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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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

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PROCEEDINGS

before Ms. Jeanne Kingery and Mr. Scott Farkas,
Hearing Examiners, at the Public Utilities Commission
of Ohio, 180 East Broad Street, Room 11-C, Columbus,
Ohio, called at 9:00 a.m. on Wednesday, March 21,
2007.

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VOLUME III

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1 Wednesday Morning Session,
2 March 21, 2007.

3 - - -

4 EXAMINER KINGERY: Good morning.

5 Mr. Small, you may call your witness.

6 MR. COLBERT: Your Honor, before
7 Mr. Small calls Ms. Hixon -- I guess you should
8 probably call Ms. Hixon first, actually.

9 EXAMINER KINGERY: Okay.

10 MR. COLBERT: OCC at this time calls Beth
11 Hixon to the stand.

12 (Witness sworn.)

13 MR. COLBERT: I provided copies to the
14 court reporter, and we would like Ms. Hixon's
15 testimony marked as Remand OCC Exhibit -- Remand
16 Exhibit 2A, and I've also put at the Bench and at
17 counsel's table a set of corrections which OCC would
18 like to have marked as Remand Exhibit 2B.

19 EXAMINER KINGERY: They will be so
20 marked.

21 (EXHIBITS MARKED FOR IDENTIFICATION.)

22 - - -

23
24 BETH E. HIXON

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

3 DIRECT EXAMINATION

4 By Mr. Small

5 Q. Ms. Hixon, would you state your full name
6 and provide your business address for the record?

7 A. My name is Beth E. Hixon. My business
8 address is 10 West Broad Street, Suite 1800,
9 Columbus, Ohio, 43215.

10 Q. Are you the same Beth Hixon whose
11 testimony was filed on March 9, 2007 in these cases?

12 A. Yes.

13 Q. On whose behalf do you appear today?

14 A. On behalf of the Ohio Consumers' Counsel.

15 Q. Do you have your prepared testimony with
16 you on the stand?

17 A. Yes, I do.

18 Q. And that would be the testimony that I
19 just had marked as Exhibit 2A.

20 A. Yes, Exhibit 2A.

21 EXAMINER KINGERY: Just for purposes of
22 clarification, this is the confidential version.

23 MR. COLBERT: Yes, it is the confidential
24 version. It was not filed in that manner but

1 presented in that manner. It is the same one that
2 has been distributed to counsel.

3 Q. Did you have the testimony prepared at
4 your direction?

5 A. Yes, I did.

6 Q. Do you have any changes or corrections to
7 your prepared testimony?

8 A. Yes, I do.

9 Q. Are those shown on Remand Exhibit 2B?

10 A. Yes, they are.

11 Q. Do you have any further additions or
12 corrections other than those shown on Exhibit 2B?

13 A. No, I do not.

14 Q. If I asked you today the same questions
15 found in your prepared testimony as modified by your
16 changes on the stand and shown in Exhibit 2B, would
17 your answers be the same?

18 A. Yes.

19 MR. COLBERT: The OCC moves for admission
20 of OCC Exhibits 2A and 2B and tender the witness for
21 cross-examination.

22 EXAMINER KINGERY: We consider admission
23 generally.

24 Mr. Colbert.

1 MR. COLBERT: Before I start cross, there
2 are a couple of preliminary matters I would ask you
3 to consider. First, it would help to shorten
4 cross-examination if it is clarified that the
5 depositions of Mr. Ficke and Ziolkowski are in the
6 record or whether we need to actually prepare them as
7 an exhibit. My understanding they've been stipulated
8 and are in the record. If that's the case, I don't
9 need to cross-examine Ms. Hixon on the subject matter
10 she raises relative to those.

11 MR. SMALL: As a matter of convenience, I
12 had planned on marking them. I thought this might
13 occur. I did plan on marking them and moving them
14 into evidence after Ms. Hixon's testimony, but under
15 the unusual circumstances, I think it might be
16 convenient if we marked them as exhibits and had them
17 available, and then we could deal with their
18 admission after Ms. Hixon leaves the stand.

19 Or are you saying just admit them?

20 MR. COLBERT: Would just admit them now,
21 and if we did that, I would have no need in
22 cross-examining on them.

23 MR. SMALL: That's fine. We intended to
24 offer them in their entirety and if there are no

1 objections, we would do that.

2 EXAMINER KINGERY: Is that acceptable?

3 MR. COLBERT: That's acceptable.

4 EXAMINER KINGERY: We will mark them as
5 exhibits and admit them if there are no objections.

6 MR. SMALL: I would like to have marked
7 as OCC Remand 7 the transcript of the deposition of
8 Mr. Denis George. Are we doing all three of them?

9 MR. COLBERT: I have no objection to
10 Mr. George's. I only needed Mr. Ziolkowski's and
11 Mr. Ficke.

12 EXAMINER KINGERY: Let's do them all at
13 the same time.

14 MR. COLBERT: That's fine.

15 MR. NEILSEN: Your Honor, IEU has no
16 objection as long as they are subject to the same
17 confidentiality provisions as we discussed on day one
18 with respect to account numbers and names and that
19 sensitive information.

20 EXAMINER KINGERY: Yes. I believe you
21 have redacted the account numbers and names?

22 MR. SMALL: That is correct.

23 EXAMINER KINGERY: It was just numbers;
24 it wasn't names.

1 MR. NEILSEN: Okay.

2 EXAMINER KINGERY: It was just numbers.

3 MR. NEILSEN: Okay. Nonetheless, the
4 portions that are confidential and have been deemed
5 confidential already will remain so as instructed?

6 EXAMINER KINGERY: Yes.

7 MR. SMALL: OCC Exhibit Remand 7 would be
8 the deposition transcript of Mr. George. No. 8 would
9 be the transcript of Mr. Ziolkowski, and 9 would be
10 the transcript of Mr. Ficke.

11 EXAMINER KINGERY: They will be so
12 marked.

13 (EXHIBITS MARKED FOR IDENTIFICATION.)

14 MR. SMALL: If you would like, I know it
15 is not regular practice, I understand they will be
16 moved into the record. Maybe I should move them, and
17 it would take care of Mr. Colbert's problem.

18 EXAMINER KINGERY: Since there will not
19 be cross-examination on them, that's fine.

20 MR. SMALL: OCC moves into evidence OCC
21 Exhibits 7, 8, and 9.

22 EXAMINER KINGERY: No objections from
23 anyone?

24 (No response.)

1 EXAMINER KINGERY: They will be admitted.

2 MR. COLBERT: Mr. George's subject to the
3 standing objection on relevancy we have.

4 EXAMINER KINGERY: I understand. Thank
5 you.

6 (EXHIBITS ADMITTED INTO EVIDENCE.)

7 MR. COLBERT: Next, your Honor, I have
8 two motions to strike. The first one I am making
9 simply, frankly, for the record with the
10 understanding of your Honors' ruling on relevancy
11 already, but given the importance of Ms. Hixon's
12 testimony, we feel it necessary to specify the pages
13 and portions of the testimony.

14 So based on the company's belief that the
15 following portions of Ms. Hixon's testimony are
16 irrelevant to the proceedings as dealing with
17 contracts not related to DE-Ohio or the MBSSO, we
18 would move to strike Ms. Hixon's testimony from
19 page 3 at line 21 through page 4, line 5; from
20 page 10 at line 11 through page 52 at line 16; from
21 page 53 at line 3 through page 74, line 23 or 22,
22 including all footnotes and attachments.

23 EXAMINER KINGERY: Just so we don't have
24 to go through, this all relates to the side

1 agreements, I assume?

2 MR. COLBERT: It does. I can give you
3 the list if you would like.

4 EXAMINER KINGERY: If it all relates to
5 the side agreements and our continuing issue whether
6 or not those are relevant, we will go ahead and deny
7 your motion as we discussed at the beginning of the
8 hearing.

9 MR. DORTCH: For the record, your Honor,
10 the same objection on behalf of Duke Energy Retail
11 Sales.

12 MR. NEILSEN: Same objection on behalf of
13 IEU.

14 MR. SMALL: Your Honor, I have a little
15 problem of Cinergy Corporation's participation in
16 this part of the proceeding. I understand and might
17 as well get this out of the way because there's a
18 briefing schedule coming. I understand the limited
19 nature of Cinergy Corporation had today with
20 protection of material and having nothing to do with
21 the substance of the proceeding. Now Cinergy
22 Corporation just made an objection having to do with
23 relevance. I don't believe that's within the scope
24 of their participation in these proceedings, and they

1 should not be filing a brief in this case on subject
2 matters either. If they want to file a brief having
3 to do with protection of material, that is something
4 that should be part of a brief. I don't have a
5 problem with that. But Cinergy Corporation has a
6 limited role in this proceeding.

7 EXAMINER KINGERY: Mr. Dortch.

8 MR. DORTCH: Thank you, your Honor. Your
9 Honor, I couldn't agree more that Cinergy
10 Corporation, Duke Energy Retail Sales sought
11 intervention in these proceedings for a limited
12 purpose. With the filing of Ms. Hixon's testimony,
13 however, my clients are -- it's unclear from
14 Ms. Hixon's testimony, since she does not draw
15 conclusions, but it seems that the import of
16 Ms. Hixon's testimony that my clients have done
17 something wrong. We contend that this is not the
18 proceeding in which that issue should be addressed;
19 that there is a complaint process, and that if anyone
20 wants to pursue that thought, those allegations, that
21 is the proper process to bring that matter to the
22 Commission's attention.

23 Nonetheless, given the fact that her
24 testimony has been admitted over our objection, given

1 the fact that my clients are -- at least the
2 suggestion exists that my clients have engaged in
3 wrongdoing here, I will ask the court to permit a
4 broader basis for the purpose my intervention at this
5 point in time.

6 EXAMINER KINGERY: Mr. Small.

7 MR. SMALL: The subject matter that I
8 brought up we heard an objection as to relevance.
9 Relevance has nothing to do with protection of the
10 material. I argued this at the time of the
11 intervention; that the companies, both DERS -- we
12 don't have DERS making a motion, but both DERS and
13 Cinergy Corporation stated in their original motions
14 in intervention they were coming in for a limited
15 purpose. Whether they do, they immediately submitted
16 a motion in limine in order to cut out the testimony
17 of OCC. That is not limited intervention. It is
18 interfering in the substance of the proceeding. The
19 Attorney Examiners subsequently ruled they would have
20 limited participation. This is not limited
21 participation.

22 EXAMINER KINGERY: I understand that
23 Mr. Dortch is making a motion to expand that
24 intervention. I was looking for a response as to

1 that issue.

2 MR. SMALL: This proceeding is not going
3 to have any effect on Cinergy Corporation, which is
4 his client. It has simply been used for evidentiary
5 purposes. There's nothing where Cinergy Corporation
6 stands a defendant or anything like that before the
7 PUCO at the present time. He mentioned that. I'm
8 not sure what consequences -- what dire consequences
9 he's trying to protect of the corporation.

10 MR. DORTCH: Your Honor, first of all,
11 for the record if I misspoke, allow me to amend. I
12 am moving to intervene on a broader basis on behalf
13 of both Cinergy Corporation and Duke Energy Retail
14 Sales. Both entities, of course, seem to be the
15 target of Ms. Hixon's intimations. Your Honor, I do
16 agree, again, as Mr. Small has stated, this is not
17 the appropriate place for the matters that seem to be
18 being brought out in this proceeding.

19 Nonetheless, we are where we are and Ms.
20 Hixon's testimony clearly intimates, without stating,
21 that my clients have engaged in wrongdoing. I think
22 they are entitled -- if that is the subject to be
23 addressed at this point in time, I think they are
24 entitled to be heard and to defend themselves upon

1 that subject.

2 EXAMINER KINGERY: We will grant your
3 motion for expanded intervention.

4 MR. DORTCH: Thank you.

5 MR. SMALL: May I inquire as to what that
6 scope of that expanded --

7 EXAMINER KINGERY: It appears that Duke
8 Energy Retail Sales and Cinergy both have an interest
9 in the general outcome of this proceeding as it may
10 impact them.

11 MR. SMALL: Are there any limitations
12 on -- left on it? I just want to know what the
13 boundaries are. Are we going to have
14 cross-examination? Are we going to have briefing
15 basically in triplicate here? I'd like to know.

16 EXAMINER KINGERY: I think there are a
17 variety of parties in this case who have intervened
18 you would theoretically argue would have only a
19 limited interest, and yet we have granted them
20 unlimited intervention. I see no reason why Cinergy
21 or Duke Energy Retail Sales should be treated
22 differently. We will allow them to just simply be an
23 intervening --

24 MR. KURTZ: For purposes of the record,

1 OEG and Kroger join the motion on relevance.

2 EXAMINER KINGERY: Thank you.

3 Anything else preliminarily?

4 MR. COLBERT: One other matter. We do
5 have one other motion to strike that we would like
6 the Bench to consider.

7 EXAMINER KINGERY: We will do that.

8 MR. COLBERT: Thank you. This motion is
9 on the grounds of improper legal testimony and
10 hearsay. There are significant portions of
11 Ms. Hixon's testimony that deal directly with various
12 rules and/or statutes, that is, Ohio Administrative
13 Code sections and statutes and start out with "I on
14 the advice of counsel," and, frankly we should be
15 permitted to cross-examine counsel who seems to be
16 testifying or these pieces should be stricken.
17 They're being offered for the assertion of the truth
18 of the matters asserted. I said that a little
19 awkwardly.

20 At any rate, the portions we would move
21 to strike on that basis are: Page 8, line 17 through
22 21; page --

23 EXAMINER KINGERY: Just a minute.

24 MR. COLBERT: Sure.

1 EXAMINER KINGERY: Beginning with the
2 words "The OCC filed a notice of appeal"?

3 MR. COLBERT: Yes.

4 EXAMINER KINGERY: Okay. Go ahead.

5 MR. COLBERT: And then page 57, line 1
6 through page 58, line 15; page 59, line 12 through
7 page 60, line 8.

8 EXAMINER KINGERY: Okay.

9 MR. COLBERT: Page 64, line 20 through
10 page 66, line 16.

11 EXAMINER KINGERY: Okay.

12 MR. COLBERT: And the last, page 68
13 line 16 through line 18.

14 EXAMINER KINGERY: I'm sorry, page 68,
15 line 16?

16 MR. COLBERT: Page 68, line 16 through
17 18, starting with "Upon the advice of counsel."

18 EXAMINER KINGERY: Yes.

19 Did you want to say anything?

20 MR. SMALL: Yes, your Honors. This
21 testimony, of course, is very much like many other
22 pieces of testimony that have been introduced in this
23 proceeding, including by the company, wherein there
24 were extensive motions to strike having to do with

1 this very type of item. Many witnesses, company
2 witnesses, OCC witness Hixon provided certain
3 information, largely historical, how we got there,
4 why I'm testifying, about what I'm testifying about.

5 We understand that Ms. Hixon is not a
6 legal expert. She's testifying only for purposes of
7 her understanding of the situation. I would also
8 argue that basically that an expert witness on a
9 regulatory framework in Ohio is basically worthless
10 unless they have a basic understanding of this
11 information, even if isn't an attorney's
12 understanding of the provisions.

13 She clearly states what it is that she is
14 testifying to. She's not testifying as an attorney.
15 The OCC on brief will cite the appropriate Ohio
16 Revised Code sections. I would ask the Bench to make
17 a consistent ruling with the other -- with the
18 introduction of other testimony in this case.

19 EXAMINER KINGERY: Thank you.

20 MR. PETRICOFF: I would like to rise and
21 agree with Mr. Small, in particular point out to the
22 objection on page 64 on line 20, the kind of
23 testimony that Ms. Hixon is giving here really is not
24 a legal interpretation. I believe that Ohio Revised

1 Code section da, da, da dictates the following. She
2 is talking about "rules that are designed to foster
3 competitive equality." That is the kind of testimony
4 you would expect from a regulatory expert.

5 MR. ROYER: I agree with Mr. Petricoff's
6 comments as with him. A large part of this testimony
7 is reciting historical fact or setting forth the
8 actual language of various provisions. I don't think
9 that raises a question of whether it's a legal
10 interpretation or not.

11 EXAMINER KINGERY: Thank you.

12 MR. COLBERT: Your Honor, this is very
13 different than the testimony than was submitted by
14 the company. The testimony on page 66 that the
15 company had did not cite over and over again and talk
16 about specific rules. They have at least six
17 sections of Ohio Administrative Code 4901:1-1-20-16
18 cited and discussed and applied to fact situations.

19 Now, it's perfectly proper for Ms. Hixon
20 to testify as to the facts and her opinion why facts
21 may be relevant to something. The citation of the
22 rules and the application of the rulings to a case is
23 not proper testimony, and she's relying on advice of
24 counsel in each instance. This is not what the

1 company did in its testimony. There were no quotes.
2 There were no citations of that type, and this type
3 of presentation is rampant throughout her testimony.

4 Now, in our opinion what is attempting to
5 be done here is to essentially without express
6 accusation accuse three Duke Energy companies of
7 wrongdoing without going through a complaint where
8 OCC would have the burden of proof and asking the
9 Commission to judge that based on this presentation
10 without all of the requisites of a complaint process,
11 and we think that that is unfair, and we certainly
12 believe that the legal portions of her testimony
13 ought to be stricken on that basis, and if they want
14 to make an allegation and/or bring a complaint at a
15 later time against one or all of the various
16 entities, they should do that. But this is not the
17 case for it.

18 EXAMINER KINGERY: We will deny the
19 motion to strike. We have made similar rulings with
20 regard to company witnesses, other witnesses in this
21 case. We don't find that fact that she has cited
22 specific rules makes a whole lot of difference. We
23 do recognize she is not a lawyer, and we will not
24 take her testimony as any recitation of the law or as

1 a complaint.

2 MR. COLBERT: Thank you.

3 EXAMINER KINGERY: You may proceed.

4 MR. DORTCH: Your Honor, before you
5 begin, I have a somewhat similar motion to strike.
6 It involves some different testimony, however. I
7 would like to make the record on that issue, if I
8 may.

9 EXAMINER KINGERY: You may do that.

10 MR. DORTCH: Your Honor, I am referring
11 to page 56, lines 17 and 18 in which Ms. Hixon refers
12 to the euphemism she uses "regulatory problems."
13 Page 68, line 6 through page 69, line 10, this is the
14 entire section entitled "Regulatory Problems" in
15 which Ms. Hixon refers to the contracts that she
16 refers to as side agreements as discriminatory.

17 EXAMINER KINGERY: Can you give me those
18 page numbers again?

19 MR. DORTCH: Yes, in the initial two
20 lines --

21 EXAMINER KINGERY: I got that one.

22 MR. DORTCH: Page 68, line 6; page 69,
23 line 10.

24 EXAMINER KINGERY: Yes.

1 MR. DORTCH: And finally page 73, line 13
2 the words, and I quote, three words, "discriminatory
3 treatment and" should be stricken.

4 In this case, your Honor, it is clear
5 that Ms. Hixon is not citing any historic fact. Ms.
6 Hixon is drawing a legal conclusion based upon her
7 view of the evidence. That leads to the conclusion
8 that the companies have by various means engaged in
9 discrimination against certain of its customers on
10 behalf of other customers. There has been no
11 determination to date that these agreements are
12 discriminatory and thus her use of the term is not
13 only a legal conclusion but also pejorative.

14 Third, to the extent OCC intends to argue
15 the agreements are discriminatory, we understand
16 that. We understand that that is their intent. It
17 is represented by able counsel capable of doing so.
18 Ms. Hixon's opinions, however, are not within the
19 scope of her expertise. They are argument, and they
20 are not the appropriate subject of expert testimony.
21 We move that they be stricken.

22 MR. SMALL: Well, what can I say about
23 that motion? Essentially that says that Ms. Hixon as
24 a regulatory expert in regulatory matters is limited

1 to stating a bunch of facts and no opinions
2 whatsoever. That really is not what an expert
3 witness does. Certainly an expert witness formulates
4 opinions based on facts but in order to -- and,
5 again, with the caveat Ms. Hixon is not an expert --
6 not giving expert legal opinions, she has opinions
7 and those opinions happen to be stated in the
8 testimony, and Mr. Dortch would have her testimony
9 limited to simply a recitation of facts, and I
10 suppose if the OCC produced a piece of testimony that
11 looked like that, it would probably strike it as this
12 is not expert testimony.

13 So you can't win with this one. I think
14 this is in the normal course of expert testimony.

15 EXAMINER KINGERY: Anybody else?

16 MR. ROYER: I'd like to support
17 Mr. Small's comments and point out the term
18 discrimination in the regulatory sense is a well
19 understood term in terms of things like rate
20 discrimination that regulatory analysts use all the
21 time in terms of the reason to do the cost of service
22 studies is to avoid discrimination. I don't think
23 there is anything pejorative about using that term.
24 It is term used all the time.

1 MR. PETRICOFF: We join.

2 MR. DORTCH: Your Honor, I am certainly
3 not suggesting that an expert witness is limited to
4 facts alone, but expert testimony is certainly
5 limited to the field in which the expertise exists.
6 Ms. Hixon's field essentially is one of rate analyst;
7 that is her background. I've read her testimony.
8 She is an expert on that regulatory construct. This
9 is a legal determination, pure and simple. It is
10 something beyond the realm of her expertise, and to
11 the extent as a regulatory analyst of any sort she
12 has any expertise in that field, I would contend it
13 does not extend to the brave new world we find
14 ourselves in in which there is both regulated and
15 unregulated providers of the same service. Again, I
16 don't believe this is appropriate testimony, move to
17 strike.

18 EXAMINER KINGERY: We will deny the
19 motion to strike.

20 MR. DORTCH: Thank you, your Honor.

21 EXAMINER KINGERY: Mr. Colbert, I think
22 you may be able to proceed now.

23 - - -

24 CROSS-EXAMINATION

1 By Mr. Colbert:

2 Q. Good morning, Ms. Hixon.

3 A. Good morning.

4 Q. How are you this morning?

5 A. Fine.

6 Q. Ms. Hixon, can you please tell me your
7 understanding of what is competitive retail electric
8 service?

9 A. Competitive retail electric service came
10 about in Ohio through a change in the law that
11 restructured electric operations in Ohio.

12 EXAMINER KINGERY: Excuse me, Ms. Hixon.
13 You have to speak up a little bit.

14 MR. SMALL: That includes counsel. I
15 even had trouble hearing the question.

16 EXAMINER KINGERY: Okay.

17 A. Competitive retail electric service came
18 about in Ohio in the terms of the law restructured
19 the electric industry such that some generation was
20 declared competitive. The provision of that
21 generation service is competitive retail electric
22 service.

23 Q. Is there anything beside generation
24 service that is competitive retail electric service?

1 EXAMINER KINGERY: Can we hold on? Let's
2 go off the record.

3 (Discussion off the record.)

4 EXAMINER KINGERY: All right. Let's go
5 back on the record.

6 MR. COLBERT: Thank you, your Honor.

7 Q. (By Mr. Colbert) Ms. Hixon, we were
8 talking about whether your understanding of
9 competitive retail electric service included any
10 other service besides generation service, and I
11 confess, I don't recall your answer to that question.
12 Is there anything besides generation you believe is
13 currently a competitive retail electric service?

14 A. My recollection is that in addition to
15 generation the Commission could determine other
16 services to be competitive. I do not recollect a
17 Commission decision doing so, so based on that, I
18 don't believe so. The types of services that are
19 mentioned in the law were ancillary services,
20 billing, metering, that type of thing. I do not
21 recollect those to have been determined competitive.

22 Q. Can you give me your understanding of
23 what a competitive retail electric service provider
24 is, what is commonly called a CRES provider?

1 A. A CRES provider is an entity that is
2 certified by the Commission to offer and provide
3 competitive retail electric service in Ohio.

4 Q. Besides certification with the
5 Commission, do CRES providers also need to become
6 qualified with the utility in the certified
7 territories they seek to provide service?

8 A. I believe there is such a process I
9 normally refer to as a type of registration with the
10 companies, with the electric distribution utility.

11 Q. And do you know do CRES providers enter
12 contracts to serve end use customers?

13 A. Generally, yes. A contract between an
14 end use customer and a CRES provider is conducted and
15 is part of that business.

16 Q. And those contracts are entered for both
17 residential and nonresidential customers; is that
18 your understanding?

19 A. Yes.

20 Q. And those contracts would commonly
21 include terms regarding both price and service?

22 A. They would include generally some
23 indication of the price as well as, perhaps, in terms
24 of service, quality, type of service.

1 Q. And all things being equal, you would
2 expect a customer to sign a contract with a CRES
3 provider that would be lower in price than the price
4 they were getting either from their incumbent utility
5 or incumbent CRES provider. Is that a fair
6 statement?

7 A. I'm not sure what you mean by "all other
8 things being equal" in that regard. I think
9 customers may decide to sign with a CRES provider
10 because of a lower price, but they may also decide to
11 do so for other reasons as well.

12 Q. I was simply referring to the other
13 reasons such as service, quality, whatever other
14 reasons you assume. I was simply saying assuming all
15 of those to be exactly equal, price is likely to be a
16 determining factor. Is that fair?

17 A. I wouldn't say that each consumer would
18 say price is the factor. Each customers makes a
19 decision based on what they want for provision of
20 generation.

21 Q. Do you have a lot of experience with
22 customers at OCC choosing CRES providers that offer a
23 higher price?

24 A. I'm aware that customers through my

1 experience at OCC as well as in the market in general
2 choose for a variety of different reasons. For
3 example, a fixed contract rate may at some point be
4 higher than a rate that is variable. The customer
5 may choose that for a certain reason. In
6 relationship to generation, a customer might decide
7 to make a choice related to green power. That might
8 be at a cost that is higher. I guess while I'm
9 saying price is consideration, I don't think it's the
10 main determinate, as you said.

11 Q. Are you aware of the Commission's
12 apples-to-apples comparison on the Commission
13 website?

14 A. Yes.

15 Q. Do they compare anything else besides
16 price?

17 A. Are we talking about for electric?

18 Q. Yes.

19 A. I'm not sure there is an apples-to-apples
20 for electric now. I haven't seen one for quite some
21 time.

22 Q. Has there been one in the past?

23 A. There has been one in the past.

24 Q. And you've seen it.

1 A. Yes.

2 Q. Was there anything besides price that was
3 included in it?

4 A. I know that price was included. I think
5 there may have been some other details perhaps
6 related to the term of the agreement in terms of
7 period of time or the nature, like I said, whether it
8 was fixed or variable. It's been so long since I've
9 seen one, I'm not sure of all the details.

10 Q. Okay. Ms. Hixon, in the context of
11 setting either regulated rates or market price, what
12 is a baseline?

13 MR. SMALL: I'm sorry, your Honor. It is
14 fading now. I couldn't hear the end of that
15 question.

16 MR. COLBERT: Simply asked her to define
17 the term "baseline" as to her understanding.

18 A. The term "baseline" beyond even setting
19 regulated or market prices is a general term that is
20 a point at which you are going to judge against. In
21 terms of setting a regulated or a market price, it
22 can be used to determine that price.

23 Q. And if a baseline or a starting point, as
24 you described it, to be used in a contract between

1 parties requires approval by a regulator, is it
2 reasonable for parties to the contract to agree to
3 support the baseline before the regulator?

4 A. Well, based on your question it sounds
5 like a starting point or the baseline in the contract
6 that you're describing is an unknown or undetermined,
7 and that determination is evidently based on again in
8 your question some action by a regulator. If it's
9 undefined, it may be reasonable for the parties to
10 seek to define that, and if the regulator is the one
11 making that determination, it may be reasonable to --
12 you said support the baseline, so I'm assuming there
13 is some proposal before the regulator that the
14 baseline be something.

15 Q. That's correct.

16 A. If that's what you're talking about, it
17 may be reasonable.

18 Q. Thank you. And if the regulator were to
19 fail to adopt the rate of the baseline, would it be
20 reasonable for those same two parties to a contract
21 to condition the continuation of the contract upon
22 the adoption of the baseline by the regulator?

23 A. Again, I guess going back to what I
24 understand is the assumption; that is, that the

1 baseline has not yet been determined and that the
2 regulator will be determining the baseline, so if
3 that baseline is not as expected, the parties may
4 then want to take some action or build something into
5 their agreement to allow for that situation.

6 EXAMINER KINGERY: Since we have to break
7 in a couple of minutes is now a good time for you?

8 MR. COLBERT: It is.

9 EXAMINER KINGERY: All right. What time
10 do you think we will available to come back?

11 MR. DORTCH: Your Honor, I'm hopeful this
12 is a brief status conference. It was called so
13 suddenly because a TRO was entered against a client.
14 I'm not sure the degree the judge will want to
15 discuss that. I'm hoping we are talking no more than
16 that 15 minutes, 20 minutes. Certainly for purposes
17 of making certain the proceedings proceed, I'm not
18 certain I would need to be here for Mr. Colbert's
19 cross-examination, and I will try to make absolutely
20 certain that I don't try to tread the same ground
21 should I conduct my cross-examination later.

22 EXAMINER KINGERY: Are you saying we
23 proceed?

24 MR. DORTCH: No, I'm asking to take a

1 break, but if you find I'm delayed for any reason and
2 you want to proceed, I understand.

3 EXAMINER KINGERY: Why don't we come back
4 at 10:15 and see how you're doing.

5 MR. DORTCH: Thank you. I appreciate
6 your indulgence.

7 (Recess taken.)

8 EXAMINER KINGERY: All right.

9 MR. COLBERT: Your Honor, I don't have --
10 your Honor, at this point I do not have my cross
11 organized into just, you know, confidential and
12 public pieces. I am going to try to keep the
13 confidential portions to a minimum, but I am going to
14 reference a confidential piece of the record now, so
15 I would request that we go under seal at least for
16 the next few minutes, and there are now,
17 unfortunately, some people in the room that are not
18 part of the case, so I would ask that they leave.

19 (Confidential portion.)
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(End of confidential portion.)

Q. (By Mr. Colbert) Ms. Hixon, on page 7 at lines 2 and 3 of your testimony, you indicate that "CG&E refused to provide copies of such agreements," referring to OCC's discovery request in the underlying proceeding to this case.

And you reference, I believe, May 20, 2004. Did DE-Ohio have contracts with any party or member of any party other than the City of Cincinnati and the wholesale contracts we talked about with Constellation NewEnergy at the time of the request?

MR. SMALL: Objection. Asked and

1 answered. He's already asked what agreements there
2 were between the company and counterparties. She's
3 already answered that question.

4 MR. COLBERT: I'm asking at a particular
5 point in time.

6 EXAMINER KINGERY: I'll allow the
7 question.

8 THE WITNESS: Could I have the question
9 read, please.

10 (Question read.)

11 A. You're asking whether or not DE-Ohio or
12 at that time CG&E had any contracts with anyone other
13 than the City of Cincinnati and Constellation
14 NewEnergy; is that correct?

15 Q. No. Perhaps I can clarify it. Let's do
16 it in two parts. On May 18, 2004, OCC made a written
17 request in its seventh set of interrogatories for any
18 contracts that DE-Ohio, then CG&E, might have had
19 with parties to the case.

20 What I'm asking you is on that date when
21 you made the request if DE-Ohio had any contracts
22 with any party or members of any party in the case
23 with the exception of the City of Cincinnati
24 contract, which I believe was signed at least

1 initially on April 21, and the wholesale
2 Constellation contract signed significantly later?

3 A. I don't know what contracts DE-Ohio had
4 with parties at that time.

5 Q. So you haven't looked to see whether or
6 not at the time of the request by OCC there were, in
7 fact, any contracts?

8 A. Where would I look to find that?

9 Q. You have the contracts on the dates of
10 the contract. Look there.

11 MR. SMALL: Your Honors, objection,
12 relevance. Any contract? What contracts are we
13 talking about? Does this have something to do with
14 these proceedings?

15 EXAMINER KINGERY: Specify the type or
16 category of contracts you are talking about.

17 MR. COLBERT: We are talking about the
18 contracts attached to Ms. Hixon's testimony.

19 A. The side agreements attached to my
20 testimony have the dates on them, and some of them do
21 precede May 20, 2004.

22 Q. Right now we are talking about May 18. I
23 apologize to interrupt. We will get to May 20. Do
24 any of them other than a City of Cincinnati contract

1 predate May 18, which is the date that OCC made its
2 discovery request?

3 A. No. The earliest date of an agreement
4 attached to my testimony is May the 19th.

5 Q. Okay. And the next time that OCC made
6 its discovery request was orally at hearing on
7 May 20. Is that your understanding?

8 A. I know that the request was made on
9 May 20. What transpired between those two points, I
10 don't know.

11 Q. Well, you just indicated that there were
12 certain contracts that were signed on May 19.
13 Without specifying any names or anything because I'm
14 trying to keep this on the public record, if you
15 could tell me how many contracts were signed on
16 May 19, that would be helpful.

17 A. As shown in my testimony, there are two
18 agreements dated May 19, 2004.

19 Q. Okay. So by the start of hearing the
20 contracts that we've just been discussing would have
21 been the only ones that could possibly have been
22 before the Commission in evidence. Is that correct?

23 MR. SMALL: Objection, calls for a legal
24 conclusion. I don't know -- the question has

1 something to do with entering things into evidence,
2 which she's certainly not qualified to respond to.

3 EXAMINER KINGERY: Could I have the
4 question read back, please.

5 (Question read.)

6 EXAMINER KINGERY: Would you rephrase to
7 take out the part that says "introduction into
8 evidence."

9 MR. COLBERT: Sure.

10 Q. The contracts we have been discussing,
11 the two you mentioned on May 19 and the prior City of
12 Cincinnati contracts and the wholesale contracts that
13 we had discussed previously, would have been the only
14 contracts prior to the start of hearing or at the
15 start of hearing that could have been provided to OCC
16 pursuant OCC's discovery request. Is that your
17 understanding?

18 A. My understanding is that the contracts
19 that you described as well as the two agreements
20 dated May the 19th all were signed prior to the day
21 the first witness appeared at hearing on May 20, but
22 I don't know that I can agree that's all that could
23 have been provided under OCC's discovery request.

24 Q. Well, you're not aware of any other inner

1 or contracts that were in existence prior to that
2 date, are you?

3 A. No, I'm not.

4 Q. Okay. At least two of the contracts we
5 have been discussing, the two on May 19, were with
6 CRS, now DERS, and counterparties, and DE-Ohio is not
7 a named party in those contracts; is that correct?

8 A. As we've said before, CG&E is not a named
9 party.

10 Q. On page 8 of your testimony on lines 1
11 and 2, you indicate that the alternative proposal
12 made by DE-Ohio as part of its application for
13 rehearing contained "new and different charges that
14 had not been investigated or been subject to a
15 hearing." What charges are you referring to?

16 A. I believe in CG&E's alternative proposal
17 a new charge called the infrastructure maintenance
18 fund and a new charge called the system reliability
19 tracker were both introduced.

20 Q. What is your understanding of the IMF,
21 infrastructure maintenance fund?

22 A. My understanding is that the IMF as
23 proposed by Kroger in their alternative proposal was
24 a nonbypassable charge. My recollection is that it

1 was a -- it was to be based on a percentage of what
2 is known as little "g."

3 Q. What is your understanding of the SRT,
4 system reliability tracker?

5 A. The system reliability tracker was again
6 a nonbypassable charge proposed by CG&E, rather than
7 being a percentage of little "g" it was requested to
8 be more of a tracker to recover specific costs
9 related to purchased power.

10 Q. On page 13 of your testimony, you state
11 that "DERS did not serve any customers as of December
12 31, 2005," but at that time DERS had" contractors
13 "with a variety of customers. Why are the
14 counterparties into the DERS contracts, in your
15 opinion, not customers?

16 A. I think maybe you misspoke, something
17 about "contractors"? I guess I was confused by the
18 term "contractors."

19 Q. If I said contractors, I misspoke. I was
20 talking about the DERS contracts. There were a
21 variety of them in place by the end of 2005 and more
22 to come into place shortly, but you do not refer to
23 the counterparties to those contracts as customers,
24 and I'm wondering why not.

1 A. Well, my testimony I said they did not
2 serve any customers.

3 EXAMINER KINGERY: Off the record.

4 (Discussion off record.)

5 A. I think I answered the question.

6 Q. I don't think we did, maybe we are
7 talking across each other. Well, let me ask a
8 follow-up then. What do you mean by DERS was not
9 serving customers?

10 A. They provided no generation to customers
11 as a competitive retail electric service provider.

12 Q. So your opinion is that DERS, even though
13 it has contracts with customers, is not providing
14 competitive retail electric service.

15 A. As of December 31, 2005, they reported to
16 the PUCO that they had no intrastate sales of
17 electricity. That led me to believe they provided no
18 electricity to customers.

19 Q. At the bottom of page 13 and the top of
20 page 14 of your testimony, you list four items
21 that -- what you call pre-PUCO order contracts have
22 in common. First is "provision of generation
23 service" through 2008. You're not suggesting that
24 there is anything improper about a CRES provider

1 contracting to provide generation service through
2 2008, are you?

3 A. No. My statement is in regard to these
4 agreements what they have in common that relates to
5 this case.

6 Q. Okay. The third provision you list is
7 that DERS's customers supported the stipulation. Are
8 parties to a CRES contract permitted to support a
9 stipulation?

10 MR. SMALL: Objection, your Honor.
11 Poorly formed hypothetical.

12 Is that a hypothetical proposed for the
13 witness?

14 MR. COLBERT: I'm asking the witness a
15 question as to whether there's something wrong with
16 customers of a CRES provider supporting a stipulation
17 before the Commission.

18 EXAMINER KINGERY: Overruled.

19 A. I'm aware of no restriction, rule, or law
20 that says a customer of a CRES provider cannot
21 support a stipulation. Again, I'm not saying that
22 these agreements -- strike that. No.

23 Q. On page 27 and onto page 28 of your
24 testimony, you list five contract terms that, in your

1 opinion, appear to bind DE-Ohio to various
2 commitments. Is that a fair description?

3 A. At the top of page 27 at lines 2 and 3
4 the way I characterize is there are provisions that
5 CG&E appears to have made commitments.

6 Q. That doesn't change your prior opinion
7 that CG&E was not a party to the contract, that is,
8 they didn't sign the contract. You're not changing
9 that, are you?

10 A. No. In fact, when I gave my opinion the
11 first time, I indicated that even though CG&E was not
12 a party, that this, for example, in my testimony is
13 one example that CG&E seems to be involved with these
14 agreements.

15 Q. Well, do you know -- do you know if it
16 would be possible for the parties to the contract to
17 satisfy the conditions that you list there
18 financially or in some other manner without the
19 involvement of DE-Ohio?

20 A. From just reading the agreements as I've
21 listed here and the provisions, since they seem to
22 require action or no action by CG&E, I'm not aware as
23 to how what you've described could be done.

24 Q. Well, for example, in your first example

1 regarding rates charged for dual feeds, if the
2 utility DE-Ohio were to increase its rates for dual
3 feeds and have that approved by the Commission, do
4 you think it might be possible for CRS to satisfy the
5 counterparties to its contracts by paying the
6 counterparty the difference between the two charges?
7 Might that be one way to do it?

8 A. Well, that action could have been taken
9 by CRS. That's not what the provision provided for.
10 It provided the rates would not be amended and my
11 understanding is that the only one that can amend
12 CG&E's rates was CG&E.

13 Q. On page 32 of your testimony, you list
14 the same four items for pre-rehearing contracts that
15 we discussed for the pre-PUCO order contracts. Is
16 that correct?

17 A. Yes, that's correct.

18 Q. And we've discussed those matters in
19 several places in your testimony. If I asked you the
20 same questions regarding those items for the
21 pre-rehearing contracts, your answers would not
22 change, would they?

23 A. I'm afraid given the number of questions
24 that you've asked in those areas I can't say

1 absolutely they wouldn't change because they are
2 different agreements and there might be reasons that
3 the pre-rehearing agreements would be different from
4 the pre-PUCO order agreements. I don't mean to be
5 difficult, but I just don't know.

6 Q. For example, your item No. 1 your
7 provision of general service to customer parties
8 during the RSP period, again, for contracts of that
9 period there's certainly nothing wrong -- you would
10 agree there's nothing wrong with a CRES provider
11 providing generation service.

12 A. Yes, I would agree with that.

13 Q. And you would agree still there is
14 nothing wrong with a CRES customer supporting a
15 stipulation in a case before the Commission.

16 A. I think the question before was whether
17 there was anything that prevented them from doing so.
18 My answer would be the same.

19 MR. COLBERT: Okay. Your Honors, I think
20 this is good time to go back under seal. I will talk
21 about some specific contracts again.

22 EXAMINER KINGERY: The record will be
23 sealed at this point.

24 MR. COLBERT: Thank you.

(Confidential portion.)

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(End of confidential portion.)

Q. On page 56 you give four reasons bearing on whether the Commission should approve, it says one of the company's proposals, but I think you mean the MBSSO in discussing the various agreements, and the third reason is alleged discrimination.

Now, are you aware of any consumer that was prevented from talking to DERS or DE-Ohio about any type of service that's available?

A. I'm not aware of that, no.

Q. Are you aware of any customer that has been denied service by DERS?

A. I'm not aware.

EXAMINER KINGERY: I'm going to jump in here while we are on page 56. You say on line 19 that OCC was excluded from negotiations and there was a course of secret negotiations. Would you please explain that.

THE WITNESS: Yes. I discuss that

1 further on page 69 of my testimony where I
2 describe -- beginning on page 69 the negotiation and
3 process that led to the May, 2004, stipulation as
4 been deficient. That this discrimination by the
5 utility in concert with their companies was directed
6 in favor of the large customers. Then I describe the
7 negotiations that took place at different points in
8 time to support the company's proposals and that the
9 support of those proposals and the affiliates'
10 operations in regards to those operations in regards
11 to setting up these side agreements was unknown to
12 OCC at that time.

13 Then I go on to talk about in the next
14 paragraph what was presented to the Commission at
15 that time, and that the Commission was relying, in
16 part, on Mr. Caahan's statement that the settlement
17 negotiations were -- all parties were notified and
18 invited. But the Commission, and for Mr. Caahan
19 yesterday, evidently did not know that these side
20 agreements were also going on at the same time. And
21 that's the discussion that I had.

22 EXAMINER KINGERY: So you're not saying
23 that OCC was excluded from discussion of the main
24 stipulation in the case but rather than from the

1 discussion of the agreements with the individuals.

2 THE WITNESS: From the discussion as well
3 as the knowledge.

4 EXAMINER KINGERY: But not the discussion
5 of the main stipulation.

6 THE WITNESS: No, I have not said that.

7 EXAMINER KINGERY: I just wanted to
8 clarify what that was. Thank you.

9 Go ahead.

10 MR. COLBERT: Your Honor, I was frankly
11 going to ask questions about that later, but since
12 you've brought it up, I'll proceed on that.

13 Q. (By Mr. Colbert) Now, in the settlement
14 discussions in this case, are you aware that DE-Ohio
15 announced it would be happy to discuss settlement in
16 groups or with individual parties?

17 A. I'm not aware of that, no.

18 Q. You reference Mr. Caahan's testimony.
19 Are you aware that Mr. Caahan testified that staff
20 encouraged DE-Ohio to meet with individual parties?

21 A. Yes, at page 70 of my testimony I cite
22 Mr. Caahan.

23 Q. And was DERS or Cinergy Corp., either one
24 of them, a party to this case prior to the remand

1 from the court?

2 A. From my review of the Commission's
3 opinion and orders, neither of those are listed as
4 parties.

5 MR. COLBERT: May we approach, your
6 Honor?

7 EXAMINER KINGERY: Yes.

8 MR. COLBERT: We would mark this as
9 DE-Ohio Remand Exhibit 20.

10 EXAMINER KINGERY: It will be so marked.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 Q. Ms. Hixon, I have handed you a document
13 that is an agreement between DE-Ohio and OCC to
14 settle matters in what is commonly referred to as
15 DE-Ohio's transition plan case, Case No.
16 99-1658-EL-ETP, et al. Can you turn to the last page
17 of this document, please? Do you note it is signed
18 there by someone named Eric Stephens?

19 MR. SMALL: Objection, relevance. We've
20 now entered into apparently the merger case involving
21 Cinergy and Duke Energy Corporation, and I don't see
22 the relevance to this proceeding.

23 MR. COLBERT: Your Honor, this one is
24 pretty simple. We are being accused implicitly or

1 explicitly of wrongdoing by somehow excluding OCC
2 from discussions not even involving DE-Ohio,
3 involving affiliates which weren't parties to the
4 case, and we are going to introduce not just this
5 document but a series of documents that show that OCC
6 is engaging in the same type of behavior.

7 Now, we are not alleging that OCC did
8 anything wrong. We didn't do anything wrong nor did
9 they. We just are saying that this type of
10 negotiation and settlement is commonplace, and we
11 think it's fair to put that on the record.

12 MR. SMALL: Just to clarify things, OCC
13 will object to those other things that were said as
14 well.

15 EXAMINER KINGERY: I expect you will. We
16 will overrule the objection.

17 MR. COLBERT: Thank you.

18 Q. (By Mr. Colbert) Can you identify the
19 person that signed the document?

20 A. It says it's signed by Eric B. Stephens,
21 legal director.

22 Q. And do you know, was Mr. Stephens, in
23 fact, legal director of OCC?

24 A. Yes, he was.

1 Q. And do you know whether this agreement
2 was filed at the Commission?

3 A. I'm not aware it was filed at the
4 Commission, no.

5 Q. Do you know whether any other parties in
6 the transition plan case were involved in the
7 discussions to consummate this agreement?

8 A. I do not know.

9 Q. Among other things in paragraph -- if you
10 turn to page -- paragraph 2, paragraph 2 of this
11 agreement appears to commit then CG&E to contribute
12 \$500,000 to a customer education campaign jointly
13 managed by the utility and OCC.

14 A. It says: CG&E will contribute \$500,000
15 to a customer education campaign concerning customer
16 choice jointly managed by CG&E and OCC.

17 MR. COLBERT: Your Honor, may we
18 approach. We have what we will mark as DE-Ohio
19 Remand Exhibit 21.

20 EXAMINER KINGERY: You may.

21 (EXHIBIT MARKED FOR IDENTIFICATION.)

22 MR. SMALL: Your Honor, I'm not sure why
23 we are marking this.

24 MR. COLBERT: I'll make it plain in just

1 a moment.

2 MR. SMALL: It's a Supreme Court
3 decision.

4 EXAMINER KINGERY: We have had situations
5 like that yesterday I believe with OCC exhibits as
6 well. We marked them and then took administrative
7 notice.

8 MR. COLBERT: I have no objection to
9 administrative notice.

10 MR. SMALL: Supreme Court?

11 EXAMINER KINGERY: Not Supreme Court.

12 MR. COLBERT: Certainly have no objection
13 to administrative notice as opposed to admission.
14 I'll make the purpose clear in just a second.

15 Has the exhibit been marked, your Honor?

16 EXAMINER KINGERY: Yes, it has.

17 Q. Ms. Hixon, if you would please turn to
18 page 3, paragraph 17 of the decision, do you have
19 that?

20 A. I have that.

21 Q. It says, the sentence, "To support its
22 argument, the Consumers' Counsel points to a separate
23 one-page sidebar agreement between DP&L and the
24 Consumers' Counsel." Do you see that?

1 A. I see that.

2 Q. This agreement -- well, are you aware
3 whether this agreement was litigated before the
4 Commission and the Court?

5 MR. SMALL: Your Honors, I don't want to
6 burden the proceeding, however, may I have a
7 continuing objection to this and other related
8 questions and the documents that he's presenting. I
9 get the impression Mr. Colbert intends on presenting
10 a number of documents, and I object to both the
11 documents and to the questions based on relevance.

12 MR. COLBERT: Your Honor, to clarify,
13 after this document there will be two more, and we
14 are proceeding through time and we are going to tie
15 these documents to OCC discussions in this case, so
16 that's where we're going with this. As we previously
17 stated, we certainly believe this line of questioning
18 is relevant. If agreements between affiliates of
19 ours, no parties to this case, are to be considered
20 by the Commission, we certainly believe that
21 agreements between OCC and others, particularly the
22 last document involving parties to this case, should
23 also be considered.

24 MR. SMALL: I understand the Hearing

1 Examiner's rulings on Exhibit 20. I just don't want
2 my silence to be taken that I feel that OCC has not
3 objected on the record to this entire course of
4 inquiry.

5 MR. ROYER: I would join in that
6 objection because the situations on their face are
7 not even close to parallel. What we're talking about
8 here and what Ms. Hixon was talking about is an
9 agreement between a nonparty to a case that includes
10 a provision that benefits a party to the case, and
11 here we're talking about a trade-trade of horses
12 between two parties to the case. To me this is a
13 little far afield from what the real situation is, so
14 I join in the objection.

15 MR. COLBERT: May I respond?

16 EXAMINER KINGERY: Briefly.

17 MR. COLBERT: Briefly, you know, it is
18 being alleged that we are acting as one party with
19 our affiliates, something that we certainly deny, but
20 if that's the allegation, I believe that the
21 situations are indeed analogous, as Mr. Royer said,
22 then that your horse trading in this case.

23 Beyond that, we are going to show that
24 OCC was engaged in confidential exclusionary

1 discussions in this case with other parties, and we
2 think it's directly on point.

3 EXAMINER KINGERY: We are going to allow
4 the line of questioning. We understand that you have
5 a continuing objection, and arguments as to a lack of
6 relevance can certainly be brought up on brief.

7 MR. COLBERT: Thank you, your Honor.

8 Q. (By Mr. Colbert) Are you aware generally
9 that this agreement was litigated before the
10 Commission and the Court?

11 A. I know that the agreement was part of the
12 proceedings at the Commission and the Court. I don't
13 think the agreement by itself was the litigation.

14 Q. Fair enough. Do you know whether this
15 agreement between DP&L and OCC was ever filed with
16 the Commission outside of the cases that we are
17 discussing?

18 MR. SMALL: Objection. The question
19 should be more clear. Outside of what cases?

20 MR. COLBERT: I'll withdraw and rephrase
21 it.

22 EXAMINER KINGERY: Thank you.

23 Q. Ms. Hixon, do you know whether the
24 agreement was ever presented to the Commission for

1 approval?

2 A. No, I don't believe it was.

3 MR. COLBERT: Your Honor, may we
4 approach?

5 EXAMINER KINGERY: You may.

6 MR. COLBERT: Thank you. Your Honor, we
7 would ask that this be marked as DE-Ohio Remand
8 Exhibit 22.

9 EXAMINER KINGERY: It will be so marked.

10 MR. COLBERT: Thank you.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 Q. Ms. Hixon, please turn to the back of
13 this document, and you'll note that there are two
14 signatories there. I believe I'm one of them on
15 behalf of Duke Energy Ohio, and do you recognize the
16 signatory on behalf of the Consumers' Counsel?

17 A. Yes.

18 Q. And is that your counsel, Mr. Small?

19 A. That's what it says, yes.

20 Q. Thank you. And do you recognize this as
21 a settlement between Duke Energy Ohio and the
22 Consumers' Counsel as regarding OCC's appeal of the
23 Duke/Cinergy merger?

24 A. Well, one of the provisions on page 2,

1 item 4, does discuss that appeal.

2 Q. Thank you. During the course of these
3 settlement discussions, the company requested that
4 staff be permitted to engage in these discussions.
5 Are you aware of whether OCC refused to permit staff
6 to participate?

7 MR. SMALL: Objection. This is not
8 evidence. Mr. Colbert just introduced his own
9 activity in that question.

10 MR. COLBERT: Please rephrase the
11 question.

12 Q. Ms. Hixon, are you aware of the parties
13 who negotiated this settlement?

14 A. I'm aware of the two parties that signed
15 it.

16 Q. Are you aware that the appeal of the
17 merger case was an appeal from a Commission order?

18 A. Yes.

19 Q. So are you familiar with appeals of
20 Commission orders generally that the appellant is one
21 party and the Commission is generally the appellee?

22 A. I'm aware that there's a party that
23 appeals, and they're appealing against the
24 Commission's order.

1 Q. That's fine. And in settlement
2 discussions, in your experience with settlement
3 discussions, is it common to have discussions
4 involving all of the parties to a particular case?

5 A. In my experience in dealing with cases
6 before the Public Utilities Commission, I'm aware
7 that it's usual to have all of the parties involved
8 in discussions that might lead to a settlement of the
9 case.

10 Q. And do you have any knowledge as to
11 whether staff or Commission representatives
12 participated in this settlement?

13 A. I'm not aware of anything about this
14 settlement in terms of who was involved or not
15 involved.

16 Q. Thank you.

17 MR. COLBERT: May we approach, your
18 Honor.

19 EXAMINER KINGERY: You may.

20 MR. COLBERT: Your Honor, this document
21 would be marked as DE-Ohio Remand Exhibit 23.

22 EXAMINER KINGERY: It will be so marked.

23 (EXHIBIT MARKED FOR IDENTIFICATION.)

24 Q. Ms. Hixon, you have in front of you what

1 has been marked DE-Ohio Remand Exhibit 23. It is an
2 affidavit by Jock Pitts, who is president of People
3 Working Cooperatively. Do you recognize People
4 Working Cooperatively as a party to these cases?

5 A. Yes.

6 Q. And this affidavit says that Mr. Pitts --
7 this is in paragraph 2 at the bottom of page 1 to the
8 top of -- through most of page 2, actually --
9 represents that he attended settlement discussions
10 where OCC asked that the discussions held during --
11 be kept confidential. Do you see that?

12 MR. SMALL: Objection, your Honor. I
13 object to this line of questioning as well as in
14 Exhibit 23 not only relevance but also on hearsay.
15 Mr. Colbert is attempting to place Mr. Pitts'
16 testimony into evidence here for the matter asserted
17 in the affidavit. If Mr. Colbert wants to put on
18 that case, he should be calling Mr. Pitts. And
19 that's the essence of the hearsay rule.

20 MR. COLBERT: Your Honor, with all due
21 respect, there is not merely an affidavit, and I'm
22 not attempting to put Mr. Pitts' statements on for
23 the truth of the matter asserted. There are also
24 e-mails attached that are from OCC to other parties

1 in the case referencing settlement proposals and
2 discussions. That will be the primary thrust of my
3 questions, but, again, this was a document that came
4 to DE-Ohio in the course of discovery. The witness
5 is able to identify Mr. Pitts as a party. These are
6 discussions that took place at OCC. There is -- and
7 we believe, as we've previously discussed, that it is
8 certainly relevant to the innuendo and allegations
9 being made by OCC to DE-Ohio, as well, frankly to the
10 its affiliates.

11 MR. SMALL: There -- nobody alleges --
12 there is one question, is People Working
13 Cooperatively a party to the case, and she said yes.
14 It has nothing to do with the affidavit. We don't
15 know if Ms. Hixon knows Mr. Pitts on anything else
16 and I consider the attachments to part of the
17 affidavit as well. It should be required under the
18 rules of evidence Mr. Pitts should be called in order
19 to introduce this evidence.

20 EXAMINER KINGERY: We are not going to
21 rule on the motion yet. We understand the issue. We
22 will allow you to go through your lines of questions
23 and then when there is a motion subsequently to admit
24 this exhibit, then we will determine whether we will

1 admit it or not.

2 MR. SMALL: That will also apply to the
3 entire line of questions about it?

4 EXAMINER KINGERY: Yes. If it turns out
5 we do not admit, we have to determine whether to
6 strike that testimony and those questions.

7 MR. SMALL: All right.

8 MR. COLBERT: Thank you.

9 Q. (By Mr. Colbert) Ms. Hixon, would you
10 turn to the first e-mail page, top right-hand corner
11 there's a 1. Starts "Denise Willis, 5/13." Do you
12 have that?

13 A. I have that.

14 Q. Ms. Hixon, in the list of cc's, there is
15 a Beth Hixon, hixon@occ.state.oh.us. Is that you?

16 A. Yes, it is.

17 Q. So, Ms. Hixon, you received this e-mail;
18 is that correct?

19 A. Yes.

20 Q. And, Ms. Hixon, in -- at the top of that
21 e-mail there are a list of e-mail addresses after the
22 word "to" and a colon. Do you see that list?

23 A. Yes, I do.

24 Q. And can you identify for me each of the

1 individuals represented by that e-mail?

2 A. I can read to you their e-mail addresses
3 and guess at who they might be.

4 Q. Well, I wouldn't ask you to guess.

5 A. I don't have --

6 Q. If you have reasonable certainty as to
7 who they might be, then I would ask you to identify
8 them. If you don't know, that's fine.

9 A. Well, for example, it says
10 dboehmlaw@aol.com. I don't know for 100 percent sure
11 it is Mr. Boehm's e-mail but I highly suspect it and
12 that would be the case -- for the other, they're
13 pretty much self-explanatory, drinebolt, mkurtz,
14 dane.stinson, SBLOOMFIELD, tobrien, broyer,
15 Mchristensen, cgoodman, korkosz, nmorgan, srandazzo,
16 Ricks, shawn, Thomas McNamee. I'm not sure, bakahn,
17 mhpetricoff, wjairey.

18 Q. Do you recognize the majority of those
19 individuals as being parties to these cases?

20 MR. SMALL: Objection, your Honor. They
21 are individual names.

22 Q. Well, as either being parties or
23 attorneys that represent parties to this case?

24 EXAMINER KINGERY: Overruled.

1 A. Again, to the extent that I, as I used
2 Mr. Boehm as an example, and drinebolt is
3 Mr. Rinebolt's e-mail, I do recognize that
4 Mr. Rinebolt represents a party in this case.

5 Q. Let me go through them. The same would
6 be true of Mike Kurtz. To the best of your
7 knowledge, does he represent Kroger?

8 A. Yes.

9 Q. And do you remember who Mr. Stinson
10 represented in these cases?

11 A. No, I don't.

12 Q. Me neither. I think it was the schools,
13 but I'm not sure.

14 Sally Bloomfield and Tom O'Brien have
15 represented a number of parties in these cases. Do
16 you remember who they are?

17 A. I know -- the Ohio Hospital Association.

18 Q. Mr. Royer, do you know what party
19 Mr. Royer represents?

20 A. Dominion Retail.

21 Q. And Mary Christensen, do you know who she
22 represents?

23 A. Her name's at the bottom of them, and I
24 believe she represents People Working Cooperatively.

1 Q. I guess we won't belabor the point. Let
2 me ask, is there anybody on that e-mail from the
3 company that you see?

4 A. To the extent that I don't know what the
5 company's e-mail would necessarily be, I can't say
6 for 100 percent sure.

7 Q. Well, if I represented to you that,
8 generally speaking, the company's e-mail would have
9 been at cinergy.com or duke-energy.com, or at this
10 time cinergy.com, do you see an e-mail recipient from
11 any of those addresses?

12 A. I don't see that address.

13 Q. And below the names that we have been
14 talking about, the cc's, there's a list of names. Do
15 you recognize all of those individuals as either
16 being current or former employees of OCC?

17 A. Yes.

18 Q. Now, this e-mail was sent by a Denise
19 Willis. Can you identify Ms. Willis?

20 A. As it says about three-quarters of the
21 way down, Denise Willis was a case team assistant at
22 the OCC.

23 Q. And does she on occasion perform
24 administrative work or other work on behalf of

1 Mr. Small?

2 A. She would do administrative work based on
3 a case, yes.

4 Q. And so would it be your understanding
5 from looking at this e-mail that she sent this e-mail
6 on behalf of Mr. Small?

7 A. That's what it says.

8 Q. And the subject matter of this e-mail is
9 an attached settlement proposal.

10 A. It says "Subject: CONFIDENTIAL
11 Settlement Proposal."

12 MR. COLBERT: I would note for the record
13 that we did -- we had discussions during the
14 discovery process with PWC about this, and there
15 are -- the substance of the settlement proposals has
16 been not provided on purpose. We did not want to ask
17 PWC to reveal the confidential nature of those
18 discussions. We didn't think it was necessary to
19 make the point.

20 Q. That e-mail is dated Thursday, May 18,
21 2004; is that correct?

22 A. That's the date.

23 Q. Would you turn the page to the next
24 e-mail? Are you there?

1 A. Yes.

2 Q. And that e-mail is dated Wednesday,
3 October 27, 2004; is that correct?

4 A. Yes.

5 Q. And this e-mail was sent to a similar set
6 of parties; is that right?

7 A. Subject to going through and checking
8 each one of them, they seem to be similar, but there
9 may be some differences. In fact, there are some
10 differences.

11 Q. What are those differences?

12 A. The one that pops out is vern.margard and
13 William.Wright.

14 Q. Do you recognize who they are?

15 A. Yes.

16 Q. And who are they?

17 A. I believe those are attorneys general
18 with the PUCO staff.

19 Q. And that's true of Mr. McNamee as well,
20 is it not?

21 A. Yes.

22 Q. And he was on both, right, Mr. McNamee?

23 A. Yes.

24 Q. And is the subject matter of this e-mail

1 also a confidential settlement communication?

2 A. That's what the subject line says, yes.

3 Q. And that's what this indicates; right?

4 It says Case No. 03-98-EL-ATA?

5 A. That's what it says.

6 Q. Again, do you see any communication to
7 anybody from the company in this e-mail?

8 A. With all the caveats that I gave in terms
9 of not knowing e-mails and I describing the e-mails
10 and me assuming that is the e-mails, there does not
11 seem to be any e-mail with that designation.

12 Q. Okay. Will you please turn the page.
13 Now, we have an e-mail dated November 3, 2004, again,
14 Denise Willis, and in this case, it is only to two
15 individuals. Can you tell me who they are?

16 A. It says Mchristensen@Columbuslaw.org and
17 jpitts@pvdhomerepairs.org.

18 Q. In the text of that e-mail it identifies
19 two individuals, a Janine and a Bruce. Can you tell
20 me who Janine is?

21 A. Janine would be Janine Migden-Ostrander.

22 Q. And can you tell me who Bruce would be?

23 A. Bruce would be Bruce Weston.

24 Q. Thank you. Is it your understanding that

1 they are sending to Ms. Christensen and Mr. Pitts a
2 confidential settlement communication?

3 A. It says, "As promised during your
4 discussion today with Janine and Bruce, please find
5 attached the confidential settlement communication
6 from OCC, dated October 27. Please feel free to
7 discuss these matters with Janine or Bruce."

8 Q. And do you know what type of organization
9 People Working Cooperatively is?

10 A. I have a general understanding.

11 Q. And what is that?

12 A. That it's an organization which provides
13 weatherization services.

14 Q. Is the provision of weatherization and
15 energy efficiency services, is that an issue that OCC
16 has an interest in?

17 A. Yes.

18 Q. Do you know whether the settlement
19 proposal being made here involved those types of
20 services?

21 A. No, I do not. I am not on this e-mail,
22 and I'm not aware of it.

23 Q. Now, attached to each of these e-mails is
24 a confidentiality notice. Do you say that?

1 A. Yes.

2 Q. Is that a standard notice that goes out
3 on all of OCC's e-mails?

4 A. We have a standard notice. This looks
5 like it, yes.

6 Q. And does OCC regularly send information
7 in its communications that it considers confidential?

8 A. I don't know about the use of the term
9 "regularly." I think if you look at all of the
10 e-mails that we send, it might not play out that they
11 were regular, but given that we have a
12 confidentiality notice, it may contain confidential,
13 privileged or legal government material. Yes, we do
14 from time to time send information that may contain
15 confidential or legal governmental material.

16 MR. COLBERT: I think that's all the
17 questions I have on this document.

18 EXAMINER KINGERY: I think now would be a
19 good time for lunch break. We have a Commission
20 meeting at 1:30. I propose to come back following
21 the Commission meeting at 2 o'clock.

22 (Thereupon, at 12:30 p.m. a lunch recess
23 was taken until 2 p.m. of the same day.)

24 Wednesday Afternoon Session,

1 March 21, 2007.

2 - - -

3 EXAMINER KINGERY: So let's go back on
4 the record.

5 MR. COLBERT: Thank you very much. Your
6 Honor. Your Honor, may we --

7 - - -

8 BETH HIXON

9 CROSS-EXAMINATION (Continued)

10 By Mr. Colbert:

11 Q. Well, Ms. Hixon, on page 63 of your
12 testimony you state that: The option contracts sue
13 DE-Ohio as a profit center while DERS reimburses
14 customers on behalf of DE-Ohio and operates at a
15 loss; is that correct?

16 A. That's what it says.

17 Q. Okay.

18 MR. COLBERT: Your Honor, may we
19 approach?

20 EXAMINER KINGERY: You may.

21 MR. COLBERT: We would mark this as
22 Remand Exhibit 24.

23 HEARING OFFICER: It will be so marked.

24 MR. COLBERT: Your Honor, if it's okay,

1 we have three similar exhibits here, and in an effort
2 to shorten this, I'm going to mark the other two and
3 have them, and I may be able to ask her just one or
4 two questions generally about all three.

5 EXAMINER KINGERY: That would be fine.

6 MR. COLBERT: And avoid going through
7 them each individually. Thank you. So we would mark
8 the next two as DE-Ohio Remand Exhibit 25 and DE-Ohio
9 Remand Exhibit 26.

10 EXAMINER KINGERY: They will be so
11 marked. For the record Exhibit 25 is the 2004 return
12 and Exhibit 26 then is the 2005 return.

13 MR. COLBERT: That's correct.

14 EXAMINER KINGERY: Okay.

15 MR. COLBERT: 24, 5, and 6 go 2003, 4 and
16 5.

17 (EXHIBITS MARKED FOR IDENTIFICATION.)

18 Q. Ms. Hixon, just a couple of preliminary
19 questions before we go to these exhibits exactly.
20 You are an accountant by training?

21 A. Education is accounting.

22 Q. And you are generally familiar with
23 financial statements, income statements, balance
24 sheets, that type of thing?

1 A. Yes.

2 Q. Okay. And specifically you are familiar
3 with an income statement?

4 A. Yes.

5 Q. Okay. And are you aware generally of
6 requirements that companies file tax returns?

7 A. Yes.

8 Q. And are you aware of the necessity to
9 file with the Federal Government and elect to make a
10 consolidated tax return?

11 A. I'm aware that a consolidated tax return
12 can be made, yes.

13 Q. Are you aware that once you make the
14 election, that election does not have to be made
15 annually; it remains?

16 A. I am not really aware of that.

17 Q. You are not, okay. Ms. Hixon, we
18 discussed -- we've discussed these exhibits
19 previously during your deposition; is that right?

20 A. I believe these are the same ones, yes.

21 Q. And, Ms. Hixon, if you turn, I think --
22 they are two-sided but the third page -- the front
23 side of the third page in.

24 A. Of which exhibit?

1 Q. Any of them. It doesn't matter which one
2 for this purpose.

3 A. Okay.

4 Q. Thank you. That page generally shows a
5 set of income statements that include -- or at least
6 include the combined statements of -- of items that
7 we will talk about in a minute, eliminations and the
8 total for Cinergy Corp. Do you see that?

9 MR. SMALL: Your Honors, I object to this
10 line of testimony, and I will object to all three of
11 these exhibits at the appropriate time, relevance to
12 this case in connection with this witness having
13 anything to do with her testimony. If this line of
14 questioning had something to do with DERS or Cinergy
15 Corp., but it's far broader than that. And this is
16 the appropriate -- if that's -- if this is the
17 intent, this is appropriate for rebuttal testimony
18 and not doing it through the OCC's witness.

19 MR. COLBERT: Your Honor, the witness has
20 made the allegation that the option agreements use
21 DE-Ohio, this company, as a profit center and its
22 affiliates operate at a loss. And the witness, as
23 she has just testified, is an accountant by training.
24 She's familiar with income statements. She's seen

1 these very statements before, and we are simply going
2 to use a few very quick questions to rebut the
3 statement that she has made on page 63 so -- not
4 openly does it tie directly to her testimony and the
5 allegations that are made, but it ties directly to
6 this witness's training. She's certainly capable of
7 answering it.

8 MR. SMALL: Your Honors, they could put
9 on an accountant on rebuttal on their own. They have
10 people with training in accounting matters. If
11 that's all there is as far as presenting it to the
12 witness, all that means is that they presented it to
13 her at a -- at a deposition. That doesn't mean that
14 she has any familiarity other than -- and basically
15 what she was asked to do, as has happened earlier
16 today, is we have a witness whose being asked to
17 simply read what is on a piece of paper. In other
18 words, there's -- there is really no use for the
19 witness or her training whatsoever, as has been the
20 case in the previous exhibits presented by the
21 company. She's simply being asked to read a piece of
22 paper.

23 We'll stipulate Ms. Hixon knows how to
24 read a piece of paper, but there's no connection with

1 this witness or her testimony, and they could put it
2 on as rebuttal testimony.

3 EXAMINER KINGERY: We are going to allow
4 the question, and we will determine admissibility
5 after cross-examination.

6 MR. SMALL: Along with the questions that
7 are attended thereto?

8 HEARING OFFICER: If it turns out he is
9 asking her questions about a document that we find is
10 inadmissible, then they will be of little use.

11 MR. SMALL: Thank you, your Honor.

12 MR. COLBERT: Fair enough. Thank you,
13 your Honor.

14 Q. (By Mr. Colbert) Ms. Hixon, if you -- the
15 page beyond where you are, if you would take just a
16 minute to look at in each of the documents the
17 subsequent pages and tell me whether or not in your
18 opinion there are a substantial number of affiliated
19 companies that have a loss.

20 A. In each exhibit?

21 Q. Yes.

22 MR. ROYER: I missed the reference.
23 Where are we looking?

24 MR. COLBERT: We are looking in each of

1 the exhibits right now, 24, 25, and 26. I am simply
2 trying to cut this short. Instead of going through
3 each page of all of the exhibits I am --

4 MR. ROYER: I thought you said something
5 about the third page, and I didn't find anything
6 there, and that's where I am confused.

7 MR. COLBERT: Beyond the third page is
8 where all of the individual income statements begin.
9 That's all. I'm simply trying to ascertain whether
10 the witness agrees there is a substantial number of
11 companies that have a loss.

12 MR. ROYER: Right. I'm with you. Thank
13 you.

14 MR. COLBERT: Thank you.

15 EXAMINER KINGERY: Mr. Colbert, I am
16 looking at the Exhibit 24 and I am going to go to the
17 1, 2, 3, 4, fifth piece of paper.

18 MR. COLBERT: Okay.

19 EXAMINER KINGERY: Front side. And I
20 wondered if there is a copying error on that page.

21 MR. COLBERT: There appears to be. It
22 appears that the top headings are chopped off.

23 EXAMINER KINGERY: Well, it looks like --
24 there are numbers at the bottom of each page and I

1 see both 217 and 218 on that page. I am wondering if
2 two fed through at the same time through the copy
3 machine. I am not sure what happened but.

4 MR. COLBERT: It could be. We can check
5 the original and get back. We are happy to make a
6 correction. It does appear that something happened
7 to the top and the bottom of that page.

8 EXAMINER KINGERY: Okay. If you find
9 something needs to be corrected there, you can just
10 file a readvised page.

11 MR. COLBERT: We will. Frankly, the line
12 we are most interested in I believe on all of them
13 would be line 30.

14 EXAMINER KINGERY: Of course, we don't
15 know what company it refers to.

16 MR. COLBERT: That's correct. We can
17 certainly supply the corrected page.

18 EXAMINER KINGERY: Thank you.

19 A. I have looked at all the exhibits, all
20 the pages that described numerous corporations.
21 There are many corporations or companies that have
22 negative numbers for taxable income, and there are
23 some that have zero, and there are some that have
24 positive.

1 Q. Would you say that approximately -- we
2 discussed this before -- but approximately, you know,
3 30 to 40 corporations have losses in each year?

4 A. I can go through and count them.

5 Q. If you would like. I was trying to avoid
6 that.

7 A. I will accept it subject to check.

8 Q. Okay. Well, subject to check --

9 A. For each exhibit there is 30 to 40.

10 Q. Okay. Thank you. And would you -- do
11 you believe that DE-Ohio is a profit center for each
12 of the non-Cinergy Retail Sales' companies that show
13 a loss?

14 A. No, that's not my testimony. My
15 testimony is the option agreement uses DE-Ohio as a
16 profit center and CRS as an organization that
17 operates at a loss.

18 Q. And you think that there's -- strike
19 that.

20 Ms. Hixon, beginning on page 65 of your
21 testimony you discuss Ohio Administrative Code
22 Section 4901:1-20-16. Are you generally familiar
23 with that Ohio Administrative Code section?

24 A. Yes, I am generally familiar with that.

1 Q. And you go through a number of specific
2 portions of that Administrative Code section and
3 state certain concerns that you have regarding --
4 regarding discussions, transactions, or actions in
5 this case and those Administrative Code sections; is
6 that correct?

7 A. On page 64, the paragraph at the bottom I
8 indicate that I recommend the Commission also
9 consider the DE-Ohio affiliated companies'
10 interrelationships, as illustrated by activities
11 related in the side agreements.

12 And then I provide examples of the
13 Commission's rules, and then at the very end I
14 provide an example of the PUCO staff's authority
15 to examine the utility and its affiliates' records.

16 Q. And you are not making any specific
17 accusation or finding of wrongdoing -- of violation
18 of any of these Administrative Code sections, are
19 you?

20 A. No. As I say in my testimony, I am
21 asking the Commission to consider looking into and
22 investigating the activities related to the side
23 agreements in light of these Commission rules.

24 Q. During these cases, did OCC approach DERS

1 for any discussions or for any other reason?

2 MR. SMALL: Objection. Extremely vague.
3 We subpoenaed their witness.

4 MR. COLBERT: I am asking whether OCC
5 approached DERS. It has nothing to do with the DERS
6 witness.

7 MR. SMALL: I guess I am very confused
8 about that question, "approached them." As I said,
9 we subpoenaed their witness. I deposed somebody. I
10 mean --

11 MR. COLBERT: Okay. I will be more
12 specific. I will withdraw that question. I didn't
13 understand your point.

14 Q. Did OCC have any settlement discussions
15 with DERS in the pendency of these proceedings?

16 MR. ROYER: Which proceedings?

17 MR. COLBERT: These 03-93-EL-ATA and on.

18 MR. ROYER: You mean from the original
19 round of the case?

20 MR. COLBERT: Yes.

21 MR. ROYER: They were not a party.

22 MR. COLBERT: Apparently -- as I
23 understand OCC's theory of the case, we were one and
24 DERS existed. I am simply asking whether they had

1 discussions with DERS.

2 EXAMINER KINGERY: You can answer the
3 question.

4 A. Let me restate and see if I understand
5 the question. You asked if OCC had any settlement
6 discussions with DERS in this case. I am not aware
7 of any.

8 MR. COLBERT: No more questions, your
9 Honor.

10 EXAMINER KINGERY: Thank you very much.

11 - - -

12 CROSS-EXAMINATION

13 By Mr. Kurtz:

14 Q. Good afternoon Ms. Hixon.

15 A. Good afternoon.

16 Q. I am going to ask you questions both on
17 behalf of Kroger and OEG.

18 A. Okay.

19 Q. Let's start with Kroger. You were
20 provided three Kroger agreements with Cinergy
21 Resources in discovery; is that correct?

22 A. Yes.

23 Q. Okay. The first agreement was dated
24 July, 2004.

1 EXAMINER KINGERY: Did you want this part
2 to be confidential?

3 MR. KURTZ: I think probably all of it.

4 EXAMINER KINGERY: Okay. We will seal
5 the record at this point. Actually, did you want
6 from the beginning of your questions?

7 MR. KURTZ: From here on is fine.

8 (Confidential portion.)
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(End of confidential portion.)

Q. You've testified you don't know that the price paid for the option agreements was in any way unreasonable; is that correct?

A. In terms of the value of the options.

Q. You've testified you don't believe

1 that -- or you don't know if the Kroger -- the third
2 Kroger agreement, the effective agreement, is in any
3 way unreasonable; isn't that right?

4 A. The third agreement is not in my
5 testimony.

6 Q. Okay. So are you making any
7 recommendation with respect to the Kroger agreement,
8 the third Kroger agreement, the effective one, or the
9 OEG or any of the option agreements?

10 A. I am not making recommendations in
11 regards to these agreements. I am making
12 recommendations to the Commission in regards to Duke
13 Energy - Ohio's rate stabilization plan.

14 Q. Okay. Next you say, "The Commission
15 should make all generation-related charges bypassable
16 to remove the incentive that has driven the
17 discriminatory treatment of customers and encourage
18 the development of the competitive market." Did I
19 read that right?

20 A. Yes.

21 Q. Okay. Do you draw a distinction -- first
22 of all, you know that virtually all of the charges
23 are bypassable. I think the evidence was 96 plus
24 percent of the generation charge is bypassable to the

1 first 25 percent of residential, the first 50 percent
2 of C&I customers?

3 A. I think you are mixing percentages at the
4 beginning there, you were talking 96 percent.

5 Q. 96 percent of generation charges, 96 plus
6 is bypassable to the first tranche, 25 percent of the
7 residential?

8 A. I am not familiar with the exact number
9 you've described.

10 Q. Okay. Do you draw a distinction of the
11 bypassability of the charges if we had a stabilized
12 generation price versus a pure market price like they
13 would have in Maryland? Do you draw a distinction
14 there?

15 A. I'm not testifying as to how the MBSSO or
16 the price is set. I'm testifying in terms of the
17 agreements and the MBSSO as it stands now and the
18 bypassability, so, no, I am not making any judgment
19 as to. I think you said market price or stabilized
20 price. I am not making a judgment to that.

21 Q. You are not -- you are not drawing a
22 distinction there should be more bypassability if we
23 had a pure market price versus a market based
24 stabilized price.

1 A. That's not part of my testimony.

2 Q. Next, I say that basically with respect
3 to RTC charges you recommend the prohibition of any
4 RTC charges; is that correct, that's what it says?
5 Are you aware by statute third parties are allowed to
6 pay RTC charges for customers?

7 MR. SMALL: Objection, your Honor. It
8 calls for a legal conclusion.

9 Q. Let me just -- I won't ask you a
10 conclusion. 4928.374, give me your nonlawyer's
11 interpretation of that nothing prevents payment of
12 all or part of your transition charges by another
13 party on a customer's behalf and then it goes on
14 about what a utility may or may not do. Were you
15 aware of that statute when you wrote your testimony?

16 MR. SMALL: Objection, your Honor. At
17 the very least she should have the entire text and
18 that's not the entire text.

19 EXAMINER KINGERY: Would you like to --

20 Q. Let me just ask the question. Were aware
21 of that provision when you wrote your testimony?

22 A. I have become aware of the provision but
23 not at the time I wrote my testimony.

24 Q. Okay. Next you go on to recommend that

1 the staff conduct an investigation -- and let me
2 paraphrase to make sure -- correct me if I am wrong,
3 that ratepayers did not pay, directly or indirectly,
4 any of the reimbursements and did not pay higher
5 rates to DE-Ohio because of the reimbursements.

6 A. I list that as part of the staff's
7 investigation. Prior to that I referenced the
8 examples that I have given in the commission rules
9 related to 4901:1-20-16 that we have discussed in
10 terms of relationships with affiliates. And part of
11 that investigation is what you just read.

12 Q. In any of your discovery, in any of your
13 investigation, in any of your anything have you
14 uncovered the attempt of the utility to try to
15 recover in rates any of the option payments or any of
16 the amounts at issue here?

17 A. In the review and the discovery I have
18 done I have not found that.

19 Q. What you have found, isn't it true, that
20 the Duke shareholders are essentially paying this out
21 of their unregulated companies?

22 A. I know what -- I know that DERS had no
23 cash and I have been told and am aware from witness's
24 deposition that Cinergy Corp. provided the funds and,

1 in fact, there is an accounts payable in D E R S's
2 books for the payments that were made. I can't
3 conclude though that Cinergy by shareholders are
4 paying that. I don't know.

5 Q. Well, if Cinergy Corp. paid that,
6 wouldn't that be Cinergy shareholders?

7 A. I don't know.

8 Q. But you have no evidence at all in
9 calling for this investigation that in any way the
10 utility has tried to recover these costs in rates
11 from any ratepayer; is that correct?

12 A. I have been presented no testimony that
13 tells me that that's why I recommend a review and
14 audit to make sure that hasn't happened.

15 Q. You have seen Mr. Steffen's testimony
16 where he walks through all the verifications
17 and true-ups of all these charges and you haven't
18 seen any indication that option payments are in there
19 anywhere, have you?

20 A. There is nothing in Mr. Steffen's
21 testimony that talks about true-ups of option
22 payments.

23 Q. All right. Your last recommendation is
24 the Commission should adopt the pricing plan

1 recommended by Mr. Talbot; is that correct?

2 A. Yes.

3 Q. Okay. Mr. Talbot recommended -- were you
4 here yesterday when he testified?

5 A. No.

6 Q. Okay. You read his testimony though,
7 correct?

8 A. Yes.

9 Q. Okay. He testified that the Commission
10 should either go with pure market pricing or a
11 full-blown pure cost of service generation case. Are
12 you aware of that?

13 A. I don't recollect those words from
14 Mr. Talbot's testimony.

15 Q. Okay. He wanted either pure market or
16 pure cost of service.

17 A. If you could give me a cite to his
18 testimony, I don't recollect that.

19 Q. Summary bullet 9.

20 A. I don't have his testimony.

21 Q. I will read it to you. "The current
22 standard service offer is neither consistently
23 cost-based, nor consistently market-based, and its
24 flaws are related to this problem. If the Commission

1 does not wish to let market price itself determine
2 market prices for standard service offer, the next
3 best proxy for market prices is a consistently
4 cost-based standard service offer." Are you familiar
5 with this?

6 A. I've read his testimony.

7 Q. I just don't want to read the whole
8 thing. Let me propose a hypothetical. Let me ask
9 you, are you -- are you aware that yesterday he
10 testified that the OCC's position and his position is
11 not to go to a pure market rate like has been done in
12 Illinois and Maryland?

13 MR. SMALL: Objection.

14 MR. KURTZ: I am asking her --

15 MR. SMALL: Could I get my objection out
16 before you argue?

17 MR. KURTZ: I will rephrase the question.

18 EXAMINER KINGERY: That's fine.

19 Q. Are you aware that Mr. Talbot testified
20 that he does not recommend, nor does the OCC office
21 recommend that the standard service offer be a pure
22 market price?

23 MR. SMALL: Objection, your Honor. This
24 is going way beyond the scope of her testimony, and

1 there is a point in her testimony where she says,
2 "This is not going to be the subject of my testimony.
3 I leave it to Mr. Talbot."

4 Mr. Talbot was on the stand. These
5 questions would have been asked of Mr. Talbot.
6 Ms. Hixon is being asked to explain Mr. Talbot's
7 testimony. It's completely meritless as far as
8 adding to the record in this case.

9 MR. KURTZ: Well, she testified finally
10 the Commission should adopt the post-MDP generation
11 pricing plan for De-Ohio based upon the
12 recommendations of OCC witness Neil Talbot.

13 MR. SMALL: That is a punt to Mr. Talbot
14 and his expertise on this matter. It is essentially
15 saying Mr. Talbot is the expert on this matter.

16 EXAMINER KINGERY: If she is asked a
17 question she cannot answer, does not know the answer
18 to, she can certainly say she does not know. I will
19 allow the question.

20 Q. Do you know if he testified to that
21 effect?

22 A. I was not here for his testimony
23 yesterday.

24 Q. If the Commission were to go with a pure

1 cost of service base standard offer, do you know if
2 there is any statutory -- in your nonlawyer capacity,
3 statutory basis for the Commission to set the market
4 base of standard service rate at pure cost of
5 service?

6 A. I am not testifying as to what the
7 Commission should do in terms of the generation
8 pricing plan. Mr. Talbot did.

9 MR. KURTZ: Okay.

10 Thank you, your Honor. Those are my
11 questions.

12 EXAMINER KINGERY: Thank you very much.
13 Do you have questions?

14 MR. DORTCH: I may, your Honor. Let me
15 review my notes for a moment. I don't think so.

16 EXAMINER KINGERY: We can go off the
17 record while you do that. Take 10 minutes.

18 (Recess taken.)

19 EXAMINER KINGERY: Okay. I think we are
20 ready to go back on the record.

21 Mr. Dortch.

22 MR. DORTCH: Thank you, your Honor.

23 - - -

24 CROSS-EXAMINATION

1 By Mr. Dortch:

2 Q. Ms. Hixon, I will be very brief. I just
3 want to be absolutely certain of one thing. You are
4 not alleging that Cinergy Corporation has violated
5 the corporate separation regulations of this
6 Commission at all, are you?

7 A. My testimony is as I have explained
8 before, is that I think the Commission should
9 investigate the transactions and review them. I have
10 not alleged any violation.

11 Q. So the answer is no, you have not alleged
12 any violation by Cinergy Corporation, correct?

13 A. Correct. I have not alleged any
14 violation.

15 Q. Thank you. I am also going to ask the
16 same question on behalf of Duke Energy Retail Sales.
17 You are not alleging that Duke Energy Retail Sales
18 has violated any regulation, corporate separation
19 rules of this Commission, correct?

20 A. With all the caveats that I have
21 explained --

22 Q. I understand you've seen these contracts,
23 that you didn't investigate everything, you want to
24 dump into the record, but you are not alleging any

1 violation, correct?

2 MR. ROYER: Object.

3 MR. SMALL: Objection.

4 MR. ROYER: Argumentative.

5 HEARING OFFICER: Let's rephrase to take
6 the word "dump" out.

7 MR. DORTCH: I will take the word "dump"
8 out.

9 Q. You are not alleging that Duke Energy
10 Retail Sales has violated the corporate separation
11 rules of this Commission, correct?

12 A. With all the caveats that I gave to the
13 first question, my testimony again is I have not
14 alleged or found any violation.

15 MR. DORTCH: Thank you. No further
16 questions, your Honor.

17 EXAMINER KINGERY: Thank you.

18 Mr. Neilsen.

19 MR. NEILSEN: I do have questions.

20 - - -

21 CROSS-EXAMINATION

22 By Mr. Neilsen:

23 Q. Ms. Hixon, my name is Dan Neilsen. I am
24 here for Industrial Energy Users - Ohio, sometimes

1 referred to as IEU-Ohio or IEU. I do have some
2 questions for you.

3 Ms. Hixon, would you turn to the page 57
4 of your testimony, please.

5 A. I have that.

6 Q. Okay. And you state in the sentence
7 beginning at line 4 that it is important to return to
8 the roots of a proceeding to consider the post-MDP
9 pricing proposals of DE-Ohio, correct?

10 A. I state it's important to return to the
11 roots for such a proceeding, yes.

12 Q. Okay. Thank you. I would like to
13 explore those roots with you. Now, you agree, in
14 fact, you state that this proceeding was initiated
15 upon the filing of an application by CG&E in Case No.
16 03-93-EL-ATA, correct?

17 A. Yes.

18 Q. Okay. And are you familiar with the
19 history of that case?

20 A. That's the case that we are currently in,
21 yes.

22 Q. Okay. And that application was filed on
23 January 10, 2003, correct?

24 A. If I could have just a moment.

1 Q. Sure.

2 A. Yes. And my testimony at page 9 I have a
3 chart, and that date is January 10, 2003.

4 Q. Okay. Now, would you agree that the
5 application filed by CG&E in that case may have roots
6 in any other cases; for example, was any provision in
7 CG&E's transition plan approved in Case No.
8 99-1658-EL-ATP referenced in the application filed in
9 03-93?

10 A. I don't have the application here in
11 front of me, but given that this was for post-MDP and
12 that the ETP cases set the MDP, I would suspect
13 strongly that was mentioned.

14 Q. Okay. And would you agree, subject to
15 check, that the transition plan that case referred to
16 gave CG&E the ability to end the market development
17 period for any class where there was 20 percent
18 shopping?

19 A. No.

20 Q. You would not -- you will not agree to
21 that subject to check?

22 A. No.

23 Q. Okay. Now, also on page 4 of your
24 testimony, beginning at line 19 and going on to page

1 5 through line 2, you state that the Commission
2 issued an entry that consolidated various matters --
3 various pending matters regarding CG&E and requested
4 that CG&E file a rate stabilization plan. Do you see
5 that?

6 A. Yes.

7 Q. Okay. What is your understanding as to
8 why the Commission requested CG&E to file a rate
9 stabilization plan?

10 A. Well, as I discuss further on in my
11 testimony where I discussed post-MDP pricing
12 proposals and also where you had cited at page 4 and
13 5, I indicate the Commission being concerned at that
14 particular point in time about the lack of
15 development in the competitive market and calling for
16 basically a departure of what would have been the
17 post-MDP generation pricing rules, that departure,
18 being a rate stabilization plan, and then the goals
19 that were established that I list on page 5.

20 Q. Okay. Ms. Hixon, could you turn to page
21 57 of your testimony, please.

22 A. I have that.

23 Q. Okay. Now, on that page beginning at
24 line 6 you provide a description of the Commission's

1 effort to develop rules for post-MDP pricing of
2 generation service, specifically Ohio Administrative
3 Code Rules 4901:1-35-01 through 4901:1-35-06 which I
4 believe you refer to as Rule 35; is that correct?

5 A. Yes.

6 Q. Okay. And you would agree that the
7 Commission did not finalize Rule 35 -- would you
8 agree that the Commission didn't finalize Rule
9 35 until December 19, 2003?

10 A. My recollection is that a finding and
11 order came out in December, 2003. I am not sure of
12 the date and I am not sure if that's what you are
13 referring to.

14 Q. Okay. That's fine, yes. And that did
15 not become effective until May of 2004. I believe
16 you state that on your -- in your testimony?

17 A. At line 9, yes.

18 Q. Yes, correct. Okay. Now, also on page
19 57 and included within footnote 89 you give some
20 description of how CG&E's proposal compared with Rule
21 35; is that correct?

22 A. At footnote 89 I describe that CG&E's
23 proposal did not provide customers who did not choose
24 a supply option to be included in the competitive bid

1 price pool as provided for by Rule 35 .

2 Q. Okay.

3 A. And then I go on to describe that.

4 Q. I'm sorry, okay. Now, is it your
5 understanding that the Ohio Supreme Court remanded
6 the case to -- this case to the Commission as a
7 result of the Court finding that the plan approved by
8 the Commission is in conflict with Rule 35?

9 A. On page 8 I give a description of my
10 understanding of what the Supreme Court did in terms
11 of this remand, at lines 19 through 22, that "the
12 PUCO erred by failing to compel the disclosure of
13 side agreements and erred by failing to properly
14 support modifications to post-MDP rates and made on
15 its entry on rehearing."

16 Q. Right. My understanding of that section
17 of your testimony is that you are not -- you are not
18 alleging that -- you are not stating that the Court
19 found that this plan approved by the Commission was in
20 conflict with Rule 35; is that correct?

21 A. I do not say that.

22 Q. Thank you. Okay. Now, if we could turn
23 back to page 6 -- oh, excuse me. I'm sorry. You
24 indicate in your testimony at page 6, yeah, that a

1 stipulation and recommendation was filed in the RSP
2 case on May 19, 2004.

3 A. I see that.

4 Q. Okay. Now, are you -- are you familiar
5 with that stipulation and recommendation?

6 A. I have read it.

7 Q. Okay. Are you aware of whether or not
8 IEU-Ohio communicated any practical reasons for its
9 support of that stipulation?

10 A. I believe in my deposition that,
11 Mr. Neilsen, you pointed out such a provision to me.

12 Q. Correct. And that provision was -- that
13 was at page 2 of the stipulation, footnote No. 1.

14 A. I don't have it with me, but subject to
15 check.

16 Q. Subject to check, okay. Now, do you
17 agree that a party may change its initial litigation
18 objectives in a legal proceeding based on certain
19 events that may have taken place during that
20 proceeding in which the party may view -- which the
21 party may view as a risk to its initial litigation
22 objectives?

23 A. A party may.

24 Q. Now, I would like to talk about the

1 bigger picture situation in Ohio at the time the
2 stipulation was filed. Are you familiar at all with
3 what Monongahela Power, or what I refer to as Mon
4 Power, was proposing for its Ohio customers in
5 conjunction with its effort to end its market
6 development period?

7 MR. SMALL: Objection, relevance. Now,
8 we are on the Mon Power purchase -- purchase of Mon
9 Power by Columbus Southern. I don't see the
10 relevance to this proceeding.

11 MR. NEILSEN: Your Honor -- your Honor,
12 Ms. Hixon states at page 61, line 2 of her testimony
13 that she discusses market -- that portion of her
14 testimony discusses market development. The market
15 development in Ohio is, in fact, relevant to this
16 proceeding.

17 EXAMINER KINGERY: I will allow it.

18 THE WITNESS: Could I have the question
19 read, please?

20 (Question read.)

21 A. I am generally familiar.

22 Q. Okay. Now, are you -- are you aware that
23 Mon Power pursued litigation in the Ohio Supreme
24 Court and Federal District Court in an effort to

1 require the Public Utilities Commission of Ohio to
2 allow Mon Power to flow spot market wholesale power
3 prices through to nonresidential customers for
4 purposes of meeting the post-MDP POLR pricing
5 obligation under Section 4928.14 Ohio Revised Code?

6 MR. SMALL: Objection. Calls for a legal
7 conclusion. Not only is it reference to a statute,
8 but he's asking her to interpret the
9 interrelationships between federal court cases and
10 the Public Utilities Commission. I am not sure there
11 are attorneys in this office -- in this room that
12 have a very clear understanding of what this
13 nonattorney is being asked to explain, the reference.

14 MR. NEILSEN: Your Honor, she indicated
15 she was generally familiar with what was going on
16 with Mon Power at the time, and I am just simply
17 trying to find out what exactly she was aware of at
18 the time. If she doesn't know, she doesn't know.

19 EXAMINER KINGERY: May I hear the
20 question read back, please.

21 (Question read.)

22 EXAMINER KINGERY: Mr. Neilsen, can you
23 perhaps modify your question to ask this piecemeal.
24 It's a very complicated question, and I think that's

1 what's causing the problem. If you are just trying
2 to find out what she is aware of you, can start at --

3 MR. NEILSEN: Your Honor, I will withdraw
4 the question. I have a couple more related to that
5 that I think will get me what I want to find out.

6 EXAMINER KINGERY: Thank you.

7 Q. Ms. Hixon, are you aware Mon Power
8 claimed that the Ohio market development period rate
9 caps were confiscatory?

10 MR. SMALL: Objection. Calls for a legal
11 conclusion.

12 EXAMINER KINGERY: He just asked if she
13 was aware of a claim. I don't think that's a legal
14 conclusion.

15 THE WITNESS: Could I have the question
16 read, please.

17 EXAMINER KINGERY: Certainly.

18 (Question read.)

19 A. I am aware that Mon Power made certain
20 claims but my understanding was that it was to
21 post-MDP, and so I am not sure, and I guess I am not
22 aware that they made the claim that the MDP rate caps
23 were confiscatory.

24 Q. Very well. Do you know if Mon Power was

1 successful in obtaining a federal court decision
2 finding that CSP rate caps are unconstitutional to
3 the extent that the law does not permit the utility
4 the opportunity to contest the rate cap on grounds of
5 confiscation?

6 A. I am aware that litigation occurred, but
7 I am not aware that was a decision, if it was.

8 Q. Very well. Ms. Hixon, do you know
9 whether or not OCC supported the rate stabilization
10 plan for Dayton Power & Light that was submitted to
11 the Public Utilities Commission in Case No.
12 02-2779-EL-ATA?

13 A. A point of clarification, is that the
14 rate stabilization plan that came out of the case
15 that extends the Dayton Power & Light market
16 development period as well?

17 Q. This would be the initial proceeding that
18 took place in --

19 A. So it was?

20 Q. Yes.

21 A. I know that OCC did support a rate
22 stabilization plan as part of the case, but also
23 extended Dayton Power & Light's market development
24 period.

1 Q. Do you know if the RSP for DP&L continued
2 the 5 percent residential rate reduction after the
3 end of the MDP?

4 MR. SMALL: Objection. Just for the
5 record, I believe we are far afield, and we have
6 talked about Mon Power here for a while, and now we
7 are talking about Dayton Power & Light. I think it
8 would be better if time spent was relevant to discuss
9 the Cincinnati Gas & Electric Company.

10 MR. NEILSEN: And, your Honor, I am
11 getting to that but, again, Ms. Hixon's testimony is
12 based on the market development at the time, and, in
13 fact, Dayton Power & Light's rate stabilization plan
14 does address the market development -- the market
15 development in the state of Ohio, just as CG&E's did.

16 EXAMINER KINGERY: I will allow the
17 question.

18 A. I think the question was whether or not
19 that particular RSP plan as approved by the Commission
20 included an extension of a residential discount. Did
21 I hear that correctly?

22 Q. Did it continue the 5 percent residential
23 rate reduction after the end of the market
24 development period?

1 A. I believe, yes, that the initial RSP did
2 have an extension of that discount through 2008.

3 Q. Now, is it your view that a rate
4 reduction for one class of customers with a rate
5 increase for other classes of customers results in
6 undue discrimination?

7 A. No.

8 Q. Ms. Hixon, are you aware of whether or
9 not the Public Utilities Commission of Ohio has
10 determined that it did not have authority to impose a
11 rate stabilization plan on a utility?

12 A. I recollect that during my deposition
13 that you took you provided me with a document and had
14 me read a statement from an order where the
15 Commission made a statement similar to that.

16 Q. And that document was a finding and order
17 in Case No. 04-1047-EL-ATA dated April 6, 2005. I
18 can provide you with that document for you to review,
19 or you can accept subject to check that indeed in
20 that finding and order the Commission indicated that
21 it could not mandate the filing of an RSP.

22 A. You asked if I was aware. That's the
23 extent of my awareness.

24 Q. Okay. Ms. Hixon, would you agree that

1 where the PUCO does not have authority to impose a
2 rate stabilization plan on a utility, the ability of
3 the Public Utilities Commission of Ohio to approve a
4 rate stabilization plan depends on that utility
5 accepting the plan and any modification made to it?

6 MR. SMALL: Objection. The beginning of
7 that question started with the conclusion or the
8 legal analysis that it was illegal for -- or that the
9 Commission lacked authority. For that part of it she
10 would have to provide a legal analysis.

11 EXAMINER KINGERY: Can you rephrase,
12 please?

13 Q. Ms. Hixon, if we assume that the Public
14 Utilities Commission cannot impose a rate
15 stabilization plan on a utility, that the ability of
16 the Commission to approve the rate stabilization plan
17 depends on the utility accepting the plan as approved
18 or modified?

19 A. If the assumption is that the Commission
20 cannot impose something, then they cannot impose it.

21 Q. Well, then Ms. Hixon, given that, would
22 you agree that in the situation where the utility
23 consent is required to effectuate a rate
24 stabilization plan, customers may have a very limited

1 negotiating leverage regarding the terms and
2 conditions of the RSP?

3 MR. SMALL: Objection. I don't have an
4 objection if he continues the -- the hypothetical,
5 that he continues, but he's lost the hypothetical
6 now, which calls for her to go into a legal analysis
7 lacking that hypothetical.

8 EXAMINER KINGERY: Please rephrase.

9 Q. Ms. Hixon, assuming again that the Public
10 Utilities Commission of Ohio has found that it cannot
11 impose a rate stabilization plan on a utility, would
12 you agree that in a situation where the utility's
13 consent is required to effectuate that rate
14 stabilization plan, customers have limited
15 negotiating leverage?

16 A. And in terms of negotiating among who for
17 what?

18 Q. Negotiating with the utility or other
19 parties regarding the terms and conditions within
20 that rate stabilization plan.

21 A. I would agree that under your assumption
22 that an authority, such as the Commission, does not
23 have the ability to impose and consent is required,
24 that that could limit negotiating leverage.

1 Q. Ms. Hixon, is it your understanding that
2 OCC's position during the initial RSP proceeding that
3 standard service offer prices should be based on a
4 wholesale auction?

5 A. When you say initial RSP, you mean --

6 Q. The proceeding prior -- the proceeding by
7 which the -- that the Public Utilities Commission's
8 issued the opinion and order on in September of, I
9 believe it was, 2005. The proceeding prior to this
10 that led to the remand.

11 A. And with that clarification could I have
12 the question reread?

13 Q. Sure. Is it your understanding that
14 OCC's position during that initial proceeding was
15 that the standard service offer prices should be
16 based on a wholesale auction?

17 MR. SMALL: Objection. This
18 mischaracterizes the evidence. We have an extensive
19 record on this, including the OCC testimony, and I
20 don't believe that has ever been part of the record
21 in this case.

22 MR. NEILSEN: One second, your Honor.

23 EXAMINER KINGERY: Okay.

24 MR. NEILSEN: I withdraw the question.

1 May I approach the witness, your Honor?

2 EXAMINER KINGERY: You may.

3 Would you like this marked as an exhibit?

4 MR. NEILSEN: Yes, your Honor. If we
5 could mark it IEU-Ohio Remand Exhibit 1, please.

6 (EXHIBIT MARKED FOR IDENTIFICATION.)

7 EXAMINER KINGERY: It will be so marked.

8 Q. Ms. Hixon, are you familiar with that
9 document? Let me back up. The document states that
10 it is the post hearing brief -- post-hearing merit
11 brief of the Office of Ohio Consumers' Counsel dated
12 June 22, 2004, date stamped June 22, 2004 at the
13 corner, in Case No. 03-93-EL-ATA and others. Are you
14 familiar with this document?

15 A. I'm sure that I've seen it or read it.

16 Q. And would you turn to page 7, please.
17 And would you read the portion under subsection C.

18 A. I've read it.

19 MR. NEILSEN: One second, your Honor.

20 Q. Now, is it true in that section OCC's
21 litigation position in that proceeding was based on
22 OCC's basic framework that caused it, the OCC, to
23 urge the Commission to order CG&E to conduct an
24 auction and direct CG&E to transfer its generating

1 assets to an exempt wholesale generator or --

2 MR. SMALL: Your Honors, these documents
3 speak for themselves. They can be cited at any point.
4 This is cross-examination, has nothing to do with
5 this witness. It has nothing to do with her -- with
6 her testimony.

7 In fact, what should be done with
8 post-ITP pricing is the subject of Neil Talbot's
9 supplemental and first testimony the first time, and
10 not only has she deferred to Mr. Talbot as the expert
11 on this matter in this remand proceeding, but he was
12 also the witness on that -- in the first and the
13 second time on this matter. So not only are -- we
14 have gone back a long ways in time, but it was never
15 the subject matter of this witness's testimony.

16 MR. NEILSEN: I'll withdraw the question,
17 your Honor.

18 Q. Ms. Hixon, yesterday Duke Energy - Ohio
19 produced an Exhibit DE-Ohio Remand Exhibit 14. It
20 was titled "Harvard Electricity Policy Group,
21 Forty-Third Plenary Session," presented by Janine
22 Migden-Ostrander. Are you familiar with that?

23 A. I was not here yesterday. I don't have
24 it.

1 MR. NEILSEN: May I approach the witness,
2 your Honor?

3 EXAMINER KINGERY: You may. We have it.

4 Q. Ms. Hixon, this was admitted into the
5 record yesterday. Would you turn to page -- the
6 seventh page of this document for me, please? I
7 believe the title of that page is "The wholesale
8 'nether world.'" And the first -- the first bullet,
9 the first line on the first bullet says, "News is
10 full of stories about short-term." Just to make sure
11 we are on the same page.

12 A. I have that page.

13 Q. Okay. Now, Ms. Hixon, would you agree
14 with the statement at slide -- on that page that
15 "Ohio has seen wholesale options that have failed to
16 generate acceptable bids"?

17 MR. SMALL: Objection, your Honor. I
18 have the same objection to this. There is a reason
19 why this was marked and used in the cross-examination
20 of Neil Talbot, and that's because he testified on
21 that subject matter and his expertise is on those
22 matters, and it was explained by counsel in defense
23 of that exhibit Mr. Talbot explained that he was
24 aware of the developments, not just Ohio but

1 regionally and even nationally, and that was the
2 basis for the cross-examination.

3 Now, this witness has been put on to
4 review and to state opinions about how certain
5 agreements that were entered into by Duke Energy -
6 Ohio and its affiliates and has nothing to do with --
7 and he refers more than one place to Mr. Talbot on
8 the matters that Mr. Neilsen wants to inquire into.
9 The cross-examination was yesterday. This has been
10 admitted into evidence, but this witness is not the
11 proper witness to ask these questions.

12 MR. NEILSEN: And, your Honor, again her
13 testimony does deal with the development of the
14 market, which is affected by the wholesale market,
15 and we are getting there as well. And as far as
16 Ms. Hixon's testimony concerns any agreements by
17 parties to the stipulation in this case, I am trying
18 to establish what some of the reasons for -- for
19 entering into that stipulation may have been. So I
20 am trying to get from her what her opinion is
21 regarding the wholesale market now and at the time
22 that this proceeding was taking place initially.

23 EXAMINER KINGERY: The witness's
24 testimony does deal with market development. We will

1 allow the question, but it is getting fair afield of
2 what she is intending to testify about.

3 Certainly if you don't know the answer,
4 feel free to say so.

5 A. Could you repeat the question, please?

6 Q. My question was, do you agree with the
7 statement on the bottom of that page that states,
8 "Ohio has seen wholesale auctions that have failed to
9 generate acceptable bids"?

10 A. Since I am aware that two FirstEnergy
11 auctions were held and did not generate acceptable
12 bids, in the sense that they were not acceptable to
13 the Commission in relationship to FirstEnergy's rate
14 stabilization plan, I would have to agree with that
15 statement.

16 Q. And if you would turn the page and look
17 at that eighth slide please, and to the extent
18 that -- to the extent that you understand the bullets
19 on that page, can you tell me whether or not you
20 agree with those observations?

21 MR. SMALL: Could I have the page? These
22 are unnumbered pages.

23 MR. NEILSEN: It's -- your Honor, it's
24 the page again that says "The Wholesale 'Nether

1 World.'" The very first bullet states -- says
2 "Reflects short-term market prices." These do not
3 have page numbers.

4 EXAMINER KINGERY: But it's the page
5 immediately following the one we were looking at.

6 MR. NEILSEN: The page immediately
7 following.

8 MR. SMALL: I guess I still am not there.
9 I'm sorry. "Reflects short-term market prices,"
10 correct?

11 MR. NEILSEN: Correct.

12 MR. SMALL: All right. Then I am there
13 now.

14 A. Since these are bullet points that
15 describe something, and I am not real clear as to
16 what that something is, in other words, they are
17 bullet points that describe, I assume, perhaps a
18 presentation or discussion, whether they correctly
19 reflect what was being described, I can't make a
20 judgment.

21 Q. I understand. Okay. Now, if you would
22 turn the pages to what would be the 11th slide and I
23 will be more descriptive for you. At the top of the
24 page it says, "What do we do now?" That's the first

1 of those pages with that title and with that heading.
2 The first -- are you there?

3 A. Yes.

4 Q. Okay. The first bullet point states,
5 "Certainly retail expectation cannot succeed without
6 a viable wholesale market." Do you agree with that
7 statement?

8 A. Yes, I do.

9 Q. I'm done with that exhibit. Ms. Hixon,
10 would you turn to page 60 of your testimony, please.

11 A. I have that.

12 Q. Okay. Now, throughout your testimony,
13 and specifically at page 60, line 8, and for
14 clarification, also page 63, lines 4 and 5, page 66,
15 line 20, and page 68, line 20, you reference the
16 development of the market. If you know without
17 having to look at all of those -- the list I just
18 gave you, are you talking about the wholesale market
19 or the retail market?

20 A. The market development that I am
21 referring to is the development of the retail market
22 in Duke Energy - Ohio service territory.

23 Q. Wouldn't you agree, though, that it's
24 impossible to distort a market that doesn't exist?

1 A. And what do you mean by the term
2 "distort"?

3 Q. Well, if you would turn to page 69 of
4 your testimony and look at line 20, you use the term
5 "distorted" there and again at page 71, line 5.

6 MR. SMALL: I'm sorry, what was that?

7 MR. NEILSEN: Page 71, line 5.

8 Q. You again use the term "distort."

9 MR. SMALL: I object, your Honor. Both
10 instances where he has cited to distort, it has
11 nothing to do with distorting the market, just
12 because the word appears there, but it doesn't apply
13 to the concept which he is examining.

14 MR. NEILSEN: Your Honor, what I meant by
15 the word distort, I am using the words that she has
16 used throughout the testimony. I didn't realize that
17 term had a different meaning to it depending on how
18 it was used in this testimony. If, in fact, it has a
19 different meaning each time, I think I would like to
20 get into that discussion but --

21 EXAMINER KINGERY: Ms. Hixon, could you
22 perhaps clarify your question as to what you were
23 asking?

24 THE WITNESS: What I was asking is what

1 do you mean to distort a market? In other words what
2 is the impact that you are using to say distort means
3 in relationship to a market? I'm sorry, not just the
4 definition of the word; I meant it in terms of the
5 question you were asking.

6 Q. Very well. That you get a false
7 impression of the intended purpose.

8 A. Okay. I think that it depends on why a
9 market does not exist as to whether you could get a
10 false impression of the intended purpose of that
11 market whereas you define as distort. For example,
12 prior to January 1, 2001, there was no competitive
13 generation market in Ohio. My understanding is that
14 was by law. There probably wasn't much you could do
15 in terms of distorting that competitive market
16 because it could not exist.

17 If a competitive market for electricity
18 could exist after January 1, 2001, but does not
19 exist, then I think you could get a false impression
20 of the intended purpose because the competitive
21 market might be distorted for a variety of different
22 reasons.

23 Q. Okay. Now, Ms. Hixon, we talked a little
24 bit earlier -- strike that.

1 Ms. Hixon, I would like to go through a
2 scenario here with you that wasn't addressed in your
3 testimony. Now, if we were to assume that the
4 Commission had no authority to acquire an EDU -- to
5 require CG&E to file a rate stabilization plan, and
6 then we assume that in this case CG&E or Duke decided
7 it would not accept OCC's recommendations, should the
8 Commission approve the RSP as is, or should they set
9 the standard service offer through an auction
10 process?

11 A. I get the sense that we are mixing an
12 assumption with in this case, so I have a little
13 trouble with that assumption and then saying in this
14 case. But the final answer to your question is I'm
15 not recommending what the Commission should do in
16 terms of what market based standard service offer
17 should be accepted. Mr. Talbot was.

18 MR. NEILSEN: That's all I have, your
19 Honor. Thank you.

20 EXAMINER KINGERY: Thank you.

21 Mr.. Howard?

22 MR. HOWARD: No questions, your Honor.

23 HEARING OFFICER: Mr. Sites?

24 MR. SITES: No questions.

1 EXAMINER KINGERY: Mr. Royer?

2 MR. ROYER: No questions.

3 EXAMINER KINGERY: Mr. McNamee?

4 MR. McNAMEE: Mr. Kurtz already asked my
5 questions, so I have nothing.

6 EXAMINER KINGERY: Ms. Christensen?

7 MS. CHRISTENSEN: No.

8 HEARING OFFICER: I think I have hit
9 everybody.

10 All right. Redirect?

11 MR. SMALL: There will be no redirect,
12 your Honor.

13 EXAMINER FARKAS: Thank you.

14 EXAMINER KINGERY: You are excused.

15 (Witness excused.)

16 MR. SMALL: The OCC has previously moved
17 OCC Exhibits Remand 2A and 2B.

18 EXAMINER KINGERY: All right. Objections
19 to OCC Remand Exhibits 2A and 2B?

20 MR. COLBERT: The same as previously
21 stated.

22 MR. NEILSEN: IEU-Ohio objects as well,
23 the same as previously stated.

24 EXAMINER KINGERY: Recognizing that there

1 are continuing objections, they will be admitted.

2 (EXHIBITS ADMITTED INTO EVIDENCE.)

3 MR. COLBERT: Your Honor, De-Ohio would
4 move in Exhibits 20, 22, 23, 24, 25, and 26 and for
5 administrative notice of 21.

6 EXAMINER KINGERY: All right. Let's take
7 them one at a time. Exhibit 20 was the communication
8 between Cinergy and Mr. Tongren. Any objections to
9 that one?

10 MR. SMALL: Yes. The OCC objects. I
11 believe my objections were previously stated.

12 EXAMINER KINGERY: Yes.

13 MR. ROYER: We also object.

14 MR. COLBERT: Yeah, your Honor, I have
15 already stated so.

16 EXAMINER KINGERY: Yes. I think we
17 already had an argument on this point. Those will be
18 admitted.

19 (EXHIBIT ADMITTED INTO EVIDENCE.)

20 EXAMINER KINGERY: We note the continuing
21 objection.

22 21 was the Supreme Court opinion. Happy
23 to take administrative notice of that. Of course,
24 you could cite it without the notice.

1 22 is a stipulation between Duke and OCC,
2 and I think we had objections to that as well.

3 MR. SMALL: OCC continues to object to
4 DE-Ohio Exhibit 23.

5 MR. ROYER: As do we.

6 EXAMINER KINGERY: We note the continuing
7 objection. It will be admitted .

8 (EXHIBIT ADMITTED INTO EVIDENCE.)

9 EXAMINER KINGERY: Okay. 23 was one that
10 we had not determined what to do with. That was the
11 affidavit of Mr. Pitts of People Working
12 Cooperatively with the three e-mails that are
13 attached.

14 MR. SMALL: Yes, your Honor. In addition
15 to my previous objections or statements in objection
16 to DE-Ohio Exhibit 23, I state the other part of the
17 objection to this type of evidence, which is I have
18 been denied the opportunity to cross-examine
19 Mr. Pitts, and that's really the -- that's really the
20 purpose for the exclusion in the Rules of Evidence,
21 and if this is to be admitted, then I should have an
22 opportunity to cross-examine Mr. Pitts.

23 MR. COLBERT: Your Honor, if that's the
24 only objection, we would agree to detach the

1 affidavit and simply submit the e-mails. We
2 certainly believe that the e-mails support the
3 affidavit and they go together, but we would agree to
4 that arrangement. And I would note that, you know,
5 Ms. Hixon was the recipient of one of the e-mails,
6 was able to identify it, et cetera.

7 MR. SMALL: Well, as I stated, the
8 attachments are part of the affidavit, so it's
9 improper evidence regardless of how they repackage
10 it. And it's been supported -- it's been supported
11 as being a representation by People Working
12 Cooperatively and, in particular, Mr. Pitts.

13 EXAMINER KINGERY: We are not going to
14 admit the two-page affidavit as hearsay. As to the
15 three e-mails that are attached, the first one where
16 Ms. Hixon was indeed listed as receiving a copy and
17 she was able to identify it, we will admit that. The
18 second two e-mails, however, she did not say that she
19 had any knowledge of and she's not shown as receiving
20 a copy of, so we will only be admitting the first of
21 the three e-mails.

22 MR. ROYER: I didn't get a chance to
23 chime in but.

24 EXAMINER KINGERY: I apologise.

1 MR. ROYER: But I would object to the one
2 that's been admitted on the grounds of relevance. I
3 have an idea where that's going to go.

4 EXAMINER KINGERY: And that objection is
5 overruled. What a shock.

6 (EXHIBIT ADMITTED INTO EVIDENCE.)

7 EXAMINER KINGERY: The reference then
8 to DE-Ohio Remand Exhibit 23 will be just to the one
9 page.

10 The next was 24, 25, and 26, which were
11 the tax returns. And I believe there was a pending
12 objection -- continuing objection to those on
13 relevance, if I recall.

14 MR. SMALL: Your Honors, for my part OCC
15 withdraws its objections of those three exhibits.

16 EXAMINER KINGERY: Thank you.

17 MR. ROYER: No objection.

18 EXAMINER KINGERY: All right. Any other
19 objection? Okay. They will be admitted.

20 (EXHIBITS ADMITTED INTO EVIDENCE.)

21 EXAINER FARKAS: That takes care of all
22 of the documents.

23 MR. HOWARD: Yesterday I understand
24 Mr. Petricoff and Mr. Colbert had a discussion about

1 not having to call Mr. Whitlock if we could introduce
2 the deposition of Mr. Whitlock into the record. And
3 I would ask that the your Honors mark as OMG Remand
4 Exhibit No. 4 the transcript of the deposition of
5 Charles Whitlock, which took place on January 9.
6 This document does not contain the exhibits to the
7 deposition and it does contain the confidential
8 portion of the deposition in a sealed -- in an
9 envelope. We would ask that that be marked and
10 admitted into evidence as OMG Remand Exhibit No. 4.

11 EXAMINER KINGERY: It will be so marked.

12 (EXHIBIT MARKED FOR IDENTIFICATION.)

13 EXAMINER KINGERY: Any objections to its
14 admission?

15 MR. NEILSEN: Your Honor, just subject to
16 the confidentiality provision that we discussed on
17 Monday the 20th -- the 19th.

18 EXAMINER KINGERY: Mr. Howard, are the
19 account numbers redacted out of this version?

20 MR. HOWARD: No, they are not.

21 EXAMINER KINGERY: Are they in the
22 confidential envelope?

23 MR. HOWARD: I think, yes. The portion
24 of the transcript that was considered confidential is

1 in the envelope.

2 MR. COLBERT: I don't believe there are
3 any account numbers in the transcript.

4 MR. SMALL: It's my understanding, and I
5 understand Mr. Howard was not in the room the other
6 day, but it was my understanding and what he just
7 represented was that there were no attachments to
8 this.

9 EXAMINER KINGERY: And all the account
10 numbers would have been in the attachments.

11 MR. SMALL: As far as I know.

12 EXAMINER KINGERY: Okay.

13 MR. COLBERT: We agree with that. I
14 think that's accurate.

15 EXAMINER KINGERY: Okay. All right.

16 MR. COLBERT: And, your Honor, being one
17 more matter.

18 EXAMINER KINGERY: That exhibit will be
19 admitted.

20 (EXHIBIT ADMITTED INTO EVIDENCE.)

21 MR. HOWARD: Thank you.

22 MR. COLBERT: We are not sure we know
23 they were marked, but have OCC Exhibit 7, 8, and 9
24 the deposition of Mr. George, Ziolkowski, and Ficke

1 been admitted?

2 EXAMINER KINGERY: I have written down
3 here admitted on my notes so.

4 MR. COLBERT: Okay. Thank you.

5 Mr. Neilsen, I assume you will not be moving to admit
6 your exhibit since you did not use it.

7 MR. NEILSEN: No, your Honor.

8 EXAMINER KINGERY: Okay. Are there any
9 other matters with regard to exhibits?

10 All right. Let's go off the record for a
11 moment.

12 (Discussion off the record.)

13 EXAMINER KINGERY: We can go back on the
14 record.

15 While off the record we discussed the
16 possibility of rebuttal testimony, and there will not
17 be any rebuttal testimony. We have also discussed a
18 briefing schedule and have agreed that initial briefs
19 will be due on April 13, reply briefs will be due on
20 April 24. We also discussed how to handle
21 confidential versions of briefs. Of course,
22 confidential briefs will be filed at the Commission
23 under seal. Redacted briefs should be filed also at
24 the Commission. Unredacted versions of the briefs

1 will also be distributed to agreed upon -- an agreed
2 upon list of attorneys in the case who will handle
3 the matter as confidential based on confidentiality
4 agreements that those parties have entered into.

5 Is there anything else that I've missed?

6 MR. SMALL: Will there be any need for
7 motions after the filing of briefs?

8 EXAMINER KINGERY: Well, let's -- oh,
9 docketing, I suppose, will need some sort of -- even
10 if it can be a one-page --

11 MR. SMALL: One-page cover letter
12 requesting the treatment.

13 EXAMINER KINGERY: Yeah. A one-page, it
14 can be a letter; it can be in the form of a motion.
15 And the motion has already been granted. So upon
16 motion made today and granted at the hearing, this is
17 being filed under seal.

18 MR. SMALL: Great.

19 EXAMINER KINGERY: Yes, Mr. Howard.

20 MR. HOWARD: How many copies of the
21 confidential version should be submitted under seal?
22 The rule typically requires three. Is that what you
23 are seeking?

24 EXAMINER KINGERY: I think that's fine.

1 That's just what docketing needs.

2 MR. HOWARD: Okay.

3 EXAMINER KINGERY: Is there anything
4 else?

5 All right. This case is submitted on the
6 record. We're adjourned.

7 (Thereupon the hearing was concluded at
8 4:23 p.m.)

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1 CERTIFICATE

2 I do hereby certify that the foregoing is a
3 true and correct transcript of the proceedings taken
4 by me in this matter on Wednesday, March 21, 2007,
5 and carefully compared with my original stenographic
6 notes.

7 Rosemary J. Anderson/jr
8 Rosemary Foster Anderson,
9 Professional Reporter.

10 Karen Sue Gibson/jr
11 Karen Sue Gibson, Registered
12 Merit Reporter.

13 (RFA-7013)

14 (KG-4644)

15 - - -

EXHIBITS

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the :
Application of Duke Energy:
Ohio to Modify its : Case No. 06-986-EL-UNC
Market-Based Standard :
Service Offer. :

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

- - -

DEPOSITION

of Charles R. Whitlock, taken before me, Maria
DiPaolo Jones, a Notary Public in and for the State
of Ohio, at the Offices of the Ohio Consumers'
Counsel, Ten West Broad Street, 18th Floor, Columbus,
Ohio, on Tuesday, January 9, 2007, at 1:20 p.m.

- - -

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- - -

1 APPEARANCES:

2 Mr. Michael J. Pahutski
 3 Assistant General Counsel
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 6 Cincinnati, Ohio 45202
 7 On behalf of Duke Energy Americas.
 8 Mr. Paul A. Colbert
 9 and Mr. Rocco O. D'Ascenzo
 10 Duke Energy Corporation
 11 139 East Fourth Street
 12 Cincinnati, Ohio 45202
 13 On behalf of Duke Energy - Ohio.
 14 Ms. Ariane Johnson
 15 Duke Energy Corporation
 16 1000 East Main Street
 17 Plainfield, Indiana 46168
 18 On behalf of Duke Energy Corporation
 19 Janine L. Migden-Ostrander
 20 Ohio Consumers' Counsel
 21 By Mr. Jeffrey L. Small
 22 and Ms. Kimberly Bojko
 23 and Mr. Larry S. Sauer
 24 Assistant Consumers' Counsel
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 On behalf of the Residential Ratepayers
 of Duke Energy - Ohio.
 McNeese, Wallace & Nurick, LLC
 By Mr. Daniel J. Neilsen
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 21 East State Street
 Columbus, Ohio 43215-4228
 On behalf of Industrial Energy Users -
 Ohio.

Tuesday Afternoon Session,
 January 9, 2007.

STIPULATIONS

It is stipulated by and among counsel for the
 respective parties that the deposition of Charles R.
 Whitlock, a witness called by the Office of
 Consumers' Counsel under the applicable Rules of
 Civil Procedure, may be reduced to writing in
 stenotypy by the Notary, whose notes thereafter may
 be transcribed out of the presence of the witness;
 and that proof of the official character and
 qualification of the Notary is waived.

1 APPEARANCES (continued):

2 Boehm, Kurtz & Lowry
 3 By Mr. David F. Boehm
 4 1510 URS Center
 5 36 East Seventh Street
 6 Cincinnati, Ohio 45202
 7 On behalf of the Ohio Energy Group.
 8 Boehm, Kurtz & Lowry
 9 By Mr. Michael L. Kurtz
 10 1510 URS Center
 11 36 East Seventh Street
 12 Cincinnati, Ohio 45202
 13 On behalf of the Ohio Energy Group and
 14 Kroger.
 15 Marc Dann, Ohio Attorney General
 16 Public Utilities Section
 17 By Mr. Thomas W. McNamee
 18 Assistant Attorney General
 19 180 East Broad Street, 9th Floor
 20 Columbus, Ohio 43215
 21 On behalf of the Staff of the Public
 22 Utilities Commission.
 23 Mr. Richard L. Sites
 24 Ohio Hospital Association
 155 East Broad Street, 15th floor
 Columbus, Ohio 43215-3620
 On behalf of the Ohio Hospital
 Association.

ALSO PRESENT:

Ms. Anita Schafer.

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1 CHARLES R. WHITLOCK
 2 being by me first duly sworn, as hereinafter
 3 certified, deposes and says as follows:
 4 EXAMINATION
 5 By Mr. Small:
 6 Q. This deposition is taken by subpoena of
 7 Duke Energy Retail Sales, LLC, which I will refer to
 8 as "DERS." Do you understand that?
 9 A. I do.
 10 Q. The terminology. Good.
 11 The subpoena was issued in 06-986-EL-UNC
 12 as well as 03-93-EL-ATA and numerous dockets that
 13 were consolidated with the 03-93 case. The subpoena
 14 was issued for last week, January 3rd, 2007; by
 15 agreement with counsel it was moved to today, January
 16 9th.
 17 MR. SMALL: The easiest way to explain
 18 the beginning of this portion, I'm just going to
 19 attach, there won't be any questions about it, the
 20 subpoena as Deposition Exhibit 1.
 21 (EXHIBIT MARKED FOR IDENTIFICATION.)
 22 Q. And I think the way we're going to
 23 progress here is if I have exhibits, I will give them
 24 to counsel and then you can use them to answer the

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1 question, and then if you would just set them aside,
 2 because in some questions we may go back to an
 3 earlier exhibit. Once you put them in a pile and
 4 we're done, you give it to the court reporter, those
 5 will be her exhibits, all right?
 6 A. (Witness nods head.)
 7 Q. You don't need to look at that, but that
 8 will be the first one.
 9 MR. PAHUTSKI: That's the subpoena?
 10 MR. SMALL: Yes. Just a copy.
 11 Q. Would you please state your name and
 12 spell your last name for the record?
 13 A. Charles Robert Whitlock, W-h-i-t-l-o-c-k.
 14 Q. My name is Jeff Small, and I represent
 15 the office of the Ohio Consumers' Counsel.
 16 Mr. Whitlock, have you ever had your deposition
 17 taken?
 18 A. No, sir.
 19 Q. Have you ever testified?
 20 A. No.
 21 Q. However, you have submitted testimony; is
 22 that correct?
 23 A. I have submitted testimony.
 24 Q. You've submitted testimony in one of the

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1 consolidated cases that had been consolidated with
 2 03-93, correct?
 3 A. I have.
 4 Q. All right. Well, due to those
 5 circumstances I think it may be more important, than
 6 other circumstances, to go through a few ground
 7 rules. Please respond to my questions audibly; it
 8 makes it easier for the reporter to take down your
 9 answers. Let me know if you don't understand the
 10 question. Let me know if you think of something that
 11 requires a revision of one of your earlier responses.
 12 Let me know if you need a break. We can
 13 take a break as long as there is no question pending.
 14 I expect we'll take at least one break; I may need it
 15 with my voice. Today I may need the break more than
 16 you do.
 17 Also we're reviewing documents for our
 18 counsel here, we're reviewing documents and there
 19 will probably be a short break and then we'll ask
 20 additional questions having to do with those
 21 documents.
 22 Your counsel may interject objections.
 23 After the objection please respond to the question
 24 unless your counsel instructs you to not respond.

1 Do you have any impairment, medication,
2 or anything else that would reduce your ability to
3 respond to my questions here today?

4 A. No.

5 Q. This next question's a little bit
6 unusual, but who is your counsel? And I ask you that
7 question because I notice Mr. Colbert is listed as
8 the trial attorney, Mr. D'Ascenzo is listed as
9 another counsel in a motion for protection filed by
10 DERS, and later on January 2nd Mr. Pahutski and
11 Ariane Johnson were on a separate pleading. So could
12 you clear up that matter?

13 A. I mean, there are a variety of attorneys
14 that DERS uses, all of those attorneys are employees
15 of Duke Energy Shared Services and so we make
16 ourselves -- we use any one of those attorneys, but
17 Michael Pahutski is my attorney for the deposition.

18 Q. Fine. So you are referring to all four
19 of those have represented DERS at one point or
20 another.

21 A. Yes, sir.

22 MR. SMALL: Go off the record for a
23 second.

24 (Discussion held off the record.)

1 MR. SMALL: Let's go back on the record.

2 Q. You mentioned, I believe it was Duke
3 Energy Shared Services; is that correct?

4 A. Yes, sir.

5 Q. That was a reference -- were you
6 referring to they have a common legal department
7 among the Duke affiliates?

8 A. Yes.

9 Q. And which other attorneys have
10 represented DERS besides the four that we just
11 mentioned?

12 A. I don't recall any others. I don't know.

13 Q. Don't know of any others that have
14 represented DERS?

15 A. I'm not sure if others have. There might
16 have been others, but I'm not sure.

17 Q. I'm, of course, aware that there has been
18 a lawsuit filed against Duke Energy Corporation in
19 Cincinnati, and in that complaint in paragraph 14
20 there's a reference to the vice president and general
21 counsel, "counsel" is spelled like an attorney. Can
22 you tell me who that vice president and general
23 counsel of Commercial Business, can you tell me what
24 that person's name is?

1 MR. PAHUTSKI: Objection. Chuck has been
2 called here to, and in accordance with the subpoena,
3 to testify to matters regarding these proceedings and
4 regarding certain contracts that DERS may or may not
5 have entered into. He's not here to testify
6 regarding any other complaint that may be filed
7 against the company. I'm going to have to instruct
8 the witness not to answer that question.

9 MR. SMALL: My question was not about the
10 complaint. My question was who is the vice president
11 and general counsel of the Commercial Business unit.

12 MR. PAHUTSKI: We'll permit him to answer
13 that question as you have just stated it.

14 A. I believe it's Jeffrey Gollomp.

15 Q. Could you spell that last name, please?

16 A. G-o-l-l-o-m-p.

17 Q. And he is an attorney?

18 A. I believe so.

19 MR. PAHUTSKI: Can we go off the record
20 for a second?

21 MR. SMALL: Sure.

22 (Discussion held off the record.)

23 MR. SMALL: Let's go back on the record.

24 Q. When we went off the record, counsel for

1 DERS made a statement about Mr. Gollomp, who is no
2 longer hired with the Duke-affiliated companies; is
3 that fair to say?

4 MR. PAHUTSKI: That's fair to say.

5 MR. SMALL: Okay.

6 Q. And he stated that he is not, Mr. Gollomp
7 is not the vice president and general counsel of
8 Commercial Business unit. It's not clear to me, is
9 that because he doesn't work with the company
10 anymore, or because he was never in that position?
11 Did he ever have that position?

12 MR. PAHUTSKI: May I assist?

13 MR. SMALL: Yes.

14 Q. Well, I'm really -- I really would like
15 to know where you got the name Jeff Gollomp. You're
16 the one who came up with the name.

17 A. Yeah, he was the vice president and
18 general counsel of the Commercial Business unit.

19 Q. At one point in time.

20 A. Yes, sir.

21 Q. And you're not aware of when he left
22 or -- that position.

23 A. Other than when we just went off the
24 record and I became aware of that.

1 Q. That response was something like December
2 2006 that he left the company, right?

3 A. (Witness nods head.)

4 Q. This is not from your personal knowledge,
5 it's --

6 A. Yes.

7 Q. Okay. Now, Mr. Whitlock, you are the
8 president of DERS, correct?

9 A. Yes.

10 Q. All right. When I refer to "DERS" for
11 the purposes of this deposition, I'm going to be
12 referring to Duke Energy Retail Sales, LLC as well as
13 its predecessor, Cinergy Retail Sales. Did that have
14 an LLC on it, too?

15 A. I believe so.

16 Q. Okay. But I mean both of the entities;
17 do you understand that?

18 A. I do.

19 Q. And if there's a distinction, if I ask a
20 question and there's a distinction between DERS and
21 CRS, please point it out to me, in other words, if
22 the response would be different for one company
23 versus the other, all right? Otherwise, I'll be
24 referring to them collectively as "DERS." Do you

1 understand that?

2 A. I do. The only distinction would be one
3 of time.

4 Q. Okay.

5 A. All right. So --

6 Q. Okay. Do you have a business card?

7 A. I do.

8 Q. Could I see it?

9 Okay. This card labels you as President
10 of Commercial Asset Management, Duke Energy Americas.
11 Can you explain what that position is?

12 A. Yeah. In that position I have the
13 responsibility to manage the commodity risk
14 associated with Duke Energy's nonregulated generation
15 fleet as well as all the commercial analytics related
16 to that generation fleet.

17 Q. I am a little confused with that answer.
18 The reason is that you've submitted testimony in
19 05-725 as well as other cases where you refer to your
20 association with the provision of services for Duke
21 Energy - Ohio's market-based standard service offer;
22 is that correct?

23 A. Can I see the document that you're
24 referring to?

1 Q. Sure. I'm looking at the bottom of page
2 1 and the top of page 2 where it reads "Specifically,
3 I have responsibility to maintain the safe, reliable,
4 and economic supply of fuel, power, emission
5 allowances, and capacity to Duke Energy - Ohio's" --
6 abbreviated DE-Ohio -- "marked-based standard service
7 offer" -- abbreviated MBSSO -- "consumers." I'll
8 give you the entire document.

9 A. That's fine.

10 Okay.

11 Q. It's not meant to be an exhibit. Why
12 don't you give it back?

13 A. I'm sorry.

14 Q. The question is you just used -- in
15 response to my earlier question you used the term
16 "nonregulated business." Did you mean to include in
17 the nonregulated business the supply of services to
18 the customers of the MBSSO?

19 A. I did.

20 Q. Now, do you have any other business
21 cards, for instance one that shows that you're the
22 president of DERS?

23 A. I don't.

24 Q. This is the business card that you

1 normally use?

2 A. Yes.

3 Q. Okay.

4 MR. PAHUTSKI: Can we go off the record
5 for a second?

6 MR. SMALL: Sure.

7 (Discussion held off the record.)

8 MR. SMALL: Let's go back on the record.

9 Q. Mr. Whitlock, I believe you want to make
10 a clarification.

11 A. Yeah, the card says "President." Those
12 cards are dated. Now the title's changed from that
13 card.

14 Q. What's your title now?

15 A. It's either Group Vice President or
16 Senior Vice President. I believe it's Senior Vice
17 President. It recently changed.

18 Q. And that title, Senior Vice President, is
19 of the Commercial Business unit for Duke Energy
20 Americas; is that correct?

21 A. Commercial Asset Management.

22 Q. Okay. So everything else except for the
23 title's right on the card.

24 A. Yeah.

1 Q. Yes.
 2 MR. PAHUTSKI: Can we go off the record
 3 once more?
 4 MR. SMALL: Sure.
 5 (Discussion held off the record.)
 6 MR. SMALL: Let's go back on the record.
 7 Q. Any more clarifications?
 8 A. No.
 9 Q. Okay. Who is Duke Energy Americas?
 10 What's their relationship to other corporations? For
 11 instance, are they owned by another Duke corporation?
 12 A. I don't know.
 13 Q. What does Duke Energy Americas do?
 14 A. It holds Duke Energy's unregulated
 15 businesses.
 16 Q. How many employees does Duke Energy
 17 Americas have?
 18 A. I don't know.
 19 Q. Do you have an approximate number? Is it
 20 a thousand? A hundred? Ten?
 21 A. I want to say north of 2,000.
 22 Q. Two thousand plus?
 23 A. I believe so.
 24 Q. And are you counting just the Duke Energy

1 Americas or all of the unregulated affiliates that it
 2 owns?
 3 A. Your question was Duke Energy Americas.
 4 Q. Yes, it was.
 5 A. That's how I answered it.
 6 Q. What's the relationship between Duke
 7 Energy Americas and DERS?
 8 A. I don't know.
 9 Q. Well, you stated that it holds Duke's
 10 unregulated businesses. Is DERS an unregulated
 11 business?
 12 A. DERS is an unregulated business.
 13 Q. Should I conclude from that, then, that
 14 it is owned by -- either directly or indirectly by
 15 Duke Energy Americas, or you don't know?
 16 A. I don't know the relationship of Duke
 17 Energy Americas. I can tell you how DERS is related
 18 to Cinergy Capital and Trading, LLC and Cinergy
 19 Investments, but I don't know how those three
 20 entities are related to Duke Energy Americas.
 21 Q. Let's go through that. DERS is owned by
 22 Cinergy Capital and Trading, Incorporated; is that
 23 correct?
 24 A. Yes.

1 Q. And Cinergy Capital and Trading,
 2 Incorporated is owned by Cinergy Investment,
 3 Incorporated; is that correct?
 4 A. Yes.
 5 Q. Cinergy Investment, Incorporated is owned
 6 by Cinergy Corporation; is that correct?
 7 A. I believe so.
 8 Q. Cinergy Corporation is owned by Duke
 9 Energy Corporation; is that correct?
 10 A. Yes.
 11 Q. That, of course, I've taken from your
 12 certificate case at the Public Utilities Commission.
 13 Where does Duke Energy Americas fit into that?
 14 A. I don't know.
 15 Q. Do you have any position or title with
 16 any of the entities that I just named?
 17 A. Yes.
 18 Q. Which corporation, and what is the title?
 19 A. I'm the president of DERS.
 20 Q. All right.
 21 A. I'm a vice president of Cinergy Capital
 22 and Trading.
 23 Q. All right. Is that it?
 24 A. Yes.

1 Q. So in the Duke-affiliated companies you
 2 hold three positions, one with DERS, one with Cinergy
 3 Capital and Trading, and one with Duke Energy
 4 Americas; is that correct?
 5 A. Yes.
 6 Q. Who issues your paycheck?
 7 A. Duke Energy Shared Services.
 8 Q. That's a different corporation than the
 9 three names that you just gave me, isn't it?
 10 A. Yes.
 11 Q. Then you must have a position with a
 12 fourth entity, Duke Energy Shared Services, don't
 13 you?
 14 A. Yes.
 15 Q. And what position is that?
 16 A. With Duke Energy Shared Services?
 17 Q. Yes.
 18 A. Senior Vice President and Commercial
 19 Asset Management.
 20 MR. PAHUTSKI: Could we go off the record
 21 for a minute?
 22 MR. SMALL: Okay, let's go off the
 23 record.
 24 (Discussion held off the record.)

1 MR. SMALL: Let's go back on the record.
 2 Q. I don't mean to -- did your consultation
 3 result in any clarification?
 4 A. No.
 5 Q. Is the title that you just gave me the
 6 same title that you have for Duke Energy Americas, or
 7 are you a senior vice president?
 8 MR. PAHUTSKI: We're going to object at
 9 this point. You know, we're here to answer questions
 10 regarding the subject matter of the subpoena, so if
 11 it's a matter of knowledge that DERS had regarding
 12 these proceedings that the subpoena's filed or issued
 13 under, or agreements that DERS may or may not have
 14 entered into, this -- this other material we're
 15 getting to simply isn't appropriate under the
 16 subpoena to be getting into these other areas of the
 17 Duke Energy family of companies.
 18 I'm going to instruct the witness not to
 19 answer that question.
 20 Q. Well, you've been instructed not to
 21 answer; that doesn't mean that we won't at some point
 22 want to revisit that at another time, that will be a
 23 matter for the Commission. In other words, I am not
 24 conceding that we can't investigate the relationship

1 between the corporate entities in this deposition.
 2 MR. PAHUTSKI: Mr. Small, are we still on
 3 the record?
 4 MR. SMALL: Let's go off the record.
 5 (Discussion held off the record.)
 6 MR. SMALL: Can I have the last question
 7 read back, please?
 8 (Question read.)
 9 MR. SMALL: I'm going to mark Deposition
 10 Exhibit 2, it's a filing by Duke Energy Retail Sales,
 11 LLC received at the Commission August 3rd.
 12 Actually, the document's dated August 2nd, but it's
 13 received at the Commission August 3rd, in case
 14 04-1323-EL-CRS, the certification case for DERS. In
 15 this case it was Cinergy Retail Sales -- I'm sorry,
 16 it was DERS.
 17 (EXHIBIT MARKED FOR IDENTIFICATION.)
 18 MR. PAHUTSKI: Can we go off the record?
 19 (Discussion held off the record.)
 20 MR. SMALL: Let's go back on the record.
 21 Q. (By Mr. Small) We may be coming back to
 22 this document from time to time during this
 23 deposition. I have a question for you right now.
 24 Could you turn to page 10 of that application? I'm

1 not sure exactly what you call it. A certification
 2 application, yes. Page 10 and 11 are affiliates of
 3 DERS. Why don't I find Duke Energy Shared Services
 4 here listed on this exhibit?
 5 A. I don't know.
 6 MR. PAHUTSKI: Can I go off the record
 7 for a second?
 8 MR. SMALL: Sure.
 9 (Discussion held off the record.)
 10 MR. SMALL: Let's go back on the record.
 11 Q. I think you had a clarifying answer.
 12 A. Yeah. Duke Energy Shared Services
 13 doesn't -- this is a list of companies that provide
 14 electric at wholesale or retail in North America, and
 15 Duke Energy Shared Services does not do that.
 16 Q. The Shared Services provides expertise of
 17 various kinds, but doesn't actually supply commodity
 18 gas or electricity; is that the idea?
 19 A. Yes.
 20 Q. And one of these affiliates that it
 21 provides those services to is DERS; is that correct?
 22 A. Yes.
 23 Q. Okay. I'd like to ask a few questions
 24 about your personal background so we'll understand

1 that part. I understand you have a Bachelor's of
 2 Business degree in accounting from Alaska at
 3 Anchorage; is that correct?
 4 A. Yes.
 5 Q. And you attended the Mahler School of
 6 Advanced Management Skills program?
 7 A. Yes.
 8 Q. Can you tell me what that is?
 9 A. Executive charm school, really.
 10 Q. How long did it last?
 11 A. It was four weeks. It lasted over a
 12 year, and it was five days of class over four
 13 different weeks.
 14 Q. And you attended the Center for Creative
 15 Leadership's Developing Strategic Leadership program;
 16 is that correct?
 17 A. Yes.
 18 Q. Can you tell me what that is?
 19 A. More of the same, executive charm school.
 20 It's really about leadership in Colorado Springs.
 21 Q. How long did that last?
 22 A. I want to say it was four days, again.
 23 Q. Four days total?
 24 A. I believe so.

1 Q. And you've studied business management?
2 You've studied business management as well, at
3 Harvard?

4 A. Yeah, I took like five classes at Harvard
5 when I lived in Boston.

6 Q. No degree came from that.

7 A. No, sir.

8 Q. Are there any other --

9 A. Unfortunately.

10 Q. Any other educational experiences that
11 led to degrees?

12 A. I attended a Bible college for two years
13 and I got a, some kind of -- I don't think it's a
14 degree, but I went for two years and I got some kind
15 of diploma from there, or a certificate of
16 graduation.

17 Q. Do you hold any licenses?

18 A. Driver's license.

19 Q. Nothing like a CPA or anything like that.

20 A. No.

21 Q. And you started with Cinergy in May 2000;
22 is that correct?

23 A. Yes.

24 Q. And what positions did you have

1 chronologically for that six-year period?

2 A. I was a manager of Realtime Price Risk; I
3 managed Day-Ahead Power book; then I began
4 supervising the short-term traders; then I had a
5 responsibility for managing all of the proprietary
6 trading business.

7 Q. What does "proprietary trading business"
8 mean?

9 A. Speculative trading business.

10 Q. What period of time are we up to at this
11 point?

12 A. January 2004ish.

13 Q. Okay. And after that?

14 A. Then I had responsibility for managing --
15 I was a vice president of Portfolio Optimization,
16 which is a precursor to the Commercial Asset
17 Management Group, and that was in February of 2004.

18 At the merger with Duke I became the
19 president of Commercial Asset Management.

20 Q. That was 2006?

21 A. Yes, sir.

22 I became president of Duke Energy Retail
23 Sales June 14th of 2006. Or June.

24 Q. Okay. That's a bunch of groups, but are

1 those all Shared Services positions?

2 MR. PAHUTSKI: Objection. We're, again,
3 heading down this path of really deviating quite far
4 from the confines of the subpoena. Mr. Whitlock,
5 again, is here as a Duke Energy Retail Sales
6 representative to answer questions regarding these
7 proceedings as well as questions on contracts that
8 may or may not have been entered into.

9 We want to limit this to the matters that
10 were noted in the subpoena as well as limited by the
11 Attorney-Examiner's entry in this proceeding as well.

12 I'm going to ask Mr. Whitlock not to
13 answer any further questions regarding any companies
14 other than Duke Energy Retail Sales at this point.

15 MR. SMALL: Well, I consider these to be
16 foundation questions to find out what his capacity
17 is. DERS has represented that he has certain
18 knowledge, I think I'm entitled to find out what his
19 background is.

20 MR. PAHUTSKI: We're not representing
21 that he is an expert witness. He's simply here to
22 represent DERS and DERS's knowledge regarding the
23 matters mentioned in the subpoena, and that's what
24 he's here for today.

1 MR. SMALL: All right. Well, I'll put on
2 the record that I can't fully explore my -- the
3 agreements that we're here to discuss unless I get
4 foundation of who it is that I'm deposing here today,
5 so we may have to just disagree about those
6 foundation questions and we may have to reconvene
7 regarding that.

8 I will do my best to make the questions
9 that I have consistent, but I do have other
10 additional questions having to do with Mr. Whitlock's
11 background.

12 Q. (By Mr. Small) In your capacity as
13 president of DERS who do you report to?

14 A. Tom O'Connor.

15 Q. And what is Mr. O'Connor's position?

16 A. Actually, could I clarify that? I mean,
17 in my capacity at DERS I report to the CEO who is
18 Paul Barry right now, but he's now -- he's been moved
19 out of that position and Tom O'Connor has taken his
20 position, and I don't think we've made officer
21 appointments to make Tom O'Connor my boss, right?
22 Does that help?

23 Q. All right. Let me see if I can get that.

24 A. Okay.

1 Q. I think maybe, as I understood your
2 answer, the official stated CEO was Paul Barry. Can
3 you spell that last name? B-e-r-r-y?
4 A. I believe it's B-a-r-r-y.
5 Q. Okay. Functionally he's been replaced.
6 Tom O'Connor --
7 A. Yes.
8 Q. -- is serving in that capacity as CEO?
9 A. Yes.
10 Q. Likely to be named in that position in
11 the near future?
12 A. Yes.
13 Q. And that's CEO of DERS; is that correct?
14 A. Yes.
15 Q. Is there any other chain of command that
16 goes above that? Does he report to anybody?
17 A. I don't know.
18 Q. Who reports to you at DERS?
19 A. I don't have any employees.
20 Q. You mean to say that DERS has no
21 employees?
22 A. Right.
23 Q. How does DERS get its work done without
24 any employees? Who does the work for DERS?

1 A. Again, it relies on Duke Energy Shared
2 Services.
3 MR. SMALL: I'm going to mark an exhibit.
4 This is a letter dated April 19th, 2005, received
5 by the Commission April 25th, 2005. It's a
6 submission, again, in 04-1323-EL-CRS. It's the
7 certification case, again.
8 (EXHIBIT MARKED FOR IDENTIFICATION.)
9 Q. Are you ready?
10 A. Yeah.
11 Q. Mr. Whitlock, the document that I gave
12 you appears to be a notice of current officers as of
13 the date of the filing. First of all, as a matter of
14 clarification, can you explain the redactions in the
15 document?
16 A. I can't.
17 Q. I want to be clear. Do you know why
18 portions of this document were redacted?
19 A. I don't.
20 Q. Do you know the information that has been
21 redacted from this document?
22 MR. PAHUTSKI: Just to note that if --
23 Mr. Whitlock's answer may very well be designated
24 confidential. If he knows the answers, knows what

1 was redacted, we'll have to hold that in confidence.
2 MR. SMALL: I'm very confused by this
3 document because I can't figure out why titles of
4 officers are redacted.
5 Let's go off the record.
6 (Discussion held off the record.)
7 MR. SMALL: Let's go back on the record.
8 Q. Do you --
9 A. Could you repeat your question?
10 Q. Let's start again.
11 A. Okay.
12 Q. Do you understand why materials, why a
13 title for a person would be redacted in the document?
14 It does not appear to be explained by the document.
15 A. I do not.
16 Q. Okay. Is this list up to date? In other
17 words, have there been any changes since this
18 document was filed?
19 A. Yes.
20 Q. Okay. What are those changes?
21 A. I'm an officer. I'm currently President
22 of DERS.
23 Q. Okay. Did you replace Ms. -- I'm not
24 sure -- Mr. Good?

1 MR. PAHUTSKI: Object; there's no
2 evidence that Ms. or Mr. Good had been president on
3 this sheet here. Object to the form of the question.
4 Q. All right. Who did you replace in your
5 position as President of DERS?
6 A. I don't know.
7 Q. There's always a possibility this wasn't
8 redacted, it just looks that way on the Commission
9 website. Or it could be shaded, not redacted, which
10 sort of would eliminate the objection for
11 confidentiality.
12 MR. SMALL: What was our last question?
13 (Question read.)
14 Q. Can we have a response to that question?
15 A. I don't know.
16 Q. Which of these individuals continues to
17 have a capacity with DERS?
18 A. None of these people, I believe, are
19 currently officers of DERS.
20 Q. Has there been some filing that states
21 who the officers of DERS are?
22 A. I don't know.
23 MR. SMALL: Let's go off the record here.
24 (Discussion held off the record.)

1 (Hearing Examiners Kingery and Farkas
2 joined via speakerphone.)

3 EXAMINER FARKAS: We don't feel that the
4 OCC should be limited under cross-examination
5 regarding DERS and its affiliates and its
6 relationship to DE-Ohio, and we reviewed the subpoena
7 and believe that it doesn't necessarily limit OCC's
8 cross-examination on that along those lines.

9 Notwithstanding that, this isn't to say
10 that evidence that would be presented at a hearing in
11 cross-examination or regarding evidence would
12 necessarily be considered relevant and/or admissible.
13 So we would agree to allow OCC to continue its
14 cross-examination, but putting everybody on notice
15 that that doesn't necessarily mean that that would be
16 admissible at the hearing.

17 MR. SMALL: Scott, may I ask a clarifying
18 question?

19 EXAMINER FARKAS: Sure.

20 MR. SMALL: Of course there is, to my
21 knowledge, I haven't inquired entirely into this, but
22 to my knowledge there isn't any direct -- I haven't
23 seen a document that says there's a, you know,
24 100 percent ownership or something relationship like

1 that between DERS and DE-Ohio, and -- I just want to
2 make sure. You know, there are a lot of affiliates
3 around. The deponent has basically stated today that
4 he's in one way or another affiliated with four
5 different Duke affiliates.

6 You made the statement that the OCC can
7 inquire into matters as far as a link between DERS
8 and -- well, somewhere in there was a statement about
9 its connection with DE-Ohio, and I wanted to make
10 sure that we didn't get off the phone here and then
11 have another problem because I wasn't talking about
12 DERS or DE-Ohio, but, you know, that affiliate --
13 those affiliates that kind of stand in relationship
14 to those entities, that I couldn't inquire into those
15 as well.

16 EXAMINER FARKAS: No; you can inquire
17 into those as well.

18 MR. SMALL: I think I'm clear.
19 Do you have any questions?

20 EXAMINER FARKAS: I don't have any
21 questions.

22 MR. SMALL: I'm sorry, Scott, I was
23 talking to Mike.

24 EXAMINER FARKAS: Okay.

1 MR. PAHUTSKI: Just to be clear, so what
2 your ruling is, is that OCC may inquire into the
3 relationship of DERS and affiliates of DERS with
4 DE-Ohio.

5 EXAMINER KINGERY: I think the entire
6 corporate structure should -- I don't see any reason
7 why --

8 EXAMINER FARKAS: There should be any
9 limitation on that.

10 EXAMINER KINGERY: Right. This is only
11 discovery at this point.

12 MR. PAHUTSKI: Well, that helped to
13 clarify that.

14 MR. SMALL: I guess we're done. Thank
15 you very much.

16 EXAMINER FARKAS: Okay.

17 EXAMINER KINGERY: Okay.

18 MR. PAHUTSKI: Thank you.

19 MS. BOJKO: Thank you.

20 EXAMINER KINGERY: Just so that you all
21 know, neither one of us is necessarily here past
22 4 o'clock.

23 MR. SMALL: We understand. Thank you.

24 EXAMINER KINGERY: Okay.

1 MS. BOJKO: Thanks.

2 (Discussion held off the record.)

3 MR. SMALL: Let's go back on the record.

4 Q. (By Mr. Small) Mr. Whitlock, I'm going to
5 go back and ask a few questions having to do with the
6 Duke family of companies. A little while back you,
7 and I apologize, I've lost my train of thought here a
8 little bit in that period of time, but we went over a
9 number of your positions with Cinergy since May of
10 2000, or with what we're calling now the
11 Duke-affiliated companies. Your association started
12 in May 2000, and you named a number of positions.
13 Now, those positions that you named, what corporate
14 affiliation were they with?

15 MR. PAHUTSKI: We're going to object and
16 voice a standing objection. We're going to allow the
17 witness to answer, but we're going to object as to
18 the relevance of any of the questions that are --
19 with respect to Duke Energy Retail Sales and its
20 relationship to affiliates and corporate structures
21 of Duke Energy Companies.

22 But we'll permit the witness to answer
23 the question.

24

1 Q. Mr. Whitlock?

2 A. Can you read the question, or you repeat
3 the question, or somebody read it back to me?

4 MR. SMALL: We'll let the court reporter.
5 (Question read.)

6 A. Duke Energy Shared Services or the
7 precursor of that, so it might have been Cinergy
8 Shared Services.

9 Q. All those positions.

10 A. Yes.

11 Q. With the exception of the DERS
12 appointment in June 2006?

13 A. Yes.

14 Q. All right. In your capacity as the
15 commercial asset -- strike that.

16 Getting back on track with where we were
17 in the questions, I asked some questions and you
18 responded with names of Paul Barry and Tom O'Connor.
19 Do you remember those questions and answers?

20 A. Yes.

21 Q. Now, I believe your response was you
22 didn't know who they reported to, but in the chain of
23 corporate affiliations would the head of, I think you
24 called it a CEO, the head of DERS report to somebody

1 in Cinergy Capital and Trading, the company that owns
2 DERS?

3 A. I don't know, but that seems logical to
4 me.

5 Q. Okay. Do you have any -- what services
6 in your position with Duke Energy Shared Services do
7 you provide to DE-Ohio? When I say "DE-Ohio," I'm
8 referring to the distribution company that provides
9 electricity to residential, commercial, and
10 industrial customers in the Cincinnati area.

11 A. Could you repeat the first part of the
12 question?

13 Q. What services do you provide, what link
14 do you have between what you do and the business of
15 DE-Ohio?

16 A. The link's the MBSSO.

17 Q. And what do you do regarding the MBSSO?

18 A. It was probably articulated most clearly
19 in the testimony that I filed in the case that you
20 showed me earlier, right?

21 Q. Would you give a little summary of that?

22 A. Yeah. I mean, I try to maintain a
23 reliable and economic supply of energy and I do that
24 through managing commodity price risks, so I buy all

1 the fuel, I manage the emission allowance position
2 related to the generation that was dedicated under
3 the MBSSO or the rate stabilization plan to Duke
4 Energy - Ohio.

5 Q. So you're basically making decisions
6 concerning purchases for inputs for DE-Ohio, the
7 provider of services?

8 A. Sure, I manage the SRT, the -- you know.

9 Q. And who do you report to in your
10 capacity -- in that capacity?

11 A. Tom O'Connor. I should say for the
12 record, right, I mean we talked about Duke Energy
13 Americas, and I'm going to get lost between the
14 functional organization, right? So Duke Energy
15 Americas and the legal entities. I am not an expert
16 on the legal structure of the Duke Corporation -- the
17 Duke Energy Corporation, so if my answer seemed
18 nonresponsive, it's just because candidly I don't
19 know.

20 Q. That's fine. My questions will be, the
21 next one will be about just what relationships you
22 have.

23 A. Okay.

24 Q. You report to Mr. O'Connor in your

1 capacity as an employee of Duke Energy Shared
2 Services; is that correct?

3 A. I do.

4 Q. And what is Mr. O'Connor's capacity, the
5 capacity that you report to?

6 A. He's my boss. I'm not sure what his
7 title is. I think he's Group Vice President. I'm
8 not sure.

9 Q. And what does that group do that he's the
10 vice president of?

11 A. He's, obviously, my boss. He's
12 responsible for an inside-of-the-fence generation
13 company we have called Duke Energy Generation
14 Services. He is responsible for our international
15 assets. He was responsible for our proprietary
16 trading; that has been sold. He has responsibility
17 for a broadband-through-power-lines business. I'm
18 just trying to think in my head through his direct
19 reports.

20 Q. How many people are in this functional
21 group that Mr. O'Connor manages?

22 A. I'm going to say it's about the same
23 number that we said before in that Duke Energy
24 Americas, so I think it's in the north of 2,000

1 employees.

2 Q. Okay. And in that capacity, I mean your
3 capacity having to do with Duke Energy Shared
4 Services, are there people who report to you?

5 A. Yes, sir.

6 Q. How many?

7 A. Approximately 50.

8 Q. Are they subdivided into groups?

9 A. Yeah, I have four direct reports.

10 Q. I'm sorry?

11 A. I have four direct reports.

12 Q. And who --

13 A. A commodity logistics organization, a
14 risk management organization, a commercial analytics
15 and fundamentals organization, and then a realtime
16 operations organization.

17 Q. Could you describe, summarize what those
18 four groups do?

19 A. Sure. I mean the first one, the
20 Commodity and Logistics group does the commodity and
21 logistics, so schedules the coal, schedules natural
22 gas.

23 Q. Buying those commodities.

24 A. Schedules them. Handles the logistics.

1 Q. Schedules the delivery of them?

2 A. Yes.

3 The next group is the Risk Management
4 group that monitors markets, buys and sells
5 commodities whether it's emission allowances, coal,
6 natural gas power capacity --

7 Q. Okay.

8 A. -- FTRs are in there.

9 And then the Commercial Analytics and
10 Fundamentals group builds the models that we use to
11 generate our positions, does structuring of
12 transactions, and provides fundamental analysis on
13 markets.

14 Q. Modeling? Modeling of markets?

15 A. The fundamental analysis on modeling, no.
16 Fundamental analysis on markets.

17 Q. I'm asking if they're a modeling group.

18 A. Yeah. That was the first thing I said, I
19 believe.

20 Q. Okay.

21 A. And then the last group is the Operations
22 group that handles the generation dispatch unit
23 commitment and interfaces with MISO, forecasts load,
24 and there's two meteorologists in that organization.

1 Q. Do you know who Mr. O'Connor reports to
2 in his group vice presidency position?

3 A. Again, I'm not sure if he's a group vice
4 president, but I do.

5 Q. Pardon?

6 A. I do know who he reports to. I don't
7 know if he's a group vice president.

8 Q. All right. You just, I think I used the
9 terminology you have, but you're not sure that's his
10 title.

11 A. Yeah. That's what I said in the previous
12 answer I believe.

13 Q. And who does he report to?

14 A. Jim Rogers.

15 Q. What is his title?

16 A. I believe CEO, Duke Energy.

17 Q. Okay. You're performing functions for
18 DE-Ohio? I'll continue to use "DE-Ohio" as being the
19 distribution company; do you understand that? It
20 will be the distribution company that provides
21 electricity to residential, commercial, and
22 industrial customers.

23 A. I understand that.

24 Q. All right. You provide services to them.

1 Do you have any reporting responsibilities to
2 DE-Ohio, the distribution company?

3 A. I don't.

4 Q. Who do you -- do you deal with anyone at
5 the distribution company; DE-Ohio?

6 A. I mean, we have code of conduct between
7 the wire side of our business and the generation side
8 of our business, so I don't -- no, I don't deal with
9 them.

10 Q. All right. I think what you're saying is
11 you're on the generation side of the business.

12 A. Right.

13 Q. That generation you're talking about is
14 owned by the distribution company, though.

15 A. It's --

16 MR. PAHUTSKI: Let me object here. The
17 notion that DE-Ohio is a distribution company, I
18 think that's causing some confusion.

19 MR. SMALL: I realize that the
20 terminology is loose. I mean DE-Ohio.

21 MR. PAHUTSKI: The regulated utility?

22 MR. SMALL: The regulated -- well, that's
23 difficult terminology in itself. I will attempt to
24 use "DE-Ohio" when I'm referring to the company that

1 provides electric service to residential, commercial,
2 and industrial and not other customers, we'll skip
3 the characterization of what functions they serve.

4 MR. PAHUTSKI: Okay. I think
5 Mr. Whitlock is still somewhat confused. Can you
6 restate that?

7 Q. (By Mr. Small) DE-Ohio owns the power
8 plants; is that correct?

9 A. Yes.

10 MR. PAHUTSKI: So for clarity, Mr. Small,
11 when you refer to "DE-Ohio," you'll be referring to
12 the legal entity that provides generation,
13 transmission, and distribution services to retail
14 residential --

15 MR. SMALL: Customers.

16 MR. PAHUTSKI: -- yeah, commercial,
17 industrial customers.

18 MR. SMALL: Correct.

19 Q. That's clear?

20 A. Yes. For now it's clear. I'm sure it
21 will get fuzzy again.

22 Q. All right. Are there people at DE-Ohio
23 that you deal with regarding generation since you
24 seem to be on the generation side of things?

1 A. We're peers.

2 Q. Peers? And you're providing shared
3 services to DE-Ohio in that capacity.

4 A. I don't understand the question.

5 Q. You're kind of a technical expert for
6 them; is that the gist of your job?

7 A. Yes. Technical expert.

8 Q. Do you know who Mr. Davis reports to?

9 A. He reports to Tom O'Connor.

10 Q. Mr. O'Connor reports to Mr. Rogers.

11 A. Yes.

12 Q. Do you know who the president of DE-Ohio
13 is? I ask because I don't see a president in the
14 link -- in the chain that you just gave me.

15 A. Yeah, I think the president of DE-Ohio is
16 Sandra Meyer.

17 Q. Yes. Where does she fit into that chain?

18 A. She's not in that chain.

19 Q. Doesn't Mr. Curtis Davis, is he an
20 employee of DE-Ohio?

21 A. I don't believe so.

22 Q. Are all the people that you named Shared
23 Services people?

24 A. I believe so. I've got to be candid with

1 A. Yes.

2 Q. And who are those individuals?

3 A. Curtis Davis. The power plant managers.

4 Q. He's one of them?

5 A. He --

6 Q. Or is he over all of them?

7 A. Over all of them, and then they have
8 power plant managers that I deal with.

9 Q. And you deal with them because you're
10 doing -- your function is to provide logistics and
11 also purchasing of inputs for those plants; is that
12 correct?

13 A. Yeah, and then I monetize the outputs
14 and -- yeah.

15 Q. Could you describe "monetize the
16 outputs"?

17 A. Sell power, excess power.

18 Q. Excess power generated that isn't needed
19 by DE-Ohio's customers. I'm just trying to define
20 what "excess power" is.

21 A. Yeah, power that's not committed under
22 the MBSSO.

23 Q. Okay. And, I'm sorry, what's your
24 relationship with Mr. Davis?

1 you, man, I barely know who I work for. I care who
2 pays my paycheck and I don't know, you know, I really
3 don't know, but I believe he is an employee of Duke
4 Energy Shared Services.

5 Q. Would you move back to Exhibit 2, it's in
6 your packet? It's a thick one.

7 A. Is this it?

8 Q. Yeah. Could you verify, is the
9 information on page 1 of -- you're looking at the
10 letter and I'm going to move to the application
11 itself, the form, which is also labeled page 1.

12 Could you verify the information on page 1? Is the
13 information correct there?

14 A. It is.

15 Q. Okay. Do you see the website address
16 there, cres.duke-energy.com?

17 A. Yes.

18 Q. When I go to that address, I reach an
19 invitation to contact DERS to buy five megawatts of
20 load individually or in aggregate accounts. Have you
21 been to that web address?

22 A. I have not.

23 Q. Do you know what happens if a user
24 provides a name, company, and e-mail address that's

1 requested on that form?

2 A. I don't.

3 Q. Do you have something on the order of
4 customer contact representatives -- and when I say
5 "you," I mean DERS, I realize that you have no
6 employees. But in the capacity of taking shared
7 employees from Duke Energy Shared Services is there
8 something like a customer contact that provides
9 services to DERS?

10 A. No. Not right now.

11 Q. Okay. Was there ever a person in that
12 capacity? The website invites a customer to contact
13 them. Was there ever anybody on the other side to
14 respond to that inquiry?

15 A. There are contacts for the company. I
16 mean, we fill out our annual report, Uma Nanjundan is
17 the contact person that's referenced on our -- and
18 you can call her and contact her at that number.

19 Q. And there's a telephone number listed on
20 the website; 800-920-5039. What happens if I call
21 that number?

22 MR. PAHUTSKI: Object; the question
23 assumes facts not established. We don't have the
24 website in front of us.

1 Q. What happens if I call the telephone
2 number that's on the website?

3 A. I don't know. I've never called it.

4 Q. DERS doesn't have an 800 number?

5 A. I've never called -- I've never called
6 the 800 number listed here, so I don't know what
7 happens.

8 Q. Do I understand -- do I understand your
9 answer that the only way to get ahold of DERS is to
10 contact the people listed on your certification
11 application? You mentioned Ms. -- this is a woman,
12 right? -- Nanjundan. That's a woman, right? That's
13 a woman.

14 A. Yes, it is a woman.

15 Q. Is she the contact person for DERS with
16 customers?

17 A. She's the contact person for Commission
18 Staff use.

19 Q. I know. That wasn't the question.

20 A. What was the question?

21 Q. Is she the contact person for customers?

22 A. Customers could contact her, but . . .

23 Q. Is there anybody else?

24 A. I don't know.

1 Q. Let's take this back in time a little
2 bit. Do you know whether there's ever been a person
3 that contacted a customer -- in a customer contact
4 capacity at DERS or its predecessor, CRS?

5 A. Yes.

6 Q. And who would that person be?

7 A. Jason Barker.

8 Q. When was he serving in that capacity?

9 A. I don't know.

10 Q. How do you know that Mr. Barker filled
11 that role?

12 A. How do I know he filled that role?

13 Q. Well, I mean, you came up with a name.
14 You just didn't come up with that --

15 A. I'm trying to --

16 Q. You must know Mr. Barker.

17 A. I do know Mr. Barker. I'm trying to
18 figure out how I knew that he was the contact. I
19 don't know how I knew that.

20 Q. And when did he stop being the contact?

21 A. I don't remember when he stopped being --
22 I presume when he left the company.

23 Q. When was that?

24 A. I don't know.

1 Q. Was it part of the merger situation?

2 A. I don't know. I believe it was before
3 the merger.

4 Q. And Mr. Barker worked with Shared
5 Services, again?

6 MR. PAHUTSKI: Could I ask you to repeat
7 that question? I'm sorry.

8 Q. Did Mr. Barker work for Shared Services?
9 And really what I mean is his paycheck was issued by
10 Shared Services.

11 A. I don't know who paid Jason.

12 Q. And are you saying that he filled that
13 capacity, but nobody replaced him when he left?

14 MR. PAHUTSKI: Objection; that
15 mischaracterizes the witness's testimony. He didn't
16 say --

17 MR. SMALL: It's a question.

18 A. I said I didn't know, I believe, and I'll
19 tell you the same thing, I don't know.

20 Q. Do you know who Kim Twele, T-w-e-l-e, is?

21 A. Kim Twele, yes, I do.

22 Q. And who is that?

23 A. She's a contract administrator.

24 Q. Is she still a contract administrator for

1 DERS?

2 A. Again, I believe she works for Duke
3 Energy Shared Services, but I'm not sure.

4 Q. She is providing services to DERS?

5 A. She or other contract administrators
6 would provide services to DERS --

7 Q. And what is --

8 A. -- if they need it.

9 Q. What does a contract administrator do?

10 A. Administers contracts.

11 Q. What does that mean?

12 A. I mean, we have enabling agreements with
13 counterparties, we have forms that need to be filled
14 out, and they will maintain those forms and submit
15 those forms, they'll -- I mean, that's basically what
16 they do.

17 Q. What is an enabling agreement?

18 A. An ISDA is an enabling agreement.

19 Q. I'm sorry, I didn't --

20 A. An ISDA.

21 Q. ISDA. What is an ISDA --

22 A. I believe it's the International Swap
23 Dealers Agreement.

24 Q. That's a trading agreement.

1 A. Yes. EEI is on --

2 Q. Are these agreements with DERS or some
3 other entity?

4 A. They could be for any of those entities.
5 You were asking me what a contract administrator did,
6 so I was trying to answer that. In the capacity --
7 again, I thought their capacity was a Duke Energy
8 Shared Service employee.

9 Q. Does DERS have any ISDA, I-S-D-A,
10 agreements?

11 A. Not to my knowledge.

12 Q. So those services would be provided to
13 one of the other companies.

14 A. Yeah.

15 Q. Okay. What does Miss Twele do for DERS?
16 I notice she's listed on Exhibit 2 --

17 A. Right.

18 Q. -- as the person who submitted this.
19 What capacity was she filling when she submitted
20 that? Is this one of the forms?

21 A. Yeah. This would be a form, sure.

22 Q. Okay. Who is -- you kind of jumped the
23 gun here. Who is Uma Nanjundan, or what are her
24 duties?

1 A. Right now she buys all of the natural gas
2 for our gas assets.

3 Q. And is that purchasing natural gas to be
4 burned by DE-Ohio's power plants?

5 A. Yes. She also in her capacity for DERS
6 did most of the work on the financial statements,
7 most of the heavy lifting on the financial
8 statements. She did structuring for various
9 transactions that the CRS has looked at in the past
10 and will likely do that kind of structuring for deals
11 that we'll look at in the future.

12 Q. What past deals are you referring to?

13 A. I'm sorry?

14 Q. I think you were referring to past deals
15 that then would be done again in the future.

16 A. Well, for example, I mean the DERS has
17 looked at participating in retail auctions in states
18 outside of Ohio. She did a lot of the heavy lifting
19 around the analysis. She probably -- she did a lot
20 of the historic pricing analysis to figure out what
21 our offer was going to be in those auctions.

22 She did analysis in the Illinois auction.
23 She, I believe, has done some analysis on other
24 utilities in Ohio about whether or not there was an

1 opportunity for us to use the CRS or DERS to
2 aggregate load in those jurisdictions.

3 Q. Has DERS participated in any auctions?

4 A. Have we participated or won any auctions?

5 Q. First, participation.

6 A. I believe so.

7 Q. Which ones?

8 A. I believe the New Jersey auction.

9 Q. The BGS auction?

10 A. Yeah. And I'm not sure if they did the
11 Illinois auction or not.

12 Q. And did the DERS, did it gain any
13 customers or any load through those auctions?

14 A. Not to -- no.

15 Q. Let's go on to Exhibit 4.

16 (EXHIBIT MARKED FOR IDENTIFICATION.)

17 Q. Now, Exhibit 4 is a letter filed at the
18 Commission in the certificate case 04-1323, it's
19 dated August 8th, 2005, received by the Commission
20 August 9th, 2005. I see Mr. Barker listed there,
21 was he -- did he have Ms. Nanjundan's position before
22 her position?

23 A. No. Again, I mean, you had asked earlier
24 about the contact person for the --

1 Q. Yes.
 2 A. -- for the CRS or for DERS, and I stated
 3 that it was Jason Barker and, indeed, from this
 4 document it appears to me that he indeed was that
 5 person, and this person -- and he's -- effective
 6 August 9th, 2005, says that Mr. John Deeds will
 7 assume responsibility as the contact person for
 8 Cinergy Retail Sales.
 9 Q. Wasn't the contact person we just spoke
 10 about, wasn't that Uma Nanjundan?
 11 A. We talked about her being the contact
 12 person for the Commission requests.
 13 Q. I see.
 14 A. I think there are various points of
 15 contact, right? I mean, they could contact me as the
 16 president, or they could contact the CEO, Tom
 17 O'Connor.
 18 Q. Let's go back to Exhibit 2.
 19 MR. PAHUTSKI: Excuse me, exhibit which
 20 number, Mr. Small?
 21 Q. Exhibit 2.
 22 A. That's the thick one?
 23 Q. Yes. I'm looking at what's labeled page
 24 2 of the form, it's the third page on your

1 attachment. Do you know why the Residential box is
 2 marked on this form, and Commercial, Mercantile,
 3 Industrial are not marked?
 4 A. Yes.
 5 Q. Why is that?
 6 A. This is a change, right? And,
 7 previously, we had selected the other boxes,
 8 Commercial, Mercantile, and Industrial, and we didn't
 9 select Residential, and this is a change to say that
 10 we're going to include -- in the text of the letter
 11 it says "This Application also includes the addition
 12 of the Residential class under Section A-10." So
 13 it's basically simply the CRS wants to do business
 14 with residential customers.
 15 Q. And the CRES we're referring to is DERS?
 16 A. Yeah. I'm going to use those
 17 interchangeably as you do.
 18 Q. I've never used the term "CRES."
 19 A. Whatever. Cinergy Retail Sales, right?
 20 Q. Oh, I'm sorry. "CRES" means competitive
 21 retail electric supplier.
 22 A. Fair enough.
 23 Q. So that's a little bit confusing.
 24 A. Okay. Our CRS.

1 Q. Yes. Which is maybe the reason why we
 2 should stick with DERS --
 3 A. Okay.
 4 Q. -- because it's easily distinguished from
 5 that word that starts with a C. The world of
 6 acronyms.
 7 A. I didn't invent them.
 8 Q. Has DERS provided any services to a
 9 residential customer?
 10 A. We have not.
 11 Q. At any point in time?
 12 A. No. I would say no, not to the best of
 13 my knowledge.
 14 Q. On the form it refers to Exhibit B-1 of
 15 the form, not to be confused with our Exhibit 2 which
 16 is what I've labeled it, Jurisdiction of Operations,
 17 it's labeled as page 15 of the form. Are you there?
 18 A. I believe so. Page 15?
 19 Q. Yes.
 20 A. Yep.
 21 Q. And it references "... qualified to do
 22 business in Ohio, Delaware, Illinois, and New
 23 Jersey." I just want to make sure, are the
 24 operations in those states, did you previously state

1 what those operations are, which is -- I believe you
 2 said participation, but no customers in New Jersey,
 3 and you didn't know whether there was participation
 4 in the Illinois auction. Does that summarize the
 5 operations in those jurisdictions?
 6 A. Yeah. I mean, this exhibit says that we
 7 are qualified to do business in Ohio, Delaware,
 8 Illinois, and New Jersey.
 9 Q. Right, and I'm asking what business you
 10 actually do in those states.
 11 A. We have no current business in those
 12 states.
 13 Q. No current customers?
 14 A. No, sir.
 15 Q. And no current revenues.
 16 A. No, sir.
 17 Q. Have you ever had customers -- ever had
 18 any revenues? And when I say "you," I mean DERS, its
 19 predecessor CRS.
 20 A. I don't know.
 21 Q. Could you, to the best of your knowledge,
 22 could you give a history of DERS, that is landmarks
 23 in its development and so forth? For instance, its
 24 formation, when did that take place?

1 A. In 2003.
 2 Q. I don't mean to disagree with you, could
 3 it be January 2004?
 4 A. I believe it was in 2003 is when it was
 5 incorporated.
 6 Q. Okay. Incorporation in Delaware.
 7 A. Yeah.
 8 In about 15 minutes I'm going to, or 10
 9 minutes, so whenever you get to a point that you can
 10 break, I'd like to take a break. A bio break.
 11 Q. Understandable. We're approaching a
 12 breaking point.
 13 A. Okay.
 14 Q. What was its first business operation or
 15 attempt to make a business operation? For instance,
 16 you mentioned the BGS auction. What was its first
 17 auction?
 18 A. I don't know. I mean, I assumed
 19 responsibility for this organization in 2006, right?
 20 So the history, I mean, I can tell you about
 21 significant things in the history, but I don't know
 22 when -- I can tell you why it was formed.
 23 Q. I'm sorry?
 24 A. I said I can tell you why it was formed.

1 Q. Okay. Why don't you tell me that.
 2 A. It was formed because in Ohio, right, and
 3 in other states, generation was being deregulated and
 4 we needed a vehicle to participate in retail
 5 auctions, and that was why this company was created.
 6 Q. And when did it become -- when did CRS
 7 become DERS? Presumably sometime after the April
 8 2006 merger.
 9 A. Indeed.
 10 Q. And probably soon afterwards? Long
 11 enough to make the name changes and that sort of
 12 thing, correct?
 13 A. Yeah.
 14 Q. Summer of 2006, something like that?
 15 A. I believe so.
 16 MR. SMALL: Let's try Exhibit 6. There's
 17 no Exhibit 5; I'm just going to live with that.
 18 (EXHIBIT MARKED FOR IDENTIFICATION.)
 19 MR. SMALL: I'm just not going to use an
 20 Exhibit 5. Just, there is no Exhibit 5. I don't
 21 want to disrupt my numbering system.
 22 Q. Mr. Deeds -- do you have Exhibit 6? And
 23 have you ever visited the Duke Energy website showing
 24 the list of certified suppliers?

1 A. I think I stumbled across it one time,
 2 yeah.
 3 Q. You notice that your company is listed
 4 there in the third --
 5 A. Yes.
 6 Q. -- row. And it shows a C under Active
 7 Marketing; do you see that?
 8 A. Yes.
 9 Q. Do you know what that designation means?
 10 Is DERS engaged in some activity that would be
 11 described as active marketing?
 12 A. Could you repeat the question?
 13 Q. Is DERS engaged in some activity that
 14 would be described as active marketing?
 15 A. I don't know.
 16 Q. Do you know who provided the information
 17 to Duke Energy --
 18 A. I don't.
 19 Q. -- regarding DERS?
 20 A. I don't.
 21 Q. Okay.
 22 MR. SMALL: Let's take a break until 10
 23 to, something like that.
 24 (Recess taken.)

1 MR. SMALL: Let's go back on the record.
 2 Q. At this point I'm going to ask you a few
 3 people whose names have popped up from various
 4 exhibits and filings at the PUCO having to do with
 5 DERS. Can you tell me who Timothy Duff is? Do you
 6 know Mr. Duff?
 7 A. I've met Mr. Duff.
 8 Q. And what position does he hold? Is he
 9 currently an employee of Duke-affiliated companies?
 10 A. Yes.
 11 Q. And what position does he hold?
 12 A. I have no idea.
 13 Q. He works for -- I'm going to abbreviate
 14 this, I'm going to say "Shared Services" every time I
 15 mean Duke Energy Shared Services; do you understand
 16 that?
 17 A. (Witness nods head.)
 18 Q. Okay. Does he work for Shared Services?
 19 A. I don't know.
 20 Q. How do you know Mr. Duff?
 21 A. I've been at a couple of meetings with
 22 Tim.
 23 Q. What capacity did he serve in those
 24 meetings?

1 A. To be honest with you, I don't remember.
 2 Q. And you haven't had any business dealings
 3 with him other than seeing him at meetings.
 4 A. No, I've talked to -- I've talked to Tim
 5 when I was reviewing some of these documents that we
 6 were going to provide or have provided for you, I
 7 talked to him about -- because his name will appear
 8 on those. So I talked to him about his perspective
 9 on those agreements in preparing for this deposition.
 10 Q. Okay. And what was his connection with
 11 the documents?
 12 A. He prepared the option agreements that we
 13 have with various counterparties, he prepared
 14 Exhibits A and B, which is the strike and the option
 15 premium.
 16 Q. We are going to get to those agreements
 17 in a little bit, but do you mean the payment by the
 18 DERS?
 19 A. Yeah, the premium that we pay for the
 20 option that we have to put power to these customers.
 21 Q. I apologize, did you say that he set
 22 those?
 23 A. No, he crafted -- he wrote the exhibits.
 24 Q. He wrote the exhibits. And do you know

1 that from conversations that you've had with him, or
 2 is his name on some documents, or --
 3 A. A conversation that I had with him.
 4 Q. How did you know to speak with him in the
 5 first place regarding those agreements?
 6 A. I don't remember.
 7 Q. I take it that Mr. Duff has something to
 8 do with DERS if he was crafting their agreements,
 9 right?
 10 A. Yeah. I mean, those agreements are
 11 between the CRS and the counterparties, so he helped
 12 write Exhibits A and B, right.
 13 Q. Do you recall when your first contact
 14 with Mr. Duff was?
 15 A. No.
 16 Q. When was your last contact with him?
 17 A. Two days ago.
 18 Q. And that was regarding the --
 19 A. It was in preparation for this
 20 deposition.
 21 Q. Had he helped to identify documents to be
 22 produced here?
 23 A. I don't know.
 24 Q. Have you ever had any telephone

1 conversations or e-mail traffic with Mr. Duff? Any
 2 other communications other than personal?
 3 MR. PAHUTSKI: Objection; that question
 4 mischaracterizes Mr. Whitlock's testimony.
 5 Mr. Whitlock never said that he had communications
 6 regarding his personal matters with Mr. Duff.
 7 MR. SMALL: Personal matters? I didn't
 8 mention any personal matters.
 9 A. Anyway --
 10 MR. PAHUTSKI: Could you repeat the
 11 question?
 12 (Question read.)
 13 MR. SMALL: When I said "personal," I
 14 mean head to head, not --
 15 MR. PAHUTSKI: Person to person.
 16 MR. SMALL: Yeah.
 17 MR. PAHUTSKI: Okay.
 18 A. I would say -- repeat the question again,
 19 sorry.
 20 (Question read.)
 21 A. Yes.
 22 Q. And what were those communications over?
 23 A. I don't remember.
 24 Q. Did they have anything to do with the

1 agreements?
 2 A. I just told you about a conversation that
 3 I had with him about these agreements in preparing
 4 for this deposition.
 5 Q. And that would be a telephone
 6 conversation.
 7 A. Yeah.
 8 Q. Okay.
 9 A. Yes.
 10 Q. Did you call him, or did he call you?
 11 A. I called him.
 12 Q. How did you know to call him?
 13 MR. PAHUTSKI: Objection; asked and
 14 answered.
 15 Q. Who else did you have contact with
 16 regarding the documents that were prepared for today?
 17 A. I talked to some accountants.
 18 Q. Please, names if you have them.
 19 A. Talked to Mark Krabbe.
 20 Q. He's an accountant?
 21 A. Yes, sir.
 22 I talked to Brian Savoy, his boss.
 23 Q. You said his boss?
 24 A. Uh-huh.

1 I talked to Uma Nanjundan. And, again,
2 these conversations are all in preparation, right?
3 Because I was trying to get the history of the CRS
4 and these people were all involved and I'd seen their
5 names on documents.

6 Q. For instance, the documents we've been
7 looking at that have been filed at the Commission?

8 A. Yeah. So I didn't -- so I talked to Uma
9 and I believe she's the one that told me, when I was
10 talking about the option agreements, that I should
11 call Timothy, but I don't -- Tim Duff, but I don't
12 recollect who specifically told me.

13 Q. Okay. What did your contact with
14 Mr. Mark Krabbe amount to? What did you discuss?

15 A. I asked him about the financial
16 statements. I asked him if I could see the trial
17 balances for the company off the ledger so that I
18 could verify -- so that I could have an understanding
19 of the financials of the company.

20 Q. Okay. Are those financial agreements in
21 the materials or provided?

22 MR. PAHUTSKI: Objection. I think you've
23 characterized them as "financial agreements."

24 THE WITNESS: I'm talking about the --

1 MR. SMALL: "Financial statements" are I
2 think his words.

3 Q. I'm referring to whatever financial
4 statements you just responded.

5 A. No; what I was talking about there was
6 the 2005 annual report that we submitted that's a
7 matter of public record --

8 Q. Okay.

9 A. -- already, so that's what I was talking
10 to him about.

11 Q. Okay.

12 A. I don't know if they're in these
13 documents, I don't think they are, but it's public
14 record.

15 Q. It's upcoming.

16 A. I'm sorry?

17 Q. It's upcoming. I have it in my stack.

18 A. Okay.

19 Q. What transpired between you and Mr. Brian
20 Savoy?

21 A. I talked to Brian to see if Mark Krabbe
22 was the guy to talk to. I assumed that it was and I
23 went to Brian, his boss, to make sure that that was
24 the right individual.

1 Q. And he confirmed that.

2 A. Yes.

3 Q. And what transpired between you and Uma
4 Nanjundan?

5 A. I asked -- again, I was trying to get
6 historical perspective about the agreements that we
7 were producing here and her historical knowledge of
8 activities that the CRS participated in -- that DERS
9 has participated in, and particularly these
10 agreements.

11 Q. Okay. What information did she provide?
12 What did you get out of your contact with her?

13 A. A historical perspective, that she did
14 the structuring, she did a lot of the structuring.
15 She was the structurer that was involved in pricing
16 the option agreements and doing the analysis of the
17 loads for the customers that we have these option
18 agreements with.

19 Q. What do you mean by "pricing option
20 agreements"?

21 A. Valuing the options. There's a value for
22 those options and she helped determine the value of
23 the options.

24 Q. Are those reported in some documents,

1 that valuation?

2 A. I don't know.

3 Q. Did you have any conversation with her
4 about that?

5 A. I didn't.

6 MR. SMALL: Does counsel know whether
7 those are included in the documents? I believe
8 they're covered by --

9 MR. PAHUTSKI: I don't know.

10 MR. SMALL: Let's go off the record.

11 (Discussion held off the record.)

12 MR. PAHUTSKI: Just seeking
13 clarification, when you say "those documents," which
14 are you referring to, Mr. Small?

15 MR. SMALL: I understand from the witness
16 that Uma Nanjundan did some valuation and, you know,
17 presumably that valuation that Mr. Whitlock just
18 referred to is committed to paper in some fashion.

19 MR. PAHUTSKI: I think Mr. Whitlock
20 testified that he wasn't sure whether or not there
21 was paper.

22 MR. SMALL: I know.

23 MR. PAHUTSKI: I don't know whether or
24 not that is in this stack.

1 MR. SMALL: Because it appears to be
2 covered by the subpoena, could you check on that for
3 me?

4 MR. PAHUTSKI: Well, you have the
5 documents as well, you can determine whether they're
6 in there. I'd have to look through these, you know,
7 one by one to determine whether that is in there.

8 MR. SMALL: Okay. Tried to shortcut the
9 process a little bit by just asking, but we can look
10 through the documents.

11 Q. (By Mr. Small) Okay, Mr. Whitlock, do you
12 know Jim Gainer?

13 A. I've met Jim.

14 Q. Okay. Have you had dealings with
15 Mr. Gainer in connection with DERS business?

16 MR. PAHUTSKI: Objection. Mr. Gainer is
17 and has been acting as an attorney with the company
18 and any of those communications would be subject to
19 attorney-client privilege.

20 MR. SMALL: Well, I asked the witness who
21 his attorneys were, and Mr. Gainer's name never came
22 up.

23 MR. PAHUTSKI: The witness also said
24 there are perhaps other attorneys working for DESS

1 this deposition to the extent that Mr. Gainer's not
2 serving as an attorney, the company isn't able to --
3 isn't entitled to claim an attorney-client privilege,
4 and I believe the witness just said he didn't deal
5 with him in a legal capacity.

6 MR. PAHUTSKI: Mr. Gainer has in the past
7 served as an attorney. I don't know whether he is
8 now or not serving as an attorney for the company,
9 but he has, and any of those past communications
10 would be subject to attorney-client privilege.

11 MR. SMALL: Just for the record, although
12 this is a delicate matter, I think we could delve
13 into Mr. Gainer's activities that are legal and
14 separate it from his nonlegal capacities, but I'll
15 move on with this.

16 Q. You recognize the title Managing Director
17 of Commercial Asset Management? That's you, right?

18 A. No.

19 Q. No? Do you recognize that title?

20 A. I don't.

21 Q. Okay. How about you mentioned Vice
22 President and General Counsel of the Commercial
23 Business, I think you identified that as Jeff Gollomp
24 previously. Is there a position like that today?

1 who have represented DERS from time to time and,
2 nevertheless, even if -- well, although Mr. Whitlock
3 did not name Jim Gainer as one of the attorneys
4 representing DERS, Mr. Gainer may have had
5 communications with Mr. Whitlock regarding other
6 matters.

7 I'm instructing the witness not to answer
8 that question.

9 MR. COLBERT: DE-Ohio would also point
10 out that Mr. Gainer is an attorney of record in these
11 proceedings.

12 Q. Why don't we ask the witness, the
13 president of DERS, have you sought legal advice from
14 Mr. Gainer?

15 A. No.

16 Q. So your contacts with him have been
17 nonlegal.

18 MR. PAHUTSKI: Objection. Whether or not
19 he's had contact with Mr. Gainer is still the subject
20 of attorney-client privilege.

21 Instruct the witness not to answer that
22 question.

23 MR. SMALL: I'll mark this as a matter
24 that might have to be inquired into in a repeat of

1 A. Not to my knowledge.

2 Q. Do you recognize the title Director of
3 Regulatory Initiatives?

4 A. No.

5 Q. Vice President of Trading?

6 A. Yes.

7 Q. Is that Mr. -- would that be Mr. Farley?

8 A. I was Vice President of Trading at one
9 time.

10 Q. At one time?

11 A. Yeah.

12 Q. Okay.

13 A. I don't know if we covered that in the
14 previous question, but you can add it.

15 Q. I recall you saying that you had a couple
16 positions in the trading capacity.

17 A. Okay.

18 Q. Who succeeded you in that position?

19 A. Kevin Paley.

20 Q. Kevin Paley? Could you spell that last
21 name?

22 A. P-a-l-e-y.

23 Q. Is that Mr. Paley currently employed as a
24 vice president of Trading?

1 A. No.
 2 Q. Okay. Was he succeeded by somebody?
 3 A. Yes.
 4 Q. Who was that?
 5 A. I believe it was Jack Farley.
 6 Q. Okay. And has Mr. Farley left that
 7 position?
 8 A. He's no longer an employee of the Duke
 9 companies.
 10 Q. Did somebody succeed him in that
 11 position?
 12 A. We sold the business.
 13 Q. Now, at various times, and we're going to
 14 have a look at an option agreement later on, but
 15 you've referred to option agreements. Generally
 16 speaking, option agreements have provided for
 17 payments by DERS to certain other parties to those
 18 option agreements; is that correct?
 19 (CONFIDENTIAL PORTION EXCERPTED.)
 20
 21
 22
 23 Q. Okay.
 24 MR. PAHUTSKI: We need to designate that

1 answer as confidential under the confidentiality
 2 agreements we signed with the parties here and the
 3 protective agreements signed with OCC here today.
 4 MR. SMALL: Okay.
 5 MR. PAHUTSKI: And a continuing
 6 designation, again, any discussion regarding the
 7 option agreements or the predecessors will be
 8 designated confidential material, among other things.
 9 MR. SMALL: We will have a series of
 10 questions here, so I'll consider all these questions
 11 to be covered by the confidentiality agreement.
 12 MR. PAHUTSKI: Thank you, Mr. Small.
 13 MR. COLBERT: If I might, will everything
 14 from this point on be confidential, Mr. Small, or is
 15 there a way that we could do it so that we aren't
 16 going back and forth to the public part of the
 17 transcript?
 18 MR. SMALL: I can't tell. I just don't
 19 know. We're getting towards that part where sections
 20 of it will be, but I can't completely anticipate how
 21 you will treat or how Mr. Pahutski will treat
 22 matters.
 23 MR. COLBERT: I was trying to make it
 24 easy for the court reporter.

1 MR. SMALL: I tried to segregate this to
 2 the end of the deposition, and we are getting to that
 3 portion, but there may or may not be sections that
 4 are still confidential coming up.
 5 MR. PAHUTSKI: Let's try this: We shall
 6 on the record designate all of this material to be
 7 confidential from this point forward unless -- until,
 8 Mr. Small, you identify something that perhaps is
 9 not, as you've framed the question, doesn't pertain.
 10 MR. SMALL: Okay.
 11 MR. PAHUTSKI: That way --
 12 MR. SMALL: I have something coming up
 13 and I will ask him again.
 14 MR. BOEHM: Excuse me, can I interrupt
 15 and ask a housekeeping question I guess? Maybe it's
 16 in one of the subpoenas or answers. How long do you
 17 folks expect to go this afternoon, Jeff?
 18 MR. SMALL: I think it may be around
 19 6 o'clock.
 20 MR. BOEHM: 6 o'clock.
 21 MR. SMALL: The court reporter was asked
 22 to be here until 6 o'clock.
 23 MR. BOEHM: Okay. If we're not finished
 24 today, do you plan to continue to tomorrow or the --

1 MS. JOHNSON: No, this is not a
 2 continuing deposition.
 3 MR. SMALL: I think we'll be able to
 4 complete this today.
 5 MR. BOEHM: Okay.
 6 (CONFIDENTIAL PORTION EXCERPTED.)
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19 (OPEN RECORD.)
20 MR. SMALL: Well, I've kind of overshoot
21 the mark, but the real question is are we out of
22 confidential information? I'm not sure we are.
23 We're looking at -- we're looking at public
24 documents.

1 MR. PAHUTSKI: Yeah, I would consider
2 these public documents not to be confidential.
3 MR. SMALL: This is not part of the
4 confidential record.
5 (OPEN RECORD.)
6 Q. Do you see the four employees on that
7 sheet?
8 A. I do.
9 Q. Do you know why it says four employees?
10 A. I assume because they had four employees.
11 Q. At what point in time? And the "they,"
12 this is DERS; is that correct?
13 A. Correct. I'm saying at this time, right,
14 I don't know when this document was prepared, but at
15 the time of this document there were four employees
16 in DERS, or at this time Cinergy Retail Sales.
17 Q. The date I've got on this for docketing
18 in the PUCO is October 3rd, 2006, not very long
19 ago.
20 A. Okay. This is a D&B report, and I'm
21 saying I don't know the date of this D&B report --
22 Q. I see.
23 A. -- right? I mean, this D&B report, you
24 can print it out of D&B. This looks like a printout

1 off of their website, indeed in the lower left-hand
2 corner is dnb.com/scripts. I have no idea when this
3 was done.
4 Q. Is it also -- it's possible that it's
5 incorrect as well? It's not an internal document.
6 A. It's a D&B document.
7 Q. Okay. I'm asking whether it could be
8 incorrect.
9 A. I don't know.
10 Q. Do you know if there's ever been an
11 employee of DERS?
12 A. We talked about some of the employees.
13 Jason Barker was an employee of DERS.
14 Q. Actually employed by DERS?
15 A. No. Wait a second. Sorry, he was a
16 Shared Service employee.
17 Q. Right.
18 A. Well, I don't know.
19 Q. Okay. You don't know of any employees of
20 DERS.
21 A. No.
22 Q. And annual sales, I think from our
23 previous questions and answers we established DERS
24 has had zero revenues. Do you know where the 300

1 comes from?
2 A. No idea.
3 Q. All right. Let's go of the record.
4 (Recess taken.)
5 MR. SMALL: Let's go back on the record.
6 I have a couple of -- in order to best segment the
7 record into confidential and nonconfidential, I have
8 a couple of follow-ups on things I'm pretty sure are
9 nonconfidential and then we'll go into the
10 agreements, okay?
11 Q. Previously you made a statement, well,
12 actually you made statements about not knowing
13 certain people's functions in the Duke-affiliate
14 structure. Regarding this separation of the
15 generation and the -- what did you call it, the wires
16 function? Does that sound fair?
17 A. I don't remember. Go ahead and ask your
18 question.
19 Q. The generation from the nongeneration
20 portion of it. How do you know what side of the
21 business somebody's on so you know whether you can
22 talk to them or not?
23 A. Well, let me say this, right, I mean the
24 people that I talk to -- I sit on a very wide-open

1 floor that is restricted, has restricted access,
2 there are places that I just can't go, so I know
3 those places that I can't go because my card key, you
4 know, alarms will go off and people will -- so that's
5 one way I know.

6 The other way I know is that, you know,
7 I'm trying to -- that's primarily the way. But the
8 people that I deal with day in and day out, I have
9 the ability to deal with. And if I have to have
10 conversations with somebody where I have a question,
11 I'll typically consult an attorney to find out that
12 I'm not going to get in the briar patch of code of
13 conduct.

14 Q. That's when you're going further afield?

15 A. If I had a question, I would ask. So I
16 would say I generally know who I can talk to. If I
17 have a question about who I can talk to, I will ask
18 someone.

19 Q. There's no guide, there's no book,
20 there's no --

21 A. There's all kinds of training on code of
22 conduct, right? I mean, I --

23 Q. That's not what I meant. I meant books
24 that would identify a person with one side of the

1 business or another.

2 A. I don't want to say there isn't. If
3 there is, I haven't seen it.

4 Q. Okay. I have a couple of other names
5 that I would like to know if you can identify these
6 individuals. Jim Ziolkowski, Z-i-o-l-k-o-w-s-k-i.

7 A. I've seen his name on some of the
8 documents that we produced for you on the payments.

9 Q. Yes.

10 A. So I recognize his name.

11 Q. He's labeled Rate Services, does that
12 tell you where he works?

13 A. Sounds like Rate Services.

14 Q. What is Rate Services?

15 A. I don't know.

16 Q. I thought you might know better than I
17 do, but okay.

18 You don't know him personally.

19 A. No.

20 Q. Okay. And you don't know whether he has
21 any connection or not with the DERS.

22 A. Well, he has a connection in that he
23 processes the payments, right, but --

24 Q. Processes payments?

1 A. Well, I mean, let's go to one of the
2 documents. I thought I saw his name on some of these
3 documents.

4 I might have been mistaken.

5 Q. But you previously described people who
6 were able to -- I believe we had some questions and
7 answers regarding the authorization of certain
8 payments --

9 A. Right.

10 Q. -- and you discussed there would be
11 certain people, accounting type people, processing
12 type people, who could authorize those payments or
13 who process those payments, and are you saying
14 Mr. Ziolkowski is one of those people?

15 A. I seem to remember seeing a document with
16 his name on it and it was processing a payment.

17 Q. Okay.

18 MR. SMALL: I believe this is the time.

19 MR. PAHUTSKI: Thank you.

20 Mr. Small has indicated that we're going
21 to begin a discussion of the option contract or the
22 contracts that DERS may or may not be entered into,
23 and we consider all of the answers to these questions
24 and perhaps the questions themselves, to the degree

1 they reference substantive matters with respect to
2 those contracts, to be confidential under the
3 confidentiality agreement signed by the parties today
4 and the protective agreement signed by OCC and DERS
5 today.

6 MR. SMALL: And, therefore, this portion
7 will be marked as Confidential in the transcript.

8 MR. PAHUTSKI: Yes. Thank you.

9 (CONFIDENTIAL PORTION EXCERPTED.)

(OPEN RECORD.)

MR. SMALL: Mr. Whitlock, my questions are at an end, and I thank you very much for your cooperation. I know it's been a little bit long and that my voice has been kind of hard to hear.

MR. PAHUTSKI: While we're still on the record, we do not waive signature. We would like to get a copy of the transcript and review that, have an opportunity to review it and sign the transcript, so while on the record we would like that to be recorded.

(Thereupon, the deposition concluded at 6:06 p.m.)

CERTIFICATE

State of Ohio : SS:

County of Franklin :

I, Maria DiPaolo Jones, Notary Public in and for the State of Ohio, duly commissioned and qualified, certify that the within named Charles R. Whitlock was by me duly sworn to testify to the whole truth in the cause aforesaid; that the testimony was taken down by me in stenotypy in the presence of said witness, afterwards transcribed upon a computer; that the foregoing is a true and correct transcript of the testimony given by said witness taken at the time and place in the foregoing caption specified and completed without adjournment.

I certify that I am not a relative, employee, or attorney of any of the parties hereto, or of any attorney or counsel employed by the parties, or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio, on this 11th day of January, 2007.

Maria DiPaolo Jones, Registered
Diplomate Reporter, CRR and
Notary Public in and for the
State of Ohio.

My commission expires June 19, 2011.
(MDJ-2046)

State of Ohio :
: SS:

County of _____ :

I, Charles R. Whitlock, do hereby certify that I have read the foregoing transcript of my deposition given on Tuesday, January 9, 2007; that together with the correction page attached hereto noting changes in form or substance, if any, it is true and correct.

Charles R. Whitlock

I do hereby certify that the foregoing transcript of the deposition of Charles R. Whitlock was submitted to the witness for reading and signing; that after he had stated to the undersigned Notary Public that he had read and examined his deposition, he signed the same in my presence on the _____ day of _____, 2007.

Notary Public

My commission expires _____.

EXHIBIT

	03-93-EL-ATA	06-1068-EL-UNC
	03-2079-EL-AAM	06-1069-EL-UNC
	03-2081-EL-AAM	05-724-EL-UNC
Case Number	03-2080-EL-ATA	06-1085-EL-UNC
	05-725-EL-UNC	

The following exhibit(s) were prefiled and can be located with the pleadings:

Exhibits		Date Filed	
COMPANY REMAND EXHIBITS		IDFD	ADMTD
19 - E-mail from D. Boehm, 3/14/07	42	--	
20 - 5-8-00 letter to Mr. Tongren	75	170	
21 - Ohio Consumers' Counsel, Appellant v. PUCO, et al., Appellees	77	170	
22 - Joint Stipulations and Settlement Agreement	82	170	
23 - Affidavit of Jock J. Pitts (Only page 3 admitted)	84	170	
24 - Cinergy IRS 1120, 2003	97	173	
25 - Cinergy IRS 1120, 2004	97	173	
26 - Cinergy IRS 1120, 2005	97	173	
OCC REMAND EXHIBITS		IDFD	ADMTD
2A - Prepared Testimony of Beth E. Hixon	6	169	
2B - Corrections to the Prepared Testimony of Beth E. Hixon	6	169	
7 - Deposition of Denis George	11	12	
8 - Deposition of James E. Ziolkowski	11	12	
9 - Deposition of Gregory C. Ficke	11	12	
OEM REMAND EXHIBITS		IDFD	ADMTD
4 - Deposition of Charles R. Whitlock	174	175	
IEU REMAND EXHIBITS		IDFD	ADMTD
1 - OCC Post-Hearing Merit Brief, 6/22/04	159	--	

EXHIBIT

Cinergy Corp.
155 East Broad Street, 21st Floor
Columbus, OH 43215
Tel 614.221.7551
Fax 614.221.7556
pcolbert@cinergy.com

PAUL A. COLBERT
Senior Counsel

CINERGY.

May 8, 2000

Mr. Robert S. Tongren
Ohio Consumers' Counsel
77 South High Street, 15th Floor
Columbus, Ohio 43215

Re: PUCO Case No's. 99-1658-EL-ETP, 99-1659-EL-ATA, 99-1660-EL-ATA, 99-1661-EL-AAM, 99-1662-EL-AAM, and 99-1663-EL-UNC.

Dear Mr. Tongren:

Conditioned upon the settlement of all issues between the Office of the Ohio Consumers' Counsel (OCC) and The Cincinnati Gas & Electric Company (CG&E) in the above referenced cases, and a Commission final order adopting such settlement without material modification, CG&E agrees to enter into the following Agreement with the OCC:

1. To develop and implement, by July 1, 2001, a customer information database to track customer complaints associated with CG&E's electric and gas customers as stated below:
 - a. CG&E shall accept customer complaints through its call center, in person or in writing.
 - b. CG&E shall create and maintain a customer complaint coding system, interfaced with its CSS system, that enables CG&E to track and prepare periodic reports

regarding customer complaints by certified supplier and complaint classification.


- c. CG&E shall electronically distribute incoming complaints to a CG&E representative, the OCC and the affected gas marketer or certified electric supplier. Nothing prohibits CG&E from providing this information to the PUCO.
 - d. CG&E shall document the actions taken by it or the subject gas marketer or certified electric supplier to resolve each complaint and log such actions into the tracking system.
 - e. The OCC shall have access and authority to log complaints into the tracking system.
 - f. CG&E may defer the costs of, but shall not seek cost recovery of the development of its tracking system other than through the RTC approved in its Transition Plan Case.
 - g. OCC agrees and will not challenge deferral of the costs against the Transition Revenues that the Commission approves for recovery by CG&E in the above referenced cases.
2. CG&E will contribute \$500,000 to a customer education campaign concerning customer choice jointly managed and designed by CG&E and OCC. Such contribution will be made within 30 days after the Final Order of the Commission in the above referenced cases. The campaign shall target residential customers in CG&E's certified territory. The goal of the campaign shall be to facilitate the implementation of competitive electric retail competition for residential customers in CG&E's certified territory in the most efficient manner practicable. OCC agrees and will not challenge deferral of the costs against the Transition Revenues that the Commission approves for recovery by CG&E in the above referenced cases. CG&E may defer the costs of, but shall not seek recovery of this contribution

other than through the RTC approved in its Transition Plan Case.

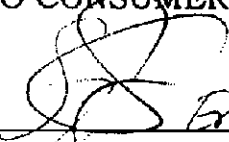
3. CG&E will contribute \$250,000 to the Ohio Department of Development (ODOD) over the next two years as requested by ODOD for development programs in the State. OCC agrees with and will not challenge deferral of the costs against the Transition Revenues that the Commission approves for recovery by CG&E in the above referenced cases. CG&E may defer the costs of, but shall not seek recovery of this contribution other than through the RTC approved in its Transition Plan.
4. CG&E agrees that OCC may review CG&E's Cost Allocation Manual (CAM). Prior to reviewing the CAM, CG&E and OCC shall execute a confidentiality agreement regarding the treatment of non-public information contained in the CAM. Such confidentiality agreement shall be executed no later than December 31, 2000.
5. Pursuant to a confidentiality agreement, CG&E agrees that the OCC may review the market monitoring information that CG&E must maintain pursuant to Commission Order and Ohio Administrative Code Section 4901:1-21-02. CG&E and OCC shall enter into such confidentiality agreement no later than December 31, 2000.

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

THE CINCINNATI GAS & ELECTRIC COMPANY

By: 
Paul A. Colbert, Senior Counsel
Its Attorney

OHIO CONSUMERS' COUNSEL

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

EXHIBIT

**OHIO CONSUMERS' COUNSEL, APPELLANT, v. PUBLIC UTILITIES COM-
MISSION OF OHIO ET AL., APPELLEES.**

No. 2005-0945

SUPREME COURT OF OHIO

110 Ohio St. 3d 394; 2006 Ohio 4706; 853 N.E.2d 1153; 2006 Ohio LEXIS 2900

May 9, 2006, Submitted
September 27, 2006, Decided

PRIOR HISTORY: APPEAL from the Public Utilities Commission, Nos. 03-2405-EL-CSS, 04-85-EL-CSS, and 03-2341-EL-ATA. Ohio Consumers' Counsel v. PUC, 109 Ohio St. 3d 1412, 2006 Ohio 1892, 846 N.E.2d 50, 2006 Ohio LEXIS 967 (2006)

DISPOSITION: Order affirmed.

HEADNOTES: *Public utilities -- Consolidated billing by electricity-distribution company -- Costs of billing for providers of competitive retail electric service -- Expenses caused by default of provider of competitive retail electric service.*

COUNSEL: Janine L. Migden-Ostrander, Ohio Consumers' Counsel, Jeffrey L. Small, and Larry S. Sauer, for appellant.

Jim Petro, Attorney General, Duane Luckey, Senior Deputy Attorney General, and Steven T. Nourse and William L. Wright, Assistant Attorneys General, for appellee, Public Utilities Commission of Ohio.

Faruki, Ireland & Cox, P.L.L., Charles J. Faruki, and Jeffrey S. Sharkey, for intervening appellee, the Dayton Power & Light Company.

Bell, Royer & Sanders Co., L.P.A., Barth E. Royer, and Judith B. Sanders, urging affirmance for amicus curiae, Dominion Retail, Inc.

JUDGES: O'DONNELL, J. MOYER, C.J., RESNICK, PFEIFER, LUNDBERG STRATTON, O'CONNOR and LANZINGER, JJ., concur.

OPINION BY: O'DONNELL

OPINION:

[*394] [***1155] O'DONNELL, J.

[**P1] In this appeal, the Ohio Consumers' Counsel challenges an order issued by the Public Utilities Commission of Ohio ("PUCO") that approved a 2004 agreement between the Dayton Power & Light Company ("DP&L") and several other entities, Dominion Retail, Inc., Green Mountain Energy Company, Miami Valley Communications Council, and Industrial Energy Users-Ohio, each of which had questioned DP&L's efforts to recoup the cost of changing its billing practices after the General Assembly deregulated the retail electricity market in 1999.

[**P2] The PUCO order at issue changed the way in which DP&L could recover its billing-system costs. For the reasons that follow, we affirm the PUCO's order.

Facts

[**P3] DP&L incurred the \$ 18.8 million in billing-system costs at issue in this case because the statutes that deregulated electricity in Ohio required electric utilities to "unbundle" or separate the costs of electricity generation from the costs of electricity distribution. See R.C. 4928.10(C)(2) and 4928.35. As a result, DP&L developed new computer programs enabling the company to produce the type of customer bills that the statutes and PUCO regulations required in a deregulated electricity market.

[**P4] In 2000, the PUCO approved DP&L's initial plan to charge "CRES providers" for the costs associated with the billing-system changes. A CRES provider is a provider of competitive retail electric service. See Ohio Adm.Code 4901:1-10-01(F) and 4901:1-21-01(A)(10). Both Dominion Retail, Inc. and Green [*395] Mountain Energy Company -- which joined the 2004 agreement at issue -- are CRES providers.

[**P5] In the competitive retail market for electricity established by the General Assembly in 1999, cus-

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tomers have the option to choose to continue paying their original electricity provider for generation service or to select a CRES provider for that service. R.C. 4928.14. Regardless of which provider the customer selects, the electricity generated by the provider is delivered over wires owned and maintained by the electric utility, and that company can continue to charge for the delivery service.

[**P6] The PUCO requires electric utilities such as DP&L that distribute electricity to offer "consolidated billing" to the CRES providers that want to offer competing electricity generation service to retail customers in the utility company's territory. Ohio Adm.Code 4901:1-10-29(G). See, also, Ohio Adm.Code 4901:1-10-01(D) ("Consolidated billing" means that a customer receives a single bill for electric services provided during a billing period" for both distribution services and generation services). Evidence in the record before us indicates that DP&L had to do substantial reprogramming of its computers to accommodate the new requirement that it offer a consolidated bill showing the unbundled charges incurred by any customer in its territory who chose to buy electricity generation service from a CRES provider while DP&L continued to provide electricity-distribution service to the customer.

[**P7] [***1156] In making its initial 2000 plan to charge CRES providers for the billing-system changes, DP&L calculated that it would have to charge \$ 4.76 for each consolidated bill it generated for a CRES provider to fully recover the costs of the billing changes. DP&L concluded that potential CRES providers in its territory would not be willing to pay such a high price for the production of each customer bill, so DP&L chose to charge CRES providers \$ 1.90 per bill under a one-year contract or \$ 1.56 per bill under a two-year contract.

[**P8] The lesser amount did not satisfy CRES providers such as Dominion Retail and Green Mountain Energy Company, and as a result, Dominion filed a complaint with the PUCO in 2003, and Green Mountain then intervened to challenge the amount DP&L charged CRES providers for each consolidated customer bill DP&L generated for them. The Miami Valley Communications Council -- a regional council of governments interested in promoting competition in the retail electricity market -- likewise filed a complaint against DP&L with the PUCO in 2003 alleging that DP&L charged CRES providers excessive amounts for billing services.

[**P9] The PUCO consolidated the cases and granted motions to intervene filed by the Consumers' Counsel and Industrial Energy Users-Ohio. At a hearing before the PUCO on these complaints, Dominion Retail and Miami Valley offered [*396] evidence that the DP&L charges were "excessive and unreasonable," "dis-

courage[d] shopping," and constituted a "barrier to competition." Expert testimony presented by the Consumers' Counsel echoed those views, describing the charges to CRES providers as "a significant impediment to competition" that would "significantly decrease the savings a residential customer would expect to realize" from switching to a new provider of retail electric-generation service.

[**P10] After several days of hearings before the PUCO in 2004, all parties except the Consumers' Counsel reached an agreement to change the way in which DP&L could recover the \$ 18.8 million in billing-related costs it had incurred from 1999 to 2001. The stipulation called for DP&L to charge CRES providers only \$.20 per customer bill (to cover the cost of transmitting customer data electronically between DP&L and the CRES provider) and then -- beginning January 1, 2006 -- allowed DP&L to recover from all of its customers those costs of the billing-system changes that had been approved in an audit.

[**P11] The stipulation also provided for DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of that CRES provider after reasonable efforts to recover from the CRES provider.

[**P12] The Consumers' Counsel refused to join the stipulation. The PUCO considered the objections raised by the Consumers' Counsel but nonetheless approved the agreement in February 2005, concluding that a reasonable arrangement would benefit ratepayers and the public. The Consumers' Counsel filed an application for rehearing, but the PUCO denied that application. This appeal followed.

Standard of Review

[**P13] "R.C. 4903.13 provides that a PUCO order shall be reversed, vacated, or modified by this court only when, upon consideration of the record, the court finds the order to be unlawful or unreasonable." *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004 Ohio 6767, P50, 820 N.E.2d 885. The court will not reverse or modify a PUCO decision as to questions of fact if the decision was not manifestly against the weight [***1157] of the evidence and was not so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty. *Monongahela Power Co. v. Pub. Util. Comm.*, 104 Ohio St.3d 571, 2004 Ohio 6896, 820 N.E.2d 921, P 29. The appellant bears the burden of demonstrating that the PUCO's decision is against the manifest weight of the evidence or is clearly unsupported by the record. *Id.*

[**P14] Although the court has "complete and independent power of review as to all questions of law" in

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appeals from the PUCO, *Ohio Edison Co. v. Pub. Util. Comm.* (1997), 78 Ohio St.3d 466, 469, 1997 Ohio 196, 678 N.E.2d 922, the court has explained [*397] that it may rely on the expertise of a state agency like the PUCO in interpreting a law where "highly specialized issues" are involved "and where agency expertise would, therefore, be of assistance in discerning the presumed intent of our General Assembly." *Consumers' Counsel v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 108, 110, 12 O.O.3d 115, 388 N.E.2d 1370.

Analysis

The Order Allowing DP&L to Charge Customers for the Billing-Related Changes Made by DP&L Is Reasonable

[**P15] The Consumers' Counsel contends first that the multiparty agreement approved by the PUCO is not beneficial to ratepayers and that it improperly deviates from DP&L's initial intention to recover from CRES providers rather than from consumers the \$ 18.8 million cost of reprogramming DP&L's computers to accommodate new billing practices mandated by the General Assembly when the competitive retail market for electricity was established in Ohio. The PUCO, DP&L, and Dominion Retail each counter those arguments, claiming that the PUCO's approval of the agreement was entirely reasonable.

[**P16] This court applies a three-part test when evaluating the reasonableness of settlements approved by the PUCO: whether the settlement is a product of serious bargaining among capable, knowledgeable parties; whether the settlement, as a package, benefits ratepayers and the public interest; and whether the settlement package violates any important regulatory principles or practices. *Consumers' Counsel v. Pub. Util. Comm.* (1992), 64 Ohio St.3d 123, 126, 1992 Ohio 122, 592 N.E.2d 1370. See, also, *AK Steel Corp. v. Pub. Util. Comm.* (2002), 95 Ohio St. 3d 81, 82-83, 2002 Ohio 1735, 765 N.E.2d 862.

[**P17] The Consumers' Counsel urges that the agreement in this case fails the second and third prongs of the test, alleging that consumers will pay costs under the agreement that DP&L initially planned to recover solely from CRES providers. To support its argument, the Consumers' Counsel points to a separate one-page sidebar agreement between DP&L and the Consumers' Counsel. In that sidebar agreement from June 2000, DP&L had agreed that it would "not seek recovery from residential customers" for costs associated with "billing system modifications" made by DP&L. The PUCO's failure to enforce that earlier agreement when DP&L and other parties presented their new agreement in October 2004 represented a "willful disregard of duty," according to the Consumers' Counsel.

[**P18] However, the June 2000 sidebar agreement was never filed with or approved by the PUCO, and for that reason, the PUCO refused to consider it when weighing the reasonableness of the 2004 agreement, explaining that "[u]nderstandings among parties that are important enough that the parties wish to [*398] have a means to bring them to the Commission's attention at a later time" should be [***1158] brought "to the Commission for approval" when those understandings are reached. The PUCO has taken a similar approach in past cases, and we have approved that practice. See, e.g., *Constellation NewEnergy, Inc. v. Pub. Util. Comm.*, 104 Ohio St.3d 530, 2004 Ohio 6767, P14-15, 820 N.E.2d 885 (approving the PUCO's refusal to consider side agreements that had not been incorporated into the agreement at issue); *Cookson Pottery v. Pub. Util. Comm.* (1954), 161 Ohio St. 498, 505, 53 O.O. 374, 120 N.E.2d 98, citing G.C. 614-17, the predecessor of R.C. 4905.31 (contracts between a public utility and its customers that are not filed with the PUCO "shall not be lawful"). R.C. 4905.31(E) provides that no financial arrangement between a public utility and consumers "is lawful unless it is filed with and approved by" the PUCO.

[**P19] The PUCO's refusal, then, to consider the unapproved June 2000 sidebar agreement between the Consumers' Counsel and DP&L appears consistent with past practice and with the relevant statutory provision.

[**P20] The PUCO also properly applied our three-part test for weighing the reasonableness of the October 2004 agreement at issue in this case. Ample evidence in the record supports the PUCO's conclusion that the agreement would be a "benefit to ratepayers and the public interest" and would "limit[] any negative impact on competition in DP&L's territory" by doing away with DP&L's initial plan to charge CRES providers up to \$ 1.90 for each consolidated electric bill prepared by the utility company.

[**P21] As the PUCO noted in its order, "it is a benefit to the ratepayers and the public interest for the parties to these cases to agree to a per-bill fee that is substantially lower than DP&L currently charges." The PUCO also explained that the 2004 agreement is consistent with standard regulatory practices because other electric and gas utility companies have been allowed to recover from their customers the same kind of billing-related charges that the agreement calls for DP&L to recover from its customers.

[**P22] The agreement also brings other benefits to the consumer. The reduced charges to CRES providers for each customer bill will lower any barrier that may have kept Dominion Retail and other competitors of DP&L from winning customers for retail electricity gen-

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eration service in DP&L's territory. And because all customers benefit from having greater choices in a competitive retail electricity market, the stipulation's removal of a significant barrier to the entry of new competitors in DP&L's territory benefits all customers in that area. As a result, as one witness testified, it is reasonable to ask all customers to pay for that benefit.

[**P23] Upon review, we have concluded that the record supports the reasonableness of the PUCO's order approving the 2004 agreement and contains [*399] sufficient probative evidence to justify the PUCO's factual findings that the agreement would benefit ratepayers and the public interest and would not violate any important regulatory principles or practices. The PUCO's decision finding the agreement reasonable is therefore not "manifestly against the weight of the evidence" and is not "so clearly unsupported by the record as to show misapprehension, mistake, or willful disregard of duty." *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (2000), 88 Ohio St. 3d 549, 555, 2000 Ohio 422, 2000 Ohio 423, 728 N.E.2d 371.

The Order Allowing DP&L to Charge Customers for the Billing-Related Changes Made by DP&L Is Lawful

[**P24] The Consumers' Counsel further challenges the lawfulness of the [***1159] PUCO's order, arguing that the PUCO should not have deviated from one of its own earlier orders and should have enforced various statutory requirements that apply to utility rate increases. We conclude that the PUCO properly rejected both arguments.

[**P25] First, the Consumers' Counsel contends that in accordance with the PUCO's 2000 order, DP&L could not recover its billing-related costs from CRES providers before 2007. However, in *Consumers' Counsel v. Pub. Util. Comm.* (1984), 10 Ohio St. 3d 49, 50-51, 10 Ohio B. 312, 461 N.E.2d 303, we explained that the PUCO may change or modify earlier orders as long as it justifies any changes. The agreement reached by DP&L and the other parties in 2004, and approved by the PUCO in the proceedings below in 2005, created a new and entirely reasonable way for DP&L to recover the billing-related costs it had incurred between 1999 and 2001. As explained above, the record supported the change, and the PUCO fully explained its reasons for approving the agreement. The PUCO was not bound to adhere to an earlier arrangement that had created anticompetitive barriers to the entry of new CRES providers in DP&L's territory, and the PUCO's decision to remove those barriers by modifying an earlier PUCO order was not unlawful.

[**P26] The Consumers' Counsel next contends that the statutory requirements for utility rate increases should have been followed in the proceedings below. Under the statute cited by the Consumers' Counsel, a

public utility seeking to change its existing rates for customers must "file a written application" with the PUCO and must prove at any hearing held on the request that it is "just and reasonable." R.C. 4909.18. The application for a rate increase must also be published by the PUCO in a newspaper in the utility company's territory, R.C. 4909.19, and public hearings must be held in large municipalities in the affected service area, R.C. 4903.083.

[**P27] Those specific statutory provisions were not followed in this case, as the proposal that DP&L's customers pay for the expenses it incurred to reprogram [*400] its computers between 1999 and 2001 to accommodate consolidated billing had emerged not from a formal rate-increase application but from the agreement between DP&L and the other parties in October 2004. Nonetheless, the agreement is valid, and the PUCO lawfully approved it in February 2005.

[**P28] The agreement in this case was reached in an R.C. 4905.26 complaint proceeding, not an R.C. 4909.18 rate-increase proceeding (with all of the attendant procedural requirements cited by the Consumers' Counsel). That former statutory provision was cited by CRES provider Dominion Retail and by the Miami Valley Communications Council when they filed their separate complaints against DP&L to initiate the proceedings that led to the agreement at issue several months later. In its February 2005 order approving the parties' settlement agreement, the PUCO acknowledged that the agreement "arose in the context of a complaint case" rather than in a rate-increase proceeding.

[**P29] We have repeatedly held that utility rates may be changed by the PUCO in an R.C. 4905.26 complaint proceeding such as this, without compelling the affected utility to apply for a rate increase under R.C. 4909.18. See, e.g., *Lucas Cty. Commrs. v. Pub. Util. Comm.* (1997), 80 Ohio St.3d 344, 347, 1997 Ohio 112, 686 N.E.2d 501 ("Pursuant to R.C. 4905.26 * * *, the commission may conduct an investigation and hearing, and fix new rates to be substituted for existing rates, if it determines that [***1160] the rates charged by the utility are unjust and unreasonable"); *Allnet Communications Servs., Inc. v. Pub. Util. Comm.* (1987), 32 Ohio St.3d 115, 117, 512 N.E.2d 350 ("R.C. 4905.26 is broad in scope as to what kinds of matters may be raised by complaint before the PUCO. In fact, this court has held that reasonable grounds may exist to raise issues which might strictly be viewed as 'collateral attacks' on previous orders"); *Ohio Util. Co. v. Pub. Util. Comm.* (1979), 58 Ohio St. 2d 153, 157, 12 O.O.3d 167, 389 N.E.2d 483 (in an R.C. 4905.26 proceeding, the PUCO can "order[] that new rates be put in effect").

[**P30] As R.C. 4905.26 itself provides, "any person, firm, or corporation," as well as the PUCO itself,

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may file a complaint alleging that an existing or proposed utility rate or charge is unjust or unreasonable. That kind of allegation was raised by both Dominion Retail and the Miami Valley Communications Council in the proceedings below, each of which questioned the charges that DP&L imposed on CRES providers for consolidated-billing services. R.C. 4905.26 indicates that the parties to a complaint proceeding "shall be entitled to be heard, represented by counsel, and to have process to enforce the attendance of witnesses." No allegation exists that those requirements were not met in the proceedings below, and in fact the PUCO held several days of hearings on the complaints and heard from multiple witnesses, including a witness who testified on behalf of the Consumers' Counsel.

[*401] [**P31] Some of the testimony in the R.C. 4905.26 complaint proceeding before the PUCO in 2004 indicated that the PUCO's 2000 order -- which allowed DP&L to charge CRES providers for the computer-related consolidated-billing costs that it incurred between 1999 and 2001 -- was unreasonable and posed a barrier to the entry of new CRES providers in DP&L's service area. Testimony presented after most of the parties in the complaint proceeding reached their October 2004 agreement indicated that shifting the computer-related costs from CRES providers to DP&L's customers would foster competition in DP&L's service area by "mak[ing] it easier for CRES providers to offer savings to customers." Multiple witnesses also testified that the agreed resolution of the complaint proceeding was reasonable and appropriate. Relying on that evidence in the record, the PUCO approved the agreement in February 2005.

[**P32] The PUCO acted lawfully. As noted above, this court has allowed the PUCO to impose new utility rates or to change existing rates in other R.C. 4905.26 complaint proceedings, and there is no dispute that the PUCO complied with all of the procedural requirements in the statute by holding a hearing and by allowing the parties to be represented by counsel and to compel the attendance of witnesses.

The Portion of the PUCO's Order Giving DP&L Additional Protections in the Event of a CRES Provider's Default Is Also Reasonable and Lawful

[**P33] Although the Consumers' Counsel primarily focuses on the reasonableness and lawfulness of the PUCO decision permitting DP&L to charge its customers for the costs that DP&L incurred when it made software changes in order to produce unbundled consolidated customer bills, the Consumers' Counsel also challenges a provision of the PUCO order allowing DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of that CRES provider.

[**P34] The PUCO and DP&L argue that the Consumers' Counsel should not be permitted to raise this issue because she did not first raise it in the application for [***1161] rehearing before the PUCO. Those parties are correct in that R.C. 4903.10 states, "No party shall in any court urge or rely on any ground for reversal, vacation, or modification not so set forth in the application..". Yet the Consumers' Counsel *did* challenge the default recovery mechanism in the application for rehearing, and the PUCO addressed the issue in its order denying rehearing. The Consumers' Counsel has therefore properly raised the issue.

[**P35] The default-recovery mechanism approved by the PUCO is unlawful according to the Consumers' Counsel because no statutory or regulatory provisions in Ohio expressly permit that kind of financial protection to be given to an [*402] electricity distributor like DP&L. Notably, though, the Consumers' Counsel cites no statutory provisions that *disallow* the practice either.

[**P36] R.C. 4928.08(B) requires CRES providers to "provid[e] a financial guarantee sufficient to protect customers and electric distribution utilities from default," and Ohio Adm.Code 4901:1-24-08(C) allows an electricity distributor (like DP&L) to "apply for relief" at the PUCO if a CRES provider fails to maintain such a guarantee. Those provisions -- the only ones cited by the Consumers' Counsel -- do not prevent the PUCO from approving the kind of additional financial protections given to DP&L to ensure that it will not incur losses when a CRES provider in its territory defaults.

[**P37] As one witness testified before the PUCO about this so-called default recovery rider, it "establishes a reasonable and appropriate process for the recovery by DP&L of prudently incurred costs of a CRES provider default * * * [and] will protect DP&L from costs that DP&L may incur to procure replacement power to serve customers who had been served by a defaulting CRES provider." Another witness testified that because DP&L does not select CRES providers (customers do), and because DP&L does not benefit from CRES providers' services (customers do), it is reasonable for the customers of a CRES provider to reimburse an electricity distributor such as DP&L for the out-of-pocket costs DP&L incurs when the CRES provider defaults. Testimony before the PUCO also indicated that similar default recovery mechanisms currently protect natural gas distributors.

[**P38] The PUCO cited and agreed with all of that testimony, stating in its February 2005 order that the default recovery mechanism "is not prohibited by any current statute or rule" and is in fact "permissible under the current statutory system." The likelihood that DP&L will ever invoke the default recovery mechanism is

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small, the PUCO noted, but it is "a reasonable method to spread the risk of the competitive market."

[**P39] The PUCO's findings as to the reasonableness of this particular provision of the 2004 agreement are supported by the record, and its legal conclusion that the provision is not unlawful is correct. The order, therefore, allowing DP&L to recover from a CRES provider's customers any of DP&L's out-of-pocket costs resulting from the default of the CRES provider was both reasonable and lawful.

Conclusion

[**P40] For the reasons explained above, the order of the PUCO that allowed DP&L (1) to shift from CRES providers to DP&L's customers the costs that DP&L incurred to update its computer software in order to provide consolidated customer bills for CRES providers in its territory and (2) to recover from a [*403] CRES provider's customers any of DP&L's out-of-pocket costs

resulting from the default of the CRES provider was both reasonable and lawful. The PUCO fully explained the rationale [***1162] for its order, evidence in the record supports the PUCO's decision, and the order is not inconsistent with any statutory or regulatory requirements. Therefore, the order of the PUCO is affirmed. n1

n1 In accordance with S.Ct.Prac.R. IX(8), the Consumers' Counsel filed a list of additional authorities before the oral argument in this case. That list of citations was timely filed, and we therefore deny the PUCO's and DP&L's motions to strike the list.

Order affirmed.

MOYER, C.J., RESNICK, PFEIFER, LUNDBERG
STRATTON, O'CONNOR and LANZINGER, JJ., con-
cur.

EXHIBIT

Joint Stipulations and Settlement Agreement

These Joint Stipulations and Settlement Agreement (Agreement) are between The Cincinnati Gas & Electric Company, doing business as Duke Energy Ohio, Inc. (Duke Energy), and the Office of the Ohio Consumers' Counsel (OCC). It is the intent of Duke Energy and OCC (Parties) that this Agreement shall bind the Parties, their officers, agents, servants, employees, assigns, and successors in interest to the terms and conditions set forth herein. This Agreement is not confidential and is a public document. This document is the entire Agreement between the Parties.

The Parties, for good consideration as set forth below, agree to the following terms and conditions:

1. Duke Energy shall provide, at its own expense and without reimbursement from its consumers, additional funding in the amount of one million dollars for the Ohio Low Income Gas Weatherization Program (Program) offered by People Working Cooperatively (PWC) for low-income residential utility consumers within Duke Energy's Ohio service area, over a twelve-month period beginning with the execution date of this Agreement. Duke Energy will promptly disburse the additional funding to PWC consistent with the progression of the Program implementation pursuant to the protocols of the existing Program. Funding shall be subject to existing evaluation criteria for this Program.
2. Duke Energy shall provide, at its own expense and without reimbursement from its customers, additional funding in the amount of two hundred fifty thousand dollars for the Home Weatherization Assistance Program offered by Cincinnati-Hamilton County Community Action Agency (CHCCAA) for residential utility consumers within Duke Energy's Ohio service area, over a twelve-month period beginning with the execution date of this Agreement. Duke Energy will promptly disburse the additional funding to CHCCAA consistent with the progression of these programs' implementation pursuant to the protocols of the existing programs. Funding shall be subject to existing evaluation criteria for these three CHCCAA programs.

3. If, at the end of the twelve-month period referenced in the above paragraphs one and two, People Working Cooperatively and/or Cincinnati-Hamilton County Community Action Agency do not utilize the funds that Duke Energy has committed for disbursement, then Duke Energy shall promptly notify the Cinergy Community Energy Partnership (CCEP) of the non-utilized funds and Duke Energy shall allocate such non-utilized funds to any of the above-referenced programs or similar programs for consumers as determined by the CCEP. (CCEP is a group of community representatives that provides guidance and recommendations to Duke Energy on energy efficiency programs that will benefit all residential consumers, especially low-income consumers, and helps the community become more energy efficient.) Duke Energy will expend all the non-utilized funds in the manner determined by CCEP within twenty-one months of the execution of this Agreement. Duke Energy will provide OCC with a letter, beginning three months after the execution date of this Agreement and every three months thereafter, in which Duke Energy informs OCC with regard to the pending and actual disbursements and the progress of the above-referenced programs pursuant to paragraphs one, two and three.
4. The OCC will file a motion to dismiss case number 06-0701, which is OCC's appeal before the Ohio Supreme Court from cases 05-732-EL-MER and 05-733-EL-MER before the Public Utilities Commission of Ohio (PUCO).
5. If the Ohio Supreme Court denies OCC's motion to dismiss case number 06-0701, then Duke Energy's obligation to fund the programs set forth in paragraphs one, two, and three of this Agreement terminates.
6. On or before July 31, 2006, Duke Energy will file an application for approval of a "green tariff" at the PUCO. The green tariff provides an incentive for the development and use of renewable energy resources. The tariff filing at the PUCO will be consistent with the green tariff that Duke Energy Indiana arranged in Indiana Utility Regulatory Commission Cause No. 42966. At least thirty days prior to filing the application for the green tariff, Duke Energy will share a draft of the filing (including the draft application and tariffs) with OCC for review and discussion between the Parties. Duke Energy will give good faith consideration to any recommendations that OCC makes in advance of the filing (including with regard to the substance and form of the application and tariffs). Duke Energy will support OCC's motion to intervene in the green tariff case at the PUCO, if OCC moves to intervene.
7. Duke Energy agrees that it will not institute a fee for consumers' use of its authorized agent and authorized pay stations for a period of at least twelve months after the execution date of this Agreement, which means that

consumers will continue to be able to pay their Duke Energy bills at such locations without a fee for at least twelve months after execution of this Agreement.

8. On the day that this Agreement is executed by the Parties, Duke Energy will file Motions at the PUCO to withdraw all cases currently at the PUCO that relate to recovery of costs associated with undetermined generating facilities to be purchased or built by Duke Energy, including, but not limited to, Case Nos. 04-1811-EL-AAM, 04-1812-EL-UNC, 04-1813-EL-AAM, and 04-1814-EL-ETP cases. Duke Energy agrees that it will not file the same or similar proposals with the PUCO for one year from the execution date of this Agreement.

This Agreement shall apply to successors and assigns of Duke Energy and OCC. The Parties shall not assign their rights or obligations under this Agreement without the written consent of the non-assigning Party and such written consent shall not be unreasonably withheld.

Except for purposes related to the implementation and/or enforcement of this Agreement, including resolution of any disputes with regard to this Agreement, neither this Agreement, nor the information contained herein, shall be cited as precedent in any future proceeding for or against any Party. This Agreement is a reasonable compromise involving a balancing of competing positions, and it does not necessarily reflect the positions that the Parties would have taken if these issues had been fully litigated.

This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio. The Parties hereby agree that Ohio Courts of Common Pleas have personal jurisdiction over Duke Energy and subject-matter jurisdiction to determine whether Duke Energy has complied with the terms of this Agreement. Duke Energy also agrees that OCC has standing to bring an action to enforce the terms of this Agreement in


Ohio Courts of Common Pleas. Nothing in this Agreement should be construed as a waiver of sovereign immunity by OCC.

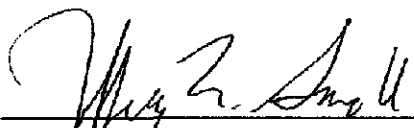
The undersigned Parties certify that they have read and understand the terms and conditions of this Agreement and that they have the authority to bind their respective Party.

Entered into on this 5th day of May: 2006 *QLS INC.*

On behalf of Duke Energy Ohio, Inc.

On behalf of OCC


Paul A. Colbert, Senior Counsel
Duke Energy Ohio, Inc.
155 East Broad Street, 21st Floor
Columbus, Ohio 43215


Jeffrey L. Small
Assistant Consumers' Counsel
Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215

EXHIBIT

EXHIBIT

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

IN THE MATTER OF THE CONSOLIDATED)	
DUKE ENERGY OHIO, INC. RATE)	Case Nos. 03-93-EL-ATA <i>et al.</i>
STABILIZATION PLAN REMAND AND)	
RIDER ADJUSTMENT CASES)	

AFFIDAVIT OF JOCK J. PITTS

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

I, JOCK J. PITTS, being first duly cautioned and sworn, hereby state as follows:

1. I am the President of People Working Cooperatively, Inc. ("PWC"), a Cincinnati-based, Ohio non-profit corporation whose mission is to provide critical home repairs, including weatherization services, for the very low-income elderly and disabled homeowners residing in the Duke Energy-Ohio ("DE-O") service territory. PWC has been an intervenor in the earlier phase of this proceeding (referred to as the "DE-O RSP Case"), which resulted in an Opinion and Order by the Public Utilities Commission of Ohio ("PUCO") that was overturned by the Ohio Supreme Court on appeal and remanded to the PUCO for this second phase. I make this statement in response to *Duke Energy Ohio's FirstSet of Interrogatories and Requests for Production of Documents Propounded to PWC*.

2. In response to DE-O's Interrogatories 10-12, I was party to meetings with the Office of Consumers' Counsel ("OCC") and to several conference calls with representatives of the OCC during the course of the RSP Case, the purpose of which was to discuss the possibility of reaching a stipulation among the consumer and marketer parties. In particular, on April 13,


2004, I was present at a meeting at OCC's offices, attended by OCC personnel, representatives of the consumer parties and representatives of the marketer parties. Although the parties did not sign a written confidentiality agreement, OCC counsel asked at the beginning of the meeting to agree to keep the discussions held during the meeting confidential. Subsequent to the meeting, OCC counsel provided a proposed stipulation for the consumer and marketer parties' review, comment and agreement, with the proposed stipulation marked "CONFIDENTIAL SETTLEMENT OFFER MATERIAL (NOT FOR ANY OTHER USE)." All subsequent e-mail versions of the OCC proposal were similarly marked. While counsel for PWC was the addressee on e-mails from OCC and the parties participating in the negotiations with OCC, PWC counsel forwarded all communications from OCC to me personally.

3. PWC also engaged in settlement discussions with OPAC separately, although informed by its counsel that he was having similar discussions with other consumer parties. Again, no written confidentiality agreement was entered into. Rather, the parties agreed orally to keep the discussions held in pursuit of settlement of their consumer issues confidential.

Further Affiant sayeth naught.


Jock J. Pitts, President

SWORN TO AND SUBSCRIBED before me, a Notary public, this 12th day of March, 2007.


Notary Public

(SEAL)

STEFAN L. OLSON
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES 06-25-11

Date: Thu, 13 May 2004 17:53:42 -0400
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>
To: <dboehmlaw@aol.com>, <drinebolt@aol.com>, <mkurtzlaw@aol.com>, <Dane.Stinson@BaileyCavalieri.com>, <SBLOOMFIELD@BRICKER.COM>, <tobrien@BRICKER.COM>, <broyer@brscolaw.com>, <Mchristensen@Columbuslaw.org>, <cgoodman@energymarketers.com>, <KorkoszA@FirstEnergyCorp.com>, <nmorgan@lascinti.org>, <srandazzo@mwncmh.com>, <RICKS@OHANET.ORG>, <shawn.leyden@pseg.com>, <Thomas.McNamee@puc.state.oh.us>, <bakahn@vssp.com>, <mhpetricoff@vssp.com>, <wjaiery@vssp.com>
Cc: "RANDY CORBIN" <CORBIN@occ.state.oh.us>, "BRUCE HAYES" <HAYES@occ.state.oh.us>, "BETH HIXON" <HIXON@occ.state.oh.us>, "ANN HOTZ" <HOTZ@occ.state.oh.us>, "RYAN LIPPE" <LIPPE@occ.state.oh.us>, "ROSS PULTZ" <PULTZ@occ.state.oh.us>, "DAWN REDMOND-TARKINGTON" <REDMOND@occ.state.oh.us>, "LARRY SAUER" <SAUER@occ.state.oh.us>, "JEFF SMALL" <SMALL@occ.state.oh.us>, "DENISE WILLIS" <WILLIS@occ.state.oh.us>
Subject: CONFIDENTIAL Settlement Proposal

Sent on behalf of Jeff Small:

The attached Settlement Proposal is being distributed to our regular service list. Please inform me if you believe that others should receive this material.

Jeff Small
small@occ.state.oh.us

Denise Willis
Case Team Assistant
OCC
willis@occ.state.oh.us

CONFIDENTIALITY NOTICE:

THIS COMMUNICATION IS INTENDED ONLY FOR THE PERSON OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN CONFIDENTIAL AND/OR PRIVILEGED LEGAL GOVERNMENTAL MATERIAL. ANY UNAUTHORIZED REVIEW, USE, DISCLOSURE OR DISTRIBUTION IS PROHIBITED. IF YOU ARE NOT OR BELIEVE THAT YOU ARE NOT THE INTENDED RECIPIENT OF THIS COMMUNICATION, DO NOT READ IT. PLEASE REPLY TO THE SENDER ONLY AND INDICATE THAT YOU HAVE RECEIVED THIS MESSAGE, THEN IMMEDIATELY DELETE IT AND ALL OTHER COPIES OF IT. THANK YOU.

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

Date: Wed, 27 Oct 2004 16:30:07 -0400
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>
To: <dboehmlaw@aol.com>, <drinebolt@aol.com>, <mkurtzlaw@aol.com>, <Dane.Stinson@BaileyCavalieri.com>, <SBLOOMFIELD@BRICKER.COM>, <tobrien@BRICKER.COM>, <broyer@brscolaw.com>, <Mchristensen@Columbuslaw.org>, <cgoodman@energymarketers.com>, <KorkoszA@FirstEnergyCorp.com>, <nmorgan@lascinti.org>, <tschneider@mgsglaw.com>, <srandazzo@mwncmh.com>, <RICKS@OHANET.ORG>, <shawn.leyden@pseg.com>, <Thomas.McNamee@puc.state.oh.us>, <vern.margard@puc.state.oh.us>, <William.Wright@puc.state.oh.us>, <bakahn@vssp.com>, <mhpetricoff@vssp.com>, <wjairey@vssp.com>
Subject: Confidential Settlement Communication in Case No. 03-93-EL-ATA

Please see the attached confidential settlement communication from Jeff Small in the above captioned case.

Please contact me if you have any trouble with this email.

Denise Willis
Case Team Assistant
OCC
willis@occ.state.oh.us

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Attachment converted: Macintosh HD:SettlementComm10-27-04.pdf (PDF /CARO) (000F6CD5)
Attachment converted: Macintosh HD:BulletResponses10-27-04.pdf (PDF /CARO) (000F6CD6)

Date: Wed, 03 Nov 2004 17:38:03 -0500
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>
To: <Mchristensen@Columbuslaw.org>, <jpitts@pwchomerepairs.org>
Subject: Fwd: Confidential Settlement Communication in Case No.
03-93-EL-ATA

As promised during your discussion today with Janine and Bruce, please find attached the confidential settlement communication from OCC, dated October 27th. Please feel free to discuss these matters with Janine or Bruce.

Thank you.

Denise Willis
Case Team Assistant
OCC
willis@occ.state.oh.us

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Date: Wed, 27 Oct 2004 16:30:07 -0400
From: "DENISE WILLIS" <WILLIS@occ.state.oh.us>
Subject: Confidential Settlement Communication in Case No. 03-93-EL-ATA
Mime-Version: 1.0
Content-Type: multipart/mixed; boundary="=_0828CDF5.B3D2BB21"

Please see the attached confidential settlement communication from Jeff Small in the above captioned case.

Please contact me if you have any trouble with this email.

Denise Willis
Case Team Assistant
OCC
willis@occ.state.oh.us

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Attachment converted: Macintosh HD:SettlementComm10-27-04.pdf 2 (PDF /CARO) (000F849E)