

FILE



DUKE ENERGY CORPORATION

139 East Fourth Street, 1212 Main
Cincinnati, OH 45201-0960
Telephone: (513) 287-4315
Facsimile: (513) 287-4386

Kristen Cocanougher
Sr. Paralegal
E-mail: Kristen.cocanougher@duke-energy.com

VIA OVERNIGHT MAIL

January 7, 2011

Docketing Division
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215

Re: *In the Matter of the Application of Duke Energy Ohio for Approval of a Market
Rate Offer*
Case No. 10-2586-EL-SSO

Dear Docketing Division:

Enclosed please find for filing the original and 20 copies of the Notice of Filing of Deposition of Kevin Higgins.

Please file-stamp the enclosed copy and return in overnight envelope provided.

Should you have any questions or concerns, please feel free to contact me.

Very truly yours,

Kristen Cocanougher

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BEFORE

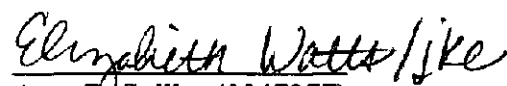
THE PUBLIC UTILITIES COMMISSION OF OHIO

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) Case No. 10-2586-EL-SSO
Offer Electric Generation Supply,)
Accounting Modifications, and Tariffs for)
Generation Service.)

NOTICE OF FILING OF DEPOSITION

Pursuant to Ohio Adm. Code 4901-1-21(N), Duke Energy Ohio, Inc. (Duke Energy Ohio) gives notice of the filing of the deposition transcript of Kevin Higgins, on behalf of the The Kroger Co. (Kroger) which was taken on December 22, 2010.

Respectfully submitted,


Amy B. Spiller (0047277)
Associate General Counsel
Elizabeth H. Watts (003192)
Assistant General Counsel
Rocco O. D'Ascenzo (0077651)
Senior Counsel
Duke Energy Business Services
139 East Fourth Street, 13 Main
Cincinnati, Ohio 45202
(513) 287-4359 (telephone)
(513) 287-4385 (facsimile)
Email: amy.spiller@duke-energy.com

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the foregoing was served on the following parties of record by electronic mail delivery or first class mail delivery, postage prepaid, this 7 day of January 2011.


Elizabeth H. Watts

<p>John W. Bentine Mark Yurick Matthew S. White Counsel for the Kroger Company Chester, Wilcox & Saxbe, LLP 65 East State Street, Suite 1000 Columbus, Ohio 43215-4213 jbentine@cwslaw.com myurick@cwslaw.com mwhite@cwslaw.com</p>	<p>David F. Boehm Michael L. Kurtz Counsel for Ohio Energy Group Boehm, Kurtz & Lowry 36 East Seventh Street, Suite 1510 Cincinnati, Ohio 45202 dboehm@bkllawfirm.com mkurtz@bkllawfirm.com</p>
<p>David C. Rinebolt Counsel for Ohio Partners for Affordable Energy 231 West Lima Street Findlay, OH 45840-3033 Drinebolt@ohiopartners.org</p>	<p>Colleen L. Mooney Counsel for Ohio Partners for Affordable Energy 1431 Mulford Road Columbus, OH 43212-3404 Cmooney2@columbus.rr.com</p>
<p>Samuel C. Randazzo Joseph E. Olikier Counsel for Industrial Energy Users-Ohio McNees Wallace & Nurick LLC 21 E. State Street, 17th Floor Columbus, Ohio 43215 sam@mwncmh.com joliker@mwncmh.com</p>	<p>William T. Reisinger, Counsel of Record Nolan Moser Trent A. Dougherty Ohio Environmental Council 1207 Grandview Avenue, Suite 201 Columbus, Ohio 43212-3449 will@theoec.org nolan@theoec.org trent@theoec.org</p>

<p>Mark A. Hayden, Counsel of Record FirstEnergy Service Company 76 South Main Street Akron, Ohio 44308 haydenm@firstenergycorp.com</p> <p>David A. Kutik Attorney for FirstEnergy Solutions Corp. Jones Day North Point 901 Lakeside Avenue Cleveland, Ohio 44114 dakutik@jonesday.com</p> <p>Grant W. Garber, Attorney for FirstEnergy Solutions Corp. Jones Day 325 John H. McConnell Blvd., Suite 600 Columbus, Ohio 43215-2673 gwwgarber@jonesday.com</p>	<p>Douglas E. Hart Attorney for The Greater Cincinnati Health Council 441 Vine Street, Suite 4192 Cincinnati, OH 45202 dhart@douglasshart.com</p>
<p>M. Howard Petricoff Stephen M. Howard VORYS, SATER, SEYMOUR AND PEASE LLP 52 East Gay Street P.O. 1008 Columbus, Ohio 43216-1008 mhpetricoff@vorys.com smhoward@vorys.com</p> <p>Cynthia Fonner Brady Senior Counsel Constellation Energy Resources, LLC 550 W. Washington St., Suite 300 Chicago, Illinois 60661 cynthia.brady@constellation.com</p> <p>Attorneys for Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc.</p>	<p>Richard Chamberlain Behrens, Wheeler & Chamberlain 6 N.E. 63rd Street, Suite 400 Oklahoma City, OK 73105 Rdc_law@swbell.net</p> <p>Kevin J. Osterkamp Roetzel & Anderss, LPA 155 E. Broad Street, 12th Floor Columbus, OH 43215 kosterkamp@ralaw.com</p> <p>Attorneys for Wal-Mart Stores East, LP, and Sam's East, Inc.</p>

<p>Tamera Turkenton Public Utility Commission of Ohio 180 East Broad Street Columbus, OH 43215-3793 Tamara.turkenton@puc.state.ohio.us</p> <p>Steven Beeler John Jones Assistant Attorneys General Public Utilities Commission of Ohio 180 East Broad Street Columbus, Ohio 43215 Steven.beeler@puc.state.oh.us John.jones@puc.state.oh.us</p>	<p>Michael D. Dortch Counsel for Duke Energy Retail Sales, LLC Kravitz, Brown & Dortch, LLC 65 East State St., Suite 200 Columbus, OH 43215 mdortch@kravitzllc.com</p>
<p>Barth E. Royer Bell & Royer Co., LPA 33 South Grant Avenue Columbus, Ohio 43215 barthroyer@aol.com</p> <p>Gary A. Jeffries Senior Counsel Dominion Resources Services, Inc. 501 Martindale Street, Suite 400 Pittsburgh, PA 15212 Gary.A.Jeffries@dom.com</p> <p>Attorneys for Dominion Retail, Inc.</p>	<p>Thomas J. O'Brien Counsel for City of Cincinnati Bricker & Eckler LLP 100 South Third Street Columbus, Ohio 43215 tobrien@bricker.com</p>
<p>Douglas E. Hart Counsel for Eagle Energy, LLC 441 Vine Street, Suite 4192 Cincinnati, Ohio 45202 dhart@douglasshart.com</p>	<p>Terrence O'Donnell Christopher Montgomery Counsel for Ohio Advanced Energy 100 South Third Street E-mail: todonnell@bricker.com cmontgomery@bricker.com</p>
<p>Mary Christensen Counsel for People Working Cooperatively Inc. Christensen & Christensen LLP 8760 Orion Place, Suite 300 Columbus OH 43240 mchristensen@columbuslaw.org</p>	<p>Anne M. Vogel, Attorney for AEP Retail Energy Partners LLC American Electric Power Service Corporation 1 Riverside Plaza, 29th Floor Columbus, OH 43215 amvogel@aep.com</p>

<p> Matthew J. Satterwhite Attorney for Columbus Southern Power Company and Ohio Power Company American Electric Power Service Corporation 1 Riverside Plaza, 29th Floor Columbus, OH 43215 mjsatterwhite@aep.com </p>	<p> Ann M. Hotz, Counsel of Record Kyle L. Verrett Jody M. Kyler Assistant Consumer Counsels Office of the Ohio Consumers' Counsel 10 West Broad Street, Suite 1800 Columbus, Ohio 43215-3485 hotz@occ.state.oh.us verrett@occ.state.oh.us kyler@occ.state.oh.us </p>
<p> Matthew W. Warnock Bricker & Eckler LLP 100 South Third Street Columbus, OH 43215-4291 Mwarnock@bricker.com </p> <p> Kevin Schmidt Ohio Manufacturers' Association 33 N. High Street, Suite 600 Columbus, OH 43215 Kschmidt@ohiomfg.com </p> <p> Counsel for Ohio Manufacturers' Association </p>	

Case Name:

Case Number:

Amendment to Deposition

Page	Line	Now Reads	Should Read	Reason for change
13	9	option	question	Witness believes "question" is intended word
13	15	option	action	Same as above
18	12	SSO	M&O	misspelled acronym
25	18	were	was	grammatical
26	24	SSP	SSO	witness believes "SSO" is intended
27	10-11	it would have the	[Delete]	Clarity
29	10	undo	undo	meaning of word
32	12	there there would	[Delete]	Clarity
37	14	? (question mark)	[Delete]	Not a question

Subscribed and sworn to me this _____ day of _____, 2000.

Notary Public

Signature of Depositor

FILE

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the)	
Application of Duke Energy Ohio)	Case No.
For Approval of a Market Rate)	10-2586-EL-550
Offer to Conduct a Competitive)	
Bidding Process For Standard)	
Service Offer Electric)	
Generation Supply, Accounting)	
Modifications, and Tariffs For)	
Generation Service.)	

TELEPHONIC DEPOSITION OF KEVIN HIGGINS

TAKEN AT: DepomaxMerit Litigation Services, Inc.
333 South Rio Grande
Salt Lake City, Utah 84101

DATE: December 22, 2010

TIME: 9:45 a.m.

REPORTED BY: Kelly L. Wilburn, CSR, RPR

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APPEARANCES (all by telephone)

For Duke Energy Ohio:

AMY B. SPILLER, ESQ. (amy.spiller@duke-energy.com)
ELIZABETH H. WATTS, ESQ.
DUKE ENERGY BUSINESS SERVICES
139 East Fourth Street
12th Floor Fourth & Main Building
Cincinnati, Ohio 45202
(513) 287-4359
(513) 287-4385 (fax)

For The Kroger Company:

MARK YURICK, ESQ. (myurick@cwsllaw.com)
CHESTER, WILCOX & SAXBE, LLP
65 East State Street, Suite 1000
Columbus, Ohio 43215-4213
(614) 221-4000
(614) 221-4012 (fax)

For FirstEnergy Solutions:

DAVID A. KUTIK, ESQ. (dakutik@jonesday.com)
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114-1190
(216) 586-3939
(216) 579-0212 (fax)

MARK A. HAYDEN, ESQ. (haydenm@firstenergycorp.com)
FIRSTENERGY SERVICE COMPANY
76 South Main Street
Akron, Ohio 44308

For The Greater Cincinnati Health Council and Eagle
Energy, LLC:

DOUGLAS E. HART, ESQ. (dhart@douglasshart.com)
LAW OFFICE OF DOUGLAS E. HART
441 Vine Street, Suite 4192
Cincinnati, Ohio 45202
(513) 621-6709
(513) 621-6981 fax

APPEARANCES, CONTINUED

For the Office of the Ohio Consumers' Counsel:

RICK REESE, ESQ.
OFFICE OF THE OHIO CONSUMERS' COUNSEL
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(877) 742-5622 or (614) 466-8574

For the Public Utilities Commission of Ohio:

STEVEN BEELER, ESQ. (Steven.beeler@puc.state.oh.us)
RAY STROM, ESQ.
TAMMY TURKENTON, ESQ.
ASSISTANT ATTORNEYS GENERAL
Public Utilities Commission of Ohio
Public Utilities Section
180 East Broad Street, 12th Floor
Columbus, Ohio 43215-3793

For Wal-Mart East, LP and Sam's East, Inc.:

RICK D. CHAMBERLAIN, ESQ.
BEHRENS, WHEELER & CHAMBERLAIN
Six Northeast 63rd Street, Suite 400
Oklahoma City, Oklahoma 73105
(405) 848-1014
(405) 848-3155 (fax)

Also Present:

Don Wathen (Duke Energy)

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EXAMINATION

<u>By</u>	<u>Page</u>
Ms. Spiller	5
Mr. Kutik	43

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EXHIBITS

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1 DECEMBER 22, 2010

9:45 A.M.

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

3 (The witness was duly sworn by
4 Kelly L. Wilburn.)

5 KEVIN HIGGINS,

6 called as a witness, having been duly sworn,
7 was examined and testified as follows:

8 EXAMINATION

9 BY MS. SPILLER:

10 Q. Mr. Higgins, this is Amy Spiller, counsel for
11 Duke Energy Ohio in connection with this matter. Can
12 you hear me okay over the phone?

13 A. I sure can.

14 Q. Okay. And we've had a bit of a perhaps
15 technical issue, so if I could just reiterate
16 Mr. Kutik's request that you speak up. I'm hoping
17 that all on the phone can hear your testimony clearly
18 this morning, sir.

19 A. I will do, I will do my best, thank you.

20 Q. Thank you. Mr. Higgins, can you identify
21 yourself for purposes of the record, please?

22 A. Yes. My name is Kevin C. Higgins.

23 Q. And what is your business address, sir?

24 A. My business address is 215 South State
25 Street, Suite 200, Salt Lake City, Utah 84111.

1 Q. And what is your occupation?

2 A. I am an economist and I'm a principal in the
3 firm of Energy Strategies, LLC.

4 Q. Mr. Higgins, do you have in front of you what
5 has been marked -- or what will be marked as Exhibit 1
6 to your deposition, which is an Amended Notice of
7 Deposition filed on December 13, 2010?

8 A. Yes, I do.

9 Q. And Mr. Higgins, have you produced at your
10 deposition this morning any documents responsive to
11 that notice?

12 A. Well, my understanding is that I needed to
13 bring any exhibits. I mean, let me just double check
14 here. I brought a lot of things so I'll.

15 Yes.

16 Q. And what are the documents, sir, that you
17 brought in response to the subpoena? Or I'm sorry, in
18 response to the notice of deposition?

19 A. I brought my testimony. I brought Duke
20 Energy Ohio's application and filing. I brought a
21 document that I reviewed, which is cited in my
22 testimony. I can give you the exact citation. Give
23 me one moment, please.

24 It's Duke Energy's Third Quarter Earnings
25 Review and Business Update, issued October 28, 2010.

1 Q. Okay.

2 A. I brought a, an Amended Substitute Senate
3 Bill No. 221, the, the act which adopted the market
4 rate offer.

5 Q. Okay.

6 A. And I brought a section of the statute that
7 is referenced in my testimony as well. I brought a
8 copy of the ESP settlement that in the last -- I don't
9 want to say the "last." I guess when the current ESP
10 was approved.

11 Q. And that would be, sir, the ESP for Duke
12 Energy Ohio filed under Case No. 08920?

13 A. Correct.

14 Q. Okay, thank you.

15 A. I, I also brought electronically some -- the
16 work papers that Duke Energy Ohio provided that were
17 used in some of my analysis. Now, I'll point out that
18 because of the volume of material associated with the
19 Company's filing I brought some of this material
20 electronically.

21 I brought some things hard copy that I
22 thought were more likely to be discussed, and I
23 brought others electronically. So if I do get asked
24 about something I brought electronically, like a work
25 paper, it will take me a moment just to go to my

1 computer, which I brought, and call it up.

2 Q. Okay. Other than what you have identified,
3 sir, do you have any other documents, whether hard
4 copy or electronic, that you brought with you to your
5 deposition today?

6 A. No, that's it.

7 Q. The items, sir, that you have just
8 identified -- your testimony filed on December 21st,
9 Duke Energy Ohio's application and filing filed on
10 November 15th, Duke Energy Ohio's third quarter
11 business update, the Ohio law, portions of the Amended
12 Senate Bill 221 and portions thereof, as well as a
13 copy of the stipulation and recommendation filed in
14 Duke Energy Ohio Case No. 08920 -- have you reviewed
15 any other documents, sir, for purposes of preparing
16 your testimony in this case?

17 A. No.

18 Q. What was it about the ESP stipulation and
19 recommendation in Case No. 08920 that you thought
20 relevant to preparing your testimony in this case?

21 A. The ESP settlement represents the status quo.
22 And I think as matter of general practice I like to
23 refresh myself with the, with the status quo as I
24 prepare my testimony.

25 Q. Okay. In preparing your testimony in this

1 case, Mr. Higgins, did you review the testimony that
2 you submitted on behalf of Kroger in connection with
3 the application filed by the FirstEnergy Distribution
4 Utilities for approval of a market rate offer?

5 A. I did not specifically re-review that
6 testimony.

7 Q. Aside from your counsel, did you speak with
8 anyone in preparing your testimony in this case?

9 A. I have a couple of associates who work -- who
10 report to me at Energy Strategies, and I did work with
11 one of those -- with one of them in preparing my
12 testimony in terms of having her research some
13 documents under my direction.

14 Q. And what were the documents, sir, that this
15 associate researched under your direction, please?

16 A. She found some work papers that were prepared
17 by Duke Energy -- Duke, Duke Energy Ohio. And she
18 also found the, the document I referred to earlier,
19 which was the third quarter earnings report.

20 Q. Okay. And when you referenced the work
21 papers, those are work papers filed by Duke Energy
22 Ohio relative to this case, correct?

23 A. That's correct. That's correct. And I also
24 spoke to the energy manager at Kroger, just simply to
25 get a, an understanding or -- of the -- Kroger's

1 current situation with respect to its -- the
2 procurement of its electricity supply.

3 Q. And who is the energy manager at Kroger with
4 whom you spoke?

5 A. Denis George.

6 Q. Denis George?

7 A. Yes.

8 Q. And the name of your associate, please, who
9 partici -- who assisted in your research?

10 A. Oliwia Smith. And that's Oliwia with a "w"
11 instead of a "v."

12 Q. Aside from your testimony, Mr. Higgins, have
13 you prepared any summaries, memoranda, or other
14 documents related to this case?

15 A. I have not.

16 Q. With regard to your position at Energy
17 Strategies, are there specific issues on which you
18 provide consulting services?

19 A. Well, I, I don't know that -- let me back up.
20 Certainly whenever I'm engaged to, to assist a client
21 in a hearing I address specific topics, so I suppose
22 the answer is yes. Are you asking what areas I, I may
23 restrict my practice to?

24 Q. Do you have areas of specialty? Perhaps a
25 better way to ask the question.

1 A. I would say I -- my experience in electricity
2 proceedings includes most areas of -- that are
3 addressed with respect to rate determination, policy
4 issues as well. Most topics, with the exception of
5 return on equity.

6 I typically don't get involved in return on
7 equity issues. But I, I've, over the course of my
8 career I've been involved in most aspects of
9 electricity rate proceedings.

10 Q. Okay.

11 A. Or policy proceedings.

12 Q. And I'm sorry, sir, I didn't mean to talk
13 over you. You broke up a bit on that response, but if
14 I may restate it. You address in proceedings rate
15 determinations, policy issues. Do not focus on return
16 on equity issues?

17 A. That is correct. And so I suppose it would
18 be fair to say I've addressed most -- I've addressed
19 fairly often revenue requirement issues, rate design,
20 cost of service, as well as policy matters pertaining
21 to the structure of electric markets.

22 Q. Okay, thank you. And you are testifying on
23 behalf of The Kroger Company in this proceeding,
24 correct?

25 A. That is correct.

1 Q. And the purpose of your testimony, sir, is to
2 address two particular issues within Duke Energy
3 Ohio's filing, correct?

4 A. That is correct.

5 MR. YURICK: Objection, I think the testimony
6 speaks for itself.

7 You may answer.

8 Q. (By Ms. Spiller) I'm sorry Mr. Higgins, you
9 can go ahead and answer.

10 A. I, I'd say that fairly characterizes my
11 testim -- my direct testimony.

12 Q. Okay. Through your testimony, Mr. Higgins,
13 you do not oppose the market rate offer structure, do
14 you?

15 A. May I ask when you say "structure," could you
16 be a little bit more specific?

17 Q. Sure. Just the general notion of a market
18 rate offer.

19 A. No, I do not. My understanding is that that
20 is an option that's available under the law for, for
21 Duke Energy Ohio. And I do not oppose that, that
22 right, you might say, that the Company has to file.

23 Q. Okay. And Mr. Higgins, you are not disputing
24 that Duke Energy Ohio's proposed competitive bidding
25 process is open, fair, and competitive, correct?

1 A. I am not disputing that.

2 Q. And to your knowledge, sir, is Kroger
3 offering any witness in this proceeding who will
4 dispute that Duke Energy Ohio's proposed competitive
5 bidding process is open, fair, and transparent?

6 A. To my knowledge, Kroger is not intending to
7 offer a witness to address that.

8 Q. And you are not disputing, Mr. Higgins, that
9 the designated option manager for Duke Energy Ohio's
10 competitive bidding process is independent, are you?

11 A. No.

12 Q. To your knowledge is Kroger offering any
13 witness in this proceeding who will dispute the
14 designation of Charles River Associates, d/b/a CRA
15 International, as an independent option manager?

16 A. To my knowledge, no.

17 Q. Okay. Mr. Higgins, you are not offering any
18 opinion in this case with regard to Duke Energy Ohio's
19 recovery of costs approved by the Federal Energy
20 Regulatory Commission, or the FERC, correct?

21 A. I have not offered an opinion on that; that
22 is correct.

23 Q. And to your knowledge, sir, Kroger is not
24 offering any witness in this proceeding who will
25 dispute Duke Energy Ohio's ability to recover FERC-

1 approved costs, correct?

2 A. That is correct.

3 Q. Mr. Higgins, you've identified that you are a
4 principal with Ener -- I'm sorry. You are a principal
5 with Energy Strategies, LLC. Are you an attorney by
6 training?

7 A. No, I am not.

8 Q. Can you tell me, sir, on what you relied in
9 concluding that it is the policy of the State of Ohio
10 to impose a gradual and orderly transformation to
11 market pricing?

12 A. I base that on my experience over the years,
13 both involved in helping make state policy -- not in
14 Ohio but elsewhere -- and on my, my reading of the
15 plain language in the statute.

16 Q. Okay. What state policy have you been
17 instrumental in shaping or forming?

18 A. I spent a number of years as the assistant
19 director of the State Energy Office in Utah. And in
20 that role I was involved on a daily basis in the
21 development of the State of Utah's energy policy, both
22 with respect to resource development and energy
23 conservation.

24 Q. Does Utah -- do the State laws -- regulatory
25 laws in Utah recognize a market rate offer similar to

1 that available under Ohio law for distribution utility
2 companies?

3 A. No.

4 Q. Mr. Higgins, can you tell me in your opinion,
5 please, what would make a transformation to market
6 pricing gradual?

7 A. It would be a matter of both degree and time.
8 It would be a combination of the, the steps necessary
9 with respect to rate changes, as well as a period of
10 time to allow for the transformation. And also to
11 provide assurance that when the -- there was sole
12 reliance on market pricing that the opportunities for
13 a competitive retail market were robust and likely to
14 be robust for the long term.

15 Q. What do you mean -- I understand the time
16 element, but with respect to degree what do you -- how
17 does that make the transformation gradual?

18 A. Well, you know, I would say that "gradual" of
19 course by its nature as a word implies an element of
20 degree. And that is that something is happening
21 incrementally. It is happening a little bit at a
22 time.

23 And so I believe that, you know, if enough
24 time is allowed for something to be transformed, then
25 it speaks to the, the degree. But I believe that a

1 degree or extent of impact is a component of gradual.

2 Q. Mr. Higgins, you mentioned that you have with
3 you a copy of Amended Senate Bill 221. Are you
4 familiar with Ohio Senate Bill 3?

5 MR. YURICK: Objection, relevance.

6 You can go ahead and answer.

7 THE WITNESS: Well, I may be. I may not
8 recall it by number.

9 Q. (By Ms. Spiller) Okay, that's fair. Are you
10 aware, sir, that Ohio has recognized a competitive
11 market for electric generation service since 2001?

12 A. Yes.

13 Q. And would that, sir, be a, a gradual
14 transformation to a competitive market in your
15 opinion?

16 A. Well, my, my understanding, based on my
17 experience in Ohio which goes back to 2000, is that
18 that was the intent. Although it appears to me that,
19 based on the adoption -- or passage of Amended Senate
20 Bill 221, that there may have been some reassessment
21 of how much progress had been made, which gave rise to
22 the, to the later legislation.

23 But I do believe that the -- it was likely
24 the intent that, you know, starting in 2000, that by
25 2010 there would be some gradual movement toward a

1 competitive market.

2 Q. So I guess to understand, is it your opinion,
3 sir, that the Ohio legislature then implemented Senate
4 Bill 221 because the development -- because they
5 wanted to accelerate the development of the
6 competitive market?

7 A. I don't know that it was necessarily to
8 accelerate the development of the competitive market.
9 I believe, you know, it appears to me that it was
10 intended to provide additional guidance and addi --
11 and a somewhat different framework to that
12 development.

13 Q. And it is your opinion, sir, that the
14 transition to market under the market rate offer
15 cannot occur in less than five years, correct?

16 A. Yes.

17 Q. So sir, in your opinion if a transition to
18 market occurred in less than five years and that
19 transition would enable customers to realize lower
20 generation costs, you believe the Ohio Commission
21 would have to reject that transition as illegal?

22 MR. YURICK: Objection, calls for a legal
23 conclusion.

24 You can go ahead and answer.

25 THE WITNESS: Yes.

1 Q. (By Ms. Spiller) Mr. Higgins, in light of
2 that objection I'm certainly happy to rephrase. But
3 in your opinion, the Commission could not accelerate
4 the transition to full market pricing in less than
5 five years, even if doing so would enable customers to
6 receive lower generation costs, correct?

7 A. Yes, because they would need to take the
8 entire period into account. And the -- while it may
9 be the case that on a particular -- at a particular
10 point in a particular year there might be lower
11 standard service offer rates from moving to a, a full
12 SSO in year three, that may not necessarily be the
13 case over the say full five-year period.

14 So I believe the Commission would have to,
15 you know, would be cognisant of the guidance in -- or
16 requirements in the statute and would need to use a
17 five-year period at a minimum.

18 Q. But you do agree, sir, that the Ohio
19 Commission has the discretion to change the blending
20 percentage, the blending duration under the market
21 rate offer, correct?

22 A. I believe they have limited discretion to do
23 so. They have the discretion to go below the
24 percentages that are shown in the statute, with the
25 exception of year one, which I believe must be

1 10 percent.

2 The -- for years two, three, four, and five
3 they can go up to the percentage that is enumerated in
4 the statute. I don't believe they can go above the
5 percentage that's enumerated in the statute. And they
6 can extend the period from five to ten years -- or
7 from five up to ten years.

8 Q. So in your opinion even beginning in year two
9 of the MRO the Commission cannot prospectively shorten
10 the path to market to less than five years?

11 A. I believes that is what the statute says,
12 yes.

13 Q. Okay. Have you consulted with your counsel
14 in forming that opinion regarding statutory
15 interpretation?

16 MR. YURICK: Objection, that's privileged.

17 MS. SPILLER: I'm not asking for the content,
18 I'm simply asking whether the consultation occurred.

19 THE WITNESS: Can I go ahead and answer?

20 MR. YURICK: Uh, yeah.

21 THE WITNESS: The answer is yes.

22 Q. (By Ms. Spiller) Okay. Thank you, sir.
23 Mr. Higgins, if you would refer, please, to page 7 of
24 your testimony?

25 A. Yes.

1 Q. And beginning on line 16 of that testimony
2 you quote the relevant statutory language from Revised
3 Code Section 4928.142(E), correct?

4 A. I, I -- well, you said the "relevant"
5 section. I do quote the section that it appeared to
6 me, from Duke's filing, that Duke was relying upon.
7 So yes, I do, I do provide an excerpt there.

8 Q. Okay.

9 A. But I don't contend that that's the only
10 relevant section.

11 Q. Okay. Fair enough. Do you agree, sir, that
12 the statutory language reflected on page 7, beginning
13 line 16 of your testimony, enables or vests the Ohio
14 Commission with discretion to alter the blend under
15 the market rate offer?

16 A. They, they can do so under certain
17 circumstances. Namely, to mitigate the effect of an
18 abrupt or significant change in the, in the Company's
19 standard service offer price.

20 Q. And what would you define, sir, as an
21 "abrupt" change in the standard serve offer price?

22 A. Well, I mean, that's go -- that is obviously
23 a matter of judgment based on circumstances. So I
24 don't -- obviously one would be looking at a degree of
25 price change involved. And I don't have a specific

1 number in mind if I, you know, as to what would pass
2 the test for "abrupt." Obviously that would be a call
3 the Commission would have to make.

4 Q. So you have no opinion as to what -- as to
5 how "abrupt" is to be interpreted under this provision
6 of the revised code?

7 A. Well, it would be -- I would have an opinion
8 that it would be a, a sudden impact. A sudden change
9 that created a substantial impact on customers.

10 Now, you know, what constitutes a substantial
11 impact is going to depend somewhat on circumstances
12 and a framework. And I have not attempted to identify
13 what bright line would constitute an abrupt change in
14 this proceeding, or a significant change in this
15 proceeding. But certainly I've made -- you know, I've
16 come to conclusions about that in other proceedings.

17 So I, I can analyze it. I -- it just --
18 right now this language leaves it to the discretion of
19 the Commission to make that determination.

20 Q. But you believe that that significant or
21 abrupt change -- well, strike that.

22 With regard to the standard service offer
23 price that is set forth in this particular statutory
24 provision contained on lines 19 and 20 of your
25 testimony, do you interpret that, sir, as the standard

1 service offer price under the MRO?

2 In other words, the standard offer price
3 that's derived from both competitive bid percentage
4 and the Company's then current or existing standard
5 service offer.

6 A. I believe that it would be the standard
7 service offer that was in effect at the time the
8 Commission made its review and determination about
9 prospective rates.

10 Q. So it would be the standard service offer
11 price charged under the MRO, correct?

12 A. Correct.

13 Q. Okay. And that price, sir, during this
14 blending period is derived from two different prices,
15 correct?

16 A. Correct.

17 Q. A portion of it is the market bid or option
18 price, correct?

19 A. Correct.

20 Q. And the other component of that MRO -- strike
21 that.

22 The other component of the standard service
23 offer price under the MRO is, per the statute, the
24 Company's then-most-recent standard service offer
25 price, correct?

1 A. That is correct.

2 Q. And here that second component, the Company's
3 then-most-recent standard service offer price, would
4 be the price under Duke Energy Ohio's current ESP,
5 correct?

6 A. Yes.

7 Q. And for purposes of clarity in your testimony
8 this afternoon, sir, can we agree that that component
9 will be referred to as the "Legacy ESP price"?

10 A. Yes.

11 Q. You've indicated that that Legacy ESP price
12 represents the status quo, correct?

13 A. Yes.

14 Q. Do you mean, Mr. Higgins, that that price
15 does not change during the blending period?

16 A. No, it's subject to change, based on several
17 factors that I identified in my testimony. Such as
18 fuel or purchase power costs, for example.

19 Q. And those changes to the Legacy ESP price can
20 either be up or down, correct?

21 A. That is correct.

22 Q. And those adjustments, sir, per the statute
23 can occur as often as quarterly, correct?

24 A. Yes.

25 Q. But it's your opinion that periodic changes

1 to the Legacy ESP price for things such as fuel or
2 purchase power cannot cause abrupt or significant
3 changes to the overall SSO price charged under the
4 market rate offer?

5 A. Well, they -- I believe that, you know, you
6 could have an abrupt or significant change based on a
7 change in a fuel adjuster.

8 Q. Do you have an opinion, sir, as to what would
9 be an abrupt or significant change based upon the fuel
10 component of the Legacy ESP price?

11 A. You know, again, it's really going to depend
12 on the circumstances and the facts in a particular
13 case. You know, there's no one bright line number
14 that identif -- that, you know, delineates an abrupt
15 or significant change. It's a matter of judgment that
16 has to be brought to bear.

17 Q. But sir, if I understand correctly, you've
18 just testified that you could have a significant or
19 abrupt change to the Legacy ESP price of the standard
20 service offer price charged under the market rate
21 offer, correct?

22 A. Yes.

23 Q. But it's also your opinion, sir, that a
24 significant or abrupt change to the standard service
25 offer price charged under the market rate offer can

1 only occur as a result of changes to the market bid
2 price, correct?

3 A. Yes.

4 Q. Mr. Higgins, do you believe that the PUCO,
5 the Public Utilities Commission of Ohio, can only
6 adjust the percentages of the blend under the market
7 rate offer where the market bid price is above the
8 then-current standard service offer price?

9 A. I believe that in all probability, yes.

10 Q. And why is that, sir?

11 A. The Commission has the discretion to alter
12 price -- alter proportions prospectively if there are
13 to be significant or abrupt changes in the standard
14 offer -- standard service offer price.

15 And for that to occur, or for that situation
16 to occur, it would be in the event that the market
17 price that was coming in as part of the bid price
18 portion of the blend were creating changes in the
19 status quo.

20 And in that event, mathematically it would be
21 the -- a situation in which the market price was
22 higher. The -- at least certainly under most
23 situations that I could conceive of.

24 Q. When you say "creating changes in the status
25 quo," is that the standard service offer price charged

1 under the market rate offer during the blending
2 period?

3 A. Yes.

4 Q. Sir, I'd ask you -- well, strike that.

5 Are you aware of how Duke Energy Ohio's
6 current ESP price compares to current market prices?

7 A. In general, yes.

8 Q. And what is your awareness, sir?

9 A. That for many customers the current ESP price
10 is higher than market prices.

11 Q. How much higher?

12 A. I don't, I don't know.

13 Q. So in the second year of the ESP -- or I'm
14 sorry, of the MRO, it's your position that the market
15 bid component can be no more than 20 percent, correct?

16 A. Yes.

17 Q. Okay. I'd like to ask you, sir, to assume a
18 couple of -- make a couple of assumptions for purposes
19 of this next question. The first is that the blending
20 percentages are 20 percent market, 80 percent Legacy
21 ESP.

22 I'd also ask you to assume, sir, that the ESP
23 price, which, which forms 80 percent of the overall
24 SSP price (sic), is above the market price.

25 A. Okay.

1 Q. With those assumptions in mind, is it your
2 opinion that reducing the market bid price percentage
3 would mitigate price changes?

4 A. Well, reducing the market bid component in
5 that situation would increase the overall blended
6 price. You know, you asked about price changes, but I
7 didn't -- in your question I didn't see anything
8 changing.

9 But, but I will agree that change -- if you
10 reduced the percentage of the blend it would have
11 the -- of the market price under those assumptions it
12 would have the effect of increasing the overall
13 blended price.

14 Q. Do you believe that that result, sir, is
15 consistent with what the legislature intended when
16 allowing for the market rate offer?

17 A. I'm trying to understand your question. The
18 result of lowering the blend in causing a higher
19 percentage, is that what you're -- a higher overall
20 blended price, is that what you're asking me?

21 Q. Right.

22 A. I don't believe they intended that specific
23 outcome, necessarily. Although, you know, within the
24 framework of a 5 to 10-year period that -- you could
25 have a circumstance, I suppose, where that occurred.

1 But nevertheless, you know, the Commission
2 does not appear to be instructed to lower the
3 percentage in such a situation. It's just required to
4 have a -- no more than a certain percentage. So I
5 don't see any instruction or direction to the
6 Commission to lower it below 20 in that circumstance.

7 Q. Do you bel -- is your opinion, Mr. Higgins,
8 that the Ohio Commission has the discretion to adjust
9 the blending percentages when doing so would provide a
10 benefit to electric generation consumers in the form
11 of reduced generation costs?

12 A. Yes, consistent with the provisions of
13 Division D of the portion of the revised code that we
14 were talking about, which sets guidance as to the
15 percentages that are allowed.

16 Q. So in that regard, sir, it's your opinion
17 that the Commission in the first five years of the
18 market rate offer can adjust the percentages, but no
19 more than 10 percent in year one, 20 percent in year
20 two, 30 percent in year three, 40 percent in year
21 four, and 50 percent in year five, correct?

22 A. Yes, with the exception of year one, where I
23 don't believe there appears to be any discretion.

24 Q. Okay, that's fair. Mr. Higgins, what is your
25 definition of a robust competitive market for electric

1 generation service?

2 A. I would consider a market to be robust if
3 there was not any undue ability for participants to
4 exercise market power in, in that market. And, you
5 know, of course there are, there's a lot of discussion
6 in the literature and in, you know, in the regulatory
7 world about what would constitute market power. Or
8 what tests are necessary to pass market power tests.

9 But -- or pass muster for a robust market.
10 But in general it's when you do not have any undo
11 market power by the participants who are selling into
12 that market.

13 Q. Does a robust competitive market correspond
14 to a particular level of customers being served by
15 alternative suppliers?

16 A. I believe that would be a factor. But also a
17 factor is the number of suppliers and their relative
18 concentration of the sales volume.

19 Q. Okay. Do you know how many certified retail
20 electric service providers are serving customers in
21 Duke Energy Ohio's service territory?

22 A. I don't -- I do not know the count of the
23 different providers.

24 Q. You are aware, sir, of the percentage of Duke
25 Energy Ohio's load that has selected alternative

1 generation suppliers, correct?

2 A. Yes, I am.

3 Q. Do you have an opinion, sir, as to whether
4 Duke Energy Ohio's service territory represents a
5 robust and competitive market for electric generation
6 service?

7 A. In my opinion the jury is still out on that.
8 There is certainly -- there has certainly been an
9 opportunity for customers to take alternative service
10 other than the ESP product offered by Duke Energy
11 Ohio.

12 But it's not clear to me, based on the market
13 concentration in that market, whether or not it would
14 qualify to be considered robust, or robust over the
15 long term.

16 Q. Can you help me understand how much more of
17 Duke Energy Ohio's load would need to switch to
18 competitive suppliers before competition would be
19 deemed robust in its territory?

20 A. Well, it's not so much a matter of the
21 percentage that have switched, but for example in an
22 evaluation of market power one would look at the fact
23 that 60 percent of the switched customer load appears
24 to be being served by Duke's affiliate company, Duke
25 Energy Retail Sales.

1 And in most evaluations of electric power
2 market structure, a 60 percent concentration would be
3 considered pretty high for one seller. It could give
4 rise to concerns about market power. So that's not --
5 that does not mean to say that customers have not had
6 the opportunity to save money by switching. Obviously
7 that is the case.

8 And so there is a market they can go to. But
9 whether or not that market is providing pricing that
10 would be considered robust or sustainable over the
11 long term, again, would be an open question. I
12 haven't concluded that it's not. But I certainly
13 wouldn't be prepared to say that a market where
14 60 percent of the, of the market share is in the hands
15 of one company is necessarily robust.

16 Q. Do the -- to your knowledge, sir, do the
17 Kroger facilities located in Duke Energy Ohio's
18 service territory take electric generation service
19 from entities other than Duke Energy Ohio?

20 A. Yes, they do.

21 Q. Do you know if any of the contracts between
22 those certified retail electric service providers and
23 the Kroger facilities taking service from them in Duke
24 Energy Ohio's territory include a demand component?

25 A. I have not seen the contracts.

1 Q. Do you know, Mr. Higgins, whether any
2 certified retail electric service provider active in
3 Duke Energy Ohio's service territory, do you know of
4 any such provider that includes demand charges as part
5 of their offer?

6 A. I'm not specifically aware of that. Although
7 I am somewhat aware that arrangements between the
8 CRE -- a CRES provider and a customer sometimes takes
9 the form of a differential relative to the ESP price.

10 And it would seem to me that implicit in that
11 then is that, to the extent there is such an
12 arrangement in place, that there would -- while there
13 may not be an explicit demand charge in the contract,
14 being tied to a differential off of the ESP price then
15 certainly the price involved would have been derived
16 from demand charges. Since demand charges are part of
17 the ESP price.

18 Q. Are you -- aside from the pricing that you
19 just described, sir, the differential to the ESP
20 price, do you know whether these CRES, C-R-E-S,
21 providers use fixed kilowatt hour charges in their
22 offers to commercial and industrial customers?

23 A. I'm not specifically aware.

24 Q. So you can't deny that those CRES providers
25 would, in fact, use such an offer based on fixed

1 kilowatt hour charges?

2 A. I --

3 MR. YURICK: Objection, asked and answered.
4 But you can go ahead and answer again.

5 THE WITNESS: I have not seen any of the
6 contracts and so I can't deny what you just said.

7 Q. (By Ms. Spiller) I'm sorry, sir. Because
8 you haven't seen any of the contracts you do not know
9 whether any CRES providers use fixed kilowatt hour
10 charges for purposes of developing offers to their
11 customers?

12 A. That's correct.

13 Q. Okay. Would that be true with regard to any
14 Kroger facilities that may be -- that exist that may
15 be operating in other service territories within Ohio
16 as well?

17 A. I, I've not seen the Kroger contracts in
18 other service areas in Ohio.

19 Q. Okay. Mr. Higgins, do you agree that the
20 market rate offer is to be established through a
21 competitive bidding process?

22 A. Yes.

23 Q. And that competitive bidding process, sir,
24 will yield market-based rates, correct?

25 A. Yes.

1 Q. And market-based rates do not incorporate
2 demand charges, do they?

3 A. Not -- well, actually they can. Certainly
4 through the structure that Duke has proposed they,
5 they would not, because the requirements of the
6 proposed bidding arrangement that the Company has
7 filed preclude a demand charge bid.

8 So by design, by definition, this market rate
9 offer would not include a demand charge. But
10 certainly there are demand charges in the market.

11 Q. With regard to the rate design proposal that
12 reflects -- or described in your testimony, Duke
13 Energy Ohio would be taking the per-kilowatt-hour rate
14 from suppliers and then converting that to another
15 rate when charging customers, correct?

16 A. Yes.

17 Q. And in that circumstance, Mr. Higgins, Duke
18 Energy Ohio would be collecting one rate from its
19 customers and yet paying suppliers a different rate,
20 correct?

21 A. Yes.

22 Q. And sir, in that circumstance some sort of
23 supplier cost reconciliation rider would be necessary
24 to ensure that what is charged by suppliers aligns
25 with that which is paid by customers, correct?

1 A. I believe that, you know, such a vehicle can
2 accomplish that, yes.

3 Q. Do you believe that such a vehicle should
4 accomplish that?

5 A. I believe it's not unreasonable for such a
6 vehicle to accomplish that. You know, I believe that,
7 you know, depending on the circumstances such a
8 vehicle may or may not be necessary. I didn't testify
9 about such a vehicle, but I don't find one to be
10 unreasonable.

11 Q. Okay. Under the market rate offer as
12 proposed by Duke Energy Ohio and the rate design
13 described in its filing, distribution charges would
14 still have a demand component, correct?

15 A. Yes.

16 Q. To your knowledge, sir, is The Kroger Company
17 averse to hourly pricing?

18 A. No.

19 Q. Mr. Higgins, your proposal as reflected in
20 your testimony, your proposal concerns demand charges
21 with an energy-based kilowatt hour credit, correct?

22 A. Your phone cut out briefly during your
23 question, so could you please ask that again?

24 Q. Okay. I'm sorry, I'll restart it. I'd like
25 to ask you about your proposal of demand charges with

1 an energy-based kilowatt hour credit.

2 A. Yes, uh-huh.

3 Q. Would you agree with me, Mr. Higgins, that
4 under this proposal -- this proposal would unjustly
5 reward high-load-factor customers in the same way that
6 you claim capacity-related charges unjustly charge
7 them?

8 A. No, I don't agree with that.

9 Q. And why not, sir?

10 A. Because under my proposal -- this is my
11 alternative proposal -- there would, there would be an
12 alignment between the demand charges that are
13 currently reflected in Duke's rates as a proxy for
14 going forward capacity costs, which Duke clearly
15 recognizes are included as part of the bid.

16 The suppliers to -- the winning suppliers
17 from the bidding process are obligated to bring
18 capacity to the table to -- as part of their product.
19 And so they will clearly be embedding the capacity
20 cost in their energy bid.

21 And my proposal is simply an attempt to
22 reflect capacity costs in the retail price, knowing
23 that capacity costs are embedded in the wholesale bid.
24 And I offer an alternative that simply lines up with
25 the current Duke weighting of capacity costs in its

1 generation rate.

2 I don't think there's anything unjust about
3 that at all. I think it's reasonable.

4 Q. Mr. Higgins, I would ask you, do you have
5 your deposi -- or your testimony still readily
6 available to refer to page 13, please?

7 A. Yes. Yes.

8 Q. Line 11, sir? Could you describe for
9 me -- or I guess my question is, what is the windfall
10 benefit that the lower-load-factor customers would
11 receive under Duke Energy Ohio's rate design as
12 proposed?

13 A. Well, if you look at Table KCH-1 you can see
14 an illustration of that windfall benefit? Table KCH-1
15 shows, on a revenue-neutral basis -- that is,
16 abstracting away from any changes in the overall level
17 of generation costs -- what the rate impacts are from
18 the Company's proposed rate design in the Company's
19 proposed year three.

20 So you can see, for example, for a DP
21 customer with a load factor of 30 percent, that
22 customer would see a rate reduction of about 16 and-a-
23 half percent solely through the change that Duke is
24 proposing in eliminating generation-related demand
25 charges and pricing the bid component strictly on a

1 kilowatt hour basis. Even though the bid component
2 includes a capacity product.

3 In my view this creates a windfall benefit
4 for the low-load-factor customers, as illustrated in
5 the table.

6 Q. With regard to your table, sir, that appears
7 on page 14 of your testimony, what was the source on
8 which you relied in identifying a 30 percent load
9 factor for Duke Energy Ohio's customers on rates TS?

10 A. The -- it was simply for consistency across
11 the different categories. There may not be a
12 30 percent load factor on Schedule TS, but if there
13 were, this would be the rate that would be shown from
14 it.

15 In my testimony, of course, I did not refer
16 to a 30 percent load factor customer on TS. But for
17 consistency across the table I showed all the
18 available -- all the categories that were there.

19 Q. Are you aware, Mr. Higgins, of any Duke
20 Energy Ohio customers on rate TS having a 30 percent
21 load factor?

22 A. As I said, I'm not.

23 Q. Okay. Are you aware, Mr. Higgins, of any
24 Duke Energy Ohio customers on rate D, as in "David,"
25 S, having an 80 percent load factor?

1 A. I'm not specifically aware of any.

2 Q. So for purposes of developing this table,
3 with specific reference to the 80 percent load factor
4 for rate DS, was that simply, as you just described,
5 to compare each of these load factors and each of
6 these rate schedules?

7 A. It was to provide a consistent set of
8 benchmarks across the rate schedules. It's not
9 implausible for there to be an 80 percent load factor
10 customer on DS, although it would be on the high end.
11 You know, the -- for example, grocery stores often run
12 as high as an 80 percent load factor. And so it's not
13 an implausible load factor for a DS customer.

14 Q. In speaking with Mr. George did he share with
15 you the load factor of the Kroger facilities here in
16 Duke Energy Ohio's service territory?

17 A. Mr. George provides me with the data for the
18 Kroger stores. And so I'm generally familiar with the
19 load factors for the Kroger stores.

20 Q. And what is the Kroger stores' load factor
21 here in Duke Energy Ohio's service territory?

22 A. I -- let me reflect on that for a moment.
23 The -- a typical load factor for a Kroger store runs
24 between 65 and 80 percent. I can't say for sure
25 whether that's the load factor in the Duke Energy Ohio

1 service territory, but that's a typical range.

2 Q. And on what rate schedule are the Kroger
3 stores here in Duke Energy Ohio's service territory?

4 A. In -- for the most part they're on DP.

5 Q. Continuing, sir, on page 14 of your
6 testimony, lines 8 and 9. You state there that the
7 rate impacts reflected in the table KCH-1 are
8 calculated for total SSO rates, correct?

9 A. Yes.

10 Q. You conclude on line 9 that the rate impact
11 for the generation component is considerably larger,
12 correct?

13 A. Yes.

14 Q. Mr. Higgins, does this mean that for purposes
15 of your analysis as summarized on Table KCH-1 that you
16 used an all-in rate that included generation,
17 transmission, and distribution?

18 A. Yes. That's what was in the Company's work
19 papers.

20 Q. Okay. Sir, if we may turn to page 18 of your
21 deposition? Line 14, please?

22 A. Of my -- 18 of my testimony?

23 Q. I'm sorry, of your testimony, yes, sir.

24 A. And page 18, did you say?

25 Q. Page 18, line 14, please?

1 A. Okay.

2 Q. You reference there a rider implemented by
3 the FirstEnergy companies, correct?

4 A. Yes.

5 Q. And that rider is GT, correct?

6 A. Well, actually it was, it was for rate
7 schedule -- it was applicable to rate schedule GT.

8 Q. Okay.

9 A. The rider was included as a part of what I
10 believe was rider EDR, which was the economic
11 development rider that FirstEnergy had.

12 Q. Okay. And that was a rider that was approved
13 under a case filed by the FirstEnergy Distribution
14 Utilities as Case No. 08935, correct?

15 A. Yes.

16 Q. Do you know, sir, whether that rider is still
17 in existence?

18 A. To my knowledge, it is not.

19 Let me clarify that. I really should say I
20 don't know.

21 Q. Okay. Do you have an opinion, Mr. Higgins,
22 as to whether the structure of Duke Energy Ohio's
23 rates for commercial (inaudible) industrial customers
24 is appropriate?

25 A. You know, there was some background noise

1 during your question. I think you asked me if I have
2 an opinion of whether the Company's ESP rate design is
3 appropriate?

4 Q. The rate structure for our commercial and
5 industrial customers.

6 A. In my opinion the, the rate structure, the
7 rate design is an appropriate rate design.

8 MS. SPILLER: Thank you. To continue along,
9 we will -- we are -- Mr. Higgins, we are -- I have no
10 further questions at this time. Would certainly offer
11 the opportunity for questioning from other counsel on
12 the phone.

13 And I don't want to put anyone on the spot
14 but I think, you know, we can just start with the list
15 of attendees as they called in. And Rick, I think you
16 were first that I heard join the call this morning.

17 MR. REESE: I have no questions.

18 MS. SPILLER: Doug, do you have any questions
19 for the witness?

20 MR. HART: Nope.

21 MS. SPILLER: David or Mark?

22 MR. KUTIK: This is David Kutik. Yes, I do
23 have questions for the witness.

24 ***

25 ***

EXAMINATION

BY MR. KUTIK:

Q. Mr. Higgins, you indicated that you're not a lawyer, correct?

A. Correct.

Q. I'm sorry, I did not hear you.

A. Correct.

Q. And can you tell me what, in your qualifications or experience, provides you with the expertise to provide an interpretation of a statute for the Commission?

MR. YURICK: Other than his understanding of English?

THE WITNESS: Well, my testimony -- in my testimony I do not attempt to draw any legal opinions. I, I have been involved in the formulation of energy policy, either on behalf of the State government or as a party to proceedings for about 27 years.

And so it's -- I'm attempting to comment on what the language appears to say and what the policy implications of that language is.

Q. (By Mr. Kutik) Would you agree with me that to discern what the policy is of a statute one has to interpret the statute?

MR. YURICK: Objection, he already answered

1 the question.

2 MR. KUTIK: No, he didn't. No, he didn't.
3 And stop coaching him.

4 MR. YURICK: Yeah, he did. Yeah, he did.

5 MR. KUTIK: He did not.

6 MR. YURICK: You can, you can go ahead and
7 answer it again, Kevin.

8 THE WITNESS: I've -- one has to, one has to
9 bring your judgment and experience to bear in reading
10 the language and inferring what the policy is from it.

11 Q. (By Mr. Kutik) All right. But one has to
12 interpret the statute, in part, to determine what the
13 policy underlying the statute is. Fair to say?

14 A. Well, yeah, you have to interpret the
15 language.

16 Q. Okay. Now, did you have any involvement in
17 the development of SB-221?

18 A. I did not.

19 Q. Did you have any involvement in the
20 development of a statute called "SB-3"?

21 A. I did not.

22 Q. Did you review any legislative history with
23 respect to SB-221?

24 A. I don't believe I had.

25 Q. Would your answer be the same for SB-3?

1 A. Probably. Although SB-3 goes back to 2000,
2 and I was involved in reviewing a number of the
3 applications that were made by Ohio Utilities pursuant
4 to SB-3. So I don't have any --

5 Q. Again my question is, did you review any
6 statutory history related to SB-3?

7 A. And I'm saying I can't recall whether I had
8 or not back in 2000.

9 Q. Okay. Now, with respect to what you did to
10 prepare for this testimony would it be fair to say
11 that in developing your interpretations of the statute
12 you relied, at least in some part, on what you were
13 advised by counsel?

14 A. In some part. I, I actually, you know, did
15 my own reading and discussed the issues with counsel.

16 Q. I'm sorry? Could you repeat what you said?

17 A. Sure. I did my own reading and research and
18 discussed the issues with counsel.

19 Q. Okay. Would it be fair to say, then, that
20 your interpretation of the statute was confirmed to
21 you by counsel?

22 MR. YURICK: Objection. You don't answer
23 that, that's privileged.

24 Q. (By Mr. Kutik) Can you answer that, sir?

25 MR. YURICK: No, he can't.

1 Don't answer it.

2 MR. KUTIK: Okay.

3 Q. (By Mr. Kutik) Can you explain to me, sir,
4 what role the interpretation of counsel played in your
5 interpretation and testimony in this case?

6 MR. YURICK: Same objection, but you can
7 answer it if you can without disclosing any
8 conversations that you and I have had.

9 THE WITNESS: Well, that's in -- that's a bit
10 of a challenge to do.

11 MR. YURICK: Well, if you can't do it, don't
12 do it.

13 THE WITNESS: I can say that I, I haven't
14 provided any testimony that, to my knowledge, is
15 contradicted by anything counsel has discussed with
16 me.

17 Q. (By Mr. Kutik) That's not my question. My
18 question is, can you describe for me what role the
19 interpretation of counsel played in developing your
20 testimony?

21 MR. YURICK: There's, there's an objection.
22 And I think you can answer it to the extent that you
23 don't disclose any conversation that has passed
24 between you and I.

25 THE WITNESS: It -- I would say that, that

1 counsel did not really play much of a role, if any, in
2 developing my testimony.

3 Q. (By Mr. Kutik) Okay. Did it play much of a
4 role in developing your thinking as to what the
5 interpretation of the statute was?

6 MR. YURICK: Objection. You can go ahead and
7 answer. Same, same thing. If you can answer the
8 question without divulging conversations between you
9 and I, you can answer it.

10 THE WITNESS: The answer is no.

11 Q. (By Mr. Kutik) So you can't tell me what
12 role counsel -- counsel's interpretation played in
13 your -- the development of your interpretation --

14 A. I'm not -- I didn't hear that to be your
15 question.

16 Q. All right. Can you tell me what role the
17 interpretation of counsel played in your
18 interpretation of the statute?

19 MR. YURICK: Objection. You can go ahead and
20 answer to the extent that it doesn't involve
21 disclosing conversations that you and I have had.

22 THE WITNESS: I would say that strictly
23 speaking, the answer is none.

24 Q. (By Mr. Kutik) Okay. So you developed your
25 interpretation of the statute independent of anything

1 that your counsel told you. Fair to say?

2 A. I would say that's, that's fair to say. You
3 know, you're asking me to parse my thought process
4 separate and apart from any actual conversations I may
5 have had. But I would say that it's -- in my view
6 the -- I arrived at my own conclusions.

7 Q. Okay. Now, for this case did you prepare any
8 study or analysis of wholesale power prices in the
9 P -- in PJM?

10 A. No.

11 Q. Did you prepare any study or analysis of
12 wholesale prices within MISO?

13 A. No.

14 Q. For purposes of this case did you review any
15 study or analysis of wholesale power prices in PJM?

16 A. Not for purposes of this study, no. Not for
17 purposes of this testimony.

18 Q. Have you seen such studies or analysis?

19 A. Over the years I have, yes, uh-huh.

20 Q. Okay. Would your answers be the same with
21 respect to wholesale prices in MISO?

22 A. Yes.

23 Q. In other words you haven't seen them for
24 purposes of this case, but you've seen them generally
25 over the years?

1 A. Yes.

2 Q. Have you reviewed the testimony submitted by
3 Duke of Mr. Rose in this case?

4 A. You know, the answer is no. I attempted to,
5 but the file was corrupt. So --

6 Q. I'm sorry, could you state that again? You
7 said -- the transmission here was corrupt.

8 A. Okay. The -- I attempted to review
9 Mr. Rose's testimony, but the file was corrupt and I
10 couldn't access it. And I, I didn't, I didn't feel it
11 was necessary for purposes of my testimony, but I did
12 not have an opportunity to read his testimony.

13 Q. All right. So the answer to my question is
14 that you have not reviewed Mr. Rose's testimony?

15 A. Correct.

16 Q. So would it be fair to say at the present
17 time you have no basis to dispute Mr. Rose's
18 testimony?

19 A. That is correct.

20 MR. YURICK: Objection. You can go ahead and
21 answer.

22 THE WITNESS: That is correct.

23 Q. (By Mr. Kutik) Have you done or seen any
24 study of Duke's riders or cost recovery mechanisms for
25 the recovery of fuel costs?

1 A. Well, I mean, I'm generally familiar with
2 them.

3 Q. Okay. And so you reviewed those riders and
4 the level of those riders?

5 A. I'm familiar with the, for example the, the
6 pattern. The fact that the recovery has been somewhat
7 volatile.

8 Q. Okay. Are you familiar enough to know what
9 the level of those riders is?

10 A. I, I do not recall at this moment.

11 Q. Okay. Have you reviewed the riders for the
12 cost recovery mechanisms relating to recovering costs
13 for purchased power, again for Duke?

14 A. Not, not to my, you know, recent
15 recollection. I mean, I say that because it's, you
16 know, from time to time I will review the various rate
17 impacts on Kroger from -- for different utilities, and
18 so that would include all the various riders.

19 But I haven't -- I don't recall specifically
20 looking at the purchased power rider in preparing for
21 this case, for example.

22 Q. Okay. So since you can't recall it, you
23 couldn't provide any description of the variability of
24 the -- that rider or the level of that rider?

25 A. No.

1 Q. What I said was correct?

2 A. Yes.

3 Q. Okay. Have you reviewed any rider that Duke
4 has or any cost recovery mechanism for the recovery of
5 costs relating to supply and demand resource portfolio
6 compliance?

7 A. Not, not specifically in preparing for this
8 case.

9 Q. Would it be fair to say that you could not
10 comment on the variability or level of such riders or
11 cost recovery mechanisms?

12 A. No.

13 Q. It would be fair to say that?

14 A. Yes.

15 Q. And have you reviewed Duke's riders or cost
16 recovery mechanisms, with respect to the recovery of
17 environmental costs, sufficient to be able to tell me
18 what the variability of that rider or cost recovery
19 mechanism is?

20 A. No.

21 Q. Is it your understanding in this case that
22 Duke is proposing to transfer some of its generation
23 assets to an affiliate?

24 A. Yes.

25 Q. Is that transfer an issue that is up for the

1 Commission's approval in this case, to your
2 understanding?

3 A. To my understanding, it is not.

4 Q. I want to refer you to the language of Ohio
5 Revised Code 4928.142(E), as in "Edward," which part
6 of which appears on page 7 of your prepared testimony.

7 A. Okay.

8 Q. Are you there, sir? Are you there, sir?

9 A. Yes.

10 Q. On line 17 of your -- of that page of your
11 testimony there is a phrase "notwithstanding any other
12 requirement of this section." Do you see that?

13 A. Yes.

14 Q. What does that mean?

15 A. It means it's not contingent on any other
16 section or any other division in the --

17 Q. So that -- so when it talks about any other
18 requirements of this section --

19 A. Uh-huh.

20 Q. -- that would include Division D, as in
21 "David"?

22 A. Yes.

23 Q. In the same Division of Section 142 -- excuse
24 me, Section 4928.142 there is a phrase starting on
25 line 18 of your testimony which discusses:

1 "...to mitigate any effect of an
2 abrupt change -- abrupt or significant
3 change in the electric distribution
4 utility's standard service offer
5 price...."

6 Do you see that?

7 A. Yes.

8 Q. What does "any" mean in that phrase?

9 MR. YURICK: Objection (inaudible.)

10 THE REPORTER: I'm sorry?

11 MR. YURICK: I said objection, but he can
12 answer.

13 THE WITNESS: Well, "any" typically means --
14 or in that phrase would refer to an effect that would,
15 um. From -- it would be an effect from any possible
16 change. I guess I'm using the word in the definition.
17 It's kind of a tough word to define since it's so
18 basic, but.

19 Q. (By Mr. Kutik) Well --

20 A. Not, you know, I guess "any" would mean, you
21 know, not precluding other -- not, not precluding
22 anything so, so long as it comports to the, the
23 requirements in the rest of the sentence.

24 Q. Okay. Well, would you agree with me that
25 "any" there could include all effects of an abrupt or

1 significant change?

2 A. Potentially, yes, uh-huh.

3 Q. That wouldn't be unreasonable to read it that
4 way, correct?

5 A. I would say probably not.

6 Q. That it probably would not be unreasonable?

7 A. Correct.

8 Q. Okay. Do you read this phrase -- well, let
9 me just -- let me back up.

10 With respect to what you have quoted here as
11 part of Section 4928.142(E) on page 7 of your
12 testimony, do you believe that that was written in
13 part to protect the Company?

14 A. No, I think it was written to protect, to
15 protect customers.

16 Q. Okay. So that's the sole basis of the change
17 that should be mitigated, would be for the protection
18 of customers?

19 A. Yes.

20 Q. Now, I want to talk with you about the phrase
21 "Beginning in the second year" in Division (D) of
22 Section 4928.142(E.) Do you read that to mean that
23 the Commission could only begin to consider potential
24 changes to the proportions outlined in Division (D)
25 starting the second year? In other words, they can

1 only start their consideration in the second year?

2 A. Well, it, it specifically says that beginning
3 in the second year is when they can take action.
4 The -- so I suppose it would be a matter of
5 interpretation to say whether they could consider it
6 prior to the, prior to the period they can take
7 action.

8 Q. So one possible interpretation of this
9 statute, and particularly phrase, might mean that the
10 Commission could consider a change before the
11 beginning of the second year, but you could only
12 effect that change sometime after the beginning of the
13 second year?

14 A. Potentially, yes.

15 Q. Now, in your testimony you provide some
16 commentary about your view as to what the phrase "not
17 more than" modifies in Division (D) of
18 Section 4928.142, correct?

19 A. Yes.

20 Q. And you have -- or you quote part of that
21 division on page 9 of your testimony at line 8,
22 correct?

23 A. Yes.

24 Q. Would you agree with me that if the general
25 assembly wanted to be clear or clearer in adopting

1 your view of what "not more than" modifies, the
2 general assembly would have included the word "and,"
3 a-n-d, before the phrase "not more than"?

4 A. I'm thinking. I would agree that if they had
5 inserted the word "and" before that it would
6 potentially provide more clarity.

7 Q. Okay. Now, you believe that -- and I'm now
8 referring to page 8 of your testimony -- that there is
9 an underlying public policy of gradual transformation
10 to market pricing for SSO generation service, correct?

11 A. Yes.

12 Q. And would you, would you agree with me that
13 your basis for believing that the general assembly has
14 articulated that public policy is in Section -- or
15 Revised Code Section 4928.142(E) and (D)?

16 A. Yes.

17 Q. You also say there is a goal of conservative
18 migration to full MRO pricing, correct?

19 A. Yes.

20 Q. And would you -- is it your testimony or your
21 belief that that goal has been expressed --

22 SPEAKER UNKNOWN: Now entering.

23 Q. (By Mr. Kutik) -- by the general assembly --

24 MS. TURKENTON: Tammy Turkenton.

25 Q. (By Mr. Kutik) -- by the general assembly in

1 Section 140 -- 1 -- Section 4928.142(D) and (E)?

2 A. I believe it's embodied in that, yes.

3 Q. Okay. Well, with respect to those -- the two
4 goals that -- or the two policies that you've
5 articulated that we've just talked about in the last
6 few questions, can you point me to any other statute
7 in Ohio that embodies either of those policies?

8 A. Not off the top of my head.

9 Q. Do you believe that there are such statutes?

10 MR. YURICK: Objection. Go ahead and answer
11 if you can.

12 THE WITNESS: Well, you know, it wouldn't
13 surprise me if there were, in that, that that would
14 show consistency with the two divisions we just
15 discussed.

16 Q. (By Mr. Kutik) All right. But I guess what
17 I'm saying is you say you can't recall anything off
18 the top of your head. My question to you is, do you
19 believe that there are other statutes which support
20 the embodiment or the articulation of either of those
21 policies?

22 A. I'm not specifically aware of any.

23 Q. Now, when we're talking about conservative
24 migration can you define that for us, please?

25 A. Yes. By "conservative migration" I mean one

1 that takes account of potential unintended
2 consequences from moving too quickly to something.
3 And so by a conservative migration it is designed to
4 be gradual, and to move within certain defined
5 parameters that ensure that small steps are taken to
6 getting to the final goal.

7 Q. Well, would you believe -- or would you think
8 that a conservative migration would be an increase in
9 the market-rate-based component of the SSO price that
10 is no greater than 10 percent on an annual basis?
11 Would that be your definition of what "conservative
12 migration" means?

13 A. Well, I, I don't have a specific number such
14 as that, but I don't know that a number like that
15 would be unreasonable.

16 Q. Okay. Well, would you think that a
17 50 percent increase in the market-based component of
18 the SSO price would constitute conservative migration?

19 A. I don't think it would, no. Well, let me,
20 and let me go back to your prior question, if I may?
21 I think I misunderstood your question. I thought you
22 were asking about the price change itself.

23 But if you were asking me about the, the
24 change in the proportion of the market-based component
25 then I do believe that, you know, moving 10 percent at

1 a time would constitute a conservative migration.

2 Q. I'm sorry, I didn't hear the last portion of
3 your answer. So could either the Court reporter --
4 well let me just have the court reporter read it,
5 please.

6 THE REPORTER: One moment.

7 MR. KUTIK: (Inaudible.)

8 THE REPORTER: What?

9 MR. KUTIK: Could I -- could we have the
10 court reporter read the entire answer. And when you
11 read it could you come close to the phone? Because
12 I'm really having trouble hearing the witness.

13 THE REPORTER: Okay.

14 (The previous answer was read back as
15 follows:

16 "I don't think it would, no. Well,
17 let me go back to your prior question,
18 if I may? I think I misunderstood your
19 question. I thought you were asking
20 about the price change itself.

21 "But if you were asking me about the
22 change in the proportion of the
23 market-based component then I do believe
24 that, you know, moving 10 percent at a
25 time would constitute a conservative

1 migration.")

2 Q. (By Mr. Kutik) So Mr. Higgins, would an
3 increase that is greater than 10 percent in the
4 market -- in the allocation or proportion of market --
5 of the market-based component of the SSO price be
6 inconsistent with conservative migration as you've
7 defined that term?

8 A. There could be circumstances when an increase
9 of 10 percent -- more than 10 percent was warranted.
10 I think it would, you know, depend on what assessment
11 the Commission makes of the, of the market in Ohio.
12 Or in -- specifically in Duke's Energy Ohio's service
13 territory.

14 I think that the 10 percent number at least
15 for the first five years provides some guidance as to
16 what a, a conservative migration would look like. But
17 it wouldn't preclude in any particular year making it
18 more than 10 percent.

19 Q. Well, again, would you believe that an
20 increase in the component -- the market-based
21 component that is greater than 10 percent on an annual
22 basis would be inconsistent with conservative
23 migration?

24 A. Not necessarily.

25 Q. Now, you've talked on page 9 of your

1 testimony -- oh, excuse me, on page 12 of your
2 testimony about -- and I'm particularly looking now at
3 line 9, about:

4 "Allowing the full blending period
5 to occur will allow the Commission to
6 monitor this retail market development."

7 Do you see that?

8 A. Yes.

9 Q. So one of -- is it your opinion that one of
10 the things that the Commission needs to take into
11 account is the retail market development in the Duke
12 Energy Ohio service territory?

13 A. I believe that it would be a reasonable
14 factor for them to take into account, yes.

15 Q. All right. And would it be fair to say that
16 you have done no market analysis with respect to that
17 retail market in terms of determining how competitive
18 that market is?

19 A. I haven't done any in-depth analysis.
20 I've -- I'm familiar with the market share, for
21 example, that Duke Energy Retail Sales apparently has.
22 And it is on the high side when it comes to
23 assessments of potential market power. How --

24 Q. But did I understand your prior testimony in
25 response to Ms. Spiller's question --

1 A. Yes.

2 Q. -- that you are not prepared to say at this
3 time whether the retail market in the Duke Energy Ohio
4 service territory is competitive or not?

5 A. That is -- that's correct, yes. Or whether
6 it would pass the test of robustness is what I believe
7 I said.

8 Q. All right.

9 A. And I -- and that's true.

10 Q. And would it also be in terms of whether the
11 market is a competitive market? In other words,
12 you're not prepared to make a determination at this
13 time as to whether it is or not?

14 A. Correct. I mean, when I say -- when we say
15 "competitive market" we mean a -- I think implicit in
16 that is a robust competitive market. I would
17 certainly agree that there are opportunities or --
18 apparently ample opportunities for customers to shop
19 from a CRES supplier.

20 However, whether or not the market would
21 constitute a robust competitive market is an open
22 question. In my mind.

23 Q. Let me refer you to page 11 of your
24 testimony. And the sentence that begins on line 17,
25 where you say:

1 "In such a scenario, it is
2 particularly important for customers to
3 be able to access a robust competitive
4 market themselves; to that end, the
5 blending period is important to ensure
6 that such a robust market materializes."

7 Now, the market that you're referring to
8 there is what?

9 A. It's the retail competitive market.

10 Q. Did you say it could be, or it is?

11 A. It is the retail competitive market. That I
12 am referring to in my testimony.

13 Q. And is it, is it your testimony that whether
14 a -- this market in Duke's territory is robust is a
15 question that includes an analysis of the presence or
16 absence of market power?

17 A. Ultimately I believe the answer to that is
18 yes.

19 Q. And you have not done that analysis, correct?

20 A. I have not done that analysis beyond the
21 commentary that I have offered.

22 Q. Why is it important for customers to have
23 access to a robust competitive market?

24 A. Well, it, it appears to me to be consistent
25 with the general thrust of a policy in which prices

1 would be set through a market process. And so to me
2 it seems to be a, an important component of the
3 overall policy that is established with a market rate
4 offer.

5 That there's a, an option that the electric
6 distribution company offers, but that customers also
7 have the ability to access the market themselves. It
8 appears to be part of a -- both appear to be
9 components of the overall policy goal in mind with
10 this legislation.

11 Q. Do customers benefit if they have access to a
12 robust competitive market?

13 A. Yes.

14 Q. Do you have any reason to believe that Duke
15 is exercising market power in its service territory
16 with respect to the retail market?

17 A. I have -- I do not have any -- I don't -- I
18 do not have an opinion on that at this point.

19 Q. All right. Do you have any reason to believe
20 that any supplier or entity at all is exercising
21 market power in Duke's service territory with regard
22 to the retail market?

23 A. I, I do not have an opinion about that.

24 Q. You -- in answer to Ms. Spiller's questions
25 you indicated that you were familiar with the

1 circumstances under which Kroger takes generation
2 service in Duke's territory, correct?

3 A. Yes.

4 Q. And is it the case that Duke -- that, excuse
5 me, that Kroger is receiving all of its generation
6 service from CRES suppliers? Or providers?

7 A. To my knowledge. I, I don't know about all.
8 But certainly I do -- I am aware that Kroger is
9 purchasing a substantial amount, if not all of its
10 power in that service territory, from a CRES supplier.

11 Q. Do you know whether Kroger is receiving
12 generation service from more than one CRES provider in
13 Duke's territory?

14 A. To my knowledge, they are not.

15 Q. Do you know who that provider is?

16 A. Yes.

17 Q. Who is it?

18 A. Duke Energy Retail Sales.

19 Q. Do you know the term or length of any of the
20 contracts that Kroger has for that service with Duke
21 Retail?

22 A. I believe they extend until the end of 2011.

23 MR. KUTIK: Let me have one moment, please.

24 (Pause.)

25 MR. KUTIK: I have no further questions at

1 this time. Thank you, Mr. Higgins.

2 THE WITNESS: Thank you.

3 MS. SPILLER: Rick, did you have any -- this
4 is Amy Spiller. Rick, did you have any questions?

5 MR. CHAMBERLAIN: No, I don't.

6 MS. SPILLER: Steve, certainly wanted to
7 extend the opportunity to you as well. Any questions?

8 MR. BEELER: No questions.

9 MS. SPILLER: And Kelly, for purposes of the
10 record, Tammy Turkenton, also with the Ohio -- Public
11 Utilities Commission of Ohio, joined the deposition
12 while in progress.

13 (A discussion was held off the record.)

14 MS. SPILLER: And I don't have any other
15 questions for the witness.

16 MR. YURICK: We'll need -- this is Mark
17 Yurick. We'll need signature on that.

18 (The deposition was concluded at 11:28 a.m.)

19 (Read and sign was requested by counsel for
20 the witness.)

21

22

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24

25

C E R T I F I C A T E

STATE OF _____ }
COUNTY OF _____ } ss.

I HEREBY CERTIFY that I have read the foregoing testimony consisting of 62 pages, numbered from 5 to 66, inclusive, and the same is a true and correct transcription of said testimony, with the exception of the corrections I have listed below in ink, giving my reasons therefor.

1. Page	_____	Line	_____	Correction	_____
Reason	_____				
2. Page	_____	Line	_____	Correction	_____
Reason	_____				
3. Page	_____	Line	_____	Correction	_____
Reason	_____				
4. Page	_____	Line	_____	Correction	_____
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12. Page	_____	Line	_____	Correction	_____
Reason	_____				

KEVIN HIGGINS

SUBSCRIBED AND SWORN to at _____
this _____ day of _____, 2010.

NOTARY PUBLIC

C E R T I F I C A T E

STATE OF UTAH }
COUNTY OF SALT LAKE } ss.

This is to certify that the deposition of
KEVIN HIGGINS was taken before me, KELLY L. WILBURN, a
Certified Shorthand Reporter and Registered
Professional Reporter in and for the State of Utah, at
the time and place set forth herein;

That the said witness was duly sworn by me to
tell the truth, the whole truth, and nothing but the
truth; that the testimony of said witness was reported
by me in stenotype and thereafter caused by me to be
transcribed into typewriting; that a full, true, and
correct transcription of said testimony is set forth
in the foregoing pages, inclusive, and said witness
deposed and said as in the foregoing annexed
deposition.

I further certify that I am not of kin or
otherwise associated with any of the parties to said
cause of action, and that I am not interested in the
event thereof.

SIGNED ON THIS 26th DAY OF December, 2010.

Kelly L. Wilburn, CSR, RPR
Utah CSR No. 109582-7801

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