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August 17, 2009

VIA MESSENGER DELIVERY

Ms. Renee Jenkins
Chief, Docketing Division
Public Utilities Commission of Ohio
180 E. Broad Street, 13th Floor
Columbus, Ohio 43215

RECEIVED-DOCKETING DIV
2009 AUG 17 PM 3:34
PUCO

Re: In The Matter of: The 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

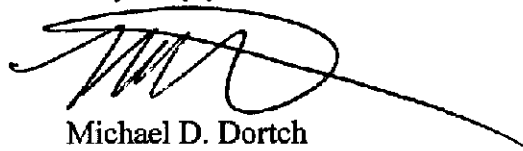
Dear Ms. Jenkins:

Enclosed please find an original and fifteen copies of Duke Energy Ohio, Inc.'s,
Supplemental Response to the Commission's Entry of June 1, 2009.

Please accept the original and fourteen copies of this document for filing in the above
identified matters. I would appreciate the return of a time stamped copy via the individual who
delivers the same to you.

As always, please call me if you have any questions concerning this filing. Thank you.

Very truly yours,



Michael D. Dortch

Enclosures

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bcc: (w/ enc.): Rocco D'Ascenzo, Esq.
Elizabeth Watts, Esq.
Ms. Anita Schafer

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the	:	Case Nos.	03-0093-EL-ATA
Consolidated Duke Energy Ohio, Inc.	:		03-2079-EL-AAM
Rate Stabilization Plan Remand and	:		03-2080-EL-AAM
Rider Adjustment Cases	:		03-2081-EL-ATA
	:		05-0724-EL-UNC
	:		05-0725-EL-UNC
	:		06-1068-EL-UNC
	:		06-1069-EL-UNC
	:		06-1085-EL-UNC

**SUPPLEMENTAL RESPONSE TO THIS COMMISSION'S
ENTRY OF JUNE 1, 2009**

On June 1, 2009, the Public Utilities Commission of Ohio's attorney examiner ("Commission" or "PUCO"), issued an entry (Entry) directing Duke Energy – Ohio, Inc. ("DE-Ohio") to file no later than June 22, 2009, in the public docket in these cases, those pages subject to this Commission's protective orders that should be modified as the result of information released in the docket of the United States District Court for the Southern District of Ohio in the matter of *Williams v. Duke Energy International, Inc. Civil Action 1:08-cv-046* ("*Williams*"), so that the released information can now be included as part of the public record in the Commission's docket.

On June 22, 2009, as directed by the attorney examiner, DE-Ohio submitted the documents as redacted in the *Williams* case along with an attachment that described the documents disclosed in the *Williams* case; identified an exhibit in which those documents are found in the Commission's record; and identified the documents by PUCO bates page numbers previously assigned to the documents.

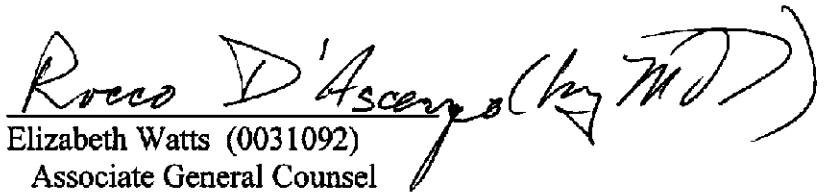
On July 17, 2007, again pursuant to the attorney examiner's direction, the Office of Ohio Consumers' Counsel ("OCC") identified additional documents to DE-Ohio which it believes should be "unredacted" in the Commission's public record for the reason that the information redacted within those documents has been revealed by the documents released within the *Williams* case.

DE-Ohio agrees with OCC that the additional materials identified by OCC contain information released to the public within the *Williams* case and therefore files, as an attachment hereto, the entirety of the materials identified by OCC. As OCC explained in its transmittal of the attachment to DE-Ohio on July 17, 2009:

[T]he portions of the documents that are lightly shaded should not be redacted. They were either unredacted by the PUCO or should be unredacted after documents were filed in federal court. The portions of the documents that are heavily shaded (and therefore not readable) would remain redacted.

No additional redactions exist that are currently under dispute with any other party.

Respectfully submitted,



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Rocco O. D'Ascenzo (0077651)
Senior Counsel

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Attorneys for DUKE ENERGY RETAIL
SALES, LLC and CINERGY CORP.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically upon parties, their counsel, and others through use of the following email addresses this 17 day of August, 2009.

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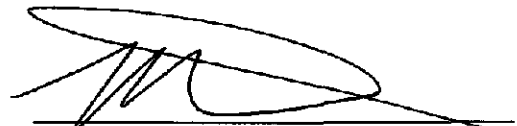
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Michael D. Dortch

1 compel Cincinnati Gas & Electric Company to do
2 anything really other than to say -- to ask for that
3 filing, but they can't compel the Cincinnati Gas &
4 Electric Company to do anything.

5 Q. You said that this agreement had been
6 superseded. What agreement supersedes it?

7 A. It's superseded by the option agreements.

8 Q. Okay. That's the individual option
9 agreements with the counterparties that are
10 identified in the first paragraph of this agreement?

11 A. Yes.

12 MR. SMALL: All right, let's mark this as
13 Exhibit 12.

14 (EXHIBIT MARKED FOR IDENTIFICATION.)

15 Q. Now, we're going to be using Exhibit 11
16 and Exhibit 12. ~~Exhibit 11~~ is the first identified
17 counterparty in paragraph 1 of Exhibit 11, right?

18 A. Yes.

19 Q. And Exhibit 12, what is that document
20 Bates stamped I through 14?

21 A. That's the option agreement that DERS has
22 with ~~AK Steel Corporation~~ and it -- it's the put
23 option that DERS bought from ~~AK Steel~~.

24 Q. I just asked you what superseded the

1 A. I don't know. I wasn't a party to the
2 negotiating of these contracts, so I don't know
3 exactly.

4 Q. Were you involved in the creation in any
5 way of the option agreements, for instance, Exhibit
6 12?

7 A. I was not.

8 Q. Okay. I'm going to mark Exhibit 13 Bates
9 stamped 333.

10 (EXHIBIT MARKED FOR IDENTIFICATION.)

11 Q. Now, this agreement -- I'm sorry, this
12 document is dated April 4th, 2005, which is after
13 the option agreement; is that correct? Or let me go
14 back.

15 Are there option agreements with ~~GE and~~
16 ~~PG&E~~ which is the subject matter of this letter that
17 are dated prior to April 4th, 2005?

18 MR. PAHUTSKI: Correction for the record.
19 The letter refers to ~~PG&E~~ rather than ~~PGES~~.

20 MR. SMALL: I'm sorry, ~~PG&E~~, Procter &
21 ~~Gamble~~.

22 MR. PAHUTSKI: Could you reread the
23 question, Mr. Small? I'm sorry, I lost it.

24 MR. SMALL: Let me start over again.

1 Q. Mr. Whitlock, is there a option agreement
2 between DERS and [REDACTED] and is there an option agreement
3 between DERS and [REDACTED] that predates April 4th, 2005?

4 A. [REDACTED] and who?

5 Q. [REDACTED] I believe that's [REDACTED] and [REDACTED].

6 MR. PAHUTSKI: Mr. Small, if there is
7 such an agreement, it would be in the materials we
8 produced. Mr. Whitlock obviously is having
9 difficulty locating that, but if there is one, it
10 would be in the materials we produced.

11 MR. SMALL: This is kind of foundational.
12 I believe there is an agreement.

13 Q. The next question is going to be what is
14 the purpose of this April 4th, 2005, letter which
15 is Exhibit 157. If you can answer that without going
16 through the document book, that would be fine.

17 A. This agreement seems to amend the option
18 premium payment for realtime pricing customers.

19 Q. And would that be in a preexisting option
20 agreement?

21 A. I believe that [REDACTED] and [REDACTED]
22 the option agreements predated this letter.

23 Q. And that's when it's amended.

24 A. That's what it appears to me.

1 would be legal counsel for them.

2 A. No.

3 Q. Have you in the -- and when I say "you,"

4 DERS --

5 A. Yes.

6 Q. -- have agreements with the city of

7 Cincinnati?

8 A. Yes.

9 No? No.

10 Q. All right.

11 MR. SMALL: I thought the answer was no,

12 but . . .

13 Q. Have you had dealings with Duke Realty
14 Corporation or with Howard Petricoff?

15 A. Not to my knowledge.

16 Q. Does DERS have any agreements with

17 ~~General Electric?~~

18 A. Yes.

19 Q. And that was one of the CEC members?

20 That's all right, let's move on.

21 Does DERS have any agreement with ~~General Electric?~~

22 A. No.

23 I think we provided the documents and all
24 the agreements that DERS's a party to.

1 which Mr. Sites is the attorney for?

2 A. I'm assuming that it's on Bates stamp
3 352, it's Exhibit 1 of the agreement.

4 Q. These are the hospitals.

5 A. I would assume. It says -- in fact, it
6 does, the first sentence, right. It says the
7 agreement -- attached agreement Exhibit 1.

8 Q. Very well, thank you.

9 A. You're welcome.

10 MR. SMALL: Exhibit 19.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 Q. Mr. Whitlock, this agreement superseded
13 the -- "this agreement" being Exhibit 19, superseded
14 the agreement shown in Exhibit 18?

15 A. Yes.

16 Q. And now I'm going to go to Exhibit 20,
17 Bates stamped 204.

18 (EXHIBIT MARKED FOR IDENTIFICATION.)

19 Q. Mr. Whitlock, the option agreement,
20 similar to the previous situations in Exhibit 20,
21 superseded the agreement in Exhibit 19, at least with
22 respect to Jewish Hospital?

23 A. Yes, I take it at 212, Bates stamp 212,
24 Section 9.7 of your Exhibit 20, it talks about this

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

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

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

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

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

⁷⁷ Attachment 13

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

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

- 11 ▪ ~~One (1) Mill per kWh of generation~~
- 12 ▪ ~~AAC~~
- 13 ▪ ~~TFP excluding EA~~
- 14 ▪ ~~IMF in excess of 4% of line g⁷⁹~~

15 A Request for Invoice Payment showing the calculation of a payment to ~~Mercy~~
 16 ~~Hospital of Fairfield~~ is attached to my testimony⁸⁰

17
 18 As another example, for the Option Payment to ~~AK Steel~~ the payment amount is
 19 calculated using the following formula:

- 20 ▪ ~~CG&E's MBSSO, including all charges related to generation service~~

⁷⁸ Attachment 17 at Bates stamp 30-81 and 87 (~~Mercy Hospital of Fairfield~~), at Bates stamp 3 and 9 (~~AK Steel~~) and at Bates stamp 34 and 11 (~~Marathon~~).

⁷⁹ Attachment 17 at Bates stamp 89, at Exhibit A.

⁸⁰ Attachment 19 at Bates stamp 432-433.

1 • ~~Less: 12% G plus FPP including EA plus DM in excess of 4% of billing~~⁸¹
 2 It appears that the end result of this calculation is that ~~CG&E~~ is reimbursed for
 3 ~~RTC, SSC, A&G, FPP, and DM in excess of 4% of billing~~. A Request for
 4 Invoice Payment showing the calculation of a payment to ~~CG&E~~ is attached to
 5 my testimony.⁸²

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

- 9 • ~~RTC~~
 10 • ~~SSC~~
 11 • ~~FPP including EA~~
 12 • ~~DM in excess of 4% of billing~~
 13 • ~~DM in excess of 4% of billing~~⁸³

14 A Request for Invoice Payment showing the calculation of a payment to
 15 ~~CG&E~~ is attached to my testimony.⁸⁴

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

⁸¹ Attachment 17 at Bates stamp 11, at Exhibit A.

⁸² Attachment 19 at Bates stamp 887-888.

⁸³ Attachment 17 at Bates stamp 44, at Exhibit A.

⁸⁴ Attachment 19 at Bates stamp 654-655.

00255 CONFIDENTIAL PROPRIETARY
TRADE SECRET

CINERGY.
SERVICES

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

April 4, 2005

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

Re: Calculation of RTP Option Payments

Dear Dave:

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

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

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

Sincerely,


James B. Gainer


David F. Boehm
Attorney for the Ohio Energy Group

OHA/CG&E SETTLEMENT TERMS (5/5/04)

1. Each OHA member and all their accounts maintain their current generation rate through 12/31/08.
 - a. Cinergy affiliated CRES will offer to sell generation to all OHA member accounts at a firm power, all-in, fixed rate of ~~little over \$0.01~~ per kWh; except as indicated in section 1(d) below.
 - b. Cinergy Corp. will reimburse OHA members on a quarterly basis for any ~~June Settlement Charge (JSC)~~ actually paid by members through December 31, 2008.
 - c. OHA member accounts avoid ~~additional fuel and purchased power expenses.~~
 - d. ~~Terrebonne Children's Hospitals~~ maintain their current RTP pricing through 12/31/08.
2. The generation offer indicated in 1(a) above will be an option for OHA member accounts to accept at anytime prior to 12/31/08 and the term of such generation arrangement will be designated by the member accounts but will extend no longer than 12/31/08.
3. OHA members pay the final PUCO approved ~~charge~~ charge.
4. There will be no new charges for dual feeds for existing load, until at least 12/31/08. Significant increases in member load subject to charge for dual feeds pursuant to a tariff approved by the PUCO.
5. Existing tariff load management riders will continue to be available to member accounts through 12/31/08.
6. CG&E will provide a management/administration fee to OHA of \$50,000.
7. This offer is conditioned upon the support of the OHA for a Stipulation filed by CG&E and OHA in CG&E's RSP case and an order by the PUCO acceptable to CG&E. Such order would also include fuel cost recovery mechanism acceptable to CG&E.
8. This offer is conditioned on the filing of a Stipulation with the PUCO with a sufficient number of signatory parties such that it may result in an order adopting the Stipulation.

00652

~~00000~~

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 the largest retail customers in the service territory: All Ohio, Procter & Gamble, General Electric, Ford, and a number of other hospitals and others. That is why the payments total about \$22 million per year. ~~Not Steel by itself, but a 200 MW customer.~~

Hope this helps

Jon Ziolkowski
Rate Services
513 287-3337

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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

1 That's the option agreements, I'm referring to the
2 agreements with largely the industrial customers,
3 [REDACTED] and so forth. Have you seen spreadsheets
4 where it shows either the calculation or the amounts
5 that would be paid under the option agreement?

6 A. I don't quarrel with the fact that I
7 reviewed spreadsheets that had dollars associated
8 with it. I'm just not sure that those were in the
9 time frame of the option agreements or not. I'd have
10 to go back and look at when those spreadsheets were
11 being prepared.

12 Q. What spreadsheets are you referring to?
13 What spreadsheets were prepared that you have seen?

14 A. I recall there being spreadsheets, you
15 know, that value the various moving pieces of the
16 rate stabilization plan.

17 Q. By "moving pieces" do you mean the
18 components such as AAC and INF, is that what you
19 mean?

20 A. Sure.

21 Q. Okay. What I was referring to would be
22 spreadsheets that would show not matters on an
23 aggregate basis for the 03-93 components of rates,
24 but for individual companies such as [REDACTED]

1 A. Okay.

2 Q. There are a series of e-mails here, and
3 the first one in time order is October 21st, 2004,
4 12:58 p.m., it's from you and it was sent to Uma
5 Nanjundan with a CC to Jack Farley. Do you see that
6 in the middle of the page?

7 A. Yes.

8 Q. Why were you making this request? And
9 there's a request concerning "Are these current?"
10 And then a reference to "[REDACTED] and [REDACTED]"
11 "[REDACTED]" What are "these"? What is the reference
12 to "Are these current?" What is your inquiry?

13 A. They provided the cost to serve, and the
14 "these" would refer to the cost to serve.

15 Q. Okay. And so you received the second
16 e-mail which refers to cost to serve [REDACTED]

17 [REDACTED] -- I'm sorry, [REDACTED]

18 A. Uh-huh.

19 Q. How was the data used? What was the
20 purpose for obtaining the data?

21 A. All during this time Cinergy Retail Sales
22 was, you know, contemplating entering into the very
23 agreements that we've been talking about here today,
24 and they were evaluating the costs to serve those

1 I knew that there were other customers involved, and
2 I was really out of clarification -- why would I get
3 an e-mail talking about [REDACTED]
4 [REDACTED] Do you understand?

5 The very documents that we were talking about
6 addressed more customers than these [REDACTED] and I
7 believe that I was asking what about the others? Why
8 are they not here?

9 Q. I'm not entirely following you. The
10 reason for that is the first e-mail in time order on
11 the first page, GCF-1, is your e-mail, 12:58 on
12 October 21st, 2004. What was -- what had initiated
13 or what was the purpose for your initial contact with
14 this subject matter?

15 A. Well, the initial -- just allow me to
16 disagree with you. The initial e-mail is from Uma
17 dated October 20th.

18 Q. Oh, I see. The day before.

19 A. Yeah. It was just -- it was a very, very
20 shallow question. You've mentioned three, but
21 there's others you haven't mentioned. There's not a
22 lot of thought that went behind this e-mail. It's
23 like your wife mentioning one of your kids but not
24 the other.

1 Q. All right. It appears as though
2 Ms. Nanjundan is responding to an earlier request
3 that you made of Mr. Farley, if I understand that
4 e-mail at the bottom. "As per your request made to
5 Jack Farley." Do you see that?

6 A. Yes.

7 Q. What request did you make to Mr. Farley?

8 A. I don't know, but I may very well have
9 asked for something with regard to all the companies
10 which caused me to send the second e-mail.

11 Q. And when you are referring to all the
12 companies, what companies are you talking about?

13 A. In addition to ~~ARMSTRONG & CKEY, INC., COLUMBUS, OHIO~~,
14 the ones that I was thinking about when I wrote this
15 e-mail were ~~ARMSTRONG & CKEY, INC., COLUMBUS, OHIO~~.

16 Q. Okay. And is there something special
17 about that set of customers? It certainly excludes
18 an awful lot of other customers. Is there something
19 special about that set of --

20 A. Not that I can recall, but I understand
21 your question. Not that I can recall.

22 Q. Did you have regular correspondence, and
23 by that I mean contact, here we see e-mail with
24 Ms. Nanjundan.

00963

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

April 4, 2005

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

Re: Calculation of RTP Option Payments

Dear Dave:

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

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

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

Sincerely,

James B. Quinn


David F. Boehm
Attorney for the Ohio Energy Group

Pure 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
DEPS	Super Agr	5/28/04	Agreement	CRS		Y	IEU		341	348
DEPS	Super Agr	11/28/04	Agreement	5/28/04 CRS		Y	IEU		334	340
DEPS	Option Agr	12/28/04	Option Agreement	CRS			IEU	508387	50	54
DEPS	Super Agr	5/28/04	Agreement	CRS		Y	IEU		341	348
DEPS	Super Agr	11/28/04	Agreement	5/28/04 CRS		Y	IEU		334	340
DEPS	Option Agr	12/28/04	Option Agreement	CRS			IEU	508388	32	48
DEPS	Super Agr	5/18/04	Agreement	CRS		Y	OEG		327	332
DEPS	Super Agr	11/22/04	Agreement	5/18/04 CRS		Y	OEG		320	328
DEPS	Option Agr	1/19/05	Option Agreement	CRS			OEG	508389	178	180
DEPS	Super Agr	5/18/04	Agreement	CRS		Y	OEG		327	332
DEPS	Super Agr	11/22/04	Agreement	5/18/04 CRS		Y	OEG		320	328
DEPS	Option Agr	2/2/05	Option Agreement	CRS			OEG	508390	1	14
DEPS	Super Agr	11/22/04	Agreement	5/18/04 CRS		Y	OEG		320	328
DEPS	Option Agr	1/10/05	Option Agreement	CRS			OEG	508391	82	78
DEPS	Super Agr	5/18/04	Agreement	CRS		Y	OEG		327	332
DEPS	Super Agr	11/22/04	Agreement	5/18/04 CRS		Y	OEG		320	328
DEPS	Option Agr	1/12/05	Option Agreement	CRS			OEG	508392	132	149
DEPS	Super Agr	5/18/04	Agreement	CRS		Y	OEG		327	332
DEPS	Super Agr	11/22/04	Agreement	5/18/04 CRS		Y	OEG		320	328
DEPS	Option Agr	12/31/04	Option Agreement	CRS			OEG	508393	19	31
DEPS	Super Agr	4/4/05	Letter re: 12/30/04 Agr.	1/20/05 CRS		Y	OEG		330	333
DEPS	Super Agr	4/4/05	Copy of Page 333	1/20/05 CRS		Y	OEG		335	338
DEPS	Super Agr	5/18/04	Agreement	CRS		Y	OEG		327	332
DEPS	Super Agr	11/22/04	Agreement	5/18/04 CRS		Y	OEG		320	328
DEPS	Option Agr	1/14/05	Option Agreement	CRS			OEG	508394	150	175
DEPS	Super Agr	4/4/05	Letter re: 1/20/05 Agr.	1/20/05 CRS		Y	OEG		333	333
DEPS	Super Agr	4/4/05	Copy of Page 334	1/20/05 CRS		Y	OEG		335	345
DEPS	Super Agr	5/18/04	Agreement	CRS		Y (a)	OHA		347	352
DEPS	Super Agr	10/28/04	Agreement (signature 11/8/04)	5/18/04 CRS		Y (a)	OHA		353	357
DEPS	Option Agr	1/28/05	Option Agreement	CRS			OHA	508395	220	236
DEPS	Option Agr	1/28/05	Option Agreement	CRS			OHA	508396	191	203
DEPS	Option Agr	12/30/04	Option Agreement	CRS			OHA	508397	306	318
DEPS	Option Agr	12/28/04	Option Agreement	CRS			OHA	508398	257	260
DEPS	Option Agr	1/25/05	Option Agreement	CRS			OHA	508399	304	220
DEPS	Option Agr	12/30/04	Option Agreement	CRS			OHA	508400	282	305
DEPS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508401	279	291
DEPS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508402	79	91
DEPS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508403	285	294
DEPS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508404	281	284
DEPS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508405	105	118
DEPS	Option Agr	1/11/05	Option Agreement	CRS			OHA	508406	119	138
DEPS	Option Agr	1/14/05	Option Agreement	CRS			OHA	508407	148	198
DEPS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508408	82	104
DEPS	Super Agr	7/7/05	Superseded Agreement	12/14/05 CRS					1173	1179
DEPS	Super Agr	11/22/04	Superseded Agreement	7/7/04 CRS					1180	1187
DEPS	Agreement	11/30/05	Agreement	11/22/04 CRS					1188	1188

DEPOSITION
EXHIBIT
3
FICKE

EX. 21

01090

Schafer, Anita

From: Nanjundan, Uma
Sent: Thursday, October 21, 2004 1:10 PM
To: Ficke, Greg
Cc: Farley, Jack
Subject: RE: Industrial load pricing

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Greg,

Yes prices are current. If you like to have valuation for 4 counterparties, we can get this to you. Please let me know.

thanks,

Uma

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

From: Ficke, Greg
Sent: Thursday, October 21, 2004 12:58 PM
To: Nanjundan, Uma
Cc: Farley, Jack
Subject: RE: Industrial load pricing

Are these current? What about [REDACTED]

From: Nanjundan, Uma
Sent: Wednesday, October 20, 2004 1:52 PM
To: Ficke, Greg
Cc: Farley, Jack
Subject: FW: Industrial load pricing
Importance: High

Greg,

As per your request made to Jack Farley, I am providing the cost to serve [REDACTED] for the period Jan 2005 - Dec 2008. The following are the assumptions used in the calculation:

<< OLE Object: Microsoft Excel Worksheet >>

Please note that load factor assumptions are critical in pricing these deals.

Please let me know if you have any questions.

Thanks,

Uma

DEPOSITION
EXHIBIT
#21

GCF 1

Schafer, Anita

01091

From: Nanjundan, Uma
Sent: Wednesday, October 20, 2004 1:52 PM
To: Ficke, Greg
Cc: Farley, Jack
Subject: FW: Industrial load pricing

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Importance: High

Attachments: Microsoft Excel Worksheet

Greg,

As per your request made to Jack Farley, I am providing the cost to serve [REDACTED] for the period Jan 2005 - Dec 2008. The following are the assumptions used in the calculation:

Customer	MW - Max (peak)	Cost to serve	Load Factor	Range in prices for cost to serve
[REDACTED]	[REDACTED]	\$ [REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	\$ [REDACTED]	[REDACTED]	[REDACTED]

Notes:

Please note that load factor assumptions are critical in pricing these deals.

Please let me know if you have any questions.

Thanks,

Uma

1 2005 there were some -- there was another
2 clarification order about April of 2005 regarding
3 return pricing and things like that.

4 Q. Okay. I'm going to mark Exhibit 7. It's
5 Bates stamped 1 through 14.

6 (EXHIBIT MARKED FOR IDENTIFICATION.)

7 Q. Mr. Ziolkowski, the Exhibit 7 is labeled
8 Option Agreement By and Between Cinergy Retail Sales,
9 LLC and ~~ARMSTRONG & OKEY, INC.~~ Do you have that in
10 front of you?

11 A. Yes.

12 MR. COLBERT: Excuse me, Mr. Small, might
13 this be a good time to go to a sealed transcript?

14 MR. SMALL: Sure. It's your designation.

15 MR. COLBERT: While he's talking about
16 the specific option agreements, the rest of this
17 should be under seal.

18 (CONFIDENTIAL PORTION EXCERPTED.)

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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 12/31/06.

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 the largest retail customers in the service territory. For example, General Electric, Ford, Ashland, etc. That is why the payments total about \$22 million per year. (Cinergy itself is a 200 MW customer.)

Hope this helps.

Jim Gathmann
Rate Services
513 287-3337

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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

Deposition Questions - Timothy Duff

Duke Energy Ohio AGREEMENTS		Case No. 03-83-EL-ATA (Remand)									
From	Type	Date	Document	Super Party 1	Party 2	Multiple?	Group	Ref No	Bag	End	
DERS	Super Agr	5/28/04	Agreement	CRS		Y	IEU		341	346	
DERS	Super Agr	11/16/04	Agreement	5/28/04 CRS		Y	IEU		334	340	
DERS	Option Agr	12/20/04	Option Agreement	CRS		Y	IEU	508367	30	6	
DERS	Super Agr	5/28/04	Agreement	CRS		Y	IEU		341	346	
DERS	Super Agr	11/16/04	Agreement	5/28/04 CRS		Y	IEU		334	340	
DERS	Option Agr	12/20/04	Option Agreement	CRS		Y	IEU	508368	32	4	
DERS	Super Agr	5/19/04	Agreement	CRS		Y	OEG		327	332	
DERS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DERS	Option Agr	11/19/05	Option Agreement	CRS		Y	OEG	508386	179	180	
DERS	Super Agr	5/19/04	Agreement	CRS		Y	OEG		327	332	
DERS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DERS	Option Agr	2/2/05	Option Agreement	CRS		Y	OEG	508388	1	1	
DERS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DERS	Option Agr	1/1/05	Option Agreement	CRS		Y	OEG	508394	65	71	
DERS	Super Agr	5/19/04	Agreement	CRS		Y	OEG		327	332	
DERS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DERS	Option Agr	11/22/05	Option Agreement	CRS		Y	OEG	508390	133	143	
DERS	Super Agr	5/19/04	Agreement	CRS		Y	OEG		327	332	
DERS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DERS	Option Agr	12/31/04	Option Agreement	CRS		Y	OEG	508387	15	31	
DERS	Super Agr	4/4/05	Letter re: 1/20/05 Agr	1/20/05 CRS		Y	OEG		333	333	
DERS	Super Agr	4/4/05	Copy of Page 333	1/20/05 CRS		Y	OEG		388	388	
DERS	Super Agr	5/19/04	Agreement	CRS		Y	OEG		327	332	
DERS	Super Agr	11/22/04	Agreement	5/19/04 CRS		Y	OEG		320	326	
DERS	Option Agr	11/16/05	Option Agreement	CRS		Y	OEG	508389	199	179	
DERS	Super Agr	4/4/05	Letter re: 1/20/05 Agr	1/20/05 CRS		Y	OEG		333	333	
DERS	Super Agr	4/4/05	Copy of Page 334	1/20/05 CRS		Y	OEG		388	388	
DERS	Super Agr	5/19/04	Agreement	CRS		Y (a)	OHA		347	352	
DERS	Super Agr	10/26/04	Agreement (signature 11/8/04)	5/19/04 CRS		Y (a)	OHA		353	357	
DERS	Option Agr	1/25/05	Option Agreement	CRS			OHA	508361	220	230	
DERS	Option Agr	1/25/05	Option Agreement	CRS			OHA	508372	191	203	
DERS	Option Agr	12/30/04	Option Agreement	CRS			OHA	508373	308	148	
DERS	Option Agr	12/28/04	Option Agreement	CRS			OHA	508369	237	260	
DERS	Option Agr	1/23/05	Option Agreement	CRS			OHA	508371	204	220	
DERS	Option Agr	12/30/04	Option Agreement	CRS			OHA	508379	292	306	
DERS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508376	278	291	
DERS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508374	79	81	
DERS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508377	265	276	
DERS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508378	251	264	
DERS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508375	105	118	
DERS	Option Agr	1/11/05	Option Agreement	CRS			OHA	508382	119	133	
DERS	Option Agr	1/14/05	Option Agreement	CRS			OHA	508380	148	156	
DERS	Option Agr	12/29/04	Option Agreement	CRS			OHA	508383	92	104	
DERS	Super Agr	7/7/04	Superseded Agreement	12/14/00 CRS					1173	1179	
DERS	Super Agr	11/22/04	Superseded Agreement	7/7/04 CRS					1180	1187	
DERS	Agreement	11/9/05	Agreement	11/22/04 CRS					1185	1195	
11/21/2005 - Deleted in these agreements											
11/21/2005 - Deleted in these agreements											

DEPOSITION
EXHIBIT

#3

Z.OLKOWSKI

OPTION AGREEMENT

BY AND BETWEEN

CINERGY RETAIL SALES, LLC

AND

AK STEEL CORPORATION

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

RECITALS

WHEREAS, AK Steel operates steel manufacturing facilities in Middletown, Ohio and purchases electric power service from The Cincinnati Gas & Electric Company (CG&E) on metered accounts listed on Exhibit C.

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

WHEREAS, CRS and AK Steel desire to establish terms and conditions for this option.

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

ARTICLE I
DEFINITIONS

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

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

Cinergy Corporate Records
04016280



Document Code

001

DEPOSITION
EXHIBIT

#7
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ownership of ten (10) percent or more.

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

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

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

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

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

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

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

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

"Firm" means that the only excuse for the failure to deliver Energy by CRS or the failure to receive Energy by ~~AK Steel~~ is Force Majeure or the other Party's failure to perform.

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

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TRADE SECRETARTICLE II
OPTION

- 2.1 [REDACTED] currently purchases its generation electric service from The Cincinnati Gas & Electric Company ("CG&E") pursuant to the applicable tariffs or will provide notice by December 30, 2004 that it will purchase generation electric service from CG&E starting no later than December 31, 2005 in accordance with applicable CG&E tariff requirements. [REDACTED] hereby grants to CRS the exclusive option, upon thirty (30) days notice, to provide generation electric service for all of [REDACTED] accounts and load set forth in Exhibit C, including any increases in accordance with Section 3.1, as of December 31, 2004 ("Option"). In the event that an Electric Choice Insufficient Return Notice Fee is incurred by [REDACTED] due to switching back to CG&E standard tariffed service prior to January 31, 2005, an amount equivalent to said fee will be paid to [REDACTED] by CRS.
- 2.2 CRS shall have the right to exercise this Option at any time during the Term of this Agreement.
- 2.3 In exchange for [REDACTED] granting CRS this option, CRS agrees to pay [REDACTED] each calendar year quarter of the Term, until exercise of the Option, the amount set forth on Exhibit A ("Option Payment"). The Parties agree that if [REDACTED] defaults or is delinquent, after any applicable cure period, in any of its payments to any Cinergy affiliated company for any service provided to [REDACTED] then CRS has the right to offset the Option Payment due hereunder with any amounts that are owed by [REDACTED] to the Cinergy affiliated company.
- 2.4 Because this is an exclusive Option, in the event [REDACTED] leaves its current electric service and receives electric service from any third party that is not CRS or an Affiliate of CRS, then CRS shall cease all Option Payments and this Agreement shall terminate and all obligations of the Parties hereunder shall terminate.
- 2.5 If CRS exercises its Option, the Parties shall enter into a power sale agreement, including the terms set forth in Article III.

ARTICLE III
CRS POWER CONTRACT TERMS

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

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- a. Energy Quantity and Type. CRS shall provide ~~with Firm, Full~~ Requirements Energy and Capacity up to ~~200 MW greater than~~ ~~the~~ ~~CRS's~~ Maximum Demand ("Quantity"). If during the Term of this Agreement, ~~CRS~~ ~~finds~~ ~~its~~ ~~additional~~ ~~load~~ ~~or~~ ~~accounts~~ ~~greater~~ ~~than~~ ~~200 MW~~, 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 ~~CRS~~ ~~above~~ the Quantity set forth herein.
- b. Transmission Service and Charges. Transmission service will be provided in accordance with the open access transmission tariff of the Midwest Independent Transmission System Operator, Inc. or CG&E (or an affiliate on its behalf), whichever is applicable, as filed with the FERC and as it may be amended, from time to time, or any successor tariff.
- c. Base Contract Price. The Base Contract Price is set forth in Exhibit B.
- d. Change to Prices. As a retail sale, the power sale agreement is not subject to the jurisdiction of the FERC; nor shall either Party seek to have the FERC assert jurisdiction over the Agreement. However, to the extent that either the FERC or the Public Utilities Commission of Ohio asserts jurisdiction over the Agreement, the Parties agree that the Contract Price specified above is just and reasonable and consistent with the public interest. Neither CRS nor ~~CRS~~ shall seek to modify the Base Contract Price through the auspices of any regulatory body.
- e. Term. The term of the power sale agreement shall be through December 31, 2008.
- f. Credit. The power sale agreement will have terms and conditions as similar as possible to CG&E's existing unbundled tariffs. CRS will not require surety bonds, deposits or other corporate guarantees.
- g. Adjusted Base Contract Price. If CRS exercises this option, then the combined net generation cost paid to CRS and CG&E will be an amount equivalent to Big G, plus ~~CRS's~~ ~~generation~~ ~~cost~~ ~~allowance~~ ~~plus~~ ~~up~~ ~~to~~ ~~4%~~ ~~of~~ ~~Big~~ ~~G~~. In addition, there will be transmission charges to be paid to CRS as set forth in Exhibit B.

ARTICLE IV
TERM OF AGREEMENT

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

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

- 4.2 Agreement Termination. This Agreement terminates if the Commission in the ongoing CG&E fuel cost recovery cases, fails to approve as part of the capped Provider of Last Resort Charge, a fuel cost recovery mechanism such that fuel costs equal the average embedded fuel costs for all consumers in CG&E's service territory served by any Cinergy company. This Agreement shall also terminate if a court or administrative agency of competent jurisdiction issues an order depriving the Parties of the benefits of this Agreement or otherwise voiding this Agreement. Before termination of this Agreement, the Parties agree to use best efforts to fulfill the intent of this Agreement by negotiating amendments to this Agreement that put the Parties in substantially the same overall economic positions as created under the PUCO's Order dated November 23, 2004 in Case No. 03-09 EL-ATA and this Agreement.

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

ARTICLE V BILLING

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

ARTICLE VI DEFAULTS AND REMEDIES

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

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

6.1.4 the failure to make when due, any payment required pursuant to this Agreement if such failure is not remedied within five (5) Business Days after written notice of such failure is given by the other Party; or

6.1.5 the Defaulting Party (i) files a petition or otherwise commences or acquiesces in a proceeding under any bankruptcy, insolvency, reorganization or similar law, or has any such petition filed or commenced against it and such petition is not withdrawn or dismissed within thirty (30) days after such filing, (ii) makes an assignment or any general arrangement for the benefit of creditors, (iii) otherwise becomes bankrupt or insolvent (however evidenced), (iv) has a liquidator, administrator, receiver, trustee, conservator or similar official appointed with respect to it or any substantial portion of its property or assets, or (v) is unable to pay its debts as they fall due.

6.2 Remedies upon an Event of Default. Upon the occurrence (and continuation beyond the applicable cure period) of an Event of Default with respect to a Defaulting Party, the Non-Defaulting Party shall have the right to terminate this Agreement and exercise all rights and remedies available to it in law or in equity.

ARTICLE VII
DUTY TO MITIGATE

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

ARTICLE VIII
GOVERNING LAW - DISPUTE RESOLUTION

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

8.2 Dispute Resolution. Any claim, controversy or dispute arising out of or relating to this Agreement, or the breach thereof, shall be resolved fully and finally by binding arbitration under the Commercial Rules, but not the administration, of the American Arbitration Association, except to the extent that the Commercial Rules conflict with this provision, in which event, this Agreement shall control. This arbitration provision shall not limit the

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

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

ARTICLE IX MISCELLANEOUS

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

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

- 9.2 Assignment. This Agreement shall be assignable by CRS without the ~~other Party'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. 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 ACR Steel~~

David F. Boehm, Esq.

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

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

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

CINERGY RETAIL SALES, LLC

By: [Signature]
Title: VP of Retail Counsel
Date: MAY 2, 2005

By: [Signature]
Title: [Redacted]
Date: 03/21/05

FORM APPROVED
[Signature]
ATTORNEY

Exhibit A:

Customer Group: ~~AK Steel Corporation~~
Quarterly Option Payment Calculation

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

The actual amount paid by ~~AK Steel Corporation~~ to The Clinchfield Gas and Electric Company during the applicable calendar quarter under its market-based standard service offer (MBSO) generation rate approved by the Commission in Case No. 00-03-EL-A14. The MBSO generation rate includes all charges related to generation service, but excludes transmission and distribution.

Less the following amounts:

The applicable certified independent generation rate approved by the Commission in Case No. 00-1638-EL-ETP and also known as "Big G" shown in the tariff schedule below:

Tariff Schedule	Demand Charge (\$ per kW)			Energy Charge (\$ per kWh)		
	First Step	Second Step	Additional	First Step	Second Step	Additional
DM ¹	N/A	N/A	N/A	\$0.070728	\$0.071171	\$0.000000
DP	\$6.9150	\$5.4950	N/A	\$0.028898	\$0.017783	N/A
DS	\$7.6274	\$6.0574	N/A	\$0.026548	\$0.016366	N/A
TS	\$8.3830	\$6.8430	N/A	\$0.019964	\$0.016467	N/A

¹ DM only shows summer seasonal rates

Plus

Fuel and Purchase Power (PPP) - excluding Emission Allowance Expense

Plus

Infrastructure Maintenance Fund (IMF) up to an amount equal to 4% of "Line G"

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EXHIBIT B:

Customer Group: ~~AK Steel Corporation~~ CRS Generation Rates for Former Rate DP Standard Service Customers

Net Monthly Generation And Transmission Bill Will Be The Following Plus IMF Up To 4% Of Little:

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	\$4.9150 per kW
Additional kilowatts	\$5.4450 per kW

(b) Energy Charge

Billing Demand times 300	\$0.023041 per kWh
Additional kilowatt-hours	\$0.017682 per kWh

(c) Fuel Charge

The Fuel Charge shall be equal to the Fuel and Purchase Power (FPP) charge excluding Emission Allowance Expense imposed by CG&E.

Transmission Charges

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

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

EXHIBIT B:**Customer Group: AK Steel Corporation****CRS Generation and Transmission Rates for Former Rate TS Standard Service Customers****Net Monthly Bill**

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

Generation Charges**(a) Demand Charge**

First 50,000 KVA	\$2.3834 per KVA
Additional KVA	\$2.4200 per KVA

(b) Energy Charge

Billing Demand times 300	\$2.014404 per kWh
Additional kilowatt-hours	\$0.014381 per kWh

(d) Fuel Charge

The Fuel Charge shall be equal to the Fuel and Purchase Power (FPP) charge excluding Emission Allowance Expense imposed by CCA.

Transmission Charges

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

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

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Exhibit C:
Customer Group: AK Steel Corporation
Customer Account List

This agreement pertains to the following AK Steel Corporation accounts:

[REDACTED]

- ii. I authorize an RFP for payments under \$250,000; Dave Wozny authorizes payment > \$250,000 (generally only quarterly payments to [REDACTED])
 - 1. Duff to handoff task to Jim Ziolkowski after Q3 '05 payments
 - 2. Duff to streamline process to provide both spreadsheet and completed RFP/Wire transfer docs for Wozny's signature and forwarding to Accounts Payable.
 - 3. Bob Muench, a clerk in Accounts Payable, has handled these payments before and is a good resource for overcoming Accounts Payables' sometimes rigid documentation rules.
- b. ESG (EDI vendor)
 - i. \$1000/mo. minimum
 - ii. Two year term expiring 12/31/06
 - iii. Sec. 2.2 requires termination notice 90 days prior to expiration, otherwise contract automatically renews for one year.
- c. OATI (scheduling vendor)
 - i. Contract
 - 1. Twelve month term commencing 12/2/04
 - 2. Sec 5.01 - Automatic renewal for indefinite term unless terminated pursuant to Sec. 5.02
 - 3. Sec. 5.02 - 60 notice to terminate required
 - ii. Security Administration
 - 1. Alan Mok and Jason Barker own the common certificates
 - 2. Logon information written inside "OATI" folder in CRS Official Files (i.e., files from Jason Barker's desk).
 - 3. Alan will likely have to assist if OATI is actually ever used, to get the Barker certificate switched to the next person.
- d. Toll free phone number
 - i. Required by PUCO under terms of CRES certification
 - ii. Phone line / email answerable by J. Barker and J. Deeds
 - iii. Tim Schalk can connect/disconnect upon request
- e. Website
 - i. www.cres.cinergy.com
 - ii. Ginny Segbers in Creative Services set this up, I presume she can tear it down. Website should be taken offline if CRS is decertified by PUCO. I think there is regulation to have the site up to retain certification.

<p>59</p> <p>1 No. 3 were negotiating and, in fact, entered into 2 what I called option agreements. 3 Q. Right. And when you refer to Exhibit 3, 4 you're referring to the parties in the column labeled 5 Party 2 and the agreements that are listed as option 6 agreements. 7 A. Correct. 8 Q. When did you become aware of the -- 9 generally aware of the agreements that you referred 10 to on Exhibit 3, the option agreements? 11 A. Around the time frame that they were 12 signed. 13 Q. Approximately December 2004? 14 A. Yes. 15 Q. And how did you become aware of those 16 agreements? 17 A. It would have either been through e-mail 18 or hallway conversation, a letter. I don't recall 19 how, but it could have been any one of those. 20 Q. And are you familiar with the individuals 21 who worked on drafting the option agreements? 22 A. Not firsthand, although I would have 23 assumed that Jim Gainer and Paul Colbert would have 24 been involved in that drafting.</p>	<p>61</p> <p>1 A. May and November I occasionally got 2 e-mails from the Cinergy Retail Sales representatives 3 or from the lawyers as things were going on. I don't 4 recall ever getting a copy of the option agreements 5 either drafts or finals. And I think that just 6 speaks to my level of involvement during that 7 particular time frame. 8 Q. The time frame you're talking about is 9 the end of 2004. 10 A. Correct. 11 Q. And do you know why a third round of 12 negotiations were undertaken with customers such as 13 which is shown on Exhibit 12? 14 A. I believe that the previous agreements, 15 the November agreements, would have been voided by 16 the Commission's action. 17 Q. And how is that connected with the option-- 18 agreements that were dated around December 2004? 19 A. I don't know that it is connected. 20 Q. Well, my question was why were the 21 agreements -- third round of negotiations undertaken, 22 and your response was that others' second round was 23 voided. I don't think that's responsive to my 24 question which is: Why was a third round of</p>
<p>60</p> <p>1 Q. Would it have included the other 2 individuals that you mentioned earlier as having been 3 involved in the May and November negotiations? 4 A. Yeah. You asked about the drafting 5 specifically here, but with regard to the entire 6 agreement, the individuals that I mentioned that were 7 representing Cinergy Retail Sales of course would 8 have guided the drafting of these option agreements. 9 Q. Okay. How about Mr. Steffen who you 10 mentioned earlier? 11 A. You know, I would ask -- I would ask Jack 12 that question. I am not aware of his level of 13 involvement with the option agreements, because I 14 wasn't involved. I knew he was involved in the 15 others because I was involved in those, but I don't 16 know to what extent he was involved in the option 17 agreements. 18 Q. So you're more involved in the 19 negotiations over the May and November agreements and 20 not involved in negotiating or -- when you say 21 "negotiating," I'm talking about the broader context 22 that you were talking about, preparing and background 23 and so forth, you were more involved in the May and 24 November than in the December.</p>	<p>62</p> <p>1 negotiations and agreements undertaken? 2 MR. DORTCH: Objection; question was 3 asked and answered. 4 MR. SMALL: Well, the question wasn't 5 answered, so . . . 6 A. The only thing that I can speculate is 7 that the Cinergy Retail Sales was interested in the 8 option and the customers were interested in, you 9 know, selling that option. 10 Q. Previously, and I'll refer to Exhibit 6, 11 we had a discussion about the November agreements and 12 this particular agreement has to do with members of 13 the Ohio Energy Group. Is it your understanding that 14 the agreements about this time, those agreements that 15 we showed in Exhibit 3, were all pretty much the same 16 agreement, general terms and conditions? 17 MR. DORTCH: Objection; documents speak 18 for themselves, and there's a whole lot of agreements 19 there and not all of them have been shown to the 20 witness, but -- 21 MR. SMALL: I'm asking for his general 22 understanding since he doesn't know the particulars 23 of any agreements. 24 Q. Do you have a general understanding</p>

EXHIBIT

12 (Pages 59 to 62)

Armstrong & Okey, Inc. Columbus, Ohio (614) 224-9481

DE OHIO
DO.4 3-13-07

1 greater volatility might result in a higher price.

2 Q. Now, you recognize the Senate Bill 3
3 treated electric supply as a deregulated commodity,
4 generally speaking; isn't that right?

5 A. Senate Bill 3 restructured Ohio's
6 electric industry to make generation competitive.

7 Q. So is there anything wrong just in -- is
8 there anything wrong with an option agreement to buy
9 or sell electricity in a deregulated market? Is
10 there anything inherently wrong with it?

11 A. No.

12 Q. DERS has option agreements with the
13 various -- with ~~the same~~ hospitals, I don't know, and
14 members of IEU, members of OEG. That's the nature of
15 your testimony -- and you attached all or most of
16 those option agreements, correct?

17 A. Those agreements and the agreements that
18 they superseded, yes.

19 Q. And under those option agreements DERS
20 has the exclusive option to supply generation at a
21 stated strike price from the time the options were
22 signed approximately May, 2005, all the way through
23 the end of 2008; isn't that right?

24 A. Could I have a moment please to look at

1 them? Not all of them.

2 Here's my understanding because, for
3 example, on the contract found at Bate stamp No. 4 in
4 attachment 17, which is the contract with ~~Montpelier~~,
5 there's a description of a base contract price.
6 There is the term -- there is an adjusted base
7 contract that talks about an equivalence related to
8 ~~big G, plus the FEE, plus IMF up to 4 percent~~. There
9 is also discussion of the transmission charges, and I
10 think those are set forth in Exhibit B. So actually
11 it doesn't look completely fixed.

12 If you go to Exhibit B, you will see the
13 fuel charge shall be equal to ~~the fuel and purchase~~
14 ~~power charge excluding emission allowance expense~~
15 imposed by CG&E, which I understand does change.

16 Q. That's correct. So a fixed formula what
17 the strike price will be is set forth in Exhibit B;
18 isn't that right?

19 A. Exhibit B sets forth the price at which
20 CRS exercises their option the party would pay for
21 generation.

22 Q. That's the strike price, isn't it, for
23 this option Exhibit B?

24 A. It could be, yes.

1 these option agreements.

2 Q. As of today, you have done no forward
3 price forecast to try to predict what the price of
4 electricity would be through the end of 2008; isn't
5 that correct?

6 A. No, I haven't.

7 Q. Okay. In order to determine whether or
8 not an option was fairly priced, wouldn't you have to
9 know that information?

10 A. You would have to do that type of
11 analysis if you want to make that judgment.

12 Q. Okay. To know whether an option was
13 fairly priced, wouldn't you also have to know the
14 type of load that you would be agreeing to serve if
15 you exercise the option?

16 A. That would be part of the analysis.

17 Q. Did you do any analysis of the kW demand
18 of any of the parties who have the option agreements?

19 A. No.

20 Q. Okay. What about the kilowatt-hour
21 usage?

22 A. No.

23 Q. Wouldn't the ability to serve a billion
24 kilowatt-hours in the case of AK Steel versus 10

1 million kilowatt-hours a year in the case of Christ
2 Hospital, wouldn't a billion be a bigger -- a more
3 valuable option because you have more load to serve?

4 A. More valuable to the person that was --
5 had the ability to exercise the option, surely.

6 Q. That would be DERS, correct?

7 A. Yes.

8 Q. Okay. Did you do any analysis of the
9 load factors of any of the customers who granted
10 options?

11 A. No.

12 Q. Wouldn't it be cheaper to serve a
13 customer with very high 100 percent load factor
14 around the clock with no shaping of the market
15 generation than one with a very spikey load factor?

16 A. In general, you would think so, yes.

17 Q. Okay. Wouldn't the fact -- wouldn't the
18 customer with very high off-peak usage relative to on
19 peak usage be a cheaper customer to serve; off-peak
20 pricing is cheaper in the market?

21 A. Yes.

22 Q. You did no analysis of customer usage
23 characteristics who are the -- whose option
24 agreements you attached to your testimony; is that

1 correct?

2 A. I have not done that analysis.

3 Q. Do you look at the credit of any of the
4 option parties, in other words, ~~Procter and Gamble's~~
5 ~~credit versus the large hospital credit?~~

6 A. No.

7 Q. Wouldn't the credit be a fact for that,
8 would go into the pricing of an option, the ability
9 of the customer to pay?

10 A. In value and option you would probably
11 consider that.

12 Q. What about the usage history or the usage
13 forecast of the customers?

14 A. Yes.

15 Q. Okay. You didn't look at any of that
16 either, did you?

17 A. No.

18 Q. Okay. So sitting here today you
19 cannot -- let me start again.

20 Since you did no forward price forecast
21 at any time of what electricity prices are expected
22 to be, and since you've looked at none of the usage
23 characteristics of these option customers, you don't
24 really have any idea as to whether or not DERS

1 who gave DERS option agreements were at one time
2 shopping and now they are back with the utility?

3 A. I am not assuming that all of them were,
4 but I know that some of them were.

5 Q. Do you know which ones have been with the
6 utility from the beginning of Senate Bill 3 all the
7 way through today?

8 A. I don't know specifically.

9 Q. So if they were with the utility the
10 whole time, if they were never shopping, the fact
11 that they are still not shopping is -- what do you
12 conclude about the effect on competition? ~~AK Steel~~
13 has never shopped. It's always bought from the
14 utility. Does that mean that there was some adverse
15 effect on competition?

16 A. There could have been an adverse effect
17 on competition if that particular customer could have
18 shopped but chose not to because of the option
19 agreement as well as the preceding superseded
20 agreements and all of the provisions related to them.

21 Q. Couldn't the reason that AK Steel has
22 never shopped also be that the market price for
23 electricity is higher than what the utility is
24 charging under the stabilized price?

that DERS would have required the contract signatories to support a filing that if changed, would have a significant economic impact upon their agreed upon market price.

Finally, OCC witness Beth E. Hixon was concerned that the contracts contain a termination provision triggered by the Commission's decision in these cases.⁸² Again, this is not surprising given that the Commission's decision could change the economic benefits of the contract by changing the agreed to baseline, DE-Ohio's MBSSO. Once again, on cross examination, Ms. Hixon agreed that such a termination clause was reasonable to protect the economic interests of the signatories.⁸³

Ultimately, Ms. Hixon contradicted each of her concerns on cross-examination and found the contract terms she examined to be reasonable. She was correct on cross-examination, and the concerns raised in her direct testimony were baseless. Ultimately, all of the contracts discussed by Ms. Hixon concerning these issues were terminated due to the Commission's holdings in these cases and replaced by contracts, now known as option contracts.

Only two contracts were exceptions. The ██████████ contract, entered well after ██████████ signed the Stipulation, was not terminated as ██████████ was paying DERS under the terms of the contract.⁸⁴ The Cinergy contracts with ██████████ had little to do with these proceedings and had nothing to do with DE-Ohio.

⁸² *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 14, 32) (March 9, 2007).

⁸³ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 33-34) (March 21, 2007).

⁸⁴ *Id.* at BEH-Attachments 6, 12.

The [REDACTED] contracts had everything to do with Cinergy attempting to be a good corporate citizen by helping [REDACTED] that is not an affiliate of DE-Ohio, trying to secure cogeneration business for a non-regulated affiliate, and trying to gain support for its regulated affiliate.⁸⁵ There is nothing wrong with DE-Ohio's actions regarding the [REDACTED] or [REDACTED] contracts.

Ms. Hixon also raised concerns with certain contract provisions, in the same contracts previously discussed that appear to commit DE-Ohio to some action.⁸⁶ Ms. Hixon discusses contract terms that state that DE-Ohio shall not amend its rates for dual feeds, allow continued purchases through its load management riders, and make certain filings in its next distribution rate case.⁸⁷

First, DE-Ohio cannot explain the contract terms in a DERS contract. It is, however, important to note that DE-Ohio was not a party to these contracts and therefore, could not be bound to them. Also, DERS never asked DE-Ohio to comply with any contract terms. Both Greg Ficke and Charles Whitlock, the President of DERS, testified to the fact that DERS never asked DE-Ohio to take any action, let alone an action pursuant to its contracts.⁸⁸

Second, each of the contract terms discussed by Ms. Hixon was capable of resolution between the contract signatories through economic compensation.

⁸⁵ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Ficke's Deposition Transcript at 73-77) (February 20, 2007).

⁸⁶ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 27) (March 9, 2007).

⁸⁷ *Id.*

⁸⁸ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Ficke's Deposition Transcript at 29, 51-52) (February 20, 2007); *in re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA *et al.* (Whitlock's Deposition Transcript at 106-107) (January 11, 2007).

separation and code of conduct protocol. There is nothing in these communications, or anywhere else in the record to suggest DE-Ohio involvement in the contract negotiations.

Ms. Hixon also questions contractual provisions that require DERS to pay specific fees to OHA and IEU-Ohio, but fails to explain the nature of her concern.⁹⁷ DE-Ohio knows of nothing that restricts one party to a contract, in this instance, DERS, from paying another party any amount for any purpose. In this case, it appears that DERS was paying for legal fees incurred in the support of the baseline market price agreed to in the contracts. Given the importance of the baseline, this makes perfect sense, and as previously discussed, Ms. Hixon agrees.⁹⁸

Finally, Ms. Hixon discusses various option contracts between DERS and various customers.⁹⁹ Except for the Cinergy contract, DE-Ohio's contract with the City of Cincinnati, and the DERS contract with ~~the City of Cincinnati~~ the option contracts are the only contracts that are currently effective having superseded all of the prior contracts previously discussed.¹⁰⁰

It is significant to note that all of the option contracts were entered into after the Commission issued its November 23, 2004, Entry on Rehearing in these proceedings.¹⁰¹ In other words, the evidentiary record was closed, all parties had presented their cases and the Commission had reached a decision

⁹⁷ *Id.* at 30.

⁹⁸ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (TR. III at 33-34) (March 21, 2007).

⁹⁹ *In re DE-Ohio's MBSSO Case*, Case No. 03-93-EL-ATA, *et al.* (Hixon's Prepared Testimony at 48) (March 9, 2007).

¹⁰⁰ *Id.* at BEH-Attachment 17.

¹⁰¹ *Id.* at 55.

of CRS reimbursing components of CG&E's Provider of Last Resort Charge established in the Pre-Rehearing Agreements."²¹²

The option agreements provide concessions to OHA, OEG, and IEU members that are no different conceptually than those provided to ~~Cogens~~ pursuant to an agreement with a non-CRES entity (e.g. with Cinergy Corp.). It is mere pretense for anyone to argue that DERS' option agreements are no different than those of a CRES provider that is not affiliated with Duke Energy Ohio. The option payments are based upon the Pre-Rehearing Agreements, and they explicitly relate back to and supersede those Pre-Rehearing Agreements.²¹³ Providing an example for OHA, OEG, and IEU members, the ~~Mercy Hospital of Fairfield~~ option agreement "supersedes and replaces in its entirety the agreement between CRS and Counterparty dated October 28, 2004."²¹⁴ The ~~AK Steel~~ option agreement states that it "supersedes and replaces the agreement between CRS and ~~AK Steel~~ dated November 22, 2004."²¹⁵ The ~~Marathon~~ option agreement states that it "supersedes and replaces the agreement between CRS and ~~MAF~~ i.e. ~~Marathon Ashland Petroleum~~ dated November 8, 2004."²¹⁶ Because the agreement dated November 8, 2004 involving "Industrial Energy Users-Ohio (IEU-Ohio) for the benefit of ~~Marathon~~

²¹² OCC Remand Ex. 2(A) at 51 (Hixon).

²¹³ *Id.* at 51.

²¹⁴ *Id.*, BEH Attachment 17 at Bate stamp 87.

²¹⁵ *Id.*, at Bate stamp 9.

²¹⁶ *Id.*, at Bate stamp 41.

the IMF in net payments are those Customer Parties who, through side agreements, have agreed to remain with Duke Energy Ohio generation service through the end of 2008 and receive reimbursements of IMF payments.²⁴⁵ This helps to explain the loss of market share by CRES providers in the two and a half years since the Commission approved Duke Energy Ohio's standard service offer.

While the Company argues that at least some percentage of customers can bypass all but a small percentage of standard service offer charges, OCC Witness Talbot pointed out that even an apparently small non-bypassable charge can threaten a large percentage of competitive retailers' profit margins -- margins that can be very small.²⁴⁶ Mr. Talbot explained that non-bypassable charges, for an entire class of customers or for part of a customer class, impose a barrier to competitive supply of generation service.²⁴⁷ In particular, the termination of the IMF charge (which is totally non-bypassable in the Company's tariffs) would remove a barrier to competitive entry into the electricity marketplace.

4. The Company's approach to post-MDP service has raised additional problems that should be addressed.

Some of the Option Agreements provide for reimbursement of a regulatory transition charge ("RTC").²⁴⁸ The payment of RTC by all customers is more than a

²⁴⁵ See, e.g., OCC Remand Ex. 2(A), BEH Attachment 17 at Bate stamp 89 (payment to ~~Cleveland Hospital of~~ ~~Payfield of IMF charge in excess of 4% of billings~~).

²⁴⁶ Tr. Vol. II at 84-85 (2007) (Talbot).

²⁴⁷ OCC Remand Ex. 1 at 62-63 (Talbot).

²⁴⁸ See, e.g., OCC Remand Ex. 2(A), Attachment 17 at Bate stamp 44 (~~Million Aikland Inc.~~).

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."¹⁸

However,

...[a]t 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.¹⁹

These payments were the option contracts attached to the Direct Prepared Testimony of Beth E. Hixon, Attachment 17.

Continuing to follow the Duke/CG&E e-mail as a roadmap,

[t]he 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.²⁰

The terms of the actual option contracts confirm the roadmap presented by the internal CG&E email. For instance, the option contract between DERS and ~~AK Steel~~, a member of the OEG, provided a quarterly financial payment to ~~AK Steel~~ even though ~~AK Steel~~ continued to obtain power through CG&E (and not the CRES affiliate). The

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Direct Prepared Testimony of Beth E. Hixon, Attachment 21, May 15, 2006 E-mail from J. Ziolkowski to J. Gomez.

amount of the quarterly payment was equivalent to the amount paid by ~~AK Steel~~ to CG&E during the quarter under CG&E's Market-Based Standard Service Offer (MBSSO) minus the sum of the following: (1) ~~the applicable tariffed unbundled~~ generation rate, (2) Fuels and Purchase Power (FPP), excluding Emission Allowance Expense and (3) Infrastructure Maintenance Fund (IMF), up to an amount equal to four percent (4%) of "g".²¹ Significantly, the ~~AK Steel~~ agreement, like all other option contracts, contained a provision whereby the agreement superseded and replaced the previous side agreement.²²

It is also important for the Commission to recognize that these option contracts are simply an attempt to disguise an otherwise prohibited for of discounted utility services. First, it is undisputed that the customers tied to the option contracts received power from Duke/CG&E and not its CRES affiliate. As stated in the internal Duke/CG&E e-mail:

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...²³

In fact, Duke/CG&E's CRES affiliate did not serve any retail customers but still had at least \$22 million per year in expenses. That alone raised internal questions within Duke/CG&E during Duke/CG&E's annual budgeting process.²⁴ Lastly, each option contract was not based on a market price, but rather the applicable utility service

²¹ See Direct Prepared Testimony of Beth E. Hixon, Attachment 3, May 19, 2004 Agreement between CRS and certain OEG members, p. 2.

²² Id.

²³ See Direct Prepared Testimony of Beth E. Hixon, Attachment 21, May 15, 2006 E-mail from J. Ziolkowski to J. Gomez.

²⁴ Id.

provided to the customer.²⁵ All of these facts establish that the option contracts were simply a guise whereby Duke/CG&E provided discounted utility services to select customers to secure the customers support for the Stipulation.

3. The Option Contracts are a thinly veiled utility service discount agreement.

The fact that the option contracts (1) follow the side agreements in time, (2) go to the same interested parties, (3) contain roughly the same discounts as the side agreements and (4) grant the same consideration to Duke/CG&E's - namely support to charge the RSP rates of Duke/CG&E's design as provided in the Stipulation - is reason enough to view the option contracts as just subsequent documents intended to carry out the original transaction envisioned by the side agreements. However, in the event that additional support is required to verify this fact, the internal memos quoted above clearly provide that Duke/CG&E in fact characterized the option contracts in much the same manner.

OMG expects that Duke/CG&E will attempt to characterize the option contracts²⁶ as valid CRES transactions which stand on their own and thus do not represent utility discounts. In order to examine the validity of this characterization, it is important to examine the operations of DERS to determine if it is a legitimate CRES or merely a shell entity. OMG subpoenaed Charles Whitlock, the person identified by DERS in discovery as the spokesperson for DERS, to testify on cross examination. By agreement Mr. Whitlock's deposition was entered into the record in lieu of making Mr. Whitlock travel

²⁵ See Direct Prepared Testimony of Beth E. Hixon, Attachment 17, Option Agreements.

²⁶ General Motors, Inc.; Johnson & Johnson; Pennington, F.B.; A.F. Blum; Cooperating in Products and Chemicals, Inc.; BP Products North America, Inc.; Eastman Company; General Electric Company; The Procter & Gamble Co.; Mercy Hospital of Fairfield; The Eastern Hospital; Mercy Franciscan Hospital; Western Hills; Middletown Regional Hospital; Summit Behavioral Healthcare; Chase Hospital; Jewish Hospital; Children's Hospital Medical Center; Duke Center; Mercy Franciscan Hospital; Mount Airy; Mercy Hospital Anderson; Mercy Hospital Cincinnati; McCullough-Hyde Memorial Hospital; Good Samaritan Hospital.

if informed and capable representatives of affected stakeholders agree to the proposed rates after serious negotiation. In the instant proceeding, Duke/CG&E appears to have tainted the "serious bargaining" with financial inducements. The Side Agreements disclose the offering of cash payment(s), and unique rate discounts not available to the entire rate class – intended to induce support for the Stipulation. The only conclusion that can be drawn from the support of a signatory party directly or indirectly receiving financial incentives is that the financial incentives are adequate, not that the rates are just and reasonable. Simply put, if a signatory party is receiving financial inducements, it cannot objectively endorse a rate it is not paying. These Side Agreements precluded serious bargaining among capable and knowledgeable parties. Accordingly, the Commission cannot use the Stipulation to establish the reasonableness of Duke Energy Ohio's standard service offer rates.

In reviewing prior Commission acceptance of stipulations, the High Court has disallowed stipulations when key stakeholders were excluded or did not join in the Stipulation.¹⁸ In a similar fashion, the payment of financial inducements to the signatory parties which are not enjoyed by other similarly-situated effectively eliminates the support from that class of customers. The Side Agreements show that financial incentives were paid to [REDACTED], OEG, DEO [REDACTED] and the Ohio Hospital Association ("OHA"). Eliminating those signatory parties leaves the Stipulation with virtually no support. The Stipulation is opposed by the legal representative of residential consumers¹⁹, a social action group²⁰ and the marketers.²¹ Thus, it cannot be said that the Stipulation enjoys broad support among the stakeholders.

¹⁸ Time Warner A&S v. Pub. Util. Comm., 75 Ohio St. 3d 233 (1996).

¹⁹ OCC

Colbert),²⁷ James Guiner (also counsel in the *Post-MDP Service Case*) who negotiated CG&E settlement terms using DERS as a corporate cover,²⁸ and the president of CG&E (Gregory Ficke).²⁹ A party "referred to DERS" by Duke Energy Ohio under such circumstances would mean nothing more than pretending that discussions took place with DERS personnel (i.e. the same individuals representing Duke Energy Ohio) in an effort to disguise a side deal to settle these cases. Finally, most of the agreements that involved DERS were executed with parties or customer members of parties to the *Post-MDP Service Case* (referred to by OCC Witness Hixon and in this Reply Brief as "Customer Parties") who were already under contract with a CRES provider in 2004 when the side agreements were negotiated.³⁰ Therefore, inquiries by such parties regarding service from a CRES provider not only lack any documentation in the record, they also seem unlikely since these parties were already knowledgeable regarding CRES service.

An example of misstated fact is contained in the DERS/Cinergy Corp. Brief. DERS/Cinergy Corp. state that "the[] option agreements are the only agreements between DERS and its customers that were not rendered void" except for "a contract between [REDACTED] and DERS for the benefit of [REDACTED]."³¹ The record contains

²⁷ OCC Initial Brief at 40, citing OCC Remand Ex. 2(A), BEH Attachments 2-6.

²⁸ OCC Initial Brief at 42, citing OCC Remand Ex. 2(A) at 29 and BEH Attachment 7 (Hixon).

²⁹ See, e.g., OCC Initial Brief at 41-42.

³⁰ OCC Remand Ex. 5.

³¹ DERS/Cinergy Corp. Brief at 12. The record includes two agreements between [REDACTED] and DERS. (OCC Remand Ex. 2(A), BEH Attachments 6 and 12. An invoice regarding "the November 2004 RSP settlement agreement between Cinergy [i.e. CRS] and [REDACTED]" is also in the record. *Id.* BEH Attachment 15 at Date stamp 1159. The existence of an agreement with [REDACTED] was denied by DERS' president, Charles Whitlock. (OCC Remand Ex. 4 at 121 (Whitlock)).

decision that was reached in 2004 without the information that is presently available to the Commission.

c. The argument that the affiliates acted separately fails.

The cumulative evidence presented during the *Post-MDP Remand Case* shows that the Duke-affiliated companies acted together to settle the *Post-MDP Service Case*. One feature of the mixed business of the Duke-affiliated companies is the commonality of persons, partially revealed above, who worked on agreements for Duke Energy Ohio's affiliates and who were also integrally involved in settlement of the *Post-MDP Service Case*. Duke Energy Ohio states that its trial counsel, Paul A. Colbert, "inadvertently misstate[ed] the company he was representing" when he executed contracts for the affiliated companies as "Senior Counsel" for the "The Cincinnati Gas & Electric Company" located at "155 East Broad Street, Columbus, Ohio 43215."⁹¹ "Inadvertence" means "[h]edlessness; lack of attention; want of care; carelessness; failure of a person to pay careful and prudent attention to the progress of a negotiation . . . by which his rights may be affected."⁹² The Company apparently is more willing to admit the implausible -- that Mr. Colbert "fail[ed] . . . to pay careful attention to the progress of a negotiation" *ten times* during a period covering *May through November 2004*⁹³ while remaining at the

⁹¹ Company Brief at 35.

⁹² Black's Law Dictionary (Fifth Edition) at 387 (West Publishing Co. 1983).

⁹³ The ten contracts involve the hospitals (OCC Remand Ex. 2(A), BEH Attachments 2 and 8); OEG members (id., Attachments 3 and 9), IEU Ohio (id., Attachments 4 and 10); [REDACTED] (id., Attachments 5 and 11); and [REDACTED] (id., Attachments 6 and 12). The contracts that involved the hospitals, OEG members, and [REDACTED] named DERS (previously CRS) as a party, while the contracts that involved IEU and [REDACTED] named Cinergy Corp. as a party.

helm of the Company's cases -- rather than admit that the dealings of Duke Energy Ohio and its affiliates are inextricably linked.

Other links between persons who negotiated for Duke Energy Ohio and its affiliated companies were revealed in the evidence. James Gainer, an attorney for Duke Energy Ohio in the *Post-MDP Service Case*, is listed to receive notices for the Duke-affiliated companies in the ten agreements executed by Mr. Colbert.⁹⁴ Mr. Gainer is also identified in correspondence with the Ohio Hospital Association ("OHA") as negotiating an "OHA CG&E Settlement Terms" for CG&E that attached an agreement with DERS.⁹⁵ The e-mail correspondence was copied to Paul Colbert and Gregory Ficke, president of CG&E. Duke Energy Ohio states that "no actual CG&E employee was involved" in the negotiation of the affiliate contracts,⁹⁶ but Mr. Ficke stated that he and other professional staff were all Shared Services employees.⁹⁷ Incredibly (in contradictory fashion), Duke Energy Ohio begins a paragraph by stating that Mr. Ficke "responded that he was involved [in the negotiation of affiliate contracts]" and ends that same paragraph by

⁹⁴ See, e.g., Company Memorandum Contra IEU Motion to Dismiss (March 18, 2003). Mr. Gainer was apparently involved in the negotiations. See, e.g., OCC Remand Ex. [REDACTED]. The reference to "Cinergy" at the point that identifies Mr. Gainer in the agreements is apparently a generic name since the named Cinergy affiliate in the Pre-PLCO Order Agreements that involves IEU and [REDACTED] is Cinergy Corp. while the named affiliate in agreements with the hospitals, OEG, and [REDACTED] was Cinergy Retail Services.

⁹⁵ OCC Initial Brief at 42, citing OCC Remand Ex. 2(A) at 29 and BEH Attachment 7 (Hixon).

⁹⁶ Company Brief at 26.

⁹⁷ See OCC Initial Brief at 39 and OCC Remand Ex. 9 at 10-11, 36 (Ficke).

3. The Company's approach to post-MDP service is discriminatory and has dealt the development of competitive markets a serious blow.

The development of the competitive market is one of the Commission's three goals that it uses in the evaluation of post-MDP rate plans.¹¹⁸ A means by which the Commission has addressed market development has been to change utility proposals regarding the bypassability of proposed charges.¹¹⁹ The record shows that market development has suffered greatly since the Company placed the proposal contained in its Application for Rehearing into its tariffs.¹²⁰

OEG comments that, "[a]s a general matter, OEG agrees that all generation-related charges should be bypassable" but "disagree[s] with OCC on the importance of developing a competitive market."¹²¹ OEG therefore rejects one of the Commission's guiding goals that are considered in the evaluation of rate plans (i.e. market development). No doubt the OEG's position is guided by the knowledge that its members have been able to bypass at least a portion of the IMF by means of side agreements with the Duke-affiliated companies.¹²² This helps to explain the loss of market share by CRES providers in the two and a half years since the Commission approved Duke Energy Ohio's standard service offer.

¹¹⁸ See, e.g., Order at 15 (September 29, 2004). The Supreme Court of Ohio recently stated that it has "recognized the commission's duty and authority to enforce the competition-encouraging statutory scheme of S.B. 3" *Consumers' Counsel 2006* at ¶44.

¹¹⁹ See, e.g., Order, Concurring Opinion of Chairman Alan R. Schriber at 2 (September 29, 2004).

¹²⁰ OCC Initial Brief at 59.

¹²¹ OEG Brief at 8.

¹²² See, e.g., OCC Remand Ex. 2(A), BEH Attachment 17 at Bate stamp 11 (CRS payment to Duke Energy Ohio's standard service offer is 4% of Title 49).

rates should be available to the other customers of the Company, including residential customers.¹³¹

4. The Company's approach to post-MDP service has raised additional problems that should be addressed.

Some of the Option Agreements provide for illegal reimbursement of a regulatory transition charge ("RTC").¹³² OEG states that the Commission is powerless to prohibit the reimbursement of RTC charges due to the provisions contained within "ORC §4928.37(4) {sic §4928.37(A)(4)} which specifically allows for the payment of all or part of the RTC charges by third parties on behalf of a customer."¹³³ The payment of RTC by all customers is a requirement of R.C. 4928.37, whereby the "transition charge shall not be discounted by any party."¹³⁴ OEG fails to read the remainder of R.C. 4928.37(A)(4), which states that the payment of RTC charges by third parties may "not contravene sections 4905.33 to 4905.35 of the Revised Code or this chapter." These statutory provisions prohibit discrimination, and have been violated as stated above. The reimbursement scheme provided for in the side agreements is illegal.

The Commission did not previously receive the information presented by the OCC in this *Post-MDP Remand Case*, partly because of the negotiating process in the *Post-MDP Service Case* during which parties involved in side deals did not disclose their

¹³¹ The OCC does not endorse the form of the discounts provided by the Duke-affiliated companies. The RTC is non-bypassable by statute, and an Insufficient Return Notice Fee contained in the Company's tariffs may not be waived. *In re Complaint of Suburban Fuel Gas Against Columbia Gas*, PUCC Case No. 86-1747-GA-CSS, Order at 23 (August 4, 1987).

¹³² See, e.g., OCC Remand Ex. 2(A), BEH Attachment 17 at Bate stamp 44 ~~(Sanction Awarded - Paid)~~.

¹³³ OEG Brief at 8.

¹³⁴ R.C. 4928.37(A)(3). During cross examination, counsel for ~~the Company~~ suggested that "R.C. 4928.37(4)" was applicable. Tr. Vol. III at 135. Counsel probably intended to refer to R.C. 4928.37(A)(4).

To be nondiscriminatory, the substantial discounting of standard service offer rates should be available to the other customers of the Company, including residential customers.⁷⁴

The Remand Order permits non-bypassability for some standard service offer pricing components such as the IMF,⁷⁵ and thereby demonstrates the discrimination against certain of the Company's customers. The record reveals that the only customers able to bypass any portion of the IMF in net payments have been those non-residential customers who, through side agreements, have agreed to *remain with Duke Energy generation service* through the end of 2008 and receive reimbursements of IMF payments.⁷⁶ The Remand Order states that the IMF should be bypassable for any "nonresidential customer who agrees that it will *remain off Duke's [generation] service* and [provides that] it will not avail itself of Duke's POLR service. . . ."⁷⁷ Under the Commission's explanation of charges, customers that have entered into side agreements should not be provided the same benefits received by customers that limit the terms under which they may avail themselves of Duke Energy's generation service. This discriminatory treatment of customers helps to explain the loss of market share by CRES providers in the two and a half years since the Commission approved Duke Energy's standard service offer.

⁷⁴ The OCC does not endorse the form of the discounts provided by the Duke-affiliated companies. The RTC is non-bypassable by statute, and an Insufficient Return Notice Fee contained in the Company's tariffs may not be waived. *In re Complaint of Suburban Fuel Gas Against Columbia Gas*, PUCO Case No. 86-1747-GA-CSS, Order at 23 (August 4, 1987).

⁷⁵ See, e.g., Remand Order at 37.

⁷⁶ See, e.g., OCC Remand Ex. 2(A), BEH Attachment 17 at Bate stamp 89 (payment to Mercy Hospital of ~~Partridge IMF charge "in excess of 4% of utility's"~~).

Remand Order at 38.

Fairfield Hospital⁷⁵ (an OHA member) provides reimbursement of AAC charges and the remainder of FPP charges after removal of its emission allowance component.⁷⁶ The option agreement for AK Steel⁷⁷ (an OEG member) provides reimbursement of AAC and SRT charges as well as the emission allowance portion of the FPP charges.⁷⁸ The option agreement for Marathon⁷⁹ (an IEU member) provides for reimbursement of the AAC, half the SRT charges, and the remainder of FPP charges after removal of its emission allowance component.⁸⁰ The legacy of the side agreements in the *Post-MDP Service Case* continues: serious bargaining did not take place between Duke Energy Ohio and parties whose members are shielded from the brunt of rate increases that are the subject of negotiations.

The City withdrew from the *Post-MDP Service Case* on July 13, 2004 without any apparent participation other than the execution of a side deal with the Company that provided the City with \$1 million.⁸¹ The City did not file an initial brief by the June 22, 2004 deadline, and did not file a reply brief by the July 6, 2004 deadline before it withdrew. The City reentered these cases in a Motion to Intervene dated February 21, 2007. The City's only apparent participation in the *Post-Remand Case* was to execute the 2007 Stipulation. The City has not demonstrated any knowledge of the issues in these

⁷⁵ Id., BEH Attachment 17 (Bate stamp 69).

⁷⁶ Id.; see also id. at 51 (Hixon).

⁷⁷ Id., BEH Attachment 17 (Bate stamp 11).

⁷⁸ Id.; see also id. at 52 (Hixon).

⁷⁹ Id., BEH Attachment 17 (Bate stamp 44).

⁸⁰ Id.; see also id. at 52 (Hixon).

⁸¹ OCC Remand Ex. 6 at ¶4.

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The customer groups supporting the April 9, 2007 stipulation are OEG, the Hospitals and IEU-O. In the remand case, OCC witness Beth Hixon testified about option agreements made by Cinergy Retail Sales, LLC ("CRS") with individual customers who are members of OEG, the Hospitals and IEU-O. OCC Remand Ex. 1 at 48. Under the option agreements with CRS, the customer takes generation service from CG&E and grants CRS the exclusive option to provide generation to the customer during 2005 through 2008. CRS has the right to exercise the option at any time. In exchange for this right, CRS pays the customers the option payment set forth in the agreement. The option payments generally follow the pattern of CRS reimbursing components of CG&E's charges set forth in the stipulation in Case No. 03-93-EL-ATA, et al. OCC Remand Ex. 2A at 51.

Pursuant to the option agreements of the Hospitals, OEG and IEU-O, the AAC is rebated back to the customers. It should be noted that the AAC is the bulk of the revenues at stake in the stipulation, with an increase from 6% to 9% of "little g". The various option agreements have different arrangements for reductions to the SRT and FPP, although all the option agreements have discounts of the full FPP and some have a discount of the SRT. OCC Remand Ex. 2A, Attachment 17. Thus, the signatory parties to the April 9, 2007 stipulation do not pay the AAC and generally do not pay the full amount of the FPP and SRT. These parties with option agreements obviously have fewer problems with these riders than customers who must pay the full amount, including the full amount of any increases. A stipulation supported exclusively by customer parties who do not pay the full amount of the increases is obviously not