

# LARGE FILING SEPERATOR SHEET

CASE NUMBER: 03-93-EL-ATA  
03-2079-EL-AAM  
03-2080-EL-ATA  
03-2081-EL-AAM  
05-724-EL-UNC  
05-725-EL-UNC

FILE DATE: 11-10-08

SECTION: 20817

NUMBER OF PAGES: 200

DESCRIPTION OF DOCUMENT: Conf. Release

1 through 2008. While some of the provisions related to generation purchases in  
 2 the Pre-Rehearing Agreements were similar to those in the Pre-PUCO Order  
 3 Agreements, some provisions changed. For example, in the November 8, 2004  
 4 Agreement between CRS and the Hospitals, beginning January 1, 2005, CRS  
 5 would still offer to sell retail electric generation service to the Hospitals at a:

6 fixed rate equal to the applicable tariff rate" of The Cincinnati  
 7 Gas & Electric Company's unbundled generation rate in Case  
 8 No. 99-1658-EL-ETP less the regulatory transition charges  
 9 approved in the same case less one (1) mill per kwh. . .<sup>43</sup>

10 The offer by CRS was still an option to the Hospitals to accept anytime prior to  
 11 December 31, 2008. However, the Hospitals' rate would now include:

12 a payment of amounts for emission allowances ["EA"] equal to  
 13 the emission allowance cost CG&E is permitted to recover as  
 14 part of its price to compare charge of the market-based  
 15 standard service offer.<sup>44</sup>

16  
 17 ***Q38. DID THE PRE-REHEARING ORDER AGREEMENTS CONTAIN***  
 18 ***ARRANGEMENTS FOR CUSTOMERS TO BE REIMBURSED FOR***  
 19 ***PORTIONS OF RSP CHARGES?***

20 ***A38.*** Yes. These Pre-Rehearing Agreements contained provisions, under which  
 21 Customer Parties would be reimbursed by CRS for portions of various RSP

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<sup>43</sup> Attachment 8 at Bate stamp 354, Provision 1.

<sup>44</sup> Attachment 8 at Bate stamp 354, Provision 1.

1 charges that CG&E was proposing at that time (i.e. October and November  
2 2004). Using the October 28, 2004 Agreement between CRS and the Hospitals  
3 as an example, during 2005 through 2008 CRS was to reimburse the Hospitals  
4 for "any rate stabilization charge (a component of the provider of last resort  
5 charge)"<sup>45</sup> paid by the Hospitals to CG&E. This reimbursement by CRS to the  
6 Hospitals for ~~the RSC~~ was the same as provided for in the Pre-PUCO Order  
7 Agreement. Quite different from that superseded agreement was a provision that  
8 CG&E was to reimburse the Hospitals for "total infrastructure maintenance fund  
9 payments in excess of 4% of little g."<sup>46</sup>

10  
11 Also different was a statement included that the Hospitals "will not pay the AAC  
12 (annually adjusted component) charges and any fuel adders that would apply to  
13 full service tariff customers."<sup>47</sup> The last part of this statement seems logical,  
14 given that the PUCO's Order had made fuel adders bypassable and if the  
15 Hospitals were purchasing generation from CRS, they could avoid payment of  
16 the fuel adders.<sup>48</sup> However, it does not seem logical that CRS and the Hospitals  
17 could agree in a November 8, 2004 Agreement that AAC charges would not be  
18 paid to CG&E during 2005 through 2008, when under the Commission's  
19 September 29, 2004 Order, the AAC was avoidable for shopping customers only

<sup>45</sup> Attachment 8 at Bate stamp 354, Provision 2.

<sup>46</sup> Attachment 8 at Bate Stamp 354, Provision 2.

<sup>47</sup> Attachment 8 at Bate Stamp 354, Provision 2.

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1 in 2005. The percentage of AAC that might be avoidable in future years (i.e.  
2 2006-2008) was to be determined by the Commission in subsequent years.<sup>48</sup>  
3

4 ***Q39. UNDER THE PRE-REHEARING AGREEMENTS DID CUSTOMER***  
5 ***PARTIES AGREE TO SUPPORT CG&E'S APPLICATION FOR***  
6 ***REHEARING IN THE POST-MDP SERVICE CASE?***

7 ***A39. Yes. In the Pre-Rehearing Agreements, Customer Parties, or groups to which***  
8 ***they are members, agreed to support CG&E's Application for Rehearing. As an***  
9 ***example, provision 9 of the November 8, 2004 Agreement between CRS and the***  
10 ***Hospitals, states:***

11 The Hospitals shall cause the Ohio Hospital Association to  
12 support an Application for Rehearing filed by The Cincinnati  
13 Gas & Electric Company and/or the Ohio Hospital  
14 Association, seeking to restore the Stipulation, without  
15 modification, signed by The Cincinnati gas[sic] & Electric  
16 Company and the Ohio Hospital Association or seeking  
17 approval, without modification of the alternative proposal  
18 made by The Cincinnati gas[sic] and Electric Company in its  
19 application for rehearing, in Case No. 03-93-EL-ATA, and  
20 any related litigation.<sup>49</sup>

<sup>48</sup> Order at 32-33 (September 29, 2004).

<sup>49</sup> Attachment 8 at Bates stamp 356, Provision 9

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1 CG&E filed an Application for Rehearing on October 29, 2004 in the Post-MDP  
2 Service Case.

3  
4 ***Q40. WERE THE PRE-REHEARING AGREEMENTS DEPENDENT UPON THE***  
5 ***OUTCOME OF THE POST-MDP SERVICE CASE AT THE PUCO?***

6 ***A40.*** Yes. Similar to the conditions in the Pre-PUCO Order Agreements, the  
7 conditions under which these agreements would terminate were tied to the  
8 PUCO's decision in the Post-MDP Service Case. In the October 28, 2004  
9 Agreement between CRS and the Hospitals, one condition under which the  
10 agreement would terminate was:

11 The Public Utilities Commission of Ohio, in case no.[sic] 03-  
12 93-EL-ATA fails to issue an entry on rehearing acceptable to  
13 Cinergy such that it restores without modification the original  
14 Stipulation signed by the Parties or adopts without  
15 modification CG&E's alternative proposal made in its  
16 application for rehearing.<sup>50</sup>

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

18  
19 ***Q41. AS YOU HAVE AGAIN USED THE CRS AND HOSPITALS AGREEMENT***  
20 ***AS AN EXAMPLE, WOULD YOU PLEASE EXPLAIN HOW THE COMMON***  
21 ***THREADS YOU DESCRIBE APPLY TO THE OTHER PRE-REHEARING***  
22 ***ORDER AGREEMENTS?***

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<sup>50</sup> Attachment 8 at Bate stamp 356, at B.

1 **A41.** Under the November 22, 2004 Agreement between the CRS and OEG members,  
 2 during 2005 through 2008, Customer Parties were given two options for the  
 3 provision of their generation service. They could either (a) purchase competitive  
 4 retail electric generation service from "a Cinergy affiliated" CRES provider or (b)  
 5 accept CG&E's MBSSO price as approved by the PUCO in the Post-MDP  
 6 Service Case, but retain rights to switch to CRES providers.

7  
 8 CRS would reimburse the Customer Parties for portions of various proposed RSP  
 9 charges, depending on the generation option chosen. If option (a), generation  
 10 from a "Cinergy affiliated" CRES, was chosen, CRS would reimburse the  
 11 amounts actually paid to CG&E for RTC, RSC, ACC, and SRT;<sup>51</sup> As seen here,  
 12 part of the difference in reimbursements from the superseded agreement with  
 13 OEG members was the new consideration of the SRT and IMF.<sup>52</sup> If, under option  
 14 (b), a Customer Party accepted CG&E's MBSSO but later switched to a CRES  
 15 provider, CRS would reimburse the Customer Party, when it was purchasing from  
 16 a CRES, 1/2 of the RSC, 1/2 of the AAC, 1/2 of the SRT and amounts of IMF in  
 17 excess of 4% of little g actually paid to CG&E. Different from the superseded  
 18 agreements, customers taking option (b) would pay CRS for 1/2 of the EA  
 19 component of CG&E's fuel component of the price to compare.<sup>52</sup>

20

<sup>51</sup> Attachment 9 at Bate stamp 321, Provision 2(A).

<sup>52</sup> Attachment 9 at Bate stamp 322, Provision 2(B).

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Support by the Customer Parties for CG&E's Application for Rehearing was also contained in this agreement by a provision under which OEG would support CG&E's Application for Rehearing.<sup>53</sup>

Under a termination provision tied to the outcome in the Post-MDP Service Case, the agreement would terminate if:

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

A provision identical to that in the superseded agreement also tied the agreement to the outcome in the Post-MDP Service Case depended on whether PUCO's order in the Post-MDP Service Case was acceptable to the regulated electric distribution company, CG&E.<sup>54</sup>

***Q42. WERE THERE PROVISIONS IN THE PRE-REHEARING ORDER AGREEMENT WITH IEU-OHIO THAT REFLECT THE COMMON THREADS YOU HAVE DESCRIBED?***

***A42.*** The provision of generation service during the proposed RSP period to Customer Parties was part of the terms and conditions in the November 8, 2004 Agreement between Cinergy Corp, through its agent CRS, and IEU-Ohio. Illustrating this is Provision 1 of the Agreement which states that if any customers were presently

<sup>53</sup> Attachment 9 at Bates stamp 323, Provision 8.

<sup>54</sup> Attachment 9 at Bates stamp 334, Provision 12.

1 purchasing generation from a non-Cinergy Corp. affiliated CRES provider; then  
2 beginning no earlier than January 1, 2005 and no later than January 1, 2006, CRS  
3 (or another Cinergy affiliated CRES provider) would supply generation to those  
4 customers.<sup>55</sup>

5  
6 For these customers, CRS would reimburse them for portions of proposed RSP  
7 charges and other charges they paid to CG&E, depending upon the year and  
8 depending on when customers purchased generation from CRS. For example, if  
9 these customers did not begin to purchase generation from CRS until January 1,  
10 2006 (i.e. they continued to purchase from another CRES provider during 2005),  
11 they would be reimbursed by CRS during 2005 for "the rate stabilization charge  
12 component, and one half of the system reliability component" paid to CG&E. On  
13 the other hand, if these customers begin purchasing generation from CRS on  
14 January 1, 2005, then CRS would reimburse them for amounts paid to CG&E for  
15 RTC, RSC, 1/2 of the SRT and, beginning in 2006, for the amount paid for the  
16 IME in excess of 4% of little g.<sup>56</sup>

17  
18 Support by the Customer Parties for CG&E's Application for Rehearing was also  
19 contained in this agreement by a provision under which IEU-Ohio would support  
20 CG&E's Application for Rehearing.<sup>57</sup> As in the superseded agreement this Pre-

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<sup>55</sup> Attachment 9 at Bate stamp 335, Provision 1.

<sup>56</sup> Attachment 10 at Bate stamp 336, Provision 1.

<sup>57</sup> Attachment 10 at Bate stamp 338, Provision 8.



Rehearing Agreement had a tie to the outcome in the Post-MDP Service Case that stated the agreement would terminate if the PUCO failed to issues an entry on rehearing acceptable to Cinergy [Cinergy Corp., through its agent CRS]<sup>58</sup>

**Q43. DID CINERGY CORP. HAVE A PRE-REHEARING ORDER AGREEMENT WITH COGNIS THAT CONTAIN PROVISIONS WITH THE SAME COMMON THREADS AS THE OTHER PRE-REHEARING AGREEMENTS?**

**A43:** Yes, the four common threads exist in the October 28, 2004 Pre-Rehearing Agreement between Cinergy Corp. and Cognis. In this agreement Cognis was to purchase generation from CG&E "pursuant to its current tariff and pursuant to the Electric Reliability and Rate Stabilization Plan approved by the Public Utilities Commission of Ohio."<sup>59</sup>

Under Provision 2 of this Agreement, Cinergy Corp. would reimburse Cognis for payments made to CG&E for the following:

- In 2005 - first 4% of the AAC, and the IMF in excess of 4% of little g
- In 2006 - first 8% of the AAC, and the IMF in excess of 4% of little g
- In 2007 - first 12% of the AAC & SRT, and the EA and the IMF in excess of 4% of little g

<sup>58</sup> Attachment 10 at Bate stamp 338, at A.

<sup>59</sup> Attachment 11 at 2, Provision 1.

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- In 2008 - first 16% of the AAC & SRT, and the EA, and the IMF in excess of 4% of little g

In this Pre-Rehearing Agreement Cognis agreed to support CG&E's Application for Rehearing in the Post-MDP Service Case.<sup>60</sup> Termination of the Agreement would occur if the PUCO failed to issue an order in the Post-MDP Service Case acceptable to Cinergy. [Cinergy Corp]<sup>61</sup>

***Q44. WAS THERE A PRE-REHEARING AGREEMENT BETWEEN CRS AND KROGER THAT SUPERSEDED THE PRE-PUCO ORDER AGREEMENT OF THE SAME PARTIES?***

***A44.*** Yes. A Pre-Rehearing Agreement between CRS and Kroger that was entered into on November 22, 2004 superseded those parties' July 2004 Agreement, but its terms and conditions replicated in many ways the earlier agreement. The Pre-Rehearing has provisions related to pre-existing transactions whereby Kroger purchases retail generation from New Energy and New Energy purchases wholesale power from the Cinergy Operating Companies. As in the earlier agreement, the terms and conditions related to the provision to Kroger of generation service and reimbursements to Kroger for portions of RSP components are both set forth for by year, 2005 through 2008. However, a new provision in this agreement notes the RSP charges as proposed in CG&E's

<sup>60</sup> Attachment 11 at 2, Provision 5.

<sup>61</sup> Attachment 11 at 3, at B.

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1       October 29, 2004 Alternative Proposal: "CG&E's POLR charge is expected to  
2       consist of these components: 1) RSC; 2) AAC; 3) IMF; and 4) System Reliability  
3       Tracker (SRT).<sup>62</sup> These terms are then used in describing Kroger's generation  
4       options, reimbursements and payments by year:

5  
6       2005: Kroger would continue to purchase generation from New Energy in 2005  
7       and CRS, or any affiliate thereof, would reimburse Kroger for one half of the  
8       amount actually paid of the POLR charge, except for the RSC and IMF (i.e. 1/2  
9       of the AAC and 1/2 of the SRT). Kroger would pay to CRS "half the emission  
10      allowance component of the fuel component of the price to compare approved by  
11      the PUCO in Case No. 03-93-EL-ATA."<sup>63</sup>

12  
13      2006-7: It was still anticipated that New Energy would continue to be Kroger's  
14      CRES provider in 2006 and 2007. If New Energy was not, Kroger could choose  
15      a different CRES provider, including a CRS affiliate, for whom the Cinergy  
16      Operating Companies would provide wholesale power at the same price provided  
17      to New Energy.<sup>64</sup> (This provision for 2006 and 2007 differs from that in the  
18      superseded agreement in which, if Kroger chose a CRS-affiliated CRES provider  
19      that provider would have supplied generation at retail to Kroger at the same  
20      prices under the Cinergy Operating Companies wholesale transaction with New

<sup>62</sup> Attachment 12 at Bate stamp 1184, Provision 2.

<sup>63</sup> Attachment 12 at Bate stamp 1182, Provision 1.

<sup>64</sup> Attachment 12 at Bate stamp 1182-1183, Provision 1.

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Energy.) During 2006 and 2007, Kroger would be reimbursed by "Cinergy [CRS] or any affiliate thereof" for half of the amount paid to CG&E for the AAC and the SRT. With either New Energy, or another CRES provider, supplying it generation in 2006 and 2007, Kroger would pay CRS half of the EA component contained in CG&E's fuel component.

2008: Kroger could choose a CRES provider in 2008, but CRS would have the right of first refusal to provide Kroger generation at the same rate as that provider. CRS would reimburse Kroger half of the amount paid to CG&E for the AAC and SRT. Kroger would pay CRS half of CG&E's EA component. In addition to the reimbursements described above by year, the Kroger Pre-Rehearing Agreement also provided that CRS would reimburse Kroger for IMF payments to CG&E in excess of 4% of little g.<sup>65</sup>

**Q45. UNDER THIS PRE-REHEARING AGREEMENT, WAS KROGER TO SUPPORT CG&E'S APPLICATION FOR REHEARING IN THE POST-MDP SERVICE CASE?**

**A45. Yes, Kroger agreed to support an Application for Rehearing filed by CG&E in Case No. 03-93-EL-ATA.<sup>66</sup>**

<sup>65</sup> Attachment 12 at Date stamp 1184, Provision 4.

<sup>66</sup> Attachment 12 at Date stamp 1184, Provision 10.

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1 **Q46. DID THE KROGER PRE-REHEARING AGREEMENT CONTAIN**  
2 **TERMINATION PROVISIONS TIED TO THE OUTCOME OF THE POST-**  
3 **MDP SERVICE CASE?**

4 **A46.** Yes. This November 22, 2004 Agreement would terminate if the PUCO failed to  
5 issue an order acceptable to CRS.<sup>67</sup> In addition, under a provision identical to  
6 one in the superseded agreement:

7 If an order in Case No. 03-93-EL-ATA is issued which is  
8 acceptable to CG&E but which renders invalid or ineffective  
9 any provision of this Agreement to the economic detriment of  
10 Kroger, then Cinergy [CRS] will provide the same economic  
11 value to Kroger through some other mutually acceptable  
12 process.<sup>68</sup>

13  
14 **Q47. IN DISCUSSING THE PRE-PUCO ORDER AGREEMENTS YOU NOTED**  
15 **SEVERAL THAT COULD HAVE IMPACTED CG&E. WERE SIMILAR**  
16 **PROVISIONS ALSO IN THE PRE-REHEARING AGREEMENTS?**

17 **47.** Yes. Earlier in my testimony I listed five provisions in the Pre-PUCO Order  
18 Agreements with the Hospitals, OEG members and Kroger that appeared to have  
19 committed CG&E to an action or lack of action. Those five provisions are also  
20 contained in the Hospitals, OEG member and Kroger Pre-Rehearing

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<sup>67</sup> Attachment 12 at Bate stamp 1185, at B.

<sup>68</sup> Attachment 12 at Bate stamp 1185, Provision 13.

1 Agreements.<sup>69</sup> For the provision in the Pre-Rehearing Agreement with OEG  
2 members, the following language about CG&E filing a cost of service study in  
3 its next rate case was added:

4 Such filing shall include a rate increase for rate TS of no more  
5 than \$0.00. The Parties retain all legal rights in The Cincinnati  
6 Gas and Electric Company's next distribution base rate case,  
7 including, but not limited to, right to litigate and settle the case.  
8 The filing of a cost of service does not in any way constitute a  
9 guarantee regarding the outcome of the case.<sup>70</sup>

10  
11 As with the Pre-PUCO Order agreements, it also appears that CG&E did have  
12 awareness and involvement with the Pre-Rehearing Agreements. In the OHA's  
13 response to OCC discovery,<sup>71</sup> in an e-mail dated November 5, 2004 from Mr.  
14 Kubacki to Mr. Gainer and Mr. Colbert, on the subject of "OHA support of  
15 CG&E", Mr. Kubacki references the "settlement agreement between OHA and  
16 CG&E" and notes that "OHA will file a memorandum in support of CG&E [sic]  
17 alternative proposal." In a subsequent November 5, 2004 e-mail Mr. Colbert  
18 sent an amended agreement to Mr. Kubacki, and copied it Mr. Ficke.  
19

<sup>69</sup> Attachment 8 at Bate stamp 355, Provisions 6 and 7 (Hospitals); Attachment 9 at Bate stamp 322-323, Provisions 8 and 10 (OEG members) and Attachment 12 at Bate stamp 1184, Provision 6 (Kroger).

<sup>70</sup> Attachment 9 at Bate stamp 322, Provision 7.

<sup>71</sup> Attachment 13 - 11/5/04 e-mail included Ohio Hospital Association response to OCC RP6.

1 **Q48. WERE THE CRS COMMITMENTS TO PAY \$50,000 TO THE OHIO**  
2 **HOSPITAL ASSOCIATION AND \$100,000 TO IEU-OHIO FROM THE**  
3 **SUPERSEDED AGREEMENTS ALSO IN THE PRE-REHEARING**  
4 **AGREEMENTS?**

5 **A48. Yes, provisions in which CRS agreed to make these payments are contained in**  
6 **the Pre-Rehearing Agreements with the Hospitals and IEU-Ohio.<sup>72</sup>**  
7

8 **Q49. WERE THESE PAYMENTS MADE TO THE HOSPITALS AND IEU-**  
9 **OHIO?**

10 **A49. At his February 12, 2007 deposition, Mr. Timothy Duff said that he had put in**  
11 **check requests in January 2005 and these payments were made, but he was not**  
12 **sure if payment was made under CRS or Cinergy Corp. While the payments**  
13 **listed in these two Pre-Rehearing Agreements were made, Mr. Duff also stated**  
14 **that the payments were made after the Pre-Rehearing Agreements were impacted**  
15 **by the PUCO's Order in the Post-MDP Service Case, as part of an effort to get**  
16 **parties back to substantially the same benefit, or economic value, as they were**  
17 **under the earlier agreements. Mr. Duff was Managing Director, Regulatory &**  
18 **Legislative Strategy for Cinergy Services from June 2004 until April 2006. In**  
19 **that role, he tracked the documents that made up the Pre-PUCO Order**  
20 **Agreements, the Pre-Rehearing Agreements and the Option Agreements. He also**  
21 **prepared calculations from these agreements to determine amounts payable to and**  
22 **from customers who were parties to the agreements.**

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<sup>72</sup> Attachment 8 at Bate stamp 355, Provision 4 (Hospitals) and Attachment 10 at Bate stamp 337, Provision 4 (IEU-Ohio).

**C. THE OPTION AGREEMENTS**

**Q50. WHAT ARE THE OPTION AGREEMENTS?**

**A50.** These are agreements by CRS with individual customers who were the Customers Parties in the Pre-Rehearing Agreements with the Hospitals, the OEG members and IEU-Ohio. The Option Agreements were entered into after the PUCO's November 23, 2004 Entry on Rehearing, during the period December 2004 through February 2005. There are no Option Agreement with [REDACTED] and [REDACTED]

It does appear that, pursuant to the October 28, 2004 Pre-Rehearing Agreement between Cinergy Corp and Cognis, reimbursements to Cognis were made by Cinergy Corp. An illustration of the request for such payments is shown in a copy of voucher attached to my testimony, in which Mr. Jack Steffen approved a "Quarterly ERRSP payment" from Cinergy Corp. to Cognis.<sup>73</sup>

For the November 22, 2004 Pre-Rehearing Agreement between CRS and Kroger, it also appears that payments were made under this agreement. However, this agreement resulted in payments by Kroger. For example, in 2005 under this agreement Kroger would continue to purchase generation from New Energy in 2005, CRS would reimburse Kroger for one half of the amount actually paid of the POLR charge, except for the RSC and IMF (i.e. 1/2 of the AAC and 1/2 of the

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Attachment 14



1       SRT)and Kroger would pay to CRS 1/2 of the EA.<sup>74</sup> As can be seen in the  
 2       invoice to Kroger and calculations for the first quarters of 2005 attached to my  
 3       testimony, Kroger was billed for the "RSP Settlement Agreement."<sup>75</sup> However, it  
 4       does not appear that payments were made to CRS, as the agreement stated, since  
 5       (1) this invoice says to make the check payable to Cinergy Corp; (2) CRS  
 6       reported no revenue for 2005 and (3) DERS, in response to OCC Interrogatory  
 7       No. RI51 states that the accounting entries for payments by Kroger are not on  
 8       DERS' books.<sup>76</sup>

9  
 10   ***Q51. WHAT CUSTOMERS ARE PARTIES TO THE OPTION AGREEMENTS?***

11   ***ASI.*** OCC was provided copies of twenty-two Option Agreements between CRS and  
 12       CG&E customers who were parties to the Post-MDP Service Case or CG&E  
 13       customers who belonged to groups that were parties to the case. These customers  
 14       were part of one of the three "customer groups" with which there were Pre-  
 15       Rehearing Agreements - Hospitals, members of OEG and IEU-Ohio. As shown  
 16       in the table below, of the twenty-two Option Agreements, fourteen are with  
 17       hospitals - which I have not listed here by name. There are six Option  
 18       Agreements with OEG customers and two Option Agreements with IEU-Ohio  
 19       members. While each Option Agreement may have specific terms and conditions  
 20       for each customer, for purposes of discussing these agreements I will use as

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<sup>74</sup> Attachment 12 at Bate stamp 1182, Provision 1.

<sup>75</sup> Attachment 15 at Bate Stamp 1159 through 1163.

<sup>76</sup> Attachment 16

examples one Option Agreement from each of the three "customer groups" that are attached to my testimony.

Date	Agreement between:	And:	Member	Attachment
12/28/04 through 1/25/05	Cinergy Retail Sales, LLC	[REDACTED] Hospitals		17
12/31/04	Cinergy Retail Sales, LLC	[REDACTED]	OEG	17
1/1/05	Cinergy Retail Sales, LLC	[REDACTED]	OEG	17
1/12/05	Cinergy Retail Sales, LLC	[REDACTED]	OEG	17
1/14/05	Cinergy Retail Sales, LLC	[REDACTED]	OEG	17
1/19/05	Cinergy Retail Sales, LLC	[REDACTED]	OEG	17
2/2/05	Cinergy Retail Sales, LLC	[REDACTED]	OEG	17
12/20/04	Cinergy Retail Sales, LLC	Marathon	IEU-Ohio	17
12/20/04	Cinergy Retail Sales, LLC	GM	IEU-Ohio	17

In addition to this table above showing the Option Agreements, attached to my testimony is a table showing all the agreements provided to OCC in which CRS was a party, by "customer group", and for [REDACTED] (i.e. Pre-PUCO Order Agreements, Pre-Rehearing Agreements and Option Agreements).<sup>77</sup>

**Q52. WHAT ARE THE GENERAL PROVISIONS THAT ARE COMMON TO EACH OF THE OPTION AGREEMENTS?**

**A52.** In general, under each Option Agreement with CRS, the customer would take generation service from CG&E - either continue its current CG&E service or provide notice it will take service from CG&E starting sometime during 2006 through 2008. The customer grants CRS the exclusive option to provide generation to the customer during 2005 through 2008. CRS has the right to

1 exercise this option at any time. In exchange for this right, CRS will pay the  
 2 customers the "Option Payment" set forth in an Exhibit to the agreement. Each  
 3 Option Agreement superseded the Pre-Rehearing Agreements with these twenty-  
 4 two customers.<sup>78</sup>

5  
 6 The calculation of the Option Payment was different for customers, but did  
 7 generally follow the pattern of CRS reimbursing components of CG&E's  
 8 Provider of Last Resort Charge established in the Pre-Rehearing Agreements.  
 9 For example, in the basic Option Payment to [REDACTED] are the  
 10 following amounts paid by the hospital to CG&E for the MBSSO:

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 A Request for Invoice Payment showing the calculation of a payment to [REDACTED]  
 16 [REDACTED] is attached to my testimony<sup>80</sup>

17  
 18 As another example, for the Option Payment to [REDACTED] the payment amount is  
 19 calculated using the following formula:

20 [REDACTED]

<sup>78</sup> Attachment 17 at Bates stamp 10-11 and 57 [REDACTED] at Bates stamp 5 and 9 [REDACTED]  
 and at Bates stamp 34 and 41 (Marathon).

<sup>79</sup> Attachment 17 at Bates stamp 89, at Exhibit A.

<sup>80</sup> Attachment 17 at Bates stamp 422-423

1 [REDACTED]  
 2 It appears that the end result of this calculation is that [REDACTED] reimbursed for  
 3 [REDACTED] A Request for  
 4 Invoice Payment showing the calculation of a payment to [REDACTED] is attached to  
 5 my testimony.<sup>82</sup>

6  
 7 The third example is a basic Option Payment from CRS to **Marathon** which is for  
 8 the following amounts paid by the **Marathon** to CG&E:

- 9 ■ **RTC**
- 10 ■ **AAC**
- 11 ■ **FPP - including EA**
- 12 ■ **50% of SRT**
- 13 ■ **IMF in excess of 4% of little g**<sup>83</sup>

14 A Request for Invoice Payment showing the calculation of a payment to  
 15 **Marathon** is attached to my testimony.<sup>84</sup>

16  
 17 **Q53. WHAT ARE THE COMPONENTS OF CG&E'S PUCO-APPROVED MBSSO**  
 18 **AND WHAT COMPONENTS ARE BYPASSABLE?**

<sup>81</sup> Attachment 17 at Bate stamp 11, at Exhibit A.

<sup>82</sup> Attachment 19 at Bate stamp 887-888.

<sup>83</sup> Attachment 17 at Bate stamp 44, at Exhibit A.

<sup>84</sup> Attachment 19 at Bate stamp 654-655.

1 **A53.** The following table shows CG&E's MBSSO components:

Market Based Standard Service Offer (MBSSO) Components PUCO-Approved		
11/23/04 Entry on Rehearing, 1/19/05 Second Entry on Rehearing and (a) (b)		
	RES (effective 1/1/06)	Non-RES (effective 1/1/05)
Tariff Generation rate	Bypassable	Bypassable
Rate Stabilization Charge (RSC)	Bypassable for first 25% of load switching	Bypassable for first 50% of load switching (a)
Annually Adjusted Component (AAC)	Bypassable for first 25% of load switching	Bypassable for first 50% of load switching (a)
Fuel & Purchased Power (FPP), including Emission Allowances	Bypassable	Bypassable
Infrastructure Maintenance Fund (IMF)	Non-bypassable	Non-bypassable
System Reliability Tracker (SRT)	Non-bypassable (b)	Bypassable (a) (b)
<p>(a) Non-RES bypass of RSC, AAC &amp; SRT subject to notice by customers of a CRES contract through 12/31/08 &amp; agreement to other provisions per CG&amp;E tariffs (CG&amp;E Tariff Sheet Nos. 55.1 (RSC), 51.1 (AAC) and 56.1 (SRT))</p> <p>(b) In the PUCO's 11/23/04 entry on rehearing it determined the SRT would be unavoidable in 2005 (except for shopping credit customers), but that avoidance in subsequent years would be determine in a case later in 2005. On 11/22/05 the PUCO adopted a Stipulation in Case No. 05-724-EL-UNC that provided for the SRT to be unavoidable and that all residential customers may return to CG&amp;E's MBSSO at the RSP price. (Order at 3 - 5)</p>		

2

3 **Q54. WHY WERE THERE CRS OPTION AGREEMENTS THAT SUPERSEDED**  
 4 **THE PRE-REHEARING AGREEMENTS?**

5 **A54.** According to DE-Ohio's response to OCC Interrogatory No. RI 103, rather than  
 6 continuing the Pre-Rehearing Agreements, the Option Agreements were entered  
 7 into because:

8 the Commission made material amendments to the alternate  
 9 proposal effectively rejecting it and terminating the November  
 10 contracts referred to above. Upon termination DERS had an  
 11 obligation to enter into discussions to see if the parties could  
 12 negotiate contracts permitting the parties to be in substantially

1 the same economic position as they were in the November  
2 contracts. Although neither party was under an obligation to  
3 enter any further contract the parties agreed on the terms and  
4 conditions of the option contracts.<sup>85</sup>

5 I am aware that this general concept and belief that the Pre-Rehearing  
6 Agreements were terminated by the outcome in the Post-MDP Service case at the  
7 PUCO is also shared by other employees of DE-Ohio affiliated companies. Mr.  
8 Ficke stated that he believed the "previous agreements, the November  
9 agreements, would have been voided by the Commission's Actions." As another  
10 example, Mr. Duff said that he believed the November Agreement with the OEG  
11 members was not effective because the Commission did not put back in place the  
12 original stipulation or adopt the alternative proposal with the modifications.  
13 In addition, a "history" related to the Option Agreements that was provided by  
14 Mr. Jim Ziolkowski, a witness for DE-Ohio in the Post-MDP Service case,<sup>86</sup>  
15 when he was asked to provide "the concept behind the CRES payments" also  
16 provides insight as to reasons for the Option Agreements. As explained in this  
17 history, in December 2004 it was decided that to have the "Cinergy CRES"  
18 provide generation "was too risky, and Cinergy essentially decided to not follow  
19 through with the contract." According to Mr. Ziolkowski, negotiations were  
20 entered into by Cinergy "with each of the parties and it was agreed to make

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<sup>85</sup> Attachment 20.

<sup>86</sup> Mr. Ziolkowski was an employee of in the Rate Department of Cinergy Services who in 2006 took over from Mr. Duff the the duties of calculating option payments under the Option Agreements.

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1 monthly or quarterly payments in lieu of offering generation service from the  
2 CRES.<sup>87</sup>

3  
4 ***Q55. IF THE OPTION AGREEMENTS WERE ENTERED INTO AFTER THE***  
5 ***PUCO'S DECISION IN THE POST-MDP SERVICE CASE, HOW ARE***  
6 ***THEY RELATED TO THE CASE?***

7 ***A55.*** All three sets of side agreements relate to CG&E's efforts to obtain support for  
8 PUCO approval of a rate stabilization plan acceptable to CG&E. In the first two  
9 sets of agreements, DE-Ohio affiliated companies used benefits for customers  
10 under these agreements to garner support from parties in Post-MDP Case for RSP  
11 plans that were acceptable to the DE-Ohio affiliated companies. This support  
12 was achieved in part through the offers in the first two set of agreements to  
13 provide, through DE-Ohio affiliated companies, generation from a CRES and/or  
14 reimbursement for portions of DE-Ohio's MBSSO charges customers would pay  
15 if they took generation from DE-Ohio. Once it was determined that the PUCO's  
16 decision could invalidate the agreements and that provision of generation under  
17 those agreements by a DE-Ohio affiliated CRES was too risky, the Option  
18 Agreements, in part, restored many of the benefits contemplated under the first  
19 two sets of agreements - - benefits agreed to in exchange for supporting RSP  
20 plans in this case that were acceptable to the DE-Ohio affiliated companies.

21  

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<sup>87</sup> Attachment 21.

**V. THE IMPORTANCE OF THE SIDE AGREEMENTS TO THIS CASE**

***Q56. DO THE SIDE AGREEMENTS YOU HAVE DISCUSSED HAVE A BEARING ON WHETHER THE COMMISSION SHOULD APPROVE ONE OF THE COMPANY'S PROPOSALS THAT WAS PROVIDED TO THE COMMISSION IN THE POST-MDP SERVICE CASE?***

***A56. Yes. I have concerns that connect the review of the side agreements that I have discussed in this testimony to the Commission's decision regarding Duke Energy Ohio's proposals. These concerns relate to:***

- A. Waiver of the Commission's rules for post-MDP pricing for generation service based upon "substantial support from a number of interested stakeholders,"<sup>88</sup> where supporting stakeholders in the Post-MDP Service Case would not bear the burden of increases under the proposed rate plans,***
- B. Waiver of the Commission's rules for post-MDP pricing for generation service based upon lack of a fully developed retail market for electric generation, where the side agreements have impeded market development,***
- C. Regulatory problems presented by the side agreements, including discrimination,***
- D. Exclusion of the OCC from negotiations, and a course of secret negotiations that resulted in support for the Stipulation and for CG&E's Alternative Proposal by parties who, due to side agreements, would not bear the burden of the rate increases proposed by CG&E.***

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<sup>88</sup> Ohio Adm. Code 4901:1-35-02(C).



1 ***Q57. WHAT ARE YOUR OVERALL CONCERNS REGARDING THE SIDE***  
 2 ***AGREEMENTS AND THE COMMISSION'S RULES REGARDING POST-***  
 3 ***MDP PRICING?***

4 ***A57. In a proceeding in which Duke Energy Ohio's proposed post-MDP pricing***  
 5 ***proposals are reviewed, it is important to return to the roots for such a proceeding.***  
 6 ***During 2003, the Commission undertook an extensive effort to develop rules for***  
 7 ***the post-MDP pricing of generation service (Ohio Adm. Chapter 4901:1-35,***  
 8 ***4901:1-35-01 through 4901:1-35-06, or "Rule 35"). The Post-MDP Service Case***  
 9 ***first developed during 2003 and Rule 35 became effective in May 2004 -- in time***  
 10 ***for the application of Rule 35 to pricing after the MDP for Duke Energy Ohio's***  
 11 ***customers. My counsel informs me that Rule 35 was promulgated according to a***  
 12 ***statutory requirement that was part of the electric restructuring legislation in Ohio.***  
 13 ***Rule 35 has extensive requirements regarding fixed and variable pricing for***  
 14 ***generation standard service offers as well as requirements for a competitive***  
 15 ***bidding option that do not bear a close relationship to the Duke Energy Ohio***  
 16 ***proposals in the Post-MDP Service Case.<sup>89</sup> The departure from the Commission's***  
 17 ***post-MDP pricing rules should be re-examined in light of the revelation of side***  
 18 ***agreements, and the results for the Post-MDP Service Case should be adjusted.***

---

<sup>89</sup> CG&E's proposals never provided that customers who do not choose a supply option are included in the competitive bid price pool of customers as provided for by Rule 35. The CG&E proposals also did not provide, for example, a plan for establishing a fixed-rate service for firm full-requirements service (Rule 35, Appendix B at 5), or specify the customer groups that will be served by each bid, or include the use of a third-party auctioneer, or include a discussion as to how the bidding process will provide confidence in the impartiality of the process, or discuss the degree to which the request for bids would include the costs and risks of providing service at retail, or identify the costs that CG&E expects to incur in providing fixed-rate service, or indicate which risks and costs of providing the service would be passed through to customers by way of the distribution function, or clarify the restrictions or conditions that customers who have chosen an alternative must face in returning to the competitive bid pool rate, or provide an analysis and justification for such restrictions and conditions that it would impose. *Id.*

**A. SUBSTANTIAL SUPPORT FOR THE RATE PLANS**

**Q58. DO YOU HAVE A SPECIFIC CONCERN REGARDING THE SIDE AGREEMENTS AS THEY RELATE TO WAIVERS FROM THE COMMISSION'S RULES REGARDING POST-MDP PRICING?**

**A58.** Yes. Upon the advice of counsel and my familiarity with the Commission's rules, one of two waiver provisions regarding the Commission's post-MDP pricing rules provides that "the EDU may propose a plan for a standard service offer and/or competitive bidding process that varies from these rules where there is substantial support from a number of interested stakeholders."<sup>90</sup> The Customer Parties that had expressed opinions regarding Duke Energy Ohio's proposals opposed the proposals until they entered into the May 19, 2004 Stipulation and related side agreements. This opposition is reflected, among other places, in the Commission's September 29, 2004 Order that states: "On March 9, 2004, most of the parties to these proceedings filed objections to CG&E's proposed RSP."<sup>91</sup>

As can be seen through my earlier discussion of the reimbursements for portions of ERRSP charges to Customer Parties, the fundamental effect of the side agreements was to insulate those large customers from the rate increases proposed in the Stipulation filed in May 2004, the Alternative Proposal proposed in Duke Energy Ohio's October 2004 Application for Rehearing, and the decision

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<sup>90</sup> Ohio Adm. Code 4901:1-35-02(C).

<sup>91</sup> Order at 6 (September 29, 2004).

1 contained in the Commission's December 2004 Entry on Rehearing. Pursuant to  
2 the side agreements, those Customer Parties supported Duke Energy Ohio's  
3 proposals for post-MDP generation pricing in this case. So rather than a plan for  
4 a post-MDP standard service offer and/or competitive bidding process that varies  
5 from the PUCO's rules "where there is substantial support from a number of  
6 interested stakeholders,"<sup>92</sup> the result in this proceeding was that Duke Energy  
7 Ohio's proposals did not have substantial support from customers who would pay  
8 all the rate increases in Duke Energy Ohio's generation pricing plans.

9  
10 **B. MARKET DEVELOPMENT**

11  
12 ***Q59. WHAT CONCERNS DO YOU HAVE REGARDING THE SIDE***  
13 ***AGREEMENTS RELATED TO THE COMMISSION'S POST-MDP PRICING***  
14 ***RULES?***

15 ***A59.*** Upon the advice of counsel and my familiarity with the Commission's rules, the  
16 other of the two waiver provisions in the post-MDP pricing rules provides that the  
17 "Commission may waive any requirement of Chapter 4901:1-35 of the  
18 Administrative Code for good cause shown or upon its own motion."<sup>93</sup> In its  
19 December 9, 2003 request for CG&E to file an RSP in the Post-MDP Service  
20 Case the Commission stated its reasoning that "[a]s the competitive retail market

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<sup>92</sup> Ohio Adm. Code 4901:1-35-02(C).

<sup>93</sup> Ohio Adm. Code 4901:1-35-02(B).

1 for electric generation has not fully developed in the CG&E territory, the  
2 Commission finds it advisable that CG&E file a rate stabilization plan as part of  
3 these proceedings, for the Commission's consideration."<sup>94</sup> The Commission's  
4 interest in departing from the post-MDP pricing rules in favor of a CG&E RSP  
5 proposal should also be re-examined in light of the side agreements that were  
6 connected with CG&E's RSP proposals. Since concern for market development,  
7 or lack thereof, was a reason the Commission requested an RSP, the side  
8 agreements should be reviewed to determine their effect on market development.

9  
10 On numerous occasions, beginning with the post-MDP pricing for the Dayton  
11 Power and Light Company,<sup>95</sup> the Commission has stated that its test of generation  
12 pricing is made in light of the PUCO's view that the competitive market has not  
13 developed sufficiently. When the Commission requested CG&E to file an RSP  
14 plan, it referred to Commission decisions in DP&L and FirstEnergy cases, and  
15 repeated similar language in CG&E's Post-MDP Service Case by stating: "The  
16 Commission has established three goals that may be met by an RSP, where CRES  
17 [i.e. competitive retail electric service] markets have not fully developed by the  
18 end of a utility's MDP: (1) rate certainty for consumers, (2) financial stability for  
19 the utility, and (3) the further development of competitive markets."<sup>96</sup> In this  
20 Post-MDP Remand case, the testimony of OCC witness Neil Talbot principally

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<sup>94</sup> Entry at 5 (December 9, 2004).

<sup>95</sup> DP&L RSP Case No. 02-2779-EL-ATA (September 2, 2003).

<sup>96</sup> Order at 15 (September 29, 2004).

1 addresses the first two of the listed goals, while in this testimony I will principally  
2 address the third goal - market development.

3  
4 In CG&E's Post-MDP Service Case, the Commission concluded that, with its  
5 modifications to the May 2004 Stipulation, "the stipulation is reasonably likely to  
6 enhance the development of the retail market for generation in CG&E's  
7 territory."<sup>97</sup> In its November 2004 Entry on Rehearing the PUCO stated that "the  
8 Commission finds that the modifications of the opinion and order suggested by  
9 CG&E . . . will further encourage the development of the competitive markets"<sup>98</sup>  
10 However, neither decision was based upon knowledge and analysis of the side  
11 agreements and their likely impact upon development of the competitive market  
12 in CG&E's service territory.

13  
14 ***Q60. WHAT ARE YOUR CONCERNS REGARDING THE IMPACT THE SIDE***  
15 ***AGREEMENTS WOULD HAVE AND/OR HAVE HAD ON THE***  
16 ***DEVELOPMENT OF THE COMPETITIVE MARKET?***

17 ***A60.*** The side agreements relate to the provision of generation service -- whether for  
18 the direct supply of generation service or for reimbursement of generation-related  
19 payments to DE Ohio -- and provide the signatory parties the ability to bypass  
20 charges that would otherwise be non-bypassable. As such, the agreements were  
21 designed to retain generation business for DE- Ohio or encourage the return of

---

<sup>97</sup> Order at 19 (September 29, 2004).

<sup>98</sup> Entry on Rehearing at 14 (November 23, 2004).

1 customers to DE-Ohio generation service under post-MDP generation pricing.  
2 The Commission has previously recognized that market development can be  
3 fostered by increasing the ability of customers to bypass generation-related  
4 charges. The Post-MDP Order features such a statement regarding the desirability  
5 of greater bypassability in Duke Energy's charges.<sup>99</sup> However, that bypassability  
6 should be for all non-wires charges and afforded to all customers, not just a select  
7 few customers who has side agreements with DE-Ohio affiliated companies. By  
8 providing reimbursement of non-bypassable charges to selected large customers,  
9 the DE-Ohio affiliated companies used the side agreements to discriminate among  
10 customers and erect barriers to entry in the generation market for non-DEO  
11 affiliated CRES providers. The amount of non-bypassable charges reimbursed to  
12 Customer Parties constituted important costs for these customers and prevented  
13 DE-Ohio's competitors from ever competing for their demand.

14  
15 The potential that the side agreements would cause many Customer Parties to be  
16 non-shoppers has seemed to have materialized. Switching rates have plummeted  
17 in areas served by Duke Energy Ohio since approval of post-MDP generation  
18 pricing in the Post-MDP Service Case. At the time the Post-MDP Service Case  
19 came to hearing in May 2004, the switching rates for commercial, industrial, and  
20 residential customers were 22.04, 19.70, and 4.91 percent.<sup>100</sup> As of December 31,

---

<sup>99</sup> Order at 19 (September 29, 2004). The Concurring Opinion of Chairman Alan R. Schriber emphasizes that changes to Duke Energy's proposed Stipulation were made to help commercial and small industrial customers shop.

<sup>100</sup> Tr. Vol. II at 133 (CG&E Witness Stevie) (May 20, 2004).

1 2006 the Electric Choice Sales switching rates listed on the PUCO's web site had  
2 fallen to 8.40, 0.36, and 2.32 percent, respectively. The Commission's hope at the  
3 end of the Post-MDP Service Case proceedings for the development of  
4 competitive options for customers has not materialized,<sup>101</sup> and the competitive  
5 market is unlikely to recover or develop further without the bypassability of all  
6 non-wires charges for all customers.

7  
8 The side agreements described in my testimony use DERS and Cinergy Corp. as  
9 conduits for the reimbursement of amounts paid by some customers under tariff  
10 rates. The Option Agreements use DE-Ohio as a profit center and its affiliate,  
11 DERS, as an organization that reimburses customers for payments they made to  
12 DE-Ohio, operates at a loss.<sup>102</sup>

13  
14 While DE-Ohio may argue that the companies involved are separate DE-Ohio  
15 affiliates, it does appear that CG&E and its parent company at that time,  
16 Cinergy Corp., viewed CG&E's RSP and the CRS and side agreements as  
17 interrelated. Attached to my testimony is a January 28, 2005 e-mail from Mr.  
18 Steve Schrader to Mr. Ficke with an attached spreadsheet showing RSP impacts  
19 by Year<sup>103</sup>. At his deposition, Mr. Ficke explained that Mr. Schrader had been

---

<sup>101</sup> E.g., Order at 19.

<sup>102</sup> Attachment 22 - According to the DERS 2005 Statement of Income, this company incurred an "Operating Loss", before interest and taxes, of approximately \$14 million in 2005. An "Operating Loss" of approximately \$22 million was budget by DERS for 2006. (DERS Renewal Application for Retail Generation Provides and Power Marketers, August 24, 2006, Exhibit C-3).

<sup>103</sup> Attachment 23.

1 Chief Financial Officer of the Regulated Business Unit and this e-mail was in  
2 regards to the overall RSP impacts on Cinergy Corp., including annual earning  
3 per share ("EPS") estimate. As an example of how the CG&E RSP and the side  
4 agreements were considered to be related, RSP Related Revenues on GCF 21,  
5 are considered to be Revenues from RSP charges less the following - "CRES  
6 Reimbursement (CRS,LLC)" for ~~AAC, FPP and SRT~~; "RSC reimbursement to  
7 CRES (CRS,LLC)"; "~~RTO~~ Reimbursement to CRES (CRS,LLC)" and "~~P~~  
8 mil/Kwh discount on CRES (CRS,LLC)".

9  
10 This interrelationship created by the side agreements allowed benefits to be  
11 offered to the Customer Parties through the reimbursement by a DE-Ohio  
12 affiliate of the RSP charges, including some non-bypassable charges; they paid  
13 to DE-Ohio. A result of this could be that Customer Parties would be less likely  
14 to purchase generation from a non-DE-Ohio-affiliated CRES provider and more  
15 like to purchase generation from DE-Ohio. Indeed, in order for Customer Parties  
16 to benefit from the purchase of generation from a non-DE-Ohio affiliated CRES  
17 provider, they must be more than compensated for their loss of the expected  
18 reimbursement of RSP charges.

19  
20 Thus, the Commission should also consider the DE-Ohio affiliated companies'  
21 interrelationships, as illustrated by activities related in the side agreements, in  
22 light of the Commission's rules that are designed to foster competitive equality.  
23 These rules also provide the Commission the ability to investigate and address



1        anticompetitive concerns raised due to the interrelationship among affiliated  
2        companies. There are numerous examples of this in the Commission's rules:

- 3            • In OAC 4901:1-20-16(A), the Commission adopted a rule "so a  
4            competitive advantage is not gained solely because of corporate  
5            affiliation. This rule should create competitive equality, preventing unfair  
6            competitive advantage and prohibiting the abuse of market power."
- 7            • In OAC 4901:1-20-16(D), the Commission's rule prohibits "cross-  
8            subsidies between an electric utility and its affiliates...."
- 9            • In OAC 4901:1-20-16(G)(1)(c), the Commission's rule requires that  
10           "Electric utilities and their affiliates that provide services to customers  
11           within the electric utility's service territory shall function independently  
12           of each other...."
- 13           • In OAC 4901:1-20-16(G)(4)(e), the Commission's rule requires "The  
14           electric utility shall not tie (nor allow an affiliate to tie) or otherwise  
15           condition the provision of the electric utility's regulated services,  
16           discounts, rebates, fee waivers, or any other waivers of the electric  
17           utility's ordinary terms and conditions of service, including but not  
18           limited to tariff provisions, to the taking of any goods and/or services  
19           from the electric utility's affiliates."
- 20           • In OAC 4901:1-20-16(G)(4)(f), the Commission's rule requires that "The  
21           electric utility shall ensure effective competition in the provision of retail  
22           electric service by avoiding anticompetitive subsidies flowing from a  
23           noncompetitive retail electric service to a competitive retail electric

1 service or to a product or service other than retail electric service, and  
2 vice versa."

- 3 • In OAC 4901:1-20-16(G)(4)(h), the Commission requires that  
4 "Employees of the electric utility or persons representing the electric  
5 utility shall not indicate a preference for an affiliated supplier."  
6 • In OAC 4901:1-20-16(G)(4)(j), the Commission's rule requires that  
7 "Shared representatives or shared employees of the electric utility and  
8 affiliated competitive supplier shall clearly disclose upon whose behalf  
9 their representations to the public are being made."

10  
11 In addition to these requirements, the PUCO Staff has the authority to examine  
12 the records of the utility and its affiliates and they "may investigate such electric  
13 utility and/or affiliate operations and the interrelationship of those operations."  
14 (OAC 4901:1-20-16(I)(1) and (2)). At the conclusion of my testimony I make a  
15 recommendation with regard to these Commission rules and the side agreements  
16 related to this case.

17  
18 **Q61. DO YOU HAVE OTHER OBSERVATIONS REGARDING THE EFFECT**  
19 **THAT THE DEALINGS BETWEEN PARTIES HAVE HAD ON THE**  
20 **COMPETITIVE MARKET?**

21 **A61.** Yes. While investigating the side agreements, the OCC obtained copies of two  
22 letter notifications attached to my testimony<sup>104</sup> from ████████ to CG&E regarding

<sup>104</sup> Attachment 24.

1 [REDACTED] use of CRES provider [REDACTED] as the source of generation  
2 service during the RSP period that extends through the end of 2008. (According  
3 to [REDACTED] submitted the second letter at the request of CG&E to clarify  
4 the first notice) Pursuant to the terms of the Stipulation, terms that were not  
5 modified by either the September 2004 Order or any subsequent entry on  
6 rehearing, a non-residential customer could avoid paying the RSC if the customer  
7 "enter[ed] [into] a contract with a credit worthy [sic] CRES provider to provide  
8 firm generation service through December 31, 2008" and providing CG&E with  
9 notification by a certain date that an alternative competitive retail electric supplier  
10 would provide the service [REDACTED] to Duke Energy Ohio did not  
11 provide such a notification for the entire period ending in December 2008, and  
12 [REDACTED] representative [REDACTED] stated during his deposition that [REDACTED]  
13 does not have a supplier past the end [REDACTED]

14  
15 CG&E was in a dispute with a CRES provider in early 2005 regarding claims that  
16 CG&E demanded customers to submit a long and intimidating agreement before  
17 they were permitted to bypass the provider of last resort charges. A Commission  
18 Entry, dated February 9, 2005, agreed that CG&E should be able to ask shopping  
19 customers to sign an agreement, but rejected the needlessly long form that CG&E  
20 required.<sup>105</sup> The situation with [REDACTED] notifications follows the overall  
21 approach taken by CG&E in the Post-MDP Service Case: some benefits were  
22 provided to Customer Parties in order to eliminate their opposition to CG&E's

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<sup>105</sup> Entry at 2 (February 9, 2005).

1 post-MDP generation pricing proposals that permitted CG&E to raise prices without the  
 2 threat of competition. The Commission could take a significant step towards  
 3 eliminating the potential for problems of discrimination and anti-competitive  
 4 activities by making all generation-related charges bypassable.

5  
 6 **C. REGULATORY PROBLEMS**

7  
 8 ***Q62. IN EVALUATING DUKE ENERGY OHIO'S PROPOSED POST-MDP***  
 9 ***GENERATION PRICING, WHAT REGULATORY CONCERNS SHOULD***  
 10 ***THE COMMISSION CONSIDER THAT ARE RAISED BY THE SIDE***  
 11 ***AGREEMENTS?***

12 ***A62.*** The overall Post-MDP generation pricing plans proposed by Duke Energy in the  
 13 Post-MDP Service Case -- when the effect of the side agreements is properly  
 14 considered -- are discriminatory in favor of a relatively small number of large  
 15 users of electricity. Anti-discrimination and rate setting in a public process is a  
 16 major theme in the regulation of utilities. Upon the advice of counsel, an anti-  
 17 discrimination statute (R.C. 4905.35 and 4928.14(A)) reflects this theme in  
 18 Ohio's regulation of generation pricing for electricity.<sup>106</sup>

19  
 20 Aside from the effect on the competitive market of the reimbursements to  
 21 Customer Parties of portions of tariffed rates, some of the Option Agreements

<sup>106</sup> To the extent that non-bypassable charges are classified as distribution-related, counsel advises me that R.C. 4905.32 applies which prohibits the refund of charges, "directly or indirectly." The option payments by CRS and payments by Cinergy Corp. constitute indirect refunds.

1 provide for reimbursement of a regulatory transition charge ("RTC"). As a matter  
 2 of fairness, the costs for which the RTC was designed to recover revenue for  
 3 CG&E associated with the legacy generation system are remnants of the previous  
 4 regulatory regime in Ohio which should be borne by all customers, not just small  
 5 customers who do not have Option Agreements with a DE-Ohio affiliate. I have  
 6 been informed by counsel that the payment of RTC by all customers is also a  
 7 legal requirement that stems from Ohio's electric restructuring legislation.<sup>107</sup> The  
 8 Duke-affiliated companies have turned the RTC into a bypassable charge that is  
 9 no longer competitively neutral (i.e. it is bypassed only by certain customers with  
 10 side agreements).

11  
 12 **D. EXCLUSION OF PARTIES AND CUSTOMER CLASSES**  
 13 **FROM NEGOTIATIONS**  
 14

15 ***Q63. WHAT CONCERNS ABOUT THE SIDE AGREEMENTS' RELATIONSHIP***  
 16 ***TO THE PROCESS THAT LED TO THE STIPULATION SHOULD THE***  
 17 ***COMMISSION CONSIDER IN EVALUATING DE- OHIO'S POST-MDP***  
 18 ***GENERATION PRICING?***

19 ***A63.*** The negotiating process which led to the May 2004 Stipulation in the Post-MDP  
 20 Service Case was deficient, which resulted in a distorted presentation to the  
 21 Commission regarding the support for Duke Energy's proposals. The  
 22 discrimination practiced by Duke Energy Ohio, in concert with its affiliated

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<sup>107</sup> R.C. 4928.37

1 companies, was directed in favor of large customers that had intervened  
2 individually or as members of groups. The negotiations that took place to enlist  
3 (1) the support of the May 2004 Stipulation (i.e. resulting in the Pre-PUCO Order  
4 Agreements), (2) the support of the October 2004 Alternative Proposal in Duke  
5 Energy's Application for Rehearing (i.e. resulting in the Pre-Rehearing  
6 Agreements), and (3) the support of Duke Energy Ohio's and its affiliates'  
7 operations under the plan approved by the Commission (including the Option  
8 Agreements) were as unknown to the OCC at the time of the Post-MDP Service  
9 Case as the side agreements themselves.

10  
11 The statement on the record regarding separate negotiations at the time of the  
12 hearing in the Post-MDP Service Case was made by Staff Witness Cahaan that  
13 the "Staff encouraged the company to meet individually with each of the parties  
14 in the case to work out their individual problems."<sup>108</sup> However, that statement  
15 was accompanied by an assurance from Staff Witness Cahaan that "[a]ll parties to  
16 the case were notified and were invited to participate in the settlement  
17 discussions."<sup>109</sup> The Commission apparently relied upon this representation,  
18 stating in its September 29, 2004 Order that "[t]here is no evidence that all parties  
19 were not invited to participate in settlement discussion. As a matter of fact,  
20 testimony at the hearing indicates that all parties participated in negotiating

---

<sup>108</sup> Staff Exhibit 2 (Cahaan Supplemental Testimony filed May 24, 2004) at 1-2.

<sup>109</sup> *Id.* at 1.

1 sessions . . . .<sup>110</sup> Contrary to this belief held by the Commission, the side  
2 agreements in the May 2004 time frame show that a great deal of negotiation and  
3 agreement was undertaken outside the view of the OCC and was not revealed in  
4 testimony in this case. The large electricity users that supported the Stipulation  
5 were favored by side agreements, distorting any negotiating process that was  
6 conducted in the open. The open negotiating sessions could not involve serious  
7 bargaining because the large electricity users had reached side agreements so that  
8 they would not be subject to the many of the generation rate increases that were  
9 publicly proposed by CG&E in its ERRSP.

10  
11 The PUCO's November 23, 2004 Entry on Rehearing also noted the support Duke  
12 Energy Ohio's Alternative Proposal from Cognis, Kroger, IEU, OHA, OEG,  
13 PWC, and FES.<sup>111</sup> The reasons for this support shown by the large electricity  
14 users is illuminated by revelation in the instant proceeding of the evidence of a  
15 second major round of side agreements (i.e., the Pre-Rehearing Agreements)  
16 Duke Energy Ohio and its affiliates tailored to Duke Energy Ohio's Alternative  
17 Proposal. As can be seen from my discussion of these Pre-Rehearing  
18 Agreements, the second round of exclusionary negotiations was based in part  
19 upon provisions in first side agreements to maintain the economic advantages  
20 provided to these Customer Parties in the event the Commission exercised its

---

<sup>110</sup> Order at 13 (September 29, 2004).

<sup>111</sup> Entry on Rehearing at 59 (November 23, 2004).

1 judgment and altered any of Duke Energy Ohio's proposals contained in the May  
2 2004 Stipulation. The second round of exclusionary negotiations substantially  
3 held the Customer Parties to the May 2004 Stipulation and to their support for  
4 CG&E's Alternative Proposal. Two parties that supported the May 2004  
5 Stipulation did not support the Alternative Proposal - Dominion Energy, the only  
6 competitive provider of generation service to CG&E residential customers and  
7 Green Mountain, who served residential customers elsewhere in Ohio. The OCC  
8 was not invited to any open negotiating sessions during the period between the  
9 PUCO Order and the November Entry on Rehearing and serious opposition to  
10 Duke Energy Ohio's Alternative Proposal was avoided because the large  
11 electricity users had reached side agreements so that they would not be subject to  
12 the portions of the generation price increases publicly proposed by Duke Energy  
13 Ohio in that Alternative Proposal.

14  
15 The CG&E-affiliated companies followed the terms of the "second round" (i.e.  
16 Pre-Rehearing Agreements) agreements with [REDACTED] and [REDACTED] but entered into  
17 new individual customer Option Agreements with members of IEU, OEG, and the  
18 Hospitals. The Option Agreements with the large electricity users that are  
19 members of these groups were again based upon maintaining the discriminatory  
20 side agreements that favored these customers by not subjecting them to the  
21 generation price increases proposed publicly by CG&E. "Whistle blower"  
22 statements by John Deeds -- formerly an employee of a DE-Ohio affiliated  
23 company who performed functions for CRS and who has characterized the CRS



option agreements as "sham transactions" in a wrongful termination action in federal court -- alerted the OCC to the existence of additional side agreements that maintained support by large electricity users of CG&E's post-MDP generation pricing to which they are not entirely subject. The OCC and other parties were excluded from discussions that resulted from CG&E's efforts to support its Post-MDP generation pricing proposals. CG&E never faced the public test of its proposals that should exist in proceedings before the Commission.

## VI. CONCLUSION

***Q64. WHAT DO YOU RECOMMEND AS THE RESULT OF YOUR EXAMINATION AND ANALYSIS REGARDING THIS CASE?***

***A64.*** I recommend the prohibition of the discriminatory treatment and anticompetitive activities that accompanied Duke Energy Ohio's RSP proposals, as adopted and modified by the Commission. The Commission should make all generation-related charges bypassable to remove the incentive that has driven the discriminatory treatment of customers and encourage the development of the competitive market. With respect to RTC charges, since all customers are to pay their fair share of regulatory transition costs, I recommend the prohibition of any reimbursements for RTC charges.

I also recommend the Commission require its Staff (or an auditor hired by the Staff at DE-Ohio's expense) to promptly investigate the interrelationships between DE-

1 Ohio and its affiliates, including activities related to the side agreements in this  
 2 case, as provided for in OAC 4901:1-20-16(I)(1) and (2). Earlier in my testimony I  
 3 listed some of the requirements of the PUCO's corporate separation rules (among  
 4 other requirements) that should be at least part of the subject of the investigation.  
 5 Part of Staff's investigation should be a review and audit of the transactions among  
 6 DE-Ohio affiliates related to the side agreements in this case, to assure that DE-  
 7 Ohio's customers who did not have side agreements have not had to pay, directly  
 8 or indirectly, for the reimbursements to the Customer Parties and have not had to  
 9 pay higher rates for costs DE-Ohio has sought to collect through its MBSSO, due  
 10 to such reimbursements. The results of this investigation should be presented to  
 11 the Commission in a hearing. Any needed modifications to the rate stabilization  
 12 plan, and to the operations of DE-Ohio and its affiliates, should be implemented by  
 13 the Commission.

14  
 15 Finally, the Commission should adopt a post-MDP generation pricing plan for  
 16 DE-Ohio based upon the recommendations of OCC witness consultant Neil  
 17 Talbot.

18  
 19 **Q65. DOES THIS CONCLUDE YOUR TESTIMONY AT THIS TIME?**

20 **A65.** Yes. However, I reserve the right to incorporate new information that may  
 21 subsequently become available.

22

# CERTIFICATE OF SERVICE

I hereby certify that a copy of the Testimony of Beth Hixon was served electronically on the persons listed on the electronic service list shown below (as supplemented for this pleading), provided by the Attorney Examiner, this 9<sup>th</sup> day of march 2007.

  
 Jeffrey L. Small  
 Assistant Consumers' Counsel

## UNREDACTED

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## REDACTED (Public Version)

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nmorgan@lascinti.org  
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Stephen.Reilly@puc.state.oh.us  
mhpetricoff@vssp.com

## ATTACHMENT 1

**Beth E. Hixon**  
**Utility Testimony**

As an employee of the Office of the Ohio Consumers' Counsel (OCC):

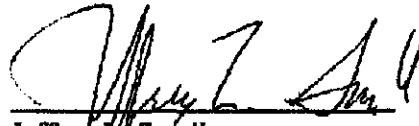
Company	Docket No.	Date
Ohio Power	83-98-EL-AIR	1984
Ohio Gas	83-505-GA-AIR	1984
Dominion East Ohio Gas	05-474-GA-ATA	2005
Dayton Power & Light	05-792-EL-ATA	2006

As an employee of Berkshire Consulting Service:

Company	Docket No.	Date	Client
Toledo Edison	88-171-EL-AIR	1988	OCC
Cleveland Electric Illuminating.	88-170-EL-AIR	1988	OCC
Columbia Gas of Ohio	88-716-GA-AIR et al.	1989	OCC
Ohio Edison	89-1001-EL-AIR	1990	OCC
Indiana American Water	Cause No. 39595	1993	Indiana
	Office of the Utility Consumer Counsel		
Ohio Bell	93-487-TP-CSS	1994	OCC
Ohio Power	94-996-EL-AIR	1995	OCC
Toledo Edison	95-299-EL-AIR	1996	OCC
Cleveland Electric Illuminating.	95-300-EL-AIR	1996	OCC
Cincinnati Gas & Electric	95-656-GA-AIR	1996	City of Cincinnati, OH

# CERTIFICATE OF SERVICE

I hereby certify that a copy of the Testimony of Beth Hixon was served electronically on the persons listed on the electronic service list shown below (as supplemented for this pleading), provided by the Attorney Examiner, this 9<sup>th</sup> day of March 2007.



Jeffrey L. Small

Assistant Consumers' Counsel

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CONFIDENTIAL PROPRIETARY  
TRADE SECRET**Agreement**

This agreement is between The Cinergy Retail Sales, LLC (Cinergy), and the hospitals shown on the attached agreement exhibit 1 incorporated by reference into this agreement (Hospitals), effective this 19th day of May 2004. It is the intent of the parties to this agreement to bind Cinergy and the Hospitals to the terms and conditions set forth herein. The following is the entire agreement between Cinergy and the Hospitals (parties); it may not be amended except by the written agreement of the parties.

This agreement is binding on the parties regarding the subject matter herein and both the terms and existence of the agreement are to remain confidential among the parties and may be released to non-parties only if ordered by a court or administrative agency of competent jurisdiction. If any issue related to the confidentiality of this agreement comes before a court or administrative agency of competent jurisdiction the party before such court or administrative agency shall use best efforts to immediately notify the other party. The parties shall defend the confidentiality of this agreement. The parties shall not circulate the agreement, or disclose its existence, to any employee, agent, or assignee of the party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the agreement.

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

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1. Beginning January 1, 2005, and through December 31, 2008,, Cinergy will offer to sell retail electric generation service to the Hospitals for all their CG&E accounts at a firm power, all-in, fixed rate equal to the applicable tariff rate of The Cincinnati Gas & Electric Company's unbundled generation rate approved by the Public Utilities Commission of Ohio (Commission) in case no. 99-1658-EL-ETP less the regulatory transition charge approved in the same case less one (1) mil per kwh, except that Jewish Hospital and Children's Hospital shall purchase competitive retail electric generation service from Cinergy at a rate equal to the real time pricing tariff rate and currently effective service agreement they are receiving from The Cincinnati Gas & Electric Company on December 31, 2004. The retail electric generation offer indicated above will be an option for Hospital accounts to accept anytime prior to 12/31/08 and the term of such generation arrangement will be designated by the Hospital accounts but will extend no longer than 12/31/08.
2. Cinergy shall reimburse the Hospitals for any rate stabilization charge (a component of the provider of last resort charge) paid to The Cincinnati Gas & Electric Company by the Hospitals purchasing competitive retail electric generation service from Cinergy pursuant to paragraph one (1) above. Cinergy shall reimburse and rate stabilization charges actually paid quarterly through the term of this agreement.
3. If, prior to December 31, 2008, the Hospitals add additional load or accounts in The Cincinnati Gas & Electric Company's certified territory, such new load or accounts may receive the options and benefits accruing from participation in this agreement to the extent that such new load or accounts represents new peak load of three (3) MW or less, except that new load relative to dual feeds shall be subject to the terms and conditions set forth in paragraph six (6) of this agreement.
4. Cinergy shall pay the Ohio Hospital Association \$50,000.00 upon the issuance of a final appealable order of the Public Utilities Commission of Ohio satisfactory to Cinergy.
5. The Hospitals shall comply with the terms and conditions of the order of the Public Utilities Commission of Ohio in case no. 03-93-EL-ATA including the payment of regulatory transition charges and provider of last resort charges except as set forth herein.

6. Cinergy shall not amend the rates charged by The Cincinnati Gas & Electric Company for dual feeds for load existing prior to December 31, 2004, until at least December 31, 2008. The Cincinnati Gas & Electric Company may amend its tariffs for dual feed where there is a significant increase in load or for new dual feed consumers pursuant to an application approved by the Public Utilities Commission of Ohio.
7. Hospitals purchasing generation service pursuant to existing tariff load management riders as of December 31, 2004, may continue to purchase generation service pursuant to such load management riders through 12/31/08.
8. This agreement has no application to The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Public Utilities Commission of Ohio.
9. The Hospitals shall cause the Ohio Hospital Association to support a Stipulation filed by The Cincinnati Gas & Electric Company and the Ohio Hospital Association, in case no. 03-93-EL-ATA, and any related litigation.

This agreement terminates after December 31, 2008, or upon the occurrence of any of the following:

- A. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to approve as part of the capped provider of last resort charge, a fuel cost recovery mechanism such that The Cincinnati Gas & Electric Company may recover fuel costs equal to the average costs for fuel consumed at The Cincinnati Gas & Electric Company's plants, and economy purchase power costs, for sales in The Cincinnati Gas & Electric Company's Certified Service Territory.
- B. The Public Utilities Commission of Ohio, in Case No. 03-93-EL-ATA or a related case necessary to carry out the terms and conditions of this agreement, fails to issue an order acceptable to Cinergy.
- C. Upon thirty (30) days written notice by either party upon the issuance of an order by a court or regulatory body of competent jurisdiction that substantially prevents either party from performing its obligations pursuant to this agreement.

All notices, demands, and statements to be given hereunder shall be



given in writing to the parties at the addresses appearing herein below and will be effective upon actual receipt:

To the Hospitals:

Rick Sites, General Counsel  
155 East Broad Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215-3620

To Cinergy:

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

or such other address as is provided in writing by the recipient from time to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and OHA shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third parties including the government regarding the enforcement or breach of this agreement, including but not limited to, property damages, environmental damages, contract damages, fines, or penalties arising from or in connection with the provision or acceptance of competitive retail electric service arising from or in connection with the performance of this agreement.

This agreement is for the exclusive benefit of the parties and may not be assigned without the written consent of the non-assigning party.

This Letter Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

Entered into on this 19th day of May:

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TRADE SECRET

On behalf of Cinergy

On Behalf of the Hospitals



Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215



Rick Sites, General Counsel  
155 East Broad St., 15th Floor  
Columbus, Ohio 43215-3620

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**Agreement Exhibit One**

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

CONFIDENTIAL PROPRIETARY  
TRADE SECRET**Agreement**

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

This Agreement is binding on the Parties regarding the subject matter herein and is to remain confidential among the Parties and may be released to non-Parties only if ordered by a court or administrative agency of competent jurisdiction. If the issue of this Agreement's confidentiality comes before a court or administrative agency of competent jurisdiction the Party before such court or administrative agency shall immediately notify the other Party. The Parties shall defend the confidentiality of this Agreement. The Parties shall not circulate the Agreement, or its existence, to any employee, agent, or assignee of the Party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the Agreement.

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

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

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

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

2. If, prior to December 31, 2008, any of the Customers add additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds a Customer's combined (all accounts) maximum demand as of January 1, 2005, such new load or accounts may receive the options and benefits accruing from participation in this Agreement to the extent that, for each Customer, such new load or accounts

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cumulatively represents new peak load of three (3) MW or less; any accounts representing new load beyond the foregoing limit are not included under this Agreement.

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

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TRADE SECRET

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

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

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

Before termination of the Agreement as provided in paragraphs A and B above, the Parties agree to use best efforts to fulfill the intent of this Agreement, by negotiating amendments to the Agreement that provide the Parties with substantially the same economic benefit for substantially the same consideration as contained in the original Agreement.

All notices, demands, and statements to be given hereunder shall be given in writing to the Parties at the addresses appearing herein below and will be effective upon actual receipt:

To Customers:

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



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To Cinergy:

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

or such other address as is provided in writing by the recipient from time to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and the Customers shall defend, indemnify, and hold harmless the non-breaching Party from any and all claims by third Parties regarding the enforcement or breach of this Agreement arising from or in connection with the performance of this Agreement.

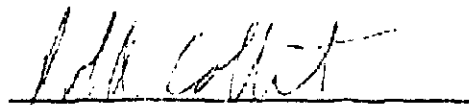
This Agreement is for the exclusive benefit of the Parties and may not be assigned without the written consent of the non-assigning Party.

This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

Entered into on this 19th day of May:

On behalf of Cinergy

On Behalf of the Customers



Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215



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

**CINERGY.**  
SERVICES

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

April 4, 2005

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

Re: Calculation of RTP Option Payments

Dear Dave:

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

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

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

Sincerely,

  
James B. Gainer

  
David F. Boehm  
Attorney for the Ohio Energy Group

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TRADE SECRET

### **Agreement**

This agreement is between Cinergy Corp. (Cinergy), through its agent Cinergy Retail Sales, LLC (CRS), and the Industrial Energy Users-Ohio (IEU-Ohio) for the benefit of Marathon Ashland, Inc., and General Motors, Inc., (Customers), effective this 28th day of May 2004. As to General Motors, Inc., this agreement is effective only to General Motors, Inc., West Chester Operation (GM). It is the intent of the parties to this agreement to bind the Customers to the terms and conditions set forth herein. The following is the entire agreement between CRS and IEU-Ohio (Parties); it may not be amended except by the written agreement of the parties.

This agreement is binding on the Parties regarding the subject matter herein and is to remain confidential among the Parties and may be released to non-parties only if ordered by a court or administrative agency of competent jurisdiction. If the issue of this agreement's confidentiality comes before a court or administrative agency of competent jurisdiction the party before such court or administrative agency shall immediately notify the other party. The Parties shall defend the confidentiality of this agreement. The Parties shall not circulate the agreement, or its existence, to any employee, agent, or assignee of the party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the agreement. For purposes of this paragraph, the term Parties includes the Customers.

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

1. Beginning January 1, 2005 or at such later time as may be specified herein for any accounts of each Customer that may be presently receiving competitive retail generation service from a supplier not affiliated with Cinergy, CRS shall supply, on a full requirements basis, and each Customer shall purchase firm competitive retail electric generation service from CRS or another Cinergy affiliated competitive retail electric service provider designated by CRS. Any accounts of each Customer presently receiving competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall have the right to delay the start date of the above described supply relationship with CRS to a date specified by such Customer provided that such delay does not cause the supply relationship with CRS to commence later than January 1, 2006. The all requirements, firm, competitive retail generation supply provided by CRS to Customers shall be priced at the currently effective unbundled generation price specified in the otherwise applicable tariff schedule for standard offer service less an amount equal to the applicable Regulatory Transition Charge (RTC), the resulting specified price also known as "Little G"<sup>1</sup>. Compliant contracts to implement the above described service relationship between Customers and CRS shall be executed as soon as reasonably possible and shall terminate no later than December 31, 2008. Cinergy shall reimburse Customers for payments made to The Cincinnati Gas & Electric Company as follows: (1) From January 1, 2005 through December 31, 2005, any Customer purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall maintain the shopping credit structure (payment of Big G less the applicable shopping credit) approved by the Commission in case no. 99-1658-EL-ETP and Cinergy shall reimburse monthly such Customers for half of the amount billed to Customers as the component of the Provider of Last Resort (POLR) charge paid to The Cincinnati Gas & Electric Company; (2) from January 1, 2005 through December 31, 2005, Cinergy shall reimburse GM monthly the full amount billed to and paid by GM as the RTC component paid to The Cincinnati Gas & Electric Company provided GM is purchasing competitive retail electric service from a non-Cinergy affiliated

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

competitive retail electric service provider during such calendar year (3) beginning January 1, 2005, through December 31, 2005, for all Customers purchasing competitive retail electric service from a Cinergy affiliated competitive retail electric service provider, Cinergy shall reimburse monthly all such Customers for the as billed and actual full amount of the RTC, the as billed and actual full amount of any Rate Stabilization Charges, and half of the amount billed to Customers as the POLR component actually paid to The Cincinnati Gas & Electric Company; (4) beginning January 1, 2006, for Customers purchasing the above described competitive retail electric service from a Cinergy affiliated competitive retail electric service provider, Cinergy shall reimburse monthly all Customers for the full amount billed to and paid by Customers as the RTC, the full amount billed to and paid by Customers as Rate Stabilization Charges, and half of the amount billed to Customers as the POLR component actually paid to The Cincinnati Gas & Electric Company.

2. If, prior to December 31, 2008, the Customers add additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds the Customer's combined (all accounts) maximum demand as of January 1, 2005, such new load or accounts may receive the options and benefits accruing from participation in this agreement to the extent that, for each Customer, such new load or accounts cumulatively represents new annual peak load of three (3) MW or less; any accounts representing new load beyond the foregoing limit are not included under this agreement.
3. Customers purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall be deemed to have provided, through this agreement, such written notice as may be required prior to the end of such purchase contract so that the Customers may avoid any penalty or additional charge that may arise absent such notice upon returning to standard offer service provided by The Cincinnati Gas & Electric Company.
3. Cinergy shall pay the Industrial Energy Users-Ohio \$100,000.00 as compensation for legal services, upon the issuance of a final order of the Commission satisfactory to Cinergy.
4. Customers shall pay The Cincinnati Gas & Electric Company's otherwise applicable transmission and distribution rates as

approved by the Commission. Customers, or their appointed representative, retain all rights to participate in Commission and Federal Energy Regulatory Commission proceedings that may affect the rates, terms, or conditions of distribution and transmission service.

5. Nothing in this agreement shall affect the terms and conditions agreed to by Industrial Energy Users-Ohio on behalf of General Motors, and Cinergy, pursuant to the agreement dated May 8, 2000 related to the settlement of certain issues in PUCO Case No. 99-1658-EL-ETP.
6. Cinergy will comply with all regulatory requirements necessary to create an affiliated competitive retail electric service provider to supply competitive retail electric service to Customers as required by paragraph one (1) of this agreement.
7. The Industrial Energy Users-Ohio shall support a Stipulation filed by The Cincinnati Gas & Electric Company and the IEU-Ohio in Case No. 03-93-EL-ATA subject to such reservation as IEU-Ohio has communicated to Cinergy.

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

- A. The Commission, in Case No. 03-93-EL-ATA, fails to issue a final order acceptable to Cinergy.
- B. A court or administrative agency of competent jurisdiction issues an order depriving the parties of the benefits of this agreement or otherwise voiding this agreement.
- C. Each Customer may individually terminate this agreement in its entirety, including its contract with the CRS, upon twelve (12) months written notice to CRS provided that such termination shall be effective for all Customer accounts and for this entire agreement.

Before termination of the agreement as provided in paragraphs A and B above, the parties agree to use best efforts to fulfill the intent of this agreement, by negotiating amendments to the agreement that provide the parties with substantially the same economic benefit for substantially the same consideration as contained in the original agreement.

All notices, demands, and statements to be given hereunder shall be given in writing to the parties at the addresses appearing herein below and will be effective upon actual receipt:

To Customers:

Samuel C. Randazzo, Esq.  
McNees, Wallace & Nurick  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 469-8000

To Cinergy:

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

or such other address as is provided in writing by the recipient from time to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and the Customers shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third parties including the government regarding the enforcement or breach of this agreement, including but not limited to, property damages, environmental damages, contract damages, fines, or penalties arising from or in connection with the provision or acceptance of competitive retail electric service arising from or in connection with the performance of this agreement.

This agreement is for the exclusive benefit of the Parties and shall apply to successors and assigns of the affected Customers as well as

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TRADE SECRET

Cinergy provided, as to the Customers, they continue to display substantially similar load and usage characteristics as those that presently exist. The Parties shall not assign their rights or obligations under this agreement without the written consent of the non-assigning party and such written consent shall not be unreasonably withheld.

This agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

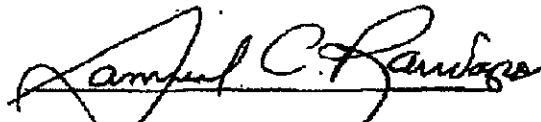
Entered into on this 28th day of May:

On behalf of Cinergy

On Behalf of the Customers



Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215



Samuel C. Randazzo, Esq.  
McNees, Wallace & Nurick  
21 East State Street  
17th Floor  
Columbus, Ohio 43215



00262

CONFIDENTIAL PROPRIETARY  
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### **Agreement**

This agreement is between Cinergy Corp. (Cinergy), and the Cognis Inc. (Cognis), effective this 7th day of June 2004. It is the intent of the parties to this agreement to bind Cinergy and Cognis to the terms and conditions set forth herein. The following is the entire agreement between Cinergy and Cognis (parties); it may not be amended except by the written agreement of the parties.

This agreement is binding on the parties regarding the subject matter herein and both the terms and existence of the agreement are to remain confidential among the parties and may be released to non-parties only if ordered by a court or administrative agency of competent jurisdiction. If any issue related to the confidentiality of this agreement comes before a court or administrative agency of competent jurisdiction the party before such court or administrative agency shall use best efforts to immediately notify the other party. The parties shall defend the confidentiality of this agreement. The parties shall not circulate the agreement, or disclose its existence, to any employee, agent, or assignee of the party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the agreement.

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

1. Cognis shall, through December 31, 2008, purchase its full requirements generation service pursuant to its current tariff and pursuant to the Electric Reliability and Rate Stabilization

Plan approved by the Public Utilities Commission of Ohio (Commission).

2. Cinergy shall reimburse Cognis for the first 4% of the annually adjusted component of Provider of Last Resort Charges actually paid by Cognis during the calendar year 2005; the first 8% actually paid in 2006; the first 12% actually paid in 2007, and the first 16% actually paid in 2008.
2. If, prior to December 31, 2008, Cognis adds additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds Cognis's combined (all accounts) maximum demand as of January 1, 2005, such new load or accounts may receive the options and benefits accruing from participation in this agreement to the extent that such new load or accounts cumulatively represents new peak load of one (1) MW or less; any accounts representing new load beyond the foregoing limit are not included under this agreement.
4. This agreement has no application to The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Commission.
5. Cognis shall support a Stipulation filed by The Cincinnati Gas & Electric Company and Cognis, in Case No. 03-93-EL-ATA, and any related litigation.

This agreement terminates after December 31, 2008, or upon the occurrence of any of the following:

- A. The Public Utilities Commission of Ohio, in Case No. 03-93-EL-ATA, or any subsequent fuel cost recovery case, fails to approve as part of the capped provider of last resort charge, a fuel cost recovery mechanism such that The Cincinnati Gas & Electric Company may recover fuel costs equal to the average costs for fuel consumed at The Cincinnati gas & Electric Company's plants, and economy purchase power costs, for sales in The Cincinnati gas & Electric Company's Certified Service Territory.
- B. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to issue an order acceptable to Cinergy.
- C. Upon thirty (30) days written notice by either party upon the issuance of an order by a court or regulatory body of competent jurisdiction that substantially prevents either party from performing its obligations pursuant to this agreement.

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- D. Cognis may terminate this agreement, in its entirety, upon twelve (12) months written notice to Cinergy that Cognis will purchase less than its full requirements generation service from CG&E or other Cinergy affiliate. Subject to the notice requirement of this provision, nothing in this agreement prohibits Cognis from terminating this agreement and constructing and utilizing co-generation facilities or switching generation suppliers.

All notices, demands, and statements to be given hereunder shall be given in writing to the parties at the addresses appearing herein below and will be effective upon actual receipt:

To Cognis:

Mr. Steve Kennedy  
Cognis Corp.  
5051 Estercreck Drive  
Cincinnati, Ohio 45232-1446

To Cinergy:

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

or such other address as is provided in writing by the recipient from time to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and Cognis shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third parties including the government regarding the enforcement or breach of this agreement, including but not limited to, property damages, environmental damages, contract damages, fines, or penalties arising from or in connection with

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the provision or acceptance of competitive retail electric service arising from or in connection with the performance of this agreement.

This agreement is for the exclusive benefit of the Parties and shall apply to successors and assigns of Cognis as well as Cinergy provided, as to Cognis, that it continues to display substantially similar load and usage characteristics as those that presently exist. The Parties shall not assign their rights or obligations under this agreement without the written consent of the non-assigning party and such written consent shall not be unreasonably withheld.

This Letter Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

Entered into on this 7th day of June:

On behalf of Cinergy

On Behalf of Cognis



Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215



Mr. Steve Kennedy  
Cognis Corp.  
5051 Estercreek Drive  
Cincinnati, Ohio 45232-1446

00206

CONFIDENTIAL PROPRIETARY  
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**Agreement**

WHEREAS, on December 14, 2000 a Confirmation Letter Agreement for a transaction under the Cinergy Operating Companies market-based power sales tariff was entered into between New Energy, Inc. and the Cinergy Operating Companies to supply firm energy to fulfill the retail power requirements of certain of the grocery stores, offices and related facilities of The Kroger Co. located in the service territory of The Cincinnati Gas & Electric Company (Grocery Store Sale);

WHEREAS, on December 14, 2000, a Performance Assurance Agreement was entered into between The Kroger Co., New Energy Inc. and Cinergy Services, Inc. whereby certain performance assurances were provided by The Kroger Co. and New Energy to Cinergy Services, Inc.;

WHEREAS, on July 31, 2001, a Confirmation Letter Agreement for a transaction under the Cinergy Operating Companies market-based power sales tariff was entered into between AES New Energy and the Cinergy Operating Companies to supply firm energy to fulfill the retail power requirements of the Kroger Co. State Street Plant (State Street Sale);

WHEREAS, the Performance Assurance Agreement was amended effective July 31, 2001;

WHEREAS, the competitive retail electric market in Ohio has not developed as envisioned when the Electric Transition Plan of The

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Cincinnati Gas & Electric Company ("CG&E") in Case No. 99-1658-EL-ETP was approved by the PUCO;

WHEREAS, on January 26, 2004, CG&E filed an Electric Reliability and Rate Stabilization Plan at the request of the Commission in order to further the transition to a competitive market;

WHEREAS, the power sales agreements by the Cinergy Operating Companies for ultimate sale to The Kroger Co. provided for firm power, and to permit Kroger to be fairly charged for reserve margin and other costs associated with the provision of competitive retail electric service as contained in the proposed Electric Reliability and Rate Stabilization Plan, and for other consideration, this new Agreement has been entered into.

This Agreement is between Cinergy Retail Sales, LLC ("Cinergy"), and The Kroger, Co. ("Kroger"), effective this 7th day of July, 2004. It is the intent of the Parties to this Agreement to bind Cinergy and Kroger to the terms and conditions set forth herein. The following Agreement may not be amended except by the written Agreement of the Parties.

This Agreement is binding on the Parties regarding the subject matter herein and is to remain confidential among the Parties and may be released to non-Parties only if ordered by a court or administrative agency of competent jurisdiction. If the issue of this Agreement's confidentiality comes before a court or administrative agency of competent jurisdiction the Party before such court or administrative agency shall immediately notify the other Party. The Parties shall defend

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the confidentiality of this Agreement. The Parties shall not circulate the Agreement, or its existence, to any employee, agent, or assignee of the Party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the Agreement.

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

1. Effective January 1, 2005, and ending December 31, 2005, Kroger shall continue to purchase competitive retail electric service from New Energy, its non-Cinergy affiliated competitive retail electric service provider, under both the Grocery Store Sale and the State Street Sale. During 2005, Kroger shall pay monthly the annually adjusted portion of the provider of last resort charge approved by the Public Utilities Commission of Ohio's in Case No. 03-93-EL-ATA and Cinergy or any affiliate thereof shall reimburse Kroger quarterly for half of the amount actually paid. Kroger shall comply with all other requirements of the Public Utilities Commission of Ohio's order in Case No. 03-93-EL-ATA. Cinergy or any affiliate thereof may set off revenues collected for the annually adjusted component of the Provider of Last Resort Charges paid, against any outstanding balance owed to any Cinergy company. POLR.
2. Beginning January 1, 2006, through December 31, 2007, Cinergy or any affiliate thereof shall continue to be the wholesale power supplier to Kroger's retail electric service provider by exercising Extension 1 and Extension 2 under the Grocery Store Sale. It is anticipated that New Energy will continue to be Kroger's retail electric service provider during 2006-2007; however, if New Energy elects not to provide such service then Kroger may choose a different retail electric service provider, including a Cinergy affiliate, and wholesale firm power will be provided by Cinergy at the same price, terms and conditions as set forth in Extension 1 and Extension 2. If a Cinergy affiliate is chosen as Kroger's CRES, then the Cinergy CRES will provide generation at retail at the prices set forth in Extension 1 and Extension 2, plus transmission costs. Kroger shall pay to The Cincinnati Gas & Electric Company the annually adjusted component of Provider of Last Resort Charge, (but not the Rate Stabilization Charge component of the POLR), and the Regulatory Transition Charge approved by the Public

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- Utilities Commission of Ohio in Case No. 99-1658-EL-ETP. Cinergy or any affiliate thereof shall reimburse Kroger quarterly for half of the annually adjusted component of the Provider of Last Resort Charge actually paid to The Cincinnati Gas & Electric Company. Cinergy or any affiliate thereof may set off revenues collected for the annually adjusted component of the Provider of Last Resort Charges paid, against any outstanding balance owed to any Cinergy company. With respect to the State Street Plant the following is agreed upon for the period January 1, 2006 through December 31, 2007: No later than 60 days after an order is issued in Case No. 03-93-EL-ATA or December 31, 2004 (whichever comes first) the State Street Plant must elect: a) to take service under the same terms and conditions as the grocery stores described above; or b) to take service under the terms of the Rate Stabilization Plan approved by the Commission in Case No. 03-93-EL-ATA, except that one half of the annually adjusted component of the Provider of Last Resort Charge will be reimbursed monthly.
3. Effective January 1, 2008, Kroger may purchase for both its grocery stores and State Street Plant competitive retail electric service from any competitive retail electric service provider, including Cinergy, at the market rate quoted by such providers. Kroger shall provide Cinergy a right of first refusal to provide competitive retail electric service at the market rate offered by the competitive retail electric service provider selected by Kroger who has provided Kroger with a bona fide and verifiable service offer. Kroger shall pay to The Cincinnati Gas & Electric Company the annually adjusted component of the Provider of Last Resort Charge (but not the Rate Stabilization Charge component of the POLR), and the Regulatory Transition Charge approved by the Public Utilities Commission of Ohio in Case No. 99-1658-EL-ETP. For calendar year 2008, Cinergy or any affiliate thereof shall reimburse Kroger quarterly for half of the annually adjusted component of the Provider of Last Resort Charge actually paid to The Cincinnati Gas & Electric Company. Cinergy or any affiliate thereof may set off revenues collected for the annually adjusted component of the Provider of Last Resort Charges paid, against any outstanding balance owed to any Cinergy company.
  4. The Cinergy Operating Companies shall exercise their Extension 1 and Extension 2 options under the December 14, 2000 Confirmation Letter Agreement to sell generation supply to New Energy Inc. in 2006 and 2007 for resale to Kroger.



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5. If, prior to December 31, 2008, Kroger adds additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds Kroger's combined (all accounts) maximum demand as of January 1, 2005, such new load or accounts may receive the options and benefits accruing from participation in this Agreement to the extent that such new load or accounts cumulatively represents new peak load of three (3) MW or less; any accounts representing new load beyond the foregoing limit are not included under this Agreement.
6. Kroger shall pay The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Public Utilities Commission of Ohio.
7. Cinergy or any affiliate thereof will comply with all regulatory requirements necessary to create an affiliated competitive retail electric service provider to offer competitive retail electric service to Kroger as contemplated by this Agreement.
8. Kroger shall support the May 19, 2004 Stipulation and Recommendation by The Cincinnati Gas & Electric Company and Kroger in case no. 03-93-EL-ATA.
9. For the grocery stores and related facilities, this Agreement constitutes Kroger's contract with a creditworthy CRES to provide firm generation service for its full capacity, energy and transmission requirements through December 31, 2008 and satisfies the requirements of the Stipulation and Recommendation in Case No. 03-93-EL-ATA that the first 25% of eligible load by consumer rate class to switch to a CRES shall not pay the Rate Stabilization Charge. For the State Street Plant, this Agreement also constitutes Kroger's contract with a creditworthy CRES to provide firm generation service for its full capacity, energy and transmission requirements through December 31, 2008 thus making the Rate Stabilization charge by-passable; provided that the State Street Plant elects to take service under the same terms and conditions as the grocery stores as set forth in Paragraph 2.
10. Nothing in this Agreement modifies or limits any settlement agreement reached by the Parties or their agents in Case No. 99-1658-EL-ETP.
11. If an order in Case No. 03-93-EL-ATA is issued which is acceptable to CG&E but which renders invalid or ineffective any provision of this Agreement to the economic detriment of

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Kroger, then Cinergy will provide the same economic value to Kroger through some other mutually acceptable process.

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

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

Before termination of the Agreement as provided by paragraph A and B above, the Parties agree to use best efforts to fulfill the intent of this Agreement, by negotiating amendments to the Agreement that provide the Parties with substantially the same economic benefit for substantially the same consideration as were contained in the original Agreement.

All notices, demands, and statements to be given hereunder shall be given in writing to the Parties at the addresses appearing herein below and will be effective upon actual receipt:

To Customers:

The Kroger Co.  
Denis George  
1014 Vine Street  
Cincinnati, Ohio 45202-1100

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To Cinergy:

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

or such other address as is provided in writing by the recipient from time to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and Kroger shall defend, indemnify, and hold harmless the non-breaching Party from any and all claims by third Parties regarding the enforcement or breach of this Agreement, arising from or in connection with the performance of this Agreement.

This Agreement is for the exclusive benefit of the Parties and may not be assigned without the written consent of the non-assigning Party.

This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.


Entered into on this 7th day of July:

On behalf of Cinergy

On Behalf of The Kroger Co.



Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215



Michael L. Kurtz, Counsel  
Boehm, Kurtz, & Lowry  
36 East Seventh Street  
Suite 1510  
Cincinnati, Ohio 45202


00273


Documents attached, labeled RP5, are those documents that are not protected by attorney client privilege. Attorney client privileged documents are not provided.

RP6 Please provide copies of all documents for the period beginning January 1, 2003 onward, (see definition of "documents" above, which includes e-mails) transmitted by DE-Ohio or its affiliates to, or received from, OHA hat contain references to the RTC, FPP, RSC, AAC, IMF, SRT charges or the Insufficient Return Notice Fee.

Please see documents attached labeled RP6.

Respectfully submitted on behalf of  
OHIO HOSPITAL ASSOCIATION

  
Richard L. Sites  
General Counsel  
155 East Broad Street, 15<sup>th</sup> Floor  
Columbus, OH 43215

  
Sally W. Bloomfield  
Thomas J. O'Brien  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, OH 43215-4291  
(614) 227-2368; 227-2335

## Rick Sites

From: Kubacki, Joseph [jkubacki@seel.com]  
 Sent: Wednesday, May 05, 2004 5:56 PM  
 To: James Gainer (E-mail); Paul Colbert (E-mail)  
 Cc: Rick Sites  
 Subject: OHA CG&E Settlement Terms - Confidential

Importance: High



SETTLEMENT  
 ERMS 5 5 04.doc (2)

> Jim and Paul,

Rick and I would like to thank you for cooperating in our settlement discussions and together developing a proposal that the OHA members were able to provide their consent. Attached is our proposed consolidation of settlement terms which we believe are agreeable to both OHA and CG&E. Note that number 5 was added this afternoon at the behest of one of our members but it will not be a deal breaker. Rick will not be available until tomorrow afternoon, but please call or email me tomorrow morning with your confirmation that these terms will be acceptable. Thanks again.

> Joe

>

>

> <<SETTLEMENT TERMS 5 5 04.doc>> .

>

> Joseph Kubacki Jr., CEP, CEM

> 412-394-5603

This e-mail, including attachments, is intended only for the person(s) to whom the sender intended to address this message. It may contain information which is legally privileged, confidential and exempt from disclosure. If you are not the intended recipient, you are hereby notified that any disclosure, copying distribution of, or use or action in reliance on, this communication is strictly prohibited and may be unlawful. If you are not the intended recipient of this message and have received this e-mail in error, please notify the sender immediately or return the e-mail and fully delete from your system the message, along with any attachments.

## OHA/CG&amp;E SETTLEMENT TERMS (5/5/04)

1. Each OHA member and all their accounts maintain their current generation rate through 12/31/08.
  - a. Cinergy affiliated CRES will offer to sell generation to all OHA member accounts at a firm power, all-in, fixed rate of [REDACTED] per kWh; except as indicated in section 1(d) below.
  - b. Cinergy Corp. will reimburse OHA members on a quarterly basis for any [REDACTED] actually paid by members through December 31, 2008.
  - c. OHA member accounts avoid [REDACTED] expenses.
  - d. [REDACTED] maintain their current RTP pricing through 12/31/08.
2. The generation offer indicated in 1(a) above will be an option for OHA member accounts to accept at anytime prior to 12/31/08 and the term of such generation arrangement will be designated by the member accounts but will extend no longer than 12/31/08.
3. OHA members pay the final PUCO approved [REDACTED] charge.
4. There will be no new charges for dual feeds for existing load, until at least 12/31/08. Significant increases in member load subject to charge for dual feeds pursuant to a tariff approved by the PUCO.
5. Existing tariff load management riders will continue to be available to member accounts through 12/31/08.
6. CG&E will provide a management/administration fee to OHA of \$50,000.
7. This offer is conditioned upon the support of the OHA for a Stipulation filed by CG&E and OHA in CG&E's RSP case and an order by the PUCO acceptable to CG&E. Such order would also include fuel cost recovery mechanism acceptable to CG&E.
8. This offer is conditioned on the filing of a Stipulation with the PUCO with a sufficient number of signatory parties such that it may result in an order adopting the Stipulation.

Rick Sites

From: Gainer, James [James.Gainer@chergy.com]  
 Sent: Thursday, May 06, 2004 9:09 AM  
 To: Kubacki, Joseph; Rick Sites  
 Cc: Colbert, Paul; Ficke, Greg  
 Subject: RE: OHA CG&E Settlement Terms -- Confidential

Importance: High

Rick and Joe, I think that the settlement looks fine. I cannot, however, provide final confirmation until I better understand the impact of your new item 5. I do not anticipate that that will be a problem. I will get back to you by the end of the day. JBG

-----Original Message-----

From: Kubacki, Joseph [mailto:jkubacki@aol.com]  
 Sent: Wednesday, May 05, 2004 5:56 PM  
 To: Gainer, James; Colbert, Paul  
 Cc: Rick Sites (E-mail)  
 Subject: OHA CG&E Settlement Terms -- Confidential  
 Importance: High

> Jim and Paul,  
 Rick and I would like to thank you for cooperating in our settlement discussions and together developing a proposal that the OHA members were able to provide their consent. Attached is our proposed consolidation of settlement terms which we believe are agreeable to both OHA and CG&E. Note that number 5 was added this afternoon at the behest of one of our members but it will not be a deal breaker. Rick will not be available until tomorrow afternoon, but please call or email me tomorrow morning with your confirmation that these terms will be acceptable. Thanks again.

> Joe

>  
 >  
 > <<SETTLEMENT TERMS 5 5 04.doc>> .

>  
 > Joseph Kubacki Jr., CEP, CEM  
 > 412-394-5603

>  
 This e-mail, including attachments, is intended only for the person(s) to whom the sender intended to address this message. It may contain information which is legally privileged, confidential and exempt from disclosure. If you are not the intended recipient, you are hereby notified that any disclosure, copying distribution of, or use or action in reliance on, this communication is strictly prohibited and may be unlawful. If you are not the intended recipient of this message and have received this e-mail in error, please notify the sender immediately or return the e-mail and fully delete from your system the message, along with any attachments.

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## Agreement

This agreement is between The Cinergy Retail Sales, LLC (Cinergy), and the hospitals shown on the attached agreement exhibit 1 incorporated by reference into this agreement (Hospitals), effective this 28th day of October 2004. This Agreement replaces and supersedes the terms and conditions of the Agreement dated May 19th 2004 between Hospitals and Cinergy. It is the intent of the parties to this agreement to bind Cinergy and the Hospitals to the terms and conditions set forth herein. The following is the entire agreement between Cinergy and the Hospitals (parties); it may not be amended except by the written agreement of the parties.

This agreement is binding on the parties regarding the subject matter herein and both the terms and existence of the agreement are to remain confidential among the parties and may be released to non-parties only if ordered by a court or administrative agency of competent jurisdiction. If any issue related to the confidentiality of this agreement comes before a court or administrative agency of competent jurisdiction the party before such court or administrative agency shall use best efforts to immediately notify the other party. The parties shall defend the confidentiality of this agreement. The parties shall not circulate the agreement, or disclose its existence, to any employee, agent, or assignee of the party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the agreement.



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

1. Beginning January 1, 2005, and through December 31, 2008, Cinergy will offer to sell retail electric generation service to the Hospitals for all their CG&E accounts at a firm power, all-in, fixed rate equal to the applicable tariff rate of The Cincinnati Gas & Electric Company's unbundled generation rate approved by the Public Utilities Commission of Ohio (Commission) in case no. 99-1658-EL-ETP less the regulatory transition charge approved in the same case less one (1) mil per kwh, except that Jewish Hospital and Children's Hospital, shall purchase competitive retail electric generation service from Cinergy at a rate equal to the real time pricing tariff rate and currently effective service agreement they are receiving from The Cincinnati Gas & Electric Company on December 31, 2004. The retail electric generation offer indicated above will be an option for Hospital accounts to accept anytime prior to December 31, 2008 and the term of such generation arrangement will be designated by the Hospital accounts but will extend no longer than December 31, 2008. The generation rate shall include a payment of amounts for emission allowances equal to the emission allowance cost CG&E is permitted to recover as part of its price to compare charge of the market-based standard service offer.
2. Cinergy shall reimburse the Hospitals for any rate stabilization charge (a component of the provider of last resort charge) actually paid to The Cincinnati Gas & Electric Company by the Hospitals purchasing competitive retail electric generation service from Cinergy pursuant to paragraph one (1) above. Cinergy shall reimburse rate stabilization charges actually paid quarterly through the term of this agreement. The Hospitals shall pay the infrastructure maintenance fund and the system reliability tracker. To the extent that hospitals actually pay the infrastructure maintenance fund component of the Provider of last resort Charge, CG&E shall reimburse, consistent with the reimbursement schedule contained herein, total infrastructure maintenance fund payments in excess of 4% of little g. The participating Hospitals will not pay the AAC (annually adjusted component) charges and any fuel adders/that would apply to full service tariff customers.
3. If, prior to December 31, 2008, the Hospitals add additional load or accounts in The Cincinnati Gas & Electric Company's

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certified territory, such new load or accounts may receive the options and benefits accruing from participation in this agreement to the extent that such new load or accounts represents new peak load of three (3) MW or less, except that new load relative to dual feeds shall be subject to the terms and conditions set forth in paragraph six (6) of this agreement.

4. Cinergy shall pay the Ohio Hospital Association \$50,000.00 upon the issuance of a final appealable order of the Public Utilities Commission of Ohio satisfactory to Cinergy.
5. The Hospitals shall comply with the terms and conditions of the order of the Public Utilities Commission of Ohio in case no. 03-93-EL-ATA including the payment of regulatory transition charges and provider of last resort charges except as set forth herein.
6. Cinergy shall not amend the rates charged by The Cincinnati Gas & Electric Company for dual feeds for load existing prior to December 31, 2004, until at least December 31, 2008. The Cincinnati Gas & Electric Company may amend its tariffs for dual feed where there is a significant increase in load or for new dual feed consumers pursuant to an application approved by the Public Utilities Commission of Ohio.
7. Hospitals purchasing generation service pursuant to existing tariff load management riders as of December 31, 2004, may continue to purchase generation service pursuant to such load management riders through December 31, 2008.
8. This agreement has no application to The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Public Utilities Commission of Ohio. Hospitals shall pay the applicable transmission and distribution rates of The Cincinnati Gas & Electric Company as approved by the Commission, and/or if applicable, shall pay to Cinergy Retail Sales the applicable transmission charges equal to the transmission charges approved by the Public Utilities Commission of Ohio for Cincinnati Gas & Electric Company.
9. The Hospitals shall cause the Ohio Hospital Association to support an Application for Rehearing filed by The Cincinnati Gas & Electric Company and/or the Ohio Hospital Association seeking to restore the Stipulation, without modification, signed by The Cincinnati Gas & Electric Company and the Ohio Hospital Association or seeking approval, without modification

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of the alternative proposal made by The Cincinnati Gas & Electric Company in its application for rehearing, in Case No. 03-93-EL-ATA, and any related litigation.

This agreement terminates after December 31, 2008, or upon the occurrence of any of the following:

- A. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to approve as part of the capped provider of last resort charge, a fuel cost recovery mechanism such that The Cincinnati Gas & Electric Company may recover fuel costs equal to the average costs for fuel consumed at The Cincinnati Gas & Electric Company's plants, and economy purchase power costs, for sales in The Cincinnati Gas & Electric Company's Certified Service Territory.
- B. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to issue an entry on rehearing acceptable to Cinergy such that it restores without modification the original Stipulation signed by the Parties or adopts without modification CG&E's alternative proposal made in its application for rehearing.
- C. Upon thirty (30) days written notice by either party upon the issuance of an order by a court or regulatory body of competent jurisdiction that substantially prevents either party from performing its obligations pursuant to this agreement.

All notices, demands, and statements to be given hereunder shall be given in writing to the parties at the addresses appearing herein below and will be effective upon actual receipt:

To the Hospitals:

Rick Sites, General Counsel  
155 East Broad Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215-3620

To Cinergy:

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

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or such other address as is provided in writing by the recipient from time to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and OHA shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third parties including the government regarding the enforcement or breach of this agreement, including but not limited to, property damages, environmental damages, contract damages, fines, or penalties arising from or in connection with the provision or acceptance of competitive retail electric service arising from or in connection with the performance of this agreement.

This agreement is for the exclusive benefit of the parties and may not be assigned without the written consent of the non-assigning party.

This Letter Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

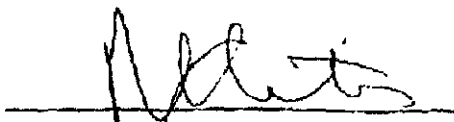
Entered into on this 8th day of November:

On behalf of Cinergy

On Behalf of the Hospitals



Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215



Rick Sites, General Counsel  
155 East Broad St., 15th Floor  
Columbus, Ohio 43215-3620

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**CONFIDENTIAL PROPRIETARY  
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### **Agreement**

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

This Agreement is binding on the Parties regarding the subject matter herein and is to remain confidential among the Parties and may be released to non-Parties only if ordered by a court or administrative agency of competent jurisdiction. If the issue of this Agreement's confidentiality comes before a court or administrative agency of competent jurisdiction the party before such court or administrative agency shall immediately notify the other party. The Parties shall defend the confidentiality of this Agreement. The Parties shall not circulate the Agreement, or its existence, to any employee, agent, or assignee of the party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the Agreement.

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

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

Option A

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

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

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

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

Option B

B. Each Customer may accept CG&E's market based standard service offer price, including the price to compare and POLR charges approved by the Commission in Case No. O3-93-EL-ATA and retain the right through December 31, 2008, to switch to a CRES under the terms and conditions of the Commission's Order. During any time between January 1, 2005, and December 31, 2008, when it is purchasing from a CRES under Option B, Cinergy shall reimburse quarterly each Customer amounts actually paid to CG&E for the following items: 1) 50% of RSC; 2) 50% of AAC; 3) 50% of SRT, and 4) any actual payment made to CG&E of the IMF in excess of 4% of little g. During January 1, 2005, through December 31, 2008, Customers choosing Option B must pay to Cinergy quarterly one half of the emission allowance component of the fuel component of the price to compare. Cinergy may set off revenues collected for actual RTC, RSC, AAC, SRT, or IMF charges against any outstanding balance owed to Cinergy or CG&E.

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

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

4. If, prior to December 31, 2008, any of the Customers add additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds a Customer's combined (all accounts) maximum demand as of January 1, 2005, such new load or accounts may receive the options and benefits accruing from participation in this Agreement to the extent that, for each Customer, such new load or accounts cumulatively represents new peak load of three (3) MW or less; any accounts representing new load beyond the foregoing limit are not included under this Agreement.
5. This agreement has no application to The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Public Utilities Commission of Ohio. Customers shall pay the applicable transmission and distribution rates of The Cincinnati Gas & Electric Company as approved by the Commission, and/or if applicable, shall pay to Cinergy Retail Sales the applicable transmission charges equal to the transmission charges approved by the Public Utilities Commission of Ohio for Cincinnati Gas & Electric Company.
6. Cinergy will comply with all regulatory requirements necessary to be certified as a competitive retail electric service provider to offer competitive retail electric service to Customers as required by paragraph one (1) of this Agreement.
7. In the Cincinnati Gas & Electric Company's next distribution base rate case that results in a change in the Customers' rates, CG&E will file a cost of service study reflecting actual cost of service for all rate classes. Such filing shall include a rate increase for rate TS of no more than \$ 0.00. The Parties retain all legal rights in The Cincinnati Gas & Electric Company's next distribution base rate case, including but not limited to, rights to litigate and settle the case. The filing of the cost of service does not in any way constitute a guarantee regarding the outcome of the case. The Cincinnati Gas & Electric Company shall support the future distribution rider proposed as Rider CIR allocated based upon distribution net plant.
8. The Customers shall cause the Ohio Energy Group to support an Application for Rehearing filed by The Cincinnati Gas & Electric Company and/or OEG seeking reinstatement without



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

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

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

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

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

- C. A court or administrative agency of competent jurisdiction issues an order depriving the Parties of the benefits of this Agreement or otherwise voiding this Agreement.

Before termination of the Agreement as provided in paragraphs A and B above, the Parties agree to use best efforts to fulfill the intent of this Agreement, by negotiating amendments to the Agreement that provide the Parties with substantially the same economic benefit for substantially the same consideration as contained in the original Agreement.

All notices, demands, and statements to be given hereunder shall be given in writing to the Parties at the addresses appearing herein below and will be effective upon actual receipt:

To Customers:

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

To Cinergy:

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

or such other address as is provided in writing by the recipient from time to time. Payments shall be made in a commercially practicable manner such as by check, ACH or wire transfer to the account designated by the payee from time to time.

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Cinergy and the Customers shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third Parties regarding the enforcement or breach of this Agreement arising from or in connection with the performance of this Agreement.

This Agreement is for the exclusive benefit of the Parties and may not be assigned without the written consent of the non-assigning party.

This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

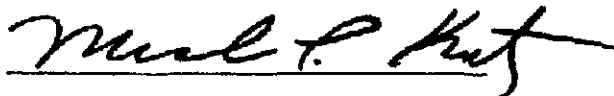
Entered into on this 22nd day of November:

On behalf of Cinergy

On Behalf of the Customers



Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215



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

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# **Agreement**

This agreement is between Cinergy Corp. (Cinergy), through its agent Cinergy Retail Sales, LLC (CRS), and the Industrial Energy Users-Ohio (IEU-Ohio) for the benefit of Marathon Ashland, Inc., and General Motors, Inc., (Customers), effective this 8th day of November 2004. This Agreement replaces and supersedes the terms and conditions of the Agreement dated May 28th 2004, between IEU-Ohio and Cinergy. As to General Motors, Inc., this agreement is effective only to General Motors, Inc., West Chester Operation (GM). It is the intent of the parties to this agreement to bind the Customers to the terms and conditions set forth herein. The following is the entire agreement between CRS and IEU-Ohio (Parties); it may not be amended except by the written agreement of the parties.

This agreement is binding on the Parties regarding the subject matter herein and is to remain confidential among the Parties and may be released to non-parties only if ordered by a court or administrative agency of competent jurisdiction. If the issue of this agreement's confidentiality comes before a court or administrative agency of competent jurisdiction the party before such court or administrative agency shall immediately notify the other party. The Parties shall defend the confidentiality of this agreement. The Parties shall not circulate the agreement, or its existence, to any employee, agent, or assignee of the party unless such employee, agent, or assignee has a need to know for

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the purpose of effectuating the agreement. For purposes of this paragraph, the term Parties includes the Customers.

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

1. Beginning January 1, 2005, or at such later time as may be specified herein for any accounts of each Customer that may be presently receiving competitive retail generation service from a supplier not affiliated with Cinergy, CRS shall supply, on a full requirements basis, and each Customer shall purchase firm competitive retail electric generation service from CRS or another Cinergy affiliated competitive retail electric service provider designated by CRS. Any accounts of each Customer presently receiving competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall have the right to delay the start date of the above described supply relationship with CRS to a date specified by such Customer provided that such delay does not cause the supply relationship with CRS to commence later than January 1, 2006. The all requirements, firm, competitive retail generation supply provided by CRS to Customers shall be priced at the currently effective unbundled generation price specified in the otherwise applicable tariff schedule of The Cincinnati Gas & Electric Company for standard offer service, less an amount equal to the applicable Regulatory Transition Charge (RTC); the resulting specified price also known as "Little G"<sup>1</sup>. Compliant contracts to implement the above described service relationship between Customers and CRS shall be executed as soon as reasonably possible and shall terminate no later than December 31, 2008. Cinergy shall reimburse Customers for actual payments made to The Cincinnati Gas & Electric Company as follows: (1) From January 1, 2005 through December 31, 2005, any Customer purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall maintain the shopping credit structure (payment of Big G less the applicable shopping credit) approved by the Commission in case no. 99-1658-EL-ETP and Cinergy shall reimburse monthly such Customers for the rate stabilization charge component, and one half of the system reliability tracker component, of the Provider of Last Resort (POLR) charge paid to The Cincinnati

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

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Gas & Electric Company; (2) from January 1, 2005, through December 31, 2005, Cinergy shall reimburse GM monthly the full amount billed to and paid by GM as the Regulatory Transition Charge paid to The Cincinnati Gas & Electric Company provided GM is purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider during such calendar year (3) beginning January 1, 2005, through December 31, 2005, for all Customers purchasing competitive retail electric service from a Cinergy affiliated competitive retail electric service provider, Cinergy shall reimburse monthly all such Customers for the as billed and actual full amount of the Regulatory Transition Charge, the as billed and actual full amount of any Rate Stabilization Charges, and one half the amount billed to Customers as the system reliability tracker component of the Provider Of Last Resort charge actually paid to The Cincinnati Gas & Electric Company; (4) beginning January 1, 2006, for Customers purchasing the above described competitive retail electric service from a Cinergy affiliated competitive retail electric service provider, Cinergy shall reimburse monthly all Customers for the full amount billed to and paid by Customers as the Regulatory Transition Charge, the full amount billed to and paid by Customers as Rate Stabilization Charge component, and one half the amount billed to Customers as the system reliability tracker component, of the Provider Of Last Resort charge actually paid to The Cincinnati Gas & Electric Company. Customers shall pay all remaining applicable market-based standard service offer charges including, but not limited to, the infrastructure maintenance fund component of the Provider of Last Resort charge. To the extent that Customers actually pay the infrastructure maintenance fund component of the Provider of last resort Charge, Cinergy shall reimburse, consistent with the reimbursement schedule contained herein, infrastructure maintenance fund payments in excess of 4% of little g. Nothing herein shall operate to limit the ability of each Customer to avoid all or such portion of any standard service offer charge that may be avoided by shopping customers. Cinergy and the Customers understand that: (1) this agreement was drafted based on the expectation that each Customer shall qualify as shopping customers so as to avoid all or such portion of any standard service offer charge that may be avoided by shopping customers; and, (2) as a shopping customer, each Customer shall not be billed any standard service offer charge that may be avoided by shopping customers.

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2. If, prior to December 31, 2008, the Customers add additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds the Customer's combined (all accounts) maximum demand as of January 1, 2005, such new load or accounts may receive the options and benefits accruing from participation in this agreement to the extent that, for each Customer, such new load or accounts cumulatively represents new annual peak load of three (3) MW or less; any accounts representing new load beyond the foregoing limit are not included under this agreement.
3. Customers purchasing competitive retail electric service from a non-Cinergy affiliated competitive retail electric service provider shall be deemed to have provided, through this agreement, such written notice as may be required prior to the end of such purchase contract so that the Customers may avoid any penalty or additional charge that may arise absent such notice upon returning to standard offer service provided by The Cincinnati Gas & Electric Company.
4. Cinergy shall pay the Industrial Energy Users-Ohio \$100,000.00 as compensation for legal services, upon the issuance of a final order of the Commission satisfactory to Cinergy.
5. This agreement has no application to The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Public Utilities Commission of Ohio. Customers shall pay the applicable transmission and distribution rates of The Cincinnati Gas & Electric Company as approved by the Commission, and/or if applicable, shall pay to Cinergy Retail Sales the applicable transmission charges equal to the transmission charges approved by the Public Utilities Commission of Ohio for Cincinnati Gas & Electric Company. Customers, or their appointed representative, retain all rights to participate in Commission and Federal Energy Regulatory Commission proceedings that may affect the rates, terms, or conditions of distribution and transmission service.
6. Nothing in this agreement shall affect the terms and conditions agreed to by Industrial Energy Users-Ohio on behalf of General Motors and Cinergy, pursuant to the agreement dated May 8, 2000 related to the settlement of certain issues in PUCO Case No. 99-1658-EL-ETP.

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7. Cinergy will comply with all regulatory requirements necessary to create an affiliated competitive retail electric service provider to supply competitive retail electric service to Customers as required by paragraph one (1) of this agreement.
8. The Industrial Energy Users-Ohio shall support a Stipulation filed by The Cincinnati Gas & Electric Company and the IEU-Ohio in Case No. 03-93-EL-ATA subject to such reservation as IEU-Ohio has communicated to Cinergy. The Customers shall cause the Industrial Energy Users-Ohio to support an Application for Rehearing filed by The Cincinnati Gas & Electric Company seeking reinstatement without modification of the Stipulation signed by The Cincinnati Gas & Electric Company and IEU-Ohio of approval by the Commission without modification of the CG&E alternative proposal submitted in its application for rehearing in Case No. 03-93-EL-ATA, and any related litigation.

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

- A. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to issue an entry on rehearing acceptable to Cinergy such that it restores without modification the original Stipulation signed by the Parties or adopts without modification CG&E's alternative proposal made in its application for rehearing.
- B. A court or administrative agency of competent jurisdiction issues an order depriving the parties of the benefits of this agreement or otherwise voiding this agreement.
- C. Each Customer may individually terminate this agreement in its entirety, including its contract with the CRS, upon twelve (12) months written notice to CRS provided that such termination shall be effective for all Customer accounts and for this entire agreement.

Before termination of the agreement as provided in paragraphs A and B above, the parties agree to use best efforts to fulfill the intent of this agreement, by negotiating amendments to the agreement that provide the



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parties with substantially the same economic benefit for substantially the same consideration as contained in the original agreement.

All notices, demands, and statements to be given hereunder shall be given in writing to the parties at the addresses appearing herein below and will be effective upon actual receipt:

To Customers:

Samuel C. Randazzo, Esq.  
McNees, Wallace & Narick  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43265  
(614) 469-8000

To Cinergy:

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

or such other address as is provided in writing by the recipient from time to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and the Customers shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third parties including the government regarding the enforcement or breach of this agreement, including but not limited to, property damages, environmental damages, contract damages, fines, or penalties arising from or in connection with the provision or acceptance of competitive retail electric service arising from or in connection with the performance of this agreement.

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This agreement is for the exclusive benefit of the Parties and shall apply to successors and assigns of the affected Customers as well as Cinergy provided, as to the Customers, they continue to display substantially similar use and usage characteristics as those that presently exist. The Parties shall not assign their rights or obligations under this agreement without the written consent of the non-assigning party and such written consent shall not be unreasonably withheld.


This agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

Entered into on this 5th day of November:

On behalf of Cinergy

On Behalf of the Customers

  
Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215

  
Samuel C. Randazzo, Esq.  
Morris Wallace & Nurick LLC  
211 East State Street  
17th Floor  
Columbus, Ohio 43215

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**Agreement**

This agreement is between Cinergy Corp. (Cinergy), and the Cognis Inc. (Cognis), effective this 28th day of October 2004. It is the intent of the parties to this agreement to bind Cinergy and Cognis to the terms and conditions set forth herein. This Agreement replaces and supersedes the terms and conditions of the Agreement dated June 7<sup>th</sup> 2004 between Cognis and Cinergy. The following is the entire agreement between Cinergy and Cognis (parties); it may not be amended except by the written agreement of the parties.

This agreement is binding on the parties regarding the subject matter herein and both the terms and existence of the agreement are to remain confidential among the parties and may be released to non-parties only if ordered by a court or administrative agency of competent jurisdiction. If any issue related to the confidentiality of this agreement comes before a court or administrative agency of competent jurisdiction the party before such court or administrative agency shall use best efforts to immediately notify the other party. The parties shall defend the confidentiality of this agreement. The parties shall not circulate the agreement, or disclose its existence, to any employee, agent, or assignee of the party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the agreement.

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

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1. Cognis shall, through December 31, 2008, purchase its full requirements generation service pursuant to its current tariff and pursuant to the Electric Reliability and Rate Stabilization Plan approved by the Public Utilities Commission of Ohio (Commission).
2. Cinergy shall reimburse Cognis for actual payments up to the first 4% of the annually adjusted component of Provider of Last Resort Charges actually paid by Cognis during calendar year 2005; the first 8% of the annually adjusted component of Provider of Last Resort Charges actually paid in 2006; the first 12% of the annually adjusted component and system reliability component of Provider of Last Resort Charges actually paid, and the emission allowance expense component of the price to compare actually paid in 2007, and the first 16% of the annually adjusted component and system reliability component of Provider of Last Resort Charges actually paid, and the emission allowance expense component of the price to compare actually paid in 2008. Cognis shall pay the entirety of the remainder of CG&E's approved rates and charges including but not limited to the Infrastructure Maintenance Fund. To the extent that Cognis actually pays the Infrastructure Maintenance Fund component of the Provider of Last Resort Charge, CG&E shall reimburse annual Infrastructure Maintenance Fund payments in excess of 4% of little g.
3. If, prior to December 31, 2008, Cognis adds additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds Cognis's combined (all accounts) maximum demand as of January 1, 2005, such new load or accounts may receive the options and benefits accruing from participation in this agreement to the extent that such new load or accounts cumulatively represents new peak load of one (1) MW or less; any accounts representing new load beyond the foregoing limit are not included under this agreement.
4. This agreement has no application to The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Commission.
5. Cognis shall support an Application for Rehearing filed by The Cincinnati Gas & Electric Company and/or Cognis, in Case No. 03-93-EL-ATA, and any related litigation.

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6. Cognis shall pay The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Commission.

This agreement terminates after December 31, 2008, or upon the occurrence of any of the following:

- A. The Public Utilities Commission of Ohio, in Case No. 03-93-EL-ATA, or any subsequent fuel cost recovery case, fails to approve as part of the capped provider of last resort charge, a fuel cost recovery mechanism such that The Cincinnati Gas & Electric Company may recover fuel costs equal to the average costs for fuel consumed at The Cincinnati Gas & Electric Company's plants, and economy purchase power costs, for sales in The Cincinnati Gas & Electric Company's Certified Service Territory.
- B. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to issue an entry on rehearing acceptable to Cinergy such that it restores without modification the original Stipulation signed by the Parties or adopts without modification CG&E's alternative proposal made in its application for rehearing.
- C. Upon thirty (30) days written notice by either party upon the issuance of an order by a court or regulatory body of competent jurisdiction that substantially prevents either party from performing its obligations pursuant to this agreement.
- D. Until March 1, 2005, Cognis may terminate this agreement, in its entirety, immediately upon providing oral notice to Cinergy. As of March 1, 2005, Cognis may terminate this agreement, in its entirety, upon twelve (12) months written notice to Cinergy that Cognis will purchase less than its full requirements generation service from CG&E or other Cinergy affiliate. Subject to the notice requirement of this provision, nothing in this agreement prohibits Cognis from terminating this agreement and constructing and utilizing co-generation facilities or switching generation suppliers.

All notices, demands, and statements to be given hereunder shall be given in writing to the parties at the addresses appearing herein below and will be effective upon actual receipt:

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To Cognis:

Mr. Steve Kennedy  
Cognis Corp.  
5051 Estercreek Drive  
Cincinnati, Ohio 45232-1446

To Cinergy:

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

or such other address as is provided in writing by the recipient from time to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and Cognis shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third parties including the government regarding the enforcement or breach of this agreement, including but not limited to, property damages, environmental damages, contract damages, fines, or penalties arising from or in connection with the provision or acceptance of competitive retail electric service arising from or in connection with the performance of this agreement.

This agreement is for the exclusive benefit of the Parties and shall apply to successors and assigns of Cognis as well as Cinergy provided, as to Cognis, that it continues to display substantially similar load and usage characteristics as those that presently exist. The Parties shall not assign their rights or obligations under this agreement without the written consent of the non-assigning party and such written consent

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### **Agreement**

WHEREAS, on December 14, 2000, a Confirmation Letter Agreement for a transaction under the Cinergy Operating Companies market-based power sales tariff was entered into between New Energy, Inc. and the Cinergy Operating Companies to supply firm energy to fulfill the retail power requirements of certain of the grocery stores, offices and related facilities of The Kroger Co. located in the service territory of The Cincinnati Gas & Electric Company (Grocery Store Sale);

WHEREAS, on December 14, 2000, a Performance Assurance Agreement was entered into between The Kroger Co., New Energy Inc. and Cinergy Services, Inc. whereby certain performance assurances were provided by The Kroger Co. and New Energy to Cinergy Services, Inc.;

WHEREAS, on July 31, 2001, a Confirmation Letter Agreement for a transaction under the Cinergy Operating Companies market-based power sales tariff was entered into between AES New Energy and the Cinergy Operating Companies to supply firm energy to fulfill the retail power requirements of the Kroger Co. State Street Plant (State Street Sale);

WHEREAS, the Performance Assurance Agreement was amended effective July 31, 2001;

WHEREAS, the competitive retail electric market in Ohio has not developed as envisioned when the Electric Transition Plan of The

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Cincinnati Gas & Electric Company ("CG&E") in Case No. 99-1658-EL-ETP was approved by the PUCO;

WHEREAS, on January 26, 2004, CG&E filed an Electric Reliability and Rate Stabilization Plan at the request of the Commission in order to further the transition to a competitive market;

WHEREAS, the power sales agreements by the Cinergy Operating Companies for ultimate sale to The Kroger Co. provided for firm power, and to permit Kroger to be fairly charged for reserve margin and other costs associated with the provision of competitive retail electric service as contained in the proposed Electric Reliability and Rate Stabilization Plan, and for other consideration, this new Agreement has been entered into.

This Agreement is between Cinergy Retail Sales, LLC ("Cinergy"), and The Kroger, Co. ("Kroger"), effective this 22nd day of November, 2004. This Agreement replaces and supersedes the terms and conditions of the Agreement dated July 7, 2004, between Kroger and Cinergy (Parties). It is the intent of the Parties to this Agreement to bind Cinergy and Kroger to the terms and conditions set forth herein. The following Agreement may not be amended except by the written Agreement of the Parties.

This Agreement is binding on the Parties regarding the subject matter herein and is to remain confidential among the Parties and may be released to non-Parties only if ordered by a court or administrative agency of competent jurisdiction. If the issue of this Agreement's



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confidentiality comes before a court or administrative agency of competent jurisdiction the Party before such court or administrative agency shall immediately notify the other Party. The Parties shall defend the confidentiality of this Agreement. The Parties shall not circulate the Agreement, or its existence, to any employee, agent, or assignee of the Party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the Agreement.

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

1. Effective January 1, 2005, and ending December 31, 2005, Kroger shall continue to purchase competitive retail electric service from New Energy, its non-Cinergy affiliated competitive retail electric service provider, under both the Grocery Store Sale and the State Street Sale. During 2005, Kroger shall pay monthly to CG&E all applicable components of the Provider Of Last Resort (POLR) charge and to Cinergy half of the emission allowance component of the fuel component of the price to compare approved by the PUCO in Case No. 03-93-EL-ATA; and Cinergy or any affiliate thereof shall reimburse Kroger quarterly for half of the amount actually paid of the POLR charge, except the Rate Stabilization Charge (RSC) and the Infrastructure Maintenance Fund (IMF) charge which shall be paid in full by Kroger (subject to Paragraph 4). Kroger shall comply with all other requirements of the PUCO's order in Case No. 03-93 EL-ATA. Cinergy or any affiliate thereof may set off revenues collected for the POLR Charges or emission allowance component of the price to compare, against any outstanding balance owed to any Cinergy company
2. Beginning January 1, 2006, through December 31, 2007, Cinergy or any affiliate thereof shall continue to be the wholesale power supplier to Kroger's retail electric service provider by exercising Extension 1 and Extension 2 under the Grocery Store Sale, including the wholesale price of generation contained therein. It is anticipated that New Energy will continue to be Kroger's retail electric service provider during 2006-2007; however, if New Energy elects not to provide such

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service then Kroger may choose a different retail electric service provider, including a Cinergy affiliate, and wholesale firm power will be provided by Cinergy at the same price, terms and conditions as set forth in Extension 1 and Extension 2. Kroger shall pay to CG&E all applicable components of the POLR charge, the Regulatory Transition Charge (RTC) approved by the PUCO in Case No. 99-1658-EL-ETP, and shall pay to Cinergy or the applicable Cinergy affiliated competitive retail electric service provider half of the emission allowance component of the fuel component of the price to compare. Cinergy or any affiliate shall reimburse Kroger quarterly for half of the amount actually paid of the POLR charge, except the RSC and IMF charge which shall be paid in full by Kroger (subject to Paragraph 4). Cinergy or any affiliate thereof may set off revenues collected for the POLR Charges and emission allowance component of the fuel component of the price to compare, against any outstanding balance owed to any Cinergy company. With respect to the State Street Plant Kroger shall take service under the same terms, conditions and price as the grocery stores described above.

3. Effective January 1, 2008, Kroger may purchase for both its grocery stores and State Street Plant competitive retail electric service from any competitive retail electric service provider, including Cinergy, at the market rate quoted by such providers. Kroger shall provide Cinergy a right of first refusal to provide competitive retail electric service at the market rate offered by the competitive retail electric service provider selected by Kroger who has provided Kroger with a bona fide and verifiable service offer. Kroger shall pay to CG&E all of the applicable POLR charges, and the RTC approved by the PUCO in Case No. 99-1658-EL-ETP, and shall pay to Cinergy or the applicable Cinergy affiliated competitive retail electric service provider half of the emission allowance component of the fuel component of the price to compare. For calendar year 2008, Cinergy or any affiliate thereof shall reimburse Kroger quarterly for half of the POLR charge actually paid to CG&E, except the RSC and IMF charge which shall be paid in full by Kroger (subject to Paragraph 4). Cinergy or any affiliate thereof may set off revenues collected for the POLR Charges, and one-half of the emission allowance component of the fuel component of the price to compare, against any outstanding balance owed to any Cinergy company.

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4. To the extent that Kroger actually pays the IMF, Cinergy shall reimburse Kroger quarterly for IMF payments in excess of 4% of little g.
5. CG&E's POLR charge is expected to consist of these components: 1) RSC; 2) AAC; 3) IMF; and 4) System Reliability Tracker (SRT).
6. The Cinergy Operating Companies shall exercise their Extension 1 and Extension 2 options under the December 14, 2000 Confirmation Letter Agreement to sell generation supply to New Energy Inc. in 2006 and 2007 for resale to Kroger under the Grocery Store Sale and State Street sale at the wholesale generation price set forth therein.
7. If, prior to December 31, 2008, Kroger adds additional load or accounts in The Cincinnati Gas & Electric Company's certified territory which exceeds Kroger's combined (all accounts) maximum demand as of January 1, 2005, such new load or accounts may receive the options and benefits accruing from participation in this Agreement to the extent that such new load or accounts cumulatively represents new peak load of three (3) MW or less; any accounts representing new load beyond the foregoing limit are not included under this Agreement.
8. This agreement has no application to CG&E's transmission and distribution rates as approved by the PUCO. Kroger shall pay the applicable transmission and distribution rates of CG&E as approved by the Commission, and/or if applicable, shall pay to Cinergy Retail Sales the applicable transmission charges equal to the transmission charges approved by the PUCO for CG&E.
9. Cinergy or any affiliate thereof will comply with all regulatory requirements necessary to create an affiliated Competitive Retail Electric Service (CRES) provider to offer competitive retail electric service to Kroger as contemplated by this Agreement.
10. Kroger shall support an Application for Rehearing filed by CG&E seeking reinstatement without modification of the Stipulation signed by CG&E and Kroger or approval by the Commission without modification of CG&E's Alternative Proposal submitted in its application for rehearing, in Case No. 03-93-EL-ATA, and any related litigation.
11. This Agreement constitutes Kroger's contract with a creditworthy CRES to provide firm generation service for its full

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capacity, energy and transmission requirements from January 1, 2005 through December 31, 2008 and satisfies the requirements of Case No. 03-93-EL-ATA that the first 50% of eligible load by consumer rate class to switch to a CRES shall not pay the Rate Stabilization Charge (RSC) and shall not pay the Annually Adjusted Component (AAC) of the POLR. Therefore, it is not expected that Kroger will pay either the RSC or AAC.

12. Nothing in this Agreement modifies or limits any settlement agreement reached by the Parties or their agents in Case No. 99-1658-EL-ETP.
13. If an order in Case No. 03-93-EL-ATA is issued which is acceptable to CG&E but which renders invalid or ineffective any provision of this Agreement to the economic detriment of Kroger, then Cinergy will provide the same economic value to Kroger through some other mutually acceptable process.

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

- A. The Public Utilities Commission of Ohio, in Case No. 03-93-EL-ATA, and ongoing fuel cost recovery cases, fails to approve as part of the capped Provider of Last Resort Charge, a fuel cost recovery mechanism such that fuel costs equal the average embedded fuel costs for all consumers in The Cincinnati Gas & Electric Company service territory served by any Cinergy company.
- B. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to issue an entry on rehearing acceptable to Cinergy such that it restores without substantial modification the original Stipulation signed by the Parties or adopts without substantial modification CG&E's Alternative Proposal made in its application for rehearing.
- C. A court or administrative agency of competent jurisdiction issues and order depriving the Parties of the benefits of this Agreement or otherwise voiding this Agreement.

Before termination of the Agreement as provided by paragraph A and B above, the Parties agree to use best efforts to fulfill the intent of this Agreement, by negotiating amendments to the Agreement that provide

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the Parties with substantially the same economic benefit for substantially the same consideration as were contained in the original Agreement.

All notices, demands, and statements to be given hereunder shall be given in writing to the Parties at the addresses appearing herein below and will be effective upon actual receipt:

**To Customers:**

The Kroger Co.  
Denis George  
1014 Vine Street  
Cincinnati, Ohio 45202-1100

**To Cinergy:**

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

or such other address as is provided in writing by the recipient from time to time. Payments shall be made in a commercially practicable manner such as by check, ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and Kroger shall defend, indemnify, and hold harmless the non-breaching Party from any and all claims by third Parties regarding the enforcement or breach of this Agreement, arising from or in connection with the performance of this Agreement.

This Agreement is for the exclusive benefit of the Parties and may not be assigned without the written consent of the non-assigning Party.

This Agreement shall be governed by and construed in accordance

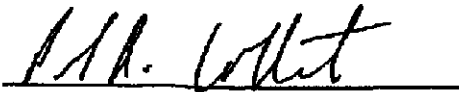
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with the laws of the State of Ohio.

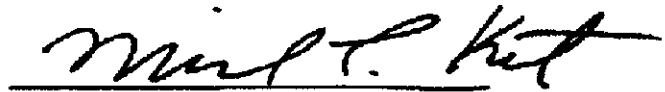
Entered into on this 22nd day of November:

On behalf of Cinergy

On Behalf of Kroger



Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215



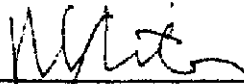
Michael Kurtz, Counsel  
Boehm, Kurtz, & Lowry  
36 East Seventh Street  
Suite 2110  
Cincinnati, Ohio 45202

Documents attached, labeled RP5, are those documents that are not protected by attorney client privilege. Attorney client privileged documents are not provided.

RP6 Please provide copies of all documents for the period beginning January 1, 2003 onward, (see definition of "documents" above, which includes e-mails) transmitted by DE-Ohio or its affiliates to, or received from, OHA hat contain references to the RTC, FPP, RSC, AAC, IMF, SRT charges or the Insufficient Return Notice Fee.

Please see documents attached labeled RP6.

Respectfully submitted on behalf of  
OHIO HOSPITAL ASSOCIATION



Richard L. Sites  
General Counsel  
155 East Broad Street, 15<sup>th</sup> Floor  
Columbus, OH 43215



Sally W. Bloomfield  
Thomas J. O'Brien  
BRICKER & ECKLER LLP  
100 South Third Street  
Columbus, OH 43215-4291  
(614) 227-2368; 227-2335

**Rick Sites**

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**From:** Kubacki, Joseph [jkubacki@se1.com]  
**Sent:** Friday, November 05, 2004 9:52 AM  
**To:** James Gainer (E-mail); Paul Colbert (E-mail)  
**Cc:** Rick Sites  
**Subject:** OHA support of CG&E

Jim, Paul,

Rick and I discussed the latest settlement agreement between OHA and CG&E. OHA will sign the agreement with the revisions we discussed yesterday, including keeping section 1 as you proposed, modifying section 2 to specify [REDACTED] while excluding [REDACTED] and modifying section 8 to only include CG&E tariff T&D rates only. OHA will file a memorandum in support of CG&E alternative proposal. As usual, nice discussing these matters with you.

Joe

Joseph Kubacki Jr., CEP, CEM  
Consultant for OHA  
412-394-5603

This e-mail, including attachments, is intended only for the person(s) to whom the sender intended to address this message. It may contain information which is legally privileged, confidential and exempt from disclosure. If you are not the intended recipient, you are hereby notified that any disclosure, copying distribution of, or use or action in reliance on, this communication is strictly prohibited and may be unlawful. If you are not the intended recipient of this message and have received this e-mail in error, please notify the sender immediately or return the e-mail and fully delete from your system the message, along with any attachments.



**Rick Sites**

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**From:** Colbert, Paul [Paul.Colbert@Cinergy.COM]  
**Sent:** Friday, November 05, 2004 11:20 AM  
**To:** Kubacki, Joe; Rick Sites  
**Cc:** Gainer, James; Ficke, Greg; Steffen, Jack  
**Subject:** OHA CGE agreement revisions 11-4-04.DOC

Joe and Rick, we are ready to execute this version of the amended agreement. It is changed based upon your e-mail this morning and our prior discussions. If you agree we will send two signed copies and you can execute them and return one to us. Please let us know. Thank you.

### Agreement

This agreement is between The Cinergy Retail Sales, LLC (Cinergy), and the hospitals shown on the attached agreement exhibit 1 incorporated by reference into this agreement (Hospitals), effective this 28th day of October 2004. This Agreement replaces and supersedes the terms and conditions of the Agreement dated May 19th 2004 between Hospitals and Cinergy. It is the intent of the parties to this agreement to bind Cinergy and the Hospitals to the terms and conditions set forth herein. The following is the entire agreement between Cinergy and the Hospitals (parties); it may not be amended except by the written agreement of the parties.

Deleted: Cognis

This agreement is binding on the parties regarding the subject matter herein and both the terms and existence of the agreement are to remain confidential among the parties and may be released to non-parties only if ordered by a court or administrative agency of competent jurisdiction. If any issue related to the confidentiality of this agreement comes before a court or administrative agency of competent jurisdiction the party before such court or administrative agency shall use best efforts to immediately notify the other party. The parties shall defend the confidentiality of this agreement. The parties shall not circulate the agreement, or disclose its existence, to any employee, agent, or assignee of the party unless such employee, agent, or assignee has a need to know for the purpose of effectuating the agreement.

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

1. Beginning January 1, 2005, and through December 31, 2008, Cinergy will offer to sell retail electric generation service to the Hospitals for all their CG&E accounts at a firm power, all-in, fixed rate equal to the applicable tariff rate of The Cincinnati Gas & Electric Company's unbundled generation rate approved by the Public Utilities Commission of Ohio (Commission) in case no. 99-1658-EL-ETP less the regulatory transition charge approved in the same case less one (1) mil per kwh, except that Jewish Hospital and Children's Hospital shall purchase competitive retail electric generation service from Cinergy at a rate equal to the real time pricing tariff rate and currently effective service agreement they are receiving from The Cincinnati Gas & Electric Company on December 31, 2004. The retail electric generation offer indicated above will be an option for Hospital accounts to accept anytime prior to 12/31/08 and the term of such generation arrangement will be designated by the Hospital accounts but will extend no longer than 12/31/08. The generation rate shall include a payment of amounts for emission allowances equal to the emission allowance cost CG&E is permitted to recover as part of its price to compare charge of the market-based standard service offer.

Deleted: , which shall be limited to a total of 1% of little g

2. Cinergy shall reimburse the Hospitals for any rate stabilization charge (a component of the provider of last resort charge) actually paid to The Cincinnati Gas & Electric Company by the Hospitals purchasing competitive retail electric generation service from Cinergy pursuant to paragraph one (1) above. Cinergy shall reimburse rate stabilization charges actually paid quarterly through the term of this agreement. The Hospitals shall pay the infrastructure maintenance fund and the system reliability tracker. To the extent that hospitals actually pay the infrastructure maintenance fund component of the Provider of last resort Charge, CG&E shall reimburse, consistent with the reimbursement schedule contained herein, total infrastructure maintenance fund payments in excess of 4% of little g. The participating Hospitals will not pay the AAC (annually adjusted component) charges and any fuel adders that would apply to full service tariff customers.

Deleted: all other Provider of Last Resort charges including, but not limited to,

Deleted: any

3. If, prior to December 31, 2008, the Hospitals add additional load or accounts in The Cincinnati Gas & Electric Company's certified territory, such new load or accounts may receive the

options and benefits accruing from participation in this agreement to the extent that such new load or accounts represents new peak load of three (3) MW or less, except that new load relative to dual feeds shall be subject to the terms and conditions set forth in paragraph six (6) of this agreement.

4. Cinergy shall pay the Ohio Hospital Association \$50,000.00 upon the issuance of a final appealable order of the Public Utilities Commission of Ohio satisfactory to Cinergy.
5. The Hospitals shall comply with the terms and conditions of the order of the Public Utilities Commission of Ohio in case no. 03-93-EL-ATA including the payment of regulatory transition charges and provider of last resort charges except as set forth herein.
6. Cinergy shall not amend the rates charged by The Cincinnati Gas & Electric Company for dual feeds for load existing prior to December 31, 2004, until at least December 31, 2008. The Cincinnati Gas & Electric Company may amend its tariffs for dual feed where there is a significant increase in load or for new dual feed consumers pursuant to an application approved by the Public Utilities Commission of Ohio.
7. Hospitals purchasing generation service pursuant to existing tariff load management riders as of December 31, 2004, may continue to purchase generation service pursuant to such load management riders through 12/31/08.
8. This agreement has no application to The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Public Utilities Commission of Ohio. Hospitals shall pay The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Commission, or if applicable, the transmission charges equal to the actual transmission costs of Cinergy's CRES.
9. The Hospitals shall cause the Ohio Hospital Association to support an Application for Rehearing filed by The Cincinnati Gas & Electric Company and/or the Ohio Hospital Association seeking to restore the Stipulation, without modification, signed by The Cincinnati Gas & Electric Company and the Ohio Hospital Association or seeking approval, without modification of the alternative proposal made by The Cincinnati Gas & Electric Company in its application for rehearing, in Case No. 03-93-EL-ATA, and any related litigation.

~~Deleted: Hospitals shall pay The Cincinnati Gas & Electric Company's transmission and distribution rates as approved by the Commission, or if applicable, the transmission charges equal to the actual transmission costs of Cinergy's CRES.~~

~~Deleted:~~

This agreement terminates after December 31, 2008, or upon the occurrence of any of the following:

- A. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to approve as part of the capped provider of last resort charge, a fuel cost recovery mechanism such that The Cincinnati Gas & Electric Company may recover fuel costs equal to the average costs for fuel consumed at The Cincinnati Gas & Electric Company's plants, and economy purchase power costs, for sales in The Cincinnati Gas & Electric Company's Certified Service Territory.
- B. The Public Utilities Commission of Ohio, in case no. 03-93-EL-ATA, fails to issue an entry on rehearing acceptable to Cinergy such that it restores without modification the original Stipulation signed by the Parties or adopts without modification CG&E's alternative proposal made in its application for rehearing.
- C. Upon thirty (30) days written notice by either party upon the issuance of an order by a court or regulatory body of competent jurisdiction that substantially prevents either party from performing its obligations pursuant to this agreement.

All notices, demands, and statements to be given hereunder shall be given in writing to the parties at the addresses appearing herein below and will be effective upon actual receipt:

To the Hospitals:

Rick Sites, General Counsel  
155 East Broad Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215-3620

To Cinergy:

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

or such other address as is provided in writing by the recipient from time

to time. Payments shall be made by ACH or wire transfer to the account designated by the payee from time to time.

Cinergy and OHA shall defend, indemnify, and hold harmless the non-breaching party from any and all claims by third parties including the government regarding the enforcement or breach of this agreement, including but not limited to, property damages, environmental damages, contract damages, fines, or penalties arising from or in connection with the provision or acceptance of competitive retail electric service arising from or in connection with the performance of this agreement.

This agreement is for the exclusive benefit of the parties and may not be assigned without the written consent of the non-assigning party.

This Letter Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

Entered into on this 19th day of May:

On behalf of Cinergy

On Behalf of the Hospitals

---

Paul A. Colbert, Senior Counsel  
The Cincinnati Gas & Electric Company  
155 East Broad Street  
Columbus, Ohio 43215

---

Rick Sites, General Counsel  
155 East Broad St., 15th Floor  
Columbus, Ohio 43215-3620

**Clnergy Corp.**

(Mail to Accounts Payable - EM860)\*

<b>Payment Reference</b> (AP Use Only)	
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## VOUCHER

**Paying Company: (Circle One)**

Vendor Name

CG&E  
ULH&P

**PSI Energy  
CInergy Corp.**

Energy Services  
Other

**VENDOR ADDRESS AND IDENTIFICATION (Required)**

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Taxpayer I.D. Number  
(Service/Rental Payments Only)

**PAYMENT DESCRIPTION REQUIRED - PASSPORT**  
**Quarterly ERR&P Payment**

**PAYMENT DISTRIBUTION (Required)**[illegible]**TOTAL****Prepared**

**GERRI AYERS**

**Employee No. 17549**

**Telephone No.**

**287-302**

**Approved**

VICE PRESIDENT, RATES  
The

Date \_\_\_\_\_

**SPECIAL HANDLING INSTRUCTIONS (Optional)**

**WHEN CHECK IS NEEDED**  
(Check only if payment is required immediately)

**SPECIAL INSTRUCTIONS**

DATE \_\_\_\_\_

~~28-04-44~~

11

**CERTIFIED  
ATTACHMENT TO FORWARD**



SEPARATE CHECK  
OTHER \_\_\_\_\_

28 April 06

**FORWARDING OF CHECK - OTHER THAN U.S. MAIL**

PAYMENT REFERENCE NUMBER  
VIA INTER CO. MAIL TO  
WHEN AVAILABLE, PLEASE CALL

**GERRI AYERS**

MAIL DROP \_\_\_\_\_  
EXTENSION 207-1302

00317

BEH ATTACHMENT 15

**CINERGY.****INVOICE**Invoice: 10100256  
Invoice Date: 4/25/2005  
Page: 1 of 1**CONFIDENTIAL**

Bill to: [REDACTED]

Customer No: [REDACTED]  
PD / Contract No: [REDACTED]  
Payment Terms: Net 45  
Due Date: 6/9/2005  
Amount Due: [REDACTED]Invoice to make Cinergy whole pursuant to the terms of the November 2004 RSP  
settlement agreement between Cinergy and [REDACTED]

For billing questions, please call Tim Duff at 513/287-2144.

Line	Date of Charge	Description	Net Amount
1		RSP Settlement Agreement	[REDACTED]

Amount Due: [REDACTED]

**CONFIDENTIAL PROPRIETARY  
TRADE SECRET**

↓ Please detach and return with your payment. Please indicate invoice number on check. ↓

**Payment Coupon**

Please make check payable to:

Cinergy Corp.

P.O. Box 1771

Cincinnati, Ohio 45201-1771

Fed Tax ID: [REDACTED]

Invoice Number: 10100256

Please Pay By: 06/09/2005  
Customer Number: [REDACTED]  
Total Amount Due: [REDACTED]

Amount Enclosed

**CINERGY.**

1159



00318

CRS Payment for 2nd Quarter 2005

PROPRIETARY  
NET

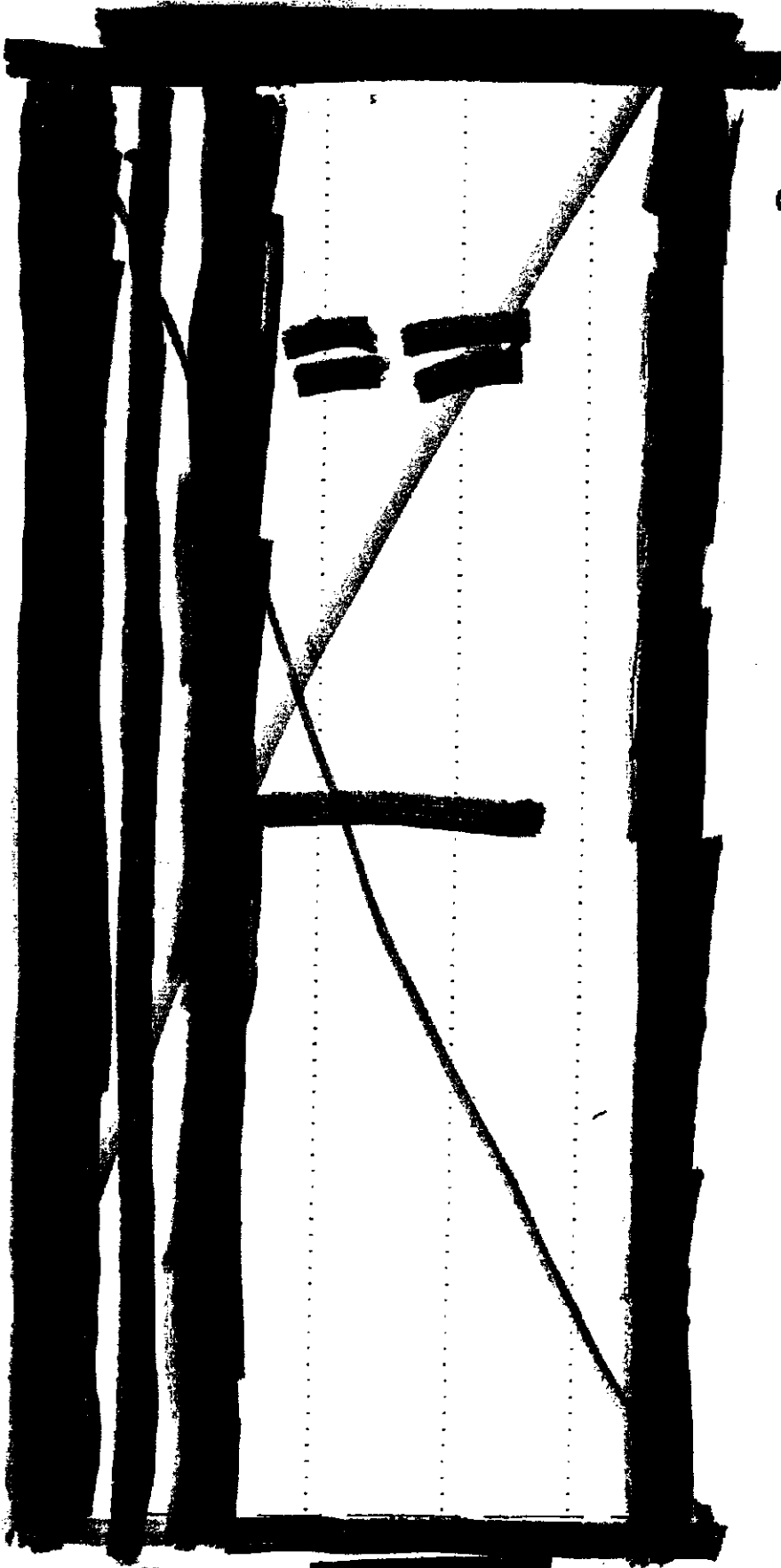
1160

00319

AK Accounts

CRS Payment for 1st Quarter 2005

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Payment = [REDACTED]

Remit payment to the following:

[REDACTED]

00320

All Accounts  
EA Component of FPP for 3rd Quarter

Monthly Usage

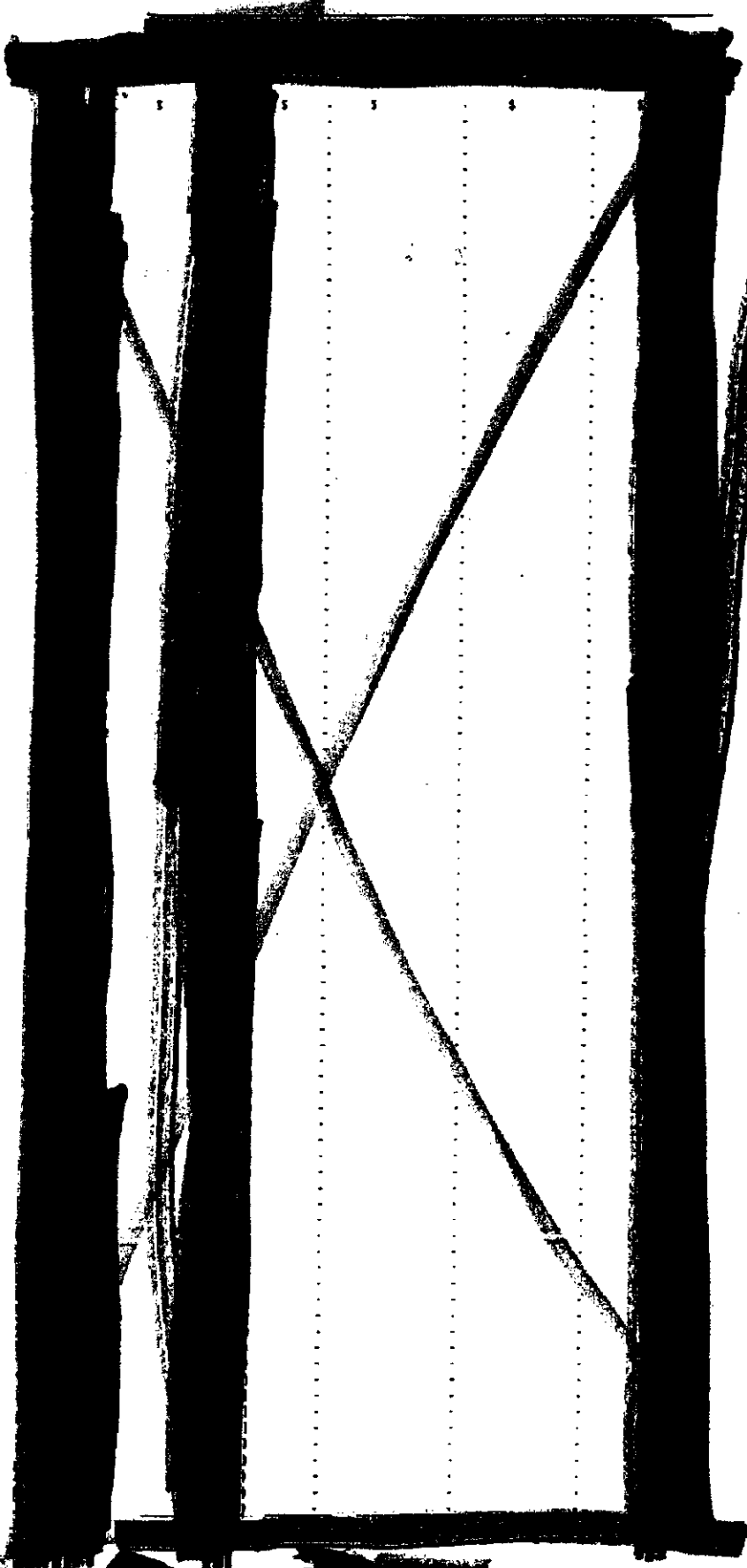
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[REDACTED]

00321

All Accounts

CRS Payment for 3rd Quarter 2005



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[REDACTED]  
Remit payment to the following:  
[REDACTED]

Ohio Consumers' Counsel  
First Set Interrogatories  
Duke Energy Retail Sales, LLC  
Case No. 03-93-EL-ATA  
Following Remand  
Date Received: February 22, 2007  
Response Due: March 5, 2007

OCC-INT-01-RI51

**REQUEST:**

Referring to the November 22, 2004 and November 9, 2005 Agreements between Cinergy Retail Sales, LLC and [REDACTED] (Bate stamped "1181 through 1195"):

- a. For payments DERS has made to [REDACTED] under these agreements, what were the amounts, for what components of the [REDACTED] were these payments made and when were payments made?
- b. For payments [REDACTED] made to DERS under these agreements what were the amounts, for [REDACTED] components were these payments made and when were payments made?
- c. What were the accounting entries on DERS' books for payments in (a) made by DERS to [REDACTED]
- d. What were the accounting entries on DERS' books for payments in (b) made by [REDACTED] DERS?

**RESPONSE:**

Objection. This question is not calculated to lead to the discovery of evidence relevant to these cases.

- a. N/A
- b. Payments were made to [REDACTED] during 2005 pursuant to the contract terms and conditions.
- c. N/A
- d. The accounting entries were not on DERS' books.

**WITNESS RESPONSIBLE:** N/A

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REF ATTACHMENT 12  
CONFIDENTIAL  
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**OPTION AGREEMENT**

**BY AND BETWEEN**

**CINERGY RETAIL SALES, LLC**

**AND**

[REDACTED]

This Option Agreement (the "Agreement") is entered into as of this 2nd day of February, 2005 (the "Effective Date") by and between Cinergy Retail Sales, LLC ("CRS") a Delaware limited liability company, and [REDACTED] corporation (each individually a "Party" or collectively the "Parties").

**RECITALS**

**WHEREAS,** [REDACTED] purchases electric power service from The Cincinnati Gas & Electric Company (CG&E) on metered accounts listed on Exhibit C.

**WHEREAS,** CRS has been certified by the Public Utilities Commission of Ohio as a Certified Retail Electric Supplier ("CRES") and has the authority to engage in the sale of electrical power at retail;

**WHEREAS,** CRS and [REDACTED] desire to establish terms and conditions for this option.

**NOW, THEREFORE,** for and in consideration of the mutual covenants contained herein, the Parties agree as follows:

**ARTICLE I  
DEFINITIONS**

The following definitions and any terms defined in this Agreement shall apply hereunder.

"Affiliate" means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, "control" means the direct or indirect

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ownership of ten (10) percent or more.

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

"Business Day" means a day on which Federal Reserve member banks in Ohio are open for business; and a Business Day shall open at 8:00 a.m. and close at 5:00 p.m. eastern prevailing time, unless otherwise agreed to by the Parties in writing.

"Maximum Demand" means [REDACTED] combined maximum annual demands for all of [REDACTED] accounts listed on Exhibit C with Cincinnati Gas & Electric ("CG&E") for the twelve months ending December 31, 2004.

"Capacity" has the meaning set forth in any Transmission Provider's tariff or MISO's transmission tariff, as amended from time to time, or as defined in any transmission tariff of a successor to MISO.

"Defaulting Party" shall have the meaning specified in Section 6.1.

"Energy" means electric energy of the character commonly known as three-phase, sixty hertz electric energy that is delivered at the nominal voltage of the Delivery Point, expressed in megawatt hours (MWh).

"Event of Default" shall have the meaning specified in Section 6.1.

"FERC" means the Federal Energy Regulatory Commission or any successor agency thereto.

"Firm" means that the only excuse for the failure to deliver Energy by CRS or the failure to receive Energy by [REDACTED] Force Majeure or the other Party's failure to perform.

"Full Requirements Energy" means, except as provided herein, that [REDACTED] shall purchase all of its retail Energy requirements for its facility from CRS and that [REDACTED] shall not resell any of the Energy provided hereunder to any third party.

"Interest Rate" means, for any date the lesser of (a) two (2) percent over the per annum rate of interest equal to the prime lending rate ("Prime Rate") as may be published from time to time in the Federal Reserve Statistical Release H. 15; or (b) the maximum lawful interest rate.

"MW" means megawatt.

"Term" shall have the meaning specified in Article 4.1.

"Transmission Providers" means the entity or entities transmitting or transporting the Energy on behalf of CRS or [REDACTED] Delivery Point.

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**ARTICLE II  
OPTION**

- 2.1 [REDACTED] currently purchases its generation electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs or will provide notice by December 30, 2004 that it will purchase generation electric service from CG&E starting no later than December 31, 2005 in accordance with applicable CG&E tariff requirements. [REDACTED] hereby grants to CRS the exclusive option, upon thirty (30) days notice, to provide generation electric service for all of [REDACTED] accounts and load set forth in Exhibit C, including any increases in accordance with Section 3.1, as of December 31, 2004 ("Option"). In the event that an Electric Choice Insufficient Return Notice Fee is incurred by [REDACTED] due to switching back to CG&E standard tariffed service prior to January 31, 2005, an amount equivalent to said fee will be paid [REDACTED] by CRS.
- 2.2 CRS shall have the right to exercise this Option at any time during the Term of this Agreement.
- 2.3 In exchange for [REDACTED] granting CRS this option, CRS agrees to pay [REDACTED] each calendar year quarter of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment"). The Parties agree that if [REDACTED] defaults or is delinquent, after any applicable cure period, in any of its payments to any Cinergy affiliated company for any service provided to [REDACTED] then CRS has the right to offset the Option Payment due hereunder with any amounts that are owed by [REDACTED] the Cinergy affiliated company.
- 2.4 [REDACTED]
- 2.5 If CRS exercises its Option, the Parties shall enter into a power sale agreement, including the terms set forth in Article III.

**ARTICLE III  
CRS POWER CONTRACT TERMS**

- 3.1 In the event CRS exercises its option, a power sale agreement between CRS and [REDACTED] will be negotiated. The power sale agreement shall include generally accepted terms and conditions relating to the sale of competitive retail electric generation service, including, among others, the following terms:



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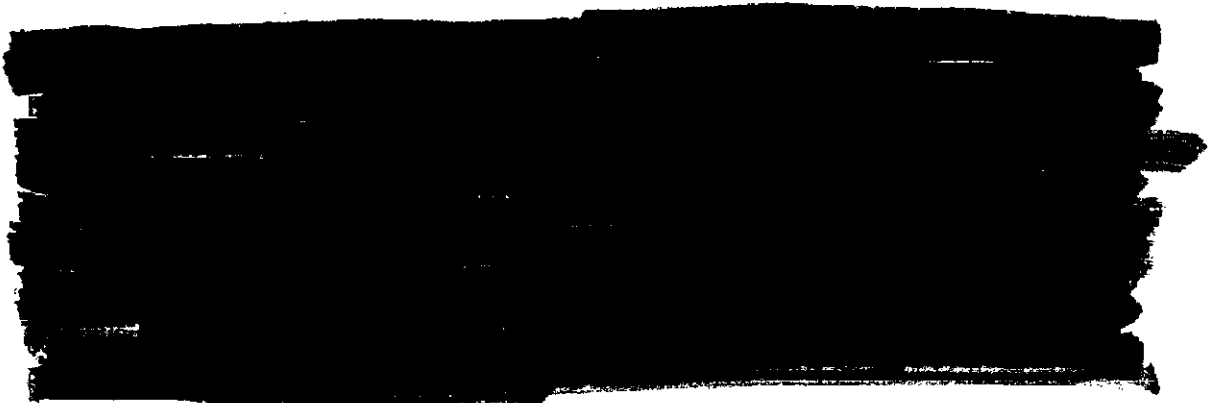
- a. Energy Quantity and Type. CRS shall provide [REDACTED] with Firm, Full Requirements Energy and Capacity up to [REDACTED] Maximum Demand ("Quantity"). If during the Term of this Agreement [REDACTED] as additional load or accounts greater than [REDACTED] then such new load or account is not included within the terms of this Agreement and CRS shall have no obligation to provide Energy and Capacity [REDACTED] above the Quantity set forth herein.
- b. Transmission Service and Charges. Transmission service will be provided in accordance with the open access transmission tariff of the Midwest Independent Transmission System Operator, Inc. or CG&E (or an affiliate on its behalf), whichever is applicable, as filed with the FERC and as it may be amended, from time to time, or any successor tariff.
- c. Base Contract Price. The Base Contract Price is set forth in Exhibit B.
- d. Change to Prices. As a retail sale, the power sale agreement is not subject to the jurisdiction of the FERC; nor shall either Party seek to have the FERC assert jurisdiction over the Agreement. However, to the extent that either the FERC or the Public Utilities Commission of Ohio asserts jurisdiction over the Agreement, the Parties agree that the Contract Price specified above is just and reasonable and consistent with the public interest. Neither CRS nor [REDACTED] shall seek to modify the Base Contract Price through the auspices of any regulatory body.
- e. Term. The term of the power sale agreement shall be through December 31, 2008.
- f. Credit. The power sale agreement will have terms and conditions as similar as possible to CG&E's existing unbundled tariffs. CRS will not require surety bonds, deposits or other corporate guarantees.
- g. Adjusted Base Contract Price. If CRS exercises this option, then the combined net generation cost paid to CRS and CG&E will be an amount equivalent to [REDACTED]  
In addition, there will be transmission charges to be paid to CRS as set forth in Exhibit B.

ARTICLE IV  
TERM OF AGREEMENT

- 4.1 Agreement Term and Effective Date. This Agreement shall become effective upon execution by the Parties. This Agreement shall extend from January 1, 2005 through and

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

4.2



- 4.3 After Termination. The applicable provisions of this Agreement shall continue in effect after termination thereof to the extent necessary to provide for final billing, billing adjustments and payments.

#### ARTICLE V BILLING

- 5.1 Payment. CRS shall submit the Option Payment to [REDACTED] check or wire transfer within forty-five (45) days after the end of each calendar year quarter. The payment shall be submitted to an account or address designated by [REDACTED].

#### ARTICLE VI DEFAULTS AND REMEDIES

- 6.1 Events of Default. An "Event of Default" shall mean, with respect to a Party ("Defaulting Party"), the occurrence of any of the following:
- 6.1.1 any representation or warranty made by the Defaulting Party herein shall at any time prove to be false or misleading in any respect material to this Agreement;
  - 6.1.2 the failure of the Defaulting Party to materially perform any covenant set forth in this Agreement (except to the extent constituting a separate Event of Default,) and such failure is not cured within five (5) Business Days after written notice thereof to the Defaulting Party;
  - 6.1.3 the Defaulting Party consolidates or amalgamates with, merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or

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transferee entity fails to assume all of the obligations of such Party under this Agreement;

- 6.1.4 the failure to make when due, any payment required pursuant to this Agreement if such failure is not remedied within five (5) Business Days after written notice of such failure is given by the other Party; or
- 6.1.5 the Defaulting Party (i) files a petition or otherwise commences or acquiesces in a proceeding under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition is not withdrawn or dismissed within thirty (30) days after such filing, (ii) makes an assignment or any general arrangement for the benefit of creditors, (iii) otherwise becomes bankrupt or insolvent (however evidenced), (iv) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (v) is unable to pay its debts as they fall due.
- 6.2 Remedies upon an Event of Default. Upon the occurrence (and continuation beyond the applicable cure period) of an Event of Default with respect to a Defaulting Party, the Non-Defaulting Party shall have the right to terminate this Agreement and exercise all rights and remedies available to it in law or in equity.

ARTICLE VII  
DUTY TO MITIGATE

- 7.1 Duty to Mitigate. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

ARTICLE VIII  
GOVERNING LAW - DISPUTE RESOLUTION

- 8.1 Governing Law and Jurisdiction. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of Ohio.
- 8.2 Dispute Resolution. Any claim, controversy or dispute arising out of or relating to this Agreement, or the breach thereof, shall be resolved fully and finally by binding arbitration under the Commercial Rules, but not the administration, of the American Arbitration Association, except to the extent that the Commercial Rules conflict with this provision, in which event, this Agreement shall control. This arbitration provision shall not limit the

right of either Party prior to or during any such dispute to seek, use, and employ ancillary, or preliminary or permanent rights and/or remedies, judicial or otherwise, for the purposes maintaining the status quo until such time as the arbitration award is rendered or the dispute is otherwise resolved. The arbitration shall be conducted in Cincinnati, Ohio and the laws of Ohio shall govern the construction and interpretation of this Agreement, except to provisions related to conflict of laws. Within ten (10) Business Days of service of a Demand for Arbitration, the parties may agree upon a sole arbitrator, or if a sole arbitrator cannot be agreed upon, a panel of three arbitrators shall be named. One arbitrator shall be selected by CRS and one shall be selected by [REDACTED]. A knowledgeable, disinterested and impartial arbitrator shall be selected by the two arbitrators so appointed by the parties. If the arbitrators appointed by the parties cannot agree upon the third arbitrator within ten (10) Business Days, then either Party may apply to any judge in any court of competent jurisdiction for appointment of the third arbitrator. There shall be no discovery during the arbitration other than the exchange of information that is provided to the arbitrator(s) by the Parties. The arbitrator(s) shall have the authority only to award equitable relief and compensatory damages, and shall not have the authority to award punitive damages or other non-compensatory damages. The decision of the arbitrator(s) shall be rendered within ninety (90) Business Days after the date of the selection of the arbitrator(s) or within such period as the Parties may otherwise agree. Each Party shall be responsible for the fees, expenses and costs incurred by the arbitrator appointed by each Party, and the fees, expenses and costs of the third arbitrator (or single arbitrator) shall be borne equally by the Parties. The decision of the arbitrator(s) shall be final and binding and may not be appealed. Any Party may apply to any court having jurisdiction to enforce the decision of the arbitrator(s) and to obtain a judgment thereon.

Notwithstanding the foregoing, the Parties may cancel or terminate this Agreement in accordance with its terms and conditions without being required to follow the procedures set forth in this Article.

#### ARTICLE IX MISCELLANEOUS

- 9.1 Representations and Warranties. On the Effective Date and on the date of entering into this Agreement, each Party represents and warrants to the other Party that: (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation and is qualified to conduct its business in each jurisdiction; (b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement and any other documentation relating to this Agreement; (c) the execution, delivery and performance of this Agreement and any other documentation relating to this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or similar provision applicable to it; (d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in

accordance with its terms; (e) there are no bankruptcy proceedings pending or being contemplated by it or, to its knowledge, threatened against it; (f) there is not pending or, to its knowledge, threatened against it or any of its affiliates any legal proceedings that could materially adversely affect its ability to perform its obligation under this Agreement or any other document relating to this Agreement; (g) no Event of Default or event which, with the giving of notice or lapse of time, or both, would constitute an Event of Default with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement or any other document relating to this Agreement or any Transaction; and (h) it is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether such Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, and is capable of assessing the merits of and understanding and understands and accepts, the terms, conditions and risks of this Agreement.

- 9.2 Assignment. This Agreement shall be assignable by CRS without [REDACTED] consent provided such assignment is to any other direct or indirect subsidiary of Cinergy Corp. provided that such direct or indirect subsidiary has an equivalent or higher credit rating than CRS. Any other assignment by either Party of this Agreement or any rights or obligation hereunder shall be made only with the written consent of the other Party, which consent shall not be unreasonably withheld.
- 9.3 Notices. All notices, requests, statements or payments shall be made as specified below. Notices required to be in writing shall be delivered by letter, facsimile or other documentary form. Notice by regular mail shall be deemed to have been received three (3) Business Days after it has been sent. Notice by facsimile or hand delivery shall be deemed to have been received by the close of the Business Day on which it was transmitted or hand delivered (unless transmitted or hand delivered after close of normal business hours, in which case it shall be deemed to have been received at the close of the next Business Day). Notice by overnight or courier shall be deemed to have been received two (2) Business Days after it has been sent. A Party may change its addresses by providing notice of the same in accordance with this Section 9.3.

**To CRS:**

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

Phone - 513-287-2633  
Fax - 513-287-1902

[REDACTED]  
David F. Boehm, Esq.

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Michael L. Kurtz, Esq.  
Boehm, Kurtz & Lowry  
36 E. Seventh Street, Suite 1510  
Cincinnati, Ohio 45202  
Ph: 513.421.2255 Fax: 513.421.2764

- 9.4 General. This Agreement constitutes the entire agreement between the Parties relating to the subject matter contemplated by this Agreement. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. No amendment or modification to this Agreement shall be enforceable unless set forth in writing and executed by both Parties. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). No waiver by a Party of any default by the other Party shall be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change will not otherwise affect the remaining lawful obligations that arise under this Agreement. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights contained herein shall survive the termination or expiration of this Agreement for three (3) years.
- 9.5 Confidentiality. Neither Party shall disclose the terms or conditions of this Agreement to a third party (other than the Party's employees, Affiliates, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or in connection with any court or regulatory proceeding applicable to such Party; provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.
- 9.6 Counterparts. This Agreement may be separately executed in counterparts each of which when so executed shall be deemed to constitute one and the same Agreement.
- 9.7 This Agreement supersedes and replaces the agreement between CRS and [REDACTED] dated November 22, 2004. During the term of this Agreement, it supersedes and replaces any other agreements between the Parties or their affiliates related to PUCO Case No. 99-1658-EL-ETP. Upon the termination of this Agreement, any other settlement agreements between the Parties or their affiliates related to PUCO Case No. 99-1658-EL-ETP shall be in full force and effect according to their original terms.

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The Parties have caused this Agreement to be executed by their duly authorized representatives in multiple counterparts as of the Effective Date.

CINERGY RETAIL SALES, LLC

By: 

Title: VP & General Counsel

Date: MAY 2, 2005

  
Date: 03/21/05

FORM APPROVED  
  
ATTORNEY

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

The CRS option payment made quarterly for the period January 1, 2005 through December 31, 2008 or the date upon which the option is exercised whichever comes first, will be equivalent to the following calculation:

The actual amount paid by [REDACTED] The Cincinnati Gas and Electric Company during the applicable calendar quarter under its [REDACTED]

Less the following amount:

Tariff Schedule	Demand Charge (\$ per kW)			Energy Charge (\$ per kWh)		
	First Step	Second Step	Additional	First Step	Second Step	Additional
DM <sup>1</sup>	[REDACTED]					
DP	[REDACTED]					
DS	[REDACTED]					
TS	[REDACTED]					

<sup>1</sup> DM only shows summer seasonal rates

Plus [REDACTED]

Plus [REDACTED]



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TRADE SECRET**EXHIBIT B:****Customer Group: [REDACTED]  
CRS Generation Rates for Former Rate DP Standard Service Customers****Net Monthly Generation And Transmission Bill Will Be The Following Plus [REDACTED]**

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

**Generation Charges****(a) Demand Charge**

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

Additional kilowatts ..... [REDACTED]

**(b) Energy Charge**

Billing Demand times 300 ..... [REDACTED]

Additional kilowatt-hours ..... [REDACTED]

**(c) Fuel Charge**

The Fuel Charge shall be equal to the [REDACTED]

**Transmission Charges**

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CG&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

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

CONFIDENTIAL PROPRIETARY  
TRADE SECRET**EXHIBIT B:**

Customer Group: [REDACTED]

**CRS Generation and Transmission Rates for Former Rate TS Standard Service Customers****Net Monthly Bill**

Computed in accordance with the following charges. (Kilovolt amperes are abbreviated as kVA and kilowatt-hours are abbreviated as kWh):

**Generation Charges****(b) Demand Charge**

First 50,000 KVA ..... [REDACTED]

Additional KVA ..... [REDACTED]

**(b) Energy Charge**

Billing Demand times 300 ..... [REDACTED]

Additional kilowatt-hours ..... [REDACTED]

**(d) Fuel Charge**

The Fuel Charge shall be equal to the [REDACTED]

**Transmission Charges**

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CG&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

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

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**Exhibit C:**

Customer Group: [REDACTED]  
Customer Account List

This agreement pertains to the following [REDACTED] accounts:

[REDACTED]

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**OPTION AGREEMENT**  
**BY AND BETWEEN**  
**CINERGY RETAIL SALES, LLC**

**AND**

[REDACTED]

[REDACTED]

This Option Agreement (the "Agreement") is entered into as of this 31 day of December 2004 (the "Effective Date") by and between Cinergy Retail Sales, LLC ("CRS") a Delaware limited liability company, and [REDACTED] (each individually a "Party" or collectively the "Parties").

**RECITALS**

**WHEREAS,** [REDACTED] and purchases electric power service from The Cincinnati Gas & Electric Company (CG&E) on metered accounts listed on Exhibit C.

**WHEREAS,** CRS has been certified by the Public Utilities Commission of Ohio as a Certified Retail Electric Supplier ("CRES") and has the authority to engage in the sale of electrical power at retail;

**WHEREAS,** CRS and [REDACTED] desire to establish terms and conditions for this option.

**NOW, THEREFORE,** for and in consideration of the mutual covenants contained herein, the Parties agree as follows:

**ARTICLE I**  
**DEFINITIONS**

The following definitions and any terms defined in this Agreement shall apply hereunder.

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Document Code

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"Affiliate" means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, "control" means the direct or indirect ownership of ten (10) percent or more.

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

"Business Day" means a day on which Federal Reserve member banks in Ohio are open for business; and a Business Day shall open at 8:00 a.m. and close at 5:00 p.m. eastern prevailing time, unless otherwise agreed to by the Parties in writing.

"Maximum Demand" means [REDACTED] combined maximum annual demands for all of [REDACTED] accounts listed on Exhibit C with Cincinnati Gas & Electric ("CG&E") for the twelve months ending December 31, 2004.

"Capacity" has the meaning set forth in any Transmission Provider's tariff or MISO's transmission tariff, as amended from time to time, or as defined in any transmission tariff of a successor to MISO.

"Defaulting Party" shall have the meaning specified in Section 6.1.

"Energy" means electric energy of the character commonly known as three-phase, sixty hertz electric energy that is delivered at the nominal voltage of the Delivery Point, expressed in megawatt hours (MWh).

"Event of Default" shall have the meaning specified in Section 6.1.

"FERC" means the Federal Energy Regulatory Commission or any successor agency thereto.

"Firm" means that the only excuse for the failure to deliver Energy by CRS or the failure to receive Energy by [REDACTED] Force Majeure or the other Party's failure to perform.

"Full Requirements Energy" means, except as provided herein, that [REDACTED] shall purchase all of its retail Energy requirements for its facility from CRS and that [REDACTED] shall not resell any of the Energy provided hereunder to any third party.

"Interest Rate" means, for any date the lesser of (a) two (2) percent over the per annum rate of interest equal to the prime lending rate ("Prime Rate") as may be published from time to time in the Federal Reserve Statistical Release H. 15; or (b) the maximum lawful interest rate.

"MW" means megawatt.

"Term" shall have the meaning specified in Article 4.1.

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"Transmission Providers" means the entity or entities transmitting or transporting the Energy on behalf of CRS to the Delivery Point.

## ARTICLE II OPTION

- 2.1 [REDACTED] currently purchases its generation electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs or will provide notice by December 30, 2004 that it will purchase generation electric service from CG&E starting no later than December 31, 2005 in accordance with applicable CG&E tariff requirements. [REDACTED] hereby grants to CRS the exclusive option, upon thirty (30) days notice, to provide generation electric service for all of [REDACTED] accounts and load set forth in Exhibit C, including any increases in accordance with Section 3.1, as of December 31, 2004 ("Option"). In the event that an Electric Choice Insufficient Return Notice Fee is incurred by [REDACTED] in switching back to CG&E standard tariffed service prior to January 31, 2005, an amount equivalent to said fee will be paid to [REDACTED] CRS.
- 2.2 CRS shall have the right to exercise this Option at any time during the Term of this Agreement.
- 2.3 In exchange for [REDACTED] granting CRS this option, CRS agrees to pay [REDACTED] each calendar year quarter of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment"). The Parties agree that if [REDACTED] defaults or is delinquent, after any applicable cure period, in any of its payments to any Cinergy affiliated company for any service provided to [REDACTED] then CRS has the right to offset the Option Payment due hereunder with any amounts that are owed by [REDACTED] to the Cinergy affiliated company.
- 2.4 [REDACTED]
- 2.5 If CRS exercises its Option, the Parties shall enter into a power sale agreement, including the terms set forth in Article III.

## ARTICLE III CRS POWER CONTRACT TERMS

- 3.1 In the event CRS exercises its option, a power sale agreement between CRS and [REDACTED] will be negotiated. The power sale agreement shall include generally accepted terms and

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conditions relating to the sale of competitive retail electric generation service, including, among others, the following terms:

- a. Energy Quantity and Type. CRS shall provide [REDACTED] with Firm, Full Requirements Energy and Capacity up to [REDACTED] than [REDACTED] maximum Demand ("Quantity"). If during the Term of this Agreement [REDACTED] as additional load or accounts [REDACTED], then such new load or account is not included within the terms of this Agreement and CRS shall have no obligation to provide Energy and Capacity to [REDACTED] above the Quantity set forth herein.
- b. Transmission Service and Charges. Transmission service will be provided in accordance with the open access transmission tariff of the Midwest Independent Transmission System Operator, Inc. or CG&E (or an affiliate on its behalf), whichever is applicable, as filed with the FERC and as it may be amended, from time to time, or any successor tariff.
- c. Base Contract Price. The Base Contract Price is set forth in Exhibit B.
- d. Change to Prices. As a retail sale, the power sale agreement is not subject to the jurisdiction of the FERC; nor shall either Party seek to have the FERC assert jurisdiction over the Agreement. However, to the extent that either the FERC or the Public Utilities Commission of Ohio asserts jurisdiction over the Agreement, the Parties agree that the Contract Price specified above is just and reasonable and consistent with the public interest. Neither CRS nor [REDACTED] shall seek to modify the Base Contract Price through the auspices of any regulatory body.
- e. Term. The term of the power sale agreement shall be through December 31, 2008.
- f. Credit. The power sale agreement will have terms and conditions as similar as possible to CG&E's existing unbundled tariffs. CRS will not require surety bonds, deposits or other corporate guarantees.
- g. Adjusted Base Contract Price. If CRS exercises this option, then the combined net generation cost paid to CRS and CG&E will be an amount equivalent to [REDACTED]  
In addition, there will be transmission charges to be paid to CRS as set forth in Exhibit B.

**ARTICLE IV  
TERM OF AGREEMENT**

4.1 Agreement Term and Effective Date. This Agreement shall become effective upon execution by the Parties. This Agreement shall extend from January 1, 2005 through and including December 31, 2008, unless terminated earlier in accordance with the terms of this Agreement ("Term").

4.2



4.3 After Termination. The applicable provisions of this Agreement shall continue in effect after termination thereof to the extent necessary to provide for final billing, billing adjustments and payments.

**ARTICLE V  
BILLING**

5.1 Payment. CRS shall submit the Option Payment to [REDACTED] by check or wire transfer within forty-five (45) days after the end of each calendar year quarter. The payment shall be submitted to an account or address designated by [REDACTED].

**ARTICLE VI  
DEFAULTS AND REMEDIES**

6.1 Events of Default. An "Event of Default" shall mean, with respect to a Party ("Defaulting Party"), the occurrence of any of the following:

- 6.1.1 any representation or warranty made by the Defaulting Party herein shall at any time prove to be false or misleading in any respect material to this Agreement;
- 6.1.2 the failure of the Defaulting Party to materially perform any covenant set forth in this Agreement (except to the extent constituting a separate Event of Default,) and such failure is not cured within five (5) Business Days after written notice



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thereof to the Defaulting Party;

- 6.1.3 the Defaulting Party consolidates or amalgamates with, merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all of the obligations of such Party under this Agreement;
  - 6.1.4 the failure to make when due, any payment required pursuant to this Agreement if such failure is not remedied within five (5) Business Days after written notice of such failure is given by the other Party; or
  - 6.1.5 the Defaulting Party (i) files a petition or otherwise commences or acquiesces in a proceeding under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition is not withdrawn or dismissed within thirty (30) days after such filing, (ii) makes an assignment or any general arrangement for the benefit of creditors, (iii) otherwise becomes bankrupt or insolvent (however evidenced), (iv) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (v) is unable to pay its debts as they fall due.
- 6.2 Remedies upon an Event of Default. Upon the occurrence (and continuation beyond the applicable cure period) of an Event of Default with respect to a Defaulting Party, the Non-Defaulting Party shall have the right to terminate this Agreement and exercise all rights and remedies available to it in law or in equity.

## ARTICLE VII DUTY TO MITIGATE

- 7.1 Duty to Mitigate. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

## ARTICLE VIII GOVERNING LAW - DISPUTE RESOLUTION

- 8.1 Governing Law and Jurisdiction. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of Ohio.

- 8.2 Dispute Resolution. Any claim, controversy or dispute arising out of or relating to this Agreement, or the breach thereof, shall be resolved fully and finally by binding arbitration under the Commercial Rules, but not the administration, of the American Arbitration Association, except to the extent that the Commercial Rules conflict with this provision, in which event, this Agreement shall control. This arbitration provision shall not limit the right of either Party prior to or during any such dispute to seek, use, and employ ancillary, or preliminary or permanent rights and/or remedies, judicial or otherwise, for the purposes maintaining the status quo until such time as the arbitration award is rendered or the dispute is otherwise resolved. The arbitration shall be conducted in Cincinnati, Ohio and the laws of Ohio shall govern the construction and interpretation of this Agreement, except to provisions related to conflict of laws. Within ten (10) Business Days of service of a Demand for Arbitration, the parties may agree upon a sole arbitrator, or if a sole arbitrator cannot be agreed upon, a panel of three arbitrators shall be named. One arbitrator shall be selected by CRS and one shall be selected by [REDACTED]. A knowledgeable, disinterested and impartial arbitrator shall be selected by the two arbitrators so appointed by the parties. If the arbitrators appointed by the parties cannot agree upon the third arbitrator within ten (10) Business Days, then either Party may apply to any judge in any court of competent jurisdiction for appointment of the third arbitrator. There shall be no discovery during the arbitration other than the exchange of information that is provided to the arbitrator(s) by the Parties. The arbitrator(s) shall have the authority only to award equitable relief and compensatory damages, and shall not have the authority to award punitive damages or other non-compensatory damages. The decision of the arbitrator(s) shall be rendered within ninety (90) Business Days after the date of the selection of the arbitrator(s) or within such period as the Parties may otherwise agree. Each Party shall be responsible for the fees, expenses and costs incurred by the arbitrator appointed by each Party, and the fees, expenses and costs of the third arbitrator (or single arbitrator) shall be borne equally by the Parties. The decision of the arbitrator(s) shall be final and binding and may not be appealed. Any Party may apply to any court having jurisdiction to enforce the decision of the arbitrator(s) and to obtain a judgment thereon.

Notwithstanding the foregoing, the Parties may cancel or terminate this Agreement in accordance with its terms and conditions without being required to follow the procedures set forth in this Article.

#### ARTICLE IX MISCELLANEOUS

- 9.1 Representations and Warranties. On the Effective Date and on the date of entering into this Agreement, each Party represents and warrants to the other Party that: (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation and is qualified to conduct its business in each jurisdiction; (b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement and any other documentation relating to this Agreement; (c) the execution, delivery and performance of this Agreement and any other documentation relating to this

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Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or similar provision applicable to it; (d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; (e) there are no bankruptcy proceedings pending or being contemplated by it or, to its knowledge, threatened against it; (f) there is not pending or, to its knowledge, threatened against it or any of its affiliates any legal proceedings that could materially adversely affect its ability to perform its obligation under this Agreement or any other document relating to this Agreement; (g) no Event of Default or event which, with the giving of notice or lapse of time, or both, would constitute an Event of Default with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement or any other document relating to this Agreement or any Transaction; and (h) it is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether such Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, and is capable of assessing the merits of and understanding and understands and accepts, the terms, conditions and risks of this Agreement.

9.2 Assignment. This Agreement shall be assignable by CRS without the [REDACTED] consent provided such assignment is to any other direct or indirect subsidiary of Cinergy Corp. provided that such direct or indirect subsidiary has an equivalent or higher credit rating than CRS. Any other assignment by either Party of this Agreement or any rights or obligation hereunder shall be made only with the written consent of the other Party, which consent shall not be unreasonably withheld.

9.3 Notices. All notices, requests, statements or payments shall be made as specified below. Notices required to be in writing shall be delivered by letter, facsimile or other documentary form. Notice by regular mail shall be deemed to have been received three (3) Business Days after it has been sent. Notice by facsimile or hand delivery shall be deemed to have been received by the close of the Business Day on which it was transmitted or hand delivered (unless transmitted or hand delivered after close of normal business hours, in which case it shall be deemed to have been received at the close of the next Business Day). Notice by overnight or courier shall be deemed to have been received two (2) Business Days after it has been sent. A Party may change its addresses by providing notice of the same in accordance with this Section 9.3.

To CRS:

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

Phone - 513-287-2633  
Fax - 513-287-1902

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To

David F. Boehm, Esq.  
Michael L. Kurtz, Esq.  
Boehm, Kurtz & Lowry  
36 E. Seventh Street, Suite 1510  
Cincinnati, Ohio 45202  
Ph: 513.421.2255 Fax: 513.421.2764

AND

[REDACTED]

9.4 General. This Agreement constitutes the entire agreement between the Parties relating to the subject matter contemplated by this Agreement. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. No amendment or modification to this Agreement shall be enforceable unless set forth in writing and executed by both Parties. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). No waiver by a Party of any default by the other Party shall be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change will not otherwise affect the remaining lawful obligations that arise under this Agreement. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights contained herein shall survive the termination or expiration of this Agreement for three (3) years.

9.5 Confidentiality. Neither Party shall disclose the terms or conditions of this Agreement to a third party (other than the Party's employees, Affiliates, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or in connection with any court or regulatory proceeding applicable to such Party; provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or

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limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.

9.6 Counterparts. This Agreement may be separately executed in counterparts each of which when so executed shall be deemed to constitute one and the same Agreement.

9.7 This Agreement supersedes and replaces the agreement between CRS and [REDACTED] dated November 22, 2004. During the term of this Agreement, it supersedes and replaces any other agreements between the Parties or their affiliates related to PUCO Case No. 99-1658-EL-ETP. Upon the termination of this Agreement, any other settlement agreements between the Parties or their affiliates related to PUCO Case No. 99-1658-EL-ETP shall be in full force and effect according to their original terms.

The Parties have caused this Agreement to be executed by their duly authorized representatives in multiple counterparts as of the Effective Date.

CINERGY RETAIL SALES, LLC

By: [Signature]Title: V. P. General CounselDate: May 2, 2005Date: 1/20/05

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

The CRS option payment made quarterly for the period January 1, 2005 through December 31, 2008 or the date upon which the option is exercised whichever comes first, will be equivalent to the following calculation:

The actual amount paid by [REDACTED] The Cincinnati Gas and Electric Company during the applicable calendar quarter under its [REDACTED]

Less the following amount:

Tariff Schedule	Demand Charge (\$ per kW)			Energy Charge (\$ per kWh)		
	First Step	Second Step	Additional	First Step	Second Step	Additional
DM <sup>1</sup>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DP	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
DS	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
TS	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

<sup>1</sup> DM only shows summer seasonal rates

Plus

Plus

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Net Monthly Generation And Transmission Bill Will Be The Following [REDACTED]  
Computed in accordance with the following charges. (Kilowatt of demand is abbreviated as kW and kilowatt-hours are abbreviated as kWh):

**Generation Charges****(a) Summer**

First 2,800 kilowatt-hours ..... [REDACTED]

Next 3,200 kilowatt-hours ..... [REDACTED]

Additional kilowatt-hours ..... [REDACTED]

**(b) Winter**

First 2,800 kilowatt-hours ..... [REDACTED]

Next 3,200 kilowatt-hours ..... [REDACTED]

Additional kilowatt-hours ..... [REDACTED]

**(c) Fuel Charge**

The Fuel Charge shall be equal to the [REDACTED]

**Transmission Charges**

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CC&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

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

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**CRS Generation and Transmission Rates for Former Rate DS Standard Service Customers****Net Monthly Bill**

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

**Generation Charges****(a) Demand Charge**

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

**(b) Energy Charge**

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

**(d) Fuel Charge**

The Fuel Charge shall be equal to the [REDACTED]  
[REDACTED]

**Transmission Charges**

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CG&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

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



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Computed in accordance with the following charges. (Kilovolt amperes are abbreviated as kVA and kilowatt-hours are abbreviated as kWh):

Real Time Pricing Program Charge ..... [REDACTED]

Load Management Rider Customer Charge..... [REDACTED]

**Generation Charges****(b) Demand Charge**First 50,000 kVA ..... [REDACTED]  
Additional kVA ..... [REDACTED]**(b) Energy Charge**Billing Demand times 300 ..... [REDACTED]  
Additional kilowatt-hours ..... [REDACTED]Real Time Pricing Incremental Cost ..... Calculated Monthly  
(Based on CBL and BDH in CG&E RTP Agreement)

Energy Efficiency Revolving Loan Program ..... [REDACTED]

**Universal Service Fund Charge**Billing Demand times 300 ..... [REDACTED]  
Additional kilowatt-hours ..... [REDACTED]**Transmission Charges**

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CG&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

- (7) Network Transmission Services
- (8) MISO Schedule Charges
- (9) Net Congestion Charges

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Computed in accordance with the following charges. (Kilovolt amperes are abbreviated as kVA and kilowatt-hours are abbreviated as kWh):

**Generation Charges****(c) Demand Charge**

First 50,000 KVA ..... [REDACTED]  
Additional KVA ..... [REDACTED]

**(b) Energy Charge**

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

**(c) Fuel Charge**

The Fuel Charge shall be equal to the [REDACTED]  
[REDACTED]

**Transmission Charges**

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CG&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

- (10) Network Transmission Services
- (11) MISO Schedule Charges
- (12) Net Congestion Charges

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**Exhibit C:**

Customer Group: [REDACTED]  
Customer Account List

This agreement pertains to the following [REDACTED] accounts:

[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]

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**Exhibit C:**

Customer Group: [REDACTED]

Customer Account List

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

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OPTION AGREEMENT

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BY AND BETWEEN

CINERGY RETAIL SALES, LLC

AND

MARATHON ASHLAND PETROLEUM LLC

This Option Agreement (the "Agreement") is entered into as of this twentieth (20<sup>th</sup>) day of December 2004 (the "Effective Date") by and between Cinergy Retail Sales, LLC ("CRS") a Delaware limited liability company, and Marathon Ashland Petroleum LLC ("MAP"), a Delaware limited liability company (each individually a "Party" or collectively the "Parties").

RECITALS

WHEREAS, MAP's facilities are situated throughout southwestern Ohio (reference Exhibit C) and are located within the retail delivery service territory of The Cincinnati Gas & Electric Company ("CG&E").

WHEREAS, CRS has been certified by the Public Utilities Commission of Ohio as a Certified Retail Electric Supplier ("CRES") and has the authority to engage in the sale of electrical power at retail;

WHEREAS, MAP desires to grant an option to CRS to provide electric service and CRS desires to provide electric service pursuant to the terms outlined herein;

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein, the Parties agree as follows:

ARTICLE I  
DEFINITIONS

The following definitions and any terms defined in this Agreement shall apply hereunder.

"Affiliate" means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, "control" means the direct or indirect ownership of ten (10) percent or more.

"Business Day" means a day on which Federal Reserve member banks in Ohio are open for business; and a Business Day shall open at 8:00 a.m. and close at 5:00 p.m. eastern prevailing time, unless otherwise agreed to by the Parties in writing.

(C17158:)

Cinergy Corporate Records

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Document Code

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"Capacity" has the meaning set forth in any Transmission Provider's tariff or MISO's transmission tariff, as amended from time to time, or as defined in any transmission tariff of a successor to MISO.

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

"Defaulting Party" shall have the meaning specified in Section 6.1.

"Energy" means electric energy of the character commonly known as three-phase, sixty hertz electric energy that is delivered at the nominal voltage of the Delivery Point, expressed in megawatt hours (MWh).

"Event of Default" shall have the meaning specified in Section 6.1.

"FERC" means the Federal Energy Regulatory Commission or any successor agency thereto.

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

"Full Requirements Energy" means, except as provided herein, that MAP shall purchase all of its retail Energy requirements for its facility from CRS and that MAP shall not resell any of the Energy provided hereunder to any third party.

"Interest Rate" means, for any date the lesser of (a) two (2) percent over the per annum rate of interest equal to the prime lending rate ("Prime Rate") as may be published from time to time in the Federal Reserve Statistical Release H. 15; or (b) the maximum lawful interest rate.

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

"MW" means megawatt.

"Term" shall have the meaning specified in Article 4.1.

"Transmission Providers" means the entity or entities transmitting or transporting the Energy on behalf of CRS or MAP to the Delivery Point.

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TRADE SECRETARTICLE II  
OPTION

- 2.1 MAP currently receives its electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs rates, or will provide NOTICE by December 30, 2004 that it will take electric service from CG&E in accordance with applicable CG&E tariff requirements. MAP hereby grants to CRS the exclusive option, upon thirty (30) days notice, to serve all of MAP's accounts and load set forth in Exhibit C, including any increases in accordance with Section 3.1, as of December 31, 2004 ("Option").
- 2.2 CRS shall have the right to exercise this Option at any time during the Term of this Agreement.
- 2.3 In exchange for MAP granting CRS this option, CRS agrees to pay MAP each calendar month of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment"). CRS shall work in good faith with MAP to establish procedures so that the Option Payment is properly distributed to each applicable MAP account.
- 2.4 Because this is an exclusive Option, in the event MAP leaves its current electric service and receives electric service from any third party that is not CRS or an Affiliate of CRS, then CRS shall cease all Option Payments and this Agreement shall terminate and all obligations of the Parties hereunder shall terminate.
- 2.5 If CRS exercises its Option, the Parties shall enter into a power sale agreement, including the terms set forth in Article III.

ARTICLE III  
CRS POWER CONTRACT TERMS

- 3.1 In the event CRS exercises its option, the power sale agreement between CRS and MAP shall include, among others, the following terms:
- a. Energy Quantity and Type. CRS shall provide MAP with Firm, Full Requirements Energy and Capacity up to 3 MWs greater than MAP's Maximum Demand for all of its accounts as of January 1, 2005 ("Quantity"). If during the Term of the Agreement, MAP has additional load or accounts greater than 3MW, then such new load or account is not included within the terms of the Agreement and CRS shall have no obligation to provide Energy and Capacity to MAP above the Quantity set forth herein.
  - b. Transmission Service and Charges. Transmission service and charges will be provided in accordance with the open access transmission tariff of the Midwest Independent Transmission System Operator, Inc. or CG&E (or an affiliate on its behalf), whichever is applicable, as filed with the FERC and as it may be amended, from time to time, or any successor tariff. Unless otherwise agreed

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

- c. Contract Price. The Contract Price is set forth in Exhibits A and B.
- d. Change to Prices. As a retail sale, the power sale agreement is not subject to the jurisdiction of the FERC; nor shall either Party seek to have the FERC assert jurisdiction over the Agreement. However, to the extent that either the FERC or the Public Utilities Commission of Ohio asserts jurisdiction over the Agreement, the Parties agree that the Contract Price specified above is just and reasonable and consistent with the public interest. Neither CRS nor MAP shall seek to modify the Contract Price through the auspices of any regulatory body.
- e. Term. The term of the power sale agreement shall be through December 31, 2008 provided that MAP may terminate this Agreement in its entirety, including any contract with CRS, upon twelve (12) months written notice provided that such termination shall be effective for all MAP accounts and for this entire agreement.

#### ARTICLE IV TERM OF AGREEMENT

- 4.1 Agreement Term and Effective Date. This Agreement shall become effective upon execution by the Parties. This Agreement shall extend from January 1, 2005 through and including December 31, 2008, unless terminated earlier in accordance with the terms of this Agreement ("Term").
- 4.2 After Termination. The applicable provisions of this Agreement shall continue in effect after termination thereof to the extent necessary to provide for final billing, billing adjustments and payments.

#### ARTICLE V BILLING

- 5.1 Payment. CRS shall submit the Option Payment to MAP within fifteen (15) days after the end of each calendar month. The payment shall be submitted to the following account or address:

Mailing address for facilities under organization code SSA  
Speedway SuperAmerica LLC  
P.O. Box 1510  
Springfield, OH 45501



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Attn: Kevin Majewski - Room B1222

Mailing address for facilities under organization code TTM

Marathon Ashland Petroleum LLC  
539 South Main Street  
Findlay, OH 45840  
Attn: Everett Baldrige - Room 477M

Mailing address for facilities under organization code PTC

Pilot Travel Centers LLC  
P.O. Box 10146  
Knoxville, TN 37939  
Attn: Jack Stalker

**ARTICLE VI  
DEFAULTS AND REMEDIES**

- 6.1 Events of Default. An "Event of Default" shall mean, with respect to a Party ("Defaulting Party"), the occurrence of any of the following:
- 6.1.1 any representation or warranty made by the Defaulting Party herein shall at any time prove to be false or misleading in any respect material to this Agreement;
  - 6.1.2 the failure of the Defaulting Party to perform any covenant set forth in this Agreement (except to the extent constituting a separate Event of Default,) and such failure is not cured within five (5) Business Days after written notice thereof to the Defaulting Party;
  - 6.1.3 the Defaulting Party consolidates or amalgamates with, merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all of the obligations of such Party under this Agreement;
  - 6.1.4 the failure to make when due, any payment required pursuant to this Agreement if such failure is not remedied within five (5) Business Days after written notice of such failure is given by the other Party; or
  - 6.1.5 the Defaulting Party (i) files a petition or otherwise commences or acquiesces in a proceeding under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition is not withdrawn or dismissed within thirty (30) days after such filing, (ii) makes an assignment or any general arrangement for the benefit of creditors, (iii) otherwise becomes bankrupt or insolvent (however evidenced), (iv) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any

substantial portion of its property or assets, or (v) is unable to pay its debts as they fall due.

- 6.2 Remedies upon an Event of Default. Upon the occurrence (and continuation beyond the applicable cure period) of an Event of Default with respect to a Defaulting Party, the Non-Defaulting Party shall have the right to terminate this Agreement and exercise all rights and remedies available to it in law or in equity.
- 6.3 Other Termination Events. If performance by either Party under this Agreement becomes subject to regulation of any kind whatsoever under any law, rule, regulation, order or similar provision to a greater or different extent than that existing on the Effective Date and such regulation either renders this Agreement illegal or unenforceable or contrary to regulatory authority, then such Party shall have the right upon thirty (30) days notice to terminate this Agreement without further liability. FERC's determination that CG&E is prohibited from selling wholesale power to CRS pursuant to CG&E's tariff shall allow CRS to terminate this Agreement in its sole discretion with thirty (30) days written notice and without further liability.

#### ARTICLE VII LIMITATIONS; DUTY TO MITIGATE

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

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

7.2 Limitation of Remedies, Liability and Damages. THE PARTIES CONFIRM THAT

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

- 7.3 Duty to Mitigate. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

#### ARTICLE VIII GOVERNING LAW - DISPUTE RESOLUTION

8.1 Governing Law and Jurisdiction. THIS AGREEMENT AND THE RIGHTS AND DUTIES OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED, ENFORCED AND PERFORMED IN ACCORDANCE WITH THE LAWS OF THE STATE OF OHIO AND SHALL BE BROUGHT IN THE STATE AND FEDERAL COURTS LOCATED IN HAMILTON COUNTY OHIO.

- 8.2 Dispute Resolution. Any claim, controversy or dispute arising out of or relating to this Agreement, or the breach thereof, shall be resolved fully and finally by binding arbitration under the Commercial Rules, but not the administration, of the American Arbitration

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Association, except to the extent that the Commercial Rules conflict with this provision, in which event, this Agreement shall control. This arbitration provision shall not limit the right of either Party prior to or during any such dispute to seek, use, and employ ancillary, or preliminary or permanent rights and/or remedies, judicial or otherwise, for the purposes maintaining the status quo until such time as the arbitration award is rendered of the dispute is otherwise resolved. The arbitration shall be conducted in Cincinnati, Ohio and the laws of Ohio shall govern the construction and interpretation of this Agreement, except to provisions related to conflict of laws. Within ten (10) Business Days of service of a Demand for Arbitration, the parties may agree upon a sole arbitrator, or if a sole arbitrator cannot be agreed upon, a panel of three arbitrators shall be named. One arbitrator shall be selected by CRS and one shall be selected by Buyer. A knowledgeable, disinterested and impartial arbitrator shall be selected by the two arbitrators so appointed by the parties. If the arbitrators appointed by the parties cannot agree upon the third arbitrator within ten (10) Business Days, then either Party may apply to any judge in any court of competent jurisdiction for appointment of the third arbitrator. There shall be no discovery during the arbitration other than the exchange of information that is provided to the arbitrator(s) by the Parties. The arbitrator(s) shall have the authority only to award equitable relief and compensatory damages, and shall not have the authority to award punitive damages or other non-compensatory damages. The decision of the arbitrator(s) shall be rendered within sixty (60) Business Days after the date of the selection of the arbitrator(s) or within such period as the Parties may otherwise agree. Each Party shall be responsible for the fees, expenses and costs incurred by the arbitrator appointed by each Party, and the fees, expenses and costs of the third arbitrator (or single arbitrator) shall be borne equally by the Parties. The decision of the arbitrator(s) shall be final and binding and may not be appealed. Any Party may apply to any court having jurisdiction to enforce the decision of the arbitrator(s) and to obtain a judgment thereon.

Notwithstanding the foregoing, the Parties may cancel or terminate this Agreement in accordance with its terms and conditions without being required to follow the procedures set forth in this Article.

#### ARTICLE IX MISCELLANEOUS

- 9.1 Representations and Warranties. On the Effective Date and on the date of entering into this Agreement, each Party represents and warrants to the other Party that: (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation and is qualified to conduct its business in each jurisdiction; (b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement and any other documentation relating to this Agreement; (c) the execution, delivery and performance of this Agreement and any other documentation relating to this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or similar provision applicable to it;

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(d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; (e) there are no bankruptcy proceedings pending or being contemplated by it or, to its knowledge, threatened against it; (f) there is not pending or, to its knowledge, threatened against it or any of its affiliates any legal proceedings that could materially adversely affect its ability to perform its obligation under this Agreement or any other document relating to this Agreement; (g) no Event of Default or event which, with the giving of notice or lapse of time, or both, would constitute an Event of Default with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement or any other document relating to this Agreement or any Transaction; and (h) it is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether such Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, and is capable of assessing the merits of and understanding and understands and accepts, the terms, conditions and risks of this Agreement.

- 9.2 Assignment. This Agreement shall be assignable by CRS without MAP's consent provided such assignment is to any other direct or indirect subsidiary of Cinergy Corp. and provided that such direct or indirect subsidiary has an equivalent or higher credit rating than CRS. This Agreement shall be assignable by MAP without CRS' consent provided such assignment is to any other direct or indirect subsidiary of MAP and provided that such direct or indirect subsidiary has an equivalent or higher credit rating than MAP. Any other assignment by either Party of this Agreement or any rights or obligation hereunder shall be made only with the written consent of the other Party, which consent shall not be unreasonably withheld.
- 9.3 Notices. All notices, requests, statements or payments shall be made as specified below. Notices required to be in writing shall be delivered by letter, facsimile or other documentary form. Notice by regular mail shall be deemed to have been received three (3) Business Days after it has been sent. Notice by facsimile or hand delivery shall be deemed to have been received by the close of the Business Day on which it was transmitted or hand delivered (unless transmitted or hand delivered after close of normal business hours, in which case it shall be deemed to have been received at the close of the next Business Day). Notice by overnight or courier shall be deemed to have been received two (2) Business Days after it has been sent. A Party may change its addresses by providing notice of the same in accordance with this Section 9.3.

To CRS:

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

Phone -513-287-2633  
Fax-513-287-1902

**To MAP:**

James A. Ebert  
539 South Main Street  
Findlay, OH 45840  
Phone: 419-421-3433  
Fax: 419-421-3809

- 9.4 General. This Agreement constitutes the entire agreement between the Parties relating to the subject matter contemplated by this Agreement. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. No amendment or modification to this Agreement shall be enforceable unless set forth in writing and executed by both Parties. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). No waiver by a Party of any default by the other Party shall be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change will not otherwise affect the remaining lawful obligations that arise under this Agreement. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights contained herein shall survive the termination or expiration of this Agreement for three (3) years.
- 9.5 Confidentiality. Neither Party shall disclose the terms or conditions of this Agreement to a third party (other than the Party's employees, Affiliates, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or in connection with any court or regulatory proceeding applicable to such Party; provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.
- 9.6 Counterparts. This Agreement may be separately executed in counterparts each of which when so executed shall be deemed to constitute one and the same Agreement.
- 9.7 This Agreement supercedes and replaces in its entirety the agreement between CRS and MAP dated November 8, 2004. Nothing in this Agreement shall affect the terms and conditions agreed to by Cinergy and the Industrial Energy Users-Ohio pursuant to the agreement dated May 8, 2000 related to the settlement of certain issues in PUCO Case No. 99-1658-EL-ETP.

The Parties have caused this Agreement to be executed by their duly authorized representatives in multiple counterparts as of the Effective Date.

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CINERGY RETAIL SALES, LLC

MARATHON ASHLAND PETROLEUM LLC

By: [Signature]  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

By: Mary D. Anttelfeld  
Title: Manager, Energy Supply  
Date: Dec. 20, 2004

As to clause 9.7:

CINERGY CORP.

By: [Signature]  
Title: \_\_\_\_\_  
Date: \_\_\_\_\_

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CINERGY RETAIL SALES, LLC

MARATHON ASHLAND PETROLEUM LLC

By: Jeffrey L. Dwyer  
Title: Vice President and General Counsel  
Date: January 7, 2005

By: Mary D. Dettfeld  
Title: Manager, Energy Supply  
Date: Dec. 20, 2004



As to clause 9.7:

CINERGY CORP

By: [Signature]  
Title: Vice President, Regulatory and Legislative Strategy  
Date: January 7, 2005



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**Exhibit A:**  
**Customer Group: Marathon Ashland, Inc.**  
**Quarterly Option Payment Calculation**

The CRS option payment will be equivalent to the actual amount paid to The Cincinnati Gas & Electric Company for the following billing charges under its market-based standard service offer approved by the Commission in Case No. 03-93-EL-ATA:

- Regulatory Transition Charge (RTC)
- Annually Adjusted Component of POLR Charge (AAC)
- Fuel and Purchase Power (FPP) -includes Emission Allowance Expense
- 50% of System Reliability Tracker (SRT)
- Infrastructure Maintenance Fund (IMF) Charge in excess of 4% of "little g"
- Electric Choice Insufficient Return Notice Fee charged to customers, who have given notice of their return to CG&E standard tariff service on or before 12/30/2004 and are actively taking CG&E service no later than 01/31/2005.

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CONFIDENTIAL PROPRIETARY  
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**Customer Group: Marathon Ashland, Inc****a) CRS Generation Rates for Former Rate DM Standard Service Customers****Net Monthly Bill**

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

**Generation Charges****(a) Summer**

First 2,800 kilowatt-hours .....	\$0.058562 per kWh
Next 3,200 kilowatt-hours .....	\$0.014952 per kWh
Additional kilowatt-hours .....	\$0.006520 per kWh

**(b) Winter**

First 2,800 kilowatt-hours .....	\$0.046480 per kWh
Next 3,200 kilowatt-hours .....	\$0.014969 per kWh
Additional kilowatt-hours .....	\$0.006191 per kWh

**Transmission Charges**

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CG&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

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

**Rate Stabilization Charge**

Energy Retail Sales will reimburse the customer for any Rate Stabilization Charge (RSC) actually paid by the customer.

**b) CRS Generation Rates for Former Rate DP Standard Service Customers****Net Monthly Bill**

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

**Generation Charges****(a) Demand Charge**

First 1,000 kilowatts .....	\$6.9150 per kW
Additional kilowatts .....	\$5.4550 per kW

**(b) Energy Charge**

Billing Demand times 300 .....	\$0.022048 per kWh
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Additional kilowatt-hours ..... \$0.017682 per kWh

**Transmission Charges**

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CG&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

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

**Rate Stabilization Charge**

Energy Retail Sales will reimburse the customer for any Rate Stabilization Charge (RSC) actually paid by the customer.

**c) CRS Generation Rates for former Rate DS Standard Service Customers**

**Net Monthly Bill**

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

**Generation Charges**

**(a) Demand Charge**

First 1,000 kilowatts ..... \$7.6574 per kW  
Additional kilowatts ..... \$6.0574 per kW

**(b) Energy Charge**

Billing Demand times 300 ..... \$0.019576 per kWh  
Additional kilowatt-hours ..... \$0.016266 per kWh

**Transmission Charges**

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CG&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

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

**Rate Stabilization Charge**

Energy Retail Sales will reimburse the customer for any Rate Stabilization Charge (RSC) actually paid by the customer.

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**Exhibit C:**  
**Customer Group: Marathon Ashland, Inc.**  
**Customer Account List**

**This agreement pertains to the following Marathon Ashland, Inc accounts:**

[illegible]

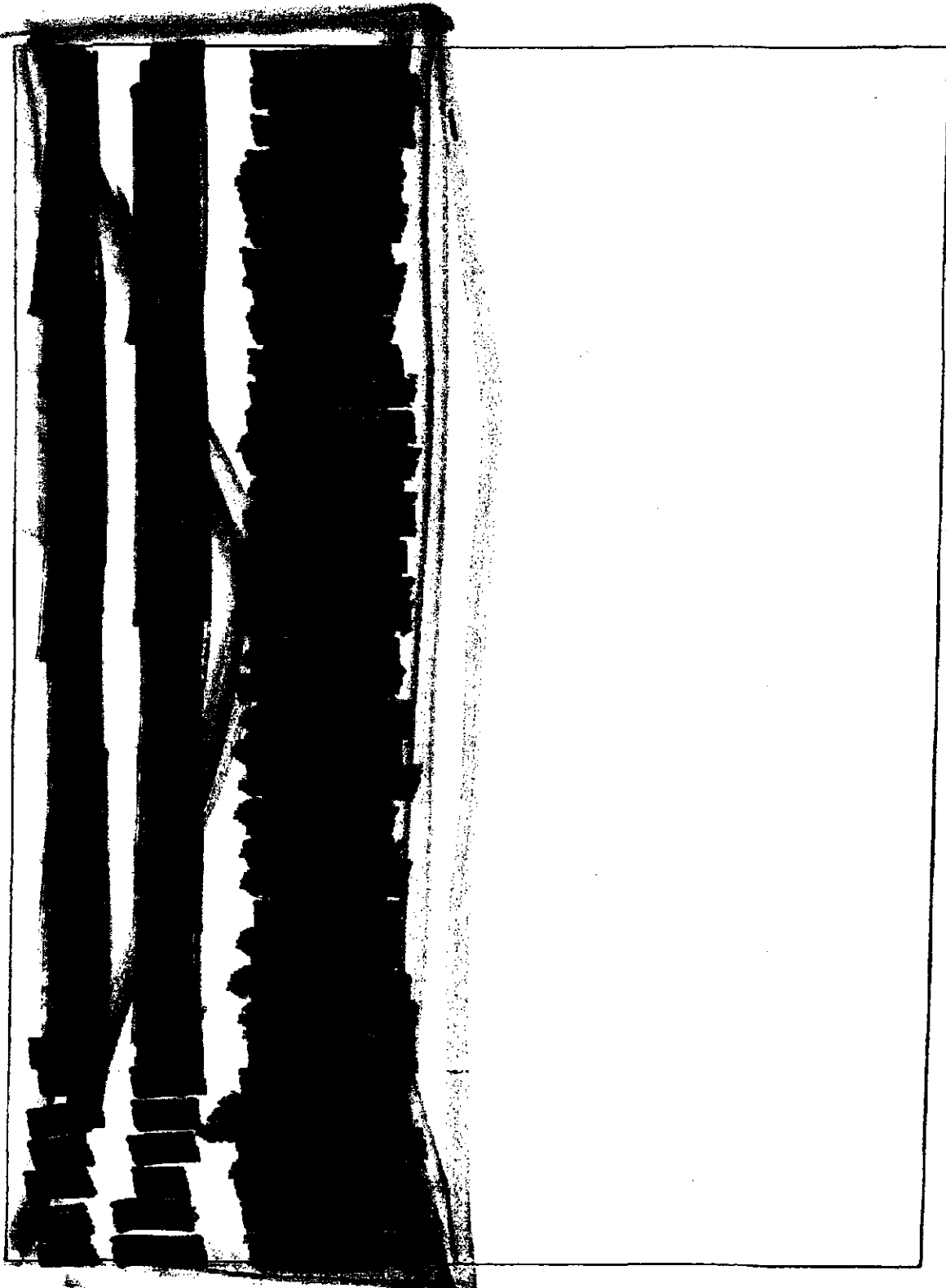
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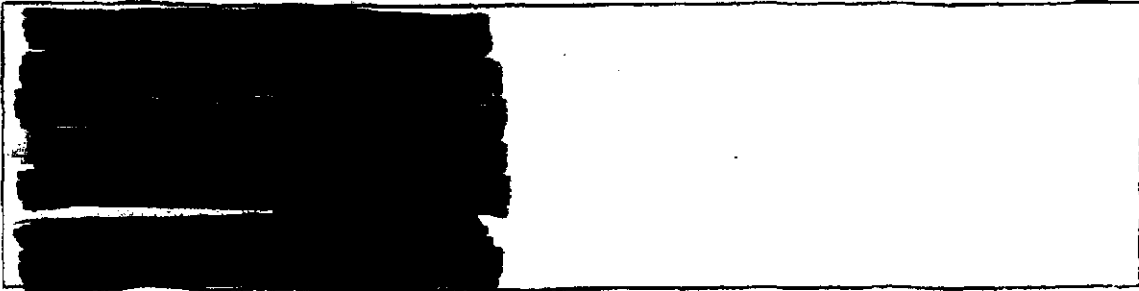


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OPTION AGREEMENT

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BY AND BETWEEN

CINERGY RETAIL SALES, LLC

AND

[REDACTED]

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

RECITALS

WHEREAS, [REDACTED] the purposes of this agreement only refers to [REDACTED] located within the retail delivery service territory of The Cincinnati Gas & Electric Company ("CG&E").

WHEREAS, CRS has been certified by the Public Utilities Commission of Ohio as a Certified Retail Electric Supplier ("CRES") and has the authority to engage in the sale of electrical power at retail;

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

NOW, THEREFORE, for and in consideration of the mutual covenants contained herein, the Parties agree as follows:

ARTICLE I  
DEFINITIONS

The following definitions and any terms defined in this Agreement shall apply hereunder.

"Affiliate" means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, "control" means the direct or indirect ownership of ten (10) percent or more.

"Business Day" means a day on which Federal Reserve member banks in Ohio are open for business; and a Business Day shall open at 8:00 a.m. and close at 5:00 p.m. eastern prevailing time, unless otherwise agreed to by the Parties in writing.

(15)  
(C17158.1)

Cinergy Corporate Records  
04016260



Document Code

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"Capacity" has the meaning set forth in any Transmission Provider's tariff or MISO's transmission tariff, as amended from time to time, or as defined in any transmission tariff of a successor to MISO.

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

"Defaulting Party" shall have the meaning specified in Section 6.1.

"Energy" means electric energy of the character commonly known as three-phase, sixty hertz electric energy that is delivered at the nominal voltage of the Delivery Point, expressed in megawatt hours (MWh).

"Event of Default" shall have the meaning specified in Section 6.1.

"FERC" means the Federal Energy Regulatory Commission or any successor agency thereto.

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

"Full Requirements Energy" means, except as provided herein, that GM shall purchase all of its retail Energy requirements for its facility from CRS and that GM shall not resell any of the Energy provided hereunder to any third party.

"Interest Rate" means, for any date the lesser of (a) two (2) percent over the per annum rate of interest equal to the prime lending rate ("Prime Rate") as may be published from time to time in the Federal Reserve Statistical Release H. 15; or (b) the maximum lawful interest rate.

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

"MW" means megawatt.

"Term" shall have the meaning specified in Article 4.1.

"Transmission Providers" means the entity or entities transmitting or transporting the Energy on behalf of CRS or GM to the Delivery Point.



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OPTION

- 2.1 GM currently receives its electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs rates, or will provide NOTICE by December 30, 2004 that it will take electric service from CG&E in accordance with applicable CG&E tariff requirements. GM hereby grants to CRS the exclusive option, upon thirty (30) days notice, to serve all of GM's accounts and load set forth in Exhibit C, including any increases in accordance with Section 3.1, as of December 31, 2004 ("Option").
- 2.2 CRS shall have the right to exercise this Option at any time during the Term of this Agreement.
- 2.3 In exchange for GM granting CRS this option, CRS agrees to pay GM each calendar month of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment"). CRS shall work in good faith with GM to establish procedures so that the Option Payment is properly distributed to each applicable GM account.
- 2.4 Because this is an exclusive Option, in the event GM leaves its current electric service and receives electric service from any third party that is not CRS or an Affiliate of CRS, then CRS shall cease all Option Payments and this Agreement shall terminate and all obligations of the Parties hereunder shall terminate.
- 2.5 If CRS exercises its Option, the Parties shall enter into a power sale agreement, including the terms set forth in Article III.

ARTICLE III  
CRS POWER CONTRACT TERMS

- 3.1 In the event CRS <sup>exercises (AC)</sup> its option, the power sale agreement between CRS and GM shall include, among others, the following terms:
- a. Energy Quantity and Type. CRS shall provide GM with Firm, Full Requirements Energy and Capacity up to 3 MWs greater than GM's Maximum Demand for all of its accounts as of January 1, 2005 ("Quantity"). If during the Term of the Agreement, GM has additional load or accounts greater than 3MW, then such new load or account is not included within the terms of the Agreement and CRS shall have no obligation to provide Energy and Capacity to GM above the Quantity set forth herein.
  - b. Transmission Service and Charges. Transmission service and charges will be provided in accordance with the open access transmission tariff of the Midwest Independent Transmission System Operator, Inc. or CG&E (or an affiliate on its behalf), whichever is applicable, as filed with the FERC and as it may be amended, from time to time, or any successor tariff. Unless otherwise agreed

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

- c. Contract Price. The Contract Price is set forth in Exhibits A and B.
- d. Change to Prices. As a retail sale, the power sale agreement is not subject to the jurisdiction of the FERC; nor shall either Party seek to have the FERC assert jurisdiction over the Agreement. However, to the extent that either the FERC or the Public Utilities Commission of Ohio asserts jurisdiction over the Agreement, the Parties agree that the Contract Price specified above is just and reasonable and consistent with the public interest. Neither CRS nor GM shall seek to modify the Contract Price through the auspices of any regulatory body.
- e. Term. The term of the power sale agreement shall be through December 31, 2008 provided that GM may terminate this Agreement in its entirety, including any contract with CRS, upon twelve (12) months written notice provided that such termination shall be effective for all GM accounts and for this entire agreement.

#### ARTICLE IV TERM OF AGREEMENT

- 4.1 Agreement Term and Effective Date. This Agreement shall become effective upon execution by the Parties. This Agreement shall extend from January 1, 2005 through and including December 31, 2008, unless terminated earlier in accordance with the terms of this Agreement ("Term").
- 4.2 After Termination. The applicable provisions of this Agreement shall continue in effect after termination thereof to the extent necessary to provide for final billing, billing adjustments and payments.

#### ARTICLE V BILLING

- 5.1 Payment. CRS shall submit the Option Payment to GM within fifteen (15) days after the end of each calendar month. The payment shall be submitted to the following account or address:

General Motors, Inc.  
NAO Util Paymnt Dept. C/O EUSB  
PO Box 319022  
Chicago, IL 60631

## ARTICLE VI DEFAULTS AND REMEDIES

- 6.1 Events of Default. An "Event of Default" shall mean, with respect to a Party ("Defaulting Party"), the occurrence of any of the following:
- 6.1.1 any representation or warranty made by the Defaulting Party herein shall at any time prove to be false or misleading in any respect material to this Agreement;
  - 6.1.2 the failure of the Defaulting Party to perform any covenant set forth in this Agreement (except to the extent constituting a separate Event of Default) and such failure is not cured within five (5) Business Days after written notice thereof to the Defaulting Party;
  - 6.1.3 the Defaulting Party consolidates or amalgamates with, merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all of the obligations of such Party under this Agreement;
  - 6.1.4 the failure to make when due, any payment required pursuant to this Agreement if such failure is not remedied within five (5) Business Days after written notice of such failure is given by the other Party; or
  - 6.1.5 the Defaulting Party (i) files a petition or otherwise commences or acquiesces in a proceeding under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition is not withdrawn or dismissed within thirty (30) days after such filing, (ii) makes an assignment or any general arrangement for the benefit of creditors, (iii) otherwise becomes bankrupt or insolvent (however evidenced), (iv) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (v) is unable to pay its debts as they fall due.
- 6.2 Remedies upon an Event of Default. Upon the occurrence (and continuation beyond the applicable cure period) of an Event of Default with respect to a Defaulting Party, the Non-Defaulting Party shall have the right to terminate this Agreement and exercise all rights and remedies available to it in law or in equity.
- 6.3 Other Termination Events. If performance by either Party under this Agreement becomes subject to regulation of any kind whatsoever under any law, rule, regulation, order or similar provision to a greater or different extent than that existing on the Effective Date and such regulation either renders this Agreement illegal or unenforceable or contrary to regulatory authority, then such Party shall have the right upon thirty (30) days notice to terminate this Agreement without further liability. FERC's determination that CG&E is

prohibited from selling wholesale power to CRS pursuant to CG&E's tariff shall allow CRS to terminate this Agreement in its sole discretion with thirty (30) days written notice and without further liability.

**ARTICLE VII  
LIMITATIONS; DUTY TO MITIGATE**

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

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

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

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

- 7.3 Duty to Mitigate. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

#### ARTICLE VIII GOVERNING LAW - DISPUTE RESOLUTION

- 8.1 Governing Law and Jurisdiction. THIS AGREEMENT AND THE RIGHTS AND DUTIES OF THE PARTIES HEREUNDER SHALL BE GOVERNED BY AND CONSTRUED, ENFORCED AND PERFORMED IN ACCORDANCE WITH THE LAWS OF THE STATE OF OHIO AND SHALL BE BROUGHT IN THE STATE AND FEDERAL COURTS LOCATED IN HAMILTON COUNTY OHIO.
- 8.2 Dispute Resolution. Any claim, controversy or dispute arising out of or relating to this Agreement, or the breach thereof, shall be resolved fully and finally by binding arbitration under the Commercial Rules, but not the administration, of the American Arbitration Association, except to the extent that the Commercial Rules conflict with this provision, in which event, this Agreement shall control. This arbitration provision shall not limit the right of either Party prior to or during any such dispute to seek, use, and employ ancillary, or preliminary or permanent rights and/or remedies, judicial or otherwise, for the purposes maintaining the status quo until such time as the arbitration award is rendered or the dispute is otherwise resolved. The arbitration shall be conducted in Cincinnati, Ohio and the laws of Ohio shall govern the construction and interpretation of this Agreement, except to provisions related to conflict of laws. Within ten (10) Business Days of service of a Demand for Arbitration, the parties may agree upon a sole arbitrator, or if a sole arbitrator cannot be agreed upon, a panel of three arbitrators shall be named. One arbitrator shall be selected by CRS and one shall be selected by Buyer. A knowledgeable, disinterested and impartial arbitrator shall be selected by the two arbitrators so appointed by the parties. If the arbitrators appointed by the parties cannot agree upon the third arbitrator within ten (10) Business Days, then either Party may apply to any judge in any court of competent jurisdiction for appointment of the third arbitrator. There shall be no discovery during the

arbitration other than the exchange of information that is provided to the arbitrator(s) by the Parties. The arbitrator(s) shall have the authority only to award equitable relief and compensatory damages, and shall not have the authority to award punitive damages or other non-compensatory damages. The decision of the arbitrator(s) shall be rendered within sixty (60) Business Days after the date of the selection of the arbitrator(s) or within such period as the Parties may otherwise agree. Each Party shall be responsible for the fees, expenses and costs incurred by the arbitrator appointed by each Party, and the fees, expenses and costs of the third arbitrator (or single arbitrator) shall be borne equally by the Parties. The decision of the arbitrator(s) shall be final and binding and may not be appealed. Any Party may apply to any court having jurisdiction to enforce the decision of the arbitrator(s) and to obtain a judgment thereon.

Notwithstanding the foregoing, the Parties may cancel or terminate this Agreement in accordance with its terms and conditions without being required to follow the procedures set forth in this Article.

#### ARTICLE IX MISCELLANEOUS

- 9.1 Representations and Warranties. On the Effective Date and on the date of entering into this Agreement, each Party represents and warrants to the other Party that: (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation and is qualified to conduct its business in each jurisdiction; (b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement and any other documentation relating to this Agreement; (c) the execution, delivery and performance of this Agreement and any other documentation relating to this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or similar provision applicable to it; (d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; (e) there are no bankruptcy proceedings pending or being contemplated by it or, to its knowledge, threatened against it; (f) there is not pending or, to its knowledge, threatened against it or any of its affiliates any legal proceedings that could materially adversely affect its ability to perform its obligation under this Agreement or any other document relating to this Agreement; (g) no Event of Default or event which, with the giving of notice or lapse of time, or both, would constitute an Event of Default with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement or any other document relating to this Agreement or any Transaction; and (h) it is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether such Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, and is capable of assessing the merits of and understanding and understands and accepts, the terms,

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conditions and risks of this Agreement.

- 9.2 Assignment. This Agreement shall be assignable by CRS without GM's consent provided such assignment is to any other direct or indirect subsidiary of Cinergy Corp. and provided that such direct or indirect subsidiary has an equivalent or higher credit rating than CRS. This Agreement shall be assignable by GM without CRS' consent provided such assignment is to any other direct or indirect subsidiary of GM and provided that such direct or indirect subsidiary has an equivalent or higher credit rating than GM. Any other assignment by either Party of this Agreement or any rights or obligation hereunder shall be made only with the written consent of the other Party, which consent shall not be unreasonably withheld.
- 9.3 Notices. All notices, requests, statements or payments shall be made as specified below. Notices required to be in writing shall be delivered by letter, facsimile or other documentary form. Notice by regular mail shall be deemed to have been received three (3) Business Days after it has been sent. Notice by facsimile or hand delivery shall be deemed to have been received by the close of the Business Day on which it was transmitted or hand delivered (unless transmitted or hand delivered after close of normal business hours, in which case it shall be deemed to have been received at the close of the next Business Day). Notice by overnight or courier shall be deemed to have been received two (2) Business Days after it has been sent. A Party may change its addresses by providing notice of the same in accordance with this Section 9.3.

**To CRS:**

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

Phone -513-287-2633  
Fax-513-287-1902

**To GM:**

~~gm~~  
Philip A. Leach  
Energy & Utility Services Group  
Worldwide Facilities Group  
PCC-Central  
Mail Code 483-520-168  
2000 Centerpoint Parkway  
Pontiac, MI 48341

Phone: (248) 753-1763  
Fax: (248) 753-6225

- 9.4 General. This Agreement constitutes the entire agreement between the Parties relating to the subject matter contemplated by this Agreement. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. No amendment or modification to this Agreement shall be enforceable unless set forth in writing and executed by both Parties. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). No waiver by a Party of any default by the other Party shall be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change will not otherwise affect the remaining lawful obligations that arise under this Agreement. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights contained herein shall survive the termination or expiration of this Agreement for three (3) years.
- 9.5 Confidentiality. Neither Party shall disclose the terms or conditions of this Agreement to a third party (other than the Party's employees, Affiliates, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or in connection with any court or regulatory proceeding applicable to such Party; provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.
- 9.6 Counterparts. This Agreement may be separately executed in counterparts each of which when so executed shall be deemed to constitute one and the same Agreement.
- 9.7 This Agreement supercedes and replaces in its entirety the agreement between CRS and GM dated November 8, 2004. Nothing in this Agreement shall affect the terms and conditions agreed to by Cinergy and the Industrial Energy Users-Ohio pursuant to the agreement dated May 8, 2000 related to the settlement of certain issues in PUCO Case No. 99-1658-EL-ETP.

The Parties have caused this Agreement to be executed by their duly authorized representatives in multiple counterparts as of the Effective Date.

CINERGY RETAIL SALES, LLC

GENERAL MOTORS, INC.

By: 

By:   
[unclear] C. [unclear]



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

Date: *January 7, 2005*

Title: *DIRECTOR ENERGY & UTILITY SERVICES*

Date: *DECEMBER 21, 2004*

As to clause 9.7:

CINERGY CORP.

By: 

Title:

*Vice President, Regulatory and  
Legislative Strategy*

Date:

*January 7, 2005*

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Title: \_\_\_\_\_

Title: DIRECTOR ENERGY & UTILITY SERVICES

Date: \_\_\_\_\_

Date: DECEMBER 21, 2001

As to clause 9.7:

CINERGY CORP.

By: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

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**Exhibit A:**  
**Customer Group: General Motors, Inc.**  
**Quarterly Option Payment Calculation**

The CRS option payment will be equivalent to the actual amount paid to The Cincinnati Gas & Electric Company for the following billing charges under its market-based standard service offer approved by the Commission in Case No. 03-93-EL-ATA:

- Regulatory Transition Charge (RTC)
- Annually Adjusted Component of POLR Charge (AAC)
- Fuel and Purchase Power (FPP) – includes Emission Allowance Expense
- 50% of System Reliability Tracker (SRT)
- Infrastructure Maintenance Fund (IMF) Charge in excess of 4% of "little g"
- Electric Choice Insufficient Return Notice Fee charged to customers, who have given notice of their return to CG&E standard tariff service on or before 12/30/2004 and are actively taking CG&E service no later than 01/31/2005.

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## EXHIBIT B:

## Customer Groups

### CRS Generation Rates for former Rate DS Standard Service Customers

**Net Monthly Bill**

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

### Generation Charges

(a) Demand Charge

### First 1,000 kilowatts

### Additional kilowatts

**(b) Energy Charge**

### Billing Demand times 100

**Additional kilowatt-hours**

### Transmission Charges

Customer will pay a transmission charge equivalent to the sum of all applicable transmission charges that they would pay to CG&E as a standard tariff customer. Transmission charges to be paid include, but are not limited to the following PUCO approved charges:

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

**Energy Retail Sales** will reimburse the customer for any

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**Exhibit C:**

**Customer Group:** [REDACTED]  
**Customer Account List**

This agreement pertains to the following [REDACTED] accounts:

[REDACTED]

**OPTION AGREEMENT**

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**BY AND BETWEEN**

**CINERGY RETAIL SALES, LLC**

**AND**

[REDACTED]

This Option Agreement (the "Agreement") is entered into as of this 1<sup>st</sup> day of January 2005 (the "Effective Date") by and between Cinergy Retail Sales, LLC ("CRS") a Delaware limited liability company, and [REDACTED] individually a "Party" or collectively the "Parties").

**RECITALS**

**WHEREAS** [REDACTED] purchases electric power service from The Cincinnati Gas & Electric Company (CG&E) on metered accounts listed on Exhibit C.

**WHEREAS**, CRS has been certified by the Public Utilities Commission of Ohio as a Certified Retail Electric Supplier ("CRES") and has the authority to engage in the sale of electrical power at retail;

**WHEREAS**, CRS and [REDACTED] desire to establish terms and conditions for this option.

**NOW, THEREFORE**, for and in consideration of the mutual covenants contained herein, the Parties agree as follows:

**ARTICLE I  
DEFINITIONS**

The following definitions and any terms defined in this Agreement shall apply hereunder.

**"Affiliate"** means, with respect to any person, any other person (other than an individual) that, directly or indirectly, through one or more intermediaries, controls, or is controlled by, or is under common control with, such person. For this purpose, "control" means the direct or indirect ownership of ten (10) percent or more.

Cinergy Corporate Records

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

"Business Day" means a day on which Federal Reserve member banks in Ohio are open for business; and a Business Day shall open at 8:00 a.m. and close at 5:00 p.m. eastern prevailing time, unless otherwise agreed to by the Parties in writing.

"Maximum Demand" means [REDACTED] combined maximum annual demands for all of [REDACTED] accounts listed on Exhibit C with Cincinnati Gas & Electric ("CG&E") for the twelve months ending December 31, 2004.

"Capacity" has the meaning set forth in any Transmission Provider's tariff or MISO's transmission tariff, as amended from time to time, or as defined in any transmission tariff of a successor to MISO.

"Defaulting Party" shall have the meaning specified in Section 6.1.

"Energy" means electric energy of the character commonly known as three-phase, sixty hertz electric energy that is delivered at the nominal voltage of the Delivery Point, expressed in megawatt hours (MWh).

"Event of Default" shall have the meaning specified in Section 6.1.

"FERC" means the Federal Energy Regulatory Commission or any successor agency thereto.

"Firm" means that the only excuse for the failure to deliver Energy by CRS or the failure to receive Energy by [REDACTED] Force Majeure or the other Party's failure to perform.

"Full Requirements Energy" means, except as provided herein, that [REDACTED] shall purchase all of its retail Energy requirements for its facility from CRS and that [REDACTED] shall not resell any of the Energy provided hereunder to any third party.

"Interest Rate" means, for any date the lesser of (a) two (2) percent over the per annum rate of interest equal to the prime lending rate ("Prime Rate") as may be published from time to time in the Federal Reserve Statistical Release H. 15; or (b) the maximum lawful interest rate.

"MW" means megawatt.

"Term" shall have the meaning specified in Article 4.1.

"Transmission Providers" means the entity or entities transmitting or transporting the Energy on behalf of CRS or [REDACTED] the Delivery Point.

**ARTICLE II  
OPTION**

- 2.1 [REDACTED] presently purchases its generation electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs or will provide notice by December 30, 2004 that it will purchase generation electric service from CG&E starting no later than December 31, 2005 in accordance with applicable CG&E tariff requirements. [REDACTED] hereby grants to CRS the exclusive option, upon thirty (30) days notice, to provide generation electric service for all of [REDACTED] accounts and load set forth in Exhibit C, including any increases in accordance with Section 3.1, as of December 31, 2004 ("Option"). In the event that an Electric Choice Insufficient Return Notice Fee is incurred by [REDACTED] due to switching back to CG&E standard tariffed service prior to January 31, 2005, an amount equivalent to said fee will be paid to [REDACTED] CRS.
- 2.2 CRS shall have the right to exercise this Option at any time during the Term of this Agreement.
- 2.3 In exchange for [REDACTED] granting CRS this option, CRS agrees to pay [REDACTED] each calendar year quarter of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment"). The Parties agree that if [REDACTED] defaults or is delinquent, after any applicable cure period, in any of its payments to CG&E or CRS for any service provided to [REDACTED] then CRS has the right to offset the Option Payment due hereunder with any amounts that are owed [REDACTED] CG&E or CRS.
- 2.4 [REDACTED]
- 2.5 If CRS exercises its Option, the Parties shall enter into a power sale agreement, including the terms set forth in Article III.

**ARTICLE III  
CRS POWER CONTRACT TERMS**

- 3.1 In the event CRS exercises its option, a power sale agreement between CRS and [REDACTED] will be negotiated. The power sale agreement shall include generally accepted terms and conditions relating to the sale of competitive retail electric generation service, including, among others, the following terms:
- a. Energy Quantity and Type. CRS shall provide [REDACTED] with Firm, Full Requirements Energy and Capacity up to [REDACTED] maximum



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Demand ("Quantity"). If during the Term of this Agreement [REDACTED] has additional load or account [REDACTED] then such new load or account is not included within the terms of this Agreement and CRS shall have no obligation to provide Energy and Capacity to [REDACTED] above the Quantity set forth herein.

- b. Transmission Service and Charges. Transmission service will be provided in accordance with the open access transmission tariff of the Midwest Independent Transmission System Operator, Inc. or CG&E (or an affiliate on its behalf), whichever is applicable, as filed with the FERC and as it may be amended, from time to time, or any successor tariff.
- c. Base Contract Price. The Base Contract Price is set forth in Exhibit B.
- d. Change to Prices. As a retail sale, the power sale agreement is not subject to the jurisdiction of the FERC; nor shall either Party seek to have the FERC assert jurisdiction over the Agreement. However, to the extent that either the FERC or the Public Utilities Commission of Ohio asserts jurisdiction over the Agreement, the Parties agree that the Contract Price specified above is just and reasonable and consistent with the public interest. Neither CRS nor [REDACTED] shall seek to modify the Base Contract Price through the auspices of any regulatory body.
- e. Term. The term of the power sale agreement shall be through December 31, 2008.
- f. Credit. The power sale agreement will have terms and conditions as similar as possible to CG&E's existing unbundled tariffs. CRS will not require surety bonds, deposits or other corporate guarantees.
- g. Adjusted Base Contract Price. If CRS exercises this option, then the combined net generation cost paid to CRS and CG&E will be an amount equivalent to Big [REDACTED]

#### ARTICLE IV TERM OF AGREEMENT

- 4.1 Agreement Term and Effective Date. This Agreement shall become effective upon execution by the Parties. This Agreement shall extend from January 1, 2005 through and including December 31, 2008, unless terminated earlier in accordance with the terms of this Agreement ("Term").

4.2 Agreement Termination

- 4.3 After Termination. The applicable provisions of this Agreement shall continue in effect after termination thereof to the extent necessary to provide for final billing, billing adjustments and payments.

ARTICLE V  
BILLING

- 5.1 Payment. CRS shall submit the Option Payment to [REDACTED] by check or wire transfer within forty-five (45) days after the end of each calendar year quarter. The payment shall be submitted to an account or address designated by [REDACTED]

ARTICLE VI  
DEFAULTS AND REMEDIES

- 6.1 Events of Default. An "Event of Default" shall mean, with respect to a Party ("Defaulting Party"), the occurrence of any of the following:
- 6.1.1 any representation or warranty made by the Defaulting Party herein shall at any time prove to be false or misleading in any respect material to this Agreement;
  - 6.1.2 the failure of the Defaulting Party to materially perform any covenant set forth in this Agreement (except to the extent constituting a separate Event of Default,) and such failure is not cured within five (5) Business Days after written notice thereof to the Defaulting Party;
  - 6.1.3 the Defaulting Party consolidates or amalgamates with, merges with or into, or transfers all or substantially all of its assets to, another entity and, at the time of such consolidation, amalgamation, merger or transfer, the resulting, surviving or transferee entity fails to assume all of the obligations of such Party under this Agreement;

- 6.1.4 the failure to make when due, any payment required pursuant to this Agreement if such failure is not remedied within five (5) Business Days after written notice of such failure is given by the other Party; or
- 6.1.5 the Defaulting Party (i) files a petition or otherwise commences or acquiesces in a proceeding under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition is not withdrawn or dismissed within thirty (30) days after such filing, (ii) makes an assignment or any general arrangement for the benefit of creditors, (iii) otherwise becomes bankrupt or insolvent (however evidenced), (iv) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (v) is unable to pay its debts as they fall due.
- 6.2 Remedies upon an Event of Default. Upon the occurrence (and continuation beyond the applicable cure period) of an Event of Default with respect to a Defaulting Party, the Non-Defaulting Party shall have the right to terminate this Agreement and exercise all rights and remedies available to it in law or in equity.

#### ARTICLE VII DUTY TO MITIGATE

- 7.1 Duty to Mitigate. Each Party agrees that it has a duty to mitigate damages and covenants that it will use commercially reasonable efforts to minimize any damages it may incur as a result of the other Party's performance or non-performance of this Agreement.

#### ARTICLE VIII GOVERNING LAW - DISPUTE RESOLUTION

- 8.1 Governing Law and Jurisdiction. This Agreement and the rights and duties of the Parties hereunder shall be governed by and construed, enforced and performed in accordance with the laws of the state of Ohio.
- 8.2 Dispute Resolution. Any claim, controversy or dispute arising out of or relating to this Agreement, or the breach thereof, shall be resolved fully and finally by binding arbitration under the Commercial Rules, but not the administration, of the American Arbitration Association, except to the extent that the Commercial Rules conflict with this provision, in which event, this Agreement shall control. This arbitration provision shall not limit the right of either Party prior to or during any such dispute to seek, use, and employ ancillary, or preliminary or permanent rights and/or remedies, judicial or otherwise, for the purposes maintaining the status quo until such time as the arbitration award is rendered or the

dispute is otherwise resolved. The arbitration shall be conducted in Cincinnati, Ohio and the laws of Ohio shall govern the construction and interpretation of this Agreement, except to provisions related to conflict of laws. Within ten (10) Business Days of service of a Demand for Arbitration, the parties may agree upon a sole arbitrator, or if a sole arbitrator cannot be agreed upon, a panel of three arbitrators shall be named. One arbitrator shall be selected by CRS and one shall be selected by [REDACTED]. A knowledgeable, disinterested and impartial arbitrator shall be selected by the two arbitrators so appointed by the parties. If the arbitrators appointed by the parties cannot agree upon the third arbitrator within ten (10) Business Days, then either Party may apply to any judge in any court of competent jurisdiction for appointment of the third arbitrator. There shall be no discovery during the arbitration other than the exchange of information that is provided to the arbitrator(s) by the Parties. The arbitrator(s) shall have the authority only to award equitable relief and compensatory damages, and shall not have the authority to award punitive damages or other non-compensatory damages. The decision of the arbitrator(s) shall be rendered within ninety (90) Business Days after the date of the selection of the arbitrator(s) or within such period as the Parties may otherwise agree. Each Party shall be responsible for the fees, expenses and costs incurred by the arbitrator appointed by each Party, and the fees, expenses and costs of the third arbitrator (or single arbitrator) shall be borne equally by the Parties. The decision of the arbitrator(s) shall be final and binding and may not be appealed. Any Party may apply to any court having jurisdiction to enforce the decision of the arbitrator(s) and to obtain a judgment thereon.

Notwithstanding the foregoing, the Parties may cancel or terminate this Agreement in accordance with its terms and conditions without being required to follow the procedures set forth in this Article.

#### ARTICLE IX MISCELLANEOUS

- 9.1 Representations and Warranties. On the Effective Date and on the date of entering into this Agreement, each Party represents and warrants to the other Party that: (a) it is duly organized, validly existing and in good standing under the laws of the jurisdiction of its formation and is qualified to conduct its business in each jurisdiction; (b) it has all regulatory authorizations necessary for it to legally perform its obligations under this Agreement and any other documentation relating to this Agreement; (c) the execution, delivery and performance of this Agreement and any other documentation relating to this Agreement are within its powers, have been duly authorized by all necessary action and do not violate any of the terms and conditions in its governing documents, any contracts to which it is a party or any law, rule, regulation, order or similar provision applicable to it; (d) this Agreement and each other document executed and delivered in accordance with this Agreement constitutes its legally valid and binding obligation enforceable against it in accordance with its terms; (e) there are no bankruptcy proceedings pending or being contemplated by it or, to its knowledge, threatened against it; (f) there is not pending or, to its knowledge, threatened against it or any of its affiliates any legal proceedings that could

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materially adversely affect its ability to perform its obligation under this Agreement or any other document relating to this Agreement; (g) no Event of Default or event which, with the giving of notice or lapse of time, or both, would constitute an Event of Default with respect to it has occurred and is continuing and no such event or circumstance would occur as a result of its entering into or performing its obligations under this Agreement or any other document relating to this Agreement or any Transaction; and (h) it is acting for its own account, has made its own independent decision to enter into this Agreement and as to whether such Agreement is appropriate or proper for it based upon its own judgment, is not relying upon the advice or recommendations of the other Party in so doing, and is capable of assessing the merits of and understanding and understands and accepts, the terms, conditions and risks of this Agreement.

9.2 Assignment. This Agreement shall be assignable by CRS without the [REDACTED] consent provided such assignment is to any other direct or indirect subsidiary of Ennergy Corp. provided that such direct or indirect subsidiary has an equivalent or higher credit rating than CRS. Any other assignment by either Party of this Agreement or any rights or obligation hereunder shall be made only with the written consent of the other Party, which consent shall not be unreasonably withheld.

9.3 Notices. All notices, requests, statements or payments shall be made as specified below. Notices required to be in writing shall be delivered by letter, facsimile or other documentary form. Notice by regular mail shall be deemed to have been received three (3) Business Days after it has been sent. Notice by facsimile or hand delivery shall be deemed to have been received by the close of the Business Day on which it was transmitted or hand delivered (unless transmitted or hand delivered after close of normal business hours, in which case it shall be deemed to have been received at the close of the next Business Day). Notice by overnight or courier shall be deemed to have been received two (2) Business Days after it has been sent. A Party may change its addresses by providing notice of the same in accordance with this Section 9.3.

**To CRS:**

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

Phone - 513-287-2633  
Fax - 513-287-1902

[REDACTED]  
David F. Boehm, Esq.  
Michael L. Kurtz, Esq.  
Boehm, Kurtz & Lowry  
36 E. Seventh Street, Suite 1510

Cincinnati, Ohio 45202

Ph: 513.421.2255 Fax: 513.421.2764

- 9.4 General. This Agreement constitutes the entire agreement between the Parties relating to the subject matter contemplated by this Agreement. This Agreement shall be considered for all purposes as prepared through the joint efforts of the Parties and shall not be construed against one Party or the other as a result of the preparation, substitution, submission or other event of negotiation, drafting or execution hereof. No amendment or modification to this Agreement shall be enforceable unless set forth in writing and executed by both Parties. This Agreement shall not impart any rights enforceable by any third party (other than a permitted successor or assignee bound to this Agreement). No waiver by a Party of any default by the other Party shall be construed as a waiver of any other default. Any provision declared or rendered unlawful by any applicable court of law or regulatory agency or deemed unlawful because of a statutory change will not otherwise affect the remaining lawful obligations that arise under this Agreement. The headings used herein are for convenience and reference purposes only. All indemnity and audit rights contained herein shall survive the termination or expiration of this Agreement for three (3) years.
- 9.5 Confidentiality. Neither Party shall disclose the terms or conditions of this Agreement to a third party (other than the Party's employees, Affiliates, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or in connection with any court or regulatory proceeding applicable to such Party; provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.
- 9.6 Counterparts. This Agreement may be separately executed in counterparts each of which when so executed shall be deemed to constitute one and the same Agreement.
- 9.7 This Agreement supersedes and replaces the agreement between CRS and [REDACTED] dated November 22, 2004. During the term of this Agreement, it supersedes and replaces any other agreements between the Parties or their affiliates related to PUCO Case No. 99-1658-EL-ETP. Upon the termination of this Agreement, any other settlement agreements between the Parties or their affiliates related to PUCO Case No. 99-1658-EL-ETP shall be in full force and effect according to their original terms.

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The Parties have caused this Agreement to be executed by their duly authorized representatives in multiple counterparts as of the Effective Date.

CINERGY RETAIL SALES, LLC

By: 

Title: *Vice President*

*Regulatory and Legislative*

Date: *May 13, 2005*

  
Date: April 1, 2005

CONFIDENTIAL PROPRIETARY  
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Quarterly Option Payment Calculation**

The GRS option payment made quarterly for the period January 1, 2005 through December 31, 2008 or the date upon which the option is exercised whichever comes first, will be equivalent to the following calculation:

The actual amount paid by [REDACTED] The Cincinnati Gas and Electric Company during the applicable calendar quarter under the [REDACTED]

Less the following amount:

[REDACTED]

Tariff Schedule	Demand Charge (\$ per kW)			Energy Charge (\$ per kWh)		
	First Step	Second Step	Additional	First Step	Second Step	Additional
DM <sup>1</sup>	[REDACTED]					
DP	[REDACTED]					
DS	[REDACTED]					
TS	[REDACTED]					

<sup>1</sup> DM only shows summer seasonal rates

Plus

[REDACTED]

Plus

[REDACTED]