of that.

12 Q. And to your knowledge, OEG is not
13 offering a witness in this case who disputes
14 that PJM has an independent market monitor,
15 correct?

16 A. Again, that's correct. I have not
17 addressed that issue. I've not reviewed any
18 recent orders of PJM or pleadings by others
19 suggesting one way or the other with regard to
20 the independence of the PJM market monitor.

21 Q. Thank you. Did you review testimony
22 filed by other witnesses in this proceeding?

23 A. I'm trying to recall. I may have -- I
24 think I did look very, very briefly at some of
25 the testimony, but I just don't recall

1 anything specific.

2 Q. Did you discuss your testimony with
3 any other witnesses in this proceeding?

4 A. No.

5 Q. On page 2 of your testimony, you
6 reference other ESP MRO cases?

7 A. Yes.

8 Q. Would you tell me what subject areas
9 you covered in those cases?

10 A. I believe -- I testified in
11 FirstEnergy cases regarding both an MRO
12 proposal and ESP proposal, and in the MRO
13 proposal I believe I addressed issues that
14 were concerns of Ohio Energy Group that
15 identified with regard to the specific MRO
16 proposal on a variety of issues. I haven't
17 reviewed that recently I think as I indicated
18 to you.

19 On the ESP, I've testified on -- and really
20 on both of them, in both AEP and in
21 FirstEnergy, on some of the -- just a number
22 of proposals related to the reasonableness of
23 the proposal, some of the rate issues, some of
24 the rider issues, the impact on customers; but
25 like I said, I haven't reviewed it probably in

1 over a year so I don't -- I don't recall all
2 of the issues.

3 Q. Mr. Baron, in your response to me just
4 now and in your testimony you used the term
5 "address" on a fairly regular basis. I wonder
6 if you could explain to me what you mean when
7 you say you addressed an issue?

8 A. Addressed in my -- when I say I
9 addressed an issue, it means I offered
10 testimony on that issue. I identified,
11 discussed the issue, I offered opinions as to
12 whether a particular proposal was or was not
13 reasonable, or in the case of an issue perhaps
14 that was not addressed in a utility's filing,
15 I offered a proposal. And so when I use the
16 term "addressed," I mean I discussed it, there
17 were questions and answers in my pre-filed
18 testimony on that subject matter.

19 Q. Is it your understanding that Ohio law
20 requires a minimum five-year transition to
21 full market prices under a market rate offer?

22 A. That is my understanding, yes.

23 Q. And would you tell me what you base
24 that understanding upon?

25 A. I base it both on my reading of SB 221

1 and on discussions with OEG counsel.

2 Q. How did the discussions with OEG
3 counsel inform your opinions?

4 MR. KURTZ: Objection, and
5 instruct the witness not to answer. That's a
6 privileged discussion.

7 MS. WATTS: With all due respect,
8 Mr. Kurtz, he has indicated in a number of
9 places that he is basing his opinion on
10 discussion with counsel. I think it's fair
11 game.

12 MR. KURTZ: Well, not in a
13 privileged discussion.

14 MS. WATTS: Let me see if I can
15 work around it this way.

16 BY MS. WATTS:

17 Q. Mr. Baron, did you form any opinion
18 other than one based upon discussion with
19 counsel?

20 A. Yes, I -- I primarily base my opinion
21 on reading the clear language of the -- of
22 section 4928.142 and D, wherein it says the
23 utility shall -- that the State will require
24 an MRO, a blended rate for five years under
25 various percentages.

1 Q. Despite your assertion that it's very
2 clear, you're not offering a legal
3 interpretation of that statute, are you?

4 A. That's correct, I'm not offering a
5 legal interpretation.

6 Q. So this is a layperson, non-attorney
7 understanding of what that statute means,
8 correct?

9 A. No, I wouldn't agree with that. It's
10 a non-attorney --

11 Q. You would not agree with it?

12 A. It's a non-attorney opinion but it's
13 not a layperson. A layperson as I -- maybe I
14 should ask for a clarification. It's based on
15 my experience, my 30-plus experience in the
16 electric utility industry and my participation
17 in many proceedings that involve issues
18 related to the application of statutory
19 requirements. I'm not offering a legal
20 opinion, but it's based on my -- my
21 understanding of the context of the consumer
22 protection provisions of SB 221 and so forth
23 and so on.

24 So if the question is I'm not -- are you
25 offering a legal opinion, the answer is no, I

1 am not. But it is based on my experience and
2 my understanding and participation in numerous
3 proceedings, including numerous proceedings in
4 Ohio.

5 Q. Again, however, Mr. Baron, you are not
6 an attorney, correct?

7 A. That's correct.

8 Q. And you've testified that you have
9 some familiarity with SB 221, correct?

10 A. Yes.

11 Q. But you did not have any involvement
12 in the development of that law, did you?

13 A. That's correct. But I have in
14 numerous -- the cases that I cited on page 2
15 of my testimony, I've been involved in --
16 prior to this case, one, two, three, four,
17 five SSO proceedings in Ohio that all were --
18 involved the application of provisions of
19 Senate Bill 221.

20 Q. Understood. But just to be clear, you
21 didn't have any involvement in the legislative
22 process that resulted in that -- in SB 221,
23 correct?

24 A. That's correct, my -- my basis and
25 expertise on this issue comes with -- is based

1 on my experience, my participation in all of
2 those proceedings, reviewing -- understanding
3 Commission orders that have been issued,
4 testimony of many witnesses and my reading of
5 the statute and understanding of it in the
6 context of retail access.

7 Q. Mr. Baron, I'm going to refer to page
8 7 of your testimony. I'll give you a moment
9 to get this if you need it.

10 A. Okay. Okay, I'm there.

11 Q. On page 7, beginning at approximately
12 line 6, you state that Duke Energy argues that
13 revised code 4928.142 (D) permits the
14 Commission to modify the blending schedule
15 prospectively in year two, is that correct?

16 A. That's my understanding of the
17 testimony of the Duke witnesses, yes. That is
18 what I said and that is my understanding.

19 Q. And so it's not your understanding
20 that Duke is relying upon section E as in
21 Edward as opposed to D as in David?

22 A. No, actually that's -- I appreciate
23 that, it is -- it is section E that I was
24 referring to. So that's a -- that should be
25 corrected.

1 Q. So you're saying your testimony on
2 line 6, that statute should be a reference to
3 E instead of D?

4 A. Just give me a moment just to make
5 sure. Let me read this whole question and
6 answer if you would.

7 The question -- the reference on line 5,
8 where -- in the question is to D, so that is
9 correct as stated. But on line 6, the
10 reference should be to E. And I think I
11 discussed that later on on page 12 of my
12 testimony at -- beginning at line 9, and
13 that's -- but that's what I was referring to.
14 So that D should be changed to an E on line 6.

15 Q. Let's turn to page 12 there where you
16 just cited to your -- in your testimony, you
17 have the statute set forth there.

18 A. Yes.

19 Q. You've only cited part of the statute
20 there, isn't that correct?

21 A. Yes, I believe I started with the word
22 "may" and that -- yes, I didn't include the
23 entire -- I didn't include the phrase
24 "beginning in the second year".

25 Q. Was there any particular reason why

1 you left off those beginning phrases?

2 A. No, no particular reason.

3 Q. So the language you omitted says,
4 beginning in the second year of a blended
5 price under division D of this section, and
6 notwithstanding any other requirement of this
7 section, the Commission may, and then it goes
8 on with the part you have cited; isn't that
9 correct?

10 A. Yes, and I -- I would be happy to
11 agree that that is part of E.

12 Q. And would you agree with me that that
13 provision gives the Commission some discretion
14 to extend the blending period or alter the
15 blending period for beyond five years?

16 A. Well, that's what I -- that's my
17 understanding, that beginning in the year --
18 in the second year, the Commission may alter
19 the blending period prospectively for up to an
20 additional five years.

21 Q. And what are you basing that
22 understanding upon?

23 A. The words in the statute. I mean, I
24 can read --

25 Q. Was that understanding also informed

1 by discussion with counsel?

2 A. It was based on my reading of the
3 statute and my understanding of why a
4 provision like that would reasonably be
5 included, that to the extent that there would
6 be abrupt changes in prices and the Commission
7 would be concerned about the impact on
8 consumers. Notwithstanding that, I'm sure
9 that I did have discussions with OEG counsel
10 regarding my interpretation and how I view the
11 statute.

12 Q. And so your understanding of the
13 statute was at least in part based upon your
14 discussion with counsel?

15 A. No, I don't think I would agree with
16 that. I think my understanding of the statute
17 is based on my clear reading of the statute.
18 I'm certain that at some point in the
19 preparation of my testimony I had discussions
20 with OEG counsel about all the issues in my
21 testimony, including my interpretation of
22 various statutory provisions.

23 Q. Again, on page 9 of your testimony,
24 Mr. Baron, in your footnote at the bottom, I
25 believe it footnote 2, you again state that

1 you're not offering a statutory interpretation
2 either in support of or against the Company's
3 position?

4 A. Right, and what I mean by that is I'm
5 not offering a legal opinion. I'm offering my
6 expert testimony as -- in the context of the
7 Company's filing in the same manner that the
8 Company's witnesses have offered testimony on
9 these issues.

10 Q. So is it correct to say that your
11 opinion is that the Commission should not
12 terminate the blending period after 29 months?

13 A. Well, my recommendation to the
14 Commission is that they should reject the
15 Company's MRO filing because it does not meet
16 the requirements of the statute based on my
17 understanding of the statutory requirements.

18 Q. So maybe you could turn back around
19 now and answer the question I just posed. Is
20 it your opinion that the Commission should not
21 terminate -- should not do the blending period
22 after -- I'm sorry, let me start again.

23 Is it your opinion that the blending period
24 must be at least five years?

25 A. Yes, that's my -- that would be my

1 recommendation, a minimum of five years and
2 with the acknowledgment that the statute also
3 permits the Commission, beginning in year two,
4 to alter the blending period prospectively for
5 up to a ten-year period.

6 Q. And is it correct to say that that
7 opinion is based upon your understanding that
8 the blending period is for the purposes of
9 consumer protection?

10 A. That -- well, it's based on my reading
11 of the statute and my understanding of why it
12 would be appropriate to have provisions like
13 that in a statute to protect consumers. So
14 consumer protection is definitely one of the
15 reasons why I believe that a provision like
16 that would be appropriate in this type of
17 statute, that consumer protection is the clear
18 objective in my view of the blending
19 provisions.

20 Now, whether it's the only objective, I
21 can't answer that but clearly consumer
22 protection would have to be the primary reason
23 for the blending proposal, or provisions.

24 Q. And so Mr. Baron, if the blending
25 period have to be at least five years, is it

1 your position that the Commission can't
2 shorten the blending period if it would
3 benefit consumers?

4 A. Well, my reading of the statute is
5 that it should be a five-year blending period.
6 Again, I can't sit here and tell you from a
7 legal standpoint whether there's some legal
8 basis for the Commission shortening the
9 blending period. From a consumer protection
10 standpoint, I can't imagine any reason why a
11 shortened blending period would be -- would
12 benefit consumers from a consumer protection
13 standpoint. It doesn't make any sense that
14 that would be true.

15 Q. So you can't foresee any set of
16 circumstances under which consumers would
17 benefit by a shorter blending period, is that
18 correct?

19 A. Yes, that's correct.

20 Q. Other than your reading of the
21 statute, do you have any other support for
22 your opinion that the Commission should not
23 terminate the blending period after 29 months?

24 A. Well, the support -- I mean, basically
25 my opinion is based on a review of the

1 statute, it's based on a review of the
2 company's filing in this case, and it's based
3 on my general understanding of the options
4 that consumers would have under the minimum
5 five-year blending period called for in the
6 statute. So it's based on a whole host of
7 factors, including the statute obviously.

8 Q. And did counsel for OEG influence that
9 opinion with respect to determination of the
10 blending period?

11 A. Influence it? Not that I'm aware of.
12 I was asked to review the company's filing and
13 provide an opinion and testimony addressing
14 those issues. Again, I had discussions with
15 OEG counsel. Beyond that, I can't really -- I
16 don't think I can answer your question.

17 Q. Would you be able to form an opinion
18 as to that issue without discussions with OEG
19 counsel?

20 A. In other words, prior to being
21 retained to provide testimony in this case,
22 are you asking me to speculate whether I would
23 have had an opinion that the MRO statute in
24 division D, or section D, required a five-year
25 blending period? If that's the question, the

1 answer is yes, I would have read that statute
2 and interpreted that as requiring a five-year
3 blending period, whether I had any discussions
4 with OEG counsel or not.

5 Q. And so to be clear, it's your opinion
6 that extending the blending period is a
7 necessary consumer protection but shortening
8 the blending period is not?

9 A. The ability of the Commission
10 beginning in year two to evaluate the impact
11 of market prices relative to the ESP rates,
12 that is an option that the statute provides
13 for the Commission, and clearly that option is
14 designed in my opinion to provide additional
15 consumer protections. I think that was your
16 question.

17 Q. And under circumstances where the ESP
18 rate is higher than market rate in year two,
19 would you agree with me that it would be
20 advisable for the Commission or perhaps
21 beneficial to consumers to get to the market
22 rate more quickly?

23 A. No, I don't, because it's obvious
24 under the MRO provisions that consumers are
25 allowed to shop, and to the extent that

1 consumers are allowed to shop, and in fact the
2 evidence submitted by the Company in this case
3 is that a substantial amount of the load is
4 shopping, those consumers can obtain market
5 prices. The purpose of the blend provision is
6 to provide -- protect an alternative to
7 consumers, and in that sense it's a protection
8 in the event of significant -- abrupt or
9 significant changes in market prices.

10 Q. And so for those consumers that are on
11 SSO prices and choose not to shop, they are
12 just obligated to pay the higher price, is
13 that what you're saying?

14 A. They would have the choice to pay a
15 market price offered by a competitive supplier
16 or to pay the standard service offer. As of
17 now, it's my understanding that market prices
18 are lower than the adjusted ESP price. That
19 could change next year or in 18 months or 24
20 months. The purpose of the blending is to
21 provide protection to consumers in the event
22 that there's an abrupt or significant change
23 in market prices. So I would say that that's
24 an excellent provision for the Commission to
25 retain.

1 Q. Would you turn to page 11 of your
2 testimony, please.

3 A. Yes.

4 Q. On page 11 you state that Duke Energy
5 Ohio would look more like FirstEnergy if it
6 were to transfer its generating facilities to
7 a non-rate affiliate, is that correct?

8 A. Yes.

9 Q. And you express some general concerns
10 with that prospect, correct?

11 A. Yes.

12 Q. Are you saying that customers of
13 FirstEnergy Ohio service territories are
14 charged rates that are higher than Duke Energy
15 Ohio's customers?

16 A. I haven't made that evaluation. My
17 concern was strictly to the issue of the
18 transfer of the legacy generation assets and
19 the fact that once those assets are
20 transferred the -- the prices for power
21 available, whether it's an SSO, even under a
22 blend or market prices, would essentially be
23 driven by the market. I believe Mr. Wathen,
24 if I pronounce it correctly, made the same
25 point in his testimony.

1 Q. Is there any other particular concern
2 you would have if Duke Energy looked more like
3 FirstEnergy?

4 A. Well, the reference there was strictly
5 to the issue of transfer of legacy generation
6 assets.

7 Q. On page 13, line 7 of your testimony,
8 I think you opined that the Commission can
9 extend the blending period to ten years only
10 to the extent market rates may cause an abrupt
11 or significant change in the MRO SSO prices,
12 isn't that correct?

13 A. That's my reading of the division D, I
14 believe that's how it's referred to -- excuse
15 me, E.

16 Q. And could you define how you used the
17 term "abrupt," what that means to you?

18 A. I'm basing that on the language in the
19 statute that refers -- it says the Commission
20 may alter prospectively the proportions
21 specified in that division to mitigate any
22 effect of an abrupt or significant change in
23 electric distribution -- in the electric
24 distribution utility standard service price.

25 I haven't done any specific analysis as to

1 what thresholds may cause that provision to be
2 invoked. So I really don't have an opinion
3 beyond the statutory requirement that the
4 Commission would have to evaluate and form --
5 make a decision as to whether such an abrupt
6 and significant change will occur. And at
7 this point I haven't done any analysis to
8 determine what those limits would be or what
9 those thresholds would be.

10 Q. But Mr. Baron, I think it's fair to
11 say you based a significant portion of your
12 testimony upon your reading of the statutes,
13 and I would like to understand what you
14 believe the word abrupt means?

15 A. Well, I would -- my interpretation of
16 the word abrupt is that rates would change by
17 some material percentage amount. I think I
18 just answered in your prior question, I
19 haven't done an analysis as to what that would
20 constitute. It's simply something that wasn't
21 really before me to look at and there was no
22 need for me to make a determination of that.
23 Abrupt is obviously a judgment decision that
24 the Commission will ultimately have to make,
25 and I would think that it would -- there would

1 be a variety of factors in terms of percentage
2 change in rates, general level of inflation,
3 the economic environment, there may be a whole
4 host of reasons or factors that the Commission
5 would or should consider. And I simply
6 haven't formed an opinion on that at this
7 time.

8 Q. Do you have an opinion with respect to
9 what "significant" means in this context?

10 A. It would be the same answer I just
11 gave you.

12 Q. So is it your opinion that the
13 Commission cannot alter the blending
14 percentage to mitigate the effect of abrupt or
15 significant change in the current SSO price?

16 A. I'm not sure I understand your
17 question, that the Commission -- did you ask
18 me if the Commission cannot do that?

19 Q. Right. So if there's a change in the
20 current SSO price, the Commission may alter
21 the blend?

22 A. On a prospective basis, if the
23 Commission -- the way I would interpret it as,
24 if the Commission believes that there would be
25 an abrupt or significant change in the SSO

1 price, then the Commission can make a change
2 in the blend. And I -- my interpretation of
3 that is in the context of extending it for
4 additional time up to a period not to exceed
5 ten years.

6 Q. Just so that you and I are clear with
7 one another, when I refer to the current SSO
8 price, that would be the SSO price as
9 reflected in Duke Energy Ohio's application
10 under current electric security plan, correct?

11 A. Okay, I was referring to the issues in
12 this case, the MRO. Maybe I did misunderstand
13 your question. It's my understanding this
14 provision of the statute applies to the rates
15 that would be applicable under an MRO.

16 Q. Let me move on and maybe we'll clarify
17 this as we go through this. Duke Energy can
18 make adjustments -- backing up for a moment,
19 the existing ESP price, would you agree with
20 me that it would be fair -- can we just refer
21 to it as the legacy ESP price so we know where
22 we're starting from?

23 A. Yes, that would be great.

24 Q. Okay. So Duke Energy Ohio can make
25 adjustments to its legacy ESP price during the

1 blending period as often as quarterly,
2 correct?

3 A. Yes.

4 Q. And those adjustments would be for
5 things such as fuel and purchased power and so
6 forth, right?

7 A. Right, and environmental costs.

8 Q. Okay. So backing up a little bit, you
9 agree with me that Duke Energy Ohio is
10 authorized to make adjustments to its legacy
11 SSO price for those purposes?

12 A. In the context of an MRO, subject to
13 the earnings provision of the statute, which I
14 addressed I believe -- I'm just trying to find
15 it. I address this last point I'm making I
16 think beginning on page 17. So just in
17 confirming your -- or responding to your
18 question, the adjustments, the quarterly
19 adjustments are subject to the earnings test
20 that I talk about beginning on page 17 on line
21 7.

22 Q. But you don't contend that -- you
23 would agree with me that the Company can make
24 adjustments based upon -- adjustments to its
25 legacy price based upon the things we

1 discussed such as fuel and purchased power and
2 so forth, right?

3 A. Yes, again, subject to the other
4 provisions of the statute, which is --
5 requires, is a burden on Duke Energy Ohio that
6 such adjustments would not result in
7 significantly excessive earnings, so that's
8 the complete answer.

9 Q. In your experience have you
10 experienced abrupt or significant changes in
11 the price of fuel?

12 A. Yes.

13 Q. And so is it your opinion that the
14 Commission could not shorten the blending
15 period to mitigate the effects of the changes
16 to Duke energy's legacy SSO price?

17 A. I don't see -- A, it doesn't -- my
18 reading and understanding of the statute would
19 not be consistent with that, that there be no
20 reason to shorten the blending period. And
21 again, I think I answered your question
22 earlier, that I cannot contemplate a scenario
23 wherein consumers are effectively better off
24 by having the blending, the MRO blending
25 period shortened.

1 Q. And so just to be clear, even if there
2 are abrupt or significant changes in any of
3 the legacy SSO factors, you would not support
4 the position that the Commission can alter the
5 MRO price accordingly?

6 A. Well, I think the -- maybe I'm not
7 following your question entirely. The
8 provisions in division E permit the Commission
9 prospectively to alter the proportions to
10 mitigate -- to mitigate the effect of an
11 abrupt or significant change in what otherwise
12 would be the SSO price. I'm not really
13 following how -- how an increase in one of the
14 adjustments, let's just say fuel, which might
15 increase the legacy ESP price, would cause the
16 Commission to want to shorten the blending
17 period when customers have the option to shop
18 under the assumption that -- which I think
19 underlies your question, that market prices
20 aren't experiencing that abrupt, that increase
21 in fuel price.

22 Customers would have the option to shop and
23 that would be the protection, the relief valve
24 that customers would have. If the Commission
25 shortened the blending period in response to

1 that, customers would no longer have an option
2 of a blended rate, they would only have the
3 market rate. And I don't -- I just can't
4 contemplate how that would be beneficial to
5 consumers.

6 Q. Do you have a copy of revised code
7 section 4928.142 in front of you?

8 A. Yes.

9 Q. Could you refer to that statute and
10 tell me where it says in there that the
11 Commission can only adjust the blending period
12 when market prices are higher than the legacy
13 SSO price?

14 A. It doesn't address that specifically.
15 I believe I paraphrased it in just an answer
16 earlier, but the sentence basically -- first
17 sentence says the Commission can alter
18 prospectively the blend to mitigate the effect
19 of an abrupt or significant change. Then it
20 goes on to say any such alteration shall be
21 made not more often than annually and it would
22 not cause a duration of the blending period to
23 exceed ten years.

24 When I read both of those -- all of those
25 pieces together, in my mind it is clear that

1 it's designed as a consumer protection
2 mechanism that permits the Commission to alter
3 the blending period so as to mitigate higher
4 market prices. Clearly, the language talks
5 about changing the duration of the blending to
6 a period not to exceed ten years. There's
7 nothing in that language that says the
8 Commission can alter the blending period to
9 reduce the blend to a shorter period than five
10 years as required in division D. And I can't,
11 again, I can't imagine any reasonable
12 interpretation of that provision that would be
13 geared towards protecting consumers by
14 shortening the blending period to a period
15 less than five years. It talks about
16 extending the blending period.

17 Q. So Mr. Baron, my question was where in
18 the statute it indicates that the Commission
19 can only adjust the blending period when
20 market prices are higher than the legacy SSO
21 price, and I believe you're -- notwithstanding
22 your answer, what you're saying is the statute
23 does not say that, correct?

24 A. It --

25 MR. KURTZ: Objection, asked and

1 answered. He's already answered this
2 question.

3 THE WITNESS: Those words are not
4 in -- this provision of the statute does not
5 talk about market price specifically. But the
6 reasonable interpretation is that that is what
7 is being referred to here when you talk about
8 extending the blending period. There would be
9 no other interpretation in my view that could
10 be applied to it.

11 BY MS. WATTS:

12 Q. And again, that interpretation is
13 informed by your experience and your reading
14 of the statute alone, correct?

15 A. It's informed -- I mean, you know, I
16 don't have the prior -- my prior answers to
17 this question, which I think I've answered a
18 few times, but it's informed by my reading of
19 the statute, my experience in 30 years plus in
20 the electric utility industry and being
21 involved in numerous retail access and cases
22 wherein consumer protection issues, standard
23 service offer issues are addressed, including
24 the cases, the four cases or five cases that I
25 have been involved in in Ohio and my general

1 understanding of the concerns involved in
2 transitioning from a legacy ESP rate to a
3 market rate. So it's based on all of that,
4 not simply a reading of the statute.

5 Q. Mr. Baron, do you know whether Ohio
6 Energy Group's members would prefer a slower
7 migration to full market prices given the
8 current market price levels?

9 A. Are you talking about with regard to
10 the blending issue?

11 Q. I'm just speaking in general, whether
12 they would prefer a slower migration or a more
13 expedient migration to market prices, given
14 current market prices?

15 A. Well, all the members of OEG, as would
16 be the case for all of Duke Energy Ohio's
17 customers, have the option today to shop and
18 to provide -- to basically acquire their power
19 at full market prices. So that option is
20 available to the members of OEG and all of
21 Duke's customers in Ohio. So I don't really
22 understand beyond that what your question is.

23 Q. Do you know how many of OEG's members
24 are currently taking generation service from
25 Duke Energy Ohio?

1 A. I do not.

2 Q. Turning to your testimony, you haven't
3 made any projections of market rates after
4 2015, have you?

5 A. No, I have not.

6 Q. On page 8 of your testimony, you
7 describe Duke Energy Ohio's only substantive
8 argument for shortening the blending period as
9 Dr. Rose's opinion that the legacy ESP price
10 and market prices convert in 2014, correct?

11 A. Yes.

12 Q. And you further state that Mr. Rose's
13 projections are wrong, market prices could
14 substantially exceed the otherwise applicable
15 blended ESP SSO market rates, correct?

16 A. That's what it says, yes, and I
17 believe that.

18 Q. Sorry, go ahead.

19 A. No, I was just saying, I think it's a
20 correct statement.

21 Q. If market prices are increasing, would
22 you expect prices of fuel to increase?

23 A. I would expect that there would be
24 certainly a correlation. I don't know what
25 that correlation would be. Clearly, increases

1 in the price of natural gas would be -- would
2 drive market prices, but changes in demand
3 would also drive market prices.

4 Q. So is that a "yes" to my question?

5 A. If the question was do changes in fuel
6 prices, would they lead to higher market
7 prices, I would expect that that would be
8 true, yes.

9 Q. If market prices are increasing, would
10 you expect fuel prices to increase?

11 A. Well, I think that would not
12 necessarily be true. It is probably -- it
13 might -- you know, it's probably likely that
14 it's true but I think I just answered the
15 question in my prior answer, that increases in
16 demand may also cause increases in market
17 prices that are not per se related to fuel
18 price increases; they are probably -- all of
19 those factors are probably related. So if
20 demand increases, that may also have an
21 increase -- impact on the price of, say,
22 natural gas.

23 Q. If market prices are increasing, would
24 you expect prices for purchased power to
25 increase?

1 A. I would.

2 Q. So if the legacy ESP price is adjusted
3 the because of increasing fuel or purchased
4 power costs, how is it that the market could
5 substantially exceed the blended price?

6 A. Well, there's not a one-to-one
7 correspondence between a change in market
8 price and a change in legacy ESP rates even
9 though fuel and other factors might be
10 changing. If that were true, there would be
11 no reason for any blending. We would simply
12 have 100 percent market rates immediately.
13 And obviously that is not desirable, it's not
14 called for by the legislation.

15 Q. And would you explain what you mean by
16 "substantially exceed" in your testimony?

17 A. Could you give me a reference to that?
18 Oh, I see that on line 7 and 8?

19 Q. Yes.

20 A. Well, I mean they would, depending on
21 how high market rates were to increase, they
22 could substantially exceed the ESP. I haven't
23 quantified whether that means 10 percent, 20
24 percent, or 30 percent, but the point I'm
25 making is that market rates can be

1 substantially higher than cost adjusted legacy
2 rates.

3 Q. And so you have no explanation for --
4 you have no description of what you mean by
5 the term "substantially exceeds"?

6 A. "Substantially exceed" in my view
7 would be at least -- probably in the range of
8 10 percent or more. But again, I haven't done
9 a specific analysis on that. I think I
10 indicated to you in a prior answer, I haven't
11 done a projection of market rates and the ESP
12 rates for 2015 or '16, but of course Mr. Rose
13 has not either.

14 Q. Is it your opinion that the market
15 rate offer is intended only to protect
16 consumers and not the utility company?

17 A. No, I don't think that's necessarily
18 true.

19 Q. In what way would you disagree with
20 that statement?

21 A. Well, your question was is the MRO --
22 are the MRO provisions only designed to
23 protect consumers, and my understanding of the
24 MRO provisions is that it's designed to
25 protect consumers but it's also designed to

1 ensure that there's no financial harm to the
2 utility.

3 Q. And how would you define "financial
4 harm" in this context?

5 A. I haven't -- I'm basing that on my
6 review of the statute. I haven't done an
7 analysis of that.

8 Q. You have no opinion about what you
9 mean by the term "financial harm"?

10 A. Well, I have opinions as to some
11 boundaries, for example, if the -- you know,
12 if bankruptcy were a result of some
13 proposed -- some rate that is in effect, that
14 would certainly constitute financial harm in
15 my opinion. With regard to -- beyond that,
16 it's really a question of what type of return
17 the -- rate of return the utility is earning
18 on its invested capital, and I haven't done
19 any analysis of that.

20 Q. Mr. Baron, in your opinion, Duke
21 Energy Ohio has not complied with the
22 Commission's rule because it's not provided
23 estimates of anticipated adjustments to the
24 legacy SSO price for the duration of the
25 blending period. Is that correct?

1 A. Yes, in addition to the fact that the
2 proposal itself does not meet the five-year
3 minimum blending requirement.

4 Q. And you have reviewed Duke Energy
5 Ohio's application in this matter, correct?

6 A. Yes.

7 Q. And the blending period proposed by
8 the Company is 29 months, right?

9 A. Yes.

10 Q. And are you aware that Duke Energy
11 Ohio is not proposing to make any adjustments
12 in this 29-month period?

13 A. Yes, assuming that -- my understanding
14 is the Commission -- the Company's proposal is
15 that if Duke's 29-month blending proposal is
16 accepted, the company is agreeing to forego
17 adjustments for fuel and the environmental
18 costs, I believe, during that period.

19 Q. So if there's -- if the application
20 proposes no adjustments, there's no
21 anticipated adjustments that need to be
22 provided in the application, correct?

23 A. Well, to the extent -- if 29 months
24 was the correct period for the blending, the
25 company has done a projection for 29 months

1 and not -- and proposed no adjustments, but
2 that misses the point that the statute
3 requires a five-year blending and the
4 Commission's rules require projections of the
5 adjusted ESP price and market prices for the
6 full five years as I understand it.

7 Would you mind if we take a couple minute
8 break?

9 MS. WATTS: That would be fine.

10 (Brief recess).

11 THE COURT REPORTER: While we have
12 this lull in the action, will counsel who want
13 copies of this deposition let me know?

14 MS. WATTS: Yes, Duke Energy Ohio
15 wants one and we would like to have it
16 expedited if possible.

17 THE COURT REPORTER: How soon?

18 MS. WATTS: Well, given that this
19 is the 23rd, how about Tuesday of this coming
20 week?

21 THE COURT REPORTER: That will be
22 fine.

23 MR. KUTIK: This is David Kutik;
24 the same for us.

25 THE COURT REPORTER: Anybody else?

1 MR. BEELER: OCC would like to
2 have an expedited copy.

3 BY MS. WATTS:

4 Q. Mr. Baron, turning to page 13 of your
5 testimony, you reference Duke Energy around
6 line 17 there, you state that under its
7 proposed electric security plan, Duke Energy
8 is to compare the protected adjusted
9 generation service prices under the
10 competitive bidding process plan to the
11 projected adjusted generation service prices
12 under its proposed electric security plan,
13 correct?

14 A. Yes.

15 Q. And Duke Energy is not proposing an
16 electric security plan in this case, correct?

17 A. That's correct. That is, however,
18 under the Commission's rules, and I'm not sure
19 I can -- it's 4901: 1-35-03 B 2 J, and as I
20 read it, B applies to an MRO. And 2 says
21 prior to establishing an MRO under division A
22 of section 4928.142, and item J is the basis
23 for my discussion on page 13.

24 Q. And so did you understand the proposed
25 electric security plan in this context to be

1 the Duke Energy Ohio legacy SSO?

2 A. That's my -- that would be my
3 interpretation, that that portion of the
4 blended rate, that the legacy ESP rates as
5 adjusted, item J says the first application
6 for a market rate offer offered by an electric
7 utility, and then goes on to say that there
8 needs to be the projections that I talk about
9 on -- well, it's stated in the rules and that
10 I identified on my testimony at page 13. So
11 I'm interpreting that as that it applies to
12 the legacy ESP prices as well as the market
13 rates under the CBP.

14 Q. And with respect to that particular
15 provision in the Commission rules, what is
16 that opinion based upon, please?

17 A. Well, it's based on reading the
18 language, which I think is plain language, in
19 the referenced provision.

20 Q. Did you have any discussions with
21 counsel with regard to interpretation of that
22 particular provision?

23 A. I believe I mentioned this to counsel.
24 So to that extent I guess that would
25 constitute a discussion.

1 Q. And did having that discussion
2 influence your opinion?

3 A. Not that I recall, no.

4 Q. We've spoken several times so far now
5 about revised code 4920.142, correct?

6 A. Yes.

7 Q. And is there anything in that statute
8 that requires Duke Energy Ohio to continue to
9 own its generation assets during the blending
10 period?

11 A. I don't recall language to that
12 effect, but it's my understanding that the
13 Commission has to approve the transfer, if
14 there is a transfer.

15 Q. I don't believe my question had to do
16 with whether the Commission had jurisdiction
17 or not. The question was is there anything in
18 that statute that requires the company to own
19 its own generating assets during the blending
20 period?

21 A. And I answered to you that I am not
22 aware of specific language to that effect.
23 But I have -- I could reread the statute
24 again, but that's my recollection.

25 Q. On page 18 of your testimony --

1 A. Yes.

2 Q. -- are you offering here a statutory
3 interpretation of the Significantly Excessive
4 Earnings Test under the market rate offer?

5 A. I'm not offering a legal opinion so my
6 testimony on page 18 is in the same context as
7 my other testimony that we discussed earlier
8 today in terms of the basis for my opinion.
9 But I'm not offering a legal opinion.

10 Q. Is it your opinion that the
11 Significantly Excessive Earnings Test is
12 applicable every time it seeks to adjust the
13 legacy ESP portion of the market rate offer,
14 every time Duke Energy seeks to adjust or the
15 Commission seeks to adjust the legacy ESP
16 portion of the market rate offer?

17 A. Well, that would be my understanding
18 of this provision in RC 4928.142 (D).

19 Q. And that opinion is informed solely by
20 your reading of the statute?

21 A. Yes, that's correct, and as I
22 indicated, I've had discussions with counsel
23 but it's primarily based on my reading of the
24 statute, and it certainly makes sense to me.
25 There's a public policy rationale for this

1 interpretation, that if a cost goes up but
2 other costs go down such that the Company's
3 earnings are perhaps increased despite the
4 fact that fuel costs say rose, then it's
5 reasonable for the Commission to adjust what
6 otherwise would be a flow-through of a fuel
7 increase. There's a legitimate public policy
8 rationale for such a provision, and it's my
9 understanding the statute provides the
10 Commission the authority to make that
11 determination.

12 Q. Mr. Baron, on page 19 of your
13 testimony you address Duke Energy Ohio
14 proposed rider BTR and RTO, correct?

15 A. Yes.

16 Q. And again, you expressly state that
17 you're not offering any opinion as to legal
18 issues related to the recoverability of
19 transmission costs, correct?

20 A. That's correct, I'm not offering a
21 legal opinion.

22 Q. And you're also not specifically
23 addressing legal issues involving federal
24 preemption and the prudence of choice
25 exception to the filed rate doctrine, correct?

1 A. That's correct, I'm not offering a
2 legal opinion. I am offering testimony that
3 those, based on my experience and
4 understanding of decisions that I reviewed,
5 that it is a legitimate prerogative of the
6 Commission to examine the prudence of
7 decisions such as the Company's election to
8 withdraw from MISO and join PJM and the impact
9 on consumers. That's a -- my understanding
10 based on many years of participation in FERC
11 proceedings and dealing with preemption
12 issues, not as a lawyer but as an expert on
13 these types of issues, that would be my
14 opinion, that the Commission has the authority
15 to consider this.

16 Q. So notwithstanding that -- so to be
17 clear, you're not offering a legal opinion but
18 you are most definitely offering an
19 opinion nonetheless?

20 A. Yes, that is correct. I am offering
21 an opinion based on my experience in the
22 electric utility industry, in numerous FERC
23 proceedings and in retail proceedings where
24 federal preemption issues arose, that this is
25 the type of issue that a state regulator can

1 review. And it's distinct from an issue where
2 a state regulator imposes the state
3 regulator's own rate when the FERC has
4 determined adjusted reasonable rate, that
5 these are distinct issues.

6 Q. And you included in your testimony a
7 reference to advice that you received from OEG
8 counsel in regard to that issue, correct?

9 A. Yes, I did discuss that issue with OEG
10 counsel, but I think I just answered you that
11 I have been involved in many proceedings that
12 address this issue where this issue has
13 arisen. I've read numerous decisions by
14 courts and state regulators and pleadings by
15 various parties that address the issue. So
16 I'm -- I would consider that I'm informed on
17 this issue, but I did have discussions with
18 OEG counsel on this, yes.

19 Q. And did OEG counsel advise you
20 anything else with respect to this issue?

21 A. Not that I recall. I'm not sure what
22 you mean by your question.

23 Q. Well, I'm just wondering if there's
24 anything else that we've not covered that
25 you've been advised about with regard to this

1 issue?

2 A. This issue about what's been usually
3 referred to as the Pike County exception
4 issue, or any issue in this case?

5 Q. Well, the issue is Duke Energy Ohio's
6 proposed riders BTR and RTO.

7 A. No, I think the issues that I
8 recall -- obviously, I've had lots of
9 communication with OEG counsel on various
10 issues, but the specific issue that I'm
11 addressing here has to do with the ability of
12 the Commission to review this issue.

13 MS. WATTS: Mr. Huseby, do you
14 have a copy of a statute that I provided
15 earlier to you this morning that's revised
16 code 4928.05.

17 (Off-the-record discussion).

18 THE COURT REPORTER: Okay, the
19 witness has it before him.

20 BY MS. WATTS:

21 Q. Great, thank you. Referring to the
22 second paragraph, so that it would be (A) (2)
23 of that statute, do you see that, Mr. Baron?

24 A. Is that the paragraph beginning with
25 "on and after the starting date of competitive

1 retail electric service," comma?

2 Q. Yes.

3 A. Okay, I see that paragraph.

4 Q. And I would like you to look further
5 down in the statute to a provision that says,
6 Notwithstanding chapters 4905 and 4909 of the
7 revised code, Commission authority under this
8 chapter shall include the authority to provide
9 for the recovery through a reconcilable rider
10 on an electric distribution utility's
11 distribution rates of all transmission and
12 transmission related costs, including
13 ancillary and congestion costs, imposed on or
14 charged to the utility by the Federal Energy
15 Regulatory Commission or an RTO, Independent
16 Transmission Operator, or similar organization
17 approved by the FERC.

18 Was that a correct reading of that statute?

19 A. Well, basically, yes. I mean, I think
20 no one is going to dispute that.

21 Q. Okay. And have you ever looked at
22 that before?

23 A. I may have looked at that, this
24 statute in a prior case. I don't recall
25 looking at it recently, but I wouldn't be

1 surprised if I had reviewed it in one of the
2 prior SSO cases that I've been involved in.

3 Q. So your statement in your testimony,
4 or your general opinions in the testimony
5 about whether Duke Energy Ohio's decision to
6 withdraw from MISO is a legitimate issue for
7 Commission determination really is a statement
8 from counsel and not you, isn't that correct?

9 A. You want to -- would you mind
10 referring me to the specific lines in my
11 testimony that you're asking me about on this
12 question?

13 Q. Yes, one moment.

14 A. I may have missed it, did you refer me
15 to the --

16 Q. I have not yet, I'm --

17 A. Okay, I'm sorry, because I was handing
18 the court reporter back his laptop.

19 Q. So I'm looking at page 21, and it's
20 lines 12 through 14.

21 A. Okay, just give me a moment and let me
22 read that. Okay, and could you just restate
23 your question now?

24 Q. So your last statement is basically a
25 restatement of what counsel told you, correct?

1 A. Yes, that statement as it says, OEG
2 counsel has advised me, that is a legitimate
3 issue, and in addition to that I have informed
4 myself by reading a number of court decisions,
5 decisions of the Federal Energy Regulatory
6 Commission, and the Pike County decision
7 itself, at least the Pennsylvania Supreme
8 Court decision.

9 Q. But in your testimony, you're not
10 offering an opinion as to the prudence of this
11 choice, correct?

12 A. That's correct, I have not made any
13 such evaluation at this time. My testimony is
14 simply that this is a significant issue and
15 it's my understanding that there's no
16 requirement that the Commission issue a
17 decision on that issue within the 90-day MRO
18 timeframe, and given the significance of the
19 issue, the complexity of the issue, it should
20 be considered in a separate proceeding.

21 Q. Have you ever been designated as an
22 expert witness on issues related to MISO?

23 A. I have -- I have testified on issues
24 related to various aspects of MISO tariffs or
25 costs in a number of cases. I guess beyond

1 that, you would have to ask more specific
2 questions. But I have addressed issues
3 related to MISO in a number of jurisdictions.

4 Q. Can you cite me to which particular
5 ones would involve MISO issues in your vitae?

6 A. Yes; might take me a moment or two but
7 I certainly can do that.

8 Q. And in the interest of time, if any of
9 them relate to similar issues with respect to
10 PJM, if you would point those out as well, I
11 would appreciate that.

12 A. Issues related to -- oh, to any issue
13 where I may have addressed something regarding
14 PJM?

15 Q. Yes.

16 A. That will probably be more difficult
17 because I have been testifying in Pennsylvania
18 since probably about 1985 or so, and in many
19 of those cases issues arose regarding PJM-
20 related issues that may have impacted other
21 retail issues. So I couldn't -- I don't think
22 I could actually tell you each and every
23 instance where I might have addressed --
24 hello?

25 (Off the record).

1 MS. WATTS: Sorry, Mr. Baron,
2 sorry to interrupt you.

3 THE WITNESS: Okay. So in the
4 case of PJM, I may have addressed issues
5 related to PJM in many cases that I testified
6 to in Pennsylvania, which probably is maybe 20
7 cases over the years, maybe more.

8 With regard to MISO, I specifically address
9 some MISO related issues in a Louisville Gas
10 and Electric and I think Kentucky Utilities
11 proceeding, I think it was a fuel proceeding.
12 And I'm trying to find it.

13 I may also addressed some issues -- I
14 recall in a Wisconsin case I did within the
15 last two years I addressed some issues related
16 to MISO but I don't recall specifically what
17 those are now.

18 BY MS. WATTS:

19 Q. Well, we've both been speaking very
20 broadly about issues related to MISO and PJM.
21 Has your testimony ever involved issues
22 identical to those that are involved in this
23 case?

24 A. Not that I'm aware of except to the
25 extent that I may have addressed an issue

1 similar to this in one of the FirstEnergy SSO
2 proceedings, I just -- I certainly remember
3 looking at that issue and I just don't recall
4 sitting here now whether I actually put --
5 addressed that in testimony. But I have
6 examined it.

7 Q. In this case, you're not offering an
8 opinion at all with respect to whether Duke
9 Energy Ohio should realign to PJM, isn't that
10 correct?

11 A. That's correct.

12 Q. In your opinion, does the market
13 structure in MISO support competitive markets
14 as well as PJMs?

15 A. When you say "as well as," do you mean
16 as good as or -- I'm not sure I -- I want to
17 make sure I understand exactly what your
18 question is. Are you asking me to compare
19 them?

20 Q. Yes.

21 A. In other words, is PJM better or is
22 MISO better? I haven't done an analysis of
23 that.

24 Q. And so is it fair to say that you
25 don't have any analysis or opinion with regard

1 to whether Ohio Energy Group customers are
2 better served by having all of the utilities
3 in Ohio in one regional transmission
4 organization?

5 A. I have not made any analysis of that
6 issue. My testimony is that there are many
7 complex issues, including that issue that you
8 just raised, that should be addressed by the
9 Commission under a normal -- more reasonable
10 time schedule that is not governed by the MRO
11 statute per se.

12 Q. Mr. Baron, can you tell me how
13 markets, when we speak of energy markets from
14 a competitive perspective, how that market
15 would be defined?

16 A. Well, I mean, as a general matter it
17 would be a market in which no participant,
18 either a purchaser or a seller, would have
19 market power and be able to unilaterally
20 influence market prices. That's sort of a
21 prime criterion.

22 Q. Are you aware of what government
23 entity has any oversight over exercise of
24 market power in energy markets?

25 A. In general, yes, the FERC would have

1 authority over -- certainly over market rates
2 by electric utilities.

3 Q. Anyone else, any other entity or
4 agency?

5 A. The Justice Department, United States
6 Justice Department may have jurisdiction on
7 that issue as well.

8 Q. It may have or --

9 A. I believe -- I believe it probably
10 does have.

11 Q. It probably does have?

12 A. Yes, I'm -- that's correct, that's
13 my -- that's what I said.

14 Q. And so may I take from your answer
15 that you've not ever been involved in any
16 investigations into market power and energy
17 markets?

18 A. I have in -- I'm recalling that I have
19 been involved in proceedings where that was an
20 issue. Actually, to some extent, I address it
21 in an ancillary way in some testimony in the
22 FirstEnergy cases, the SSO cases, but
23 primarily I think I have been in cases where
24 that has been an issue, and certainly I've
25 participated just in a recent Entergy

1 proceeding at the FERC that involved to some
2 extent issues related to market based rates,
3 and market power issues were part of some of
4 the material that I reviewed in preparation
5 for my testimony at the FERC. I did not offer
6 testimony on market power itself.

7 Q. And so what exact subject matter did
8 your testimony cover for that purpose, for
9 that case at the FERC?

10 A. That was a contract case involving
11 Entergy. It's actually still going on. The
12 administrative law judge has just issued an
13 order in that case. But the issue with regard
14 to market base rates arose regarding some
15 prior FERC decisions related to Entergy's
16 market based rate authority and the types of
17 market base rates that the company -- that
18 Entergy could offer.

19 Q. So when we're looking at -- in that
20 particular case where you said there were
21 market power issues involved, how was the
22 geographic market defined?

23 A. The issues that I was referring to in
24 the Entergy case had to do with old cases in
25 which the Federal Energy Regulatory Commission

1 did review market power issues related to
2 Entergy. I wasn't in those cases. What I was
3 trying to explain in my answer was those
4 issues carried over into this recent contract
5 case that I was involved in.

6 Now that you're -- so I reviewed FERC, some
7 of the FERC decisions, but I don't recall
8 specifics on that. I do recall now that in
9 the FirstEnergy SSO case, and I don't remember
10 whether it was an MRO case or an ESP case, I
11 think it was the MRO case, I did review some
12 FERC -- a FERC decision or some pleadings on
13 market power analyses that were performed with
14 regard to FirstEnergy moving -- withdrawing
15 from MISO and moving to PJM. Beyond that, I
16 don't recall specifics. So I don't know if
17 that helps in answer to your question or not.

18 Q. It does. In the FirstEnergy case that
19 you just referred to, how was market power
20 defined?

21 A. Well, I think FERC uses the
22 Herfindahl-Hirschman index, and there's a
23 number of different tests I recall to
24 basically assess market power, and there was
25 the -- there were issues related to

1 establishment of a region -- and I just can't
2 remember now all the details, I mean, I'm not
3 offering testimony on that in this case, but
4 my recollection is that there was -- the
5 definition of the geographic region is the
6 service area, and my recollection is it's
7 perhaps one set of connections beyond that,
8 but I don't remember the specifics.

9 Q. Mr. Baron, have you ever performed a
10 Herfindahl-Hirschman index analysis yourself?

11 A. No.

12 Q. Do you believe that Duke Energy Ohio
13 remaining in MISO would have a chilling effect
14 on competition in MISO?

15 A. I haven't made any analysis of that,
16 so I don't have an opinion on that.

17 Q. Do you have any knowledge as to
18 whether MTEP costs would be higher than RTEP
19 costs over the next 40 the 50 years?

20 A. I have not made an analysis of that,
21 though I believe that's an issue that would
22 appropriately be considered by the Ohio
23 Commission in an evaluation of the
24 reasonableness of Duke Energy Ohio withdrawing
25 from MISO and joining PJM.

1 Q. But you don't have any specific
2 knowledge today with regard to MTEP and RTEP
3 costs?

4 A. No, I don't. My understanding from a
5 pleading, I think that -- I did read just
6 earlier today, I was reviewing something where
7 the costs perhaps for MTEP might be in the
8 range of 25 to 30 million, but I haven't done
9 any study. And I certainly have no projection
10 of what PJM's RTEP costs are. I know they are
11 increasing rapidly based on some cases that
12 I've recently been in involving American
13 Electric Power.

14 Q. But again, you've not done any study
15 or analysis with respect to Duke Energy Ohio
16 and RTEP and MTEP, correct?

17 A. That's correct, I think that should be
18 addressed in a separate proceeding in which
19 the Commission evaluates the decision.

20 Q. Have you done any analysis that would
21 suggest that the transfer to PJM is not in the
22 best interest of Duke Energy Ohio's customers?

23 A. I have not done that analysis. I
24 indicated in my testimony that I had not done
25 that analysis but I think that analysis needs

1 to be done. And the Company offered no
2 evidence regarding that other than the
3 evidence that I discussed in my testimony, no
4 quantification of projected impacts, for
5 example.

6 Q. Mr. Baron, you've mentioned that you
7 testified on behalf of FirstEnergy -- or I'm
8 sorry, in the FirstEnergy MRO case, and I
9 think that would be case 09906, is that
10 correct?

11 A. I'll accept that. It was the
12 FirstEnergy MRO case.

13 Q. It was their request for approval of a
14 market rate offer?

15 A. Yes.

16 Q. I think you testified that you had not
17 looked back at that testimony recently in
18 preparation for your testimony today, is that
19 correct?

20 A. That's correct, it's probably been --
21 it's been over a year.

22 Q. Do you recall whether or not you
23 rendered an opinion with respect to Network
24 Integrated Transmission Services, or NITS,
25 being recovered by the distribution utility

1 through a non-bypassable rider?

2 A. I just don't recall.

3 Q. Does it help you at all if I mention
4 that FirstEnergy's proposed rider was called
5 NMB for Non-Market Based?

6 A. I'm sorry, I just don't recall that
7 testimony.

8 Q. Okay, but do you recall whether you
9 made any recommendation with respect to that?

10 A. I'm sorry, I've testified in a fair
11 number of cases since then and I -- I just
12 have not reviewed that testimony. I certainly
13 remember reviewing those issues in the case.
14 I just don't -- I feel like I'm at a
15 disadvantage since I don't have that testimony
16 in front of me to review, so answering
17 questions about it is really, would be
18 speculative at this point.

19 Q. All right. When I use the acronym
20 NITS, you understand what I'm referring to,
21 correct?

22 A. Network Integrated Transmission
23 Service, NITS?

24 Q. Yes.

25 A. Yes.

1 Q. Okay. And Duke Energy's recovery of
2 NITS through a separate rider would take those
3 charges out of the auction process, correct?

4 A. Yes.

5 Q. And removing that from the -- the NITS
6 charge from the auction process also removes
7 the risk premium for NITS that suppliers would
8 otherwise include in their bids, correct?

9 A. To the extent that there is -- that
10 there would be a risk premium associated with
11 the NITS component of the bid price, I guess
12 that sounds right. I haven't really addressed
13 that.

14 Q. Turning to page 22 of your testimony,
15 again, there's a footnote that references the
16 opinion of counsel regarding what the Ohio
17 Commission may consider in respect of
18 transmission cost recovery, do you see that?

19 A. Yes, I do, just give me a moment.

20 Yes, I think that's -- that language in the
21 footnote was really referring to the issues of
22 recovery of the MISO exit fee and the MTEP and
23 the issues that I discussed previously.
24 That's what I was referring to.

25 Q. Right. I didn't mean to switch

1 subject areas on you quite that quickly. I
2 agree -- I mean, I don't agree, I understand
3 what you're trying to say that that refers
4 back to MTEP, RTEP as opposed to NITS,
5 correct?

6 A. Correct, that's what I was referring
7 to.

8 Q. And again, it refers to opinions of
9 counsel for OEG, and what I'm wondering is if
10 counsel told you anything else with respect to
11 that particular topic?

12 A. Nothing that -- well, I don't know.
13 It's possible that counsel did tell me
14 something else; I didn't put it -- if I've
15 addressed it in my testimony I certainly would
16 be able to answer questions on it. I've had
17 numerous discussions with counsel.

18 Q. But in respect to that particular
19 footnote, you're merely reiterating what
20 counsel told you, correct?

21 A. Well, the footnote starts off by
22 saying while the FERC has previously
23 determined that such a cost benefit analysis
24 is not required, I base that on my reading of
25 the Commission decisions, particularly in the

1 Duke case before the FERC on withdrawal from
2 MISO and joining PJM.

3 With respect to the issue of the
4 recoverability of MISO exit fees and MTEP,
5 it's based on my reading of court decisions,
6 the Pike County decision, FERC decisions that
7 reference that and clearly state that the
8 FERC's approval of a rate does not in and of
9 itself address the issue of whether that rate
10 is better or worse than some other FERC
11 approved rate and that public -- state
12 regulators are able to do that, and in
13 addition to my reading of those statutes, I've
14 had discussions with OEG counsel and OEG
15 counsel has informed me that my -- that that
16 is counsel's view as well.

17 Q. The subject and predicate of that
18 footnote comes from your conversation with
19 counsel, correct?

20 A. Well, the first part of the clause is
21 based on my reading of the FERC's order -- I'm
22 trying to give you the case number. I think I
23 gave it to you earlier, the Duke/FERC case.
24 Yes, it's the FERC's order of October 21st,
25 2010 in ER 10-1562. And I think in my reading

1 of that order, I think FERC has indicated that
2 it does not require, and it cited the LG&E
3 decision, cost benefit analysis. As to
4 whether a state regulator such as the Ohio
5 Commission can review the prudence of the
6 decision to exit MISO and join PJM, that's
7 based on the reviews that I've made and
8 discussions with OEG counsel.

9 Q. Mr. Baron, in your opinion are
10 customers better served by having an SSO price
11 that is comprised in part of a fixed price for
12 the first few years or a floating price for
13 the first few years?

14 A. All else being equal, it really
15 depends on whether one's expectations are that
16 the adjustments to arrive at a floating price
17 are downward adjustments or upward
18 adjustments.

19 Q. And you do not have any analysis in
20 your testimony in regard to whether prices are
21 going up or down, correct?

22 A. I haven't made any independent
23 analysis of that, at least for the -- yeah,
24 for any of the period.

25 Q. And can you explain how the recovery

1 of costs to serve customers, such as fuel and
2 purchased power, enhance the earnings of a
3 utility company?

4 A. Are you referring to the issue that I
5 address regarding the statutory requirements
6 that the company has a burden to demonstrate
7 that it's -- that an adjustment to the legacy
8 ESP price would not result in significantly
9 excessive earnings, is that what you're
10 referring to?

11 Q. No, I'm not referring back to that.
12 I'm simply asking a very straightforward
13 question, how fuel and purchased power, the
14 recovery of costs for those items could
15 potentially enhance the earnings of a utility
16 company?

17 MR. KURTZ: Excuse me, Elizabeth.
18 What section of his testimony are you
19 referring to then?

20 MS. WATTS: We had a fairly
21 lengthy discussion about the SEET test, and
22 I'm not asking the question in relation to a
23 particular statement but that discussion in
24 general.

25 MR. KURTZ: So it is about the

1 SEET earnings test issue?

2 MS. WATTS: Yes.

3 THE WITNESS: Well, the issue --
4 the reason it could result in significantly
5 excessive earnings is that if the company is
6 already over-earning, even with the increase
7 in the cost of, say, fuel, obtaining
8 additional revenues through upward adjustment
9 in the legacy ESP price would increase the
10 earnings even more.

11 BY MS. WATTS:

12 Q. So the over-earning that you're
13 referring to in your response is not related
14 to fuel and purchased power, correct?

15 A. I'm not following, when you say my
16 response, you're talking about in the answer
17 that I just gave?

18 Q. Yes.

19 A. Well, I think I -- I thought I
20 referred specifically to fuel as an
21 illustration. If a utility under this
22 provision is already earning in excess of some
23 level, which would constitute significantly
24 excessive earnings, then increasing the
25 utility's revenues for the increase in -- to

1 reflect an increase in fuel and purchased
2 power cost would maintain that significantly
3 excessive earnings level. And to the extent
4 that the earnings are already excessive,
5 including the additional costs for the fuel
6 and purchased power, then there's no
7 justification for granting the utility
8 additional revenues to maintain or to -- those
9 earnings.

10 Q. I understand your --

11 A. It's basically straightforward
12 arithmetic, but maybe I'm not understanding
13 fully your question.

14 Q. Well, I think you're not answering my
15 question. I understand your position in your
16 testimony. What I'm asking is whether fuel
17 and for purchased power cost recovery enhances
18 the earnings of a utility company?

19 MR. KURTZ: He just answered that
20 question for the third time.

21 MS. WATTS: With all due respect,
22 Mike, I don't believe he did.

23 MR. KURTZ: Mr. Baron, why don't
24 you answer it for a fourth time.

25 THE WITNESS: If a utility

1 including -- okay, let's say a utility is
2 earning -- has excessive earnings and there's
3 an increase in fuel and purchased power cost
4 that results, all else being equal, that
5 increase in cost would reduce the earnings,
6 but if the resultant earnings still would
7 constitute excessive earnings, then there's no
8 basis for a revenue adjustment to permit the
9 company to fully recover those increased
10 costs. That's my understanding of the
11 provision of the MRO statute, and it's a
12 reasonable position.

13 BY MS. WATTS:

14 Q. And again, I'm not questioning your
15 position and I don't believe I asked about a
16 reasonable basis for revenue adjustment. I
17 simply asked whether cost pass-through of fuel
18 and purchased power enhances a utility's
19 earnings.

20 MR. KURTZ: For the fifth time,
21 Steve, go ahead and answer it.

22 THE WITNESS: Well, I guess I need
23 to -- as a general matter, unrelated to an
24 MRO --

25 MR. KURTZ: Answer it in the

1 context of the earnings of a SEET.

2 MS. WATTS: I didn't ask it in the
3 context of a SEET. I asked the question
4 because we were having a discussion about
5 SEET, but I specifically said I'm not asking
6 this in the context of a SEET. I'm just
7 asking about fuel and purchased power.

8 MR. KURTZ: Well, I object that
9 it's irrelevant then.

10 BY MS. WATTS:

11 Q. Then you can answer my question,
12 Mr. Baron.

13 A. All right. And let me make sure I do
14 understand it. You're talking as a general
15 matter, unrelated to MROs or the Significantly
16 Excessive Earnings Test or any of the issues
17 that were -- that I'm addressing in my
18 testimony but as a general matter, are you
19 asking me that if a utility's earnings are X
20 and its cost go up by a dollar, and the
21 company recovers an additional dollar because
22 of fuel, then it's earnings still
23 arithmetically would be X. As an arithmetic
24 calculation, I think that follows.

25 Q. Thank you. Mr. Baron, in your

1 testimony you have recommended to the
2 Commission that Duke Energy Ohio's application
3 be rejected because we have not met certain
4 statutory requirements?

5 A. Yes.

6 Q. Are all of the statutory and
7 regulatory requirements that you contend the
8 company has not met detailed in your
9 testimony?

10 A. Yes, with respect to the issues that
11 I'm addressing, they are.

12 Q. And do you contend that the company
13 has not met any other rules or statute
14 requirements?

15 A. I myself have not addressed other
16 issues, certainly not in this testimony.

17 Q. And are you aware of whether or not
18 OEG has held such an opinion and has a witness
19 with that issue?

20 A. Well, my understanding is that there
21 are no other OEG witnesses. With regard to
22 positions that OEG may or may not take as a
23 legal matter, I can't answer that.

24 MS. WATTS: Okay. I, Mike, do not
25 have any other questions at the moment,

1 although I have received the documents that
2 Mr. Baron provided in response to the subpoena
3 and I'll try to go through those really quick,
4 and so I may have some questions at the end
5 related to those if I can get through them
6 quick enough.

7 MR. KURTZ: That's fine.

8 MS. WATTS: So that being the
9 case, Mr. Baron, I'm going to hand you off to
10 the next person who may or may not have
11 questions for you. I'll go down the list in
12 order.

13 Doug, do you have any questions?

14 MR. HART: No, I do not.

15 MS. WATTS: Steve Beeler, do you
16 have any questions?

17 MR. BEELER: No, I do not.

18 MS. WATTS: Mr. Reese, do you have
19 any questions?

20 MR. REESE: No, I do not.

21 MS. WATTS: Mr. Kutik or
22 Mr. Hayden, do you have any questions?

23 MR. KUTIK: Yes, we do. But
24 before I begin, let me ask the witness, would
25 you like another break?

1 THE WITNESS: Yeah, I guess a
2 couple of minutes.

3 MR. KUTIK: All right, why don't
4 we come back in five minutes then.

5 THE WITNESS: All right.

6 (Brief recess).

7 EXAMINATION

8 BY MR. KUTIK:

9 Q. Mr. Baron, would I be correct to
10 understand that you are not relying on the
11 opinions of counsel in coming up with your
12 interpretation of what Ohio revised code
13 section 4928.142 requires?

14 A. That's correct. I base that as I
15 indicated in prior answers on reviewing the
16 statute, participating in this case as well as
17 I guess four or five of the other SSO cases in
18 Ohio, as well as my experience over many
19 years.

20 Q. So your experience plays a role in
21 coming up with your interpretation, correct?

22 A. Yes, it does.

23 Q. When -- well, I think you said earlier
24 that the statute in Ohio, and particularly I'm
25 talking about SB 221, is unique in some

1 respects, correct?

2 A. Yes, at least -- excuse me. It's
3 unique in some certain respects based on my
4 knowledge. To my knowledge I personally am
5 not aware of a statute identical to this in
6 another state.

7 Q. Right. Well, based on and your
8 experience it's unique, correct?

9 A. Correct.

10 Q. And with respect to the proceedings
11 that you have participated in in Ohio relating
12 to the statute, would it be correct to say
13 that in none of those proceedings was it an
14 issue as to what section 1 -- excuse me,
15 section 4928.142 D and E meant?

16 A. I don't have a recollection that it
17 was an issue.

18 Q. Well, certainly it wasn't an issue in
19 the FirstEnergy cases, correct?

20 A. That's -- again, I don't have a
21 recollection in the FirstEnergy cases or other
22 cases that I've been in, though I haven't
23 reviewed in preparation for this deposition
24 all of the testimony from other parties or
25 myself in those cases. But I have no

1 recollection that it was an issue.

2 Q. Well, would it be fair to say that to
3 the best of your recollection sitting here
4 today, you believe that it was not an issue in
5 those cases?

6 A. Yes, I think that would be a fair way
7 to say it.

8 Q. Now, you mentioned that you reviewed
9 some different things for preparation of your
10 testimony, including a few Supreme Court
11 opinions and some opinions from the Federal
12 Energy Regulatory Commission, correct?

13 A. Yes.

14 Q. Were those provided to you by counsel?

15 A. Some of them were and some of them I
16 obtained myself.

17 Q. Did you get them at the suggestion of
18 counsel or did you get them because you saw
19 them and you wanted to read them on your own?

20 A. Well, for example -- the answer is
21 probably both. I think initially upon reading
22 the Company's filing I went to the FERC
23 website and obtained FERC's decision in the
24 MISO withdrawal case, I guess the RTO
25 realignment case, ER 1015.62 and I also

1 obtained some pleadings by Duke Energy and I
2 think I recall the MISO transmission owners
3 and perhaps some other parties. Other -- some
4 of the other documents I obtained from OEG
5 counsel.

6 Q. The RTO realignment case you just
7 referred to, was that relating to Duke or
8 FirstEnergy or some other company?

9 A. Duke.

10 Q. Would it be correct to say that the
11 Supreme Court opinions that you received, that
12 you reviewed, you received from counsel?

13 A. Yes. I actually had reviewed in the
14 past probably a number of times the
15 Mississippi Power v. Moore case because it
16 involved Entergy, which I've participated in
17 many FERC proceedings. So I've reviewed that
18 in the past, but I did obtain that from
19 counsel as well.

20 Q. I believe you said in response to
21 Ms. Watts' questions that you did not -- you
22 may have very briefly reviewed the testimony
23 of other witnesses in this case but you didn't
24 recall specifics. Have I characterized your
25 testimony accurately?

1 A. Yes, that's right.

2 Q. So it's fair to say that -- or would
3 it be fair to say that you understood that
4 question to mean or ask you about testimony
5 presented by interveners, not necessarily from
6 a company?

7 A. Right, that was my understanding of
8 the question, because I think I testified
9 early on that I had reviewed the testimony of
10 Duke witnesses and the Company's application.

11 Q. Do you recall reviewing Mr. Higgins'
12 testimony?

13 A. I may have, I just don't -- I just
14 reviewed some testimony of Mr. Higgins in
15 another case that I'm involved in in Colorado
16 and I cannot remember sitting here now whether
17 I reviewed his testimony in both cases or only
18 in the Colorado case.

19 Q. So your testimony today is you can't
20 remember whether you reviewed Mr. Higgins
21 testimony?

22 A. That's correct. I did not print out
23 the testimony of any of the witnesses, but I
24 do recall at least looking at some of the --
25 at least to get an understanding for a number

1 of the parties of the subjects that they were
2 addressing.

3 Q. Other than the testimony filed on
4 behalf of the company, that is Duke, did you
5 review the testimony, whether final or draft
6 form, from any other witness in this case
7 before you finalized your own testimony.

8 A. No.

9 Q. Before this case, would it be fair to
10 say that you did no study or analysis of
11 wholesale power prices in PJM or MISO?

12 A. That's correct, not for this case.

13 Q. And would it be fair to say that you
14 did not review any study regarding -- for the
15 purpose of this case regarding the accuracy of
16 forecasts of prices, power prices?

17 A. That's correct.

18 Q. Have you seen such studies?

19 A. Well, I reviewed Mr. -- maybe I'm not
20 understanding your question. I reviewed
21 Mr. Rose's testimony in this case in which he
22 developed a forecast through 2014. I did
23 review that testimony.

24 Q. Well, I guess my question is a little
25 broader and not directed to Mr. Rose's

1 testimony, at least not yet. My question to
2 you is have you ever seen a study that
3 considers whether forecasts made in the past
4 come out to be accurate or not?

5 A. I'm certain I have.

6 Q. And what do you recall?

7 A. I don't recall anything specific but
8 I've been involved in many cases, particularly
9 cases in the late 1990s and early 2000s in
10 both Ohio and in Pennsylvania regarding
11 stranded cost calculations that were filed by
12 electric utilities in anticipation of moving
13 to retail access. And those cases all
14 involved projections of market prices. I've
15 been involved I'm sure in numerous other cases
16 that involve -- where evidence was presented
17 on future market prices, but those were -- the
18 cases in Ohio and in Pennsylvania were
19 strictly related to retail access issues,
20 stranded cost.

21 Q. Well --

22 A. And, I'm sorry, I guess in the
23 FirstEnergy MRO and SSO cases I reviewed
24 projections of market prices as well.

25 Q. Well, you told me that you reviewed

1 projections, but that really wasn't my
2 question.

3 A. Okay.

4 Q. My question was about studies that
5 have looked at whether forecasts made in the
6 past come out to be accurate or not, and you
7 said yes, you thought you reviewed such
8 studies and I want you to tell me about those
9 studies, not whether you reviewed projections
10 generally, but basically assessing the
11 accuracy of forecasts generally, or
12 specifically in any particular context?

13 A. Okay, I understand. I apologize. I
14 think the -- I can't recall any specific
15 studies. I have a recollection that I -- I
16 probably did review some studies or perhaps
17 even made some analyses myself. But I have no
18 recollection at this point of any specific
19 studies.

20 Q. Would it be your view that with
21 respect to forecasts, whether it be the
22 forecast of Mr. Rose in this case or the other
23 forecasts that you have seen in your career,
24 that what generally goes with respect to
25 forecasts is sometimes they may be right and

1 sometimes they may be wrong?

2 A. I'd say that's true and I agree with
3 that.

4 Q. And with respect to forecasts of
5 particular prices, the forecasts may be high
6 or they may be low?

7 A. That's true also.

8 Q. Now, do you have any basis with
9 respect to Mr. Rose's projections for
10 disputing them?

11 A. For disputing the general proposition
12 that forecasts can be inaccurate or wrong?

13 Q. No, now I'm asking about Mr. Rose's
14 studies and whether you have any basis to
15 believe that Mr. Rose's forecasts will be
16 wrong?

17 A. I don't have any reason to believe one
18 way or the other whether they will be right or
19 wrong. I haven't done that analysis.

20 Q. Thank you. Have you made any study of
21 Duke Energy Ohio's riders or cost recovery
22 mechanisms for the recovery of costs relating
23 to fuel?

24 A. I likely have made reviews like that
25 in the past but I did not -- beyond reviewing

1 the filing in this case, I didn't really make
2 any analysis of those riders in this case.

3 Q. So other than whatever might be
4 appearing in this case about those riders, you
5 did not do any such study, correct?

6 A. That's correct, I didn't do any
7 independent analysis in this case of those
8 riders or the projection of costs that might
9 result from those riders.

10 Q. Would your answer be the same with
11 respect to riders relating to recovery of
12 purchased power costs?

13 A. Yes.

14 Q. And environmental costs?

15 A. Yes.

16 Q. Have you done any review of any
17 filings that Duke may have made relating to --
18 and again, when I say Duke, I mean Duke Energy
19 Ohio, relating to the significant excess
20 earnings tests?

21 A. I have not done any analysis on that
22 in this case.

23 Q. Have you seen their filings or any
24 filings on that subject?

25 A. I have not. I have not reviewed that.

1 Q. Do you know whether Duke Energy Ohio
2 is in danger of exceeding the Significantly
3 Excessive Earnings Test?

4 A. I haven't made any analysis of that
5 myself.

6 Q. So you don't know?

7 A. That's correct.

8 Q. And just so I understand your answer
9 to some questions that were asked of you by
10 Ms. Watts, is it your understanding with
11 respect to just the general proposition of
12 earnings and cost pass-throughs that recovery
13 of costs on a pass-through basis have zero
14 effect on earnings?

15 A. Well, I think I answered as a general
16 matter, I believe I gave an illustration which
17 I thought should have been clear, that if the
18 earnings were X and the fuel costs then
19 subsequently rises by one dollar and revenues
20 via an adjustment rises by one dollar, thus
21 offsetting the one dollar increase in costs,
22 the earnings all else being equal would still
23 be X.

24 Q. So it would be unaffected?

25 A. In that example.

1 Q. Okay.

2 A. But just to be clear, that's not the
3 issue that I offered testimony on regarding
4 the implication of the Significantly Excessive
5 Earnings Test and how that impacts the
6 recovery of rider costs, adjustments to the
7 legacy ESP.

8 Q. Now, you've said several times in your
9 testimony that was submitted, as well as your
10 testimony today, that with respect to certain
11 questions relating to the requirements of
12 section 4928.142, that you were not offering
13 either a statutory or legal opinion, correct?

14 A. That's correct.

15 Q. But you are providing an opinion,
16 correct?

17 A. That's correct, and for the reasons
18 that I probably repeated five or six times,
19 maybe more in the deposition today.

20 Q. So would you term your testimony or
21 your opinion as an expert opinion?

22 A. Yes, it's an expert opinion based on
23 my experience, expertise and participation
24 in -- in cases that addressed similar types of
25 issues in the past.

1 Q. Will you say that it is a regulatory
2 expert opinion?

3 A. I guess that would be a way to
4 characterize it.

5 Q. Would you characterize it as an
6 electric industry expert opinion?

7 A. Well, I would -- I guess I would
8 include that. It's a regulatory policy issue
9 that based on my experience requires experts
10 who offer testimony on regulatory policy to
11 provide their understanding of statutes and
12 how those apply to rate making issues. I've
13 been doing that for many years.

14 Q. Would you -- or do you believe that
15 the question of whether an MRO application
16 complies with the statute is a legal question?

17 A. Ultimately, it is.

18 Q. Now, is it your understanding that
19 Duke is proposing to transfer some of its
20 generation assets to an affiliate or
21 affiliates?

22 A. It's my understanding that the company
23 has indicated -- they have testified that they
24 intend to do that but they have not
25 specifically asked for that in this

1 proceeding.

2 Q. And so it's your understanding that
3 that is -- the approval of that potential
4 transfer is not an issue in this case,
5 correct?

6 A. That's my understanding, correct.

7 Q. Now, I want to talk with you a little
8 bit about section 4928.142 and divisions D a
9 as in David and E as in Edward, and your
10 understanding of what those sections mean.

11 A. All right.

12 Q. First, would you agree that if we are
13 trying to discern the policy that underlies
14 the statute, we begin with the language of the
15 statute?

16 A. I think that seems reasonable to me.

17 Q. Okay. Now, turning to division E, it
18 is correct to say, is it not, that that
19 division uses the words "alter," "alteration,"
20 "altering," correct?

21 A. Yes.

22 Q. It doesn't use the word "extend,"
23 "extension," or "extending," correct?

24 A. Correct.

25 Q. And with respect to your view that the

1 word "alteration" only can refer to
2 extending -- well, let me back up. Is it your
3 view that the reference to "alter,"
4 "alteration," "altering" means in this
5 division "extension" and only "extension"?

6 A. Yes, and without a doubt.

7 Q. Okay. Now, would it be fair to say
8 that you believe or part of your belief with
9 respect to the fact that "alteration" or
10 "altering" means "extending" or "extension,"
11 is because it refers to the fact that the
12 blending period can be set no greater than ten
13 years, correct?

14 A. Yes, that is a large part of the
15 reason.

16 Q. Okay.

17 A. There are other reasons I think that I
18 had discussed in earlier answers regarding my
19 interpretation of this provision as an
20 additional consumer protection and the fact
21 that this simply would give the Commission an
22 option to alter the blending, extend it up to
23 ten years if there would be an abrupt or
24 significant change in the price. It makes no
25 sense to me that this provision could be

1 interpreted to reduce the five-year blending
2 period.

3 And I guess one other point that I would
4 make is that there's a sentence in the middle
5 of division E that says any such alteration
6 shall be made not more often than annually. I
7 would guess that if the Commission reduced --
8 in year two, if the Commission terminated the
9 blending say after 29 months, then the
10 Commission could not any longer alter it
11 annually. That's just an aside but I think
12 the ten years is probably the most significant
13 element of that division that leads me to
14 believe that we are talking about extending.

15 Q. Okay. And going back to the large
16 reason that you mentioned you believe
17 "alteration" means "extension" in division E,
18 and the fact that it refers to the fact that
19 the duration could be no longer than ten
20 years, it is true, is it not, that the
21 reference to ten years comes within a clause
22 that begins with the word "including"?

23 A. Yes, I see the word "including".

24 Q. Okay. And "including" means that it's
25 one of other things that may happen or that

1 could happen or that could be included,
2 correct?

3 A. Well, I think as a general matter
4 there's -- by the phrase include -- the word
5 "including" suggests that there could be other
6 factors; I guess as a matter of English usage
7 that probably is true.

8 Q. Well, would you agree with me that
9 when we're trying to interpret a statute we
10 should assume that the legislature took care
11 in deciding which words it would use?

12 A. Yes, I think that's reasonable.

13 Q. Let me refer to another part of this
14 division, which -- and that is division E, and
15 that's the phrase that starts or that includes
16 these words: That the Commission may, quote,
17 alter prospectively the portions specified in
18 that division to mitigate any effect of an
19 abrupt or significant change in the electric
20 distribution utility's standard service offer
21 price, end quote.

22 And I want to refer you to the word "any,"
23 do you see that, sir?

24 A. Mitigate, after the word "mitigate,"
25 mitigate any effect.

1 Q. Okay. Would you agree with me that
2 "any" can mean "all," would that be a
3 reasonable interpretation of the word "any"?

4 A. I would agree that this is granting
5 the Commission the ability to mitigate any
6 effects that the Commission finds in its
7 judgment as a result of an abrupt or
8 significant change.

9 Q. Okay. And let's talk about what it's
10 supposed to be looking for in terms of that
11 abrupt or significant change. It's true, is
12 it not, that the Commission is to be looking
13 to mitigate any effect on the standard service
14 offer price, correct?

15 A. Yes.

16 Q. And when we're talking about how the
17 standard service offer price is determined
18 under the blending period, it includes what we
19 might think of as two components, a market
20 based or MRO based component and a, what has
21 been referred to earlier as a legacy ESP
22 component, correct?

23 A. Yes.

24 Q. And you agree that with respect to the
25 legacy ESP component, because of the

1 adjustments that are allowed under division D
2 of section 4928.142 (D), the legacy ESP
3 component could increase, correct?

4 A. I would agree that the adjustments
5 could result in an increase in the legacy ESP
6 component.

7 Q. And would the Commission be allowed
8 under division E to take action to alter the
9 proportions that are set out in division D if
10 there was a significant or abrupt change in
11 the standard service offer price as a result
12 of a significant or abrupt change in the
13 legacy ESP price?

14 A. Well, the statute -- I think the
15 answer is that the statute says, refers to an
16 abrupt or significant change in the standard
17 service offer price, which is the blended
18 price as I would understand it. And so the
19 focus of the Commission's decision is on the
20 blended price. But in terms of -- I think I
21 answered this question earlier, that given
22 that consumers are allowed to obtain 100
23 percent market pricing by electing to take
24 service from a competitive retail supplier,
25 consumers have protection in the form of

1 electing 100 percent market price if that
2 would be a better option.

3 So it would make no sense to me that there
4 would be a provision in this division E that
5 would want -- permit the Commission to reduce
6 the blending or to change the blending period
7 to effectively implement 100 percent market
8 pricing for everyone immediately, when
9 customers have that option already. And so
10 there would be no need to protect consumers
11 from an abrupt or significant change in that
12 regard. Logically, it just doesn't make sense
13 to me.

14 Q. So is it your testimony that the
15 Commission would not have the authority under
16 this statute to alter the standard -- the
17 blending period or the proportions set out in
18 D if there was a significant and substantial
19 change in the standard service offer price as
20 a result of significant or abrupt changes in
21 the legacy ESP component of that standard
22 service offer price?

23 A. No, I'm not testifying to that. I'm
24 testifying that the Commission -- if it's
25 just -- if your positing a hypothetical where

1 the significant and abrupt change in the
2 blended SSO price is due to an increase in the
3 ESP -- the legacy ESP price, and then the
4 question is can the Commission alter the
5 blending period, I would think that the
6 Commission could alter the blending period but
7 there would be no rationale for altering it by
8 moving to 100 percent market price in the
9 blending, which is the Company's proposal in
10 this case, when customers have that option
11 already. It would make no sense.

12 Q. So it's your testimony that in the
13 circumstances I described, the Commission
14 could have that authority but it would be
15 unwise policy given the options available to
16 the customers?

17 A. A, yes, it would be an unwise policy,
18 and to the extent that the language of the
19 divisions refers to the standard offer price
20 which is the blended price, it's an abrupt
21 change in the blended price, and the statute
22 doesn't provide further detail regarding that
23 except to the extent in that sentence, but
24 when one looks at the -- takes it into context
25 of the entire MRO proceeding, or statute, the

1 percentages in division D, I interpret it as a
2 consumer protection mechanism to provide the
3 customers an option to have a transition from
4 the legacy ESP price and maintain those legacy
5 ESP rates for at least five years at declining
6 proportions.

7 And, again, I can't tell you beyond the
8 fact that the standard service offer price is
9 the price that the Commission would look at or
10 mitigate from abrupt and significant change,
11 but, again, it would make no sense to shorten
12 the blending period. I can't see any public
13 policy rationale for doing so.

14 And when you consider the fact that later
15 on in the division it does refer to the
16 extension for ten years, there's a clear
17 implication that the intent was to provide
18 protections in the form of a consumer choice
19 to have a legacy ESP rate or some portion of
20 that for as long as possible. And the
21 legislature has basically determined that ten
22 years would be the maximum and five years
23 would be the minimum. That's my
24 understanding.

25 Q. Okay. And it's your view, is it not,

1 Mr. Baron, that the language of divisions D
2 and E are clear?

3 A. With regard to the issues that we have
4 just been speaking of or with regard to any
5 issue?

6 Q. Well, I think you said earlier that,
7 in response to Ms. Watts' questions that you
8 thought that the language of sections D and E
9 were clear. Am I correct in understanding
10 that that's your view?

11 A. With regard to the blending issue,
12 yes.

13 Q. And with respect to the Commission's
14 authority with respect to how they might alter
15 the blending issue, the blending portions in
16 D, is it clear?

17 A. Well, it's clear to me that it would
18 not be a reasonable policy to shorten the
19 blending from five years to 29 months as a
20 means of protecting consumers, and it
21 certainly would not be appropriate to do so
22 based on Mr. Rose's forecasts, which I think
23 you and I both agreed earlier is subject to
24 uncertainty and potential error.

25 Q. Well, I didn't ask you to opine on the

1 policy. I just asked you whether it's your
2 view that the language of section -- of
3 division D and E is clear?

4 A. Well, that is my view, that it's clear
5 because it would not make sense otherwise.

6 Q. Okay, thank you. Division D -- excuse
7 me, division E as in Edward starts with the
8 phrase, beginning in the second year of a
9 blended price under division D of this
10 section, correct?

11 A. Yes.

12 Q. Do you take that to mean that the
13 Commission cannot start to even think about
14 changing the proportions and blending that's
15 set out in D until the second year or can they
16 start thinking about it in Duke's case now?

17 A. My understanding of that provision is
18 that the Commission may not alter
19 prospectively the blended price until the
20 second year, and the way I read division E is
21 that the Commission actually will be
22 conducting an analysis, and the basis for that
23 is it says any such alteration shall be made
24 not more often than annually; so the
25 presumption that I draw from that or the

1 conclusion that I draw from that is that the
2 Commission beginning in the second year will
3 begin reviewing the impact.

4 Q. Okay. Well, again, I'm not sure you
5 answered my question.

6 A. Well, I think --

7 Q. Excuse me, let me put the question to
8 you again, sir.

9 A. All right.

10 Q. And the question is can the Commission
11 consider now before the MRO is in place
12 altering the proportions and blending set out
13 in D, or can they only start thinking about
14 that beginning in year two?

15 A. Well, I -- my understanding --

16 MR. KURTZ: Excuse me. Are you
17 asking the witness if we know today whether
18 there will be an abrupt or significant change
19 beginning the second year?

20 MR. KUTIK: That's not what I'm
21 saying at all. Can they start thinking about
22 it now or making those changes now before the
23 MRO starts, or do they have to start that
24 consideration beginning in year two?

25 THE WITNESS: Well, you asked me

1 can the Commission think about it. I
2 certainly think the Commission could consider
3 it, evaluate it, perform it, request studies
4 be done, but the language of division E is
5 that the Commission may alter prospectively
6 the proportions beginning in the second year.
7 That's what it says. So I assume from that
8 that beginning in the second year the
9 Commission can alter the proportions that were
10 specified in division D. That's my
11 understanding.

12 BY MR. KUTIK:

13 Q. So could the Commission now alter the
14 proportions set out in D with respect to year
15 two?

16 A. My understanding is influenced by the
17 sentence that says, any such alteration shall
18 be made not more often than annually. That
19 suggests to me that this is a contemporaneous
20 analysis that would be conducted and it would
21 be -- it could be conducted at least annually
22 but no more than annually. And that
23 suggests -- so that suggests to me that the
24 Commission, if it were to offer the
25 five-year -- alter the five-year period, would

1 do so in year -- beginning in year two.

2 Q. So the Commission could not now make
3 changes to the proportions set out in D now,
4 correct?

5 A. That would be my understanding.

6 Q. All right. With respect to the phrase
7 in division E, "notwithstanding any
8 requirement of this section," do you take that
9 to mean notwithstanding any requirement in
10 division D, among others?

11 A. Yes, I believe so.

12 Q. Now, I think you had a few questions
13 that were asked to you by Ms. Watts about the
14 members of OEG. Are you familiar with how
15 they take generation service in Duke Energy
16 Ohio service territory?

17 A. I have not -- I am not familiar with
18 that.

19 Q. So you don't know, for example,
20 whether any of them shop?

21 A. I don't know specifically which of
22 them shop. It's my understanding that many
23 and perhaps all of them shop, but I haven't
24 discussed that issue beyond what I just
25 described to you with OEG counsel.

1 Q. So it's your belief that many of them
2 do, but the details you don't know?

3 A. Correct.

4 Q. For example, you don't know of those
5 who may have shopped who they take service
6 from?

7 A. That's absolutely correct.

8 Q. Let me refer you to your testimony,
9 and particularly the chart on page 7, or the
10 table on page 7. Are you there?

11 A. Yes.

12 Q. And you have a column, the first
13 column on the left that says MRO year.
14 Correct?

15 A. Yes.

16 Q. And after the first year you have 2.1
17 to 2.5 and then 2.6 to 2.12, then 3.1 to 3.5
18 and 3.6 to 3.12, correct?

19 A. Yes.

20 Q. Why do you break up year two and year
21 three like that?

22 A. Because the Company's proposal is a
23 29-month proposal, so in order to provide a
24 fair comparison it was necessary to break year
25 two into multiple pieces.

1 Q. Okay. And as far as your MRO years
2 are concerned, are they 12-month years or are
3 they some other duration?

4 A. Well, when it's a single number such
5 as one, it refers to 12 months. If it's -- on
6 the second line where it says 2.1 to -- hyphen
7 2.5, it means January in year two through May
8 of year two, the fifth month.

9 Q. Thank you. And with respect to the
10 sixth year, would it be correct to say that if
11 we were to -- if we were to put in some
12 numbers under RC 4928.142 (D), the sixth year
13 could be zero for SSO and 100 percent for
14 market?

15 A. That's correct, it could be.

16 Q. So the Commission -- or the blending
17 could go from 50/50 to zero to a hundred,
18 correct?

19 A. That's correct, it could. The point
20 of this table is to demonstrate -- is to
21 provide a comparison and to also show that in
22 years six through ten there could be an
23 extension that includes a continuation of
24 blending.

25 Q. With respect to the transfer of Duke's

1 generation assets, if that occurs does the
2 Commission lose jurisdiction to set DEO's
3 retail rates for generation service?

4 A. The Commission would still have
5 jurisdiction to set the rates that are
6 permissible by the statute, which would be
7 distribution, transmission, generation rates
8 pursuant to an MRO. The loss that the -- the
9 loss in jurisdiction that the Commission would
10 have is that the Commission would no longer be
11 able to establish a blending rate based on a
12 legacy ESP rate, but would be -- would have to
13 face PPA's prices for the -- as a substitute
14 for the legacy ESP component of the blended
15 MRO. That was a point made by Duke's own
16 witness in this case, which I agree with.

17 Q. Do you believe that if Duke transfers
18 its generation assets then to establish the
19 generation rates for non-shopping customers,
20 that those rates could only be set by an MRO
21 and not an ESP?

22 A. No, that's not -- I don't agree with
23 that. FirstEnergy has transferred its assets
24 and has an ESP. The issue -- the issue
25 concerns the price of the ESP.

1 Q. Well, that's not my question. My
2 question is simply a company that divests its
3 generation assets is not required to set its
4 rates for non-shopping customers, the
5 generation rates for non-shopping customers,
6 through an MRO; it can use an ESP, correct?

7 A. Yes, I would agree with that.

8 Q. And for the Commission to accept an
9 ESP, you're aware that the company must show
10 that the ESP is more beneficial than an MRO?

11 A. Yes, I recall that as one of the
12 provisions.

13 Q. Now, there's several times in your
14 testimony that you have discussed what you
15 call consumer protection provisions, correct?

16 A. Yes, I recall that.

17 Q. I mean, for example, I'll direct you
18 to the bottom of page 11, line 19 and going on
19 to page 12, line 1. And would it be correct
20 to understand you to mean when you are
21 referring to the consumer protection
22 mechanism, to be the blending mechanisms that
23 are discussed in divisions D and E of section
24 4928.142?

25 A. That's what I was referring to.

1 Q. I take it that it is your view that if
2 market prices are substantially below the
3 legacy ESP price, that the Commission
4 shouldn't accelerate the blending period,
5 correct?

6 A. That's I think -- yes, that's correct.
7 That's not -- that's not the issue. The issue
8 is --

9 Q. Excuse me, sir, I asked you is that
10 correct.

11 MR. KURTZ: Explain your answer if
12 you need to.

13 MR. KUTIK: Well, no, I --

14 MR. KURTZ: Explain your answer,
15 Mr. Baron, if you need to.

16 MR. KUTIK: Don't coach him. I
17 asked him if that was correct.

18 MR. KURTZ: Well, I'm advising him
19 he's allowed to explain his answer.

20 BY MR. KUTIK:

21 Q. Well, is that correct? That's the
22 first thing.

23 A. Would you repeat the question again?

24 Q. Sure. It's your view that if the
25 market -- if market prices are significantly

1 below the legacy ESP price, that the
2 Commission shouldn't and couldn't accelerate
3 the blending period; is my understanding of
4 your testimony or views correct? Let's start
5 there first.

6 A. The market price issue, the fact that
7 market prices are below the legacy ESP price
8 now is not -- is not the issue.

9 Q. That's not my question.

10 A. The answer is that I don't believe the
11 Commission should or could shorten the
12 blending period as proposed by Duke in this
13 case irrespective of whether the market prices
14 today are lower than or exceed the legacy ESP
15 price.

16 Q. Well, with due respect, Mr. Baron, I
17 didn't ask you about whether market prices
18 today are lower. I just said if market prices
19 are lower, significantly lower, than legacy
20 ESP, it's your view that the Commission
21 shouldn't and couldn't accelerate the blending
22 period; am I correct that that's your view?

23 A. Well, I guess I need to understand the
24 context of your question. Are you speaking of
25 a scenario in which the Commission has

1 approved an MRO and it has a five-year
2 blending period, and pursuant to division E
3 the Commission subsequently decides to shorten
4 or terminate the blending because market
5 prices are lower than the legacy ESP rates, is
6 that what you're asking me?

7 Q. Yes.

8 A. I think I've already addressed that I
9 think in answer to Duke's questions and to
10 your questions earlier, that I don't believe
11 that the Commission should or based on the
12 statute has the right to do that pursuant to
13 the statute but more significantly there is --
14 there would be no public policy reason to make
15 such a determination or finding to shorten the
16 blending period at that point because
17 consumers have the option to get the
18 presumably lower market prices by shopping.

19 Q. So the answer to my question is yes,
20 that's your view?

21 A. That the -- in a subsequent -- based
22 on the clarification that I asked you and you
23 agreed to, that there's an existing five-year
24 blending and subsequently after year two
25 market prices are lower than the legacy ESP,

1 are you asking me can the Commission shorten
2 the blending period; and I -- and my answer is
3 as I gave it.

4 Q. Which is yes, correct?

5 A. No, that -- that they should not --
6 they cannot and should not shorten the
7 blending period, and most significantly, there
8 would be no public policy reason to do so.

9 Q. Is there some reason you can't answer
10 my question "yes"?

11 A. I thought I answered -- well, you're
12 going to have to restate the question for me
13 to answer it "yes" or "no." Please state it
14 again.

15 Q. Is it your view, sir, that if at any
16 time once the MRO is established the
17 Commission finds that market rates are
18 significantly below legacy ESP, that the
19 Commission cannot and should not accelerate
20 the blending period?

21 A. Yes.

22 Q. That's your view, isn't it?

23 A. Yes, that is my view, and it would
24 make no sense for the Commission to do that.
25 It would -- it would preclude customers from

1 the protection inherent in the five-year
2 blending or perhaps the extension of blending
3 under division E.

4 Q. Do you have any capability, sir, to
5 answer my question "yes," without --

6 A. I did answer it "yes." I did answer
7 it "yes" and then I explained it.

8 Q. All right. You felt you needed to
9 explain your answer after this many times
10 discussing the topic, is that what you're
11 saying, sir?

12 A. Well, I wanted to be perfectly --

13 MR. KURTZ: Do you have a real
14 question for him?

15 BY MR. KUTIK:

16 Q. Is that what you're saying? I just
17 want to understand, Mr. Baron, is that what
18 you're saying?

19 A. I wanted to make sure that the
20 question before me was clear, and the first
21 time you asked the question you didn't provide
22 clarifications that you subsequently provided
23 after I posited them. So I just want to make
24 sure when I answer the question that it's
25 clear.

1 Q. Now, isn't it true, sir, that you have
2 done no analysis of market share or market
3 power in the wholesale market of PJM?

4 A. Yes, I believe I answered that
5 question earlier today but the answer is still
6 the same, yes, I have not done an analysis.

7 Q. And you have not done an analysis for
8 MISO, correct?

9 A. That's correct.

10 Q. And would it be fair to say that you
11 have not done an analysis with respect to the
12 retail generation market in the Duke Energy
13 Ohio service territory?

14 A. That's correct. There was no reason
15 to in developing my analysis and testimony in
16 this case.

17 Q. And isn't it true that you have never
18 been retained to assess market power in any
19 particular market, correct?

20 A. That's correct.

21 Q. And with respect to your testimony
22 in --

23 A. And just to be clear, I'm sorry to
24 interrupt you, but just to be clear, for the
25 record I'm not offering testimony in this case

1 on market power, but the answer is still yes,
2 that I haven't testified on that.

3 Q. Right. And it's also true that with
4 respect to your testimony in the FirstEnergy
5 MRO cases and the ESP case, you did not offer
6 testimony about whether any particular company
7 had market power, correct?

8 A. That's correct.

9 Q. Do you have a view as to whether the
10 retail generation market within Duke Energy
11 Ohio is a robust competitive market?

12 A. I have not done any analysis of that.

13 Q. So you have no view?

14 A. That's correct.

15 Q. Do you have a view as to whether the
16 PJM wholesale market is a robust competitive
17 market?

18 A. I have a view.

19 Q. What's your view?

20 A. My view is that it would be.

21 Q. Same question for MISO, the MISO
22 wholesale market, do you believe that to be a
23 robust competitive market?

24 A. As a -- my view is to the extent
25 that there have not been findings that I'm

1 familiar with to the contrary, I guess that's
2 true. I'm more familiar with that issue with
3 regard to PJM. And I have not reviewed recent
4 market monitor reports that might have been
5 produced for MISO, and so I to some extent
6 hesitate to answer that. But I'm not aware of
7 any contentions, I have no knowledge of
8 contentions to the contrary. That probably
9 would be the best way to state it.

10 Q. So based upon the current information
11 you have, you have no reason to believe that
12 the MISO wholesale market is not a robust
13 competitive market?

14 A. That would be a fair way to say it,
15 yes.

16 Q. Now, you have suggested in your
17 testimony, particularly on page 15, lines 11
18 through 14, that the Commission conduct annual
19 reviews, correct?

20 A. Yes.

21 Q. Does the Commission have the statutory
22 authority to do that in your view?

23 A. It's my understanding that division E
24 provides for that.

25 Q. And where in division E does it say

1 that?

2 A. In the sentence that says, any such
3 alteration shall be made not more often than
4 annually, and the Commission shall not by
5 altering and so forth and so on. So my
6 interpretation of that provision is that the
7 Commission can review beginning in the second
8 year the blended rates to decide if there
9 needs to be an alteration.

10 Q. Am I correct to understand, sir, that
11 you have done no comparison of retail
12 generation rates available to customers within
13 the FirstEnergy Ohio service territory versus
14 those rates available to customers in the Duke
15 Energy Ohio service territory?

16 A. That's correct, I've not done such an
17 analysis.

18 Q. I believe you said earlier in response
19 to a question or two from Ms. Watts that you
20 believe that there were provisions in the MRO
21 statute that were designed to assure that
22 there would be no financial harm to the
23 utility. Am I correct that that's what you
24 said?

25 A. I did say something to that effect,

1 yes.

2 Q. Can you point me to anything within
3 section 4928.142 that is designed to assure
4 that there would be no financial harm to a
5 utility?

6 A. Just give me a moment.

7 Q. Sure.

8 A. (Witness reviews document). I think
9 what I was referring to in answering,
10 providing that prior answer, was division D,
11 right before division E, there's a -- the last
12 paragraph starts out, additionally the
13 Commission may adjust the electric
14 distribution utility's most recent standard
15 service offer price to address any emergency
16 that threatens the utility's financial
17 integrity.

18 Q. Is that the extent of the provisions
19 that you're aware of that are designed to
20 assure there's no financial harm to the
21 utility?

22 A. That's the one that I had in mind when
23 I answered the question. I have not done a
24 thorough review of other sections of the
25 statute with regard to that issue.

1 Q. I'm just referring you now to section
2 142, or section 4928.142. Can you point me to
3 anywhere else in that section that discusses
4 or is --

5 A. Well, the --

6 Q. -- no financial harm to the utility?

7 A. I'll need to read it again, then.
8 Just give me a few moments.

9 Q. Sure, go ahead.

10 A. (Witness reviews document). Nothing
11 else that I see.

12 MR. KUTIK: Okay, thank you very
13 much, Mr. Baron. I have no further questions
14 at this time.

15 MR. KURTZ: Does anybody else have
16 any questions for Mr. Baron?

17 Mr. Baron, I would just like to ask you a
18 couple of clarification questions.

19 EXAMINATION

20 BY MR. KURTZ:

21 Q. None of your testimony that you
22 provided in this case is rendering a legal
23 opinion, is that correct?

24 A. That's correct.

25 Q. You have interpreted the relevant

1 statutes, though, however?

2 A. Yes, for the purposes of offering my
3 opinion about the Company's proposal in the
4 case, yes.

5 Q. And your statutory interpretation was
6 based upon the combination of your reading of
7 the law, your 30-plus years of regulatory
8 experience, your experience in prior ESP and
9 MRO cases in Ohio, as well as the advice of
10 counsel?

11 A. Yes.

12 Q. Mr. Court reporter, when will we have
13 a deposition copy for Mr. Baron to review?

14 THE COURT REPORTER: Can we go
15 off the record?

16 (Off-the-record discussion).

17 THE COURT REPORTER: Mr. Kurtz,
18 are you ordering a copy of the transcript?

19 MR. KURTZ: Well, we'll certainly
20 need one for him to review.

21 (Off-the-record discussion).

22 BY MR. KUTIK:

23 Q. In light of your answers to your
24 counsel's questions, Mr. Baron, I guess I'm
25 confused. You indicated in response to his

1 question that your statutory interpretation is
2 based in part on the advice of counsel, and I
3 thought you had said to me that you were not
4 relying on advice of counsel. So can you
5 clear that up for me? Did you or did you not
6 rely on counsel's advice in coming up with
7 your interpretation for purposes of this
8 testimony?

9 A. Well, I read -- I think all of the
10 things that I answered earlier and then also
11 to counsel and I thought to you, was that I
12 reviewed the statute and based on my
13 experience and so forth I formed an opinion.
14 I did discuss with counsel to confirm my
15 understanding, and I think that's what I was
16 trying -- attempting to answer when I just
17 answered Mr. Kurtz' questions, that in
18 discussions with counsel it confirmed my
19 understanding.

20 Q. So in terms of your testimony in this
21 case, are you or are you not relying on advice
22 of counsel?

23 A. With respect to any statutory
24 interpretations, I have relied in part on
25 the -- the discussions I've had with counsel,

1 which would include advice as to the
2 statutory -- counsel's statutory
3 interpretation of these provisions that I have
4 addressed. So I thought I made that clear
5 that I did have discussions with counsel
6 regarding the interpretation, and counsel
7 confirmed my understanding of how these
8 provisions work.

9 Q. So you relied in part on advice from
10 counsel?

11 A. Yes.

12 Q. All right. Tell me what counsel told
13 you.

14 MR. KURTZ: Don't answer -- I'm
15 advising the witness not to answer that
16 question to the extent --

17 MR. KUTIK: No, no, if advice of
18 counsel is part of what he's relied upon for
19 his opinion, I'm entitled to know that, and
20 the rest of us are, too.

21 MR. KURTZ: Well, it's privileged
22 communication.

23 MR. KUTIK: I don't care, he's
24 just waived it by relying on advice of
25 counsel.

1 MR. KURTZ: We can take it up with
2 the hearing examiner.

3 MR. KUTIK: Okay, we will. So
4 we'll just have to schedule this for a time
5 between the holidays.

6 MR. KURTZ: That's fine.

7 MR. KUTIK: That's all the
8 questions I have. I assume, counsel -- I
9 assume, Mr. Baron, that in light of your
10 instruction you will not answer any questions
11 as to what you were told by counsel with
12 respect to the statutory interpretation
13 that you relied upon?

14 MR. KURTZ: Let's just be more
15 clear then. What exactly do you want the
16 witness -- your broad question of what did
17 your lawyer tell you is over-broad and it
18 seeks privileged information. What do you
19 want specifically?

20 MR. KUTIK: With respect to the
21 issues that he's relied upon for statutory
22 interpretation in terms of advice of counsel,
23 I want the know what he was told.

24 MR. KURTZ: Go ahead and answer
25 the question, Mr. Baron.

1 THE WITNESS: Okay, sure. It
2 would basically be on two areas -- well,
3 excuse me, with regard to the statute that
4 we're talking about, counsel confirmed my
5 understanding that the five-year blending
6 requirement in division D is a minimum
7 requirement, and division E permits an
8 extension up to ten years. And that's how I
9 read the statute, that makes perfect sense to
10 me from a public policy standpoint, and
11 counsel in discussions confirmed that my
12 understanding was correct.

13 BY MR. KUTIK:

14 Q. And who did you have these discussions
15 with?

16 A. I believe it was Mr. Kurtz. It may
17 have been Mr. Kurtz and Mr. Boehm but it
18 definitely was Mr. Kurtz included.

19 Q. Did you receive anything in writing in
20 terms of e-mails or letters that expressed
21 their, that is counsel's, interpretation of
22 the statute, particularly divisions D and E?

23 A. Not that I recall. Again, I formed an
24 opinion based on reviewing the statute,
25 reviewing the testimony of the Duke witnesses;

1 I had discussions with counsel, and my
2 understanding was confirmed via those
3 discussions. It wasn't really that
4 complicated.

5 Q. Did you have more than one
6 conversation?

7 A. I don't recall. It's possible.

8 Q. You don't recall whether you had more
9 than one conversation?

10 A. I had multiple conversations. I don't
11 recall whether this issue required -- came up
12 again. It likely did in some fashion. To me,
13 it was self-evident that there was a five-year
14 minimum blending requirement.

15 Q. I didn't ask you whether it was
16 self-evident, sir. I just asked you whether
17 you had more -- whether you could recall
18 whether you had more than one conversation on
19 the subject.

20 A. I said I had -- I will answer it this
21 way. I had at least one conversation. The
22 subject may have come up in other
23 conversations. Because it was self-evident,
24 it was not -- any subsequent conversations
25 would not have been extensive because it was

1 self-evident.

2 BY MR. KUTIK:

3 Q. Okay. And can you tell me
4 approximately when you had this conversation?

5 A. Only to the extent that it was
6 sometime between the time I was retained on
7 this case and the time that I developed my
8 testimony and filed it. It was some period in
9 that -- it wasn't that long a period, if I
10 recall.

11 Q. Do you keep records of the time that
12 you spend on this case?

13 A. Bill records, yes.

14 Q. And do those records indicate when you
15 may have had conversations with Mr. Kurtz?

16 A. No.

17 Q. Give me one moment.

18 MR. KUTIK: I have no further
19 questions.

20 (Deposition adjourned, 3:09 p.m.)

21

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Corrections to Baron Deposition Transcript of December 23, 2010

Case No. 10-2586-EL-SSO

<u>Page – Line #</u>	<u>Corrections (Phrase in “ “ should read as Phrase in <i>Italics</i>)</u>
p-10, L-18	“electric gas” ----- <i>electric and gas</i>
p-22, L-15	“30-plus experience” ---- <i>30-plus years experience</i>
p-33, L-6	“to provide -- protect an” ----- <i>to provide -- provide an</i>
p-46, L-10	“market prices convert in” ----- <i>market prices converge in</i>
p-46, L-12	“state that Mr. Rose’s” ----- <i>state that if Mr. Rose’s</i>
p-59, L-4	“determined adjusted reasonable” ----- <i>determined a just and reasonable</i>
p-69, L-14	“market base rates” ----- <i>market based rates</i>
p-69, L-15	“Intergy’s” ----- <i>Entergy’s</i>
p-69, L-17	“market base rates” ----- <i>market based rates</i>
p-111, L-24	“if it were to offer” ----- <i>if it were to alter</i>

Signed: Stephen J. Baron



January 4, 2011

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1 Page_____ Line_____ should read: _____
2 Reason for change: _____
3
4 Page_____ Line_____ should read: _____
5 Reason for change: _____
6
7 Page_____ Line_____ should read: _____
8 Reason for change: _____
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10 Page_____ Line_____ should read: _____
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13 Page_____ Line_____ should read: _____
14 Reason for change: _____
15
16 Page_____ Line_____ should read: _____
17 Reason for change: _____
18 _____
19 Signature
20 Sworn to and Subscribed before me
21 _____, Notary Public.
22 This_____ day of _____, 2010.
23 My Commission Expires: STV
24
25

1 C E R T I F I C A T E

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4 G E O R G I A:

5 FULTON COUNTY:

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I hereby certify that the foregoing deposition was reported, as stated in the caption, and the questions and answers thereto were reduced to the written page under my direction; that the foregoing pages 1 through 134 represent a true and correct transcript of the evidence given. I further certify that I am not in any way financially interested in the result of said case.

18

19

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21

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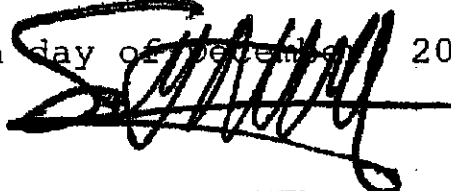
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19 My Commission Expires

20 January 17th, 2011.
21
22
23
24
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