LARGE FILING SEPERATOR SHEET

CASE NUMBER: 03-93-EL-ATA
03-2079-EL-AAM
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FILE DATE: 11-10-08

SECTION: 4 of 17

NUMBER OF PAGES: 200

DESCRIPTION OF DOCUMENT: Conf. Release

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Exhibit A:
Customer Group: [redacted]
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 [redacted]

EXHIBIT B: [redacted]

Customer Group: [redacted]

CRS Generation and Transmission 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 ..... [redacted]

Additional kilowatts ..... [redacted]

(b) Energy Charge

Billing Demand times 300 ..... [redacted]

Additional kilowatt-hours ..... [redacted]

[redacted]

Customer will pay monthly an amount equivalent 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.

[redacted]

Cinergy Retail Sales [redacted] **reimburse the customer for any** [redacted]

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Exhibit C[redacted]

Customer Group:[redacted]

Customer Account List

This agreement pertains to the following [redacted]

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OPTION AGREEMENT

BY AND BETWEEN

CINERGY RETAIL SALES, LLC

AND

[redacted]

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This Option Agreement (the "Agreement") is entered into as of this 29 day of December 2004 (the "Effective Date") by and between Cinergy Retail Sales, LLC ("CRS") a Delaware limited liability company, and [redacted] ("Counterparty"), an Ohio corporation (each individually a "Party" or collectively the "Parties").

RECITALS

WHEREAS, [redacted] member of the Ohio Hospitals Association and is 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, CRS and Counterparty desire to establish terms and condition 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.

"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.

"Counterparty's Maximum Demand" means Counterparty's combined maximum demand for all

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of Counterparty's accounts as of January 1, 2005.

"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 Counterparty 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 the Counterparty is Force Majeure or the other Party's failure to perform.

"Full Requirements Energy" means, except as provided herein, that Counterparty shall purchase all of its retail Energy requirements for its facility from CRS and that Counterparty 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 Counterparty to the Delivery Point.

ARTICLE II
OPTION

2.1 Counterparty currently receives its electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs rates or will provide notice that it

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will take electric service from CG&E in accordance with applicable CG&E tariff requirements. Counterparty hereby grants to CRS the exclusive option, upon thirty (30) days notice, to serve all of Counterparty'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 Counterparty granting CRS this option, CRS agrees to pay Counterparty each calendar year quarter of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment").

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
CRES POWER CONTRACT TERMS

3.1 In the event CRS exercises its option, the power sale agreement between CRS and Counterparty shall include the following terms:

a. Energy Quantity and Type. CRS shall provide Counterparty with Firm, Full Requirements Energy and Capacity up [redacted] than Counterparty's Maximum Demand for all of its accounts as of January 1, 2005 ("Quantity"). If during the Term of this Agreement, Counterparty 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 Counterparty 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. Charges will be assessed consistent with the otherwise applicable CG&E retail tariff rates and riders as they may be amended, from time to time, or any successor tariff.

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 Counterparty 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.

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 Counterparty within thirty (30) days after the end of each calendar year quarter. The payment shall be submitted to the following account or address:

[insert account information] [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 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 fifteen (15) Business Days after written notice via certified mail 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 fifteen (15) Business Days after written notice via certified mail 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. [redacted]

ARTICLE VII
LIMITATIONS; DUTY TO MITIGATE

7.1 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.

7.2 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 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; (d) there are no bankruptcy proceedings pending or being contemplated by it or, to its knowledge, threatened against it; (e) 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

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this Agreement; (f) 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 (g) 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.

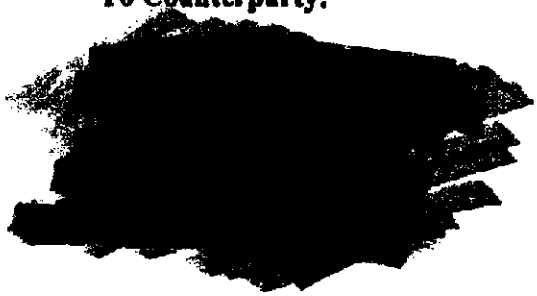
9.2 Assignment. This Agreement shall be assignable by CRS without the Counterparty's consent provided such assignment is to any other direct or indirect subsidiary of Cinergy Corp. provided that such direct or indirect subsidiary has an equivalent or higher credit rating than CRS. Any other assignment 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' provided there is some form of confirmation that the receiving party actually received the notice. 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 Counterparty:



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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 in its entirety the agreement between CRS and Counterparty dated October 28, 2004 and as well as any other settlement agreements between Counterparty and Cinergy Corp. or any other Cinergy entity related to PUCO Case No. 99-1658-EL-ETP. By signing this Agreement, Counterparty, CRS and Cinergy Corp. (on behalf of all Cinergy entities) agree to this provision.

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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: [signature]

Title: VP & General Counsel Commercial Business Unit

Date: 1/23/05

COUNTERPARTY

[redacted]

Date: 12/29/04

As to clause 9.7:

CINERGY CORP.

By: [signature]

Title: VP & Gen. Counsel

Date: JAN. 25, 2005

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Exhibit A:

Customer Group: [redacted]

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 [redacted]

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EXHIBIT B:

Customer Group: [redacted]

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 ..... [redacted]

Additional kilowatts ..... [redacted]

(b) Energy Charge

Billing Demand times 300 ..... [redacted]

Additional kilowatt-hours ..... [redacted]

[redacted]

Customer will pay monthly an amount equivalent t [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.

[redacted]

Cinergy Retail Sales will reimburse the customer for an [redacted]

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Exhibit C:

Customer Group: [redacted]

Customer Account List

This agreement pertains to the following [redacted]

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OPTION AGREEMENT

BY AND BETWEEN

CINERGY RETAIL SALES, LLC

AND

[redacted]

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This Option Agreement (the "Agreement") is entered into as of this 30th day of December 2004 (the "Effective Date") by and between Cinergy Retail Sales, LLC ("CRS") a Delaware limited liability company, and [redacted] Counterparty"), a not for profit corporation (each individually a "Party" or collectively the "Parties").

RECITALS

WHEREAS, [redacted] a member of the Ohio Hospitals Association and is 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, CRS and Counterparty desire to establish terms and condition 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.

"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.

"Counterparty's Maximum Demand" means Counterparty's combined maximum demand for all

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of Counterparty's accounts as of January 1, 2005.

"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 Counterparty 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 the Counterparty is Force Majeure or the other Party's failure to perform.

"Full Requirements Energy" means, except as provided herein, that Counterparty shall purchase all of its retail Energy requirements for its facility from CRS and that Counterparty 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 Counterparty to the Delivery Point.

ARTICLE II
OPTION

2.1 Counterparty currently receives its electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs rates or will provide notice that it

will take electric service from CG&E in accordance with applicable CG&E tariff requirements. Counterparty hereby grants to CRS the exclusive option, upon thirty (30) days notice, to serve all of Counterparty'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 Counterparty granting CRS this option, CRS agrees to pay Counterparty each calendar year quarter of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment").

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
CRES POWER CONTRACT TERMS

3.1 In the event CRS exercises its option, the power sale agreement between CRS and Counterparty shall include the following terms:

a. Energy Quantity and Type. CRS shall provide Counterparty with Firm, Full Requirements Energy and Capacity up to [redacted] Counterparty's Maximum Demand for all of its accounts as of January 1, 2005 ("Quantity"). If during the Term of this Agreement, Counterparty has additional load or accounts [redacted] en 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 Counterparty 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. Charges will be assessed consistent with the otherwise applicable CG&E retail tariff rates and riders as they may be amended, from time to time, or any successor tariff.

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 Counterparty 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.

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 Counterparty within thirty (30) days after the end of each calendar year quarter. The payment shall be submitted to the following account or address:

[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 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 fifteen (15) Business Days after written notice via certified mail 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 fifteen (15) Business Days after written notice via certified mail 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. [redacted]

ARTICLE VII
LIMITATIONS; DUTY TO MITIGATE

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

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TRADE SECRET

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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.

7.2 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 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; (d) there are no bankruptcy proceedings pending or being contemplated by it or, to its

knowledge, threatened against it; (e) 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; (f) 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 (g) 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 Counterparty's 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' provided there is some form of confirmation that the receiving party actually received the notice. 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 Counterparty:

[redacted]

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[redacted]

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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 in its entirety the agreement between CRS and Counterparty dated October 28, 2004 and as well as any other settlement agreements between Counterparty and Cinergy Corp. or any other Cinergy entity related to PUCO Case No. 99-1658-EL-ETP. By signing this Agreement, Counterparty, CRS and Cinergy Corp. (on behalf of all Cinergy entities) agree to this provision.

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TRADE SECRET

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: VP and General Counsel Commercial Business Unit

Date: 1/25/05

COUNTERPARTY

[redacted]

Date: 12/28/04

As to clause 9.7:

CINERGY CORP.

By: [signature]

Title: VP & Gen Counsel

Date: Jan. 25, 2005

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Exhibit A: [redacted]

Customer Group [redacted]
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 [redacted]

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TRADE SECRET

EXHIBIT B: [redacted]

Customer Group: [redacted]

CRS Generation and Transmission 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 .....

Next 3,200 kilowatt-hours .....

Additional kilowatt-hours .....

(b) Winter

First 2,800 kilowatt-hours .....

Next 3,200 kilowatt-hours .....

Additional kilowatt-hours .....

[redacted]

Customer will pay monthly an amount equivalent 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.

[redacted]

Cinergy Retail Sales will reimburse the customer for any [redacted]

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EXHIBIT B:

Customer Group: [redacted]
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 ..... [redacted]

Additional kilowatts ..... [redacted]

(b) Energy Charge

Billing Demand times 300 ..... [redacted]

Additional kilowatt-hours ..... [redacted]

[redacted]

Customer will pay monthly an amount equivalent to [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.

[redacted]

Cinergy Retail Sales will reimburse the customer for any [redacted]

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Exhibit C: [redacted]

Customer Group: [redacted]

Customer Account List

This agreement pertains to the following [redacted]

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OPTION AGREEMENT

BY AND BETWEEN

CINERGY RETAIL SALES, LLC

AND

[redacted]

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This Option Agreement (the "Agreement") is entered into as of this 30 day of DECEMBER 2004 (the "Effective Date") by and between Cinergy Retail Sales, LLC ("CRS") a Delaware limited liability company, and [redacted] Counterparty"), a _____ corporation (each individually a "Party" or collectively the "Parties").

RECITALS

WHEREAS, [redacted] member of the Ohio Hospitals Association and is 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, CRS and Counterparty desire to establish terms and condition 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.

"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.

"Counterparty's Maximum Demand" means Counterparty's combined maximum demand for all

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of Counterparty's accounts as of January 1, 2005.

"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 Counterparty 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 the Counterparty is Force Majeure or the other Party's failure to perform.

"Full Requirements Energy" means, except as provided herein, that Counterparty shall purchase all of its retail Energy requirements for its facility from CRS and that Counterparty 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 Counterparty to the Delivery Point.

ARTICLE II
OPTION

2.1 Counterparty currently receives its electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs rates or will provide notice that it

will take electric service from CG&E in accordance with applicable CG&E tariff requirements. Counterparty hereby grants to CRS the exclusive option, upon thirty (30) days notice, to serve all of Counterparty'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 Counterparty granting CRS this option, CRS agrees to pay Counterparty each calendar year quarter of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment").

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
CRES POWER CONTRACT TERMS

3.1 In the event CRS exercises its option, the power sale agreement between CRS and Counterparty shall include the following terms:

a. Energy Quantity and Type. CRS shall provide Counterparty with Firm, Full Requirements Energy and Capacity up to [redacted] Counterparty's Maximum Demand for all of its accounts as of January 1, 2005 ("Quantity"). If during the Term of this Agreement, Counterparty has additional load or accounts [redacted] 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 Counterparty 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. Charges will be assessed consistent with the otherwise applicable CG&E retail tariff rates and riders as they may be amended, from time to time, or any successor tariff.

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

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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 Counterparty 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.

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 Counterparty within thirty (30) days after the end of each calendar year quarter. The payment shall be submitted to the following account or address:

[insert account information] [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;

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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 fifteen (15) Business Days after written notice via certified mail 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 fifteen (15) Business Days after written notice via certified mail 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. [redacted]

ARTICLE VII
LIMITATIONS; DUTY TO MITIGATE

7.1 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.

7.2 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 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; (d) there are no bankruptcy proceedings pending or being contemplated by it or, to its knowledge, threatened against it; (e) 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; (f) 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 (g) 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 Counterparty's 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.

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To CRS:

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

Phone – 513-287-2633
Fax__ 513-287-1902

To Counterparty:

[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 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.

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9.7 This Agreement supersedes and replaces in its entirety the agreement between CRS and Counterparty dated October 28, 2004 and as well as any other settlement agreements between Counterparty and Cinergy Corp. or any other Cinergy entity related to PUCO Case No. 99-1658-EL-ETP. By signing this Agreement, Counterparty, CRS and Cinergy Corp. (on behalf of all Cinergy entities) agree to this provision.

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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: Jeff [illegible]
Title: VP & General Counsel Commercial Business Unit
Date: 1/25/05

COUNTERPARTY

[redacted]

Date: 12-29-04

As to clause 9.7:

CINERGY CORP.

By: [illegible]
Title: VP & Gen Counsel
Date: Jan. 25, 2005

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Exhibit A:
Customer Group [redacted]
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 [redacted]

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EXHIBIT B:

Customer Group: [redacted]

CRS Generation and Transmission Rates for former Rate DP Standard Service Customers

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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]

[redacted]

Customer will pay monthly an amount equivalent 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.

[redacted]

Cinergy Retail Sales will reimburse the customer for any [redacted]

So 8373

CONFIDENTIAL PROPRIETARY
TRADE SECRET

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Exhibit C:

Customer [redacted]

Customer Account List

This agreement pertains to the followin[redacted]

[redacted]

00642

Duke Energy Ohio Case No. 03-93-EL-ATA (Remand)
AGREEMENTS

From	Type	Date	Document	Super	Party 1	Party 2	Multiple?	Group	Ref No	Beg.	End
DERS	Super Agr	5/28/04	Agreement		CRS	[redacted]	Y	IEU		341	346
DERS	Super Agr	11/8/04	Agreement	5/28/04	CRS	[redacted]	Y	IEU		334	340
DERS	Option Agr	12/20/04	Option Agreement		CRS	[redacted]		IEU	508367	50	64
DERS	Super Agr	5/28/04	Agreement		CRS	[redacted]	Y	IEU		341	346
DERS	Super Agr	11/8/04	Agreement	5/28/04	CRS	[redacted]	Y	IEU		334	340
DERS	Option Agr	12/20/04	Option Agreement		CRS	[redacted]		IEU	508368	32	49
DERS	Super Agr	5/19/04	Agreement		CRS	[redacted]	Y	OEG		327	332
DERS	Super Agr	11/22/04	Agreement	5/19/04	CRS	[redacted]	Y	OEG		320	326
DERS	Option Agr	1/19/05	Option Agreement		CRS	[redacted]		OEG	508386	176	190
DERS	Super Agr	5/19/04	Agreement		CRS	[redacted]	Y	OEG		327	332
DERS	Super Agr	11/22/04	Agreement	5/19/04	CRS	[redacted]	Y	OEG		320	326
DERS	Option Agr	2/2/05	Option Agreement		CRS	[redacted]		OEG	508388	1	14
DERS	Super Agr	11/22/04	Agreement	5/19/04	CRS	[redacted]	Y	OEG		320	326
DERS	Option Agr	1/1/05	Option Agreement		CRS	[redacted]		OEG	508384	65	78
DERS	Super Agr	5/19/04	Agreement		CRS	[redacted]	Y	OEG		327	332
DERS	Super Agr	11/22/04	Agreement	5/19/04	CRS	[redacted]	Y	OEG		320	326
DERS	Option Agr	1/12/05	Option Agreement		CRS	[redacted]		OEG	508390	133	145
DERS	Super Agr	5/19/04	Agreement		CRS	[redacted]	Y	OEG		327	332
DERS	Super Agr	11/22/04	Agreement	5/19/04	CRS	[redacted]	Y	OEG		320	326
DERS	Option Agr	12/31/04	Option Agreement		CRS	[redacted]		OEG	508387	15	31
DERS	Super Agr	4/4/05	Letter re:1/20/05 Agr.	1/20/05	CRS	[redacted]	Y	OEG		333	333
DERS	Super Agr	4/4/05	Copy of Page 333	1/20/05	CRS	[redacted]	Y	OEG		386	386
DERS	Super Agr	5/19/04	Agreement		CRS	[redacted]	Y	OEG		327	332
DERS	Super Agr	11/22/04	Agreement	5/19/04	CRS	[redacted]	Y	OEG		320	326
DERS	Option Agr	1/14/05	Option Agreement		CRS	[redacted]		OEG	508389	159	175
DERS	Super Agr	4/4/05	Letter re:1/20/05 Agr.	1/20/05	CRS	[redacted]	Y	OEG		333	333
DERS	Super Agr	4/4/05	Copy of Page 334	1/20/05	CRS	[redacted]	Y	OEG		386	386
DERS	Super Agr	5/19/04	Agreement		CRS	[redacted]	Y (a)	OHA		347	352
DERS	Super Agr	10/28/04	Agreement (signature 11/8/04)	5/19/04	CRS	[redacted]	Y (a)	OHA		353	357
DERS	Option Agr	1/25/05	Option Agreement		CRS	[redacted]		OHA	508381	220	236
DERS	Option Agr	1/25/05	Option Agreement		CRS	[redacted]		OHA	508372	191	203
DERS	Option Agr	12/30/04	Option Agreement		CRS	[redacted]		OHA	508373	306	318
DERS	Option Agr	12/28/04	Option Agreement		CRS	[redacted]		OHA	508369	237	250
DERS	Option Agr	1/25/05	Option Agreement		CRS	[redacted]		OHA	508371	204	220
DERS	Option Agr	12/30/04	Option Agreement		CRS	[redacted]		OHA	508379	292	305
DERS	Option Agr	12/29/04	Option Agreement		CRS	[redacted]		OHA	508378	279	291
DERS	Option Agr	12/29/04	Option Agreement		CRS	[redacted]		OHA	508374	79	91
DERS	Option Agr	12/29/04	Option Agreement		CRS	[redacted]		OHA	508377	265	278
DERS	Option Agr	12/29/04	Option Agreement		CRS	[redacted]		OHA	508376	251	264
DERS	Option Agr	12/29/04	Option Agreement		CRS	[redacted]		OHA	508375	105	118
DERS	Option Agr	1/11/05	Option Agreement		CRS	[redacted]		OHA	508382	119	133
DERS	Option Agr	1/14/05	Option Agreement		CRS	[redacted]		OHA	508380	146	158
DERS	Option Agr	12/29/04	Option Agreement		CRS	[redacted]		OHA	508383	92	104
DERS	Super Agr	7/7/04	Superceded Agreement	12/14/00	CRS	[redacted]				1173	1179
DERS	Super Agr	11/22/04	Superceded Agreement	7/7/04	CRS	[redacted]				1180	1187
DERS	Agreement	11/9/05	Agreement	11/22/04	CRS	[redacted]				1188	1195

(a) [redacted]

[redacted]

All Accounts

CRS Option Payment for First Quarter 2005

Account Number	Option Payment Components					Insufficient Notice Fee (Incurred for billing service by 1/31/2006)	Total
	Fuel & Purchase Power	One (1) Mil per kWh of Generation	[redacted]	[redacted]			
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	-	-	[redacted]
	$ [redacted]	$ [redacted]	[redacted]	$ -		$ -	$ [redacted]

Option Payment = $ [redacted]

Remit payment to the following:

[redacted]

CONFIDENTIAL PROPRIETARY
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00643

BEH ATTACHMENT 19
CONFIDENTIAL

ergy Corp.

eturn to: Accounts Payable (EM860)

REQUEST FOR INVOICE PAYMENT

Paying Company: (Circle One Only) 010 070 CG&E 100 ULH&P 800 PSI Energy 500 Cinergy Corp. Cinergy Services O[redacted]

Payment Reference (AP Use Only)	[redacted]	Routing for Field Approval (AP Use Only)	
Signature:	Jason Barker	Employee #	23642
Telephone #	513.419.5165		

ACCOUNTING DISTRIBUTION

Amount	Resp. Corp.	Resp. Cntr.	Work Code	LOB	Reference (Veh. #, Emp. #, Sub. Ledger #)	LOC	SVC	DCE
$ [redacted]								
$ [redacted]								

TOTAL

Notes:
Open Payment for:
MERCY FAIRFIELD

Invoice #

ENCLOSE INVOICE WITH CUSTOMER CHECK

WHEN CHECK IS NEEDED
(Request if payment is required immediately)

DATE

SPECIAL INSTRUCTIONS

☑ ATTACHMENT TO FORWARD

☐ SEPARATE CHECK

FORWARDING OF CHECK - OTHER THAN U.S. MAIL

☐ VIA INTER CO. MAIL TO

MAIL DROP

☐ WHEN AVAILABLE, PLEASE CALL

EXTENSION

M-9300-1-R 4-05

CONFIDENTIAL PROPRIETARY
TRADE SECRET

00644

423

00645

Payment Reference
(AP Use Only)

CONFIDENTIAL - CONTAINS TRADE SECRET

Cinergy Corp. **Mail to: Accounts Payable (EM860)**

REQUEST FOR ACH/WIRE TRANSFER PAYMENT

Paying Company (Circle One)
CG&E **PSI Energy** **Cinergy Services**
ULH&P **Cinergy Corp.** **Other** [redacted]

Date_____

Vendor Name [redacted]

Street Address [redacted]

City [redacted] State [redacted] ZIP [redacted]

Vendor Tax I.D. Number [redacted]

PAYMENT DISTRIBUTION

Amount	Resp. Corp.	Resp. Cntr.	Work Code	LOB	Reference (Veh. #, Emp. #, Sub-Ledger #)	LOC	SVC	DCE
[redacted]								
[redacted]	TOTAL							

Preparer Jim Ziolkowski_____ Employee No. [redacted]

Telephone No. [redacted]

Approved by_____ Title_____

Approver Passport ID#_____

Bank Name [redacted] ABA Number [redacted]

Account Number [redacted]

Account Name if Different than Vendor Name_____

Due Date Aug 12, 2006

M9300-9 R 08/05

All Accounts

CRS Option Payment 2nd Quarter 2006

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Account Number	CG&E MISO Components: Generation Charge	Fuel & Purchase Power (Incl. Sales)	System Reliability Tracker	Annually Adjusted Component	Rate Stabilization Charge	Infrastructure Maintenance Fund	Regulatory Transition Charge	Total CG&E MISO	Less the Following	"Big G"	Fuel & Purchase Power (Incl. Sales)	Infrastructure Maintenance Fund up to 4%	Total Option Payment
[redacted]													

Option Payment = $ 1,035,786.45

Remit payment to the following:

[redacted]

To be Paid by Wire

Payment Info:

[redacted]

000046

888

Cine Corp.

to: Accounts Payable (EM860)

CONFIDENTIAL PROPRIETARY TRADE SECRET

REQUEST FOR INVOICE PAYMENT

Paying Company: (Circle One Only) 010 CG&E 070 ULH&P 100 PSI Energy 800 Cinergy Corp. 500 Cinergy Services 800 Other: Cinergy Investments

Payment Reference (AP Use Only)	Routing for Field Approval (AP Use Only)
Signature: John Deeds	Employee # 19147
Telephone # 513.419.5318	

ACCOUNTING DISTRIBUTION

Amount	Resp. Corp.	Resp. Cntr.	Work Code	LOB	Reference (Veh. #, Emp. #, Sub. Ledger #)	LOC	SVC	DCE
[redacted]								
[redacted]								

Notes:

Option Payment for Speed [redacted]

Invoice #

ENCLOSE INVOICE WITH CUSTOMER CHECK

Please Forward to Bob Muench in Accounts Payable

WHEN CHECK IS NEEDED

(Request if payment is required immediately)

DATE IMMEDIATE

SPECIAL INSTRUCTIONS

☐ ATTACHMENT TO FORWARD

☐ SEPARATE CHECK

FORWARDING OF CHECK - OTHER THAN U.S. MAIL

☐ VIA INTER CO MAIL TO

MAIL DROP

☐ WHEN AVAILABLE, PLEASE CALL

EXTENSION

OCG-7

[redacted]

M-9300-1-R 4-05

[redacted]

CRS Option Payment for January 2006

CONFIDENTIAL PROPRIETARY
TRADE SECRET

Option Payment Components

Account Number

[redacted]	$	$	$	$	$	$	$

Option Payment = [redacted]

Remit payment to the following:

[redacted]

Ohio Consumers' Counsel
Fifth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: February 9, 2007
Response Due: February 209, 2007

OCC-INT-05-RI103

REQUEST:

Regarding the December 20, 2004 Option Agreement by "Cinergy Retail Sales, LLC. ('CRS')" with "General Motors, Inc. ('GM')" (Bate stamped "50" in documents provided at the deposition of Charles Whitlock) and the December 20, 2004 Option Agreement by CRS with "Marathon Ashland Petroleum, LLC. ('MAP')" (Bate stamped "32"):

a. Who were the persons responsible for the decision to have CRS and Cinergy enter into each agreement (i.e., identify each person)?

b. When was the decision made to have CRS and Cinergy enter into each agreement?

c. For each person identified in response to part (a) above, at the time each agreement was executed, what was each person's company of employment (i.e., identify the company), job title, job duties, and responsibility related to each agreement?

d. Why were Option Agreements entered into, rather than continue the November 8, 2004 agreement?

RESPONSE:

Objection. This question is not calculated to lead to the discovery of relevant evidence. Charles Whitlock was a deponent for DERS, not DE-Ohio. Without waiving its objection DE-Ohio makes the following representations:

a-c. DE-Ohio was not a party to the DERS decision making process.

d. DE-Ohio is not privy to the reasoning of DERS or the counterparties on this subject. Based on its attendance of the depositions of Charles Whitlock and Tim Duff, and its receipt of the contracts through the discovery process, DE-Ohio states, on information and belief, that the Commission made material amendments to the alternate proposal effectively rejecting it and terminating the November contracts referred to above. Upon

termination DERS had an obligation to enter into discussions to see if the parties could negotiate contracts permitting the parties to be in substantially the same economic position as they were in the November contracts. Although neither party was under an obligation to enter any further contract the parties agreed on the terms and conditions of the option contracts.

WITNESS RESPONSIBLE: N/A

CONFIDENTIAL

Sent: Monday, July 24, 2006 1:12 PM
To: Burns, Jennifer; Dirr, Michael
Subject: FW: CRES Payments

CONFIDENTIAL PROPRIETARY
TRADE SECRET

FYI. This is the CRES 101 that I got from Rates.

From: Ziolkowski, Jim
Sent: Monday, May 15, 2006 10:19 AM
To: Gomez, Jon; Wathen, Don
Cc: Storck, Don
Subject: RE: CRES Payments

Jon,

These are all native-load, retail customers located in the DE Ohio (CG&E) service territory. As described below, the original plan was to have them become "shoppers" in accordance with Ohio Electric Customer Choice, and they would receive their generation service from the newly-formed Cinergy CRES. At the last minute, Cinergy deemed the contracts to be too risky, and negotiated the payments instead.

Jim Ziolkowski
Rate Services
513 287-3337

From: Gomez, Jon
Sent: Monday, May 15, 2006 10:11 AM
To: Ziolkowski, Jim; Wathen, Don
Cc: Storck, Don
Subject: RE: CRES Payments

Thank you very much for the background. I do have one follow up question. We went through the budget with Chuck Whitlock last week and he has asked to start seeing the CRES payments as part of his native load budget since it is related to the RSP. It sounds like from your history explanation it is related to full requirements customers which we call non-native. Why would the non-native customers intervene on rates that would not affect them or are you considering those customers as part of the retail load? Thanks again, Jon

---

From: Ziolkowski, Jim
Sent: Thursday, May 11, 2006 4:03 PM
To: Wathen, Don; Gomez, Jon
Cc: Storck, Don
Subject: RE: CRES Payments

Jon,

Here is the history behind the so-called "CRES" payments:

During late 2003, the Public Utilities Commission of Ohio asked all of the electric investor-owned utilities in the State of Ohio to prepare and submit Rate Stabilization Plans. At that time, we were still in our Market Development Period following the implementation of electric Customer Choice in January 2001. During the Market Development Period,

electric rates were frozen, and the original plan was for all of the utilities to offer market-based rates following the end of the Market Development period. The Market Development period was scheduled to end no later than 12/31/05.

By 2003, the PUCO and other groups became concerned that the competitive electric retail market in Ohio was not sufficiently robust to prevent wild price swings under pure competition and market pricing. The problems in California and the subsequent Enron meltdown also colored their feelings. As a result, they asked the utilities to offer Rate Stabilization Plans in lieu of pure market pricing.

CG&E (Duke Energy Ohio) filed its RSP (known as the Electric Reliability and Rate Stabilization Plan, ERRSP) during the first half of 2004. A number of large customers, some represented by industry groups, intervened in the filing. CG&E's and the PUCO's goal was to obtain rapid approval of the RSP such that the new rates could go into effect on 1/1/2005. The interveners represented a roadblock, however. To eliminate this roadblock and prevent a formal hearing, CG&E negotiated special conditions with the interveners and ultimately reached agreements with them.

The original settlement agreement with the interveners called for Cinergy to form a "CRES" (Certified Retail Electric Supplier - the State of Ohio must certify all retail electric providers in terms of creditworthiness, etc.). The Cinergy CRES was to provide generation service for the interveners at pre-specified, contractual rates. At the last minute (i.e., December 2004), Cinergy's top management decided that the CRES settlement was too risky, and Cinergy essentially decided to not follow through with the contract. To prevent lawsuits for breach of contract, Cinergy entered into negotiations with each of the parties and agreed to make monthly or quarterly payments in lieu of offering generation service from the CRES.

So as you can see, the "CRES" customers are actually full-requirement customers of Duke Energy Ohio, but they receive payments from the Company instead of receiving generation service from the Cinergy CRES (the Cinergy CRES does not have any retail customers, but has at least $22 million of expenses).

The payments for each group of the "CRES" customers differ from each other. Generally speaking, the contracts with each group specify that the customers belonging to that group will receive refunds of various RSP riders (e.g., Rider AAC, Rider FPP, Rider IMF, Rider SRT, etc.). Each month or quarter, I prepare statements that show the amount of money that is to be refunded to each customer, and the payments are made from the CBU's (non-regulated generation) budget.

These payments will last through December 2008 at which point the ERRSP will terminate.

By the way, the "CRES" customers include some of [redacted] is why the payments total about $22 million per year. [redacted]

Hope this helps.

Jim Ziolkowski
Rate Services
513 287-3337

CONFIDENTIAL PROPRIETARY
TRADE SECRET

From: Wathen, Don
Sent: Thursday, May 11, 2006 3:08 PM
To: Ziolkowski, Jim
Subject: FW: CRES Payments

Jim,

Can you respond to Jon's question? You and Tim are the only ones I'm aware of who know this stuff.

From: Gomez, Jon
Sent: Thursday, May 11, 2006 3:00 PM

00653 ~~00659~~

To: Wathen, Don
Subject: CRES Payments

Do you have anything that tells or can you briefly describe the concept behind the CRES payments? We are budgeting around $22M annually for this out of our non-native segment. How was that number derived, who does it go to, and does it last until the end of 2008? Just trying to get a little more educated on this. Thanks, Jon

Jon Gomez
DEA Budgeting & Forecasting
(317) 838-1653
jgomez@cinergy.com

CONFIDENTIAL PROPRIETARY
TRADE SECRET

EXHIBIT C-3

DUKE ENERGY RETAIL SALES, LLC

OFFICER CERTIFICATION OF FINANCIAL STATEMENT

LON C. MITCHELL, JR.

I, Lon C. Mitchell, Jr. do hereby certify that I am Vice President, Chief Financial Officer, and Treasurer of Duke Energy Retail Sales, LLC.

I further certify that I have reviewed the attached Financial Statements of Duke Energy Retail Sales, LLC, and that such Financial Statements are accurate and complete to the best of my knowledge, information and belief.

Dated this 22nd day of August, 2006.

Lon C. Mitchell
Vice President, Chief Financial Officer, Treasurer
Duke Energy Retail Sales, LLC

EXHIBIT C-3

Duke Energy Retail Sales LLC
Balance Sheet
December 31, 2005

Assets	
Accounts Receivable - affiliates	$ 4,245,431
Liabilities	
Accounts Payable - affiliates	$ 11,172,890
Accrued Taxes	(710,115)
Other	3,023,158
Total Liabilities	13,485,933
Member's Equity	
Retained (Deficit)	(9,240,502)
Total Liabilities and Member's Equity	$ 4,245,431.00

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EXHIBIT C-3

Duke Energy Retail Sales LLC
Statement of Income
For the year ended December 31, 2005

Revenues	$ -
Operating Expenses	
Option Premium Expense	13,768,812
Administrative and General Expenses	259,460
Operating (Loss)	(14,028,272)
Interest Expense	147,549
(Loss) Before Taxes	(14,175,821)
Income Tax Expense (Benefit)	(4,950,863)
Net Income	$ (9,224,958)

CONFIDENTIAL

EXHIBIT C-3

Duke Energy Retail Sales LLC
Budgeted Statement of Income
For the year ended December 31, 2006

Revenues	$ -
Operating Expenses	
Option Premium Expense	22,247,000
Administrative and General Expenses	28,500
Operating (Loss)	(22,275,500)
Interest Expense	800,000
(Loss) Before Taxes	(23,075,500)
Income Tax Expense (Benefit)	(8,076,425)
Net Income	$ (14,999,075)

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Schafer, Anita 00658 ~~00653~~ CONFIDENTIAL PROPRIETARY ~~TRADE SECRET~~

From: Schrader, Steve
Sent: Friday, January 28, 2005 2:23 PM
To: Ficke, Greg; ^Janson, Julie - cell phone
Subject: FW: RSP Impacts by Year.xls
Attachments: RSP Impacts by Year.xls

Thought I would walk Phil through this

RSP EBIT Impacts on Plan

	2004	2005	2006	2007	2008	
RSP RELATED REVENUES						
Transmission Cost rider on C&I (MISO tracker)	[redacted]					Recovery of C&I only in 2005 All classes 2006-2008
Distribution Deferral Recovery						itsel by Amortization of 2004/2005 Deferrals
AAC Revenues (net switching)						&I only in 2005. All classes in 2006-2008 plus rate increases
Less: CRES Reimbursement (CRS, LLC)						
Net AAC Revenues						
FPP (Fuel/EA and PP) Tracker						C&I only in 2005 All in classes in 2006-2008
Less: CRES Reimbursement (CRS, LLC)						
Total FPP Tracker						
SRT (System Reserve Tracker) Revenues						
Less: CRES Reimbursement (CRS, LLC)						
Net SRT Revenues						nes full recovery of costs (except CRES)
RSC reimbursement to CRES (CRS, LLC)						
RTC reimbursement to CRES (CRS, LLC)						
1 Mil/Kwh discount on CRES (CRS, LLC)						
IMF (Infrastructure Maintence) Revenues						C&I only in 2005 All in 2006. Rate incr in 2007
Total Revenue Items						
RSP RELATED EXPENSES						
Deferral of Distribution Depr., Prop. Tax, and Carrying cost						-year amort. starts in 2008 (not shown is 2004 $11.2m deferral)
MISO Expenses						Increase in 2005 to end of MDP deferral on Res
Fuel/PP and EA Costs over Frozen Base Rates						Fuel expense exceeding $12.45/Mwh in frozen rate
Reserve Purchase Power Costs						
Total On-going Expenses						
Total Net RSP Impacts						
Year to Year Change						
EPS estimate						

00659 ~~00654~~

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TRADE SECRET

00660 ~~00653~~ 660

CONFIDENTIAL

[redacted]

November 30, 2004

Mr. Dan Jones
Certified Supplier Business Center
The Cincinnati Gas & Electric Company
139 East Fourth Street
Cincinnati, Ohio 45202

Re: Notice of [redacted]tent to Stay with or Switch to a CRES Pursuant to Paragraph 25 of the PUCO's Entry on Rehearing in Case No. 03-093-EL-ATA, *et al.*

Dear Mr. Jones:

Pursuant to instructions provided by CG&E Counsel Michael Pahutski and Ordering Paragraph 25 of the PUCO's Entry on Rehearing in the above-captioned proceeding, th[redacted] hereby notifies CG&E that it intends to a) keep its current "Choice" accounts with a CRES provider and b) enroll additional accounts with a CRES provider conditioned on receipt of any available enhanced shopping credit available to the first 20% of shoppers in each applicable class. Attached to this letter is a list of the accounts applicable to groups (a) and (b) above. The Group (b) account numbers are prioritized in the sequence tha[redacted]uld like them placed in the queue.

[redacted]s issued this notice in order to place existing sales accounts in the queue to avoid RSC and ACC charges beginning January 1, 2005, and as a precaution to permit existing CRES accounts to avoid these charges for 2005 and for the period beginning January 1, 2006. To the exten[redacted]urrent enrollment with a CRES already permits it to avoid these charges (see e.g. Ordering Paragraph 27 of the PUCO Order on rehearing), CG&E may disregard this notice.

Please send all confirmations and correspondence regarding this matter to my attention at the address and number listed above, or via e-mail a[redacted]

On behalf o[redacted] thank you for your prompt attention to this correspondence.

Sincerely,

[redacted]

CONFIDENTIAL

Cc: M. Pahutski, Esq. – CG&E
M. Kurtz, Esq. – Boehm, Kurtz & Lowery

Attachment

CONFIDENTIAL

[redacted]

December 3, 2004

Mr. Dan Jones
Certified Supplier Business Center
The Cincinnati Gas & Electric Company
139 East Fourth Street
Cincinnati, Ohio 45202

Re: Addenda to Notice o[redacted]ent to Stay with or Switch to a CRES Pursuant to Paragraph 25 of the PUCO's Entry on Rehearing in Case No. 03-093-EL-ATA, *et al.*

Dear Mr. Jones:

In addition to the Notice issued by Letter dated November 30, 2004 [redacted] wishes to notify CG&E th[redacted]ill enroll all of its accounts with a CRES provider for service effective January 1, 2006 for the entire calendar year.

[redacted]s issued this notice in order to place these accounts in the queue to avoid RSC and ACC charges beginning January 1, 2006 in accordance with the Commission's Order on Rehearing.

Please send all confirmations and correspondence regarding this matter to my attention at the address and number listed above, or via e-mail [redacted]

On behalf o[redacted] thank you for your prompt attention to this correspondence.

Sincerely,

[redacted]

Cc: M. Pahutski, Esq. – CG&E
M. Kurtz, Esq. – Boehm, Kurtz & Lowery

RECEIVED-DOCKETING DIV
2007 MAR 13 AM 11:50
PUCO

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

CONFIDENTIAL

MEMORANDUM CONTRA MOTIONS OF DUKE ENERGY, OHIO, INC., DUKE ENERGY RETAIL SALES, CINERGY CORP., OHIO HOSPITAL ASSOCIATION, AND KROGER FOR PROTECTIVE ORDERS
AND
MOTION FOR PREHEARING CONFERENCE
AND
REQUEST FOR EXPEDITED RULING
BY
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

The Office of the Ohio Consumers' Counsel ("OCC") hereby responds to motions for protective orders filed in this case by parties that wish to keep certain information out of the public domain. In this Memorandum, OCC will explain why the information should be made public.

The OCC also moves, pursuant to Ohio Adm. Code 4901-1-12(A) and 4901-1-26, for a prehearing conference in these cases. The prehearing conference is important for a number of reasons, and particularly to deal with matters that arise in the above-captioned cases due to the presence of documents that one or more parties consider confidential that will figure prominently in a case that involves multiple witnesses and parties. The OCC requests an expedited ruling, pursuant to Ohio Adm. Code 4901-1-12(C). All parties were

notified electronically regarding the OCC's request, but this filing is made before affirmative responses were obtained from all parties.

The reasons supporting the OCC's Motion for Prehearing Conference are contained in the following Memorandum in Support.

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Trial Attorney
Ann M. Hotz
Larry S. Sauer
Assistant Consumers' Counsel

Office Of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
Telephone: 614-466-8574
Fax: 614-466-9475
E-mail small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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

ARGUMENT AND
MEMORANDUM IN SUPPORT

I. INTRODUCTION

On February 23, 2007, the Office of the Ohio Consumers' Counsel provided notice to three Duke-affiliated companies and two other parties -- Duke Energy Ohio, Inc. ("Duke Energy Ohio," also a reference to its predecessor, the Cincinnati Gas and Electric Company), Duke Energy Retail Sales, LLC ("DERS"), Cinergy Corp. ("Cinergy"), the Ohio Hospital Association ("OHA"), and Kroger Co. ("Kroger," collectively with the other movants, "Movants") – that they should either allow certain documents (that they want to protect against disclosure) to become available in the public domain or they should fulfill their responsibility under law and rule to prove to the PUCO that the documents they believe to be confidential are in fact deserving of such secrecy from the public. The OCC provided this notice pursuant to its rights to do so under paragraph nine of the various protective agreements.

Other documents have recently been filed in the above-captioned cases, and one letter in particular distracts from the main issue presented in the Motions. In response to the OCC's aforementioned notices to the five parties that seek confidential treatment of documents, the Industrial Energy Users - Ohio ("IEU-Ohio") filed a letter on March 2, 2007. OCC will respond herein to that letter, as well.

II. PROCEDURAL HISTORY

On January 10, 2003, Duke Energy Ohio (i.e. as the Cincinnati Gas and Electric Company) filed an application ("January 2003 Application") containing proposals to provide a competitive market option standard service offer ("CMO") and to establish an alternative competitive bidding process for the period after the market development period (i.e. post-MDP) for non-residential customers.[1]

On December 9, 2003, the Commission issued an entry that, among other matters, consolidated various pending matters regarding Duke Energy Ohio and requested that Duke Energy Ohio file a "rate stabilization plan"[2] ("RSP") in keeping with the Commission's policy statements regarding the post-MDP pricing of generation service by other utilities in Ohio. On January 26, 2004, Duke Energy Ohio filed another application ("January 2004 Application") in the consolidated cases. The January 2004 Application proposed that the Commission approve either the CMO approach contained in the January 2003 Application, "consistent with the language and intent of R.C. Chapter

[1] January 2003 Application at 1.

[2] Entry, page 5 (December 9, 2004).

4928," or an "ERRSP" plan containing rates for generation service proposed by Duke Energy Ohio that included non-bypassable charges.[3]

The hearing was delayed in connection with the filing of a stipulation on May 19, 2004 ("Stipulation") in these cases that described another plan of service ("ERRSP Stipulation Plan"). The parties who did not execute the Stipulation, including the OCC, were permitted a very short period during which they could inquire into the Stipulation by means of discovery. The OCC sought copies of all side-agreements between Duke Energy Ohio and other parties to the Post-MDP Service Case, and the Company refused to provide copies of such agreements. The first witness appeared at hearing on May 20, 2004 (based on pre-filed testimony not related to the Stipulation). The OCC began the hearing on May 20, 2004 with an oral Motion to Compel Discovery of the side-agreements. The Motion to Compel Discovery was denied.[4]

The Commission's Order in the Post-MDP Service Case was issued on September 29, 2004. Several parties, including Duke Energy Ohio and the OCC, filed applications for rehearing on October 29, 2004. Duke Energy Ohio asked the PUCO to either i) approve its original CMO proposal; ii) approve the Stipulation that Duke Energy Ohio proposed at the hearing (i.e. unaltered by the PUCO); or iii) approve a new rate plan ("New Proposal") having an array of new and different charges that had not been investigated or been subject to a hearing.

Duke Energy Ohio's New Proposal was built on the four conditions placed by the Commission on the Stipulation and introduced new charges and modified previously

[3] January 2004 Application at 8.

[4] Tr. Vol. II at 8, line 4 though 15, line 2.

proposed charges. In the First Entry on Rehearing, the PUCO adopted (in principal part) the New Proposal. The Commission provided for certain Duke Energy Ohio filings before some of the rate increases provided for in the New Proposal could be placed into effect. The above-captioned cases reflect the existence of these filings.

The OCC submitted its second application for rehearing, which was denied in a Second Entry on Rehearing dated January 19, 2005. The Commission's last action was an "Order on Rehearing" (Appx. 92.), dated April 13, 2005, that addressed complaints by certain marketers regarding the willingness of Duke Energy Ohio to accept notices regarding contractually binding service to end users of electricity.

The OCC filed a Notice of Appeal on May 23, 2005. After argument before the Supreme Court of Ohio, the Court issued an opinion on November 22, 2006. The Court decided that the PUCO erred by failing to compel the disclosure of side agreements and erred by failing to properly support its decision that determined rates and rate procedures for the post-MDP.[5] The Court remanded the case for additional consideration by the Commission.

On November 29, 2006, the Attorney Examiner issued an Entry in the above-captioned cases that provided for a "hearing . . . to obtain the record evidence required by the court" and ordered that a prehearing conference be held on December 14, 2006.[6] The above-captioned cases were consolidated ("Post-MDP Remand Case"). A procedural Entry was issued on February 1, 2007 that, among other matters, set a hearing date for March 19, 2007. In their responses to OCC's discovery, the Movants marked as

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[5] *Ohio Consumers' Counsel v. Public Util. Comm.*, 111 Ohio St.3d 300, 2006-Ohio-5789 at ¶95 ("*Consumers' Counsel 2006*").

[6] November Entry at 3, ¶(7).

confidential (and subject to protective agreements) most everything that is of interest with regard to the heretofore secret side agreements.

Movants now seek a hearing that would essentially be closed to public scrutiny. To that purpose they filed five motions for protection on March 2, 2007.[7]

III. A PRE-HEARING CONFERENCE SHOULD BE HELD.

These proceedings are complex even without the added burden presented by many documents over which parties seek protection and the closure of the hearing room. For example, the hearing was bifurcated to deal first with issues on remand from the Supreme Court of Ohio and next with issues raised by various filings by Duke Energy Ohio regarding proposed riders and trackers.[8] However, due dates for all testimony were contained in a single schedule. The separation of witnesses between the two portions of the hearings is not entirely clear.

Another matter that should be discussed at a prehearing conference is the order of witnesses.. The Attorney Examiners have issued subpoenas for three witnesses from the Cincinnati area (upon motions by the OCC) and their appearances should be discussed to minimize the amount of time each witness is required to spend in Columbus at the hearing. Alternatively, counsel for Duke Energy Ohio and Kroger contacted the OCC to request that the OCC use deposition transcripts in lieu of the live appearances of these three witnesses, a matter that should be dealt with in the presence of other parties.

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[7] Kroger's Motion for Protection contains a certificate of service that incorrectly states that the pleading was served electronically. Electronic service is required pursuant to the instructions of the Attorney Examiners under the expedited procedure also ordered for pleadings in these proceedings. Hard copies of Kroger's Motion for Protection were received by the OCC in the mail on March 5, 2007 (but never transmitted by Kroger to the OCC's trial counsel).

[8] Entry at 2 (February 1, 2007).

These cases also present difficulties regarding the treatment of confidentiality claims regardless of the outcome for the Motions and the OCC's Memorandum Contra. One issue arose during the deposition of John Deeds on February 8, 2007. Restricted in its questioning regarding information gained during discovery, the OCC limited its cross-examination to more fully examining the claims contained in Mr. Deed's Complaint. Information was thereby provided to the OCC outside the terms of any protective agreement, and did not obtain any protected status under such agreements. Duke Energy Ohio stated at the deposition that the deposition transcript acquired protected status under its protective agreement with the OCC.[9] Duke Energy Ohio's position finds no support within the terms of the protective agreements. "Protected Materials" are not created in a vacuum, but in the context of "documents and information furnished subject to the terms of th[e] Agreement and so designated by [the providing party] by conspicuously marking each document or written response as confidential."[10] The result advocated by Duke Energy Ohio would conclude that an agreement intended to free the flow of information *from Duke Energy Ohio* could be transformed into a special restriction on only parties that signed protective agreements[11] regarding information obtained from someone other than Duke Energy Ohio.

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[9] Trial counsel for Duke Energy Ohio stated at the deposition of Greg Ficke on February 20, 2007 that Duke Energy Ohio was reconsidering its position.

[10] See, e.g., DERS Motion for Protective Order, Attachment A at ¶3.

[11] For example, a party such as the Ohio Partners for Affordable Energy ("OPAE") that has not executed a protective agreement with any of the Duke-affiliated companies could have subpoenaed Mr. Deeds and obtained documents from Mr. Deeds. According to Duke Energy Ohio's argument, the information obtained would not be subject to any restriction. The result advocated by Duke Energy Ohio (that would restrict only the OCC and not OPAE) is ridiculous. The Duke-affiliated companies lost control of information regarding their side agreements before the OCC knew of their existence.

IEU-Ohio was not represented at the deposition of Mr. Deeds. Its innuendo that the OCC has engaged in some impropriety regarding contact with Mr. Deeds is based on pretense and disregard for facts. IEU-Ohio Letter at 1-2 (March 2, 2007).

The same holds true regarding documents obtained as the result of the subpoena duces tecum served upon John Deeds.[12]

Loose claims by Duke-affiliated companies regarding the confidential treatment of documents have been a continuing problem for the OCC. Documents provided by the Duke-affiliated companies have in some instances (aside from the discussion of John Deeds) been obtained from other sources and thereby have lost their protected status under the protective agreements.[13] The Duke-affiliated companies themselves have released discussions of documents as part of discovery without any claim to confidentiality.[14] Siding with caution, many parties may not receive unredacted versions of the OCC's testimony even though any claim to the confidential status of some documents (and thereby to discussions of those documents) is tenuous.

Without conceding any result regarding the Motions and the OCC's Memorandum Contra, maintaining the confidentiality claimed by various parties would be restrictive and cumbersome at the hearing. For instance, OCC testimony is organized by subject matter and the flow of exposition: it is not organized by the source of the information used. A constantly shifting attendance by counsel for various parties might result if no other arrangement or instruction is provided. The OCC should be able to cross examine a

[12] The documents were not part of the subject matter for the deposition other than brief questioning by Duke Energy Ohio regarding whether documents had been provided to the OCC.

[13] See, e.g., DERS Motion for Protective Order, Attachment A at ¶3 ("Protected Materials" shall not include any information or documents contained in the public files of an administrative agency or court or otherwise in the public domain.").

[14] As an example, the OCC was provided with multiple responses to the OCC's fifth set of discovery to Duke Energy Ohio that discuss the side deals that were used to settle the Post-MDP Service case using Cinergy Retail Sales, LLC as a vehicle to accomplish the task. The versions conflict regarding their claim, or lack thereof, regarding confidentiality.

customer witness using documents obtained from a Duke-affiliated company. Duke Energy should not be able to exclude parties from the hearing room (and maybe even from briefing the case) by requiring parties to submit to unreasonably restrictive protective agreements. These situations can be dealt with at a prehearing conference using limiting instructions. The aim should be to include counsel for parties in the proceedings to the extent possible.

For the foregoing reasons, a prehearing conference should be conducted for these proceedings.

IV. THE MOTIONS FOR PROTECTION SHOULD BE DENIED IN FAVOR OF HOLDING A *PUBLIC PROCEEDING.*

A. The Law Regarding Claims of Confidentiality

The Movants seek to engage the OCC in a debate over public policy in which legal authority favors the OCC -- which is to say the law favors the public's interest in the conducting of open proceedings by their government. All of the protective agreements at issue state that "the burden shall be upon [the party seeking confidential treatment]... to show that any materials labeled as Protected Materials pursuant to this Agreement are confidential and deserving of protection from disclosure."[15]

Ohio Adm. Code 4901-1-27(B)(7)(e) requires that "[t]he party requesting such protection shall have the burden of establishing that such protection is required." The reason for this burden upon Movants is that the OCC supports "the inherent, fundamental policy of R.C. 149.43 ... to promote open government, not restrict it."[16]

[15] See, e.g., DERS Motion for Protection, Exhibit A (Protective Agreement) at ¶10.

[16] *Besser v. Ohio State University* (August 9, 2000), 89 Ohio St. 3d 396, 396.

R.C. 149.43 is Ohio's public records law that has been addressed in numerous proceedings before the Commission. R.C. 4901.12 requires that "all proceedings of the public utilities commission and all documents and records in its possession are public records," except as provided in the exceptions under R.C. 149.43. The Commission has noted that R.C. 4901.12 and R.C. 4905.07 "provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome."[17]

Ohio Admin. Code 4901-1-24(D) requires of the PUCO that "[a]ny order issued under this paragraph shall minimize the amount of information protected from public disclosure." The Commission stated in a 2004 case:

> The Commission has emphasized, in *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry issued November 23, 2003, that:
>
> > [a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (Section 149.43, Revise Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio pubic records law is intended to be liberally construed to 'ensure that governmental records be open and made available to the public ... subject to only a few very limited exceptions.' *State ex. rel. Williams v. Cleveland* (1992), 64 Ohio St. 3d 544, 549, [other citations omitted].[18]

The Commission's Entry in the above-quoted case is as informative for its details as it is for the cited legal authority. Faced with demands for "wholesale removal of the document from

[17] *In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR, *Opinion and Order* at 5 (October 18, 1990).

[18] *In re MxEnergy, Inc.*, Case No. 02-1773-GA-CRS *et al.*, Entry at (3) (September 7, 2004) (notations in original).

public scrutiny,"[19] the Commission reviewed several documents and determined in each case how documents could be redacted "without rendering the remaining document incomprehensible or of little meaning...."[20]

The Commission has also used a balancing approach in its review of motions for protective orders. For instance, the PUCO has noted "it is necessary to strike a balance between competing interests. On the one hand, there is the applicant's interest in keeping certain business information from the eyes and ears of its competitors. On the other hand, there is the Commission's own interest in deciding this case through a fair and open process, being careful to establish a record which allows for public scrutiny of the basis for the Commission's decision."[21]

The Ohio Supreme Court has addressed the test for protection from disclosure under R.C. 149.43 as the "state or federal law" exemption.

> We have also adopted the following factors in analyzing a trade secret claim:
>
> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and

[19] *Id.* at 3.

[20] *Id.*

[21] *In the Matter of the Application of Rapid Transmit Technology Inc. for Certificate of Public Convenience and Necessity to Provide Local Telecommunications Service in the State of Ohio*, Case No. 99-890-TP-ACE, *Entry* at 2-3 (October 1, 1999); *see also In the Matter of the Joint Application of the Ohio Bell Telephone Company and Ameritech Mobile Services, Inc. for Approval of the Transfer of Certain Assets*, Case No. 89-365-RC-ATR at 7 (October 18, 1990) (holding that "any interest which the joint applicants might have in maintaining the confidentiality of this information [fair market value and net book value of assets proposed to be transferred] is outweighed by the public's interest in disclosure.")

> (6) the amount of time and expense it would take for others to acquire and duplicate the information.'[22]

The analysis of these factors regarding the documents in question is missing from all of the Motions except for some broad, summary statements.[23]

The Commission requires specificity from those that seek to keep information from the public record. Ohio Admin. Code 4901-1-24(D)(3) requires movants for confidentiality to file a pleading "setting forth the specific basis of the motion, including a detailed discussion of the need for protection from disclosure...." The specificity required by law, and supported by the terms of both the Protective Agreement and the Protective Attachment,[24] is missing from the Motions. Movants have failed to meet their burden under the terms of the protective agreements and under Ohio law.

B. The Motions and the Documents

In its notices of February 23, 2007, the OCC advised the Movants that they should either allow **all** the documents for which they claimed confidentiality to become available to the public domain or they should proceed with their responsibility under law and rule to try to convince the Commission that **all** of the documents are deserving of remaining secret from the public scrutiny. The OCC is hereby modifying its notices to limit the issue now before the PUCO to the documents that are attached to the testimony of OCC Witness Beth

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[22] *Besser* at 399-400.

[23] See, e.g., Ohio Hospital Association Motion for Protective Order at 4-5, which does not apply the test to any actual document or type of document. Revelations in connection with the wrongful discharge action by former employee John Deeds in connection with "option agreements" renders the efforts of the Duke-affiliated companies to limit dissemination of information regarding its side agreements within the limits of the organization is suspect, as does the apparent lack of precautions taken to guard the secrecy of the information. .

[24] DERS Motion for Protection, Attachment A at 5, ¶9 ("nature and justification for the injury").

Hixon. The OCC conditions its narrowing of the scope of the documents at issue upon the recognition of this modification of the notices, with full reservation of the OCC's rights (under paragraph nine of the protective agreements) to give notice to the Movants in the future with regard to any documents not attached to Witness Hixon's testimony. The OCC anticipates that any further exercise (if any) of its notice rights will be limited and related to potential cross-examination and rebuttal or surrebuttal testimony. Duke Energy - Ohio's counsel and the OCC last week agreed that any narrowing of the OCC's notice regarding the documents would not preclude the OCC, under the circumstances just described, from giving further notice later. The PUCO should recognize the OCC's rights in any ruling in these proceedings.

1. Attachments to the Testimony of OCC Witness Hixon

The arguments fundamentally presented by the Duke-affiliated companies state that the OCC failed to provide specificity regarding the documents that it seeks to introduce into the public domain during these proceedings[25] and that the documents contain confidential agreements that involve Duke Energy affiliates.[26] The protective agreements signed with all Movants contain the same language regarding notification of counsel in order to identify the protected materials that are the subject of notice by the OCC. The purpose served by that portion of each of the protective agreements is to provide the party producing the documents fair notice regarding the OCC's intent regarding the treatment of documents. While the

[25] See, e.g., Duke Energy Ohio Motion for Protection at 13-14; DERS Motion for Protection at 10-11; Cinergy Motion for Protection at 3. The identification of material by "page and line numbers" (Duke Energy Motion for Protection at 14) is an impractical result in any proceeding , let alone the present proceeding with its expedited schedule that Duke Energy Ohio has advocated is too long. The purpose of protective agreements is practicality within the confines of litigation.

[26] See, e.g., Duke Energy Ohio Motion for Protection at 7; DERS Motion for Protection at 4; Cinergy Motion for Protection at 5.

OCC's original notices were broad, they provided the required, clear notification regarding the OCC's intent. Movants do not complain that any misunderstanding existed.

The confidentiality requested by Movants regarding documents of Duke Energy Ohio's affiliates should not be confused with any competitive supply arrangements for generation service. A detailed confrontation of Duke Energy Ohio's fallacy in this regard is contained in Section III of OCC witness Hixon's prefiled testimony, whose presentation exposing the fallacy is incorporated herein. The agreements and payments that involve Cinergy Retail Sales, now DERS, are settlements related to the Post-MDP Service Case. The agreement of Cinergy Corp. involves a Duke-affiliated company that is not even qualified to provide competitive retail electric service in the area served by Duke Energy Ohio. Cinergy euphemistically refers to the settlement agreement in the Post-MDP Service Case as "economic development assistance."[27] The issue, therefore, is one of revealing the totality of the settlement reached between the Duke-affiliated companies (at the time, the Cinergy-affiliated companies) in the Post-MDP Service Case. The public should have access to the totality of that settlement.

a. BEH Attachments 2-7: May 2004 Agreements between CRS and the Hospitals, OEG members, and IEU-Ohio; June 2004 Agreement with Cognis and July Agreement with Kroger; May 2004 Documents from OHA Response to OCC No. RP6

As elaborated upon in the testimony of OCC Witness Hixon, Attachments 2-7 contain secretly negotiated and concluded settlement agreements and discussions regarding those settlement agreements that were arranged in conjunction with the

[27] Cinergy Motion for Protection at 5.

proposals contained in the Stipulation that was publicly filed on May 19, 2004 in the Post-MDP Service Case. These portions of the total package of rates proposed by Duke Energy Ohio should be part of the public record in the same manner as the Stipulation filed on May 19, 2004.

Attachments 2-4 were obtained from DERS and involve agreements with parties that are membership organizations that do not contain any rates currently paid by any customer, but provide an important part of the initial settlement agreement in the Post-MDP Service Case that was elaborated upon later during the proceeding. The side agreements contain a variety of commitments by Duke Energy Ohio (then, the Cincinnati Gas and Electric Company) that were made to gain the support of Duke Energy Ohio's early opponents in the Post-MDP Service case for the Company's proposals.[28] Demonstrating that the agreements were *not* made by a marketer independent from Duke Energy Ohio, commitments were made that could only relate to Duke Energy Ohio's provision of distribution service.[29] Attachment 7 shows communications obtained from OHA in connection with the negotiation of Attachment 2, communications that are identified as negotiations with Duke Energy Ohio. The Attachment 7 information should likewise be treated as public information.[30]

Attachments 5-6 contain agreements with Cognis and Kroger (again, obtained from DERS), parties to the Post-MDP Service Case, that do not contain any rates

[28] Attachment 2 at Paragraph 9, Attachment 3 at Paragraph 6, Attachment 4 at Paragraph 7.

[29] See. e.g. Attachment 2 at Paragraph 6 (rates for dual feeds), Attachment 3 at Paragraphs 5 and 7 (Rider CIR and minimum stay).

[30] The material that OHA considers confidential is not entirely clear to the OCC since no separation of the material was attempted by OHA. Under these circumstances, the OCC has used a cautious approach to the use of OHA-provided information.

currently paid by any customer. Again, these agreements provide an important part of the initial settlement agreement in the Post-MDP Service Case that was elaborated upon later during the proceeding. The side agreement with Cognis commits that customer to support the Stipulation in the Post-MDP Service Case,[31] and requires Cognis to obtain its generation service from Duke Energy Ohio.[32] The agreement with Kroger, Attachment 6, is similar to those located in Attachments 2-4 except that it involves a wholesale arrangement by the Duke-affiliated companies instead of a retail arrangement. The agreement provides for Kroger's support of the publicly filed Stipulation in the Post-MDP Service case[33] and should be available to the public as part of the negotiated package.

The agreements in Attachments 2-6 are also listed in the chart that appears as Attachment 18, and should be released into the public domain as part of that Attachment. Attachment 18 is a summary chart that was used extensively during depositions.

b. BEH Attachments 8-15: November 2004 Agreements between CRS and the Hospitals; OEG members, and IEU-Ohio; October Agreement with Cognis and November Agreement with Kroger; and follow-up documents

As elaborated upon in the testimony of OCC Witness Hixon, Attachments 8-15 contain a second round of secretly negotiated and concluded settlement agreements and discussions regarding those settlement agreements that were arranged in conjunction with the proposal submitted on October 29, 2004 to the Commission in Duke Energy's

[31] Attachment 5 at Paragraph 5.

[32] Id. at Paragraph 1.

[33] Attachment 6 at Paragraph 8.

Application for Rehearing in the Post-MDP Service Case. These portions of the total package of rates proposed by Duke Energy Ohio should be part of the public record in the same manner as the statements by the parties that supported the package.

Attachments 8-10 were obtained from DERS and involve agreements with parties that are membership organizations that do not contain any rates currently paid by any customer, but provide an important part of the evolving settlement agreement in the Post-MDP Service Case that resulted from Duke Energy Ohio submitting its New Proposal. . The side agreements contain a variety of commitments by Duke Energy Ohio that were made to gain the support of Duke Energy Ohio's early opponents in the Post-MDP Service case for the Company's proposals.[34] Demonstrating that the agreements were *not* made by a marketer independent from Duke Energy Ohio, commitments were again made that could only relate to Duke Energy Ohio's provision of distribution service.[35] Attachment 13 shows communications obtained from OHA in connection with the negotiation of Attachment 8, communications that identify themselves as negotiations with Duke Energy Ohio.[36]

Attachments 11-12 contain second round agreements with Cognis and Kroger (again, obtained from DERS). Again, these agreements provide an important part of the evolving settlement agreement in the Post-MDP Service Case that was elaborated upon

[34] Attachment 8 at Paragraph 9, Attachment 9 at Paragraph 8; Attachment 10 at Paragraph at 8.

[35] See, e.g. Attachment 8 at Paragraph 6 (rates for dual feeds), Attachment 9 at Paragraphs 7 and 9 (Rider CIR and minimum stay).

[36] The communication on November 5, 2004 at 11:20 a.m. was copied to the President of CG&E, Greg Ficke. Attachment 13 at 3. As with Attachment 7, it is not entirely clear from the transmittal of the information contained in Attachment 13 whether OHA considers information confidential.

later during the proceeding. The side agreement with Cognis commits that customer to support Duke Energy Ohio's Application for Rehearing in the Post-MDP Service Case,[37] and requires Cognis to obtain its generation service from Duke Energy Ohio.[38] The agreement with Kroger, Attachment 12, is similar to those located in Attachments 8-10 except that it involves a wholesale arrangement by the Duke-affiliated companies instead of a retail arrangement. The agreement provides for Kroger's support of Duke Energy Ohio's Application for Rehearing,[39] and should be available to the public as part of the negotiated package.

The agreements in Attachments 8-10 and Attachment 12 are also listed in the chart that appears as Attachment 18, and should be released into the public domain as part of that Attachment.

The Cognis and Kroger side agreements, Attachments 11 and 12 (obtained from Cinergy and DERS), resulted in later transactions that are documented in Attachments 14-16. Attachment 14 is a voucher for payments to Cognis, identified as a "Quarterly ERRSP Payment." The document does not contain account information, only an address for the payment to Cognis. Attachment 15 contains an invoice to Kroger regarding the November agreement with Kroger, self identified as prepared "pursuant to the terms of the November 2004 RSP settlement agreement."[40] Pages 2-5 of Attachment 15 contains account numbers and dollar amounts. All but the account numbers should be made part

[37] Attachment 11at Paragraph 5.

[38] Id. at Paragraph 1.

[39] Attachment 12 at Paragraph 10.

[40] Attachment 15 at 1 (page Bate stamped 1159).

of the public domain. Attachment 16 is a response by DERS to OCC Interrogatory 51 that demonstrates that Kroger made payments under the November agreement that are not accounted for on the books of DERS. Attachment 16 information was communicated by DERS without any designation that the information was confidential.[41]

c. BEH Attachments 17 and 19[42]: "Option" Agreements and Requests for Payments

As elaborated upon in the testimony of OCC Witness Hixon, Attachments 17 and 19 contain a third round of secretly negotiated and concluded settlement agreements (obtained from DERS) and related interactions that evolved from the earlier rounds of agreements with members of OHA, OEG, and IEU-Ohio. These portions of the total package of rates proposed by Duke Energy Ohio for its customers should be part of the public record in the same manner as the statements by the parties that supported the package.

The numerous agreements that are part of Attachment 17 were obtained from DERS and involve payments to members of parties to the Post-MDP Service Case. The side agreements replaced the second round of agreements, carrying out the economic commitment by the Duke-affiliated companies to other parties that were made during the course of the Post-MDP Service Case. The agreements provide settlement concessions, described in Exhibit A to each agreement, of charges proposed by Duke Energy Ohio in the Post-MDP Service Case and demonstrate that support was gained for Duke Energy Ohio's proposals from customers that did not bear the burden of the proposed charges.

[41] Therefore, information contained in Attachment 16 has already been introduced into the public domain by DERS.

[42] Attachment 18 was discussed previously.

These are the agreements that are referred to in the Deeds Complaint. Information other than the account information contained in Exhibit C to each agreement should be released to the public domain along with other settlement information.[43]

Attachment 19 shows an example of a payment transaction under the third round agreements that provided for settlement concessions. Only the account numbers that are not part of the public domain[44] should be maintained as confidential.

d. BEH Attachments 20-24: Other Documentation

The remaining attachments provide a more complete context for the various agreements between the Duke-affiliated companies and those involved in the Post-MDP Service Case. Attachment 22 was taken from the Commission's website. The other communications were internal to the Duke-affiliates or with customers regarding the results of Case No. 03-93-EL-ATA, et al. before remand to the Commission. The communications may not present the image desired by the Duke affiliates, but that is not the test for the confidential status of documents in proceedings before the Commission.

2. Additional Explanation of Documents Presented to the OCC

a. Documents Provided by Duke Energy Ohio

For clarity, the documents obtained from Duke Energy Ohio over which the OCC currently seeks to end any claim to confidentiality are Attachments 20 and 23 to the testimony of OCC Witness Hixon.

[43] Two of the agreements, for **General Motors and Marathon**, were received by the OCC by means other than obtaining the information subject to any protective agreement.

[44] E.g. **Mercy Hospital-Fairfield** account numbers, Attachment 19 at 1 (Bate stamp 432).

b. Documents Provided by Cinergy

For clarity, the documents obtained from Cinergy over which the OCC currently seeks to end any claim to confidentiality are Attachments 5 and 11 to the testimony of OCC Witness Hixon.

c. Documents Provided by OHA

For clarity, all documents obtained from OHA that were attached to the testimony of OCC Witness Hixon (i.e. Attachments 7 and 13) were provided without any distinction between information that OHA considers confidential and information that OHA does not consider confidential.

d. Documents Provided by Kroger

For clarity, the documents obtained from Kroger that were attached to the testimony of OCC Witness Hixon (i.e. Attachment 24) were provided to the OCC before the execution of a protective agreement, and were simply stamped "CONFIDENTIAL" by Kroger. Later documents that contain the "term and pricing information" that are the subject of Kroger's Motion for Protective Order.[45] The "documents at issue," according to Kroger's Motion,[46] were provided later and separately under a protected status.

Kroger argues that it is provided generation by a CRES provider and that agreements regarding that arrangement and related to that arrangement should not be subject to public scrutiny.[47] The documents that are the subject of Kroger's Motion for Protective Order are comprised of five contracts (bilateral and three-party) that provide the foundation for the

[45] Kroger Motion for Protective Order at 5.

[46] Id.

[47] Kroger Motion for Protective Order at 3 and 5.

Constellation New Energy supply to Kroger. These five contracts are not the same as the agreements contained in Attachments 6 and 12 that are discussed above, and the scope of the information that the OCC seeks to introduce into the public domain has been limited to attachments to OCC Witness Hixon's testimony.

The confidentiality of the contracts regarding the CRES provider and Kroger are not being challenged by the OCC for purposes of OCC's modification of its February 23rd notice to Kroger. (OCC explained that modification and its reservation of rights, in above section IV.B.) Not only are the contracts not attached to the testimony of OCC Witness Hixon, but these five contracts appear to be distinguishable from the agreements that the Duke-affiliated companies seek to conceal that are mere side agreements connected with settlement of the Post-MDP Service Case. The side agreements do not involve the competitive retail electric supply to any customer.

V. IEU-Ohio's Letter

On March 2, 2007, IEU-Ohio filed a vituperative letter against PUCO procedural rulings, electric restructuring, and the OCC. At least three of the seven paragraphs in IEU-Ohio's rant contain expressions of frustration about PUCO rulings that for most parties would be funneled to an application for rehearing or to an interlocutory appeal. It is easier to define what the letter is not; it is not a motion for protection of documents. Whatever the letter is, it has been filed, sent to PUCO Commissioners and Attorney Examiners, and the OCC will therefore briefly address the letter.

In its letter, IEU-Ohio attacks the OCC for its "plan" to make confidential documents public. Under Ohio Adm. Code 4901-1-27(B)(7)(e), the plan of the PUCO provides that those seeking to secure secrecy from public scrutiny must bear "the burden of

establishing that such protection is required." Those bearing that burden, including Duke Energy Ohio and its two affiliates, now have the opportunity under Ohio law and rule to overcome the presumption that proceedings before the public's government will be open. As matters now stand, IEU-Ohio was able to make its public harangue cloaked by the present protection afforded documents in this proceeding that also constrains the OCC from a full public response.

IEU-Ohio mischaracterizes the OCC's position in the Post-MDP Service Case as seeking divestiture of the utility's generating assets, referencing page 7 of OCC's brief filed on June 22, 2004. The OCC's brief referenced "corporate separation," not divestiture, and recommended the transfer to an "electric [sic, exempt] wholesale generator" -- a status that Cinergy itself could have created under federal law. In fact, the OCC addressed the very sorts of concerns about the need for corporate separation that IEU-Ohio itself has addressed before the PUCO.[48]

IEU-Ohio's letter -- written and filed a full week before OCC filed its testimony to recommend reductions in rates for residential consumers -- characterized OCC's position as harmful and contributing to deregulatory "dysfunction." Of course, IEU-Ohio and its counsel make no reference in the letter to their role in actively supporting the electricity deregulation that is now Ohio law and about which they now complain. IEU-Ohio's counsel, as reported in one publication, was characterized as a "true believer" in deregulation and a "deregulation advocate."[49] In another edition, IEU-Ohio's counsel was

[48] *In re Electric Transition Plan Rulemaking*, Case No. 99-1141-EL-ORD, Comments of Coalition for Choice in Electricity at 28-33, 104 (October 13, 1999) (in which IEU-Ohio joined with others to comment extensively on the need for corporate separation).

[49] "Future Is Rosy For Ohio Deregulation As Senate Chief Gives It Top Billing," Industrial Energy Bulletin, Volume 25, Issue 51, p. 1 (December 25, 1998) (available on LEXIS).

described as someone who championed the cause of customer choice and who considered Senate Bill 3 to be "a work product that's capable of producing a 10, on a 1 to 10 scale."[50]

Finally, what seems to a motivating factor for IEU-Ohio's letter -- that there should be no more process in this case, public or otherwise -- was rejected by the highest court in this state, the Supreme Court of Ohio, in the appeal of Case No. 03-93-EL-ATA, et al., and is *not at issue* as the result of the OCC's February 23, 2007 notices. The Court remanded this case to resolve flaws that IEU-Ohio now defends, and there is no further consideration due IEU-Ohio in this regard.

VI. CONCLUSION

The Motions fail to meet the requirements under law for continued protection of the documents that were provided to the OCC during discovery. The Motions submitted by Movants should be denied with regard to the information described in this Memorandum Contra that should be released to the public domain, and they are rendered moot with regard to the information that the OCC will continue to hold protected as described above, subject to OCC's reservation of rights to give notice if appropriate under paragraph nine of the protective agreements.

The OCC's Motion for Prehearing Conference should be granted to deal with many complicating factors that are present in the instant proceedings.

[50] "Ohio Users Like Restructuring Bill, Readied for Signature of Gov. Taft," Industrial Energy Bulletin, p.2 (June 25, 1999) (available on LEXIS).

Respectfully submitted,

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Trial Counsel
Ann M. Hotz
Larry S. Sauer
Assistant Consumers' Counsel

The Office of The Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (T)
(614) 466-9475 (F)
small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

CERTIFICATE OF SERVICE

I hereby certify that a copy of the OCC's Un-redacted Memorandum Contra Motions for Protection and Motion for Prehearing Conference was served electronically on the persons listed on the electronic service list as shown below (as supplemented for this pleading), provided by the Attorney Examiner, this 13th day of March 2007.

Ann M. Hotz
Assistant Consumers' Counsel

Un-redacted Version:
paul.colbert@duke-energy.com
rocco.d'ascenzo@duke-energy.com
anita.schafer@duke-energy.com
michael.pahutski@duke-energy.com
ariane.johnson@duke-energy.com
mdortch@kravitzllc.com

Scott.Farkas@puc.state.oh.us
Jeanne.Kingery@puc.state.oh.us

Redacted Version:
cmooney2@columbus.rr.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
sam@mwncmh.com
dneilsen@mwncmh.com
lmcalister@mwncmh.com
jbowser@mwncmh.com
drineboll@aol.com
WTTPMLC@aol.com
schwartz@evainc.com
rsmithla@aol.com
barthrover@aol.com
sbloomfield@bricker.com
TOBrien@Bricker.com
dane.stinson@baileycavalieri.com
korkosza@firstenergycorp.com
JKubacki@strategicenergy.com
mchristensen@columbuslaw.org
tschneider@mgsglaw.com
shawn.leyden@pseg.com
ricks@ohanet.org
cgoodman@energymarketers.com
nmorgan@lascinti.org
eagleenergy@fuse.net
Stephen.Reilly@puc.state.oh.us
mhpetricoff@vssp.com

Thomas.McNamee@puc.state.oh.us
Werner.Margard@puc.state.oh.us

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the Application of Duke Energy Ohio to Modify its Market-Based Standard Service Offer.	:	Case No. 06-986-EL-UNC
Consolidated Duke Energy Ohio, Inc. Rate Stabilization Plan Remand and Rider Adjustment Cases.	:	Case Nos. 03-93-EL-ATA 03-2079-EL-AAM 03-2081-EL-AAM 03-2080-EL-ATA 06-1068-EL-UNC 05-725-EL-UNC 06-1069-EL-UNC 05-724-EL-UNC 06-1085-EL-UNC

- - -

DEPOSITION

of Denis George, called by the Office of Consumers' Counsel, taken before me, Michael O. Spencer, a Notary Public in and for the State of Ohio, held at the offices of Boehm, Kurtz & Lowry, 36 East Seventh Street, Cincinnati, Ohio, on Wednesday, February 21, 2007, at 10:00, A.M.

- - -

Armstrong & Okey, Inc.
185 S. Fifth Street, Suite 101
Columbus, Ohio 43215
(614) 224-9481 - (800) 223-9481
Fax - (614) 224-5724

ORIGINAL

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1 APPEARANCES:

2 Mr. Paul A. Colbert
155 East Broad Street
3 21st Floor
Columbus, Ohio 43215
4
On behalf of Duke Energy Ohio.
5

6 Mr. Jeffrey L. Small
Assistant Consumers' Counsel
7 10 West Broad Street
Suite 1800
8 Columbus, Ohio 43215-3485

9 On behalf of the Residential
Ratepayers of Duke Energy Ohio.
10

11 Boehm Kurtz & Lowry
1510 URS Center
12 By Mr. Michael L. Kurtz
and
13 Mr. Kurt Boehm
36 East Seventh Street
14 Cincinnati, Ohio 45202

15 On behalf of the Ohio Energy
Group and Kroger.
16

17 ALSO PRESENT:
Ms. Beth Hixon
18 Ms. Anita M. Schafer

19

20

- - -

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1 Wednesday Morning Session,
2 February 21, 2007.
3 - - -
4 MR. SMALL: This deposition is
5 taken in case 03-93-EL-ATA and consolidated
6 cases before the Public Commission of Ohio.
7 It is also taken in case 06-986-EL-UNC, a
8 related but separate matter before the Public
9 Utilities Commission of Ohio.
10 This deposition is taken pursuant to
11 notice to Kroger, agreement as to date and
12 location between the parties. And all parties
13 were notified of the change in location and
14 the time and date of this deposition.
15 - - -
16 DENIS GEORGE
17 being by me first duly sworn, as hereinafter
18 certified, deposes and says as follows:
19 CROSS-EXAMINATION
20 By Mr. Small:
21 Q. For the court reporter would you
22 state and spell your name?
23 A. Denis, D-E-N-I-S E. George,
24 G-E-O-R-G-E.

1 Q. Mr. George, I think you and I are --
2 you are familiar with me. I am Jeff Small, I
3 represent the Office of the Ohio Consumers'
4 Counsel and the residential customers of Duke
5 Energy Ohio.
6 A. Nice to see you again.
7 Q. Nice to see you again. I am sure
8 that you have testified. Have you ever had your
9 deposition taken?
10 A. I have.
11 Q. Okay. I am sure that you have been
12 deposed and testified many times. I have just a
13 few things for reminders. Please respond
14 audibly so the court reporter can take down your
15 responses. Let me know if you don't understand
16 a question. Let me know if you think of
17 something that requires revision of one of your
18 answers.
19 Let me know if you need a break.
20 I don't expect this to be a lengthy deposition,
21 but there will probably be an opportunity to
22 take a break sometime during the course of the
23 deposition day.
24 Please respond to my questions

1 unless you are instructed by your counsel
2 otherwise. Your counsel is Mr. Kurtz here
3 today?
4 A. Yes.
5 Q. All right. Do you understand those
6 instructions?
7 A. Yes, I do.
8 Q. Thank you. I would like to know a
9 little bit about your background as far as
10 positions that you have had. And I understand
11 that you at one point worked for Dayton Power &
12 Light; is that correct?
13 A. That is correct.
14 Q. And what position did you hold
15 there?
16 A. I held several positions there. I
17 started there in 1980 as a gas supply analyst.
18 I held that position from 1980 on 1982. I was a
19 summer legal intern there in the summer of 1983.
20 From 1985 to 1990 I was counsel.
21 1990 to 1993 I was supervisor of regulatory
22 activities. 1993 to 1995 I was Associate
23 General Counsel.
24 Q. In your position as supervisor of

1 regulatory activities did you have supervisory
2 responsibilities regarding the tariffs for
3 Dayton Power & Light?
4 A. Yes.
5 Q. You departed Dayton Power & Light in
6 1995?
7 A. December of 1995.
8 Q. What was your position after that?
9 A. I was Vice President and General
10 Manager Stand, S-T-A-N-D, Energy Corporation in
11 Cincinnati.
12 Q. What were your responsibilities in
13 that position?
14 A. Many and varied. But the general
15 management of the daily affairs of the company.
16 I helped create an electricity trading desk and
17 oversaw the company's regulatory interventions.
18 Q. Those would be regulatory
19 interventions including before the Public
20 Utilities Commission of Ohio?
21 A. Yes.
22 Q. What was your next position?
23 A. Well, between -- I left Stand in
24 March of 1997. And I did not have a position

1 until June of 1999 when I joined Kroger.
2 Q. What position did you hold when you
3 joined Kroger in 1999?
4 A. Corporate Energy Manager. The
5 position I hold now.
6 Q. What are your responsibilities in
7 that position?
8 A. I am responsible for energy and
9 natural gas procurement for the company in areas
10 where such things are possible. I am
11 responsible for implementation of energy
12 efficiency programs in our facilities. I am
13 responsible for overseeing utility relationships
14 as well as regulatory interventions. And I also
15 have responsibility for energy information and
16 reporting within the company.
17 Q. In your role as -- or one of your
18 duties to procure energy where it is possible,
19 does that include electricity in Ohio since
20 electric restructuring started January 1st,
21 2001?
22 A. Yes.
23 MR. SMALL: I am going to mark a
24 number of exhibits. And I will put before you

all the exhibits that I have today. Then I will direct your attention to one part of it or another. So at this point in time I would like to mark Exhibits A, B, C, and D.

(EXHIBITS MARKED FOR THE PURPOSES OF IDENTIFICATION)

(DISCUSSION OFF THE RECORD)

(Beginning of the Confidential portion of the deposition)

- - -

1 MR. SMALL: All right. That
2 concludes my questions then. I appreciate you
3 taking the time out to do the deposition.
4 THE WITNESS: My pleasure. Thank
5 you.
6 (At 12:50, P.M. the deposition was
7 concluded)
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1 State of Ohio :
2 SS:
County of Hamilton :
3 I, Denis George, do hereby certify that
4 I have read the foregoing transcript of my
5 deposition given on February 21, 2007; that
6 together with the correction page attached
7 hereto noting changes in form or substance, if
8 any, it is true and correct.
9
10 Denis George
11 I do hereby certify that the foregoing
12 transcript of the deposition of Denis George was
13 submitted to the witness for reading and
14 signing; that after he had stated to the
15 undersigned Notary Public that he had read and
16 examined his deposition, he signed the same in
17 my presence on the _____ day of _____,
18 2007.
19
Notary Public
20
My commission expires
21 _____,20____.
22 - - -
23
24

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Consolidated Duke Energy Ohio, Inc., Rate Stabilization Plan Remand and Rider Adjustment Cases.	)	Case Nos. 03-93-EL-ATA
	)	03-2079-EL-AAM
	)	03-2081-EL-AAM
	)	03-2080-EL-ATA
	)	05-724-EL-UNC
	)	05-725-EL-UNC
	)	06-1068-EL-UNC
	)	06-1069-EL-UNC
	)	06-1085-EL-UNC
In the Matter of the Application of Duke Energy Ohio To Modify Its Market-Based Standard Service Offer.	)	Case No. 06-986-EL-UNC

CONFIDENTIAL PORTION OF DEPOSITION TRANSCRIPT AND CONFIDENTIAL EXHIBITS OF DENIS GEORGE TAKEN FEBRUARY 21, 2007

JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL

Jeffrey L. Small, Trial Attorney
Ann M. Hotz
Larry S. Sauer
Assistant Consumers' Counsel

OHIO CONSUMERS' COUNSEL
10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574-telephone
(614) 466-9475-fascimile
small@occ.state.oh.us
hotz@occ.state.oh.us
sauer@occ.state.oh.us

1 INDEX TO EXHIBITS

2 - - -

		MARKED
A	Agreement for a Transaction Under the Cinergy Operating Companies	9
B	Agreement	9
C	Agreement	9
D	Agreement	9
E	Letter 11-30-04 to Dan Jones from Denis George	72

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2 CONFIDENTIAL EXCERPTS

3 FROM THE DEPOSITION OF

4 DENIS GEORGE

5 WEDNESDAY, FEBRUARY 21, 2007

6 - - -

7 MR. SMALL: We have marked Exhibits

8 A, B, C and D and they are before the deponent.

9 Q. We will be running through these

10 basic agreements, and we may be able to do this

11 without reference to the documents in front of

12 you. Those documents include a 12-2000

13 agreement between CG&E and [redacted]

14 MR. SMALL: This is probably a good

15 point to mark this part of the transcript.

16 MR. KURTZ: Yes. Let's put this

17 part of the transcript under seal, please.

18 And I think you misspoke. You meant CRS.

19 MR. SMALL: No, I didn't.

20 Q. I have a 12-2000 agreement between,

21 and just to be more precise with Mr. Kurtz's

22 comments, the agreement is between the Cinergy

23 companies, I believe. Cinergy operating

24 companies is the reference, and [redacted] And

that I believe is on the very top of Exhibit A. Do you see that?

A. I see it says seller and it says Cinergy Services, Inc. as agent for and on behalf of the Cincinnati Gas & Electric Company and PSI Energy, collectively Cinergy Operating Companies.

Q. That was my reference. Cinergy Operating Companies.

A. Yes. That is the seller's name.

Q. This is kind of background. I have a question to go behind the scenes here. I have a second agreement which is dated 12-2000 again. It's in this packet, Exhibit A, it's called Performance Assurance Agreement. Do you have it in front of you?

A. Yes.

Q. And then I have a third agreement, these are in time order, which is the very last agreement in Exhibit A. And that is an agreement between [redacted] and Kroger. All right?

A. Yes.

Q. Okay. Sorry about this. We haven't

exactly gotten to my question. There is another set of agreements in another point in time in July of 2001. It will be apparent, it will soon be apparent why we have just gone through those first three agreements.

In Exhibit A there is also a July 2001 agreement. Do you have that? At the top it says, there are no page numbers, but it says 2 of 11.

A. Yes. I have that.

Q. All right. And that is again with the Cinergy Operating Companies. It's very similar to agreement 1 only it has a different date on it. I am sure it has different provisions, but similar in formate and appearance.

A. Yes.

Q. Okay. Now, there is another agreement, it's in Exhibit A again, and it is a first amendment to the Performance Assurance Agreement. That is the third agreement in Exhibit A. And that says 2 of 9 at the top.

A. Yes. I see it.

Q. So, that is similar to Exhibit 2

being the Performance Assurance Agreement.

A. It's actually an amendment to the other Performance Assurance Agreement.

Q. Here is the question. Is there a third agreement similar to the Exhibit 3, but different in the time frame between [redacted] and Kroger? In the July 2001 period?

A. There is probably not another agreement, but what there may be, we would have to check, there is an additional schedule or an addendum to this base agreement to add additional accounts to the basic contract.

Q. You are referring to the --

A. The Energy Service Agreement between [redacted] and Kroger.

Q. The one that is dated January 2001?

A. I am looking at the Energy Service Agreement dated December 15, 2000, unless there is a date in the back.

Q. Yes, there is. It was signed by you on 1-3-01. That is where my date comes from.

A. Okay.

Q. But, that is the agreement in Exhibit A and you are saying that the list of

1 accounts, there may be an amendment?
2 A. There have been several amendments
3 over the years on this as we add and delete
4 accounts to the base agreement. So, I think we
5 are up to about 9 or 10 through this week
6 because we are opening a new store tomorrow.
7 Q. Amendments to the schedule?
8 A. Yes. There is a schedule A to this
9 agreement that lists accounts that are covered.
10 And it's only that schedule that usually gets
11 amended when we are adding and deleting
12 accounts.
13 Q. But there aren't any other
14 provisions in that, just a change in the
15 exhibit?
16 A. To my knowledge there are no other
17 provisions except that. But I would have to
18 check on that for you.
19 Q. Okay. All right. I just wanted to
20 be clear about what agreements Kroger has. All
21 right. I would like to direct your attention to
22 Exhibit B. And that is an agreement dated in
23 the back, the last page, there are Bates stamps
24 on this document 1173 through 1179. And if you

1 could turn to Bates stamp 1179 you will see a
2 date of July 7th, and earlier in the document on
3 1174 it says 2004. So, July 7th, 2004.
4 A. Yes.
5 Q. Bates stamp 1179 that shows Mr.
6 Colbert's signature. Was this agreement ever
7 executed by Kroger?
8 A. I believe it was, yes.
9 Q. Okay. Remaining within that
10 document, turning to page Bates stamp 1174, and
11 the first paragraph after the whereas. It's
12 about midway through the page. That paragraph
13 basically identifies the parties and has the
14 date of July 7th, 2004. Who is Cinergy Retail
15 Sales LLC that is mentioned in the first
16 sentence of that paragraph?
17 A. Who are they?
18 Q. Yes.
19 A. To my knowledge it is an operating
20 subsidiary of the large electric holding company
21 that I know as Cinergy that is responsible for
22 transactions such as this. I don't know much
23 more about them than that.
24 Q. Do you know what the status is of

Cinergy Retail Sales or its successor? What the status of Cinergy Resale Sales at the time of this agreement was with respect to its ability to transact business in electricity in the State of Ohio?

A. I am sorry. Can you say the question again?

MR. SMALL: Can we have it read?

(QUESTION READ)

A. If I knew what the status was at the time I can't recall it now.

Q. Do you know whether they were a certified retail electric service provider?

A. I can't recall.

Q. You are familiar with the term certified retail electric supplier?

A. Yes.

Q. Okay. One other thing that I should have put in the instructions. In this particular case we are having a little bit of trouble especially with the record in distinguishing CRES from CRS because they are so close when we say them. So I have been spelling them out like that so we can distinguish. And

if you would do the same that would help tremendously in clarifying things.

A. Okay.

Q. Sorry. I lost my chain of thought. You don't know whether they were certified?

A. If I knew then I don't recall.

Q. Okay. Do you know anything about their current status as being certified before the Public Utilities Commission?

A. No.

Q. And would your response be the same regarding their status as registered with Duke Energy Ohio, formerly known as Cincinnati Gas & Electric?

A. Yes. My answer would be the same.

Q. All right. Turning to these previous agreements for a second. I am on Exhibit A. And we had a little bit of an exchange concerning who the parties were to the first agreement executed December 2000, very first one, agreement on Exhibit A. And you noted Cinergy Operating Companies. Do you see that?

A. Yes.

Q. And you understand that to be Cincinnati Gas & Electric and PSI; correct?

A. That is what it says there, yes.

Q. Okay. And agreement 2, I call it agreement 2, it's the second one in this packet, again December 2000, and again it says Cinergy Operating Company and refers to CG&E and PSI again. Do you agree?

A. Yes. I see that.

Q. Okay. And an agreement in the packet a little bit, we looked at this earlier, it's July 2001, again it's that confirmation letter that says 2 of 11 at the top.

A. Yes.

Q. And that also says the seller is Cinergy Operating Companies which is a reference to CG&E and PSI again?

A. Yes.

Q. And finally the document just before that which we identified as the Performance Assurance, or Amendment to the Performance Assurance Agreement, it has 2 of 9 at the very top. Do you see that?

A. I see that.

Q. Again you have Cinergy Operating Companies which is a reference again to CG&E and PSI; is that correct?

A. Yes. That is in the first paragraph.

Q. Okay. With all these agreements that were entered into earlier than the agreement that is shown in Exhibit B with the Cinergy Operating Companies, being CG&E and PSI, why did Kroger enter into discussions and finally as you see execute an agreement with Cinergy Retail Sales?

I will clarify the question. Whose suggestion was it that you engage in a business transaction with Cinergy Retail Sales as opposed to the Cinergy Operating Companies which seems to be the subject of your previous agreements?

A. That would have been resolved between the lawyers as regards to what would have been the appropriate entities with whom to contract to serve the purposes of these agreements.

Q. So you weren't part of that process?

A. I was part of the process, but I

accepted the advice and recommendation of counsel as to the parties involved.

Q. When you are mentioning counsel are you referring to Mr. Kurtz?

A. Mr. Kurtz would have been our counsel, yes.

Q. And do you know who the counsel would have been for the other side of the transaction? Would it be Mr. Colbert who executed the agreement?

A. I don't believe Mr. Colbert executed the Performance Assurance Agreement.

Q. I hope we are clear. I am on Exhibit B.

A. No wonder. I am in the wrong one.

Q. I was directing your attention to the earlier agreements just because they said Cinergy Operating Companies. But now I am on Exhibit B. This is July 2004. And as you stated it was executed by Mr. Kurtz. It was executed by Mr. Kurtz at some point?

A. Yes.

Q. And by Mr. Colbert?

A. Yes.

Q. And so I suggested was Mr. Colbert involved in this?

A. Yes, he was.

Q. Okay. Anyone else on the other side of the transaction that you can recall being involved?

A. I believe James Gainer was involved. G-A-I-N-O-R.

Q. Anyone else?

MR. COLBERT: Excuse me. Just for the record I believe that is E-R, not O-R.

MR. KURTZ: Off the record.

(DISCUSSION OFF THE RECORD)

A. It seems like there were other representatives involved for the Cinergy companies, but I cannot recall specifically who they were.

Q. Was Mr. Ficke involved? President of Cincinnati Gas & Electric?

A. Greg Ficke?

Q. Yes.

A. I remember Mr. Ficke being involved somewhere along this process, but I can't recall at which time, and which of these agreements he

1 was involved in. But I remember him being at
2 meetings.
3 Q. When you are speaking about these
4 agreements are you mentioning the agreements
5 with the Cinergy Operating Companies or the
6 agreements with Cinergy Retail Sales?
7 A. I am referring to the agreements
8 that we have marked as Exhibit B, C and D.
9 Q. Do you remember a Timothy Duff who
10 worked for Jim Gainer?
11 A. Yes. I remember Mr. Duff and I
12 remember him being involved.
13 Q. In the --
14 A. Now that you refreshed my
15 recollection.
16 Q. In the Exhibits B, C and D?
17 A. Yes.
18 Q. Do you recall a Jason Barker?
19 A. I do not recall Jason Barker.
20 Q. And do you recall a Charles
21 Whitlock?
22 A. I do not recall Charles Whitlock.
23 Q. Now, you have been mentioning who
24 you remember being involved in the process.

Were you involved in negotiating these agreements B, C and D?

A. Yes.

Q. When did the, we have looked at this being dated the 7th of July, when did the -- do you first recall discussions regarding this agreement? That would be July 2004.

A. Yes. It would have been sometime before that. It would have been a point in time after the initial rate stabilization filing was made. At some point subsequent to that. But, I can't recall when.

Q. There were two major filings in the rate stabilization case which is the 03-93 case that I announced at the beginning of this deposition. The first was a -- what the company refers to as competitive market option in January 2003. And then it came forth with a second plan on January 2004 which is generally thought of as being the rate stabilization proposal. When you say after the proposal, after which one of those proposals?

A. I am referring to the later. The one in January 2004 which is known as rate

stabilization proposal.

Q. And you don't recall what part of the year?

A. No.

Q. Between January and July?

A. Yes.

Q. Now, this agreement, for present purposes I am remaining on Exhibit B, Bates stamp 1177, refers to, in paragraph 8, refers to -- states "Kroger shall support the May 19th, 2004 stipulation and recommendation" and so forth. Do you see that?

A. Yes.

Q. Did Kroger sign that stipulation?

A. I believe we did. I have to, subject to check, but I believe we did.

Q. Now, you are familiar with the contents of this agreement; is that correct?

A. Yes.

Q. Okay. Do you consider this an agreement for service by Cinergy Retail Services to the Kroger Company?

A. I have to say, yes, because it addresses terms and conditions that are relevant

1 to the sale and provision of electricity that we
2 use in our stores. So, I have to say yes.
3 Q. Is the provision of that energy
4 though from Cinergy Resale Services?
5 A. Cinergy Resale Services in this case
6 is the wholesale supplier of the electricity
7 that is purchased by New Energy and in turn New
8 Energy is the retail supplier of the electricity
9 to Kroger.
10 Q. All right. I would like to go
11 through the major provisions of this. And I am
12 at page Bates stamp 1175. You are already
13 there. Paragraph 1. Paragraph 1, am I correct
14 that this is basically organized as paragraph 1
15 is for 2005, paragraph 2 is for 2006-2007, so
16 forth and so on? The paragraphs have to do with
17 different time periods?
18 A. At least the first three paragraphs
19 have to do with different time periods.
20 Q. Okay. Let's start with paragraph 1,
21 and that is for the period 2005; correct?
22 A. Yes.
23 Q. All right. Now, it provides for --
24 well, there is a statement here that "Kroger

shall pay monthly the annually adjusted portion of the provider of last resort charge." Do you see that? About midway in the paragraph?

A. I see that.

Q. Who is that payment made to?

A. I believe that is to Cinergy, the regulated utility.

Q. What I have been calling Duke Energy Ohio, formerly Cincinnati Gas & Electric Company?

A. Yes.

Q. Okay.

A. Formerly know as the Cincinnati Gas and Electric Company then. The names have changed so many times, but they are certainly currently known as Duke Energy Ohio.

Q. All right. That charge that is the subject of this sentence paying the annually adjusted portion of the provider of last resort charge, that is something that was part of the Duke Energy? It's awkward because of the names as you mentioned. I am going to refer to the company, the company that provides distribution service and so forth as Duke Energy Ohio, but

you should understand that I mean and its predecessor company which in this time period was not called Duke Energy Ohio. Do you understand that?

A. I understand.

Q. Okay. I believe it was Cincinnati Gas & Electric, but I will just call it Duke Energy Ohio.

A. Okay.

Q. That was part of the Duke Energy Ohio proposal, or that payment would be made under the Duke Energy Ohio proposal anyway; wouldn't it?

A. Yes.

Q. Okay.

A. May I condition that?

Q. All right.

A. And I don't know at which time it happened, but I know a lot of those -- there is no charge called the provider of last resort charge. It consists of several components which combined people know as the provider of last resort charge. Some are bypassable for people in the market by their nature and

1 definition. Some are not. And so we pay in
2 accordance with the applicability and charges
3 that are in tariffs approved by the Commission.
4 Q. Right. And with that response, I
5 hope it was clear in my earlier question, the
6 statement here is not the Kroger shall pay the
7 provider of last resort charge, it's that they
8 pay the annually adjusted portion.
9 A. I understand, yes.
10 Q. Okay. Now, right below that it
11 states that, middle of the paragraph again,
12 "Cinergy or any affiliate thereof shall
13 reimburse Kroger quarterly for half the amount
14 actually paid." Do you see that?
15 A. Yes.
16 Q. And you understand that to be, the
17 actually paid, to refer to the portion just
18 above what I referenced, the annually adjusted
19 portion of the provider of last resort charge?
20 A. Yes.
21 Q. Why under this agreement was Kroger
22 willing to pay -- why under this agreement would
23 a company that is not the Duke Energy Ohio pay
24 Kroger for amounts actually paid by Kroger?

A. At the time we were concerned as I will call a deregulated customer, a customer who is buying energy in the market, we were concerned about many things, but the two things that come to mind is, one, we were going to pay what I will say double, pay twice for the same thing, which would be capacity. The right to have power on a fixed basis on demand.

And based on the fact we were in a long-term fixed price contract, combined with the fact that the distribution utility was proposing that these charges being paid in part by deregulated customers, and the fact that they wanted their rate stabilization plan to occur in 2005 rather than at the end of the transition period 2006, gave rise to our concern about paying multiple times for capacity.

Given the contractual situation between the parties, all the parties involved, and given the fact that we had a strained relationship with **New Energy**, we did not want to rework the wholesale power agreement that created difficulties. So, this is the way that the parties worked out the arrangement to

1 satisfy our concerns, Kroger's concerns,
2 regarding that potential double charging of
3 capacity.
4 Q. I want to make sure that I
5 understood the word that you used. Did you use
6 the word strained?
7 A. Yes.
8 Q. I wanted to distinguish it from
9 strange. It was strained?
10 A. Strained. S-T-R-A-I-N-E-D.
11 Q. Okay.
12 A. We already established my ability to
13 spell.
14 Q. I wanted to find out a little bit
15 more about that. Since January 1st, 2001 has
16 Kroger continuously made purchases from New
17 Energy or sometimes called Constellation New
18 Energy?
19 A. They are currently known as
20 Constellation New Energy. And for the State of
21 Ohio and this system the answer is yes.
22 Q. So they started supplying in January
23 1st, 2001 to Kroger and they continue to supply
24 energy to Kroger?

A. To this day, yes.

Q. This agreement, paragraph 1, again refers to payments or reimbursement is the word used in the agreement, by Cinergy, which I believe is a reference to Cinergy Retail Sales, or any affiliate thereof. Do you see that?

A. Yes.

Q. Did you expect to receive these payments regardless of the situation that Cinergy Retail Sales was in whether it existed or not?

A. Well, I couldn't receive -- Kroger couldn't receive payment if they didn't exist.

Q. Well, Kroger could receive payment from an affiliate of CRS?

A. They could receive payment from an affiliate of CRS as long as the affiliate was credit worthy and we were receiving payments which we had planned to receive that was acceptable to us.

Q. Let's go down to paragraph 2 which relates to, I am still on Bates stamp 1175 in the agreement, paragraph 2 refers to matters in 2006-2007; is that correct?

A. Yes.

Q. Now, about midway in paragraph 2 it refers to a situation where New Energy might not be supplier, retail supplier, for Kroger. And it states "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 and terms and conditions as set forth in extension 1 and extension 2." Do you see that?

A. Yes.

Q. Is that what you were referring to earlier as the other party to this agreement other than Kroger being the wholesale supplier of power that eventually flows to Kroger?

A. Can I have that read back, please?

(QUESTION READ)

A. Yes.

Q. Now, the extension 1 and extension 2 that are found in that paragraph, is that a reference -- I am going to take you back to Exhibit A, very first page of it, and there is a reference under quantity on a confirmation letter agreement to extension 1 being connected

with 2006 and extension 2 being connected to 2007. Do you see that in Exhibit A?

A. Yes.

Q. Is that the reference that is being made on Exhibit B, Bates stamp 1175?

A. Yes.

Q. So this is saying that the wholesale power which is the subject of the confirmation letter agreement, Exhibit A, the wholesale power can be, for lack of a better term, taken with Kroger if they select another supplier and that will be provided to Kroger's chosen CRES provider?

A. I don't know about the term taken with. But, the wholesale arrangement can be transferred to another CRES if that contingency were the case.

Q. And back on Exhibit A, this extension 1 and extension 2 is also mentioned on the second page of Exhibit A under term. Do you see the references to extension 1 and extension 2?

A. Yes.

Q. Under that reference in Exhibit A,

that is an option that the Cinergy Operating Companies can -- or that is a right that the Cinergy Operating Companies can invoke; is that correct?

A. That is correct.

Q. In paragraph 2, Bates stamp 1175 of Exhibit B, under this provision Kroger is entitled to this power, or at least this wholesale power arrangement, for this period of the extension 1 and the extension 2; is that correct?

A. I am sorry. You will have to read that question again.

(QUESTION READ)

A. Yes. This arrangement, and you have to read paragraph 2 in conjunction with paragraph 4, provides for the extension of that wholesale power arrangement and adds the contingency in the event that New Energy is not the CRES.

Q. So we have gone from a situation under the confirmation letter agreement in December 2000 where the Cinergy Operating Companies can exercise the right to a situation

now in Exhibit B where the company is entitled to that power at a certain rate?

A. I don't know if entitled is the proper word. But, as a result of this agreement that is marked as Exhibit B one of the agreements made by Cinergy, larger term, is their agreement to exercise those extensions.

Q. And that is where I get a little bit confused. Because the Cinergy Operating Companies, and you referenced paragraph 4, Bates stamp 1176, the Cinergy Operating Companies are defined in Exhibit A as Cincinnati Gas & Electric Company and PSI Energy, Inc. But this agreement, Exhibit B, is not with either of those entities.

Why is paragraph 4 which refers to Cinergy Operating Companies, exercising, that being CG&E and PSI, why is that an agreement between Kroger and CRS?

A. I think one must evaluate that in terms of the Performance Assurance Agreement as well as additional information that I have to get some help on, but the Exhibit A was the arrangements that existed in December of 2000

when this happened. It seems to me there were subsequent corporate reorganizations and other rearrangements so that at the time we did this --

Q. Referring to Exhibit A?

A. Referring to Exhibit A, this was I think a FERC approved wholesale power schedule under those parties, but subsequent changes in tariff, changes in corporate organization, some of this may have been assigned in whole or in part with whom we contracted. I think we are missing some information, Mr. Small, that may help piece that together.

Q. Then --

A. But that is my answer.

Q. From that response and from an earlier one about wholesale supply do you believe that the contracting parties here, which is Cinergy Retail Sales, was a wholesale supplier of power at the time this agreement was entered into?

A. That would have been our understanding at the time we entered into the agreement.

Q. And from that also that CRS was actually the wholesale supplier to New Energy, which was your Kroger's retail supplier?

A. I guess I don't know the answer to that. I would have to get some verification. I can't answer that question right now.

Q. I guess what I am questioning is if they are able to exercise the extension 1 and extension 2 in paragraph 4, and they must, it would seem at least from the four corners of this agreement, that they were the entity that was providing the wholesale power to Constellation New Energy.

A. It seems like a logical conclusion.

Q. Now, there is also, I am going back to Bates stamp 1175, Exhibit B, there is another provision in paragraph 2 that refers to, I will quote "If a Cinergy affiliate is chosen as Kroger's CRES then the Cinergy CRES will provide generation at retail at prices set forth in extension 1 and extension 2 plus transmission costs." Do you see that?

A. Yes.

Q. That would be even a better deal for

1 Kroger, wouldn't it, to get the pricing at
2 resale at these prices without a middleman
3 markup?
4 A. Yes.
5 Q. All right. At the bottom of that
6 page, remaining in paragraph 2, there is another
7 reference to "Kroger shall pay the Cincinnati
8 Gas & Electric Company," which we have been
9 calling Duke Energy Ohio, "the annually adjusted
10 component of the provider of last resort
11 charge." Do you see that?
12 A. Yes.
13 Q. That is the same provision we saw up
14 in paragraph 1; correct?
15 A. I believe it is.
16 Q. This provision then, going over on
17 page 4 which is Bates stamp 1176, refers to
18 reimburse Kroger quarterly for half the annually
19 adjusted component. Does that again reflect
20 Kroger's concern that in this period it would be
21 paying for capacity charges to Constellation New
22 Energy once and then again under
23 the non-bypassable annually adjusted component
24 to the Duke Energy Ohio?

A. Yes.

Q. If you could go to page Bates stamp 1176. And paragraph 3 of this relates to the time period 2008; is that correct?

A. I believe 2008 and thereafter, yes.

Q. I am looking at the 5th line of that paragraph. And it's the first appearance that I can find of a Cinergy right of first refusal. Do you see that?

A. Yes.

Q. Do you know why that was part of this agreement?

A. I believe during those discussions that Cinergy Retail had requested that in contemplation of a possible entry into the retail market at that time.

MR. SMALL: Could I have that re-read?

(ANSWER READ)

Q. So you believe that they were a wholesale supplier and they were giving some consideration to entering the retail market in Ohio?

A. That is my recollection.

Q. I also see the payments made to Kroger in paragraph 3 that we previously mentioned. My question is there are payments for half the amount actually paid on a annually adjusted portion for the provider of last resort in paragraph 1, 2 and 3. Were there payments made under this agreement to Kroger from Cinergy Retail Sales?

A. I don't believe this agreement ever went into effect. So I have to say the answer is no.

Q. Paragraph 8 of this agreement, Bates stamp 1177, refers to Kroger supporting the May 19th, 2004 stipulation. Do you see that?

A. Yes.

Q. How did Kroger support the May 19th, 2004 stipulation?

A. Subject to verification, but I believe this is the case, we were a signatory to the stipulation document that was filed with the Commission. I don't think we filed any other pleadings showing support. There may have been something on the record, but I would have to

identify with my counsel.

Q. Was the genesis of this agreement, which we have been referring to as Exhibit B, the genesis of the discussion and the eventual execution of the agreement a response to the rate stabilization plan case, the 03-93 case, that was mentioned in paragraph 8?

A. I have difficulty with the term genesis. The filing of that proceeding led to many of the issues we had that we discussed concerning the potential double recovery of certain capacity costs. It was partially in response to that application and its potential implementation.

Q. Do you recall this agreement, Exhibit B, ever being discussed with the Staff of the Public Utilities Commission or anyone else at the Public Utilities Commission of Ohio?

A. I have no knowledge of it being discussed with the Staff at the Commission.

Q. Or anyone else at the Commission?

A. I am not aware of any such conversations.

Q. Or discussions with any of the other

1 parties to the 03-93 case?
2 A. I am not aware of any, and I would
3 be surprised if there were any.
4 Q. Turn to Bates stamp 1174. The last
5 paragraph of this agreement states that it is to
6 remain confidential among the parties. Do you
7 see that?
8 A. Yes.
9 Q. Is that the reason why you would be
10 surprised if it was discussed with the other
11 parties?
12 A. Yes. That would be part if it.
13 Q. And why was this document to remain
14 confidential?
15 A. Because it dealt with our wholesale
16 power transaction and our electricity expense on
17 this system. And as such it is a matter that we
18 did not want our competitors in the grocery
19 business to be aware of.
20 Q. Turn to the page Bates stamp 1177
21 and paragraph 11 which goes over into page Bates
22 stamp 1178. Was this agreement terminated in
23 connection with the PUCO order in the 03-93
24 case?

A. The initial order?

Q. Any order.

A. After the initial order in September of 2004 was issued subsequent conversations ensued.

Q. Okay. I will ask that question. The September 2004 Public Utilities Commission order in the 03-93 consolidated cases, did that terminate this agreement pursuant to paragraph 11?

A. I don't think the order itself terminated this, but there were subsequent agreements which by their terms superseded the terms of this agreement.

Q. On page Bates stamp 1178 there is a paragraph E which refers to the agreement terminating "If the Public Utilities Commission issues an order unacceptable to Cinergy." Do you see that?

A. Paragraph B as in boy?

Q. B as in boy, yes.

A. Yes. I see that.

Q. Did Cinergy relate that they were -- the order, the September 2004 order, was

1 unacceptable to them?
2 A. I don't remember that express
3 statement being made. I just know that
4 provisions of the order really gave rise to both
5 parties coming back together and revisiting this
6 particular agreement in light of what that order
7 said.
8 Q. And is that a fulfillment of the
9 provisions below paragraph C on 1178, "parties
10 agree to use best efforts to fulfill the intent
11 of this agreement"? Were those later discusses
12 an effort to fulfill that provision?
13 A. I believe that is correct.
14 MR. SMALL: Okay. Let's go off
15 the record for a second.
16 (DISCUSSION OFF THE RECORD)
17 (RECESS TAKEN)
18 Q. All right. If you could turn to
19 what I have labeled as Exhibit C. That
20 agreement.
21 MR. KURTZ: Did you want to clarify
22 your last answer?
23 THE WITNESS: If I might.
24 Q. All right.

A. One thing I wanted to clarify in our conversation, I think you asked whether or not this agreement covered by Exhibit B had terminated.

Q. Okay.

A. And I don't believe that -- we never formally terminated the agreement. There is no formal letter or notification that it expired. It's just based on the Commission order and based on the terms of that order and the names of these rates, changing of things, we just really continued the conversation that led to the agreement under Exhibit C that we are going to discuss.

But, there was never a formal termination. I didn't want to convey the wrong image of that. The wrong information there.

Q. All right. Exhibit C which is Bates stamp 1180, 1187. It bears a date of November 22nd on the final page executed by Paul Colbert and Michael Kurtz.

Going to Bates stamp 1181, again this agreement is an agreement between Kroger and Cinergy Retail Sales; is that correct?

A. That is correct.

Q. And the reason for the contracting party being Cinergy Retail Sales, or your discussion being from Cinergy Retail Sales, was a, as you say, a continuation of the discussion promised in the agreement that is shown on Exhibit B?

A. Correct.

Q. Earlier I asked who was involved in the Kroger -- in the discussions having to do with Exhibit B. Are your responses as far as who was involved in the discussions that led to Exhibit C, different, any different in this time frame?

A. I don't believe they would be any different.

Q. And that is --

A. I recall Mr. Colbert and Mr. Gainer. I would have a strong suspicion that Mr. Duff was involved. Mr. Ficke may or may not have been involved in this specific document. I cannot recall all those.

Q. He was involved in either B, C, D, or all of them?

A. Or all of them in some capacity.

Q. All right.

A. There may have been others. I just don't have recollection of specific people. The names you had mentioned I did not have -- did not generate any recollection on my part.

Q. Jack Stephan? Does that name connect?

A. I know Jack Stephan, but I can't recall if Mr. Stephan was part of this or not. I don't think so because Mr. Stephan does the rate work for Duke Energy of Ohio. And I don't believe he would have been involved.

Q. Greg Ficke was the President of Cincinnati Gas & Electric Company, now what we have been referring to as Duke Energy Ohio. What connection did you place with him with regard to Cinergy Retail Sales?

A. I don't know if I would have placed a relationship with Cinergy Retail Sales or not.

Q. Well, the gist of my question is really related to your previous response that Mr. Stephan wouldn't be involved because this was a -- this was not a negotiation with Duke

1 Energy Ohio. But, my question is wouldn't that
2 also be the same with Mr. Ficke as well?
3 A. Perhaps I should clarify. I
4 consider Mr. Stephan somebody with whom one
5 would engage in technical rate work, the
6 numbers, the rate designs, the things that were
7 in the proposal. We weren't, to my
8 recollection, negotiating those, discussing
9 those matters in the context of this agreement.
10 That would have been part of the rate
11 stabilization proceedings in general if Mr.
12 Stephan were involved.
13 I don't know in addition to being
14 President of what we are calling Duke Energy
15 Ohio, which he was an officer in any other
16 companies. I don't know that, if there was that
17 relationship or not. I don't recall us
18 particularly clarifying why Mr. Ficke might have
19 been in the room other than we do business with
20 the Cinergy organization in several states and
21 pay them a lot of money each year. I think Mr.
22 Ficke was partly there as in a customer service
23 representative capacity.
24 Q. Do you recall when the mentioned

1 discussions that took place that resulted in the
2 execution of Exhibit B, do you know when those
3 discussions took place?
4 A. I do not have specific dates in
5 mind. It would have been a combination of
6 telephone conversations, e-mails, and probably
7 face-to-face meetings. But, I don't have
8 specific dates in my mind.
9 Q. Would it have occurred immediately
10 after the -- we referred to the September
11 Commission order in 03-93?
12 A. Immediately suggests to me within a
13 matter of days. I don't know it was a matter of
14 days, but it was in time sequence sometime
15 thereafter which would have put it in October of
16 2004.
17 MR. COLBERT: Excuse me. Two
18 questions ago you asked about Exhibit B and
19 maybe I am confused --
20 MR. SMALL: Yes. I think I did err
21 in that regard.
22 Q. My question had to do with Exhibit C
23 which is a document executed on or dated
24 November 22nd. So if I asked you that question,

to clarify this, I was asking about Exhibit C.

A. And my answers were made with Exhibit C in mind.

Q. So in the October 2004 time frame?

A. Yes.

Q. All right.

MR. COLBERT: Thank you.

Q. Again, any discussions with Staff or anyone else at the PUCO concerning the document that is labeled Exhibit C?

A. I had no such discussions, no.

Q. Do you know of any discussions that took place regarding these arrangements shown in Exhibit C with any party to the 03-93 rate stabilization case?

A. I don't believe there would have been any discussions with other parties, no.

Q. Again this would be a confidential document known only to the Kroger and for lack of a better term Cinergy companies. Is that your understanding?

A. That is correct. It would have been Cinergy Retail Sales.

Q. Go to page Bates stamped 1182. And

in a similar fashion I am going to work through the paragraphs here. Paragraph 1 deals with the period 2005; correct?

A. That is correct.

Q. All right. Now midway in this paragraph it states that Kroger shall pay to CG&E all applicable components of the provider of last resort charge. And then it states and to Cinergy, referring to Cinergy Retail Sales, half of the emission allowance component of the full component of the price to compare approved by the PUCO in 03-93. Do you see that?

A. Yes.

Q. Why would Kroger pay to CRS half of the emission allowance component?

A. It was in keeping with the parties' intent to maintain the economic value that we had negotiated in the prior agreement that we have marked as Exhibit B. We couched it in terms of the specific charges that came out of the case because they were identifiable and recognizable and could be measured and could be verified.

Q. Well, is it your understanding that

there is an emission allowance component charge in the Duke Energy Ohio tariffs?

A. I am aware that there is emission allowance component built into the -- I think it's built into the -- I don't think it's called the fuel clause anymore. There is a --

Q. FPP, fuel and economy purchase power clause?

A. I believe that's right. Whatever the name is. It has to do with fuel recovery, fuel adjustment. And there is a component within that that is separately identified and talks about emission allowance.

Q. When you say separately identified do you mean in the tariff or do you mean in the filings of the company?

A. I don't know if it's in the -- I think it's in the tariff itself. But, that is subject to check. I know that it is in publicly available form that one can view and access.

Q. By publicly available you mean at the Public Utilities Commission?

A. Yes.

Q. And that would be the source that

you would use to verify, for instance, the proper charges for -- to verify any payments made by Kroger?

A. That is correct.

Q. I guess the part of it that I am trying to understand is that emission allowances as you say being part of the fuel and economy purchase power provision is an avoidable charge. If you are shopping such as Kroger is and getting retail power from Constellation New Energy, so if Kroger can avoid it why would they -- why is there a provision for paying half of it?

A. Based on my recollection it wasn't so much about the technical aspects of whether or not we could or could not pay that charge. It had to do with the resulting dollar valuation that helped to balance the economic value of the arrangement. It's really I call it the currency of the day. It was a way by which we could have a measurable and verifiable figure that we could use to balance and adjust the payments, verify the numbers, and secure the economic value.

Q. So it's not so much the payment of

the emission allowance but a certain dollar value connected with this agreement. Is that the concept?

A. I am speaking from Kroger's perspective. That is correct.

Q. And from Kroger's perspective it was important to have something that was verifiable that you are relying upon for this agreement?

A. Sure. That is correct, yes.

Q. Now, the payment of the fuel and economy power is to CG&E, by the reimbursement -- I am sorry. But the payment of half of the emission allowance component that we just mentioned is to Cinergy Retail Sales; correct?

A. I believe that is correct.

Q. And was it your understanding that that payment to Cinergy Retail Sales is being made as part of the total package of Cinergy Retail Sales being the wholesale supplier of power to Constellation New Energy which you then benefit from?

A. Yes. And to which we have to guarantee payment pursuant to the Performance

Assurance Agreement, yes.

Q. Now, following through on that, looking lower down in that paragraph is a statement that "Cinergy or any affiliate thereof shall reimburse Kroger quarterly for half the amount actually paid of POLR charge." Do you see that?

A. Yes.

Q. And then there is some new terminology we haven't seen before, RSC and IMF. Was the reimbursement to Kroger also part of this total package concept that you mentioned in your response to an earlier question?

A. Yes. We talked about when we were talking about document B, the first agreement, our concern about capacity charges. These specific terms, I don't know if they came out of the original filing, the stipulation or the Commission order, but at this point in time they back the terms for the specific charges within the Duke Energy Ohio tariff. But they related to the POLR charge in the generic sense. And so they became the terms by which again we had measurable and verifiable numbers to make sure

1 the economic value of the arrangements were
2 working for both parties.
3 Q. So as I understand your response it
4 wasn't so much -- it was not a specific
5 consideration of what was in, for instance, the
6 RSC charge or what was in the IMF charge or not
7 in the IMF charge, it's a total package concept
8 of the benefit to the two parties?
9 A. Yes, which is what the entire
10 document is. The total economic value to both
11 parties. This was my term, the currency of the
12 day, but it was the ability to have measurable
13 and verifiable numbers that were independent of
14 the two parties of this agreement.
15 Q. Now I am going to turn to page Bates
16 stamp 1184, and paragraph 5. This is perhaps
17 refreshing your memory. It says "CG&E POLR
18 charge is expected to consist of these
19 components." And then it mentions, for
20 instance, the RSC and the IMF that were
21 previously mentioned in paragraph 1.
22 And also paragraph 10 says "Kroger
23 shall support this application for rehearing
24 filed by CG&E." With that to refresh your

memory is it reasonable, or is it your understanding that the charges that we have been referring to are part of the application for rehearing that Duke Energy filed in the 03-93 case?

A. I believe they were part of the -- well, give me a moment to think. I have, subject to check, I believe that the Duke Energy rehearing or whatever Duke Energy was filing at the time included tariffs that had these components in it. I do not know if they came from the Commission order or they came from Duke Energy in the process of submitting another application. But they -- I know they arose at the time. They were the terms that were being used and discussed.

Q. Now, were the payments that are referred to in paragraph 1 made? Or payments under this agreement made? And I ask that in a broad sense. I know that paragraph 1 includes payments going in both directions. So either were they made, both payments, or on a net basis were there transactions done under this paragraph 1?

A. I believe there were transactions done under this paragraph 1. I recall Kroger having to make payments to Cinergy in 2005.

Q. How, how does that arrangement work? Did you receive an invoice from some entity?

A. We received an invoice from Cinergy. I don't recall the exact entity whose name appeared on the invoice. I would have to check.

Q. Some Cinergy affiliate?

A. Cinergy affiliate, with a total charge. And then at our request a breakdown of that charge by store so that we could assess it back to our individual profit centers. I believe as well probably a supporting calculation of how the charge was being calculated.

Q. And who submitted those invoices to Kroger? Do you know the person that you were transacting business with?

A. I don't know who created the invoice, but I do recall working with Mr. Duff on calculations and backup.

Q. Did Kroger ever have any disputes or problems regarding those invoices and the

1 amounts of the payments?
2 A. No. Once we got the supporting
3 documentation and the allocation by stores we
4 reviewed it and deemed it consistent with the
5 agreement of the parties.
6 Q. In that process of verification were
7 there environmental allowance numbers provided
8 as backup to Kroger?
9 A. I have to check, Mr. Small. I would
10 presume, but I have to check.
11 Q. I am a little bit unclear as to how
12 these payment were made. The payments to
13 Cinergy, which is the name used here for Cinergy
14 Retail Sales, half of the emission allowance
15 component. Now, that would in the tariff
16 normally be stated as a monthly charge. Were
17 there monthly figures associated with that?
18 A. I don't recall.
19 Q. And the reason I am asking is then
20 there is a reimbursement for Kroger, I am
21 looking in paragraph 1, Bates stamp 1128, of
22 quarterly payments to Kroger. And I would like
23 to know how these arrangements were made. Were
24 there monthly payments being made and then

1 quarterly reimbursements coming to Kroger?
2 A. Well, Kroger would have paid the
3 Duke Energy Ohio invoices as rendered. Those
4 invoices are rendered on billing cycles. They
5 contain assessment of charges that are approved
6 by the Commission. Then on a quarterly basis we
7 would have made the calculations I will say
8 outside of the utility billing process, but
9 would have taken the numbers paid outside of
10 that and made calculations that were part of the
11 utility billing cycle, and then made the
12 requisite payments or whichever direction they
13 went.
14 Q. Your response though seems to omit
15 one payment which is -- you mentioned the
16 payment under the tariffs to what we have been
17 calling Duke Energy Ohio.
18 A. Yes.
19 Q. And the reimbursement to Kroger
20 quarterly which we can see in paragraph one, but
21 there also is a payment by Kroger to Cinergy for
22 half the emission allowance component.
23 A. Yes.
24 Q. And your response didn't mention

that payment.

A. I am sorry. That is what I was talking about. We did make that payment on a quarterly basis.

Q. So there were quarterly payments to Cinergy, quarterly reimbursements to Kroger. So there is a quarterly system that developed here?

A. Yes.

Q. Okay.

A. That was completely outside of the utility billing cycle because that was an addition.

Q. If you would turn in Exhibit C, paragraph 10, there is reference to Kroger. It states "Kroger shall support application for rehearing filed by CG&E." Do you see that?

A. Yes.

Q. How did Kroger support the application for rehearing filed by CG&E which we have been calling Duke Energy Ohio?

A. Oh, I am not sure if there was a specific document that was signed by the parties that was submitted by CG&E. Or if Kroger filed

1 a pleading. I would have to verify. Or if
2 there was something orally done at a hearing.
3 I don't know the specific means by which our
4 support manifested.
5 Q. Some action at the Public Utilities
6 Commission?
7 A. Some appropriate action at the
8 Public Utilities Commission.
9 Q. Is it fair to say that the agreement
10 that we have labeled as Exhibit C is the result
11 of or predicated upon the application for
12 rehearing filed by CG&E or Duke Energy Ohio?
13 A. I am not sure what all that meant.
14 But what I would tell you is that the
15 Commission's order in that proceeding changed a
16 lot of the terms and conditions and economic
17 value for both parties to the point where we had
18 to look at our ongoing arrangement and make the
19 requisite adjustments to maintain the economic
20 value to both parties.
21 Q. And the economic adjustments that
22 you are referring to are those that would
23 recognize the then current proposals of Duke
24 Energy Ohio?

A. Yes. Because that was the independent tariff numbers that were measurable and verifiable that became the measurements for the two parties.

Q. If you would turn to page Bates stamp 1185. Actually it's paragraph 11 which is 1184 and carries over to page 1185. It states "This agreement constitutes Kroger's contract with a credit worthy CRES firm generation service for its full capacity energy and transmission requirements from January 1st, 2005 ..." I don't want to continue to read that paragraph. But, what does that mean? Provide firm generation services. It has the flavor of being a retail, and it does mention competitive, CRES stands for competitive retail electric service, it has the sound that Cinergy Retail Sales is the retail provider to Kroger.

A. It may have that sound to you. At the time they were not our retail provider.

Q. And they never have been your retail provider?

A. That is correct.

Q. What does paragraph 11 mean?

A. Kroger was very concerned based on what was going on in the rate stabilization case that we were still able to avoid any of the bypassable charges that were available in the Duke Energy Ohio proceedings. And so we tried whenever possible to make our documents such that we could present them to Duke Energy Ohio at the appropriate time and as required to make sure that we were considered in the case of the rate stabilization charges described on Bates stamp 1185; that we were part of that first 50 percent of eligible load so that we avoid some of these charges.

Q. Weren't you already -- didn't Kroger already have a contract with a credit worthy CRES provider by the name of Constellation New Energy?

A. We did.

Q. And that is the actual retail arrangement. Not one within Cinergy Retail Sales?

A. It is our actual arrangement, but we were erring on the side of being conservative and putting provisions in whenever we could,

1 whenever possible, just to add to our
2 documentation to that effect.
3 Q. Was there notification to Duke
4 Energy Ohio regarding Kroger's contract with
5 Constellation New Energy as well?
6 A. Can I have that read back, please?
7 (QUESTION READ)
8 A. Duke Energy Ohio was aware of that
9 agreement already because we were a market
10 participant. I can't recall any sort of
11 reaffirming of the arrangement because it was
12 ongoing.
13 MR. SMALL: Could you re-read that
14 answer?
15 (ANSWER READ)
16 Q. You mentioned in your response Duke
17 Energy Ohio. Is your response that Duke Energy
18 Ohio knows which customers are already switched?
19 Is that the concept?
20 A. It's my understanding they keep
21 those records because they need to know what
22 charges to assess to market customers.
23 Q. And in addition to that wholesale
24 power was being provided by some Cinergy

1 affiliate to Constellation New Energy for
2 service to Kroger as well. They knew that as
3 well; is that correct?
4 A. They being --
5 Q. A Cinergy affiliate. I didn't
6 specify which one.
7 A. Well, the Cinergy affiliate
8 providing power to New Energy knows of that
9 agreement, yes. If that is what your question
10 is.
11 Q. And you believe that was Cinergy
12 Retail Sales?
13 A. To the best of my knowledge, yes.
14 Q. Take you back to the document Bates
15 stamped 1182. It's within this package, Exhibit
16 C. Here there is reference to "It is
17 anticipated that New Energy will continue to be
18 Kroger's retail electric service provider during
19 2006 through 2007." Do you see that?
20 A. Yes.
21 Q. And in the paragraph that we just
22 visited, paragraph 11, it refers to "Providing
23 notice that Kroger will take generation service
24 January 1st, 2005 through December 31, 2008."

Do you see that?

A. Yes.

Q. There is a difference of one year. Was there an arrangement with Constellation New Energy for the 2008 period?

A. I don't believe so, no.

Q. Was there any other arrangement with a competitive retail electric service provider, that is one that is certified and registered to do business as a retail provider, is there an agreement in place for retail service to Kroger in the 2008 time frame?

A. No.

Q. Is there an agreement to that effect today?

A. No.

Q. Your agreement with Constellation New Energy ran out at the end of 2007; is that correct?

A. That is correct.

Q. Turning in Exhibit C to paragraph 13, which also has sub-paragraphs A, B and C. B in particular, subpart B of paragraph 13 refers to --

A. B as in boy?

Q. B as in boy, 03-93, and the termination provision relates to "If the PUCO fails to issue an entry on rehearing acceptable to Cinergy." Do you see that?

A. Yes.

Q. Did that happen? Did Cinergy Retail Sales provide any indication or notice to Kroger that an entry on rehearing was unacceptable in 03-93?

A. I don't recall one. I don't believe so.

Q. Was this agreement terminated by the provisions of paragraph 13?

A. I don't believe it was terminated by the provisions of paragraph 13.

Q. Was it terminated in some other fashion?

A. No. I don't believe it was terminated at all. Probably superseded by the document that we note as Exhibit D. But there have been no formal termination of these arrangements.

Q. And payments were made under what we

1 have marked as Exhibit C?
2 A. Yes. Kroger made payments under
3 these arrangements.
4 Q. And we are going to get to the
5 superseding of this agreement in just a little
6 bit. But while these payments were being made
7 either to Kroger or to Cinergy Retail Sales were
8 the other provisions in this agreement, Exhibit
9 C, also there in effect and being followed by
10 the parties?
11 A. To my knowledge they were.
12 Q. Let's move to Exhibit D, which is an
13 agreement dated on the last page, the agreement
14 is Bates stamp 1188 to 1195. And on the last
15 page 1195 it's dated November 9th, 2005.
16 Are you familiar with this agreement?
17 A. Yes.
18 Q. And is the execution of this
19 agreement, Exhibit D to this deposition, the
20 document that you referred to previously as a
21 superseding agreement?
22 A. I believe it is. Yes.
23 Q. So the provisions in Exhibit C were
24 followed by the parties until execution of what

1 we have marked as Exhibit D in November 2005; is
2 that correct?
3 A. To the best of knowledge, yes.
4 Q. What caused the parties to re-exam
5 their agreement and enter into the agreement
6 listed as Exhibit D?
7 A. Knowing that intervening one-year
8 period, my recollection there were probably a
9 number of different things going on. The one of
10 greatest importance to us was the proposed
11 merger of Cinergy with Duke Energy. I don't
12 know what else may have been going on at that
13 time. But it had been a year that the merger
14 was being proposed. Because they are our
15 wholesale provider of power you stay close to
16 your people with whom you do business.
17 But, I am thinking maybe the merger
18 proceeding was probably the primary driver.
19 Q. If you could direct your attention
20 to paragraph 8, Bates stamp 1192. I think this
21 is more confirmation than anything. There are
22 two proceedings at the Public Utilities
23 Commission that are mentioned there or --
24 actually there are three case numbers, but one

of the -- there is an electric distribution rate case mentioned and a Cinergy-Duke merger.

A. Paragraph 11?

Q. I am in paragraph 8.

A. Okay.

Q. But I believe it's also mentioned in paragraph 11.

A. Okay

Q. Are these the major events that transpired that caused the new negotiation to take place?

A. For me it was. For Kroger it was the Cinergy-Duke merger case.

Q. And going back one more time to Exhibit C, 1185, the bottom of the page there is a reference to best efforts to fulfill the intent of this agreement. Are you saying that it was the merger that caused you or the events around the merger that caused new negotiations and not the termination of the agreement and the provision here for making a best efforts to renegotiate the agreement?

A. It was a combination of maintaining the economic value of the addition of the

current agreement, and that was the primary driver, plus just the knowledge and understanding of the merger and what it meant to our agreement. And we just wanted to make sure there was continuity in the economic value, and as always being responsible for Kroger and its electricity expense, if there was new value to be gained we were seeking it.

MR. SMALL: Let's go off the record for just a moment.

(DISCUSSION OFF THE RECORD)

(RECESS TAKEN)

(EXHIBIT MARKED FOR PURPOSES OF IDENTIFICATION)

Q. Let's go back on the record. During the break, Mr. George, I have had marked Exhibit E which is two letters, one dated November 30, 2004, and another one dated December 3, 2004. And they have the designation that you are the responsible party for the document. Do you recall these documents?

A. Yes, I do.

Q. What are these documents?

A. Pursuant to I believe terms of

the -- what we are calling Duke Energy Ohio tariff had to issue a notice to the utility and it had to do with notifying them that we were going to stay with a CRES because that was one of the conditions by which we could avoid some of those charges we were talking about before.

Q. Those are charges that were in the tariffs following the submission of tariffs after the Commission's entry on rehearing?

A. Right. And this refreshes my recollection from before that pursuant to the applicable terms of the utility tariff we had to issue that notice. And I believe it applied to '06-'07 and I believe '08. We had to issue this letter to the utility to let them know what we were doing so that we could avoid some of those charges.

Q. What is the purpose of the December 3rd letter? It seems to provide additional information to the November 30th letter.

A. Yes. If I recall correctly when I believe Mr. Jones or someone in his office called me about this and there was something about the letter that I wrote that wasn't clear.

Q. You are referring to the November 30th letter?

A. Yes. I am sorry. The November 30th letter. I believe there might have been an attachment that went with it. And I didn't adequately put all of the accounts on there. And so I had to issue the December letter just to make sure we were clear that it was all of our eligible accounts. I would have to check my records on that, but I believe that is what was going on at the time.

Q. And who is Mr. Jones?

A. I believe Mr. Jones is in the Supplier Business Center and he is the one to contact people regarding being in the market.

Q. Did you have any other dealings with Mr. Dan Jones?

A. No, other than this exchange over these few days. I don't believe I had before or since. This does remind me that we needed to do that to comply with the tariffs that were taking effect at the time.

Q. All right. You can set that aside. I wanted to go back for a moment to

Exhibit C. It's the agreement dated November 22, 2004.

A. Yes.

Q. Bates stamp 1184, and paragraph 4 at the top. Paragraph 4 refers to the IMF payments, or -- are you familiar with the IMF charge in Duke Energy's tariffs?

A. I don't have knowledge of the specific provisions. I know it's infrastructure maintenance fund maybe, but I know it's a tariff rider that is in existence.

Q. Okay. And this is a term that is new to -- at least it wasn't in the earlier agreement from approximately July 2004. Did you have discussions with the company or with the counter party concerning the IMF charge?

A. I believe we did as part of this overall document, and separately as we are looking at the various PUCO documents being filed and discussions taking place in that case. I think we were aware of it in that case independently.

Q. Is it your understanding the IMF is related some way to a capacity charge? Related

to capacity in some way?

A. It's my understanding that it is. It's part of the provider of last resort which for me, my opinion is it deals with capacity charges. It probably deals with a lot of other things as well. But, that is how I consider it. What I consider it to be.

Q. Okay. And this states that "Cinergy shall reimburse Kroger quarterly for IMF payments in excess of four percent of little g." Do you see that?

A. Yes.

Q. Were there payments made by Cinergy Retail Sales to Kroger to reimburse Kroger for IMF charges as provided in this paragraph?

A. I have to check, Mr. Small, but I don't recall ever receiving payments under paragraph 4.

Q. Would those have been on the overall spreadsheets that where being exchanged, or the documentation. I think you referred to it as backup material for the charges to Kroger and charges to Cinergy Retail Sales.

A. If there were payments made they

1 would be there. I just don't recall ever
2 getting any payments for anything in excess of
3 four percent of the little g.
4 Q. And is it your understanding that
5 that is in excess of -- you mentioned earlier
6 that the paragraphs 1, 2 and 3 pertain to
7 particular periods. Paragraph 4, is it your
8 understanding that is for IMF payments in excess
9 of four percent of little g for all periods of
10 time?
11 A. It would have been applicable to all
12 periods of time.
13 (End of the confidential portion of
14 the deposition)
15 - - -
16
17
18
19
20
21
22
23
24

1 State of Ohio :
2 SS:
County of _____ :
3 I, Denis George, do hereby certify that
4 I have read the foregoing transcript of my
5 deposition given on February 21, 2007; that
6 together with the correction page attached
7 hereto noting changes in form or substance, if
8 any, it is true and correct.
9
10 _____
Denis George
11 I do hereby certify that the foregoing
12 transcript of the deposition of Denis George was
13 submitted to the witness for reading and
14 signing; that after he had stated to the
15 undersigned Notary Public that he had read and
16 examined his deposition, he signed the same in
17 my presence on the _____ day of _____,
18 2007.
19 _____
Notary Public
20
My commission expires
21 _____,20____.
22 - - -
23
24

CERTIFICATE

State of Ohio :
SS:
County of Franklin :

I, Michael O. Spencer, Notary Public in and for the State of Ohio, duly commissioned and qualified, certify that the within named Denis George was by me duly sworn or affirmed to testify to the whole truth in the cause aforesaid; that the testimony was taken down by me in stenotypy in the presence of said witness, afterwards transcribed upon a computer; that the foregoing is a true and correct transcript of the testimony given by said witness taken at the time and place in the foregoing caption specified.

I certify that I am not a relative, employee, or attorney of any of the parties hereto, or of any attorney or counsel employed by the parties, or financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office at Columbus, Ohio, on this 23rd day of February, 2007.

Michael O. Spencer

Michael O. Spencer, Notary Public in and for the State of Ohio and Registered Professional Reporter.

My commission expires
July 28, 2008

No. of Pages 4	Date: 12/14/00 | Audit #:
Name: [redacted]	Name: Joseph W. Toussaint
Customer [redacted]	Company: Cinergy Services, Inc.
Fax: [redacted]	Fax: (859) 372-5568
Phone: [redacted]	Phone: (859) 372-6868

CONFIRMATION LETTER AGREEMENT FOR A TRANSACTION UNDER THE CINERGY OPERATING COMPANIES MARKET-BASED POWER SALES TARIFF – MB

SERVICE SCHEDULE A: MARKET-BASED POWER

This Confirmation Letter Agreement and the Service Agreement for Power Between [redacted] and Cinergy Operating Companies dated as of December 14, 2000, (together, the "Agreement") contains the mutual and respective understandings between [redacted] or "Buyer") and the Cinergy Operating Companies ("Cinergy" or "Seller") regarding the specific terms and conditions of service and the characteristics for the sale of Market-Based Power, pursuant to Service Schedule A of the Cinergy Operating Companies FERC Electric Market-Based Power Sales Tariff, Original Volume No. 7 ("Cinergy MB tariff").

The following are the Pricing Terms and Conditions of Service for the Transaction:

Seller:	Cinergy Services, Inc., as agent for and on behalf of The Cincinnati Gas & Electric Company ("CG&E") and PSI Energy, Inc. (collectively, "Cinergy Operating Companies").
Buyer:	[redacted]
Product:	Firm Energy with Liquidated Damages for each of the 24 hours for each day provided during the term of this agreement. The Product is further defined by hourly load shape limitations described below in the Load Shape Provision.
Quantity:	The Maximum Hourly Quantity in any hour during each year of the term will be as follows: **Year** **Maximum Hourly Quantity** 2001 [redacted] 2002 2003 2004 2005 2006 (applicable to Extension 1) 2007 (applicable to Extension 2) ***Buyer is currently confirming its forecasted retail load obligation. As such, Buyer shall have the right to increase the Maximum Hourly Quantity for up to [redacted] for each Year.

DEPOSITION EXHIBIT
A
6-2-05

	respectively ("Adjustment"). Buyer must elect and confirm the Adjustment by documentary verification provided to Seller by December 31, 2000. To the extent that Buyer elects and confirms the increase to the Maximum Hourly Quantity, the Maximum Hourly Quantity shall be increased for each of the Years by equal quantity. In no event shall the Maximum Hourly Quantity for each Year increase by more tha[redacted]rsuant to the Adjustment. If the Buyer's megawatt hour consumption exceeds the Maximum Hourly Quantity stated above in any hour (including the Adjustment, if applicable), Seller shall charge Buye[redacted]f the hourly market price as calculated by Cinergy in a commercially reasonable manner for each megawatt hour served above the Maximum Hourly Quantity. Buyer shall take or pay for the quantity equal to a monthly minimum load factor [redacted]sed on the Maximum Hourly Quantity defined above, in the aggregate for each month and a yearly minimum load factor o[redacted]sed upon the Maximum Hourly Quantity defined above, in the aggregate for each year. During and limited to January and February of 2001, and the last month of the Term of the Agreement[redacted]eserves the right to schedule below the minimum monthly load factor. To the extent the contract is terminated as a result of an Event of Default[redacted]hall not have the right to schedule below the monthly minimum load factor for that month.
Delivery Point:	Into Cinergy, Seller's Daily Choice. (See Attachment A for further definition).
Term:	Hour Ending ("HE") 0100 Eastern Prevailing Time ("EPT") on [redacted]hrough HE 2400 EPT o[redacted] On or befor[redacted]Cinergy shall have the right, but not the obligation, to extend the Term of this Agreement, including the Price and each of the terms and conditions expressed herein for the period [redacted]hrough[redacted] ("Extension 1"). On or befor[redacted] the extent that Cinergy exercises Extension 1, Cinergy shall have the right, but not the obligation, to extend the Term of this Agreement, including the Price and each of the terms and condition expressed herein for the perio[redacted] through[redacted]xtension 2").
Price:	[redacted] megawatt hour.
Scheduling:	The Buyer must provide day-ahead schedules by 10:00 a.m. EPT one business day prior to delivery of energy. Pre-schedules and control area information will be confirmed by the Seller and the Buyer before 10:00 a.m. EPT, one Business Day prior to delivery. The Buyer will be allowed a maximum o[redacted]schedule changes per day for no additional fee. Seller shall charge Buye[redacted]

	additional schedule change. Further, the Buyer shall provide 45 minutes notice prior to the start of any schedule change.
Transmission:	Buyer shall be responsible for all transmission costs and transmission losses from the Delivery Point. Seller shall be responsible for transmission costs and losses to the Delivery Point. [redacted] shall be responsible for all charges associated with its provision of retail electric service that derives from this wholesale transaction.
Load Shape Provision:	The parties agree that the Price per megawatt hour of energy that is offered under this Agreement is predicated upon a specified load shape and Cinergy's understanding of the consumption pattern of [redacted] end use, retail customer [redacted] That is, the determination of the Price stated herein relied, in part, upon a specified, predictable, and relatively consistent energy consumption pattern. The parties agree that this offering was not priced to accommodate a wholesale economic call option product and agree that such use would, constitute an Event of Default pursuant to the Cinergy MB tariff. As such, [redacted] agrees to receive the wholesale power delivered by Cinergy pursuant to this Agreement in a manner consistent with the mutual understanding expressed above. Energy scheduled and received by [redacted] from Cinergy in excess of [redacted] of the energy required to serve [redacted] retail load [redacted] on an hourly basis will be billed at the greater of the Price or [redacted] the hourly market price as calculated by Cinergy in a commercially reasonable manner. [redacted] shall permit Cinergy to audit the meter data for [redacted] and other applicable records as necessary to ensure compliance with this provision. Such meter data and applicable records shall be preserved and retained by [redacted] the duration of the contract term.
Conditions Precedent	This agreement shall be conditioned upon implementation of CG&E's Customer Choice Program, which is to occur on or about January 1, 2001.

Any conflicts between this Confirmation Letter Agreement, the Service Agreement, and the Cinergy MB tariff shall be resolved in favor of the Confirmation Letter Agreement.

Please confirm your agreement with the transaction terms and conditions set forth in this Confirmation Letter by executing five (5) copies of this letter and returning them by the end of this business day to the undersigned Cinergy representative at Cinergy Services, Inc., 7200 Industrial Road, Florence, Kentucky 41042.

Customer [redacted]

[redacted]

Company: Cinergy Services, Inc.
As Agent for and on Behalf of:
The Cincinnati Gas & Electric
Company & PSI Energy, Inc.

By: Joseph W. Toussaint
Name: Joseph W. Toussaint
Title: Vice President

Date Signed: December 14, 2000

ATTACHMENT A

"Into Cinergy" Product and Delivery Mechanism

"Into Cinergy" is a bilateral transaction for the sale or purchase of electrical energy. Energy is traded in the form of physical Megawatt-hours scheduled between counterparties according to specific demand periods[1]. Performance in Into Cinergy transactions is secured by liquidated damages.

I. Delivery

a. Delivery is made into the receiving control area's transmission system. Seller's daily option of interface; or by procuring energy generated from a source within the receiving control area.

b. The receiving control area in Into Cinergy deliveries is defined as the high voltage transmission system operated by Cinergy Corp., which otherwise can be referred tne Cinergy Transmission System.

c. The Cinergy Transmission System contains eleven (11) border interfaces. These interfaces include: CIN/AEP, CIN/NIPS, CIN/OVEC, CIN/EKPC, CIN/KU, CIN/SIGE, CIN/CIPS, CIN/IP&L, CIN/LG&E, CIN/DPL, CIN/HE.

d. In the case of interfaces internal to the Cinergy Transmission System, there are several entities that own or control generation inside the receiving control area, which can be used in fulfillment of Seller's "Into Cinergy" delivery obligations. A partial list of these entities includes Cinergy, Indiana Municipal Power Agency (IMPA), Wabash Valley Power Association (WVPA), City of Hamilton (OH), City of Logansport (IN) and Purdue University.

II. Seller's Obligations:

a. The Seller is required to deliver financially firm energy into the receiving control area's transmission system at any interface designated by the Seller. Seller's designation of interface can change daily.

b. The availability to the Buyer of transmission service on the receiving control area's transmission system at a particular interface shall serve as a precondition of Seller's designation of delivery point. The Seller places no restrictions on the Buyer regarding the quality of transmission service to be used in the transaction[2].

c. The determination of transmission service availability for the Buyer is made through Buyer's confirmed transmission request recorded on the receiving control area's Open Access Same Time Information System (OASIS), or by the regional transmission group/Independent System Operator (hereafter referred to as an ISO). Buyer's transmission request for day ahead scheduling of energy must be submitted to the responsible transmission agency at the earliest time for the receipt of such schedules after the 12:00 P.M. Eastern Prevailing Time declaration of schedules.

d. The Seller is not released from his delivery obligation to the Buyer, if the Buyer is unable to obtain transmission service on the receiving control area's transmission system. Should transmission service

[1] The product description for energy in Into Cinergy transactions is "Firm, with Liquidated Damages".

[2] There are circumstances where Buyer's use of non-firm transmission service adheres the standard of transmission availability, but can result in risk to the Buyer that is beyond the scope of Seller's responsibilities in "Into" transactions (see III c)

not be available to the Buyer at the Seller's designated interface, the Seller shall be required to make one of the following designations to the Buyer: (1). an alternate interface for which transmission service is available to the Buyer, or (2). a generation source inside the receiving control area for which transmission service is available to the Buyer (see id).

e. The Seller is responsible for securing any transmission service or interface capacity required to deliver financially firm energy from the generating source into the receiving control area's transmission system.

f. Seller's obligation to deliver energy to the Buyer is not relieved because of: (1). insufficient Available Transfer Capacity (ATC) between the receiving control area and adjacent control areas, (2). transmission service curtailments at Seller's designated interface, (3). Seller's loss of transmission service, or (4). Seller's loss of generation source. In the event Seller is unable to deliver energy to the Buyer, Seller shall designate an alternate interface or source of generation inside the receiving control area by which Seller's delivery obligation can be satisfied. This provision is applicable to day ahead and same day transactions.

g. Seller is responsible for any additional transmission purchases incurred by the Buyer in connection with Seller's failure to deliver energy at Seller's previous interface designation(s). Should this circumstance occur, Seller is obligated to compensate for Buyer's incremental transmission costs, and/or associated congestion charges as a result of Seller's change in Buyer's point of receipt[1]. In the case of same-day curtailments, Seller is responsible for the lesser of, (1). Buyer's hourly non-firm transmission system purchases over the duration of the curtailment, or (2). Seller's hourly transmission costs incurred from the delivery of energy to Buyer's point of delivery, which by mutual agreement can include any transmission purchases outside of the receiving control area. For day-ahead transactions, Seller is responsible for all additional receiving control area transmission purchases, attributed to Seller's change in Buyer's interface designation(s).

h. Except for the conditions referenced in IIg, the Seller is not responsible for transmission service inside the receiving control area's transmission system. The Seller's delivery obligation to the Buyer is limited to the transfer of energy to the Buyer at the Seller's designated interface. Seller's responsibility does not extend beyond the Buyer's point of receipt.

III. Buyer's Obligations:

a. The Buyer has the obligation to receive financially firm energy at the interface designated by the Seller

b. Should no transmission service be available to the Buyer at a particular interface designated by the Seller, the Buyer can require the Seller to make delivery to another interface, Seller's option of Buyer's receipt point. (Refer to Seller's obligations, sections IIb and IIc).

c. The standard of availability of transmission service to the Buyer at Seller's designated interface is applicable to both firm and non-firm transmission service. No requirement is made on the Buyer to select firm transmission service over non-firm service. However, following designation of interface by the Seller.

[1] In the case of Cinergy, congestion charges refer to same day generation re-dispatch costs caused by the unintended scheduling of Buyer's energy on Cinergy's 500 MW Inter-Company (ITC) transmission tie line. This condition would be due to Seller's same day change in Buyer's point of receipt from one side of the Cinergy Transmission System to the other. The Cinergy Transmission System is interconnected to control areas on the East side in Ohio, and control areas on the West side in Indiana.

Buyer's decision to purchase and utilize non-firm transmission service can carry singular consequential risk for the Buyer[4].

d. Under mutual agreement, the Seller can mitigate the effect of Buyer's consequential risk by moving the interface designation for the Buyer. Should such an accommodation be made by the Seller, the Buyer is responsible for all costs associated with re-routing Seller's energy to the Buyer's point of receipt, including Seller's incremental transmission costs.

IV. Performance

Counterparty performance in "Into Cinergy transactions for energy is excused only by event of force majeure.

V. Seller's Non-Performance

a. If the Seller fails to deliver energy, the Seller shall be liable to the Buyer for Buyer's reasonably-incurred financial cost of replacing the energy the Seller failed to deliver.

VI. Buyer's Non-Performance

a. If the Buyer fails to take delivery of the energy, the Buyer shall be liable to the Seller for Seller's reasonably-incurred financial loss in connection with Seller's efforts to resell the energy that the Buyer failed to take.

VII. Scheduling of Energy

Daily prescheduled by 12:00 PM Eastern Prevailing Time, one business day ahead excluding NERC holidays.

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[4] Consequential risk caused by the Buyer's decision to obtain non-firm transmission service can be illustrated by two examples:

(1) Despite the availability of firm transmission service at the time of Seller's interface designation, the Buyer decides to purchase non-firm transmission service through Cinergy for a delivery obligation downstream. A line-loading problem develops outside of Cinergy, and the Buyer's use of non-firm transmission service through Cinergy causes the transmission provider in a control area adjacent to Cinergy to curtail the Buyer's transmission service at a Cinergy System border interface. Even though the Buyer had arranged for firm transmission from the Cinergy Border to the point of delivery downstream, the reason for the Buyer's curtailment is attributed to the quality of transmission service used in Cinergy. In this example the Seller's delivery obligation is met. The Buyer has available transmission and is able to bring the Seller's energy into Cinergy. Seller's choice of interface has no effect on Buyer's consequential loss.

(2) The Buyer has obtained non-firm transmission service for a next day energy transaction, but declines to upgrade to firm transmission service when notified by the Cinergy Transmission System of curtailments to holders of non-firm transmission, due to increased sales of firm transmission products. Although the Buyer is granted the right of first refusal to upgrade to firm transmission before a third party is allowed to purchase firm, the Buyer chooses not to change the quality of his transmission, on the assumption that the Seller is required to change interface designation under such circumstances. In this instance the Seller's delivery obligation is met. The Seller is under no obligation to designate another interface or to re-supply the Buyer.

PERFORMANCE ASSURANCE AGREEMENT

[redacted]

This Performance Assurance Agreement dated as of December 14, 2000, (the "Agreement") is made by and between [redacted] with offices at [redacted] Cincinnati, Ohio, 45202 [redacted] orporation, with offices at [redacted] and Cinergy Services, Inc., [redacted] poration, acting on behalf of and as agent for The Cincinnati Gas & Electric Company ("CG&E"), an Ohio corporation and PSI Energy, Inc., an Indiana corporation, (each a "Cinergy Operating Company") and collectively, ("Cinergy").

WHEREAS [redacted] Certified Supplier eligible to supply electricity pursuant to various Ohio utility Customer Choice Programs, including that of CG&E; and

WHEREAS [redacted] s approached Cinergy regarding [redacted] sire to procure wholesale energy from Cinergy in order to meet [redacted] tail load obligations to [redacted] rsuant to CG&E's Customer Choice Program; and

WHEREAS [redacted] nd Cinergy desire to enter into a certain Confirmation Letter Agreement of even date herewith whereby the Cinergy Operating Companies shall sell between [redacted] ore fully described in the Confirmation Letter Agreement, pursuant to the "Cinergy Operating Companies Market Based Power Sales Tariff FERC Electric Tariff Original Volume 7" (the "Confirmation Letter Agreement"), under the terms and conditions of the Confirmation Letter Agreement; and

WHEREAS, Cinergy's willingness to enter into the Confirmation Letter Agreement wit [redacted] d assume the associated commodity risk is predicated upon the fact that [redacted] has executed a long-term retail supply agreement wit [redacted] which retail agreement has a term coincident with the wholesale agreement to be executed betwee [redacted] d Cinergy; and

WHEREAS, Cinergy's willingness to offer [redacted] e price specified in the Confirmation Letter Agreement is predicated, in part, upon the load profile of [redacted] retail customer [redacted]

WHEREAS, Cinergy is unwilling to enter into the Confirmation Letter Agreement unless [redacted] ter into this Agreement.

NOW THEREFORE, in consideration of, and as an inducement for, the Cinergy entering into the Confirmation Letter Agreement [redacted] hereby covenant and agree as follows:

1. **Performance Assurances.**

(a) [redacted]ovenants. [redacted]ree with Cinergy (i) to fully and timely perform and comply with all of the provisions of the retail supply agreement between [redacted]tail agreement") with respect to energy purchased by [redacted]nder the Confirmation Letter Agreement (and for which performance is not excused in accordance with the terms thereof), (ii) not to amend or modify th[redacted]tail agreement in a manner that will modify in any way either the amount of energy tha[redacted]equired to purchase from [redacted]ith respect to the Confirmation Letter Agreement or the terms and conditions thereof, and (iii) not to terminate or repudiate the [redacted] Retail Agreement in breach or default thereof (including without limitation, through any rejection or similar termination of that agreement in a bankruptcy proceeding involving [redacted]

(b) To the extent that [redacted]relinquishes or otherwise forfeits its right to supply retail electric service generally, as referenced above, and specifically to [redacted] becomes bankrupt or insolvent, or otherwise terminates its business operations such that it is unable to continue performance under the Confirmation Letter Agreement, or otherwise fails to perform any of its obligations under the Confirmation Letter Agreement so as to trigger an Event of Default, [redacted]rees to guarantee payment of all monies owed by [redacted]o Cinergy under the Confirmation Letter Agreement as evidenced by that certain Guaranty of even date herewith made by [redacted]or the benefit of Cinergy Services, Inc., as agent for and on behalf of The Cincinnati Gas & Electric Company and PSI Energy, Inc.; provided, however, that [redacted]vill not owe such monies to the extent a Replacement Retail Provider assumes [redacted]ights and obligations under the Confirmation Letter Agreement. The Guaranty shall survive any succession of retail provider.

(c) [redacted]ree to provide Cinergy with access to all [redacted]nergy meter data during the term of the Confirmation Letter Agreement.

(d) Notwithstanding any of the provisions contained in this Agreement, none of the parties hereto shall be liable to the other for any indirect, special, incidental or consequential damages with respect to any claim arising hereunder or under the obligations pursuant to the Confirmation Letter Agreement.

(e) For purposes of this Agreement and the Confirmation Letter Agreement, [redacted] shall be defined to include th[redacted] located within the CG&E service territory, and the [redacted] located within the CG&E service territory; provided, however, that the installation of any additiona[redacted]cilities will not act to increase the Maximum Hourly Quantities specified in the Confirmation Letter Agreement.

2. Term. This Agreement shall terminate on the last day of the term specified in the Confirmation Letter Agreement.

3. Notices. (a) All notices and other communications about this Agreement must be in writing, must be given by facsimile, hand delivery or overnight courier service and must be addressed or directed to the respective parties as follows:

If to Cinergy, to:

Cinergy Services, Inc.
The Cincinnati Gas & Electric Company
PSI Energy Inc.
c/o Cinergy Corp.
139 East Fourth Street
Cincinnati, Ohio 45202

If to [redacted] to:

[redacted]

If to [redacted] to:

[redacted]

Notices are effective when actually received by the party to which they are given, as evidenced by facsimile transmission report, written acknowledgment or affidavit of hand delivery or courier receipt.

4. Representations and Warranties. The parties represent and warrant as of the date hereof that:

(a) They are duly organized, validly existing and in good standing under the laws of the jurisdiction of their incorporation and have full power and legal right to execute and deliver this Agreement and to perform the provisions of this Agreement on their part to be performed;

(b) the execution, delivery and performance of this Agreement have been and remain duly authorized by all necessary corporate action and do not contravene any provision of its certificate of incorporation or by-laws or any law, regulation or contractual restriction binding on them or their assets;

(c) subject to all necessary regulatory approval, all consents, authorizations, approvals, registrations and declarations required of the due execution, delivery and performance of this Agreement have been obtained from or, as they case may be, filed with the relevant governmental authorities having jurisdiction and remain in full force and effect, and all conditions thereof have been duly complied with and no other action by, and no notice to or filing with, any governmental authority having jurisdiction is required of such execution, delivery or performance;

(d) this Agreement constitutes the legal, valid and binding obligation of the parties hereto enforceable against them in accordance with its terms, except as enforcement hereof may be limited by applicable bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally or by general equity principles;

(e) that, to the best of their knowledge, at the time of the execution and delivery of this Agreement, nothing (whether financial condition or other condition) exists that would impair the obligations and liabilities of the parties hereunder;

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

6. Assignment. This Agreement shall be binding upon the parties, their respective successors and assigns, and shall inure to the benefit of the parties, and their respective successors and assigns. The parties may not assign this Agreement or delegate its duties hereunder without the express prior written consent of the other parties.

7. Amendments. No term or provision of this Agreement shall be amended, modified, altered, waived, or supplemented except in a writing signed by the parties hereto.

8. Miscellaneous. (a) This Agreement is the entire and only agreement between the parties with respect to the subject matter hereof arising out of the Confirmation Letter Agreement. All representations, warranties, agreements, or undertakings heretofore or contemporaneously made, which are not set forth herein, are superseded hereby. (b) The section headings contained in this Agreement are used for convenience of reference only and not to limit or modify the substance of this Agreement.

IN WITNESS WHEREOF, the Parties have caused this Performance Assurance Agreement to be executed in their respective corporate names and by their duly authorized representative as of the date first above written.

[redacted]

[redacted]

CINERGY SERVICES, INC.
As Agent for and on Behalf of:
The Cincinnati Gas & Electric Company
PSI Energy, Inc.

By: Joseph W. Toussaint
Name: Joseph W. Toussaint
Title: Vice President

[redacted]

FIRST AMENDMENT TO
PERFORMANCE ASSURANCE AGREEMENT

This First Amendment to the Performance Assurance Agreement, dated as of July 31, 2001, (the "Amendment") is made by and between [redacted] Cinergy Services, Inc., a Delaware corporation, acting on behalf of and as agent for The Cincinnati Gas & Electric Company ("CG&E"), an Ohio corporation and PSI Energy, Inc., an Indiana corporation, (each a "Cinergy Operating Company") and collectively, ("Cinergy").

WHEREAS, Cin[redacted] are parties to the Performance Assurance Agreement, dated as of [redacted] the "Agreement") wherein [redacted] agreed to assume certain obligations (as described more fully in the Agreement) in consideration for Cinergy's willingness to provide wholesale energy to [redacted] retail energy supplier, [redacted] pursuant to the Confirmation Letter Agreement dated as of December 14, 2000 ("December 14 Confirmation Letter"); and

WHEREAS [redacted] desire to enter into that certain Confirmation Letter Agreement, dated as of July 31, 2001 ("July 31 Confirmation Letter"), pursuant to which Cinergy shall sell up[redacted] firm energy and which energy shall be for the ultimate consumption of [redacted] as more fully described in the July 31 Confirmation Letter; and

WHEREAS, as a material portion of the consideration to Cinergy in exchange for Cinergy's willingness to enter into the July 31 Confirmation Letter and offer the price specified therein, [redacted] have agreed to provide the same performance assurances as set forth in the Agreement and amend the Agreement to encompass the July 31 Confirmation Letter.

NOW THEREFORE, in consideration of, and as an inducement for, the Cinergy entering into the July 31 Confirmation Letter, Cinergy [redacted] hereby covenant and agree as follows:

1. Each of the provisions set forth in the Agreement shall apply with respect to the July 31 Confirmation Letter, except as set forth below.

2. For purposes of the July 31 Confirmation Letter, [redacted] shall be defined to include the [redacted] facility located [redacted]

3. This Amendment shall be effective as of July 31, 2001. [redacted]

(The remainder of this page is intentionally blank)

[redacted]

[redacted]

Executed as of the day and year first set forth above.

[redacted]

[redacted]

CINERGY SERVICES, INC.
As Agent for and on Behalf of
The Cincinnati Gas & Electric Company
PSI Energy, Inc.

By: _____ KEM
Name: Tim McCabe
Title: Executive Vice President

[redacted]

APR 23 2004 [redacted]

No. of Pages 3	Date: 07/31/01	Audit #:
Name: [redacted]	Name: Tim McCabe	
Customer: [redacted]	Company: Cinergy Services, Inc.	
Fax: [redacted]	Fax: (859) 372-5416	
Phone: [redacted]	Phone: (859) 372-5570	

CONFIRMATION LETTER AGREEMENT FOR A TRANSACTION UNDER THE CINERGY OPERATING COMPANIES MARKET-BASED POWER SALES TARIFF – MB

SERVICE SCHEDULE A: MARKET-BASED POWER

This Confirmation Letter Agreement and the Service Agreement for Power Between [redacted] and Cinergy Operating Companies dated as of July 31, 2001, (together, the "Agreement") contains the mutual and respective understandings between [redacted] ("Buyer") and the Cinergy Operating Companies ("Cinergy" or "Seller") regarding the specific terms and conditions of service and the characteristics for the sale of Market-Based Power, pursuant to Service Schedule A of the Cinergy Operating Companies FERC Electric Market-Based Power Sales Tariff, Original Volume No. 7 ("Cinergy MB tariff").

The following are the Pricing Terms and Conditions of Service for the Transaction:

Seller:	Cinergy Services, Inc., as agent for and on behalf of The Cincinnati Gas & Electric Company ("CG&E") and PSI Energy, Inc. (collectively, "Cinergy Operating Companies").
Buyer:	[redacted]
Product:	Firm Energy with Liquidated Damages for each of the 24 hours for each day provided during the term of this agreement. The Product is further defined by hourly load shape limitations described below in the Load Shape Provision.
Quantity:	The Maximum Hourly Quantity in any hour during the Term of the contract will [redacted] hour. If the Buyer's megawatt hour consumption exceeds the Maximum Hourly Quantity stated above in any hour, Seller shall charge Buyer [redacted] calculated by Cinergy in a commercially reasonable manner for each megawatt hour served above the Maximum Hourly Quantity. Buyer shall take or pay for the quantity equal to a monthly minimum load factor o[redacted] based on the Maximum Hourly Quantity defined above in the aggregate for each month and a yearly minimum load factor o[redacted] based upon the Maximum Hourly Quantity defined above, in the aggregate for each year. During and limited t[redacted] the last month of the Term of the Agreement,

	[redacted]
Delivery Point:	Into Cinergy, Seller's Daily Choice. (See Attachment A for further definition).
Term:	Hour Ending ("HE") 0100 Eastern Prevailing Time ("EPT") on [redacted] On or before [redacted] Cinergy shall have the right, but not the obligation, to extend the Term of this Agreement, including the Price and each of the terms and conditions expressed herein for the period [redacted] tension 1"). On or before [redacted] the extent that Cinergy exercises Extension 1, Cinergy shall have the right, but not the obligation, to extend the Term of this Agreement, including the Price and each of the terms and conditions expressed herein for the period [redacted] "Extension 2").
Price:	[redacted]
Scheduling:	The Buyer must provide day-ahead schedules by 10:00 a.m. EPT one business day prior to delivery of energy. Pre-schedules and control area information will be confirmed by the Seller and the Buyer before 10:00 a.m. EPT, one Business Day prior to delivery. The Buyer will be allowed a maximum [redacted] hanges per day for no additional fee. Seller shall charge Buyer [redacted] additional schedule change. Further, the Buyer shall provide 45 minutes notice prior to the start of any schedule change.
Transmission:	Buyer shall be responsible for all transmission costs and transmission losses from the Delivery Point. Seller shall be responsible for transmission costs and losses to the Delivery Point. New Energy shall be responsible for all charges associated with its provision of retail electric service that derives from this wholesale transaction.
Load Shape Provision:	The parties agree that the Price per megawatt hour of energy that is offered under this Agreement is predicated upon a specified load shape and Cinergy's understanding of the consumption pattern of [redacted] use, retail customer, [redacted] That is, the determination of the Price stated herein relied, in part, upon a specified, predictable, and relatively consistent energy consumption pattern. The parties agree that this offering was not priced to accommodate a wholesale economic call option product and agree

	that such use would constitute an Event of Default pursuant to the Cinergy MB tariff; provided, however [redacted] longer requires any energy, [redacted] must use the energy provided hereunder for a load with comparable usage pattern and load shape. As such, [redacted] grees to receive wholesale power delivered by Cinergy pursuant to this Agreement in a manner consistent with the mutual understanding expressed above. Energy scheduled and received b[redacted] from Cinergy in excess o[redacted] the energy required to serve [redacted] etail load [redacted] n an hourly basis will be billed at the greater of the Price o[redacted] hourly market price as calculated by Cinergy in a commercially reasonable manner. [redacted] hall permit Cinergy to audit the meter data fo[redacted] other applicable records as necessary to ensure compliance with this provision. Such meter data and applicable records shall be preserved and retained b[redacted] the duration of the contract Term plus an additiona[redacted] the termination of the Term.

Any conflicts between this Confirmation Letter Agreement, the Service Agreement, and the Cinergy MB tariff shall be resolved in favor of the Confirmation Letter Agreement. Please confirm your agreement with the transaction terms and conditions set forth in this Confirmation Letter by executing five (5) copies of this letter and returning them by the end of this business day to the undersigned Cinergy representative at Cinergy Services, Inc., 7200 Industrial Road, Florence, Kentucky 41042.

Customer: [redacted]

Company: Cinergy Services, Inc.
As Agent for and on Behalf of:
The Cincinnati Gas & Electric Company & PSI Energy, Inc.

By: _____
Name: Tim McCabe
Title: Executive Vice President

Date Signed: July 31, 2001

Date Signed: July 31, 2001

ENERGY SERVICE AGREEMENT

THIS [redacted] NERGY SERVICE AGREEMENT ("Agreement"), effective as of December 15, 2000 between [redacted] and [redacted] requests [redacted] Electric Distribution Company ("EDC") to continue providing electricity distribution services under the same standards and with the same reliability otherwise required by law and regulation, and authorizes the EDC to proceed with enrollment of, and supply of electricity to, the Account(s) (as defined in Section 6 of this Agreement), and for which the Parties have agreed to as follows:

1. [redacted] authorizes [redacted] to serve as Certified Retail Electric Supplier ("CRES") on its behalf and to act as [redacted] exclusive manager for electricity procurement services for the Account(s) set forth on Schedule A and pursuant to the terms of this Agreement. [redacted] will arrange and be responsible for the following services for the Account(s): the procurement of electricity; scheduling coordination; transmission and ancillary services; and imbalance services. [redacted] authorize [redacted] to act, as it deems necessary, from time to time to provide such services for the Account(s) [redacted] designate [redacted] to its EDC and other energy supplier(s) as an authorized recipient of [redacted] current and historical energy billing and usage data. [redacted] shall have full responsibility for payment of any existing amounts owed to EDC. The limited agency described above shall be irrevocable and exclusive for the term of the Agreement. Further, such limited agency shall not create or result in the imposition of any other duties of [redacted] to [redacted] including any duties, which may otherwise arise by operation of law.

2. **ENERGY PRICE SCHEDULE** [redacted] will pay [redacted] the capacity, energy, forecasting, scheduling, *billing, transmission and ancillary services (excluding energy imbalance service) provided under the Agreement terms* in accordance with the attached Schedule A. The resulting [redacted] price of all services shall, except as otherwise expressly stated in this Agreement, include all costs associated with the provision of services by [redacted] pursuant to this Agreement, including but not limited to assessments, and/or charges relating to the services provided to [redacted] under this Agreement.

3. **TERM.** The term will commence on the first day of the EDC billing cycle, beginning on or about the Switch Date(s) for the Account(s) listed on Schedule A; provided, however, that commencement of service is dependent upon timely enrollment and acceptance of the Account(s) by the EDC and will end upon [redacted] meter reading of the EDC billing cycle concluding on or after the date specified in Schedule A as to each such Account(s).

4. ***INVOICING AND PAYMENT.*** *Invoices will be issued to* [redacted] *according to* [redacted] *normal monthly* billing cycle. Subject to applicable law and regulation, and unless otherwise agreed in writing, [redacted] shall provide a single bill for each of the Account(s) for amounts due [redacted] from [redacted] under this Agreement. [redacted] shall direct all payments related to electricity services without offset or reduction of any kind as to each of the Account(s) served under this Agreement to [redacted], and shall immediately notify [redacted] of any dispute with the amounts billed. [redacted] shall pay any undisputed portion of the invoices. Any sums billed and not received by [redacted] within twenty (20) calendar days of invoice may be assessed a late payment charge of one and one-half percent (1.5%) per month.

5. **DEFINITIONS, TERMS AND NOTICE.** Capitalized terms shall have the meanings provided in this Agreement and as stated in the accompanying General Terms and Conditions incorporated herein by reference. All notices, requests or approvals required hereunder shall be in writing and shall be deemed given when received. All such notices shall be delivered personally or by facsimile to the addresses provided below.

6. **ENROLLMENT OF ACCOUNT(S).** [redacted] requests [redacted] to provide service under the terms of this Agreement to the Account(s) identified on Schedule A and accepted by the EDC for enrollment ("Account(s)") on the respective Switch Date(s) identified on Schedule A.

[redacted]

7. [redacted] CUSTOMER SERVICE. [redacted] may request information regarding its invoice or services by calling NewEnergy toll-free at: (888) 638-2210. Kroger agrees to contact its EDC in the event of an emergency, power outage or other service disruption at the following telephone number: [redacted]

8. ALTERATIONS. The terms and conditions preprinted on this Agreement, including the General Terms and Conditions and Schedule A, may not be altered or modified and any addition, modification or alteration thereto shall be void and without effect. This Agreement shall be void and without effect unless an Energy Price Schedule has been executed by [redacted] and provided [redacted] Contract Number corresponding to this Agreement and the [redacted] Reference Number stated below.

9. MISCELLANEOUS. [redacted] affirms that it has read this Agreement in its entirety and that it agrees to purchase services from [redacted] subject to the terms and conditions contained herein. This Agreement has been drafted by both parties and accordingly shall not be construed against either party as drafter.

[redacted]

By: [redacted]

Address: [redacted]

Attention: [redacted]
Telephone: [redacted]
Facsimile: [redacted]

[redacted]

By: [redacted]

Address: [redacted]

Attention: [redacted]
Facsimile: [redacted]
Daytime Telephone: [redacted]
Evening Telephone: [redacted]

[redacted] Reference Number: _____

Account Manager: _____

Agreement is Not Valid Unless Executed by [redacted]

[redacted]

DEFINITIONS AND GENERAL TERMS AND CONDITIONS

[redacted] means the Party to this Agreement that controls the electricity purchases for the Account(s) identified on Schedule A.

"EDC" mean[redacted]ectric distribution company, the public utility controlling the distribution system required for reliable delivery of electricity to the Account(s).

"Energy Charge" means the cents per kilowatt-hour Energy Price identified on Schedule A as to each of the Account(s) which amount includes assessments relating to the services provided to Kroger under this Agreement.

"Energy Price Schedule" means the Schedule A incorporated as part of this Agreement and providing an Expiration Date, Account(s), Switch Date(s), applicable Energy Price, applicable Transmission and Ancillary Services cost, NewEnergy Reference Number identified on this Agreement, a NewEnergy Contract Number corresponding to this Agreement, and such other information as may be required by NewEnergy thereon.

"Force Majeure" means an event that is not within the reasonable control of the Party claiming suspension ("Claiming Party"), and that by the exercise of due diligence, the Claiming Party is unable to overcome or obtain or cause to be obtained a substitute performance therefor and shall not be deemed a breach or default under this Agreement. Force Majeure includes but is not limited to acts of God, accident, strike, storm, fire, war, flood, earthquake, civil disturbance, sabotage, facility failure, breakage of equipment or machinery, curtailment of supply by or as a result of the EDC, declaration of emergency by the ISO, regulatory, administrative, or legislative action, or action or restraint by court order or governmental authority; provided, however, Force Majeure is not intended to apply to a change in market prices or the supply of electric power and energy not arising from an event identified herein.

"ISO" means Independent System Operator or other entity approved by the Federal Energy Regulatory Commission as administering transmission reliability and control, providing a recognized power exchange or operating an open market wholesale energy exchange.

"Party(ies)" means [redacted]ndividually or collectively.

"Switch Date" shall be the date of first delivery of electricity to the Account(s) listed on Schedule A. Switch Dates are requested by [redacted]e time an account is enrolled on EDC's delivery service tariff, are assigned by EDC, and are subject to EDC's acceptance and enrollment of Account(s).

T1.1 Payment and Billing Cycle. Each invoice for amounts due under this Agreement shall be due and payable by [redacted] on the date of such without offset or reduction of any kind. [redacted]ll pay any undisputed portion at that time, and give prompt written notice of its dispute regarding any unpaid portion. Any sums billed and not received by [redacted] within twenty (20) calendar days of invoice shall be automatically assessed a late payment charge of one and one-half percent (1.5%) per month. In the event that the EDC is unable to procure timely meter reads, [redacted] entitled to bi[redacted]ased on estimated billing parameters until such time as accurate meter reads can be obtained. If during the course of [redacted] agreement it is determined that any meters, or method of obtaining or processing meter data has or have been incorre[redacted] entitled to adjust bills back to the latter of, the point in time in which the error(s) first occurred or the period allowed for in the EDC's Distribution Tariff.

T1.2 Electricity Procurement. This Agreement including Schedule A shall remain in full force and effect throughout the term of this Agreement. Title to electricity provided under this Agreement shall pass from [redacted] to [redacted]t the intersection of the EDC's transmission and distribution system provided however that [redacted] shall provide all necessary distribution losses; provided, however, th[redacted]ll not be deemed to be in control or possession of such electricity prior to delivery to or by the EDC.

T1.3 Energy Profile and Minimum/Maximum Use Limitations. The Parties agree that the Price per megawatt hour of energy that is stated in Schedule A, is predicated upon a specified load shape an[redacted]nderstanding of the consumption pattern o[redacted]ccounts listed in Schedule. That is, the determination of the Price stated herein relied, in part, upon a [redacted] The parties agree that this offering was not priced to accommodate an economic call option product. If [redacted] megawatt hour consumption exceeds the Maximum MW Demand as listed in Schedule A in any [redacted] greater of

[redacted]

the price stated in Schedule A [redacted] the hourly market price as calculated by Cinergy in a commercially reasonable manner for each megawatt hour served above the Maximum MW Demand [redacted] shall take or pay for the quantity equal to a monthly minimum load facto[redacted] based on the Maximum MW Demand as listed in Schedule A, in the aggregate for each calendar month and a yearly minimum load factor [redacted] based upon the Maximum MW Demand defined in Schedule A, in the aggregate for each year.) At the request [redacted] will endeavor to mitigate losses [redacted] by marketing any megawatts necessary [redacted] to achieve the minimum load factors stated above.

T2.1 Adjustments to Schedule A Costs. Any changes to [redacted]'s cost resulting from interpretation or implementation of current or future statutory, regulatory, or environmental action, being beyond the control of [redacted] shall be directly passed on to [redacted]

T2.2 Usage and Account Information. [redacted] acknowledges that the [redacted] cost of Electricity Services is based upon [redacted] historic monthly usage and metered rate of consumption for all Account(s) identified on Schedule A. [redacted] shall notify [redacted] of any material variance in usage and [redacted] agrees to bear any actual, incremental, and reasonable charges resulting from any variance [redacted] monthly usage of electricity or metered rate of consumption of more than ten percent (10%) as compared to historical usage (weather adjusted) or as a result of inaccurate information regarding the Account(s) as reflected on Schedule A.

T2.3 Limitation of Liability. The liability of [redacted] and its affiliates for any and all claims arising from or relating to this Agreement, including any causes of action in agency, contract, tort or strict liability, shall not exceed the amount of [redacted] charge under its largest monthly invoice during the Term. Notwithstanding any other provision of this Agreement, in no event shall [redacted] its affiliates be liable for any consequential, exemplary, special, incidental or punitive damages, including, without limitation, lost opportunities or lost profits; provided, however, that for purposes of this Agreement and not by way of limitation, [redacted] costs and expenses related to arranging and providing electric power and energy for the Account(s) shall be deemed direct damages. It is the intent of the parties that the limitation herein imposed on remedies and the measure of remedies be without regard to the cause, or causes related thereto, including the negligence of any party, whether such negligence be sole, joint, or concurrent, or active or passive. To the extent that any damages required to be paid hereunder are liquidated, the parties acknowledge that damages are difficult or impossible to determine, otherwise obtaining an adequate remedy is inconvenient, and liquidated damages constitute a reasonable approximation of the harm or loss.

T3.1 Independent Contractor and CRES Certification. [redacted] and will perform as an independent contractor under this Agreement. Except as otherwise provided in this Agreement, neither Party has the authority to execute documents that purport to bind the other and nothing herein shall be construed to constitute a joint venture, fiduciary relationship, partnership or other joint undertaking. [redacted] certified as a CRES by the Public Utilities Commission of Ohio as may be required to perform the services identified in this Agreement and will maintain such certification in good standing, and will provide and maintain, consistent with applicable law and regulation, any bonds or other security required thereby.

T3.2 Information and Confidentiality. [redacted] may immediately terminate this Agreement or suspend service for [redacted] noncompliance with this Section. All terms of this Agreement are confidential and shall not be disclosed by [redacted] without [redacted] prior written consent, except as required by law. [redacted] shall keep [redacted] information confidential in accordance with applicable law and regulation and not disclose such information without [redacted] consent, except as required by law.

T3.3 Force Majeure. Notwithstanding any other provision of this Agreement, if either Party is unable to carry out any obligation under this Agreement (other than an obligation to pay money) due to Force Majeure, this Agreement shall remain in effect but such obligation shall be suspended for the period necessary as a result of the Force Majeure, provided that: (i) the non-performing Party gives the other Party prompt written notice describing the particulars of the Force Majeure, including but not limited to the nature, date, and expected duration of the; (ii) the suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure; and (iii) the non-performing Party uses commercially reasonable efforts to remedy its inability to perform.

T3.4 Entire Agreement. This Agreement, including its General Terms and Conditions and the corresponding Schedule A, embodies the entire agreement and understanding of the Parties, supersedes all prior agreements and understandings of the Parties related to the subject matter hereof, and may not be contradicted by evidence of any prior or contemporaneous

[redacted]

oral or written agreement. Receipt of a facsimile copy of [redacted] signature shall be considered an original for all purposes under this Agreement an[redacted] agrees to provide its handwritten signature upon request. No amendment to this Agreement shall be valid or given effect unless executed by both Parties.

T3.5 Governing Law and Arbitration. The validity, performance, and construction of this Agreement shall be governed and interpreted in accordance with the laws of the State of Ohio. Any controversy or claim arising from or relating to this Agreement shall be settled in accordance with the express terms of this Agreement by arbitration in Cincinnati, Ohio, in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. No arbitrator shall have the authority to limit, expand, or otherwise modify the terms of this Agreement and each party irrevocably waives any claim thereto.

T3.6 Third Parties. The services provided by [redacted] pursuant to this Agreement are for the exclusive benefit of the Parties hereto. If [redacted] represented by an agent or broker in connection with the procurement or performance of this Agreement [redacted] shall be fully responsible for any fee, commission or other compensation owing any such agent or broker, and shall indemnify, defend and ho[redacted] harmless from any and all claims for compensation of any such agent or broker arising from or relating to this Agreement.

T3.7 Waiver, Assignment, and Severability. No waiver in the requirements of this Agreement shall occur based on a failure of either Party to provide notice of any default or other requirement under this Agreement and failure to object to any default shall not operate or be construed as a waiver of any future default, whether like or different in character. Neither Party shall assign this Agreement without the prior written consent of the other Party; provided, however, [redacted] hereby consents to the assignment of this Agreement, consistent with applicable law and regulation, to any commonly controlled subsidiary or affiliate of [redacted] Provided further, in the event of [redacted] default and/or withdrawal from providing service pursuant to the terms of this Agreement, [redacted] shall assign the underlying wholesale supply contract t[redacted] designated CRES if possible. This Agreement shall be binding upon the Parties and all permitted assigns and other successors-in-interest of the Parties. If any portion of this Agreement, or application thereof to any person or circumstance, shall be held legally invalid, the remaining portion(s) of this Agreement shall not be affected and shall be valid and enforced to the fullest extent permitted by law or equity.

T3.8 Termination or Cancellation. Notwithstanding any other provision of this Agreement, [redacted] fails to make any non-contested payment within thirty (30) days of the date specified for such payment, [redacted], after providing [redacted] not less than five (5) days prior written notice of such default, cancel this Agreement as to the Account(s), and, upon taking such action and notice to [redacted] move service for any of the Account(s) to the EDC's then applicable Standard Offer Tariff Service. Should this Agreement be terminated or cancelled, [redacted] agrees that it shall remit full payment, without offset or reduction of any kind, within fourteen (14) days of a final invoice date, plus all applicable charges and [redacted] collection expenses. Notwithstanding any other term of this Agreement, [redacted] remedies at law and in equity shall survive the Term of this Agreement.

T3.9 DISCLAIMER. [redacted] ACKNOWLEDGES AND AGREES THAT NO WARRANTY, DUTY, OR REMEDY, WHETHER EXPRESS, IMPLIED, OR STATUTORY, IS GIVEN OR INTENDED TO ARISE AS TO [redacted] AND ITS AFFILIATES UNDER THIS AGREEMENT EXCEPT AS OTHERWISE EXPRESSLY STATED HEREIN, AND [redacted] SPECIFICALLY DISCLAIMS ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR USE.

T4.0 Contingency This Agreement is contingent on the execution of a similar supply agreement, which [redacted] expects to close on or about the same time as this Agreement.