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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

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

- - -

PROCEEDINGS

before Ms. Katie Stenman and Ms. Christine M.T.
Pirik, Hearing Examiners, at the Public Utilities
Commission of Ohio, 180 East Broad Street, Room 11-A,
Columbus, Ohio, called at 9:00 a.m. on Tuesday,
January 18, 2011.

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VOLUME V

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1 Tuesday Morning Session,
2 January 18, 2011.

3 - - -

4 EXAMINER PIRIK: I believe the first
5 witness on the list is from Constellation.

6 MR. PETRICOFF: Thank you, your Honor.

7 At this time we would like to have marked
8 as Constellation Exhibit No. 1 the direct prepared
9 testimony of David I. Fein.

10 EXAMINER PIRIK: The document is so
11 marked.

12 (EXHIBIT MARKED FOR IDENTIFICATION.)

13 MR. PETRICOFF: Thank you.

14 And with that, your Honor, we'd like to
15 call David I. Fein to the stand.

16 EXAMINER PIRIK: Please raise your right
17 hand.

18 (Witness sworn.)

19 EXAMINER PIRIK: Thank you. Please be
20 seated.

21 I need to remind everyone, I don't think
22 we have the witness microphone on yet, everyone needs
23 to try to remember to use the microphone.

24 Mr. Petricoff, you probably speak loud
25 enough.

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DAVID I. FEIN

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

DIRECT EXAMINATION

By Mr. Petricoff:

Q. Would you please state your name and
business address for the record?

A. My name is David Fein, and that's spelled
F-e-i-n. My business address is 550 West Washington
Boulevard, Suite 300, Chicago, Illinois, 60661.

Q. Mr. Fein, on whose behalf do you appear
today?

A. I'm appearing on behalf of Constellation
NewEnergy and Constellation Energy Commodities Group.

Q. And do you have with you a copy of what
now has been marked as Constellation Exhibit No. 1?

A. Yes, I do.

Q. And is that a copy of your direct
prepared testimony?

A. Yes, it is.

Q. Are there any changes or amendments you
would like to make to that testimony?

A. No, there is not.

Q. And if I were to ask you today the same
questions that are contained in that direct prepared

1 testimony, would your answers be the same?

2 A. Yes, they would.

3 MR. PETRICOFF: Your Honor, the witness
4 is available for cross-examination.

5 EXAMINER PIRIK: Thank you.

6 It's my intent to do all of the
7 intervenors, then the company, and then staff as far
8 as cross-examination goes.

9 MR. HAYDEN: No questions, your Honor.

10 MR. BOEHM: No questions, your Honor.

11 MS. MOONEY: No questions.

12 MS. HOTZ: No questions, your Honor,
13 thank you.

14 MR. YURICK: No questions, your Honor.

15 MR. OLIKER: No questions.

16 MR. HART: No questions.

17 EXAMINER PIRIK: Mr. Montgomery.

18 MR. MONTGOMERY: No questions.

19 EXAMINER PIRIK: The company.

20 MS. WATTS: Thank you, your Honor.

21 - - -

22 CROSS-EXAMINATION

23 By Ms. Watts:

24 Q. Good morning, Mr. Fein.

25 A. Good morning.

1 Q. Mr. Fein, would you agree with me that
2 Constellation's primary issues and concerns related
3 to this case involve designing characteristics of the
4 bidding requirements in the process?

5 A. I'd say in large measure they have to do
6 with the structure of the auction construct that's
7 before the Commission, a lot of issues regarding how
8 the contract is worded to effectuate that, as well as
9 my testimony addresses a number of other related
10 issues with how this intersects with the competitive
11 retail market that exists in the Duke service
12 territory.

13 Q. And this is because Constellation
14 Commodities Group would be a potential bidder into
15 Duke Energy-Ohio's competitive bid process, correct?

16 A. That's correct.

17 Q. Is it a fair characterization of your
18 testimony that Constellation supports the general
19 concept of Duke Energy's market rate offer?

20 A. Yes, it is.

21 Q. And I believe you used the term "ardent
22 advocate" on behalf of your client with respect to
23 the competitive bid process generally in your
24 testimony, correct?

25 A. Yes.

1 Q. Is it fair to say that you believe
2 FirstEnergy's auction was quite a successful auction
3 in that it yielded, as you stated, robust and
4 competitive market forces that resulted in lower
5 prices for customers?

6 A. Yes.

7 Q. To your knowledge, Constellation is not
8 offering any witness who will testify that the market
9 rate offer should be rejected by the Commission,
10 correct?

11 A. That is correct.

12 Q. And you are an attorney, correct?

13 A. I am.

14 Q. And you are not disputing that Duke
15 Energy-Ohio's proposed competitive bidding process
16 plan is open, fair, and competitive.

17 A. Did you say "you are not"?

18 Q. Correct. You are not disputing that it's
19 open, fair, and competitive.

20 A. Oh. That's correct.

21 Q. And you do not dispute that the
22 designated auction manager for Duke Energy-Ohio's
23 competitive bidding process is independent, correct?

24 A. Correct.

25 Q. And you are not offering any opinion in

1 this case with regard to Duke Energy-Ohio's recovery
2 of FERC-approved costs, correct?

3 A. Correct.

4 Q. And you're not disputing that the Midwest
5 ISO is an independent regional transmission
6 organization or that the RTO approved by -- or an RTO
7 approved by FERC, correct?

8 A. Correct.

9 Q. And you're not disputing that the PJM
10 Interconnection, LLC is also an independent RTO
11 approved by FERC, correct?

12 A. Correct.

13 Q. Is Constellation Commodities Group a
14 prospective auction participant in the auctions
15 described in Duke Energy-Ohio's application?

16 A. Yes.

17 Q. And certainly you anticipated that would
18 be the case when you filed your direct testimony,
19 correct?

20 A. Yes.

21 Q. If you believe that Duke Energy-Ohio's
22 proposed competitive bid plan would not function
23 fairly, openly, and transparently for all prospective
24 suppliers including Constellation, you would have
25 testified to that in your direct testimony, correct?

1 A. Correct.

2 Q. And you're not aware of any significant
3 issues associated with Duke Energy-Ohio's realignment
4 to PJM effective January 1, 2012, are you?

5 A. Not at this time, no.

6 Q. And you're aware that the FERC has
7 already given Duke Energy-Ohio permission to withdraw
8 from the Midwest ISO, are you not?

9 A. Yes.

10 Q. And you are also aware that the FERC has
11 already approved Duke Energy-Ohio's full resource
12 requirements or the FRR plan, correct?

13 A. Yes.

14 Q. And you're not aware of any circumstances
15 that would prevent Duke Energy-Ohio from realigning
16 to PJM, correct?

17 A. I am not aware of any.

18 Q. And are you aware of any circumstances
19 that would cause the Commission to delay its decision
20 on this application for approval of a market rate
21 offer?

22 A. This Commission?

23 Q. Correct.

24 A. I'm not aware of any.

25 Q. And as I understand it you support how

1 Duke Energy-Ohio has proposed to treat network
2 integration transmission services under the MRO,
3 correct?

4 A. Yes.

5 Q. And is it your testimony that removing
6 N-I-T-S, or NITS, from the auction thereby removes a
7 product that bidders would otherwise have to price as
8 part of their overall bid, correct?

9 A. Correct.

10 Q. And you're aware that Duke Energy-Ohio
11 has submitted an amended master supply agreement in
12 this case, are you not?

13 A. Yes, I am.

14 Q. Have you had an opportunity to review
15 that document?

16 A. Yes, I have.

17 Q. And some of the changes to that document
18 incorporated some of your recommendations, correct?

19 A. Some of them, yes.

20 Q. If the Commission should opt not to
21 accept the changes that have been offered, do you
22 still agree that Duke Energy-Ohio's competitive bid
23 plan satisfies statutory requirements for a market
24 rate offer?

25 A. I do.

1 Q. With regard to information exchange,
2 settlement hourly data is available from PJM,
3 correct?

4 A. Yes.

5 Q. So there's already an avenue available to
6 your clients in securing that information, correct?

7 A. There is, but probably not at the
8 granular level that we'd like to see as a potential
9 bidder, or if we were lucky enough to be a winning
10 supplier, on a going-forward basis.

11 Q. Okay. Thank you, that's fair.

12 Can you describe for me, sir, what
13 accounting education you've had?

14 A. None.

15 Q. And you're not a CPA, correct?

16 A. No, I am not.

17 Q. At page 29 of your testimony you
18 recommend that certain language regarding the
19 definition of "settlement amount" in the master
20 supply agreement article 1 be deleted or removed such
21 that it's optional at the discretion of the supplier,
22 correct?

23 A. Yes.

24 Q. Would you agree with me that if all SSO
25 load were to switch to competitive suppliers, the

1 notional quantity in this instance would be zero?

2 A. If all SSO load moved to competitive
3 retail service?

4 Q. Correct.

5 A. It would certainly be less of an issue,
6 yes.

7 Q. Does this remove the possibility that the
8 MSA might be considered a derivative?

9 A. It might.

10 Q. Your other proposed changes to the credit
11 thresholds are intended to allow suppliers with
12 credit ratings below investment grade to qualify for
13 the auction, correct?

14 A. Yes.

15 Q. Do you know whether or not suppliers with
16 credit ratings below investment grade are more likely
17 to default on their obligations than suppliers having
18 an investment grade credit rating?

19 A. I don't have an opinion on that.

20 Q. Do you have any -- sorry, strike that.

21 Would you agree with me that not all
22 companies have the same risk tolerances?

23 A. I would agree with that.

24 Q. So if the FirstEnergy companies are
25 willing to accept a particular credit risk, that does

1 not mean that Duke Energy-Ohio might be willing to
2 accept the same credit risk.

3 A. I would agree with that.

4 Q. And, in fact, you agree that the credit
5 allowed should be proportionate to the risk, correct?

6 A. Correct.

7 Q. And the risk in this circumstance is the
8 risk of supplier default that the company is willing
9 to assume, correct?

10 A. Yes.

11 Q. The credit requirements are intended in
12 part to cover the company's damages in the event of
13 supplier default.

14 A. In part, that's one aspect of it, yes.

15 Q. If those credit provisions are too
16 liberal or relaxed, the company could be forced to
17 look to its customers to pay for those damages caused
18 by suppliers' default, correct?

19 A. Presumably the company would be free to
20 pursue whatever other legal remedies they believe
21 they're entitled to if they didn't receive recovery
22 pursuant to the contract.

23 Q. And one possible solution to that would
24 be to recover those costs from ratepayers, correct?

25 A. I assume the company could try to do

1 that, yes.

2 Q. Have you done any studies or analyzed
3 potential cost impacts to Duke Energy-Ohio as a
4 result of the changes you proposed in your testimony?

5 A. I have not.

6 Q. Would you agree that the slice of system
7 approach reflected in Duke Energy-Ohio's competitive
8 bid plan is designed to result in least cost to
9 customers?

10 A. I believe in totality for all customers,
11 I believe that's the intent of it, yes.

12 Q. And from your experience in competitive
13 wholesale procurements -- I'm sorry, strike that.

14 Is it correct to say that there is some
15 time needed between the RTO alignment decision and
16 the auction?

17 A. Yes.

18 Q. Would you agree with me that one month
19 would be a sufficient amount of time?

20 A. One month should be. I mean, more time
21 is better than less time, of course, but if you're
22 talking a 30-day period, that should be sufficient in
23 allowing all stakeholders to understand the
24 ramifications of that decision and how it might
25 affect the auction.

1 Q. Would you agree with me that there is
2 also some level of uncertainty with respect to load
3 procurement?

4 A. Yes.

5 Q. And each supplier anticipates its own
6 level of uncertainty, correct?

7 A. Yes.

8 Q. Suppliers routinely assess the risk,
9 balance that risk and formulate their respective
10 bids, correct?

11 A. Yes.

12 Q. In your opinion the absence of a load cap
13 is not a detriment to participation in the auction,
14 correct?

15 A. Correct.

16 Q. Would you agree that some questions posed
17 through the information website process may be more
18 complex and require review by more than one person?

19 A. I would agree with that.

20 Q. Would you further agree that it may be
21 unreasonable to commit to a two-day response time for
22 every FAQ response?

23 A. In absolute terms, maybe, yes, but if
24 there is some understanding that -- some clarity on
25 that issue is actually probably our biggest concern

1 with that issue and we would like to see a little
2 more clarity now as opposed to trying to work with
3 the auction manager after the case is closed to get
4 some greater certainty on response time, but yes.

5 Q. Thank you.

6 And you have stated that you would like
7 the auction manager to tell suppliers that they are
8 on the report to the Commission, correct?

9 A. Correct.

10 Q. So you're asking for notification before
11 the Commission even approves the auction, correct?

12 A. That's correct.

13 Q. And isn't it true that the Commission
14 must approve the results within three days of
15 submission of the report?

16 A. That's correct.

17 Q. In the window of time between the close
18 of the auction and the Commission's approval of the
19 auction results, suppliers who have won tranches are
20 in a provisional status, correct?

21 A. That's correct.

22 Q. So can you tell me what is happening in
23 that three-day window that requires the suppliers to
24 know of preliminary results that could be rejected by
25 the Commission?

1 A. Well, I wouldn't say -- can you rephrase
2 the question, I'm sorry?

3 Q. Sure. We agree that from the time the
4 auction closes until the Commission approves it
5 there's this three-day window, correct?

6 A. Uh-huh.

7 Q. And you've indicated that you would like
8 to have the suppliers advised that they are on that
9 list. I'm just inquiring as to what you think is
10 crucial for the suppliers to know in that period of
11 time.

12 A. What's crucial to know, and really runs
13 through a lot of my testimony, but really on this
14 point is as a bidder in the auction you'd like to
15 reduce as much uncertainty as possible, and if you
16 are able to -- every little sliver of information
17 sort of helps reduce that uncertainty.

18 So if, for example, there was some
19 notification that a supplier was one of the, quote,
20 winning suppliers and that the auction manager is now
21 following through with the next step in the process
22 of advising the Commission of that, that's useful
23 information to a potential supplier about, you know,
24 likelihood of success that the auction manager is not
25 recommending to the Commission rejection of the

1 auction, that while it's still subject to Commission
2 approval, a potential supplier may wish to take some
3 actions to sort of hedge that risk that they now
4 potentially could be responsible for in serving that
5 load.

6 Q. Isn't it true, though, sir, that in that
7 three-day window, even if you are notified that you
8 are on the list that's being submitted to the
9 Commission, the risk is the same? There's still the
10 risk that the Commission could not approve the list.

11 A. That's correct.

12 Q. Mr. Fein, you testified that the May 2009
13 auction for the FirstEnergy companies resulted in
14 retail rates that were set through robust and
15 competitive market forces, correct?

16 A. Correct.

17 Q. You have no reason to believe that the
18 competitive bid plan as proposed by Duke will not
19 similarly result in rates established through robust
20 and competitive market forces, do you?

21 A. No, I do not.

22 Q. There's nothing that prevents any
23 prospective supplier from determining how Duke
24 Energy-Ohio's bid documents compare to the bid
25 documents used by the FirstEnergy companies, is

1 there?

2 A. There's nothing that prevents someone
3 from comparing the two?

4 Q. Correct.

5 A. Other than technology and a lot of pages,
6 no.

7 Q. And it's your testimony, sir, that a
8 reservation price serves no beneficial purpose,
9 correct?

10 A. We don't believe so, no.

11 Q. Would you agree with me that a
12 reservation price prevents an auction participant
13 from strategically withdrawing?

14 A. I don't know that to be the case, no.

15 Q. Isn't it true that a large supplier could
16 try to close a descending price clock auction early
17 at higher prices by withdrawing a bid?

18 A. I am sure a bidder could potentially do
19 that, but I'm struggling with how the existence of a
20 reservation price in and of itself would prevent that
21 from happening considering that a bidder would not
22 know what the reservation price is.

23 Q. Isn't it true if there's no reservation
24 price and they withdraw their supply at a particular
25 point, then they -- well, strike that.

1 Would you agree with me that with a
2 reservation price that particular strategy would
3 become more risky?

4 A. I guess it could if that meant the
5 supplier could lose out completely in winning any
6 tranches in the auction, if that's what you mean by
7 that, yeah, I guess I would agree with that.

8 Q. And also the existence of a reservation
9 price allows a higher starting price to be set
10 thereby encouraging interest in the auction, correct?

11 A. Again, I didn't understand. It's not our
12 experience that a reservation price necessarily
13 accomplishes that. As I understand it, most of the
14 auctions, the bid manager's going to have an opening
15 bid price that commences the auction but, again, if
16 the reservation price isn't known to bidders, I
17 don't -- I guess I'm struggling with trying to
18 understand how that would lead to any higher or lower
19 starting price in an auction.

20 Q. Wouldn't the reservation price in that
21 instance protect customers in the unlikely event that
22 participation falls below expectations?

23 A. Well again, even without the reservation
24 price, if in the auction manager's expert opinion
25 that the auction wasn't sufficiently competitive,

1 they could certainly note that in their report to the
2 Commission and, I believe, the Commission also would
3 be able to reject the auction results due to, you
4 know, lack of competitiveness if there weren't a
5 sufficient number of suppliers or whatever criteria
6 they might have.

7 But again, the existence of the
8 reservation price concept, I don't see how that
9 impacts that issue.

10 Q. Mr. Fein, have you performed any analyses
11 with respect to the impact of reservation prices on
12 bidding?

13 A. I have not.

14 Q. You would agree with me, would you not,
15 sir, that no participant in the auction knows in
16 advance that they have won tranches in the auction?
17 Correct?

18 A. Correct.

19 Q. So the risk associated with not knowing
20 if any individual supplier will win tranches is not
21 different than the risk associated with a reservation
22 price, correct?

23 A. I mean, I wouldn't describe the risk --
24 well, they're both unknowns, of course, right? You
25 don't know if you're going to win. But the unknown

1 risk associated with a reservation price is that it's
2 a number that is developed by the utility in
3 conjunction with the auction manager and we just
4 don't think the utility should be involved in setting
5 a reservation price. I think that's where a lot of
6 the concern comes, that that reservation price, for
7 whatever reason, you know, could potentially not be
8 used or could be influenced by the input of the
9 regulated utility who's conducting the auction.

10 I think that's the uncertainty that's
11 unknown and that's the uncertainty that gives the
12 bidder some concern, it's a risk they have to, if
13 they want to participate, deal with, of course, but
14 all risks have an upward impact on price.

15 So to the extent you can reduce as many
16 risks as possible, that inures to the benefit of the
17 end use retail customers, which is a good thing, and
18 that's what the recommendation is really striving for
19 in my testimony.

20 Q. Thank you. I appreciate that.

21 I'd like to take you back to the
22 beginning of your response. I believe you agreed
23 with me that the risk with respect to the reservation
24 price is akin to or at least the same as the risk of
25 not knowing whether you've won tranches or not; isn't

1 that correct?

2 A. Yes, it's a subjective unknown that we
3 would have no way of knowing how to assess that.

4 Q. In your testimony at page 26 you propose
5 that Duke Energy's master supply agreement be revised
6 to permit weekly settlements with PJM; isn't that
7 correct?

8 A. Yes.

9 Q. Is there any other Ohio utility that does
10 this?

11 A. No, unfortunately FirstEnergy wasn't
12 willing to agree with that one.

13 Q. Thank you.

14 At page 36 of your testimony you
15 reference Duke's full resource requirement plan and
16 the need to know as soon as possible prior to the
17 auctions what load has opted out of the FRR, correct?

18 A. Correct.

19 Q. And you point out that Duke Energy-Ohio's
20 filings at the FERC proposed that eligible wholesale
21 load in its territory that elects to opt out require
22 notification to the utility by March 31st, 2011,
23 correct?

24 A. Correct.

25 Q. And you further state that SSO suppliers

1 need to know about the opt-out so they can estimate
2 their likely capacity obligations, correct?

3 A. Correct.

4 Q. But would you agree with me that in the
5 first 29 months of the market rate offer SSO
6 suppliers are procuring capacity from Duke
7 Energy-Ohio?

8 A. Correct.

9 Q. And that FRR plan as approved by the FERC
10 provides how capacity will be priced for the first 29
11 months.

12 A. Correct.

13 Q. How soon prior to the auction does
14 Constellation Energy Group need to know the price of
15 capacity?

16 A. Again, I don't have a specific date or
17 days in mind, but certainly we'd like to know that
18 information, you know, as soon as possible or when
19 it's available, of course. And as close in time to
20 the conduct of the auction as reasonably possible, so
21 if that's, you know, three days or ten days or what
22 have you, you know, as a potential auction
23 participant we'd like as accurate and as close in
24 time information as possible.

25 Q. You mentioned risk around capacity prices

1 that suppliers perceive and that that risk would be
2 paid by customers in the form of a risk premium,
3 correct?

4 A. Correct.

5 Q. Have you performed any analysis to
6 determine the magnitude of that risk premium on a
7 supplier's bid?

8 A. I have not.

9 Q. Isn't it likely that each supplier will
10 evaluate those risks and perceive them and place
11 their own value on risk premiums?

12 A. Yes.

13 Q. So there's no guarantee that you are
14 proposing -- what you are proposing would result in
15 lower bids, correct?

16 A. No guarantee, but like with all risks,
17 trying to reduce as many as possible.

18 Q. In your testimony you suggest that the
19 Commission should require Duke Energy-Ohio to conduct
20 a collaborative process.

21 A. Yes.

22 Q. And you further state that the bidders
23 can be consulted in this collaborative process on the
24 information that needs to be made available prior to
25 and during the competitive bid process, correct?

1 A. Correct.

2 Q. In making this recommendation you did not
3 acknowledge that there may be limitations on what
4 information Duke Energy-Ohio is able to produce,
5 correct?

6 A. I did not indicate, no. I have no
7 knowledge on what information necessarily Duke can or
8 cannot provide.

9 Q. But you would agree with me, I assume,
10 that there are certain limitations both in terms of
11 costs of providing information and the availability
12 of certain information, correct?

13 A. I certainly understand that certain
14 information and the manner which it's been requested
15 may or may not be available, but we would obviously
16 hope that if it is available, that it can be
17 provided.

18 As far as the costs associated with
19 compiling and providing that information, you know, I
20 have not conducted an analysis of that and the
21 company, I assume, would be free to seek recovery of
22 any costs of, you know, providing data underneath
23 whatever appropriate tariffs or mechanisms that they
24 have available to them.

25 Q. Thank you, Mr. Fein.

1 You also offered testimony in this case
2 that focuses on the interaction between Duke
3 Energy-Ohio and its CRES suppliers; isn't that true?

4 A. Yes.

5 Q. And those recommendations are not
6 relevant to the statutory and Commission rule
7 requirements that need to be considered for the
8 purposes of the Commission approving this MRO
9 application, correct?

10 A. If you mean the narrow sections regarding
11 the statutory criteria for whether a proposal meets
12 the MRO, I'd agree. But, obviously, the statute says
13 what it says and the Commission still has an
14 overarching obligation to effectively promote an
15 effectively, I can't remember the exact language, but
16 competitive retail market in Ohio, so I think it
17 certainly is a part of the proposal.

18 Q. Do you happen to know whether Duke
19 Energy-Ohio already updates its customer lists on a
20 yearly basis?

21 A. I don't.

22 Q. If the company, in fact, does this, your
23 recommendation would be somewhat moot then, correct?

24 A. With respect to the frequency, that's
25 correct. You know, obviously the amount of

1 information in there is obviously a different issue.

2 Q. And you also suggested that you would
3 like Duke Energy-Ohio to offer information through a
4 web-based program, correct?

5 A. That's correct.

6 Q. Do you know whether such a program is
7 currently in existence?

8 A. No, I don't.

9 Q. And if it does not exist, do you know the
10 costs associated with creating a program?

11 A. No, I don't.

12 Q. And if such a program had to be created,
13 would you propose that CRES providers pay for that
14 program?

15 A. I think that's certainly a potential way
16 in which the company might, you know, propose cost
17 recovery. My recommendations in my testimony did not
18 address that issue on what's the most appropriate
19 avenue for that. Certainly that's one way in which
20 it could be accomplished.

21 Other ways can be just due to the fact
22 that these types of system enhancements would
23 enable -- greater enable and facilitate the ability
24 of retail suppliers to serve customers, that should
25 be viewed as a benefit to the marketplace as a whole,

1 and in that instance maybe, you know, that's
2 something that just gets recovered in rates through
3 some other mechanism as opposed to assessing the CRES
4 provider those costs. But I think that's a question
5 for another day.

6 Q. Thank you.

7 Mr. Fein, would you say that you are
8 conversant with respect to what information is shared
9 between Duke Energy-Ohio and CRES -- active CRESs in
10 its service territory?

11 A. I would say somewhat conversant.

12 Q. You've made a list of -- on page 47 of
13 your testimony you've dictated a list of items that
14 you would like to see provided.

15 A. Yes.

16 Q. Would you be surprised to learn that most
17 of that information is already, in fact, provided?

18 A. A little bit. I know that some of it is
19 provided, but I was not aware that all of it's been
20 provided. If that's the case, obviously we'd be very
21 happy to hear that and to learn that.

22 Q. Can you tell me how the information you
23 requested, referring to that list on page 47, which
24 of those items are provided by Dayton Power & Light
25 to CRES suppliers?

1 A. No, I wouldn't know that, not the most
2 robust retail market in Ohio, and I don't have a
3 great deal of experience dealing with the Dayton
4 utility.

5 Q. Thank you.

6 And how about AEP? Can you compare it
7 with AEP?

8 A. No, I can't. I personally have not had
9 much experience with their provision of data and
10 information to retail suppliers.

11 Q. Thank you.

12 Can you explain why a CRES provider needs
13 to know whether a customer's account is on Duke
14 Energy-Ohio's purchase of account receivables
15 program?

16 A. Yes. In marketing to a customer it's
17 helpful to know, you know, what type of services
18 they're purchasing currently without having to ask
19 them for it in an effort to provide them with a
20 competitive offering, you know, that type of
21 information is useful in your marketing efforts to
22 that potential customer.

23 Q. You've also asked Duke Energy-Ohio to
24 advise CRES suppliers when it files for tariff
25 revisions at the Commission, correct?

1 A. Yes.

2 Q. But there's nothing that prevents any
3 particular CRES provider from getting electric
4 notification from the Commission as well, correct?

5 A. No; that's correct. You can, you
6 know, plow through that list to find something of
7 interest. We've seen electric distribution
8 companies, though, in an effort to help promote
9 retail markets actually just as a courtesy send out
10 an e-mail to retail suppliers saying, you know, for
11 your information Duke Energy-Ohio, you know, for
12 example, made a filing, just making you aware of it.
13 You know, you can try to download it from the
14 Commission website or from the utility's website if
15 they post it.

16 It's just a nice convenience and courtesy
17 that assists a retail supplier in staying abreast of
18 matters in a market and being informative to their
19 customers.

20 Q. Is there any other utility in Ohio that's
21 currently doing that?

22 A. I am not aware that any of the utilities
23 have warmed up to that recommendation as of yet.

24 Q. Mr. Fein, I'd like to go back to the
25 question I asked you previously about why a CRES

1 provider needs to know whether a customer is on a
2 purchase of account receivables. Isn't it true that
3 it's the CRES that enrolls in the purchase of account
4 receivables? Right?

5 A. Correct.

6 Q. So when the CRES is interacting with the
7 customer, there's nothing in that information that
8 enhances the relationship between the CRES and the
9 customer.

10 A. No; only in the instance if that customer
11 might be being served by another CRES provider. So
12 in other words if our friends at FirstEnergy
13 Solutions are serving a customer on a program like
14 that, you know, that flag indicator of whether a
15 particular account is on that, not showing what
16 supplier -- other supplier they're with but knowing
17 that they're underneath that program is useful
18 information.

19 Q. And how would it be useful?

20 A. That a customer is used to, for example,
21 you know, seeing a single invoice for both commodity
22 and delivery; that if you, Mr. Constellation, want to
23 market to that customer and might propose not to
24 enroll a customer in that program, maybe engage in
25 sort of a dual billing situation, that may be

1 something that is not attractive to that customer so
2 before proposing that to a customer that would be
3 useful information to know.

4 Q. Thank you.

5 You also recommended in your testimony
6 that there be semiannual or quarterly meetings with
7 CRES providers to discuss proposed changes to Duke
8 Energy-Ohio's business practices, correct?

9 A. Yes.

10 Q. Does Constellation NewEnergy share its
11 proposed changes and business practices with third
12 parties?

13 A. No, and I think by the nature of your
14 question you've clearly misunderstood the purpose of
15 the recommendation. The recommendation is designed,
16 again, to facilitate the relationship between the
17 regulated utility and the competitive retail service
18 providers in its service territory. Such a meeting
19 is not something that we were to be seeking, you
20 know, competitively sensitive or other information
21 about Duke Energy's retail operations, but solely on
22 how that affects the interaction between a retail
23 supplier and a regulated utility.

24 And that is something, actually, that
25 even Dayton Power & Light, to go back to your

1 example, does for suppliers on an annual basis. That
2 is a frequent component of something that is just a
3 courtesy type of arrangement where it gets everyone
4 in a room and allows people to ask questions of
5 general applicability that helps facilitate that
6 interaction of the marketplace.

7 Q. Thank you.

8 With regard to your recommendations
9 relative to the submission of tariffs, would you
10 agree with me that it's appropriate for Duke
11 Energy-Ohio to make those submissions as directed by
12 the Commission?

13 A. Yes.

14 Q. Okay. Just a couple more questions.

15 Mr. Fein, would you agree with me that
16 once Duke Energy-Ohio has reached -- attained a level
17 of a hundred percent load auction, that competition
18 in its service territory will be more robust and
19 competitive?

20 A. I'd like to think so, yes.

21 Q. And you're aware, are you not, of
22 FirstEnergy's auction for 2009?

23 A. Yes.

24 Q. And, in effect, your company participated
25 in that auction, correct?

1 A. Correct.

2 Q. And are you aware, sir, of what the
3 resulting price was for any of the particular
4 products in that auction?

5 A. I don't have the precise numbers in front
6 of me, but I recall that the results on the pure
7 commodity basis resulted in a rate decrease for the
8 vast majority of customers, if not all customer
9 classes.

10 Q. Thank you. Just one moment.

11 MS. WATTS: Your Honor, may I approach?

12 EXAMINER PIRIK: Yes.

13 Q. Mr. Fein, could you describe, if you
14 would, what it is that I just handed you?

15 A. Yes. You handed me a press release
16 issued by the Public Utilities Commission of Ohio
17 dated October 22, 2010, entitled "PUCO accepts
18 results of FirstEnergy auction."

19 Q. Thank you, sir. And is this not the
20 auction that we were just discussing?

21 A. Actually, it's not, because you
22 referenced the 2009 auction.

23 Q. I'm sorry. I apologize.

24 A. But if you're referring to the first of
25 six auctions for the ESP 2 plan of FirstEnergy's,

1 yes, that's what this relates to.

2 Q. All right. And you participated in this
3 auction, correct?

4 A. The company did. I did not personally.

5 Q. Right. Would you kindly refer to the
6 third paragraph in that document, the last two
7 sentences. It indicates that there was a product
8 that was for a delivery period from June 1, 2011, to
9 May 2013 and a product from June 1, 2011, to
10 May 2014. It's that latter one that I'd like to ask
11 you about.

12 A. Okay.

13 Q. The Commission's press release indicates
14 that the price for that latter product was \$56.58,
15 correct?

16 A. Correct.

17 Q. Per megawatt-hour.

18 A. Correct.

19 Q. Do you recall that figure?

20 A. I do.

21 Q. Would you agree with me then that for at
22 least one particular product for one particular
23 bidder there was a willingness to serve load at that
24 price through 2014 and that --

25 A. I --

1 Q. I'm sorry --

2 A. Go ahead, I interrupted you.

3 Q. -- and that price is lower than Duke
4 Energy's SSO price?

5 A. I believe that's correct.

6 Q. Thank you.

7 EXAMINER PIRIK: Ms. Watts, are you
8 intending on marking this as an exhibit?

9 MS. WATTS: I am not.

10 EXAMINER PIRIK: Because I think in order
11 to make the record clear we need to have it and the
12 court reporter needs to have it and we need to mark
13 it.

14 MS. WATTS: Okay, well, we can do that.

15 EXAMINER PIRIK: There's a lot of press
16 releases issued by the Commission and I think since
17 you're referencing specific paragraphs.

18 MS. WATTS: I understand. Thank you,
19 your Honor.

20 EXAMINER PIRIK: You're on No. 21, I
21 believe.

22 MS. WATTS: That's correct, and I would
23 ask that this document be marked as Duke Energy-Ohio
24 Exhibit 21.

25 EXAMINER PIRIK: Thank you.

1 (EXHIBIT MARKED FOR IDENTIFICATION.)

2 Q. (By Ms. Watts) Mr. Fein, just a couple
3 last questions.

4 A. Sure.

5 Q. I wasn't sure if you were reading
6 something there.

7 A. Just the press release.

8 Q. Okay. Do you have any reason to believe
9 that competition will not be better served by Duke
10 Energy-Ohio being fully at market?

11 A. No, I do not.

12 Q. And this benefits customers, correct?

13 A. I believe it will, yes.

14 MS. WATTS: Thank you. I have nothing
15 further.

16 EXAMINER PIRIK: Thank you.

17 Mr. Beeler?

18 MR. BEELER: No questions, your Honor.

19 EXAMINER PIRIK: Redirect?

20 MR. PETRICOFF: Yes, your Honor, thank
21 you.

22 - - -

23 REDIRECT-EXAMINATION

24 By Mr. Petricoff:

25 Q. Good morning, Mr. Fein.

1 A. Good morning, Mr. Petricoff.

2 Q. Earlier Ms. Watts asked you whether
3 certain information was available at the RTO unloads;
4 do you recall that exchange?

5 A. Yes I do.

6 Q. And your answer was that the information
7 wasn't as granular. What do you mean by "granular,"
8 and what kind of information is not available at the
9 RTO level that you believe should be available to
10 bidders?

11 A. You know, I don't have the specific list
12 in front of me, but some of this type of information
13 is being provided by the FirstEnergy utilities to
14 winning auction suppliers as well as I believe it was
15 provided to potential bidders prior to the auction.

16 It's breaking down that detail load
17 information, you know, settlement data by customer
18 account for different periods of time, and I'm just
19 right now drawing a blank on the specific items that
20 are provided, but it's the same auction manager. And
21 that information is very helpful to a supplier in
22 continuously managing that risk of supplying that
23 load over the term of the delivery period.

24 Q. Was that type of information supplied in
25 the FirstEnergy auction as reflected in the prices

1 that came out of Duke Exhibit 21?

2 A. Yes.

3 Q. Is that the kind of information that --
4 is that a list of information that Constellation
5 is -- let me start over. I withdraw that question.

6 Is Constellation seeking the same list of
7 information from Duke that it received from
8 FirstEnergy?

9 A. Yes, at a minimum. There was, you know,
10 additional information that was sought that is not
11 being provided to suppliers by FirstEnergy and we
12 certainly would like more information, but at a
13 minimum that kind of information would be useful to
14 suppliers.

15 Q. Ms. Watts asked you about the frequently
16 asked questions, the FAQ, and your testimony about
17 that and your suggestion that the turnaround should
18 be two days. Why is it important to have a
19 turnaround limit?

20 A. I think it's important to have a
21 turnaround limit so that there's some clarity on and
22 some finality about when such information will be
23 provided. We have a lot of experience with this in
24 FirstEnergy auction and, as you might appreciate, you
25 know, those questions may not always be answered

1 completely, we need to issue a follow-up question and
2 a follow-up question and a follow-up question.

3 So with some sort of deadline, you know,
4 much like you have with a discovery response, for
5 example, that's going to provide greater certainty
6 about the information being provided, and if it's not
7 being provided in a manner that answers the question
8 or provides you with the information you need, then
9 at least you'll know that you may have to take or try
10 to take some other action to get that information.

11 And that problem only is exacerbated as
12 you get closer in time to the auction because
13 unanswered questions or additional questions that
14 arise, there's just a higher volume of those
15 towards -- as you get closer to the auction. So
16 having some sort of deadline at least I think adds a
17 little more finality and certainty to the process.

18 Q. There was a long series of questions that
19 you were asked about reserve price and I'd like to
20 begin by asking you if you would define what a
21 reserve price is.

22 A. As I understand the reservation price
23 concept, it's a price developed by the auction
24 manager in conjunction with the utility that if
25 prices, you know, are in excess of that, that the,

1 basically the auction would be canceled. It would be
2 a failed auction and the auction manager would say to
3 the Commission "We set this reservation price and,
4 you know, nothing came in, so we'll have to do
5 another procurement event."

6 Q. Would the bidders know what this reserve
7 price is?

8 A. No.

9 Q. Would the bidders just be told at the end
10 of the auction, then, that the results would not be
11 accepted?

12 A. That's my understanding, yes.

13 Q. Is it possible if the auction was rebid,
14 that the net result would be higher than the first
15 auction price that was rejected?

16 A. It certainly could be, yes.

17 Q. Is the risk of bidding at an auction and
18 winning at the lowest price the same as the risk of a
19 reserve price from a bidder's perspective?

20 A. I don't believe so. I mean, there are
21 risks, I guess it's how much weight you assess to
22 each risk.

23 Q. And the weight a bidder would assess to a
24 reserve price would be different than the risk of
25 trying to win a descending clock low-price auction?

1 A. Yeah. I mean, I struggled with the word
2 as was used to describe that as a risk. We submit a
3 bid obviously hoping that you win not knowing what
4 other suppliers are going to bid, so maybe "risk" is
5 not the right term to describe that. Maybe it's just
6 the uncertainty that is inherent in a bidding process
7 of whether you will win or not.

8 The reservation price, in contrast, adds
9 a risk element to the entirety of the process that
10 you could be the lowest cost bidder and you may not
11 win because some arbitrary number that the utility
12 and the auction manager come up with on their own
13 isn't going to allow that.

14 Q. As a supply bidder in the wholesale
15 market do you have to participate in a supply
16 auction, in every supply auction?

17 A. No. I assume we're no different than any
18 other potential wholesale supplier. You're going to
19 look at opportunities to bid and you're going to
20 assess the risks of those auctions and you're going
21 to determine whether you're willing to participate
22 based on that and other commercial opportunities you
23 have to participate in other auctions. There's a
24 host of other states that conduct load auctions.

25 So, you know, it -- there's no certainty,

1 there's no requirement that we participate. You
2 know, just like any commercial activity, you're going
3 to assess the risks and pros and cons of
4 participating and make that sort of decision on
5 whether you want to participate.

6 Q. As a supplier would the existence of a
7 reserve price influence your decision as to whether
8 to participate in an auction or not?

9 A. It certainly is something that we
10 would -- we consider, and it's certainly something
11 that has an effect on, you know, the price at which
12 or the amount of risk that we're willing to assume in
13 participating in such an event.

14 MR. PETRICOFF: No further redirect,
15 thank you, your Honor.

16 EXAMINER PIRIK: Thank you.

17 Is there any recross?

18 MS. WATTS: One moment, your Honor, if I
19 may.

20 EXAMINER PIRIK: From any of the other
21 parties?

22 (No response.)

23 - - -

24 RECROSS-EXAMINATION

25

1 By Ms. Watts:

2 Q. Mr. Fein, just one more question. In the
3 FirstEnergy auctions that your company has
4 participated in, isn't it true that the FirstEnergy
5 documents provide for the ability to impose a
6 reservation price?

7 A. Yes.

8 Q. And have they done so?

9 A. I believe that in the public reports from
10 the auction manager they might have indicated that,
11 yes, in fact they did develop one.

12 Q. And those were in auctions in which
13 Constellation Commodities Group participated,
14 correct?

15 A. Correct.

16 MS. WATTS: Thank you. Nothing further.

17 EXAMINER PIRIK: Thank you, Mr. Fein.

18 THE WITNESS: Thank you.

19 MR. PETRICOFF: No further questions,
20 your Honor.

21 EXAMINER PIRIK: Would you like to move
22 admission of your exhibit?

23 MR. PETRICOFF: Yes, your Honor. At this
24 time we would like to move for admission of
25 Constellation Exhibit No. 1.

1 EXAMINER PIRIK: Are there any
2 objections?

3 (No response.)

4 EXAMINER PIRIK: Hearing none,
5 Constellation Exhibit 1 shall be admitted into the
6 record.

7 (EXHIBIT ADMITTED INTO EVIDENCE.)

8 MS. WATTS: And, your Honor, may we move
9 into the record Duke Energy-Ohio Exhibit 21.

10 EXAMINER PIRIK: Are there any
11 objections?

12 (No response.)

13 EXAMINER PIRIK: Hearing none, Duke
14 Energy Exhibit 21 shall be admitted.

15 (EXHIBIT ADMITTED INTO EVIDENCE.)

16 EXAMINER PIRIK: We'll take a ten-minute
17 break.

18 (Recess taken.)

19 EXAMINER PIRIK: Back on the record.
20 Mr. Yurick, I believe the next witness is yours.

21 MR. YURICK: On behalf of the Kroger
22 Company we would call Kevin Higgins to the stand.

23 EXAMINER PIRIK: Please raise your right
24 hand.

25 (Witness sworn.)

1 EXAMINER PIRIK: Thank you. Please be
2 seated.

3 MR. YURICK: At this time, your Honors,
4 I'd like to have Mr. Higgins' prefiled testimony
5 marked as Kroger Exhibit No. 1.

6 EXAMINER PIRIK: The document will be so
7 marked.

8 (EXHIBIT MARKED FOR IDENTIFICATION.)

9 MR. YURICK: Thank you.

10 - - -

11 KEVIN C. HIGGINS

12 being first duly sworn, as prescribed by law, was
13 examined and testified as follows:

14 DIRECT EXAMINATION

15 By Mr. Yurick:

16 Q. Mr. Higgins, at this point could you
17 please state your name and spell your last name for
18 the record?

19 A. My name is Kevin C. Higgins,
20 H-i-g-g-i-n-s.

21 Q. And how are you currently employed, sir?

22 A. I'm a principal in the firm Energy
23 Strategies, LLC.

24 Q. And did you prepare and submit prefiled
25 expert testimony in this proceeding?

1 A. Yes, I did.

2 Q. Showing you what's been marked Kroger
3 Exhibit 1, is that a copy of your prefiled testimony
4 you filed in this case?

5 A. Yes, it is.

6 Q. And this testimony was, again, prepared
7 by you or at your direction?

8 A. Yes, it was.

9 Q. If I were to ask you the questions set
10 forth therein, would your answers be the same today
11 as they appear in the prefiled testimony?

12 A. Yes, they would be.

13 MR. YURICK: At this point the Kroger
14 Company would tender the witness for
15 cross-examination, your Honor.

16 EXAMINER PIRIK: Thank you.

17 FirstEnergy?

18 MR. KUTIK: Your Honor, at this time will
19 you entertain motions to strike?

20 EXAMINER PIRIK: Yes.

21 MR. KUTIK: Your Honor, the basic thrust
22 of our motions is that the testimony here seeks to
23 provide an analysis of what the statutes require and
24 that what we really have in this testimony and, if
25 necessary, the potential cross-examination is a lot

1 of -- will be a lot of discussion about what the
2 statute says and how it should be interpreted and
3 that is the subject matter for a brief, it's not the
4 subject matter for testimony.

5 We have two specific provisions to strike
6 with respect to Mr. Higgins' testimony. Our first
7 motion, your Honor, is directed to page 5 starting on
8 line 20, the word "specifically." Starting with the
9 word "specifically" and going through the rest of
10 that answer which ends on page 6, line 12.

11 EXAMINER PIRIK: Okay.

12 MR. KUTIK: That's our motion, and it's
13 based upon the fact that Mr. Higgins at this point in
14 his testimony is talking about what the statute
15 requires and giving his interpretation of the
16 statute.

17 EXAMINER PIRIK: Do you have other
18 motions?

19 MR. KUTIK: Yes, your Honor. Our second
20 motion is directed to the question and answer that
21 begins on page 7, line 25, and the answer continues
22 over to page 10, line 17. And our second motion is
23 that that entire question and answer be stricken.

24 MR. YURICK: Your Honor, would you like a
25 response?

1 EXAMINER PIRIK: Not at this time. As
2 soon as we get all the motions to strike --

3 MR. YURICK: Thank you.

4 EXAMINER PIRIK: -- we will do it all at
5 once.

6 MR. YURICK: I thought there were only
7 two.

8 MR. KUTIK: Those are the only two I
9 have.

10 EXAMINER PIRIK: Those are the only two
11 you have?

12 MR. KUTIK: Yes.

13 EXAMINER PIRIK: Are there any other
14 motions to strike?

15 MS. SPILLER: Your Honor, we would just
16 join in with FirstEnergy motions.

17 EXAMINER PIRIK: Now, Mr. Yurick.

18 MR. YURICK: Frankly, the motion is just
19 preposterous. We have all kinds of testimony in the
20 record by nonlawyers about what the statute says.
21 Mr. Kutik has been doing this for a while, I would
22 imagine he could ask a few cross-examination
23 questions if he has any questions about whether this
24 witness is qualified to read the statute.

25 The witness's qualifications are

1 extensive and impressive and I think he's capable of
2 reading the statutory language and giving his
3 impression of what it says as an expert witness.

4 I'm not suggesting that he can't cross on
5 these things, but if this witness -- if this
6 witness's testimony as to the statute is stricken,
7 then all witness testimony not of a lawyer ought to
8 be stricken and that's going to entail an awful lot
9 of testimony because Duke's witnesses, nonlawyers,
10 talked about their understanding of what the blending
11 period was.

12 Now, some of those interpretations were
13 bizarre, but they are in the record and they were
14 given by people who were nonlawyers. So in order to
15 be consistent, I think if Mr. Kutik or Ms. Spiller
16 want to cross-examine my witness on his ability to
17 read the statute or what it says, I think that's fair
18 game, but I don't think there's any way this
19 testimony can be stricken. It's relevant to a major
20 issue in the case and my expert's qualifications are,
21 as I said, extensive and impressive

22 MR. KUTIK: May I respond, your Honor?

23 EXAMINER PIRIK: Yes.

24 MR. KUTIK: One thing that's missing,
25 your Honor, from the qualifications is the fact that

1 this witness is a lawyer. He's not a lawyer. If
2 Mr. Yurick is troubled by the fact that other
3 witnesses, particularly Duke's witnesses have
4 testified on that, well, that's his problem because
5 he waived the argument that I'm making now.

6 I had no desire, I had no need to strike
7 those pieces of testimony, frankly, because I was in
8 support of what they were saying, not necessarily
9 that they were proper or not.

10 I'm now at a point where I do have a
11 witness that I disagree with and the interpretation
12 is, his interpretation of what we'll be talking
13 about, his interpretation of the statute which again
14 is subject of a brief and not testimony, we shouldn't
15 be burdening ourselves and our time in this record
16 with this witness or any other witness about the
17 language of the statute and what it is and what
18 statutory interpretation rules should apply or not
19 apply or how those rules apply.

20 MR. BOEHM: Your Honor, may I address --
21 may I throw in my two cents here?

22 EXAMINER PIRIK: Mr. Boehm.

23 MR. BOEHM: Thank you. Your Honor, at
24 the very beginning -- let me back up.

25 I support the position of Mr. Yurick in

1 this. At the very beginning, if your Honor will
2 remember, I moved to strike certain testimony of
3 Duke's president, Ms. Janson, who of course is a
4 lawyer, but in my preface in that case or in that
5 instance I said, and I think the company ultimately
6 agreed with me that given the nature of this
7 proceeding we were all of us going to be dealing with
8 this question about what statutes meant and the
9 testimony of our witnesses right along.

10 Ms. Janson went further than merely
11 offering her interpretation of the statute but
12 specifically gave us instances of what she regarded
13 as the legislative intent even in Ohio where that's
14 not really considered evidence and completely without
15 any foundation as to how she got to that point that
16 she could declare what the intent of the legislature
17 was.

18 Your Honor had made the ruling and we
19 assumed that that was setting the ground rules in
20 this case that the attorney-examiners would hear that
21 testimony and give it whatever weight they deemed
22 relevant. And it was my assumption, and I think
23 probably some of the other parties here, is that that
24 set the ground rule for this proceeding. And so we
25 have assumed that what's sauce for the goose is sauce

1 for the gander and that that was going to be the rule
2 in this case.

3 EXAMINER PIRIK: Mr. Yurick, anything
4 further?

5 MR. YURICK: I'm not going to, thank you,
6 your Honor.

7 EXAMINER PIRIK: Mr. Kutik, do you have a
8 response to Mr. Boehm? I just want to give you that
9 opportunity.

10 MR. KUTIK: Sure. I mean, Mr. Boehm
11 pointed out at least one potential distinction, that
12 is that Ms. Janson was a lawyer. To the extent she
13 was asked with respect to legislative intent that
14 Mr. Boehm is now saying is improper, well, the
15 questions themselves caused the problem. If you're
16 seeking evidence by questions that are improper, you
17 now can't claim that that evidence is improper which
18 you sought.

19 EXAMINER PIRIK: Your objection is noted
20 for the record, however, I'm going to deny the motion
21 to strike. I think we are walking a fine line here
22 but the Commission is going to have to make those
23 decisions in weighing the evidence and, obviously,
24 these issues will be brought up on brief as well.

25 MR. KUTIK: Very well, your Honor.

1 EXAMINER PIRIK: Thank you.

2 MR. KUTIK: May I proceed?

3 EXAMINER PIRIK: Yes.

4 - - -

5 CROSS-EXAMINATION

6 By Mr. Kutik:

7 Q. Good morning, Mr. Higgins.

8 A. Good morning, sir.

9 Q. I want to talk with you about your
10 interpretation of section 4928.142(D) and (E).

11 A. Delighted to do so.

12 Q. You're not a lawyer.

13 A. I am not an attorney, no.

14 MR. YURICK: I'll stipulate he's not a
15 lawyer.

16 Q. And you consulted with your counsel for
17 Kroger in formulating your opinion; did you not?

18 A. I discussed my reading of Duke's
19 testimony and the statute with my attorney, but came
20 to the conclusions presented in my testimony on my
21 own.

22 Q. Again, you consulted with your lawyer in
23 formulating your opinion, correct?

24 MR. YURICK: Objection; asked and
25 answered.

1 EXAMINER PIRIK: Objection overruled.

2 Q. Correct?

3 A. I did discuss my testimony with my
4 attorney, yes. I consulted with him with respect to
5 my testimony.

6 Q. Thank you.

7 And you would agree with me, would you
8 not, that to discern the policy of the statute one
9 has to interpret the language of the statute?

10 A. Yes. It requires interpretation.

11 Q. You had no involvement, did you, sir,
12 with the development of Senate Bill 221 or Senate
13 Bill 3? Correct?

14 A. That is correct.

15 Q. And you don't recall that you have
16 reviewed any of the legislative history that, to the
17 extent there is any, with respect to either one of
18 those statutes, correct?

19 A. That is correct.

20 Q. Now, your interpretation of the statute
21 is based, in part, is it not, on your experience?
22 Correct?

23 A. Yes.

24 Q. And that experience includes your work
25 with the Utah State government in formulating energy

1 policy, correct?

2 A. That is part of my background, yes.

3 Q. And you were assistant director of the
4 State Energy Office, correct?

5 A. That is correct.

6 Q. And that office is focused on state
7 energy conservation programs as well as on research
8 and development, correct?

9 A. On resource development, yes.

10 Q. That's a separate entity from the entity
11 that regulates and sets policy for the public
12 utilities in Utah, correct?

13 A. It is a separate entity, yes.

14 Q. The Utah law does not and did not
15 recognize an MRO similar to what is available to Ohio
16 EDUs; fair to say?

17 A. That is fair to say.

18 Q. Now let me direct you specifically to the
19 language of section 4928.142(E) which is cited on
20 page 7 of your testimony. Are you there, sir?

21 A. I am.

22 Q. That division starts with the phrase
23 "Beginning in the second year." Correct?

24 A. Correct.

25 Q. And it is potential interpretation of

1 that phrase that the Commission could consider now a
2 change to the blending proportions set forth in
3 section 4928.142(D), but not implement it until the
4 beginning of the second year, correct?

5 A. I believe it's a stretch, but I would say
6 that it's logically conceivable.

7 Q. It is a potential interpretation; is it
8 not?

9 A. It's a, certainly it's a potential
10 interpretation.

11 Q. Thank you.

12 Now, the division also uses the phrase
13 "notwithstanding any other requirement of this
14 section," correct?

15 A. Yes, it does.

16 Q. And what that means is it's not
17 contingent on the requirements of any other section.
18 Any other parts of that section, correct?

19 A. Correct.

20 Q. Including division (D).

21 A. Yes.

22 Q. Division (E) also uses the phrase, quote,
23 to mitigate any effect of an abrupt or significant
24 change in the EDUs standard service offer price,
25 correct?

1 A. Yes.

2 Q. And "any" there refers to the effect of
3 any possible change, correct?

4 A. It refers to any effect.

5 Q. Okay. So it could include all effects of
6 any significant or abrupt change, correct?

7 A. It's subject to the remainder of the
8 sentence, to whatever qualifications are in the
9 remainder of the sentence.

10 Q. But again, it would be any significant
11 abrupt change that qualified for the rest of the
12 sentence.

13 A. Yes.

14 Q. Now, you express your view on page 9 of
15 your testimony about a phrase in division (D) as to
16 what the clause "not more than" modifies, correct?

17 A. Yes.

18 Q. And if the General Assembly had wanted to
19 be clear in adopting your view of what "not more
20 than" modifies, you would agree with me that it would
21 have modified or it could have included the word
22 "and," a-n-d, before the phrase "not more than."
23 Correct?

24 A. I agree that that could have potentially
25 provided more clarity as to that phrase.

1 Q. Now, you think that the statute here, and
2 I'm now talking about section 4928.142(D) and (E),
3 calls for or embodies a policy of conservative
4 migration to a market-based SSO, correct?

5 A. Yes.

6 Q. And would it be fair to say that you
7 could not point me to any other part of 4928.142 that
8 would embody the same policy? Correct?

9 A. That is correct.

10 Q. Would it also be correct to say that you
11 would believe that a move from -- for a 50 percent
12 increase in the market-based portion of the SSO would
13 not be consistent with the policy of conservative
14 migration to a market-based SSO?

15 A. I believe that there are circumstances in
16 which that could be considered.

17 Q. All right. So it's possible that one
18 could go from 50 percent to a hundred percent in one
19 year.

20 A. That is possible, as it was certainly a
21 potential for that to occur from year 5 to year 6,
22 for example, under the time frame that is spelled out
23 in section -- in division (D).

24 Q. The statute, I now want to talk back to
25 section 4928.142(D), you believe was written to

1 protect customers, correct?

2 A. Yes.

3 Q. But the Commission could not accelerate
4 the transition to full market pricing in less than
5 five years even if doing so would enable nonshopping
6 customers to pay lower generation costs, correct?

7 A. Correct.

8 Q. Now, you would agree with me, would you
9 not, that there could be an abrupt or significant
10 change in the legacy ESP portion of the SSO price?
11 Correct?

12 A. That can occur, specifically through the
13 rider type of mechanism that the utility, in this
14 case Duke Energy-Ohio, could still be allowed to
15 apply to the legacy portion of its rate.

16 Q. There are four cost adjustment categories
17 that are set out in division (D), correct?

18 A. Yes.

19 Q. And that's what you're referring to,
20 right?

21 A. Yes.

22 Q. So if there were an abrupt or significant
23 change in the legacy portion -- legacy ESP portion of
24 the SSO price, you would agree with me as a matter of
25 math that would also be or could also be an abrupt or

1 significant change in the SSO price.

2 A. Yes.

3 Q. Now, you believe that the abrupt or
4 significant change to the SSO price that's referred
5 to in division (E) only refers to a change in the
6 market price, not in the change to the ESP price,
7 correct?

8 A. As a practical matter, yes.

9 Q. Now, let me change topics. You think
10 that the blending period that's contemplated here in
11 these two divisions that we've been talking about
12 needs to wait to go to full market-based pricing
13 until there are robust, competitive markets available
14 to customers, correct?

15 A. I believe that that's a factor that the
16 Commission probably ought to take into consideration
17 when the Commission is evaluating prospectively the
18 blending period.

19 Q. So the answer to my question is yes, it's
20 a factor.

21 A. And I think I answered your question.
22 There's some qualification to that. For example, the
23 law --

24 Q. I just asked you if my question was "yes,
25 it's a factor."

1 MR. YURICK: Your Honor, I'm going to
2 object. Can the witness finish his answer?

3 MR. KUTIK: He's going well beyond my
4 question.

5 A. The answer to your question, sir, is no
6 as a factor.

7 Q. Pardon?

8 A. The answer to your question is no.

9 Q. So are you saying, then, that you're not
10 advocating that the Commission consider ending the
11 blending period when or until there is a robust,
12 competitive market available to customers? Are you
13 or are you not recommending that?

14 A. I'm recommending that the Commission take
15 that into consideration within the parameters set by
16 the statute which is a five- to ten-year period.

17 Q. So the availability of robust markets is
18 a consideration or a factor when the Commission is
19 making its determination as to when to end the
20 blending period, correct?

21 A. Yes.

22 Q. Now, you would agree with me, would you
23 not, that customers benefit from access to robust,
24 competitive markets?

25 A. I agree.

1 Q. And the market that you're talking about
2 in your testimony is the retail electric market,
3 correct?

4 A. Yes, specifically that's what I address
5 in my testimony.

6 Q. And the competitive bidding process is a
7 process that deals with the wholesale competitive
8 market, correct?

9 A. Yes.

10 Q. Or wholesale market.

11 A. Yes, it is.

12 Q. Now, you're not prepared to say, are you,
13 sir, that the retail market in Duke Energy-Ohio's
14 territory is competitive or not, correct?

15 A. That is correct. I certainly acknowledge
16 that there has been a relatively high degree of
17 shopping activity, but I do point out in my testimony
18 that I believe it's still an open-ended question as
19 to whether or not that market would be considered
20 robust over the long-term or whether or not it would
21 pass market power tests.

22 Q. Well, you just anticipated my next
23 question, that what constitutes a robust, competitive
24 market or, perhaps better said, whether a market is
25 robust and competitive involves an analysis of market

1 power, correct?

2 A. Yes.

3 Q. And you have not done a market power
4 analysis for purposes of your testimony here.

5 A. I have not done a market power analysis.
6 I have referred to a couple of metrics that are
7 available in the record, but I have not done what I
8 would consider to be a market power analysis.

9 Q. And so you have no opinion, do you, sir,
10 that Duke is exercising market power in the retail
11 market within its service territory?

12 A. I don't have an opinion as to whether
13 Duke is exercising market power. I do believe that
14 Duke's -- and its affiliates share of the market is
15 typically, is above the threshold that is typically
16 used in a market power analysis to ascertain whether
17 there's the potential for market power.

18 MR. KUTIK: May I have the answer read,
19 please?

20 (Record read.)

21 MR. KUTIK: Your Honor, I move to strike
22 the answer starting with the words "I do believe." I
23 just asked him whether he did an analysis, he did not
24 do an analysis, that's the answer to my question.

25 EXAMINER PIRIK: I think that's correct

1 but I'm going to deny the motion to strike.

2 MR. KUTIK: Okay.

3 Q. Would it also be true, sir, that you
4 would have done no analysis and therefore have no
5 opinion whether any supplier is exercising market
6 power in Duke's territory?

7 A. That is correct.

8 MR. KUTIK: One minute, your Honor.

9 I have no further questions, thank you.

10 EXAMINER PIRIK: Thank you.

11 Mr. Boehm?

12 MR. BOEHM: Just a few questions, your
13 Honor.

14 - - -

15 CROSS-EXAMINATION

16 By Mr. Boehm:

17 Q. Mr. Higgins, you've read, then
18 4928.142(E) and the company's witnesses' testimony in
19 preparation for your testimony; is that correct?

20 A. Yes, I have. Yesterday.

21 MR. KUTIK: Your Honor, there are rules
22 in this Commission, certainly there are customs
23 within this Commission against friendly cross. There
24 is no adversity between OEG's position and Kroger's
25 position on this. So with respect to any questions

1 with respect to this witness's testimony on the
2 meaning of 142(D) and (E), I would move that
3 Mr. Boehm be precluded from asking those questions.

4 MR. BOEHM: Your Honor, if I may address
5 that. For reasons that we cannot divine FirstEnergy
6 Services, which is a marketing company, has chosen to
7 take a position which is consistent with Duke, the
8 regulated utility company, and Mr. Kutik's
9 cross-examination of the witness indicates that now.

10 I'm not sure whether Mr. Kutik is doing
11 this out of mere force of habit or he has some
12 position which is very similar to Duke Energy, but
13 certainly if there is a question of friendly cross,
14 rehabilitating a witness or attacking a witness in
15 conjunction with the utility company, he's guilty of
16 that. I'm merely following up on his
17 cross-examination. I don't think I'm throwing any
18 softballs for the witness, if I am, I think it's too
19 early to tell.

20 EXAMINER PIRIK: I understand what you're
21 saying as far as following up on cross-examination
22 which is not appropriate, it's only appropriate to do
23 your own cross-examination. Any follow to
24 cross-examination will happen in redirect.

25 MR. BOEHM: Okay.

1 EXAMINER PIRIK: So please avoid friendly
2 cross.

3 MR. BOEHM: I will, your Honor, thank
4 you.

5 EXAMINER PIRIK: Thank you.

6 MR. BOEHM: And let me ask a few
7 questions, if you think I've violated your order,
8 please let me know.

9 EXAMINER PIRIK: If someone violates it,
10 I'm sure someone will object.

11 MR. BOEHM: Certainly.

12 Q. (By Mr. Boehm) Getting back to my
13 question, Mr. Higgins --

14 A. Yes.

15 Q. -- as you read 4928.142(E) in preparation
16 for your testimony, and I'm referring specifically to
17 the language quoted on page 7 of your testimony, "the
18 Commission may also prospectively alter prospectively
19 the proportions specified in that division to
20 mitigate any effect of an abrupt or significant
21 change in the electric distribution utility's
22 standard service price that would otherwise result in
23 general or with respect to any rate group or rate
24 schedule but for such alterations."

25 MR. KUTIK: Objection. Same grounds.

1 EXAMINER PIRIK: Why don't you finish
2 your question and then let me hear the rest of your
3 question.

4 MR. BOEHM: All I've done is quoted the
5 testimony here.

6 Q. Mr. Higgins, as you read that provision
7 in connection with the company's testimony in this
8 case, the company's witness testimony, please
9 identify the abrupt or significant change that is
10 cited by the electric utility.

11 MR. KUTIK: Objection.

12 EXAMINER PIRIK: I just -- are these your
13 own cross-examination questions or --

14 MR. BOEHM: Yes, your Honor.

15 EXAMINER PIRIK: If these are follow-ups
16 to FirstEnergy Solutions' questions, they are not
17 appropriate. You need to ask your own
18 cross-examination questions of this witness.

19 MR. BOEHM: I have no questions then,
20 your Honor. Thank you.

21 EXAMINER PIRIK: Ms. Mooney?

22 MS. MOONEY: No questions.

23 MS. HOTZ: No.

24 EXAMINER PIRIK: Mr. Olikar?

25 MR. OLIKER: No questions, your Honor.

1 EXAMINER PIRIK: Mr. Hart?

2 MR. HART: None.

3 EXAMINER PIRIK: Mr. Montgomery?

4 MR. MONTGOMERY: No questions.

5 EXAMINER PIRIK: Ms. Vogel?

6 MS. VOGEL: No.

7 EXAMINER PIRIK: Mr. Petricoff, I don't
8 know if you were in the room when we started.

9 MR. PETRICOFF: No, I wasn't, but I have
10 no questions.

11 EXAMINER PIRIK: I'll return to the
12 company, then.

13 MS. SPILLER: Thank you, your Honor.

14 - - -

15 CROSS-EXAMINATION

16 By Ms. Spiller:

17 Q. Good morning, Mr. Higgins.

18 A. Good morning.

19 Q. Sir, to be clear, although you are
20 offering an interpretation of Revised Code Section
21 4928.142(D) and (E), you are not offering a legal
22 opinion, correct?

23 A. That is correct.

24 Q. And, sir, you would agree with me that
25 you testified a time or two in Ohio regulatory

1 proceedings.

2 A. Yes, I have.

3 Q. None of those prior instances, sir, in
4 which you have offered testimony involved the
5 blending issue that is central to Duke Energy-Ohio's
6 application in this proceeding, correct?

7 A. That is correct.

8 Q. Mr. Higgins, you would agree that Duke
9 Energy-Ohio by statute has the right to pursue a
10 market rate offer for standard service offer supply,
11 correct?

12 A. Correct.

13 Q. And you are not disputing, sir, that the
14 competitive bidding process plan proposed by Duke
15 Energy-Ohio in its application is open, fair, and
16 transparent, correct?

17 A. That is correct.

18 Q. You are not disputing, Mr. Higgins, that
19 the auction manager identified in Duke Energy-Ohio's
20 application is independent, are you?

21 A. I am disputing that.

22 Q. You are not offering an opinion in this
23 case regarding Duke Energy-Ohio's recovery of any
24 FERC approved cost, correct?

25 A. Correct.

1 Q. You are not disputing, Mr. Higgins, that
2 the Midwest Independent System Operator is an
3 independent regional transmission organization, or
4 RTO, approved by the FERC, correct?

5 A. Correct.

6 Q. And you are not disputing, sir, that PJM
7 Interconnection, LLC is also an independent RTO
8 approved by the FERC, correct?

9 A. Correct.

10 Q. Mr. Higgins, you do not dispute in your
11 direct testimony that the Midwest ISO has an
12 independent market monitor, correct?

13 A. Correct.

14 Q. And you also do not dispute that PJM has
15 an independent market monitor, correct?

16 A. Correct.

17 Q. There was some testimony, sir, in which
18 you referred to a legacy ESP price. So that I am
19 clear on your testimony, the SSO price that will be
20 charged by Duke Energy-Ohio during the blending
21 period under the market rate offer is comprised of
22 two components, correct?

23 A. Yes.

24 Q. One component being the market bid or
25 auction price, correct?

1 A. Yes.

2 Q. The other component is, per the statute,
3 Duke Energy-Ohio's most recent standard service offer
4 price, correct?

5 A. Yes.

6 Q. And, sir, is that most recent standard
7 service offer price what you have referred to as the
8 legacy ESP price?

9 A. Yes.

10 Q. You've indicated that your reading of
11 section 4928.142 was based upon your experience,
12 correct?

13 A. Well, I brought my experience to bear in
14 reading that language.

15 Q. You also relied, sir, upon your plain
16 reading of those provisions, correct?

17 A. Yes.

18 Q. And in that regard, Mr. Higgins, you do
19 not dispute that the Commission has discretion to
20 alter the blending period under the MRO provisions,
21 correct?

22 A. I do not dispute -- I do not dispute
23 that.

24 Q. Rather, it's your opinion that the
25 Commission can only exercise that discretion to

1 extend the blending period, correct?

2 A. Yes.

3 Q. And when you looked at the plain reading
4 of the statutory language in sections (D) and (E),
5 you gave all of those words their plain and ordinary
6 meaning, correct?

7 A. Yes.

8 Q. So, sir, under your interpretation
9 "alter" means only to "extend, lengthen, or enlarge,"
10 correct?

11 A. In the -- not necessarily as a use of the
12 verb, but in the context of the language in division
13 (E) it has that logical implication that you just
14 gave it.

15 Q. So you are giving the word "alter" an
16 implied definition and not its ordinary and plain
17 meaning, correct?

18 MR. YURICK: Objection. I think the
19 witness answered the question that he looked at the
20 word in context and interpreted it in context.

21 EXAMINER PIRIK: Objection overruled.

22 A. I read the plain meaning of the statute
23 and I looked at it in the context of the math that
24 was implicit in the blending periods that are laid
25 out in the statute in division (D).

1 Q. So, sir, if I could go back to my
2 question, please, you gave the word "alter" an
3 inferred definition, correct?

4 A. If by looking at the -- if by
5 interpreting the word in context that means
6 "inferred," then I would agree with that.

7 Q. So, Mr. Higgins, it's your testimony that
8 the plain and ordinary meaning of "alter" is not to
9 change, transform, or make different, correct?

10 MR. YURICK: Objection. I think this
11 question's been asked and answered.

12 EXAMINER PIRIK: Objection overruled.

13 A. The word "alter" does have a broader
14 meaning than simply to increase, for example. But
15 there is -- there's a remainder of a sentence in
16 which that word is used, so in the context of the
17 remainder of the sentence it comes to have a more
18 restricted meaning than the word would have in a
19 vacuum.

20 Q. And, sir, we'll get to the remainder of
21 this sentence. Although you used an inferred
22 definition of the word "alter" for purposes of
23 arriving at your conclusions, you did not form any
24 opinion as to the definition of "abrupt" as appearing
25 in that same sentence, correct?

1 A. I have no -- I did not ascribe any
2 specific meaning to the word "abrupt" other than what
3 it says there in the sentence.

4 Q. And you also, sir, have not ascribed any
5 specific meaning to the word "significant" that also
6 appears in that sentence, correct?

7 A. Correct.

8 Q. And you have relied upon your inferred
9 definition of the word "abrupt" to conclude that it
10 is the policy of the state of Ohio to enable the
11 orderly And gradual transition to full market prices,
12 correct?

13 A. I do not rely on the interpretation of
14 the word "abrupt" to come to that conclusion. I
15 believe that there are -- I mean, I believe that this
16 language in division (E) supports my belief that the
17 state of Ohio wishes to have an orderly transition to
18 market pricing, but my conclusion that that is the
19 case is not dependent solely on this language.

20 Q. It is dependent, sir, solely on divisions
21 (D) and (E) of section 4928.142, correct?

22 A. I believe divisions (D) and (E) do
23 strongly support that interpretation. I do believe
24 that there are other indicators in the policies
25 adopted by the state of Ohio that also support that,

1 however.

2 MS. SPILLER: I'm sorry, can I have the
3 answer read back, please?

4 (Record read.)

5 Q. So, sir, you are now saying that the
6 state policy that you have articulated is set forth
7 in other sections of the Ohio Revised Code?

8 A. I believe that when looked at as a whole,
9 for example, there are other policies or other
10 statutes that would support this interpretation.

11 Q. You have not described those other
12 statutes at all in your testimony, have you, sir?

13 A. I have not. And, in fact --

14 MS. SPILLER: May I approach the witness,
15 your Honor?

16 EXAMINER PIRIK: Yes.

17 MR. YURICK: I'd like to see what you're
18 handing the witness.

19 MS. SPILLER: Oh, it's a copy of his
20 deposition. Would you like a copy?

21 MR. YURICK: No, that's fine.

22 Q. Mr. Higgins, do you recall when your
23 deposition was taken on December 22nd, 2010?

24 A. Yes, I do.

25 Q. And you were administered an oath at that

1 time, correct?

2 A. Yes.

3 Q. And, sir, if you could turn to page 56 of
4 the deposition. And on line 12, page 56 of your
5 deposition, sir, the question that was posed to you
6 as follows: And would you, would you agree with me
7 that your basis for believing that the General
8 Assembly has articulated that public policy is in
9 section or Revised Code Section 4928.142(E) and (D)?
10 Your answer there was: Yes. Correct?

11 A. Yes. Could you please cite me to the
12 page again, I'm having trouble finding it.

13 Q. Sure, page 56.

14 A. 56, yes. Line?

15 Q. Line 12.

16 A. Yes, I recall that.

17 Q. Okay. And, sir, did I read that exchange
18 correctly?

19 A. Yes.

20 Q. Thank you.

21 In articulating what you believe to be
22 Ohio's policy you believe, Mr. Higgins, that the
23 transition to full market pricing should provide
24 assurance that when there is a sole reliance upon
25 market pricing, that there are opportunities for a

1 competitive market that is robust, correct?

2 A. Yes.

3 Q. And, sir, that competitive market is
4 enhanced when Duke Energy-Ohio is fully at market
5 pricing, correct?

6 A. Potentially.

7 Q. Potentially.

8 A. Potentially, yes, uh-huh.

9 Q. So you don't think that the competitive
10 retail market in Ohio benefits from Duke Energy-Ohio
11 procuring 100 percent of its generation supply
12 through a competitive auction.

13 A. I believe that it would potentially
14 benefit.

15 Q. Now, there is nothing, sir, in the two
16 sections upon which you have relied, sections (D) and
17 (E) of Revised Code 4928.142, that speaks to
18 completing this transition to full market prices only
19 when the competitive market is or will be robust,
20 correct?

21 A. That is correct.

22 Q. And you have no opinion, Mr. Higgins, as
23 to whether the competitive retail market in Duke
24 Energy-Ohio's service territory currently is robust,
25 do you?

1 A. I have not conducted a thorough analysis
2 of that.

3 Q. So you have no opinion on that particular
4 issue, correct?

5 A. My opinion is that there are early
6 indicators that the market share concentration that
7 Duke's affiliate has would have difficulty passing a
8 market power test, but I would not -- I've not gone
9 beyond that observation to claim that I've performed
10 a study of market power or whether or not there's
11 been any abuse of market power. I simply point out
12 that there are facts that I'm aware of that would
13 have -- that would be used in an analysis of market
14 power.

15 Q. So there is one fact, sir, that you have
16 and that is the percentage of the switched load in
17 Duke Energy-Ohio's service territory that is served
18 by its affiliate Duke Energy Retail, correct?

19 A. Yes.

20 Q. You don't know how many competitive
21 suppliers are active in Duke Energy-Ohio's service
22 territory, do you?

23 A. That is correct.

24 Q. And although you have this suspicion, if
25 I may, you've not conducted any analysis whatsoever

1 regarding market power, correct?

2 A. That is correct.

3 Q. So, sir, as you sit here today you cannot
4 dispute that the retail competitive market in Duke
5 Energy-Ohio's service territory is robust, correct?

6 A. I have not disputed that in my testimony.

7 Q. Given, sir, that you've done no analysis,
8 you have no opinion -- strike that.

9 Give you that you have done no analysis,
10 you cannot say that Duke Energy or its affiliate are
11 exercising market power in Duke Energy-Ohio's service
12 territory, correct?

13 A. That is correct, I have not made that
14 claim.

15 Q. So based upon your plain reading of the
16 MRO provisions, if the transition to market -- if a
17 transition to market occurred in less than five years
18 and that result enabled customers to realize lower
19 generation prices, the Commission could not approve
20 such a transition, correct?

21 A. Correct.

22 Q. And, sir, it is your opinion as set forth
23 in your testimony that mathematically the only way to
24 avoid abrupt or significant changes in the SSO price
25 during the blending period is to decrease the market

1 bid price component of that SSO price, correct?

2 A. Correct, within the context of division
3 (E), yes.

4 Q. Sir, division (E) does not plainly say
5 that the Commission can alter the proportions of that
6 SSO price only by altering the market bid component,
7 does it?

8 A. Yes, it does.

9 Q. It says that the Commission can only
10 alter the market bid component of the SSO price?

11 A. It may alter prospectively the
12 proportions specified in division (D).

13 Q. And the proportions that are referred to
14 in division (D) are both the market bid proportion
15 and the legacy ESP proportion, correct?

16 A. No. The language that I referred to
17 certainly in division (D) in my testimony is the
18 proportion of the market component that is spelled
19 out which is the, specifically the division (D)
20 identifies the weights that should be given to the
21 market components, 10 percent in year 1, no more than
22 20 percent in year 2, 30 percent in year 3,
23 40 percent in year 4, and 50 percent in year 5.

24 Q. So it's your interpretation that division
25 (D) refers only to the market bid portion of the

1 overall SSO.

2 A. That's what it identifies. That's what
3 it specifies.

4 Q. So although the legacy ESP portion of the
5 SSO price under the MRO can, by your own admission,
6 cause significant or abrupt changes in that SSO
7 price, you believe that the Commission cannot alter
8 the legacy ESP portion.

9 A. The Commission can alter the legacy ESP
10 portion. If it does so, if it alters the portion
11 because they would be -- they are inversely related.
12 So I do not maintain that the Commission can't alter
13 the legacy portion. I'm making the point that
14 logically the alteration contemplated by division (D)
15 is an alteration in which the market component would
16 be reduced and the legacy component increased.

17 Q. I believe, sir, you've just testified
18 that division (D) refers only to the market bid
19 component of the SSO price, correct?

20 A. Those are the percentages that are
21 enumerated in division (D) are the market component
22 percentages.

23 Q. And the corollary proportion would be the
24 legacy ESP price, correct?

25 A. Yes.

1 Q. And the legacy ESP price can, pursuant to
2 division (B) -- I'm sorry, pursuant to division (D),
3 be adjusted, correct?

4 A. They would be effectively adjusted as a
5 result of adjusting the market component. So there's
6 a market component that is spelled out in division
7 (D), division (E) allows for a prospective adjustment
8 of those market components, when that is done, then
9 naturally the legacy component is also adjusted
10 inversely.

11 Q. But you are saying, sir, that the only --
12 that mathematically the only way to avoid abrupt or
13 significant changes is to decrease those percentages
14 as set forth in division (D).

15 A. In the context of division (E), yes,
16 which is a prospective adjustment.

17 Q. Sir, but my question is it's your opinion
18 that the Commission can only alter the market bid
19 portion of the SSO price by decreasing that market
20 bid portion.

21 A. Yes. Per -- in the context of division
22 (E), yes.

23 Q. Thank you.

24 With regard to the legacy ESP price, that
25 price, sir, can be adjusted on as often as a

1 quarterly basis, correct?

2 A. Yes.

3 Q. And it can be adjusted for items such as
4 fuel, purchased power, environmental compliance
5 costs, and the costs incurred by the company in
6 complying with the state's alternative energy
7 resource requirements, correct?

8 A. Yes.

9 Q. Mr. Higgins, you do not know whether Duke
10 Energy-Ohio's fuel costs will vary during its
11 proposed blending period, correct?

12 A. That is correct.

13 Q. And you cannot provide any description
14 whatsoever as to the variability of any of the riders
15 that would be utilized to adjust the four categories
16 that we've just described, correct?

17 A. Correct.

18 Q. Sir, you've indicated that it is your
19 opinion that the policy of the state is to enable a
20 gradual or orderly transition to market pricing which
21 I believe you've also identified as a conservative
22 transition?

23 A. Yes.

24 Q. But, sir, you do not know what would
25 constitute a conservative transition to full market

1 prices in Duke Energy-Ohio's service territory,
2 correct?

3 A. I'm not sure I understand the question.
4 I have come to the conclusion that a five- to
5 ten-year transition period is consistent with the
6 policy of a conservative transition.

7 Q. But you would also agree that -- strike
8 that.

9 You have not formed any opinion as to
10 what would constitute a conservative transition,
11 correct?

12 A. Well, I believe that five to ten years
13 would be a conservative transition.

14 Q. Sir, you also agree that there are
15 circumstances when an increase of more than
16 10 percent in that market-based component would
17 constitute a conservative transition to full-market
18 pricing, correct?

19 A. Yes.

20 Q. Mr. Higgins, the Kroger located within
21 Duke Energy-Ohio's service territory takes their
22 generation service from competitive retail suppliers,
23 correct?

24 A. Yes.

25 Q. And you are not aware of the terms and

1 conditions of any of those contracts as entered into
2 between the Kroger facilities and those competitive
3 retail suppliers, correct?

4 A. I've not read the terms and conditions,
5 but I have discussed generally with Kroger the nature
6 of the contract.

7 Q. You don't know if those offers from
8 competitive suppliers that are serving Kroger
9 included a demand component, correct?

10 A. As I said, I've not reviewed the
11 contract. My understanding based on -- based on my
12 discussions with Kroger is that there's, in my view
13 as an economist, an implicit demand charge associated
14 with the purchase because it is, as I understand it,
15 tied to a differential from current rates. Current
16 rates have a demand charge.

17 So if one enters into a contract that's
18 based on a differential from current rates and if
19 current rates have a demand charge, even though a new
20 contract may not have an explicit demand charge in
21 it, implicitly the demand charge from the reference
22 price does.

23 Q. And is this a conversation that you've
24 had with Kroger, sir, subsequent to your
25 December 22nd deposition?

1 A. No. No. Was prior to the deposition,
2 and during the deposition I did state that I was
3 aware there are contracts that are -- there are
4 arrangements that are based on differences from
5 current tariff.

6 Q. Sir, you can't comment on whether
7 suppliers in Duke Energy-Ohio's service territory
8 used fixed kilowatt-hour charges in their offers to
9 commercial and industrial customers other than
10 Kroger, correct?

11 A. Correct.

12 Q. Under your rate design proposal as
13 described in your testimony Duke Energy-Ohio would be
14 taking the per kilowatt-hour rate from suppliers and
15 converting that into a different -- or, another rate
16 for customers, correct?

17 A. Yes, after those same suppliers have
18 embedded a capacity --

19 Q. Well, sir --

20 A. -- price into their bid, yes.

21 Q. The question was just are they taking a
22 per hour rate from suppliers and converting that into
23 another or different rate for customers?

24 A. They would be taking the capacity --

25 Q. Sir.

1 A. -- portion.

2 No, I'm answering your question. They
3 would be taking the capacity portion of the bid price
4 and converting it into a demand charge.

5 Q. And as a result of that, Mr. Higgins,
6 what Duke Energy -- Duke Energy-Ohio would be
7 collecting a different rate from customers than it
8 pays to suppliers, correct?

9 A. Yes.

10 Q. So under your rate design as described in
11 your direct testimony, a supplier cost reconciliation
12 rider would be necessary to ensure that the costs
13 paid to suppliers are the same as those costs paid by
14 customers, correct?

15 A. Correct. But that's not unique to my
16 proposal because, as it stands now Duke's own
17 proposal would have a different retail rate than the
18 specific rate that is paid to the wholesale
19 providers. There's a translation or reconciliation
20 required either way.

21 Q. So you have no reason, sir, to contest
22 the Rider SCR as proposed by the company in its
23 filing, correct?

24 A. I have not contested it.

25 Q. Sir, have you reviewed the auction

1 schedule that Duke Energy-Ohio proposed as part of
2 its filing in this proceeding?

3 A. I reviewed it generally.

4 Q. Would you agree with me that the
5 staggered auction as set forth in that filing
6 mitigates price volume?

7 A. I believe that the staggered approach
8 would help mitigate price volatility, yes.

9 Q. And under the MRO as described in the
10 company's filing, demand charges would still have a
11 demand component, correct?

12 A. Associated with the portion of the rate
13 that's based on the legacy price.

14 Q. Sir, if we may briefly discuss the chart
15 that appears on the top of page 14 of your testimony,
16 please. Do you have that, sir?

17 A. I do.

18 Q. There is in that chart a reference to
19 customers on rate TS having a 30 percent load factor,
20 correct?

21 A. Correct.

22 Q. You are not aware of any Duke Energy-Ohio
23 customers on rate TS having a 30 percent load factor,
24 correct?

25 A. Correct.

1 Q. Similarly, sir, you are not aware of any
2 Duke Energy-Ohio customers on rate DS that have an
3 80 percent load factor, correct?

4 A. I'm not specifically aware of any, no.

5 Q. Mr. Higgins, your testimony regarding
6 demand charges is not a reason on which the
7 Commission could rely rejecting Duke Energy-Ohio's
8 application for approval of an MRO, correct?

9 A. Correct. Well, my understanding is that
10 the Commission can order modifications to the
11 company's proposal, so if the Commission were to
12 approve the MRO, then this is a modification that I'm
13 recommending.

14 Q. So simply a recommendation, sir, correct?

15 A. Yes.

16 Q. So, sir, is it fair to say that the only
17 reason that you articulate in your direct testimony
18 on which the Commission could rely in rejecting Duke
19 Energy-Ohio's application is the blending period
20 described in its filing?

21 A. Yes.

22 Q. Sir, if the Commission were to disagree
23 with your interpretation and accelerate the
24 transition to market in less than five years, you
25 offer no other reason on which the Commission could

1 rely in rejecting the company's filing, correct?

2 A. Correct.

3 Q. Sir, on page 18 of your testimony you
4 discuss a rate GT applicable to customers in the
5 FirstEnergy distribution utility service companies,
6 correct?

7 A. Yes.

8 Q. And, sir, effective with the case
9 approved under Case No. 10-388, rate GT will no
10 longer be in effect for those FirstEnergy customers,
11 correct?

12 A. Well, my understanding, as I reviewed
13 FirstEnergy's tariff over the weekend, and there is
14 still a provision that says it's effective
15 January 1st, 2011, for the economic development
16 rider which does have this demand charge adjustment
17 in it. So unless that posting on the FirstEnergy
18 website is in error, I do believe there is a -- the
19 demand charge provision that I'm discussing here is
20 effective this year.

21 Q. Sir, you were present when Mr. Fein
22 testified this morning, correct?

23 A. Yes.

24 Q. And you heard the discussion about the
25 auction prices that cleared relative to the

1 FirstEnergy auction that was conducted in October of
2 2010, correct?

3 A. Yes.

4 Q. Sir, would you agree that those auction
5 prices are a fair proxy for market prices for the
6 period to which they apply?

7 A. I agree.

8 MS. SPILLER: Nothing further. Thank
9 you, your Honor.

10 EXAMINER PIRIK: Mr. Beeler?

11 MR. BEELER: No questions, your Honor.

12 EXAMINER PIRIK: No questions?

13 Redirect?

14 MR. YURICK: May I have a moment with my
15 witness, your Honor?

16 EXAMINER PIRIK: Yes. We'll stay right
17 here.

18 (Recess taken.)

19 MR. YURICK: No redirect, your Honor.

20 EXAMINER PIRIK: Thank you.

21 MR. YURICK: May the witness be excused
22 at this point?

23 EXAMINER PIRIK: Yes, the witness may be
24 excused.

25 MR. YURICK: At this point The Kroger

1 Company would move for the admission of Kroger
2 Exhibit 1, the prefiled testimony of Mr. Higgins.

3 EXAMINER PIRIK: Thank you.

4 Are there any objections?

5 MR. KUTIK: Yes, your Honor. We object
6 to the portions of Mr. Higgins' testimony that were
7 the subject of our motions to strike.

8 EXAMINER PIRIK: The objection is noted
9 on the record. Hearing no other objection, the
10 Kroger Exhibit 1 shall be admitted.

11 MR. YURICK: Thank you very much, your
12 Honor.

13 (EXHIBIT ADMITTED INTO EVIDENCE.)

14 EXAMINER PIRIK: We'll go off the record.

15 (Discussion off the record.)

16 EXAMINER PIRIK: We'll be back at 12:30.

17 (Luncheon recess taken.)

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Tuesday Afternoon Session,
January 18, 2011.

- - -

EXAMINER PIRIK: We'll go back on the
record.

Mr. Boehm.

MR. BOEHM: Thank you, your Honor. Your
Honor, I would call as our witness Mr. Stephen J.
Baron.

(Witness sworn.)

EXAMINER PIRIK: Thank you. Please be
seated.

- - -

STEPHEN J. BARON

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

DIRECT EXAMINATION

By Mr. Boehm:

Q. Mr. Baron, do you have in front of you a
document entitled "Direct Testimony and Exhibits of
Stephen J. Baron on Behalf of the Ohio Energy Group"?

A. Yes, I do.

MR. BOEHM: Your Honor, I've already
provided a copy to the court reporter and would like
to have that marked as OEG Exhibit No. 1.

1 EXAMINER PIRIK: The document will be so
2 marked.

3 MR. BOEHM: Thank you.

4 (EXHIBIT MARKED FOR IDENTIFICATION.)

5 MR. KUTIK: Your Honor, could we go off
6 the record?

7 EXAMINER PIRIK: Yes.

8 (Discussion off the record.)

9 Q. (By Mr. Boehm) Mr. Baron, would you state
10 your name and spell your name for the court reporter?

11 A. Yes, Stephen J. Baron, S-t-e-p-h-e-n,
12 middle initial J, baron.

13 Q. And, Mr. Baron, did you prepare OEG
14 Exhibit No. 1 or was it prepared under your direction
15 and supervision?

16 A. Yes.

17 Q. And do you have any corrections with
18 regard to that document or the exhibits?

19 A. Not to my knowledge.

20 Q. If I were to ask you the same questions
21 that are contained in there would your answers be the
22 same today?

23 A. Yes, they would.

24 MR. BOEHM: Your Honor, we would submit
25 the witness for cross-examination.

1 EXAMINER PIRIK: Thank you.

2 MR. KUTIK: Your Honor, at this time
3 would you entertain motions to strike?

4 EXAMINER PIRIK: Yes.

5 MR. KUTIK: Your Honor, the basis of the
6 motions are the same as the bases of the ones we
7 submitted on behalf or with respect to Mr. Higgins'
8 testimony, so I will not belabor that point in
9 anticipation of your ruling but just so I can make my
10 record.

11 EXAMINER PIRIK: Yes.

12 MR. KUTIK: We have seven motions and our
13 first motion, your Honor, is directed to page 4
14 starting at line 9, the first bullet point there with
15 the sentence that begins "RC 4928.142(D)" to the end
16 of that bullet point on line 14. That's our first
17 motion.

18 Should I continue, your Honor?

19 EXAMINER PIRIK: Yes.

20 MR. KUTIK: Our second motion, your
21 Honor, is directed to page 5, starting at line 12,
22 the sentence that begins there "This is in contrast,"
23 the entire sentence that ends on line 13.

24 Our third motion is directed to the
25 question and answer that begins on line 15 of page 5

1 continuing over to the end of the answer on page 6,
2 line 5.

3 Our fourth motion is directed to the
4 table that appears on page 7 and particularly the two
5 columns including and under the heading that says "RC
6 4928.142(D)."

7 Our fifth motion, your Honor, is directed
8 to page 12 and the question and answer that begins on
9 line 4 and ends on line 7.

10 Our sixth motion continues on page 12,
11 line 9 and the question and answer that begins there
12 and ends on line 1 of page 13.

13 And our seventh and last motion, your
14 Honor, relates to page 16, starting at line 15 after
15 "RC 4928.142(D)," in other words, the rest of that
16 answer. That concludes our motions.

17 EXAMINER PIRIK: Mr. Kutik, do you want
18 to reiterate your arguments or you would just want to
19 reference the argument you had made with regard to
20 the previous witness?

21 MR. KUTIK: I would reference our other
22 arguments, your Honor. In sum, this is a brief
23 masquerading as testimony.

24 EXAMINER PIRIK: Mr. Boehm.

25 MR. BOEHM: Your Honor, in order to be

1 equally efficient I will reference my former defense
2 of Witness Higgins' testimony in this regard.

3 EXAMINER PIRIK: Are there any other
4 comments that anyone would like to make?

5 MS. SPILLER: Your Honor, Duke
6 Energy-Ohio would support the motion to strike as
7 articulated by Mr. Kutik and then we also have a
8 motion on a separate issue.

9 EXAMINER PIRIK: A motion to strike?

10 MS. SPILLER: Yes, ma'am.

11 EXAMINER PIRIK: Again, I do understand
12 that there is a fine line and that the majority of
13 these issues are appropriate for briefing and need to
14 be included in the briefs, but at this time I'm going
15 to deny the motion to strike and allow the
16 information to continue to be in the record.

17 Ms. Spiller.

18 MS. SPILLER: Thank you, your Honor.
19 With regard to Mr. Baron's testimony, he also renders
20 opinion on whether there is an issue for the
21 Commission to consider regarding the prudence of the
22 decision of Duke Energy-Ohio to realign from the
23 Midwest ISO to the PJM Interconnection. He submits
24 this issue in the context of the recovery of costs
25 associated with that realignment. That issue is not

1 one before the Commission in this proceeding and as
2 such it is an irrelevant issue for purposes of this
3 hearing.

4 I would further submit that Mr. Baron
5 simply restates opinions of counsel as shared with
6 him regarding the scope of review that may be
7 permitted by this Commission on the issue of Duke
8 Energy-Ohio's realignment.

9 So we would argue that portions of
10 Mr. Baron's testimony are both improper to the extent
11 he is attempting as an expert witness to restate
12 opinions of legal counsel, also that they are
13 irrelevant to the issues to be decided in this
14 proceeding.

15 With regard to the particular testimony
16 at issue, the first is on page 4 beginning on line
17 30 -- I'm sorry, beginning on line 31, the clause
18 that reads "...such as the Company's transmission
19 cost recovery proposals" continuing on through the
20 balance of that to line 37.

21 Similarly, your Honor, on page 20 the
22 sentence on line 15 that begins "As I will more fully
23 discuss below...", continuing on through line 4 on
24 page, I'm sorry, continuing on through line 16 on
25 page 21.

1 On page 22, sentence that begins on line
2 4 "This information would be material...", continuing
3 on through the conclusion of that sentence on line 6.
4 And, your Honor, on page 23, on line 4, the second
5 half of the sentence that says "...and require the
6 Company to refile its request in a separate
7 proceeding, not tied to the MRO approval proceeding."

8 And then the last part of that answer
9 that begins on line 11 starting with "The issues
10 raised by the Company's request...", concluding
11 through that answer on line 17.

12 EXAMINER PIRIK: Does that conclude
13 your -- that's it?

14 MS. SPILLER: Yes, your Honor.

15 EXAMINER PIRIK: Just a minute,
16 Mr. Boehm, I just want to read through some of these
17 to see --

18 MR. BOEHM: Yes, your Honor, I'll need to
19 do that myself.

20 EXAMINER PIRIK: Okay.

21 Whenever you're ready, Mr. Boehm.

22 MR. BOEHM: I wonder, your Honor, may I
23 ask the court reporter to read that objection so I
24 have it firmly in mind?

25 (Record read.)

1 MR. BOEHM: If I may, your Honor. As you
2 may know, the testimony of Mr. Baron is that this
3 whole issue of the costs associated with the movement
4 from MISO to the PJM is a fitting subject of another
5 proceeding, not this proceeding, okay.

6 And I think his testimony is to the
7 extent that's true, I think I hear implicitly from
8 the company that they seem to agree that it's true,
9 then Mr. Baron said if that topic is really a topic
10 for another proceeding, then the topic of how to
11 recover any costs attendant upon that change is also
12 a fitting subject of that other proceeding, not of
13 this proceeding. That the two go together, I think.
14 Logically, that's a reasonable position and I don't
15 understand the -- I don't know why it's
16 objectionable.

17 EXAMINER PIRIK: Yes.

18 MS. HOTZ: Your Honor, we would agree --

19 EXAMINER PIRIK: Are you agreeing with
20 me --

21 MS. HOTZ: -- Duke is the one.

22 EXAMINER PIRIK: You're agreeing with
23 Mr. Boehm?

24 MS. HOTZ: Yes, with Mr. Boehm. Duke
25 incorporated the recovery of those costs in their

1 application and I think it's difficult for parties
2 not to address that issue because they did it in
3 their application.

4 EXAMINER PIRIK: Mr. Oliker.

5 MR. OLIKER: I would add that I think at
6 least perhaps four different witnesses from Duke have
7 opined on the benefits of moving to PJM, so I think
8 it would be the right of the other parties to also
9 weigh in on that issue.

10 EXAMINER PIRIK: Ms. Spiller.

11 MS. SPILLER: Thank you, your Honor.

12 With regard to Mr. Oliker's statements, those
13 witnesses opined in the scope of cross-examination
14 and over objection from Duke Energy-Ohio and I think,
15 you know, we are now starting to split hairs,
16 Mr. Oliker I suspect would contend that the benefits
17 of the realignment were integral to his allegation of
18 a corporate separation violation, but Mr. Boehm, by
19 his own admission here, acknowledges that cost
20 recovery is not a fitting issue in this particular
21 case.

22 To be clear, Duke Energy-Ohio is asking
23 the Commission to approve two riders, Rider BTR and
24 Rider RTO, through which FERC approved costs will be
25 recovered.

1 There was no Duke Energy-Ohio witness who
2 testified, nor was there a Duke-Ohio witness so
3 examined on cross-examination regarding the dollar
4 amounts specific to those riders, the rates for those
5 riders. In other words, Duke Energy-Ohio through
6 this case is not asking the Commission to approve
7 particular dollar amounts that would be recovered
8 either through Rider BTR or Rider RTO.

9 EXAMINER PIRIK: Having heard your
10 objection, I'm going to allow the information to
11 continue to be in the record and deny your motion to
12 strike, but you will be able to cross-examine so that
13 he can clarify specifically what his testimony is
14 referencing.

15 MS. SPILLER: Thank you, your Honor.

16 EXAMINER PIRIK: We're tendered for
17 cross-examination?

18 MR. BOEHM: Yes, your Honor.

19 EXAMINER PIRIK: Mr. Petricoff.

20 MR. PETRICOFF: Yes, your Honor, no
21 questions.

22 EXAMINER PIRIK: Okay. FirstEnergy?

23 MR. KUTIK: Yes, your Honor, thank you.

24 - - -

25 CROSS-EXAMINATION

1 By Mr. Kutik:

2 Q. Mr. Baron, you would agree with me, would
3 you not, that the question of whether the MRO
4 application complies with the statutes at issue is
5 ultimately a legal question?

6 A. I would say that's correct. I mean,
7 that's my experience in probably every regulatory
8 proceeding I've ever been in, that ultimately issues
9 will -- can be finally adjudicated by a court and so
10 to that extent they're legal issues.

11 Q. Your opinion about the requirements of
12 4928.142 is based upon your experience, expertise,
13 and your participation in cases that address similar
14 types of issues in the past, correct?

15 A. Over the years, not -- I've certainly
16 testified in, specifically in Ohio, in ESP
17 proceedings and MRO proceedings involving your client
18 or FirstEnergy I guess, your other client, and prior
19 to that the retail access proceedings in the
20 early-2000s involving the separation or movement to
21 retail access in Ohio.

22 I've done similar -- analyzed similar
23 cases and participated in numerous cases in
24 Connecticut and in Pennsylvania involving retail
25 access and reviewed statutes similar, but not

1 identical, to the Ohio statutes regarding provisions
2 associated with standard service offer and consumer
3 protection.

4 Q. So the answer to my question is yes.

5 A. It's based on my experience, yes.

6 Q. Okay. Now, you're not an attorney.

7 A. That's correct.

8 Q. And you're not rendering, quote, a legal
9 opinion, end quote, right?

10 A. That's correct, I'm -- even if I was an
11 attorney, I wouldn't be here rendering a legal
12 opinion.

13 Q. Okay. But you did rely, in part, on
14 advice of counsel, correct?

15 A. Yes. To the extent that I've reviewed
16 the material in this case, the testimony of the
17 company, I had conversations on a number of occasions
18 with counsel regarding my opinions, my views, I
19 received comments from counsel, so to that extent,
20 absolutely.

21 Q. And with regard to your experience, you
22 mentioned a little bit that you testified in other
23 states, but you recognize, do you not, and you agree
24 that the statute in Ohio, and particularly we're
25 talking about SB 221, is unique?

1 A. Yes. I would say it's unique and,
2 obviously, depending on how you characterize
3 "unique." It's unique in that to my knowledge there
4 was no other exact statute like that in another
5 state.

6 It's not unique if you took the broad
7 universe of statutes regarding the offering of
8 standard services and so forth, other legislation in
9 other states like Pennsylvania have similar
10 legislative requirements.

11 Q. But with respect to, for example, the MRO
12 and the blending requirement, that's unique, correct?

13 A. Well, based on my knowledge, I'm not
14 familiar --

15 Q. In your experience.

16 A. In my experience I don't recall seeing
17 any statute that has the specific language requiring
18 the type of blending that's called for in Ohio.

19 Q. With regard to your testimony in other
20 cases with respect to the statute, that is section
21 4928.142, it's true, is it not, that you can't recall
22 that any of your testimony dealt with the meaning and
23 application of section 4928.142(D) and (E), correct?

24 A. That's correct. I previously testified
25 in a FirstEnergy MRO proceeding and to the best of my

1 recollection, and I've recently reviewed my
2 testimony, I did not address those specific
3 provisions. I did review the entire statute in
4 preparation for the FirstEnergy case as well as this
5 proceeding, and of course during the pendency of the
6 FirstEnergy case there was various testimony on
7 issues, but I don't recall the blending issue as
8 being one of them, though it could have been.

9 Q. So we're clear, the testimony in those
10 cases that you've testified with respect to section
11 4928.142 or 143 did not relate to the meaning and
12 application of 142(D) and (E), correct?

13 A. Well, with respect to the blending,
14 that's true to the best of my recollection. It's
15 possible, and I'd have to go through and review my
16 testimony to see if there was some other provision in
17 division (D) or (E) that I might have addressed, but
18 to the extent that your question's related to the
19 blending issue, I don't -- I did not, to the best of
20 my recollection, testify on that issue in the prior
21 MRO.

22 Q. Well, isn't it true that you cannot
23 recall providing any testimony about what section
24 4928.142(D) and (E) meant? Correct?

25 A. That's to the best of my recollection,

1 prior to my testimony in this case I don't recall
2 offering testimony on those issues.

3 Q. All right.

4 A. As I said, I may have -- I likely did
5 review that as part of both participation in ESP
6 cases and MRO cases, but . . .

7 Q. But you didn't provide testimony on that
8 issue.

9 A. That's correct.

10 Q. All right. Now, when -- you would agree
11 with me that when we are interpreting a statute we
12 should assume that the legislature, General Assembly,
13 took care in deciding which words to use; that would
14 be reasonable, correct?

15 A. Yes, I would agree.

16 Q. And when we're trying to discern the
17 policy that might underlie a statute, we begin with
18 the words of the statute; that's also correct, right?

19 A. Yes. Certainly the words in the statute
20 would be the primary consideration. Obviously, they
21 have to be dealt -- interpreted in a context of other
22 provisions in the statute and the entire framework of
23 the issue that we're dealing with which is, in this
24 case, a transition to full market pricing at some
25 point or an alternative such as ESP.

1 Q. But we start with the words of the
2 statute, correct?

3 A. Yes. I would agree.

4 Q. Now, turning to the language of section
5 4928.142(E), it uses the words "alter," "alteration,"
6 and "altering," correct?

7 A. Yes.

8 Q. The words "extend," "extension," and
9 "extending" are not in there, correct?

10 A. In division (E)?

11 Q. Yes.

12 A. I don't see those exact words.

13 Q. Thank you.

14 A. But obviously in the context of the
15 entire division it's referring to an extension of a
16 length of time.

17 Q. Well, my question, sir, is do the words
18 "extend, extension, extending" appear in division
19 (E)? Do they or don't they?

20 A. Those words, as I said, I don't see
21 those, but to me that doesn't really address the
22 issue as to the context of the division.

23 MR. KUTIK: Move to strike everything
24 after the word "but" including the word "but."

25 EXAMINER PIRIK: Overruled. Denied.

1 Q. Now, isn't it true that you believe that
2 the words "alter," "alteration," and "altering" can
3 only mean "extend," "extension," or "extending"?

4 A. Yes, in the context of the entirety of
5 the language of division (E), that would be the
6 logical and reasonable interpretation.

7 Q. Now, a large part of your belief with
8 respect to the fact that, in your view, division (E)
9 refers to the fact that you can only extend in terms
10 of altering, is that the blending period can be set
11 for no longer than ten years.

12 A. Yes. That's certainly a large reason,
13 yes.

14 Q. And the clause that that issue appears,
15 that is the potential to extend it as long as ten
16 years, that is the blending period as long as ten
17 years, is included in a clause that begins with the
18 word "including." Correct?

19 A. I see that word after the comma.

20 Q. Right. So the answer to my question is
21 yes.

22 A. Yes.

23 Q. And the word "including" means that it's
24 one of other things that could happen, correct?

25 A. Yes, but in the -- as I read the entire

1 sentence, my interpretation is that the alteration
2 would be a consideration of an extension up to ten
3 years. That's the context of that portion of
4 division (E).

5 Q. My question to you is doesn't the word
6 "including" mean that it's one of the things that
7 could happen or may happen?

8 A. It says -- I would imagine that that's
9 what it means, that "including," because of the
10 length of time, it's a specific instruction that when
11 an alteration occurs, that -- from the standpoint of
12 time it not exceed ten years. That's -- and the use
13 of the word "including" suggests that there possibly
14 could be some other issue.

15 Q. So again --

16 A. It's not stating.

17 Q. The word "including" means it's one of
18 other things that could happen, correct?

19 A. I think the way I answered it previously
20 is that the language of the division specifically
21 identifies a length of time up to ten years,
22 "including" means that possibly there could be some
23 other issue.

24 Q. Do you have your deposition, Mr. Baron?

25 A. I certainly do.

1 MR. KUTIK: Your Honor, may I approach to
2 give the Bench a copy?

3 EXAMINER PIRIK: Yes, please.

4 Q. Mr. Baron, you recall that your
5 deposition was taken on December 21st, 2010?

6 A. Yes.

7 Q. Mr. Baron, I want to refer you to page
8 101 of your deposition. Are you there, sir?

9 A. Yes.

10 Q. And were you asked the following
11 questions and did you give the following answers
12 starting on line 24, "Question: Okay. And
13 'including' means that it's one of other things that
14 may happen or that could happen or that could be
15 included, correct?

16 "Answer: Well, I think as a general
17 matter there's -- by the phrase 'include' -- the word
18 "including" suggests that there could be other
19 factors; I guess as a matter of the English language
20 that's probably true."

21 Was that your testimony, sir?

22 A. Yes. I think that's similar to what I
23 just said in answer to your question, but --

24 Q. Well, sir, you don't answer my questions
25 "yes" or "no," you have to give explanations so I'm

1 not sure what your answer is.

2 A. Okay.

3 Q. So that's why I asked you the question.

4 So that was your testimony, is it not?

5 A. Yes.

6 Q. Thank you.

7 A. And as I said, this testimony in my
8 deposition, to the best of my perception, was exactly
9 how I answered your question.

10 Q. Well, the record will reflect what it
11 reflects but let me now direct you to another part of
12 division (E) and specifically the words that it uses
13 that the Commission "may alter prospectively the
14 portions specified in that division to mitigate any
15 effect of an abrupt or significant change to the
16 electric distribution utility's standard service
17 offer price." Do you see that?

18 A. I'm sorry, would you give me a line and
19 page reference?

20 Q. I'm talking about division (E) of the
21 statute.

22 A. Oh, I'm sorry.

23 Q. Are you familiar with that statute?

24 A. I thought you were back on my deposition.
25 I'm sorry.

1 Q. No.

2 A. Please, would you repeat your question?

3 Q. Sure. I will. The question, sir, is --
4 you're familiar with a phrase that's used in division
5 (E) of section 4928.142 which says that "The
6 Commission; may alter prospectively the portions
7 specified in that division to mitigate any effect of
8 an abrupt or significant change in the electric
9 distribution utility's standard service offer price."

10 A. Yes, I'm familiar with that.

11 Q. And you would agree with me that the word
12 "any" means all.

13 A. Yes. I would agree with that.

14 Q. And when we're talking about the SSO
15 price, it contains two components. It contains a
16 component that is derived from a market-based
17 proceeding or procedure for an MRO and the then
18 standing ESP price, correct?

19 A. Yes.

20 Q. And with regard to what we might call the
21 legacy ESP component, it could increase during the
22 blending period based upon adjustment for factors
23 that are specified in section 4928.142(D), correct?

24 A. Yes, I would agree.

25 Q. And that would include things like fuel

1 costs, power purchased costs, and environmental
2 compliance costs.

3 A. Yes, those are permissible adjustments.

4 Q. And you have not done an analysis or
5 study of Duke's riders as they exist today with
6 respect to the recovery of those costs, correct?
7 Those types of costs.

8 A. Well, when you say -- when you say
9 "analysis," are you talking about a projection or any
10 analysis? I mean, I haven't done an analysis but it
11 would really help me understand if you're talking
12 about a projection.

13 Q. Well, let me refer you to your testimony
14 in your deposition.

15 A. Okay.

16 Q. Particularly page 94 starting at line 20,
17 did you provide the following testimony in response
18 to the following questions "Question: Thank you.
19 Have you made any study of Duke Energy Ohio's riders
20 or cost recovery mechanisms for the recovery of costs
21 relating to fuel?

22 "Answer: I likely have made reviews like
23 that in the past but I did not -- beyond reviewing
24 the filing in this case, I didn't really make any
25 analysis of those riders in this case.

1 "Question: So other than whatever might
2 be appearing in this case about those riders, you
3 didn't do any such study, correct?

4 "Answer: That's correct, I didn't do any
5 independent analysis in this case of those riders or
6 the projection of costs that might result from those
7 riders.

8 "Question: Would your answer be the same
9 with respect to riders relating to recovery of
10 purchased power costs?

11 "Answer: Yes.

12 "Question: And environmental costs?

13 "Answer: Yes."

14 Is that your testimony in your
15 deposition?

16 A. Yes, and I believe I used the word
17 "projection" in one of the answers and that's what I
18 was trying to get a clarification from you.

19 Q. You understood what my questions meant in
20 the deposition, did you not?

21 A. I guess I answered it. I certainly
22 answered it.

23 Q. Now, with respect to -- you're familiar
24 with something called the significantly excessive
25 earnings test, right?

1 A. Yes, in general.

2 Q. Or SEET.

3 A. Yes.

4 Q. And you haven't looked at any filings
5 relating to Duke and any potential for Duke to exceed
6 the SEET, correct?

7 A. That's correct.

8 Q. And, in fact, you don't know whether Duke
9 Energy-Ohio is in danger of exceeding the SEET,
10 correct?

11 A. That's correct.

12 Q. Now, if Duke recovers costs dollar for
13 dollar through a pass-through cost recovery mechanism
14 like riders, increases in the level of the cost
15 recovery riders would not have an effect on earnings,
16 correct?

17 A. All else being equal, if I understand
18 your question, that would be correct. I'm going to
19 try to explain it just to make sure this is the
20 context of your question.

21 If Duke was earning X percent return at
22 an instant in time and then a cost, an adjustment
23 cost like fuel went up by a million dollars and the
24 company recovered a million dollars of additional
25 revenue, those two, the expense increase and the

1 revenues would wash, the return would still be X.

2 It's an arithmetic truism.

3 Q. So in the example, that gave the effect
4 of an increase in the cost recovery rider would not
5 have an effect on earnings, correct?

6 A. In the context of the answer I just gave
7 you, that's correct.

8 Q. Now, if there is an abrupt or significant
9 change in the SSO price as a result of a significant
10 or abrupt change -- significant or abrupt changes in
11 the legacy or ESP component of the SSO price, you
12 believe that the Commission would have the authority
13 to shorten the blend period but that that would be
14 bad policy, correct?

15 A. To shorten the blend period?

16 Q. Yes.

17 A. I recall you asking me a question like
18 this in my deposition. As a matter of fact, many,
19 many questions of the same type. And it's my
20 interpretation of division (E) that the Commission
21 would not -- I believe I testified in my deposition
22 that the Commission could not shorten the blending
23 period. It certainly couldn't shorten it until
24 beginning of the year even if it could, and I believe
25 I did say that irrespective of that, it would be bad

1 policy to do so.

2 Q. Well, so do you believe that after the
3 second year, is it your testimony that after the
4 second year the Commission could have the authority
5 or would have the authority to shorten the blending
6 period, but that would be bad policy?

7 A. Because the SSO, this is not related
8 to --

9 Q. No.

10 A. -- whether the legacy price went up, or
11 does it matter?

12 Q. Let me pose the question to you again,
13 since apparently you haven't kept it in mind.

14 The question is, assume that there is a
15 significant or abrupt change in the SSO price as a
16 result of a significant or abrupt change in the
17 legacy ESP component. Are you with me so far?

18 A. Yes.

19 Q. Is it true that after the second year the
20 Commission would have the authority to shorten the
21 blending period, but that would be bad policy?

22 A. I believe that -- now, and the second
23 year I mean in realtime, not sitting where we are
24 today, but as we move forward in time when we are in
25 the second year the language in division (D) says

1 "alter." My contextual interpretation of that is
2 that, in the context of the other provisions of
3 division (E), is that the meaning is to lengthen the
4 time.

5 At the same time, the word "alter" means
6 to change, and so it's possible that the language
7 would grant the Commission the legal authority to do
8 that. Certainly in the context of division (E) I
9 wouldn't interpret it that way because all of the
10 provisions in division (E) speak to lengthening the
11 blending period. It would make no sense to shorten
12 it; it would be adverse to consumer protection.

13 Q. So the Commission could have the legal
14 authority to shorten the blend under my hypothetical,
15 but you believe that that would be wrong and under
16 your view of the appropriate policy that might apply.

17 A. I think I just answered the question --

18 Q. Well, frankly you didn't, that's why I
19 asked you again --

20 A. -- quite clearly and the answer is if one
21 interprets the word "alter" as meaning change and
22 disregards the rest of the context of lengthening the
23 blending period, I don't believe that actually is
24 what the division (E) means when it says "alter."
25 But that's a possibility.

1 Q. Let me refer you to your deposition, sir.

2 A. All right.

3 Q. Let me refer you to page 105.

4 A. What was the page?

5 Q. 105.

6 A. 105, okay.

7 Q. Let me know when you're there, sir. Are
8 you there?

9 A. Yes. Give me a chance to read this.

10 Q. I'm going to read it into the record,
11 sir. Wasn't it your testimony that you gave the
12 following answers to the following questions.
13 Starting at line 14 "Question: So is it your
14 testimony that the Commission would not have the
15 authority under this statute to alter the standard --
16 the blending period or the proportions set out in D
17 if there was a significant and substantial change in
18 the standard service offer price as a result of
19 significant or abrupt changes in the legacy ESP
20 component of that standard service offer price?

21 "Answer: No, I'm not testifying to that.
22 I'm testifying that the Commission -- if it's just --
23 if you're posting a hypothetical where the
24 significant and abrupt change in the blended SSO
25 price is due to an increase in the ESP -- the legacy

1 ESP price, and then the question is can the
2 Commission alter the blending period I would think
3 that the Commission could alter the blending period,
4 but there would be no rationale for altering it by
5 moving to 100 market price in the blending, which is
6 the Company's proposal in this case, when customers
7 have that option already. It would make no sense."

8 Was that your testimony in your
9 deposition?

10 A. Yes, it was.

11 Q. Thank you.

12 Now, with regard to how fast the blend
13 could occur, it's possible that the portion of the
14 SSO price that's market based could go from
15 50 percent to a hundred percent in a year, correct?

16 A. Under the provisions in division (D) from
17 going from year 5 to year 6 it could go to a hundred
18 percent.

19 Q. So, for example, that's something that
20 could be shown in your table 7, correct? Your table
21 1 on page 7, excuse me. That if you look at year 6,
22 if we wanted to fill in some numbers under the RC
23 4928.142(D) column, we could put a hundred percent
24 there, could we --

25 A. Yes.

1 Q. -- not, for market?

2 A. Yes, the question marks are there because
3 division (E) provides the Commission the opportunity
4 to evaluate that beginning in the second year and to
5 extend the blending.

6 Q. Let me change topics for a minute.
7 You're familiar, are you not, with the wholesale
8 markets in PJM and MISO?

9 A. Generally, yes.

10 Q. And you would agree with me, would you
11 not, that the PJM wholesale market is a robust and
12 competitive market?

13 A. Robust and competitive wholesale market,
14 yes.

15 Q. Yes. And with respect to the wholesale
16 market within MISO, to the best of your knowledge,
17 based on the information available to you, you
18 believe that also is a robust, competitive market.

19 A. Yes, I would agree.

20 Q. You made some comments on Mr. Rose's
21 financial projections. Would it be correct to say
22 that you have no reason to believe that Mr. Rose's
23 financial numbers or projections are right or wrong?

24 A. That's correct, they're projections. I
25 have no -- I've reviewed Mr. Rose's testimony, the

1 methodology that he employed, but I haven't done any
2 detailed analysis to assess whether they are
3 reasonable or how correct they might be, or
4 incorrect.

5 MR. KUTIK: No further questions, thank
6 you.

7 EXAMINER PIRIK: Thank you.

8 Ms. Mooney?

9 MS. MOONEY: No questions.

10 MR. YURICK: No questions, thank you,
11 your Honor.

12 EXAMINER PIRIK: Mr. Oliker?

13 MR. OLIKER: No questions, your Honor.

14 EXAMINER PIRIK: Mr. Hart?

15 MR. HART: No questions.

16 EXAMINER PIRIK: Mr. Montgomery?

17 MR. MONTGOMERY: No questions.

18 EXAMINER PIRIK: Ms. Spiller.

19 MS. SPILLER: Thank you, your Honor.

20 - - -

21 CROSS-EXAMINATION

22 By Ms. Spiller:

23 Q. Good afternoon, Mr. Baron.

24 A. Good afternoon.

25 Q. Sir, you would agree with me that the

1 question of whether Duke Energy-Ohio's MRO
2 application complies with the statute is a legal
3 decision?

4 A. Ultimately I think I indicated that it
5 would be a decision that the Commission and perhaps
6 courts would have to determine, it's a statutory
7 interpretation.

8 Q. Sir, you were not involved in drafting
9 Senate Bill 221, correct?

10 A. That's correct.

11 Q. You also had no involvement, sir, in
12 developing Senate Bill 221, correct?

13 A. Yes, that's correct.

14 Q. You have not reviewed any legislative
15 history on Senate Bill 221 for purposes of developing
16 your direct testimony in this proceeding, correct?

17 A. That's correct. I haven't reviewed any
18 specific history. I cannot remember whether I did in
19 some prior proceeding in Ohio, but I did not in this
20 proceeding.

21 Q. And, sir, to be clear, the prior
22 proceedings in Ohio in which you offered direct
23 testimony would not have concerned the blending issue
24 that is integral to your direct testimony in this
25 proceeding, correct?

1 A. That's correct, but to the extent that I
2 might have reviewed some document or some material,
3 the issue may have been in there. I just don't
4 recall that.

5 Q. Mr. Baron, you do not, as a policy
6 matter, oppose the market rate offer, correct?

7 A. No.

8 Q. And you are not disputing, sir, that Duke
9 Energy-Ohio's proposed competitive bidding process
10 plan as outlined in its application is open, fair,
11 and transparent, correct?

12 A. I am not offering an opinion on that,
13 correct.

14 Q. Similarly, sir, you are not offering an
15 opinion on whether Charles River Associates is an
16 independent auction manager, correct?

17 A. That's correct.

18 Q. Mr. Baron, you do not dispute that the
19 Midwest ISO is an independent regional transmission
20 organization, or RTO, approved by the FERC, correct?

21 A. I'm not disputing that.

22 Q. And you also do not dispute, sir, that
23 the PJM Interconnection, LLC is an independent RTO
24 approved by the FERC, correct?

25 A. That is correct.

1 Q. You would agree, sir, that the Midwest
2 ISO has an independent market monitor, correct?

3 A. Yes.

4 Q. And you would also agree that PJM has an
5 independent market monitor, correct?

6 A. Yes.

7 Q. There was some discussion, Mr. Baron,
8 about the legacy ESP price, and just so that you and
9 I are using the same terminology, the SSO price that
10 would be charged to Duke Energy-Ohio's customers
11 during the blending period under the MRO is comprised
12 of two components, correct?

13 A. Yes, that's correct.

14 Q. One being the market-based or auction bid
15 component, correct?

16 A. Yes.

17 Q. And the other being the company's most
18 recent standard service offer price, correct?

19 A. That is correct.

20 Q. And that second component, the most
21 recent standard service offer price, is what you have
22 referred to in your testimony today as the legacy ESP
23 price, correct?

24 A. Yes.

25 Q. Can we have the understanding, sir, that

1 we'll continue to use that terminology?

2 A. Yes, that would be appropriate for me.

3 Q. Thank you.

4 Mr. Baron, based upon your experience you
5 have reviewed statutes in Ohio, correct?

6 A. I have.

7 Q. And, in fact, sir, fair to say you have
8 reviewed statutes in other jurisdictions?

9 A. That is correct.

10 Q. And are you aware, sir, of the rule --

11 A. Including the Federal Power Act.

12 Q. Excuse me? Go ahead.

13 A. I just said including the Federal Power
14 Act.

15 Q. And you would agree with me, sir, that a
16 rule of statutory construction is that words are to
17 be given their plain and ordinary meaning unless
18 otherwise specifically defined in the statute,
19 correct?

20 A. Yes, I think that's my understanding.

21 Q. But you have given the word "alter" the
22 meaning of "extend, lengthen, or enlarge," correct?

23 A. I have because of the language in
24 division (D), the context -- excuse me, the language
25 and context in division (E) and the context of both

1 division (D) and (E) that address consumer
2 protection.

3 Q. Well, sir, let's talk about that for a
4 moment. It's your belief and opinion in this
5 proceeding that the Commission can only lengthen the
6 term of the blending period because this provision
7 is, in essence, a consumer protection provision,
8 correct?

9 A. That is my interpretation. I believe I
10 had -- if you take the word "alter" and simply look
11 at that word, it means "change," but in the context
12 of the other provisions of division (E) where it
13 talks -- addresses the lengthening of the blending
14 period and in concert with division (D), my view
15 based on my experience, not only in Ohio but in other
16 states, is that those provisions are designed to
17 provide protection to consumers to basically provide
18 mitigation in the event of large price increases as
19 rates -- as standard offer rates move to a hundred
20 percent market.

21 Q. And, sir, in preparing your direct
22 testimony in this case did you review the provisions
23 of Revised Code section 4928.02 that set forth the
24 specific policies of the state?

25 A. I don't -- that sounds familiar. I don't

1 know whether I reviewed that in the -- as part of my
2 preparation in this case. I very likely have
3 reviewed that in the last two years, but I honestly
4 just don't remember now.

5 Q. Sir, so while you have -- strike that.

6 Because you have reviewed section 4928.02
7 which sets forth the policy of the state of Ohio, you
8 would not dispute that one of those policies is to
9 protect at-risk populations, would you?

10 A. No; I recall -- the answer is I wouldn't
11 dispute that.

12 Q. Okay.

13 A. I recall some language, I don't have it
14 in front of me, I'm going to see if I can find it
15 though, it may help me answer your questions.

16 Q. Well, my question, sir, was simply
17 whether you disputed that that was one of the
18 policies of the state.

19 A. I'm sorry. I don't dispute it.

20 Q. Okay. Thank you.

21 Mr. Baron, do you recall whether it is
22 the policy of the state of Ohio to give customers who
23 receive standard service offer supply under an MRO
24 the option of choosing between market prices and some
25 other price?

1 A. A customer. It's my understanding that
2 that is the policy, that customers -- wait. Would
3 you repeat the question again? I'm sorry.

4 Q. Sure.

5 MS. SPILLER: Maria, can you read that
6 back, please?

7 (Record read.)

8 A. And when you said "choosing between
9 market prices," did you mean going to a competitive
10 retail supplier?

11 Q. I mean market price, sir.

12 A. Well, to the extent that customers -- to
13 the extent that an MRO is implemented, customers in
14 Ohio are still -- still have the right to go and take
15 service from an alternative supplier at presumably
16 market rates; that is part of the policy.

17 Q. And, sir, isn't that really the crux of
18 your direct testimony in this proceeding, that you do
19 not believe the Commission can or should ever shorten
20 the blend under the market rate offer to less than
21 five years because customers always have the right to
22 select a different supplier?

23 A. Well, as a policy matter and as a
24 consumer protection matter it would -- the answer is
25 yes, that since customers always have the option to

1 get 100 percent market prices, it would make no sense
2 whatsoever for the Commission to shorten the blending
3 period and forego that option to consumers, and it's
4 particularly improper, in my view, to preapprove, as
5 the company's requesting in this case, a shortening
6 before there is actually any information about market
7 prices relative to the legacy ESP rates in 2012, '13,
8 '14, and so forth, beyond.

9 Q. Sir, to be clear, customers' ability to
10 shop is the only reason on which you rely in
11 concluding that as a policy matter the Ohio
12 Commission cannot or should not shorten the blending
13 period, correct?

14 A. The answer to that is, that is the basis
15 for my recommendation, but I would add that to the
16 extent that we're talking about the company's
17 proposal in this case, which is to do a shortening of
18 the blending period before the second year of the
19 MRO, there's no basis, as I understand division (E),
20 for the Commission to do that.

21 Q. Well, sir, I appreciate that, but let's
22 talk in general terms, and I'll try again. A
23 customer's ability to shop is the only reason on
24 which you rely in concluding that in your opinion the
25 public policy of Ohio is such that the Commission

1 cannot or should not shorten the blend to less than
2 five years.

3 A. Well, if we take the -- the ability to
4 shop is clearly the basis, from a policy standpoint,
5 of my view that the Commission should not shorten the
6 blending period. From a statutory standpoint
7 division (E) doesn't provide that opportunity to the
8 Commission as I interpret it because it says that
9 that decision would be made beginning in year 2 of
10 the MRO.

11 But if we ignore that and we just talk
12 about the policy --

13 Q. Sir, if we could ignore that and focus on
14 the question that I posed, that would be appreciated.

15 A. If we just do it in the context of
16 policy, regulatory policy, the ability to shop is the
17 reason that consumers do not require, from a consumer
18 protection standpoint, a shortening of the blending
19 period, because they would always have that
20 opportunity to achieve 100 percent market prices.

21 Q. So you, Mr. Baron, cannot envision any
22 circumstance whatsoever in which customers would
23 benefit from a shortening of the blending period,
24 correct?

25 A. As a general policy matter, that's

1 correct.

2 Q. But, sir, not all of the customers in
3 Duke Energy-Ohio's service territory have the right
4 to shop, do they?

5 A. Have the right to shop?

6 Q. Yes, sir.

7 A. I'm not aware of customers that don't
8 have the right to shop, but perhaps you could -- I'm
9 just not aware of that.

10 Q. Are you aware, sir, that customers who
11 are enrolled in Duke Energy-Ohio's PIPP or percentage
12 of income payment program, cannot, unilaterally or
13 individually, shop?

14 A. I'm not familiar with that, no.

15 Q. And you, sir, then I take it are not
16 aware of Duke Energy-Ohio's certified supplier
17 tariffs that prevent customers who have an arrearage
18 of more than \$30 from switching to a competitive
19 supplier that participates in Duke Energy-Ohio's
20 purchase of accounts receivable program, correct?

21 A. I'm not knowledgeable on that issue.

22 Q. And you also, sir, are you not aware of
23 Duke Energy-Ohio's tariff provisions that preclude a
24 customer who has an arrearage -- strike that -- whose
25 arrearage is more than 30 days outstanding from

1 changing to a competitive supplier that participates
2 in Duke Energy-Ohio's purchase of accounts receivable
3 program, correct?

4 A. It would be the same answer, I'm not
5 familiar with that.

6 Q. So, sir, is it your opinion that consumer
7 protection is advanced when customers who cannot shop
8 are precluded from access to lower generation prices?

9 A. Taken just in the limited framework of
10 your statement that customers have no other option
11 but to take service under rate X and then you're
12 asking me is it good policy for the Commission never
13 to reduce rate X? I would say no, that may not be
14 good policy, but that's not the issue before us in
15 this case.

16 When you talk about the broad spectrum of
17 all of the customers on Duke power, I acknowledge
18 there may be need for some exceptions, apparently
19 there are exceptions in the case of certain customers
20 who have arrearages or other provisions, factors in
21 their usage, but as a general policy matter it would
22 still -- I continue to believe that it would make no
23 sense to raise rates to basically eliminate an option
24 and certainly in the case of Duke's filing in this
25 case to eliminate an option before the fact and deny

1 customers the opportunity to take advantage of the
2 blending provisions that are spelled out in division
3 (D), that makes no sense to me.

4 Q. And, sir, why does it make no sense,
5 because if the blend is shortened, customers only
6 have access to market rates?

7 A. Well, you've identified a certain group
8 of customers that may have access. I told you I'm
9 not familiar with that. The broad category of
10 customers who take standard service offer power would
11 have the option to shop, and those customers can
12 obtain 100 percent market rates at any time.

13 Q. So, sir, a fair characterization of your
14 testimony is that you oppose a shorter blending
15 period because you want customers to have the option
16 of some price other than full market pricing,
17 correct?

18 A. Well, I oppose it because I believe the
19 statute requires a five-year blending period, and I
20 support that provision of the statute because it
21 makes sense, it provides necessary consumer
22 protection.

23 Where we are today is we have a
24 projection from Mr. Rose that, not to worry, market
25 prices will be the same as the legacy ESP prices, but

1 we're not in 2014 now and we're certainly not in 2015
2 and '16 which would continue under a five-year blend.

3 Q. And, sir, you've done no analysis in this
4 proceeding regarding the forecasted prices, correct?

5 A. That's correct.

6 Q. Sir, would you agree with me that an SSO
7 price derived from market rates is what defines the
8 market rate offer?

9 A. It's one component of the market rate
10 offer, if I understand your question. Maybe I didn't
11 understand it.

12 Q. My question simply is as a general
13 premise that a standard service offer price derived
14 from market price is what defines the market rate
15 offer?

16 A. Yes, I mean the market rate offer
17 ultimately, after the blending period terminates,
18 would reflect full hundred percent market rates. And
19 prior to that it's a blending of those.

20 Q. Sir, you do not dispute that the
21 Commission has the authority to alter the blending
22 period, correct?

23 A. I do not dispute -- you're asking me if I
24 -- no; the Commission can -- division (E) says that
25 the Commission can alter the blending period.

1 Q. And in fact, sir, you admit that the
2 Commission has the option to shorten the blending
3 period to less than five years, correct?

4 A. I, as I indicated I think to Mr. Kutik,
5 that if you look at the word "alter" in isolation, it
6 means "change." It doesn't say one way or the other.
7 If you look at it in the context of the other
8 provisions of division (E), my interpretation of
9 division (E), the entirety of division (E) is that
10 the alteration beginning in actual second year is to
11 extend it. That's the majority of the discussion in
12 division (E) goes to that issue.

13 Q. Sir, I --

14 A. And is consistent with the public policy,
15 consumer protection mechanism.

16 Q. And, sir, I appreciate your opinion and
17 what you believe Ohio public policy to be, but my
18 question was rather simple: Do you admit that the
19 Ohio Commission has the option to shorten the
20 blending period to less than five years?

21 MR. BOEHM: I think he answered that,
22 your Honor.

23 MS. SPILLER: Well, it's a "yes" or "no"
24 and it wasn't quite what was received.

25 A. Well, I told you the answer I gave

1 earlier which was the word "alter" which means
2 "change."

3 Q. So yes.

4 A. And it doesn't mean with one way or the
5 other when read in the context of the other
6 provisions, my interpretation would be that the
7 language in division (E) is to extend. But beyond
8 that I don't really have an opinion.

9 MS. SPILLER: Your Honor, I'm going to
10 move to strike and ask that the witness be directed
11 to answer the question which is offered in such a way
12 as to elicit a "yes" or "no" response.

13 EXAMINER PIRIK: I'm going to deny the
14 motion to strike, but I think she is asking for a
15 "yes" or "no" answer.

16 THE WITNESS: Yes, your Honor.

17 As I said, I think that it could be
18 interpreted as shortening beginning in the second
19 year, not today. I absolutely would disagree that
20 Duke's MRO filing is consistent with division (E).

21 Q. Sir, is there anything in division (E)
22 that expressly prevents the Commission from
23 considering now whether to make that alteration
24 effective beginning in year 2?

25 A. I would say the answer is yes, there is a

1 provision that says -- that basically explains what
2 is meant, in my view, by "beginning in the second
3 year," and that is the second sentence that says "Any
4 such alteration shall not be made more often than
5 annually."

6 To me that, A, that requires some
7 eval- -- it means there's some evaluation that's
8 ongoing as information is obtained so that provides
9 context to what the beginning of the second year
10 means.

11 It also, to some extent, means that the
12 Commission could not shorten the blending period
13 because if that was the case, it could effectively
14 then re-lengthen it in another year, and there's no
15 prohibition in division (E) that says if the blending
16 period were changed, it couldn't be extended in a
17 subsequent year.

18 Q. Sir, Duke Energy-Ohio is not asking the
19 Commission to make an alteration to the percentages
20 of this blend more often than annually, is it?

21 A. No, but it's asking the Commission to
22 approve an alteration in the blending period today,
23 and that's not consistent with beginning in the year
24 in my view.

25 Q. But that alteration will be effective not

1 today, but effective in the third year of the
2 company's proposed MRO, correct?

3 A. Yes, but the context of division (E) is
4 that if the Commission -- consider this, if the
5 Commission can make alterations annually, then that
6 means that there's new information that arises each
7 year upon which the Commission can make that
8 alteration.

9 If that's true, then the Commission can't
10 make that alteration decision today, in my view,
11 because there's no -- the only information that's
12 available today is what, basically in this case
13 Mr. Rose's forecast that the legacy rates and the
14 market rates look like they'll be close in 2014.

15 MS. SPILLER: Your Honor, I would move to
16 strike all of Mr. Baron's testimony after the phrase
17 that began "consider this" as nonresponsive.

18 EXAMINER PIRIK: Motion denied.

19 MS. SPILLER: Thank you.

20 Q. Mr. Baron, although you deliberated on
21 the word "alter" and its intended meaning, you did
22 not opine on what would constitute an abrupt change
23 in the SSO price, correct?

24 A. That's correct.

25 Q. And you also, sir, did not opine on what

1 would constitute a significant change in the SSO
2 price, correct?

3 A. That is correct. It wasn't necessary for
4 any analysis that I was preparing or any opinion that
5 I was offering in this case.

6 Q. Sir, you have no opinion as to whether
7 any Duke Energy entity is exercising market in Duke
8 Energy-Ohio's service territory, correct?

9 A. I have not done any analysis, that's
10 correct, of market power.

11 Q. And, Mr. Baron, it's also your opinion
12 that the Ohio Commission cannot change the legacy
13 portion of the blended price during the blending
14 period, correct? The ESP price, you believe that
15 that price cannot be changed by the Commission,
16 correct?

17 A. Well, if I understand your question, the
18 statute permits the price to change for changes in
19 fuel price, purchased power, environmental; is that
20 what you're referring to?

21 Q. No, sir. I'll rephrase. It's your
22 opinion that the Commission cannot change the
23 blending percentage to mitigate any impacts to the
24 SSO rate that may result from changes to the legacy
25 ESP component of that rate, correct?

1 A. I don't know whether -- I think that in
2 theory the Commission could change it for -- for the
3 legacy ESP price. I don't believe that's the general
4 expectation that I read in division (E), but I
5 suppose that that could happen. I honestly don't
6 know. I don't see a prohibition against that, let's
7 put it that way.

8 Q. And, sir, there is also not a prohibition
9 in Revised Code Section 4928.142(E) that prohibits
10 the Commission from altering the blends when the
11 market component or the market price is lower than
12 the legacy ESP price, correct?

13 A. Well, there's no language to that
14 specific instance that you hypothesized.

15 Q. Sir, with regard to your testimony
16 regarding adjustments to the legacy ESP price, you
17 opine that each time an adjustment is made, the
18 company is subject to a significantly excessive
19 earnings test, correct?

20 A. That's my interpretation and
21 understanding of the statute.

22 Q. Sir, the process for making adjustments
23 to the legacy ESP portion of the SSO price under the
24 MRO is not a question relevant to whether the
25 company's filing has met the applicable statutory and

1 Commission rule requirements, correct?

2 A. The company's filing in this case, yes,
3 that it's not an issue per se because there's no
4 adjustment being requested -- no change in adjustment
5 being requested in this case. It is an issue that
6 would govern any changes in the legacy ESP portion of
7 the blended rate.

8 Q. And those changes, sir, would be relevant
9 only after the MRO is approved and the company
10 subsequently applies to the Commission for
11 adjustments to that legacy ESP price, correct?

12 A. Yes, I would agree with that.

13 Q. And your testimony as to the application
14 of the significantly excessive earnings test to any
15 adjustments that the company may make to the legacy
16 ESP price is not a legal opinion or interpretation,
17 correct?

18 A. It's in the same context as my other
19 testimony regarding the appropriate -- reasonable
20 interpretation and application of the statutory
21 provisions.

22 Q. Sir, there is no requirement in the MRO
23 provisions of Senate Bill 221 that require Duke
24 Energy-Ohio to continue to own generating facilities
25 while providing standard service offer supply to its

1 customers under an MRO, correct?

2 A. I, to the best of my knowledge, that's
3 correct. It is my understanding that given that the
4 company does own those legacy generation assets, it
5 needs to seek Commission approval to transfer those
6 from the utility.

7 Q. And that request for permission to
8 transfer the facilities is not a request pending in
9 this proceeding, correct?

10 A. The company has -- that's correct to the
11 best of my knowledge. The company has offered
12 testimony on that issue, but has stated that it is
13 not requesting a transfer, but it is an issue in the
14 case nonetheless.

15 Q. Sir, with regard to the transmission
16 riders that you discuss in your direct testimony, you
17 render opinion on what you believe this Commission's
18 scope of review to be, correct?

19 A. Yes.

20 Q. And you had developed that testimony,
21 sir, in consultation with counsel for the OEG,
22 correct?

23 A. Yes. In the same manner -- that's
24 correct, I've discussed that issue with counsel for
25 OEG, I have reviewed a number of cases actually, some

1 of the cases I've reviewed many years ago and as
2 recently as this past summer in testimony I presented
3 at the Federal Energy Regulatory Commission. But I
4 did discuss that with OEG counsel, yes.

5 Q. And in fact, sir, as set forth in your
6 direct testimony what counsel shared with you
7 regarding his opinion as to the Commission's scope of
8 review, correct?

9 A. Yes. Specifically with regard the Ohio
10 Commission, yes.

11 Q. And with regard to your testimony, to the
12 extent that is based upon your review of case law,
13 that is your opinion only with regard to what those
14 cases may state, correct?

15 A. Yes. Absolutely. I've been -- I'm
16 familiar with the -- I've been familiar with the
17 Nantahala decision for many years, the Pike County
18 decision, the Mississippi decision that I cited, I've
19 reviewed -- but it is based on my understanding and
20 interpretation and reading of statements by courts
21 and the Federal Energy Regulatory Commission as to
22 what is and is not an appropriate issue for a state
23 regulator to address.

24 A filed rate that's approved by the FERC
25 would be subject to federal preemption, but issues

1 about which filed rate is most appropriate and
2 reasonable and least cost, that's an issue that I
3 understand can be addressed by a state regulator.

4 Q. Sir, that is your understanding based
5 upon your review of cases and your consultation with
6 counsel for the OEG, correct?

7 A. Yes, that's correct.

8 Q. Sir, would you agree with me that it is
9 for the Commission or the courts to read, interpret,
10 and apply the applicable case law to any dispute that
11 may come before them?

12 A. Yes.

13 Q. Sir, in forming your direct testimony in
14 this case you did not refer to the provisions of Ohio
15 Revised Code Section 4928.05, correct?

16 A. 05, no. I don't recall that.

17 Q. Sir, you have no reason to dispute the
18 content of that statute, do you?

19 A. Well, I don't have any reason to one way
20 or the other.

21 Q. Mr. Baron, in this case Duke Energy-Ohio
22 is not asking the Commission to establish the amounts
23 to be recovered through Rider BTR or Rider RTO,
24 correct?

25 A. That's correct, but the company did

1 identify specifically that it intended, in Rider BTR,
2 to recover MISO exit fees and MTEP fees, it did not
3 quantify those.

4 The company has quantified those or at
5 least provided estimates in other cases, the Kentucky
6 case that I'm familiar with for Duke Energy-Kentucky
7 where the company did provide a quantification of the
8 costs, and roughly based on that it was I think Duke
9 Energy-Ohio portion would be \$25 million. But they
10 have not done it in this case. The company has not
11 done it in this case.

12 Q. So the answer to my question would be no;
13 is that right?

14 A. The company has not provided an estimate
15 in this case.

16 Q. No, my question was in this case Duke
17 Energy-Ohio is not asking the Commission to establish
18 the amounts to be recovered through Rider BTR or
19 Rider RTO, correct?

20 A. That's correct, but the important issue
21 is not the amount because that will be decided
22 ultimately when negotiations with MISO are completed.
23 The important issue is the company is requesting in
24 this case the permission to recover those costs,
25 presumably, whatever they are. So that is a

1 rate-making issue, but not to set the level of the
2 rate.

3 MS. SPILLER: I would, your Honor, move
4 to strike all of the response that starts with "but."

5 EXAMINER PIRIK: Motion denied.

6 MS. SPILLER: Thank you.

7 Q. Mr. Baron, you are not offering any
8 specific testimony in this case on the issues
9 relating to Duke Energy-Ohio's realignment from the
10 Midwest ISO to the PJM, correct?

11 A. That's correct.

12 Q. Have you reviewed the auction schedule
13 that Duke Energy-Ohio proposed as part of its
14 application?

15 A. I may have looked at it but I didn't
16 spend a lot of time reviewing it.

17 Q. Well, based upon that cursory review as
18 well as your experience in other MRO proceedings in
19 Ohio, would you agree that a staggered auction in
20 which not all of the load is bid out at one time
21 mitigates price volatility?

22 A. As a general matter I would agree that a
23 staggered auction would tend to reduce risk.

24 Q. Sir, if we could go back to Riders BTR
25 and RTO, it's your opinion that the Commission reject

1 those riders as filed in this proceeding, correct?

2 A. That is correct. And that the company be
3 required to file in a separate proceeding where a
4 longer period of time can be taken by the Commission
5 and parties to evaluate those issues.

6 Q. Well, sir, what is so controversial about
7 the recovery of network integration transmission
8 service charges that that issue cannot be resolved in
9 the context of this MRO proceeding?

10 A. That issue is not -- well, first of all,
11 again, the MRO proceeding requires, it's my
12 understanding, a 90-day time frame. There's no such
13 requirement for transmission riders.

14 But putting that aside, the issue that
15 I've raised in my testimony and concern that I have
16 doesn't go to the recovery of network integration
17 transmission service costs, which are the predominant
18 costs, but it does go to the issue of the recovery of
19 MISO legacy costs, the exit fees and MTEP costs, and
20 those, in my view, those are a reasonable issue that
21 parties should be able to evaluate and offer
22 testimony on.

23 Q. So, sir, is it your testimony that Duke
24 Energy-Ohio should be permitted to recover NITS, or
25 network integration transmission service charges,

1 through one of these transmission riders and that the
2 Commission should approve that recovery in this
3 proceeding?

4 A. No, for the reason that -- first of all,
5 there's no proposal like that in the record to my
6 knowledge. The company's proposing Rider BTR that
7 includes both NITS and the MISO exit fees and MTEP
8 cost. So there is no tariff, to my knowledge, that
9 is just designed to recover NITS. The company hasn't
10 requested that.

11 So for that simple matter it would be
12 inappropriate for the Commission, I believe, to
13 approve a tariff that the company hasn't even
14 requested, but more significantly, while generally
15 the recovery of NITS costs would not be a
16 controversial item, there is no requirement that that
17 decision be made within a 90-day period. Those
18 tariffs aren't going into effect until January 2012,
19 there is sufficient time for the Commission to
20 consider those riders in a separate proceeding
21 related to those riders.

22 Q. Mr. Baron, you testified on behalf of the
23 OEG in the application filed by the FirstEnergy
24 distribution utilities for approval of a market rate
25 offer in 2009, correct?

1 A. Yes.

2 Q. And in that case, sir, the FirstEnergy
3 distribution utilities were proposing to recover NITS
4 through a nonbypassable transmission rider, correct?

5 A. That's correct.

6 Q. And was that rider one in which other
7 costs would be recovered?

8 A. I don't recall whether the original
9 filing included other costs, for example, MISO exit
10 fees and MTEP costs, but the ultimate resolution of
11 that, that those costs were not recovered.

12 Q. The NITS are recovered, sir.

13 A. The NITS are recovered, correct.

14 Q. And when you filed your direct testimony
15 in Case No. 09-906, you did not bother to address the
16 FirstEnergy utility companies' proposed recovery of
17 NITS, did you?

18 A. I don't recall that I did.

19 Q. Sir, would it be helpful for you to
20 refresh your recollection looking at your direct
21 testimony in that case?

22 A. I have that testimony. As I said, I
23 don't recall that I did. I believe I've got it.

24 Q. If you don't, I have a copy for you.

25 A. No; I have it.

1 Well, I think in looking at page 5 of my
2 testimony I offer testimony saying that the company's
3 MRO was premature, but -- and one of the reasons had
4 to do with the recovery of capacity-related costs,
5 but I don't believe that I addressed network
6 integration transmission service costs.

7 Q. Thank you.

8 But a year later, sir, it's your
9 testimony that Duke Energy-Ohio should not recover
10 NITS through Rider BTR as proposed in its filing,
11 correct?

12 A. No; that's not my testimony.

13 Q. So is it your testimony that Duke
14 Energy-Ohio should be permitted to recover NITS
15 through a nonbypassable rider?

16 A. No. My testimony -- the answer is no,
17 and I can explain it if you would like.

18 Q. No; that's fine, sir.

19 You have stated in your direct testimony
20 that the company's filing fails to comply with one of
21 the Commission's rule requirements applicable to MRO
22 applications, correct?

23 A. Yes.

24 Q. And that rule, sir, provides in part that
25 Duke Energy-Ohio is to compare projected adjusted

1 generation service prices under its competitive
2 bidding process plan to the projected adjusted
3 generation service prices under its proposed electric
4 security plan, correct?

5 A. That's the provision, that provision (j),
6 and that's -- that is the language, and that is under
7 I guess section 4901:1-35-03(B(2(j)), and it
8 concerns -- (B) starts out by saying an SSO
9 application that contains a proposal for an MRO, so
10 it concerns an MRO, and that was the provision in the
11 rule, the Commission's rules that I cited in my
12 testimony.

13 Q. Thank you, sir.

14 Duke Energy-Ohio is not proposing an ESP
15 in this case, is it?

16 A. That is correct, but this language in the
17 rule refers to an MRO and, in fact, in the section or
18 division (j), section (j), it specifically talks
19 about the blending -- the blended rates the company
20 has to file the proposed blending plan for the first
21 five years.

22 Q. Sir --

23 A. In fact, this rule I think reinforces my
24 interpretation of the statute, at least the
25 Commission seems to have already set a rule on this

1 that the company has to file a five-year blending
2 period.

3 Q. Sir, if we could go back to the portion
4 of the rule that I just identified, that is that the
5 company is to compare projected adjusted generation
6 services under its competitive bidding process plan
7 to projected adjusted generation service prices under
8 its proposed electric security plan, correct?

9 A. Yes, and that's what it says.

10 Q. And Duke Energy-Ohio is not proposing an
11 electric security plan in this proceeding, is it?

12 A. That is correct.

13 Q. Sir --

14 A. But this language is included under the
15 requirements for an MRO, it clearly relates to the
16 provisions of an MRO, section 4928.142 of the Revised
17 Code, and I just assumed that the use of the words
18 "electric security plan" really should have been
19 "MRO," but beyond that I can't offer you any
20 explanation.

21 Q. But, sir, you've said previously that
22 you've interpreted the proposed electric security
23 plan as actually referring to the company's existing
24 electric security plan, correct?

25 A. I honestly don't recall that. I assumed

1 that this -- I mean, this provision is related to MRO
2 rates, there's no doubt in my mind, and I assume
3 that's what this sentence refers to, but beyond that
4 I can't really explain it.

5 Q. Mr. Baron, with regard to your testimony
6 regarding the transfer or future transfer of
7 generating assets, that is not an issue integral to
8 the Commission's determination of whether the
9 company's filing meets the statutory and Commission
10 rule requirements, correct?

11 A. I would agree with that. It's an issue
12 in this case, but I would agree with your statement.

13 Q. But, sir, based upon your reading of the
14 MRO provisions you believe the company's filing does
15 not comply with the statutory requirements regarding
16 the blending period set forth in Revised Code
17 sections 4928.142(D) and (E), correct?

18 A. That's correct. There's no doubt in my
19 mind that the Duke plan doesn't comply with division
20 (D) and (E).

21 Q. And that, sir, is an opinion based upon
22 your interpretation of the statute and your
23 consultation with counsel, correct?

24 A. Yes, it's based on my experience, but my
25 interpretation of the statute, my understanding of

1 the context of standard service offer transition
2 provisions that those two divisions address, but yes,
3 your statement is correct.

4 Q. And, sir, the Commission could disagree
5 with you and find that there is a reason to shorten
6 that blending period to less than five years,
7 correct?

8 A. Obviously the Commission could disagree
9 with me.

10 Q. And if the Commission were to disagree
11 with you regarding the scope or term of the blending
12 period, you offer no other reason to reject Duke
13 Energy-Ohio's MRO filing, correct?

14 A. Well, I think that's correct. The
15 blending issue is the primary basis that I am
16 offering my opinion regarding the company's failure
17 to meet the requirements of the law and the
18 Commission's rules.

19 MS. SPILLER: One moment, please, your
20 Honor.

21 No further questions, thank you, your
22 Honor.

23 EXAMINER PIRIK: Thank you.

24 Staff?

25 MR. JONES: No questions, your Honor.

1 EXAMINER PIRIK: Thank you.

2 Redirect?

3 MR. BOEHM: Your Honor, may I have one
4 moment to consult?

5 (Discussion off the record.)

6 MR. BOEHM: Your Honor, we have no
7 redirect for this witness.

8 EXAMINER PIRIK: Thank you, Mr. Baron.

9 THE WITNESS: Thank you, your Honor.

10 EXAMINER PIRIK: With regard to OEG
11 Exhibit 1.

12 MR. BOEHM: Thank you, your Honor. At
13 this time, your Honor, we would move to admit OEG
14 Exhibit No. 1.

15 EXAMINER PIRIK: Are there any
16 objections?

17 MR. KUTIK: Your Honor, we would object
18 to the portions of Mr. Baron's testimony that were
19 subject to our motions to strike.

20 MS. SPILLER: Your Honor, Duke
21 Energy-Ohio would similarly object to those portions
22 of the direct testimony that were identified in our
23 motion to strike.

24 EXAMINER PIRIK: So noted.

25 Any other objections?

1 (No response.)

2 EXAMINER PIRIK: Hearing none, OEG
3 Exhibit 1 will be admitted into the record.

4 (EXHIBIT ADMITTED INTO EVIDENCE.)

5 EXAMINER PIRIK: I believe
6 Ms. Ringenbach.

7 MR. KUTIK: Your Honor, may we go off the
8 record for a moment?

9 EXAMINER PIRIK: Yes. Actually, I think
10 we're going to take a break.

11 (Discussion off the record.)

12 EXAMINER PIRIK: Let's take a break, 15
13 minutes.

14 (Recess taken.)

15 EXAMINER PIRIK: We'll go back on the
16 record.

17 Please raise your right hand.

18 (Witness sworn.)

19 EXAMINER PIRIK: Thank you.

20 MR. PETRICOFF: Yes, your Honor, at this
21 time we would like to have marked as RESA Exhibit No.
22 1 the direct prepared testimony of Teresa Ringenbach.

23 EXAMINER PIRIK: The document is so
24 marked.

25 (EXHIBIT MARKED FOR IDENTIFICATION.)

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TERESA L. RINGENBACH

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

DIRECT EXAMINATION

By Mr. Petricoff:

Q. Would you please state your name and business address for the record?

A. Teresa L. Ringenbach, and my business address is 9605 El Camino Lane, Plain City, Ohio, 43064.

Q. Ms. Ringenbach, on whose behalf do you appear today?

A. The Retail Energy Supply Association.

Q. And do you have before you what has just been marked as RESA Exhibit No. 1?

A. Yes.

Q. And is that your direct prepared testimony?

A. Yes.

Q. Do you have any changes or amendments to that testimony?

A. No.

Q. If I were to ask you the same questions today that are in that testimony, would your answers

1 be the same?

2 A. Yes.

3 MR. PETRICOFF: Your Honor, the witness
4 is available for cross-examination.

5 EXAMINER PIRIK: Thank you.

6 FirstEnergy?

7 MR. HAYDEN: No questions, your Honor.

8 MR. BOEHM: No questions, your Honor.

9 MS. MOONEY: No questions.

10 MS. KYLER: I just have two questions to
11 clarify your testimony.

12 - - -

13 CROSS-EXAMINATION

14 By Ms. Kyler:

15 Q. On page 13 of your testimony, lines 13
16 through 15, I just wanted to know what costs you're
17 referring to when you say "CRES RTO transition
18 costs."

19 A. I'm actually just referring to MTEP, RTEP
20 that might actually be imposed on a CRES separately
21 from the utility.

22 Q. And what costs were you referring to when
23 you say "normal RTO costs"?

24 A. Outside of normal RTO costs, I mean if a
25 CRES is currently behind Duke but not within PJM and

1 they would have to enroll in PJM and become a market
2 participant, those are what I consider normal costs.

3 MS. KYLER: No further questions.

4 EXAMINER PIRIK: Mr. Yurick?

5 MR. YURICK: No questions, thank you,
6 your Honor.

7 EXAMINER PIRIK: Mr. Olikar?

8 MR. OLIKER: No questions, your Honor.

9 EXAMINER PIRIK: Mr. Hart?

10 MR. HART: Nothing.

11 EXAMINER PIRIK: Mr. Montgomery?

12 MR. MONTGOMERY: No questions.

13 EXAMINER PIRIK: I will come back to the
14 company.

15 MS. WATTS: Yes, thank you, your Honor.

16 - - -

17 CROSS-EXAMINATION

18 By Ms. Watts:

19 Q. Good afternoon, Ms. Ringenbach.

20 A. Hello.

21 Q. I heard your counsel refer to the Retail
22 Energy Supply Association as "RESA." Would it be
23 okay with you if I do the same?

24 A. Yes.

25 Q. Thank you.

1 Ms. Ringenbach, with respect to your
2 testimony in this case is it fair to say you support
3 the company's market rate offer?

4 A. Yes.

5 Q. You testify on page 5, line 7 of your
6 testimony that the MRO provides regulatory certainty
7 and you discuss the challenges to competitive retail
8 electric suppliers of a short-term or three-year ESP.
9 Do you see that?

10 A. Yes.

11 Q. Is it your experience that longer term
12 contracts are more difficult to consummate in Ohio
13 given the short-term nature of an ESP?

14 A. Yes.

15 Q. And in that instance how would you define
16 "longer term"?

17 A. I would actually define it in terms of
18 not just a longer term contract directly with the
19 customer, but a longer term investment in the state.
20 So just coming into the state you have to become
21 licensed, you have to have certain back office things
22 that are in place, you also have to, of course, be a
23 member of the RTO and be able to operate in that
24 area, you have to get a license with the Commission,
25 you have to maintain certain things.

1 Just your ability to go out and purchase
2 power on a broader basis to sell to customers knowing
3 that you can only do it for a certain period of time,
4 three years, or depending on how far along you are in
5 the ESP even a shorter period of time than that, it
6 plays a huge factor in deciding whether you're going
7 to come to Ohio and sell to those customers or go to
8 Pennsylvania and sell to customers where you know
9 long-term what you're competing against.

10 Q. Thank you.

11 You're aware, are you not, through your
12 review of the company's application that it's
13 realigning with a different RTO? Correct?

14 A. Correct.

15 Q. Does that realignment cause you any
16 concern with respect to your ability to actively
17 participate in Duke Energy-Ohio's competitive bid
18 process?

19 A. No. The only concern I've addressed in
20 my testimony is any, outside of normal RTO costs that
21 might be imposed on us from the exiting of MISO and
22 moving over to PJM.

23 Q. And just to be clear, when I say -- I
24 asked that question and I said "your," I meant
25 RESA's, correct?

1 A. Right.

2 Q. You're not disputing that Duke
3 Energy-Ohio's proposed competitive bidding process
4 plan is open, fair, and competitive, are you?

5 A. No.

6 Q. And you're not disputing that the
7 designated auction manager for Duke Energy-Ohio's
8 competitive bidding process is independent, correct?

9 A. Correct.

10 Q. And you're not offering an opinion in
11 this case with regard to Duke Energy-Ohio's recovery
12 of FERC approved costs, correct?

13 A. Correct.

14 Q. And you're not disputing that the Midwest
15 Independent System Operator is an independent
16 regional transmission organization or an RTO approved
17 by FERC, are you?

18 A. No.

19 Q. You're not disputing that PJM
20 Interconnection, LLC is also an independent RTO
21 approved by the FERC, correct?

22 A. Correct.

23 Q. And you're not aware of any significant
24 issues associated with Duke Energy-Ohio's realignment
25 to PJM effective January 1, '12, are you?

1 A. No.

2 Q. Is there any issue presently on the table
3 that might stop this process?

4 A. Not that I'm aware of other than the
5 MTEP/RTEP issue that we brought up.

6 Q. Thank you.

7 Are you aware that the FERC has already
8 given Duke Energy-Ohio permission to withdraw from
9 the Midwest ISO?

10 A. Yes.

11 Q. And are you also aware that the FERC has
12 already approved Duke Energy-Ohio's fixed resource
13 requirements, or FRR, plan?

14 A. Yes.

15 Q. Are you aware of any circumstances that
16 would prevent Duke Energy-Ohio from realigning to
17 PJM?

18 A. No.

19 Q. Are you aware of any circumstances that
20 would cause the Commission to delay its decision on
21 this application for approval of a market rate offer?

22 A. No.

23 Q. On page 13 of your testimony you indicate
24 that the company's proposal with regard to network
25 integration transmission -- to NITS, N-I-T-S, NITS, I

1 never get that right, is reasonable, correct?

2 A. In terms of putting it into Rider BTR?

3 Q. Yes.

4 A. Yes.

5 Q. So you don't have any objection with
6 respect to that proposal, correct?

7 A. Correct.

8 Q. On page 6, line 21, you recommend other
9 changes that RESA would like to see made to the
10 company's MRO. Do you see that? Page 6, line 21.

11 A. Yes.

12 Q. If the Commission should not accept the
13 changes that you're recommending there, do you still
14 believe that the competitive bid plan as proposed by
15 the company satisfies the statutory requirements for
16 an MRO?

17 A. Yes.

18 Q. And if the Commission does not accept the
19 changes to the company's MRO that you have outlined
20 in your direct testimony, you would still recommend
21 approval of the MRO, correct?

22 A. RESA supports an MRO because of the
23 regulatory certainty that it provides regardless of
24 these changes.

25 Q. Thank you.

1 Ms. Ringenbach, with respect to your
2 proposal that Rider RECON should be avoidable, can
3 you tell me how you would expect the utility to bill
4 and keep track of which individual customers pay
5 which fuel costs on any given day?

6 A. The same way they do it for Rider FPP
7 today. So if they're with the utility, they would
8 pay it. If they're not, they would not.

9 Q. On an individual customer basis or on a
10 customer tariff basis?

11 A. Yes. Today if you're with the utilities,
12 you pay Rider FPP, right? If you're with the
13 supplier, you don't. I expect that that would
14 continue for Rider RECON.

15 Q. On page 11 of your testimony with regard
16 to your proposal about Rider UE-GEN, the revisions
17 you propose would also lead to a rider that is
18 nonbypassable, correct?

19 A. For customers that are with a supplier
20 using purchase of receivables, yes.

21 Q. Also on page 11, one other point with
22 respect to Rider UE-GEN, you mention that the Duke
23 gas policy with respect to the purchase of accounts
24 receivables has expended the potential for -- has
25 expanded the potential for lower income residential

1 customers to shop. Could you please explain that
2 dynamic a little further?

3 A. Absolutely. When you have an
4 uncollectible generation rider, you typically with
5 that have a lower-to-zero discount factor for
6 purchase of receivables.

7 By removing the -- the internal struggle
8 that a retail supplier has between going after a
9 customer and doing a credit check to make sure it
10 fits in with that discount factor and actually
11 serving them if it fits within the discount factor or
12 not serving them based on their credit review, by
13 removing that you allow customers who maybe would not
14 normally pass that credit check to now receive
15 service.

16 Q. Thank you.

17 Referring to page 14 of your testimony,
18 line 8 through 13, you talk about prolonging the
19 blend to market is not in the public interest. Do
20 you see that?

21 A. Yes.

22 Q. Could you explain how you feel that is
23 not in the public interest?

24 A. Currently market prices are lower, so
25 that's one factor, and I think that's shown by the

1 number of offers that are happening in Duke's
2 territory right now.

3 The other part of it is when you go to an
4 ESP or something where you're sort of creating an
5 artificial market rate for customers, there are costs
6 and fees, carrying charges, et cetera, that go along
7 with that so ultimately the customer might wind up
8 paying more than had they been at market. So in
9 terms of that, you have an additional cost by
10 extending it out too long or creating these riders or
11 carrying charges that go with it.

12 And then finally, Ohio is a competitive
13 state, so a customer needs the ability to clearly
14 decide if their price to compare, if their price to
15 compete matches apples to apples to what a supplier's
16 offering, and if you have these sort of mixed-up
17 rates that aren't really reflective of market and
18 what the customer's really paying, then they're not
19 getting an apples-to-apples comparison with their
20 supplier.

21 Q. Thank you.

22 On page 14 of your testimony you twice
23 use the term "price spike."

24 A. Yes.

25 Q. Do you see that?

1 Would you agree with me that the term
2 "price spike" does not occur in SB 221?

3 A. Yes.

4 Q. Ms. Ringenbach, are you aware that Duke
5 Energy-Ohio holds a collaborative meeting with
6 respect to its deployment of smart grid with
7 interested stakeholders?

8 A. Yes.

9 Q. Have you ever participated in any of
10 those collaborative meetings?

11 A. I did at the very beginning, but due to
12 regulatory uncertainty in Ohio, there wasn't much
13 interest in participating in smart grid initiatives.

14 Q. Do you happen to know how many of Duke
15 Energy-Ohio customers have opted to participate in
16 rate TD, rate PTR, and rate TD-AM?

17 A. No.

18 MS. WATTS: Thank you, I have no further
19 questions.

20 EXAMINER PIRIK: Staff?

21 MR. BEELER: No questions.

22 EXAMINER PIRIK: Redirect?

23 MR. PETRICOFF: No redirect, your Honor.

24 EXAMINER PIRIK: Thank you, Ms.

25 Ringenbach.

1 THE WITNESS: Thank you.

2 EXAMINER PIRIK: With regard to your
3 exhibit, Mr. Petricoff.

4 MR. PETRICOFF: Yes, your Honor, at this
5 time we would like to move admission of RESA Exhibit
6 No. 1.

7 EXAMINER PIRIK: Are there any
8 objections?

9 (No response.)

10 EXAMINER PIRIK: Hearing none, the
11 exhibit shall be admitted into the record.

12 (EXHIBIT ADMITTED INTO EVIDENCE.)

13 EXAMINER PIRIK: I believe the next
14 witness is Ms. Turkenton.

15 Please raise your right hand.

16 (Witness sworn.)

17 EXAMINER PIRIK: Have a seat.

18 MR. BEELER: Your Honors, at this time
19 staff would like to mark for identification purposes
20 Staff Exhibit 1, the direct testimony of Tamara S.
21 Turkenton, filed December 28th, 2010.

22 EXAMINER PIRIK: The document is so
23 marked.

24 (EXHIBIT MARKED FOR IDENTIFICATION.)

25 MR. BEELER: Thank you.

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TAMARA S. TURKENTON

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

DIRECT EXAMINATION

By Mr. Beeler:

Q. Would you please state your name and address for the record?

A. Tamara Turkenton, 180 East Broad, Columbus, Ohio, 43215.

Q. By whom are you employed and in what capacity?

A. Public Utilities Commission of Ohio, chief of the Accounting and Electricity Division.

Q. Do you have before you what's been marked as Staff Exhibit 1?

A. I do.

Q. What is that?

A. The direct testimony in this case.

Q. Filed by you?

A. Filed by me.

Q. Was it prepared by you or under your direction?

A. It was.

Q. Do you have any corrections to make to that document today?

1 A. I do. They're nonsubstantive, they are
2 mostly typos and formatting, but I do feel the need
3 to go through them. So the first one -- I will kind
4 of jump around a teeny bit. The first one is on page
5 16, it's regarding footnote 26. It says "DR-01-00."
6 That should be "DR-01-003."

7 The second formatting issue is on page
8 11, lines 15 and 16, the "18" and "19" should be
9 superscript.

10 And then the last is actually just a
11 typo, I can go through these individually, but I
12 think it's -- I spelled Mr. Wathen's name
13 incorrectly. If you look at footnote 9, footnote 14,
14 footnote 16, footnote 23, it should be Wathen with an
15 "E-N" instead of an "A-N." And those are all.

16 Q. Okay. With those corrections noted are
17 the contents of what's been marked for identification
18 as Staff Exhibit 1 correct and truthful to the best
19 of your knowledge?

20 A. They are.

21 Q. Do you adopt it as your direct testimony
22 in this case?

23 A. I do.

24 Q. If I asked you the same questions today,
25 would your answers be the same?

1 A. They would.

2 MR. BEELER: Thank you. The witness is
3 available for cross.

4 EXAMINER PIRIK: Thank you.
5 Mr. Petricoff?

6 MR. PETRICOFF: Thank you.

7 - - -

8 CROSS-EXAMINATION

9 By Mr. Petricoff:

10 Q. Good afternoon, Mrs. Turkenton.

11 A. Hello.

12 Q. Are you generally familiar with the
13 tariffs of Duke Energy-Ohio?

14 A. I am.

15 Q. Okay. And you would agree with me that
16 Duke Energy-Ohio is both a natural gas company and an
17 electric light company?

18 A. They are.

19 Q. And is it foreseeable that a utility such
20 as a natural gas company or an electric light company
21 is going to provide standard service to customers and
22 some of those customers will not pay them?

23 A. Yes.

24 Q. And does the Commission have rate design
25 mechanisms to compensate utilities for when they are

1 not paid for standard service?

2 A. Yes.

3 Q. And would you agree with me that there's
4 basically two general types of mechanisms for such
5 bad debt compensation, a bad debt tracker and then
6 building expenses into the base rate?

7 A. Yes, I would agree.

8 Q. Are there bad debt trackers for Duke
9 Energy-Ohio that are currently authorized by the
10 Commission?

11 A. Yes, there is one for gas, for the gas
12 industry.

13 Q. And does the one that's authorized for
14 the gas cover both the pipeline service and the
15 natural gas itself?

16 A. Yes.

17 Q. Is there a tracker on the electric side
18 for just the wires service?

19 A. There is not.

20 Q. So to the best of your knowledge there is
21 no tracker, bad debt tracker for any of the expenses
22 on the electric side for Duke Energy-Ohio?

23 A. Correct.

24 Q. How is Duke Energy-Ohio today compensated
25 for bad debt for the standard service, for their

1 electric service, standard electric service?

2 A. They are not.

3 Q. Is there anything built into their rates
4 to compensate them?

5 A. Actually I do stand corrected, I think
6 there is a portion of uncollectibles in their
7 distribution rates, but in terms of generation, there
8 is nothing that allows them to collect generation
9 uncollectibles.

10 Q. As part of your preparation for this case
11 did you review the last electric rate case for Duke
12 Energy-Ohio?

13 A. Their distribution case?

14 Q. The last overall rate case.

15 A. Okay, are you talking about a
16 distribution rate case or are you talking about their
17 last 08-920 case, their SSO case?

18 Q. Are you familiar with Case 08-709-EL-AIR?

19 A. Generally. I did not work on the case,
20 but generally I'm aware of the outcomes.

21 Q. And you would agree with me that when you
22 look at the Commission docket numbers, you get a fair
23 idea of what type of proceeding it is.

24 A. Correct.

25 Q. And the "AIR" stands for?

1 A. Rate case. Increase in rates.

2 Q. Is it possible, then, that the Commission
3 authorized some amount of money for uncollectibles in
4 the last rate case for Duke Energy-Ohio?

5 A. Yes, and that's where I misspoke. From a
6 distribution perspective, yes. In that distribution
7 rate case.

8 Q. And that would cover energy as well as
9 the wires service?

10 A. It wouldn't cover generation, no. Only
11 distribution.

12 MR. PETRICOFF: Your Honor, may I
13 approach the witness?

14 EXAMINER PIRIK: Yes.

15 MR. PETRICOFF: I'll visit counsel first.

16 Q. I want to show you what is page 15 from
17 the Commission's opinion and order in Docket
18 08-709-EL-AIR, ask you to take a look at that,
19 particularly the last paragraph, and I want to ask
20 you a question or two about that paragraph.

21 A. I've read it.

22 Q. Okay. First, are you familiar with that
23 case at all?

24 A. I did not work on this case. I'm, like,
25 generally familiar with the outcome.

1 Q. And would you agree with me that the
2 Commission in this case basically has upped the
3 revenue requirements in order to account for
4 uncollectibles?

5 A. From a distribution perspective, I would
6 agree with you from a distribution perspective.

7 Q. So your understanding is that there is no
8 compensation in that allowance for the cost of
9 generation?

10 A. That's my understanding, yes.

11 Q. Are you familiar with Duke Energy-Ohio
12 electric Rider UE-ED?

13 A. Yes.

14 Q. What does that collect for? What costs
15 are collected through that rider?

16 A. Incremental uncollectible expenses for
17 distribution, hence the uncollectible electric
18 distribution, UE, ED.

19 Q. And that would pick up any type of
20 uncollectible expense on the distribution side that
21 was not picked up in the rate allowance?

22 A. Correct.

23 Q. Now, the company has asked for an
24 uncollectible rider in this proceeding; are you
25 familiar with that?

1 A. I am.

2 Q. And, in fact, you testify on page 6 of
3 your testimony on the rider, the proposed Rider
4 UE-GEN.

5 A. I do.

6 Q. On lines 7 and 8 on page 6 you indicate
7 that the -- that you don't believe that there's a
8 provision in Revised Code Section 4928.142(D) for an
9 uncollectible rider; is that a fair summary of your
10 testimony?

11 A. That's fair.

12 Q. Is there any other reason, other than
13 it's not authorized under that tariff section, for
14 not approving the Rider UE-GEN?

15 A. No. I just think it's not contemplated
16 under 4928.142(D). I don't think the MRO is the
17 construct to have a generation uncollectible rider.

18 Q. If you will, assume a hypothetical where
19 the same application that we have for the auction in
20 rates was filed under an ESP, would you object to
21 this rider in that case, "this rider" being the
22 UE-GEN?

23 A. I would have to look at certainly that
24 ESP filing and determine the merits of that
25 particular rider. If it was structured exactly like

1 this, certainly I think an ESP construct staff would
2 be more amenable to an uncollectible generation. I
3 think 4928.143 allows for those type of adjustments
4 where I don't think 4928.142 does.

5 Q. Is it your belief that under the MRO
6 structure any utility, any electric utility would
7 have to bear the expense of nonpayment or bad debt
8 for the standard service energy portion?

9 A. For generation, yes.

10 Q. But that would not be true in the ESP.

11 A. I would have to look at the merits of
12 that ESP proceeding in that case, but in general I
13 think an ESP construct, because of the way 143 is
14 structured, yes, a generation uncollectible could
15 perhaps be not unreasonable.

16 MR. PETRICOFF: I have no further
17 questions. Thank you very much.

18 EXAMINER PIRIK: Thank you.

19 As before, I'll have the company cross
20 last.

21 FirstEnergy?

22 MR. HAYDEN: No questions, your Honor.

23 MR. BOEHM: No questions, your Honor.

24 MS. MOONEY: No questions.

25 MS. HOTZ: No questions.

1 MR. YURICK: No questions, your Honor,
2 thank you.

3 MR. OLIKER: No questions, your Honor.

4 MR. HART: No questions.

5 MR. MONTGOMERY: No questions.

6 EXAMINER PIRIK: We're back to the
7 company.

8 MR. D'ASCENZO: Thank you, your Honor.

9 - - -

10 CROSS-EXAMINATION

11 By Mr. D'Ascenzo:

12 Q. Good afternoon, Ms. Turkenton.

13 A. Good afternoon.

14 Q. Ms. Turkenton, you have reviewed Duke
15 Energy-Ohio's filing in this proceeding, correct?

16 A. I have.

17 Q. And you've also reviewed the direct
18 testimony that was filed as part of that application,
19 correct?

20 A. I have.

21 Q. And in fact, you cite to specific
22 portions of testimony throughout your testimony --

23 A. I have.

24 Q. -- correct?

25 On page 2 of your testimony you discuss

1 the purpose for submitting your testimony. Is it
2 fair to summarize that the purpose of your testimony
3 is to discuss the various riders Duke Energy-Ohio is
4 proposing in this case?

5 A. Yes, that's the scope of my testimony.

6 Q. So for clarification, you are not
7 offering testimony regarding whether Duke
8 Energy-Ohio's competitive bidding process that's
9 proposed in this application complies with Ohio
10 Administrative Code 4901:1-35-03?

11 A. I am not.

12 Q. And for further clarification, in your
13 direct testimony you are not disputing that Duke
14 Energy-Ohio's proposed competitive bidding process
15 results in an open, fair, and transparent process,
16 correct?

17 A. No; that's outside the scope of my
18 testimony.

19 Q. Thank you.

20 And again, for clarification, you are not
21 offering an opinion whether the Midwest ISO is an
22 independent FERC approved reasonable transmission
23 organization, correct?

24 A. I am not.

25 Q. And the same question with respect to

1 PJM, you are not offering an opinion whether PJM is
2 an independent FERC approved regional transmission
3 organization.

4 A. I am not.

5 Q. And you are also not offering testimony
6 that disputes that the Midwest ISO has an independent
7 market monitor, correct?

8 A. I am not.

9 Q. And again the same question with respect
10 to PJM, you are not disputing --

11 A. I am not disputing, no.

12 Q. Thank you.

13 Ms. Turkenton, were you part of
14 staff's -- drafting staff's comments filed in this
15 proceeding on December 7th of 2010?

16 A. I was not.

17 Q. Are you familiar with those comments?

18 A. I am.

19 Q. Are you familiar with the direct
20 testimony of staff witness Ray Strom in this case?

21 A. I am.

22 Q. And Mr. Strom's testimony indicates that
23 he is supporting section 1 of the staff's comments,
24 and my question is, who is supporting section 2 of
25 staff's comments?

1 A. I do not know. Not me.

2 Q. Are you familiar with section 2 of
3 staff's comments?

4 A. You could -- I don't think I have staff
5 comments up here, so if you could give me a copy, I
6 can certainly look at it.

7 MR. JONES: Your Honor, I can provide a
8 copy.

9 Do you want me to?

10 MR. D'ASCENZO: That would be fine.

11 Thank you.

12 A. Section 2 starts, could you point me so
13 we can --

14 Q. Certainly.

15 A. At page 6?

16 Q. I believe that's correct. Yes.

17 A. Regarding Duke should consider an
18 electric security plan SSO option?

19 Q. Yes.

20 A. Mr. Strom would be supporting section 2.

21 Q. Mr. Strom would?

22 A. Yes.

23 Q. Okay. Are you familiar with Duke
24 Energy-Ohio's current switching level?

25 A. Yes.

1 Q. And is it fair to say that Duke
2 Energy-Ohio's current switching levels are about
3 60 percent?

4 A. 60 percent of its total load, yes.

5 Q. Are you familiar with the standard for
6 approval of an electric security plan under Ohio law?

7 A. Generally, yes.

8 Q. And isn't it true that the standard for
9 approval for an electric security plan is that it has
10 to be better in the aggregate than the results of an
11 MRO?

12 A. Yes, and an ESP in the aggregate has to
13 be better than an MRO, yes.

14 Q. And you would agree with me that there is
15 no standard that an MRO has to be better than an ESP,
16 correct?

17 A. I would agree.

18 Q. If you would please turn to page 2 of
19 your testimony.

20 A. I'm there.

21 Q. Beginning on page 2 you discuss Duke
22 Energy-Ohio's proposed Rider RECON. Would you agree
23 with me that the purpose of Rider RECON is to true up
24 the balance of any over or underrecovery of Riders
25 PTC-FPP and Rider SRA-SRT as of December 31st,

1 2011?

2 A. I would agree.

3 Q. Now, on page -- let me get you a page
4 reference here. On page 4 beginning on line 2 of
5 your testimony you state that you were unable to
6 review any actual forecasted 2011 Rider RECON costs
7 on which to form an opinion; is that accurate?

8 A. That's accurate.

9 Q. You would agree with me that the
10 objective of the filing of both the Rider PTC-FPP and
11 SRA-SRT is to set the rate level at such a level that
12 will recover the expected costs for that quarter plus
13 any then-existing over or underrecovery?

14 THE WITNESS: Could I have that question
15 reread, please?

16 (Record read.)

17 A. I would agree.

18 Q. So isn't it the case that a forecast for
19 the reconciliation of either Rider FPP or SRT would
20 always be zero just by the very nature of the manner
21 in which the rates for those riders are calculated?

22 A. The forecast would be zero?

23 Q. Yes.

24 A. I don't think --

25 Q. With respect to the reconciliation.

1 A. With respect to the reconciliation, yes.

2 Q. So with respect to your statement on line
3 4 that you were unable to review any actual
4 forecasted Rider RECON costs, you're not suggesting
5 that the company withheld any information regarding
6 the reconciliation, are you?

7 A. No. I'm simply acknowledging that at
8 December 2011 there were no forecasts available for
9 Rider FPP and/or SRT.

10 Q. Thank you.

11 Are you familiar at all with the fuel
12 rider for the American Electric Power companies?

13 A. Generally.

14 Q. Isn't it true that Ohio Power and
15 Columbus Southern Power were permitted to defer some
16 of their fuel costs that would ordinarily flow
17 through their bypassable FAC rider for recovery in
18 future years?

19 A. They were.

20 Q. And isn't that future recovery in the
21 form of a nonbypassable charge?

22 A. It is.

23 Q. Just out of curiosity, do you know how
24 much of Ohio Power's fuel costs including carrying
25 costs have been deferred through the end of 2010?

1 A. About \$450 million. Approximately.

2 Q. And based upon what you know from Duke's
3 past FPP filings, do you have any reason to believe
4 that the dollars to be flowed through the proposed
5 Rider RECON will be anywhere near the \$450 million?

6 A. I would hope not, no.

7 Q. Your testimony regarding Rider RECON
8 recommends that Duke Energy-Ohio's -- that the rider
9 should be bypassable; is that correct?

10 A. That's correct.

11 Q. So with that caveat you're not opposed to
12 the creation of Rider RECON; is that fair to say?

13 A. No; I think it's a necessary rider to
14 true up the December 31st balances of both SRT and
15 FPP.

16 Q. Thank you.

17 If you would please turn to page 5 of
18 your testimony.

19 A. I'm there.

20 Q. Beginning on page 5 you discuss the
21 proposed Rider UE-GEN, correct?

22 A. That's correct.

23 Q. And Rider UE-GEN is intended to recover
24 the cost of bad debt associated with generation
25 service in Duke Energy-Ohio's standard service offer;

1 is that correct?

2 A. That's correct.

3 Q. Now, on line 14 on page 5 you describe it
4 as "incremental generation uncollectible accounts
5 expense above what is in base rates"; is that
6 correct?

7 A. That's correct.

8 Q. Do you know when Duke Energy-Ohio's last
9 base rate case was that included generation related
10 bad debt?

11 A. I do not.

12 Q. Would you agree with me that Duke
13 Energy-Ohio hasn't had a base rate case with
14 generation included since prior to deregulation?

15 A. I would agree.

16 Q. And your recommendation with respect to
17 Rider UE-GEN is that it not be approved under an MRO
18 construct, correct?

19 A. That's correct.

20 Q. You would agree with me that Duke
21 Energy-Ohio is obligated to offer a standard service
22 offer to all customers in its service territory,
23 right?

24 A. I would agree.

25 Q. And that price could be in the form of

1 either an ESP or an MRO under Ohio law.

2 A. It could.

3 Q. And do you know whether under an MRO Duke
4 Energy-Ohio would still be required to follow the
5 Commission's rules for disconnection of customers?

6 A. It would.

7 Q. So the MRO does not give Duke Energy-Ohio
8 the ability to immediately disconnect a customer for
9 nonpayment, correct?

10 A. That's correct.

11 Q. We'd still have to go through the notice
12 requirements, right?

13 A. That's correct.

14 Q. And are you familiar with those notice
15 requirements?

16 A. I am not.

17 Q. Do you know when an account is considered
18 delinquent under Ohio Administrative Code?

19 A. I am not.

20 Q. Do you know whether under an MRO Duke
21 Energy-Ohio will still be required to follow the
22 Commission's winter disconnection rules that limit
23 the ability to disconnect customers for nonpayment
24 between November and April?

25 A. I'm sure that they are still applicable,

1 they still have to follow those rules, yes.

2 Q. Ms. Turkenton, are you aware of Duke
3 Energy-Ohio's purchase of receivables program for
4 CRES providers?

5 A. Generally. On the electric side or the
6 gas side?

7 Q. On the electric side.

8 A. I believe you have a waiver of the -- the
9 PAR. Is that what you're referencing?

10 Q. Yes.

11 A. Generally, yes.

12 Q. And are you generally aware that Duke
13 Energy-Ohio currently purchases CRES receivables at a
14 discount?

15 A. Yes, I think around 98 percent.

16 Q. I believe that's about right.

17 If Rider UE-GEN was characterized as a
18 nonbypassable charge that included CRES receivables
19 purchased at a zero percent discount, do you believe
20 that CRES providers would find that to promote
21 competition?

22 A. I can't speak for a CRES provider.

23 Q. Do you believe that would help promote
24 competition?

25 A. At a zero percent? In a nonbypassable.

1 Certainly, yes, I think it would.

2 Q. Would you please turn to page 7 of your
3 testimony.

4 A. I'm there.

5 Q. On page 7 of your testimony begins
6 discussion of the proposed Rider SCR; is that
7 correct?

8 A. That's correct.

9 Q. And you describe the purpose of Rider SCR
10 is to make Duke Energy whole to any differences in
11 options billed to customers compared to the rate they
12 paid -- the rate paid by Duke Energy-Ohio to winning
13 bidders in the MRO; is that fairly accurate?

14 A. That's accurate.

15 Q. Would you also agree with me that the
16 purpose of Rider SCR is not only to make Duke
17 Energy-Ohio whole but also to make customers whole as
18 well?

19 A. I don't know what you mean by
20 "customers." End use retail customers?

21 Q. Well, the customer -- or, excuse me, the
22 rider could act as a credit, correct?

23 A. It could, yes.

24 Q. So the proposed rider would also serve to
25 ensure that Duke collects no more from customers than

1 it owes its suppliers and that it collects no less
2 from customers than it owes.

3 A. I would agree.

4 Q. Duke Energy-Ohio's proposed Rider SCR
5 would also recover the costs of the competitive bid
6 plan consultant; is that correct?

7 A. That's correct.

8 Q. Would you agree with me that Revised Code
9 4928.142 authorized such recovery?

10 A. I would agree.

11 Q. And Rider SCR is also designed to recover
12 the cost of any Commission retained consultant,
13 correct?

14 A. That's correct.

15 Q. And similarly, 4928.142 would allow that
16 recovery, correct?

17 A. Yes.

18 Q. And would you also agree with me that
19 Ohio Administrative Code 4901:1-35-03 requires the
20 competitive bid plan to provide for the funding of a
21 consultant for the Commission?

22 A. I would agree.

23 Q. In your testimony you also discuss the
24 company's proposal to implement what you've
25 characterized as a circuit breaker, would you please

1 elaborate on your understanding of that?

2 A. Basically if the costs in Rider SCR are
3 greater than 5 percent, I believe that Duke is
4 proposing that the rider be nonbypassable, and if the
5 costs in SCR that you just outlined are less than
6 5 percent, we believe that you -- you're proposing
7 that the rider be bypassable.

8 Q. Isn't it true that the FirstEnergy
9 companies have a similar construct in their
10 generation cost recovery rider as part of their
11 competitive bid process?

12 A. They do, but that was part of a
13 stipulated case.

14 Q. That's right, but they do have that
15 rider, correct?

16 A. Yes.

17 Q. Now, on page 8 of your testimony -- are
18 you there?

19 A. I am.

20 Q. -- line 18 you discuss a spiral
21 situation. Would you please explain what you mean by
22 "spiral situation"?

23 A. Where there's nobody left on standard
24 service offer to pay the rider. Where everybody has
25 shopped. Everyone went to a CRES provider.

1 Q. On page 8, line 18 of your testimony you
2 specifically state "If this spiral situation occurs
3 or Duke procures a hundred percent of its SSO by
4 auction, Duke could make a separate filing to the
5 Commission to address this unlikely scenario, as well
6 as the continued bypassability of Rider SCR."

7 Did I read that correctly?

8 A. You did.

9 Q. Ignoring all of the varying
10 interpretations of the blending requirements that
11 have been offered in this case, isn't it true that at
12 some point under an MRO scenario a hundred percent of
13 the SSO load will be procured by auction?

14 A. At some point, yes.

15 Q. And with the statement that we just
16 talked about, you seemingly recommend that if the
17 Rider SCR deferral balance gets too large or if
18 customer switching accelerates, that first the
19 company should be able to see it coming and, second,
20 could make a separate filing to address that
21 scenario; have I characterized your testimony
22 correctly?

23 A. That's my testimony.

24 Q. What level of switching, in your opinion,
25 would Duke Energy-Ohio have to experience to make

1 such a filing?

2 A. I think that's up to Duke as to whether
3 they -- my testimony supports that this rider should
4 be bypassable with no circuit breaker. I did
5 acknowledge that Duke may have a situation where
6 everyone has switched and there's no one left to pay
7 the rider, I think Duke would have to assess at that
8 time, you know, how many customers are left on their
9 standard service offer service and whether they would
10 be at risk and then they would need to make the
11 filing in front of the Commission.

12 Q. Under an MRO Duke Energy-Ohio would have
13 to file quarterly filings to the Commission to make
14 adjustments to its prices, correct?

15 A. Correct.

16 Q. And would you agree that those quarterly
17 filings could be a reasonable opportunity for the
18 Commission to view whether the unlikely scenario is
19 materializing?

20 A. I don't agree. I mean, Rider FPP or -- I
21 think the adjustments that they make under 142 are
22 for purchased power, fuel, environmental, and other
23 renewable requirements. I don't know that, I mean
24 those would just be detailing costs, I don't think it
25 would have anything to do with who switched and who

1 hasn't.

2 Q. How often is Duke Energy-Ohio proposing
3 to adjust its Rider SCR?

4 A. Quarterly.

5 Q. So Duke Energy-Ohio would be making a
6 quarterly filing with respect to Rider SCR, correct?

7 A. In respect to SCR, but you asked me about
8 adjustments. I thought you meant adjustments under
9 142, the specific four adjustments. SCR is not one
10 of those adjustments, it's . . .

11 Q. I would agree with you that Rider SCR is
12 not one of the four listed adjustments, but would you
13 agree with me that Rider SCR is an adjustment?

14 A. It's a reconciliation mechanism between
15 what you pay suppliers versus what is billed to
16 customers with a few other costs that you have laid
17 out in your application.

18 Q. And you don't believe a reconciliation is
19 an adjustment?

20 A. It's an adjustment, just not an
21 adjustment under 142. It's a separate rider.

22 Q. You've cited to the direct testimony of
23 Don Wathen several times in your testimony. Are you
24 familiar with Mr. Wathen's description of Rider SCR?

25 A. I am.

1 Q. And Mr. Wathen describes Rider SCR as
2 including the costs of the CBP consultant as allowed
3 under Ohio Administrative Code. You are not taking
4 the position that Duke Energy-Ohio should not be
5 permitted to recover the costs of the CBP consultant,
6 are you?

7 A. I am not.

8 Q. And you are not opposed to using Rider
9 SCR as that mechanism, are you?

10 A. I am not. But I am opposed to other
11 undefined costs such as other costs as outlined in
12 your application.

13 Q. But you would agree that Duke Energy-Ohio
14 could file an application to include specific costs,
15 it would just have to prove those for inclusion in
16 Rider SCR, correct?

17 A. I would agree.

18 Q. If you would please turn to page 11 of
19 your testimony.

20 A. I'm there.

21 Q. Beginning on looks like line 3 you state
22 that "Staff recommends that Rider FPP not be
23 continued during the blending period...." Do you see
24 that?

25 A. I do.

1 Q. You also go on to state "...and the
2 placeholder for Rider EIR not be created at this
3 time." Is that correct?

4 A. That's correct.

5 Q. With respect to your recommendation
6 regarding Rider FPP not being continued, are you
7 suggesting that it not be continued during the
8 blending period proposed by the company of 29 months?

9 A. Yes, that's my recommendation. The
10 company's proposal is that they would freeze Rider
11 GEN for 29 months and you would not make any
12 adjustments to Rider FPP, so yes, I'm just talking
13 about the blending period.

14 Q. So if, for example, the Commission
15 requires a longer blending period, are you suggesting
16 that Duke Energy-Ohio should not be permitted to
17 adjust its standard service offer price for prudently
18 incurred costs of fuel used to produce electricity?

19 THE WITNESS: Can I have that question
20 reread, please?

21 (Record read.)

22 A. I am not suggesting that. I think that
23 Duke in its application said during at least the --
24 if the Commission approved your proposal, that you
25 would not make adjustments to FPP. If the Commission

1 did not agree with your proposal or ordered something
2 different, I think that Duke does have the ability to
3 then change FPP as required under the statute or as
4 contemplated under the statute.

5 Q. And in that scenario would you support
6 the creation of a Rider FPP?

7 A. I would.

8 Q. Now, with respect to Rider EIR, was your
9 recommendation not to create the placeholder with
10 respect to the proposed blending period of 29 months?

11 A. Yeah; the same rationale.

12 Q. So that if a longer blending is required,
13 you would support the creation of an environmental
14 rider to recover prudently incurred environmental
15 costs.

16 A. I think "support's" a strong word. I
17 think you're entitled under the statute to come in
18 and collect for those type of adjustments. Again, as
19 we've all been through, I think the blending period
20 is obviously a legal question as will be determined
21 by this Commission, but Duke has proposed in its
22 application that during the blending period, if it's
23 29 months, that you're not going to come in for
24 adjustments. I think if the Commission alters that
25 and does not go with your proposal, I think you have

1 the ability and/or opportunity to do that as
2 contemplated under the statute.

3 Q. Thank you.

4 Would you please turn to page 12 of your
5 testimony.

6 A. I'm there.

7 Q. Beginning on line 17 you recommend as a
8 policy based on the uncertainty surrounding new
9 carbon tax legislation or environmental laws, that
10 Duke make a separate filing with the Commission
11 regarding the types of environmental costs that the
12 company believes are eligible for inclusion in Rider
13 EIR; is that an accurate summary of what you say?

14 A. It is.

15 Q. So are you suggesting that the company
16 must get preapproval before it makes any
17 environmental expenditure?

18 A. Not any environmental expenditure, but
19 any incremental environmental expenditure above
20 what's already currently in the AAC.

21 Q. Can you point to where in 4928.42 there's
22 a requirement for the company to get preapproval for
23 any environmental expenditure?

24 A. I don't know that I said "preapproval."
25 You need to make an application before the Commission

1 and lay out those costs. Is that what you're deeming
2 "preapproval"?

3 Q. Well, you're suggesting that the company,
4 before it makes an expenditure, it must apply to the
5 Commission. Would the Commission have to approve?

6 A. I think the company's free to make any
7 expenditure that they want. That doesn't necessarily
8 mean that they're going to get recovery here at the
9 Commission.

10 So I guess to retract, you can make any
11 expenditure you want, but I do think you need to come
12 in, specifically in terms of EIR, I think you need to
13 come in here and make an application in front of the
14 Commission as to what type of environmental costs
15 that you plan on passing through EIR, just like you
16 would any other application before the Commission.

17 Q. Does Duke Energy-Ohio have to get,
18 currently get preapproval for -- to make an
19 environmental expenditure under its Rider AAC?

20 A. Again, not preapproval to make the
21 expenditure. But we do look at the prudence, once
22 you make those expenditures, we look at the prudence
23 of those expenditures when we review AAC.

24 Q. So with respect to your statement on line
25 12 -- I'm sorry, page 12, lines 17 through 20, are

1 you referring merely to the annual review process for
2 prudency review?

3 A. Could you direct me where you're
4 referencing in my testimony again?

5 Q. Yes. Page 12, beginning line 17 through
6 20.

7 A. All I'm merely trying to say in this
8 paragraph is that you want to create a placeholder
9 Rider EIR, which I think Mr. Wathen has described or
10 alluded to in his testimony that it would just be
11 environmental expenditures incremental to those that
12 are currently in the rider that's currently in place,
13 AAC.

14 My point here is if there is -- if there
15 are other environmental expenditures, I think 142
16 just talks about environmental expenditures in
17 general, if there are other environmental
18 expenditures, I just -- I believe that you need to
19 come in before or at least make an application so we
20 can consider those costs as to whether they are
21 eligible for inclusion in Rider EIR. You can make
22 the expenditure.

23 Q. So are you suggesting that it's the same
24 process that's currently undertaken with respect to
25 the AAC where the company comes in on an annual basis

1 to set the rider?

2 A. Yes.

3 Q. You're not saying any new process with
4 respect to establishing the environmental cost
5 recovery, correct?

6 A. I don't think there's any new process. I
7 think that just like you would any other rider, these
8 are -- EIR is something that is contemplated under
9 142, you would need to come in for an annual
10 application and we would certainly look at the
11 prudence of those costs or any costs that you have in
12 that rider.

13 Q. Let me ask it this way: You're not
14 suggesting that the company would have to file two
15 applications, one to include costs and then one to
16 set the rider.

17 A. No.

18 Q. Okay. Would you agree with me that
19 4928.142 part (D) does not place any limit on the
20 types of environmental costs which can be adjusted
21 for other than that they be prudently incurred?

22 A. Yes, and exactly my point.

23 Q. Thank you.

24 A. That's exactly what I'm trying to say.

25 Q. Would you please turn to page 14 of your

1 testimony.

2 A. I'm there.

3 Q. On page 14 you discuss Rider BTR.

4 A. I do.

5 Q. Beginning on line 16 you state "Staff
6 believes that Duke is not asking for explicit
7 approval (recoverability) of these types of expenses
8 in this proceeding." Did I read that correctly?

9 A. You did.

10 Q. So you would agree with me that Duke
11 Energy-Ohio is not asking for explicit approval of a
12 specific dollar amount for either Rider BTR or RTO in
13 this case, right?

14 A. Yes. Regarding the specific dollar
15 amount, you are not asking for recoverability, yes.

16 Q. And with respect to MISO exit fees and
17 the like, to the best of your knowledge FERC has not
18 approved any such cost recovery at this time for Duke
19 Energy-Ohio, correct?

20 A. That's correct. However, I would state
21 that it appears from testimony by Mr. Wathen that
22 if -- to the extent that FERC would approve those
23 types of costs, that you believe that Rider BTR is
24 the mechanism in which to recover those costs.

25 And staff is just simply stating in

1 testimony that those costs are future costs, we have
2 no idea what those costs will be, and that whether
3 Rider BTR or some other rider, if and when we would
4 agree to have those costs, you know, passed through,
5 Rider BTR might not be the mechanism is what I'm
6 trying to say. It could be some other rider.

7 Q. So you're saying that it could be Rider
8 BTR or another rider that's to be determined.

9 A. I think, again, we're talking about
10 unknown costs, pass-through of future costs, I don't
11 have an opinion because I don't know what those costs
12 are. You haven't even made an application before
13 FERC, so to prejudge or to give you preapproval is
14 the way I look at it, to -- if approved by FERC to
15 put them in BTR I don't think is acceptable. I'm
16 suggesting that we would not give you preapproval to
17 do that.

18 Q. Would you agree with me, Ms. Turkenton,
19 ignoring for a moment the categories of costs,
20 specifically MTEP versus RTEP, exit fees, et cetera,
21 would you agree with me that Duke Energy-Ohio is
22 entitled to recover RTO costs through rates?

23 A. I wouldn't say that they're entitled to
24 recover, no. I mean, in general I'm aware of the
25 statute 4928.05 and I'm aware that this Commission

1 has done this in the past, but again, what I'm
2 testifying to is that you're asking staff and/or this
3 Commission to preapprove, we don't know what the
4 types of costs are, they're future costs, and for us
5 to give you preapproval and say that you have the
6 ability to pass them through I think is premature.

7 But yes, this Commission does -- have
8 they passed through these type of costs before? Yes.

9 Q. Thank you.

10 Would you please turn to page 15 of your
11 testimony.

12 A. I'm there.

13 Q. Beginning on line 4 you state "Staff
14 points out that MISO exit fees, PJM entrance fees,
15 and RTEP expansion planning costs and other similar
16 type costs are the subject of open proceedings at
17 FERC and the Commission." What proceeding before the
18 Commission are you referring to?

19 A. I don't know if I have the case number,
20 but I think it's perhaps 09-778. I don't know if
21 that's the number.

22 Q. That case does not involve Duke
23 Energy-Ohio, correct?

24 A. No. It's in relation -- my point here in
25 the testimony is just to point out that MISO exit

1 fees, PJM entrance fees, RTEP charges are still
2 subject to litigation in the FE proceeding.

3 Q. And again, that does not involve Duke
4 Energy-Ohio, correct?

5 A. It does not, but these type of costs are
6 still up for -- are part of open proceedings.

7 Q. Wasn't the issue with respect to
8 FirstEnergy and transmission expansion costs and exit
9 fees part of the settlement in their 10-388 case?

10 A. It was.

11 MR. D'ASCENZO: If I could just have one
12 moment.

13 No further questions.

14 EXAMINER PIRIK: Thank you.

15 Redirect?

16 MR. BEELER: Can I have one moment just
17 to talk.

18 EXAMINER PIRIK: Yes.

19 (Discussion off the record.)

20 MR. BEELER: Thank you. Just one
21 question on redirect.

22 - - -

23 REDIRECT EXAMINATION

24 By Mr. Beeler:

25 Q. Ms. Turkenton, do you remember a

1 discussion you had with Mr. Petricoff regarding
2 uncollectible --

3 A. I do.

4 Q. -- uncollectible riders?

5 A. I do.

6 Q. Do you have any clarifications to make to
7 that discussion?

8 A. Yes. I think when Mr. Petricoff was
9 asking me about the distribution case, the 709 case,
10 I was focused on distribution uncollectibles which
11 they are incremental in that, but there also are
12 generation type of uncollectible expenses in base
13 rates.

14 What I did say, which still stands true,
15 is that there is not a mechanism for anything above
16 what's in base rates for generation that is being
17 currently collected by Duke, but there is generation
18 and distribution uncollectible expenses in base
19 rates.

20 MR. BEELER: Thank you. Nothing further.

21 EXAMINER PIRIK: Thank you.

22 Any recross?

23 MR. PETRICOFF: No, your Honor.

24 MR. D'ASCENZO: No, your Honor.

25 MR. HAYDEN: No, your Honor.

1 EXAMINER PIRIK: Hearing none, thank you,
2 Ms. Turkenton.

3 MR. BEELER: At this point staff would
4 like to move for the admission of Staff Exhibit 1,
5 the direct testimony of Tamara S. Turkenton.

6 EXAMINER PIRIK: Any objection?

7 (No response.)

8 EXAMINER PIRIK: Hearing none, the
9 exhibit shall be admitted into the record.

10 (EXHIBIT ADMITTED INTO EVIDENCE.)

11 EXAMINER PIRIK: We'll go off the record
12 for a moment.

13 (Discussion off the record.)

14 EXAMINER PIRIK: Please raise your right
15 hand.

16 (Witness sworn.)

17 EXAMINER PIRIK: Thank you.

18 - - -

19 RAYMOND W. STROM

20 being first duly sworn, as prescribed by law, was
21 examined and testified as follows:

22 DIRECT EXAMINATION

23 By Mr. Jones:

24 Q. Would you please state your name for the
25 record, please?

1 A. Raymond W. Strom.

2 MR. JONES: Your Honor, at this time I'd
3 like to mark the prefiled testimony of Raymond W.
4 Strom that was filed in this docket on December
5 28th, 2010, as Staff Exhibit 1.

6 EXAMINER PIRIK: The document is so
7 marked.

8 MR. JONES: Sorry, Staff Exhibit 2.

9 EXAMINER PIRIK: Yes.

10 (EXHIBIT MARKED FOR IDENTIFICATION.)

11 MR. JONES: Further, your Honor, I'd like
12 to have marked for identification the comments
13 submitted on behalf of the staff of the Public
14 Utilities Commission of Ohio that were filed in this
15 docket on December 7th marked for identification as
16 Staff Exhibit 3.

17 EXAMINER PIRIK: The document is so
18 marked.

19 (EXHIBIT MARKED FOR IDENTIFICATION.)

20 Q. (By Mr. Jones) Mr. Strom, would you
21 please identify for the record what's been marked as
22 Staff Exhibits 1 and 2, please. Or 2 and 3, please.
23 Excuse me.

24 A. If I understood correctly, Staff Exhibit
25 2 is my prefiled testimony in this case, and Staff

1 Exhibit 3 is the comments that the staff submitted
2 earlier in the case.

3 Q. And were these Staff Exhibits 2 and 3,
4 were these prepared by you or at your direction?

5 A. Yes.

6 Q. And do you have any changes to be made to
7 the Staff Exhibits 2 or 3?

8 A. I believe the only change would be in
9 light of some previous staff testimony just a few
10 moments ago, I would add that on page 3 in the
11 vicinity of line 13, I talk about supporting section
12 1 of the staff's initial comments. I would also add
13 that I support section 2 to the extent that it's
14 addressed in my testimony.

15 Q. Any other changes to be made to Staff
16 Exhibits 2 and 3?

17 A. No, I don't believe so.

18 Q. Okay. Then with those changes being made
19 are those Staff Exhibits 2 and 3 correct and truthful
20 to the best of your knowledge and belief?

21 A. Yes.

22 Q. And do you adopt Staff Exhibits 2 and 3
23 as your direct testimony and the comments on behalf
24 of staff in this case?

25 A. Yes.

1 Q. And, Mr. Strom, if I were to ask you for
2 purposes of Staff Exhibit 2, your prefiled testimony,
3 the same questions that are contained therein, would
4 your answers be the same?

5 A. Yes.

6 MR. JONES: Your Honors, at this time I
7 would offer Mr. Strom for cross-examination.

8 EXAMINER PIRIK: Thank you.

9 MR. GARBER: Your Honor, before we begin
10 would your Honor entertain a motion to strike a
11 portion of Mr. Strom's testimony at this time?

12 EXAMINER PIRIK: Yes, that would be the
13 right time.

14 MR. GARBER: With that in mind, Solutions
15 would move to strike, and I'm going to refer to page
16 3 of Mr. Strom's testimony, page 3, line 7 beginning
17 with the phrase "From a non-attorney perspective,"
18 through line 13, the clause that ends "could last as
19 long as ten years."

20 Solutions moves to strike that portion of
21 the testimony for reasons similar to those
22 articulated by Mr. Kutik as to the other witnesses,
23 to the extent this testimony relates to a strictly
24 legal question that is reserved for the Examiners for
25 the Commission, and to the extent this witness is not

1 qualified to offer that testimony, we would move to
2 strike it.

3 EXAMINER PIRIK: Do you have any other
4 motions?

5 MR. GARBER: No, your Honor.

6 EXAMINER PIRIK: Any response? To the
7 motion?

8 MR. JONES: Your Honor --

9 EXAMINER PIRIK: Well, other individuals.
10 I will definitely call on staff.

11 MR. JONES: Sorry.

12 EXAMINER PIRIK: Now, staff, Mr. Jones.

13 MR. JONES: Yes, your Honor, in all
14 fairness, your Honor, we would like to have the same
15 latitude provided by the company witnesses and all
16 other parties in this case as to their understanding,
17 their interpretation of the 4928.142 and its
18 provisions, and as a staff witness, a staff person,
19 you know, they have to have an understanding of the
20 MRO statute in order to do their job.

21 So I mean, in all fairness, this record
22 has testimony by other witnesses who are not
23 attorneys and were able to provide their
24 understanding, their belief as to how that statute
25 should be interpreted and we would like that same

1 latitude, your Honor.

2 EXAMINER PIRIK: The objection is noted
3 on the record, and consistent with our previous
4 rulings, we will deny the motion to strike.

5 Now, Ms. Clark?

6 MS. CLARK: I have a couple questions.

7 - - -

8 CROSS-EXAMINATION

9 By Ms. Clark:

10 Q. Good afternoon, Mr. Strom.

11 A. Good afternoon.

12 Q. Could you please turn to page 5 of your
13 testimony?

14 EXAMINER STENMAN: Could someone pass her
15 a microphone?

16 A. Okay, I'm there.

17 Q. Thank you.

18 You state in your testimony that the
19 Commission has oversight on aspects of the bidding
20 and process including an auction closing process; is
21 that correct?

22 A. Could you point me to a specific line?

23 Q. Well, basically that whole page, but line
24 16 in particular refers to the auction closing
25 process.

1 A. Okay, yes.

2 Q. Okay. And does this oversight listed in
3 this rule allow for the Commission to reject the
4 results of the auction?

5 A. I believe so.

6 Q. You believe so? Please state the reasons
7 that the Commission can reject the auction results.

8 A. I think the reasons are the statutory
9 guidelines for approval of the auction results.

10 Q. Okay.

11 A. I don't have the statute in front of me.

12 Q. That's okay. Would you agree that the
13 Commission can reject the results if each portion of
14 the bidding were not oversubscribed?

15 A. Yes.

16 Q. Okay. And would you agree that the
17 Commission could reject the auction results if there
18 were not more than four bidders?

19 A. Yes.

20 Q. And would you agree that the Commission
21 can reject the auction results if there were not at
22 least 25 percent of the load bid upon by persons
23 other than the electric distribution utility?

24 A. Yes.

25 Q. Okay. And are these reasons the only

1 reasons upon which the Commission may reject the
2 auction results?

3 A. I don't think that they would be
4 necessarily the only reasons. I think those would be
5 reasons that the Commission could reject the results.

6 Q. Okay. Could the Commission reject the
7 auction results based on the dollar amount per
8 megawatt-hour?

9 A. I think that would be possible, but it's
10 hard to contemplate a situation where that would
11 necessarily occur except for the potential that
12 there's a reserve price that wasn't met and that
13 information would be provided to the Commission that
14 the reserve price wasn't met.

15 Q. Do you know if there's anything that
16 would authorize the Commission outside of the statute
17 to reject based on price?

18 A. There's nothing specifically that comes
19 to mind at the moment, no. This was not an area I
20 was anticipating, I haven't read the statute and the
21 rules with this in mind recently, but I think that
22 the Commission has to have some latitude to reject
23 the auction results if things happen that weren't
24 supposed to happen or shouldn't or were out of the
25 ordinary, collusion was detected, things of that

1 nature, you know, I think the Commission has to have
2 some latitude for rejection of the results.

3 Q. Right. Okay, but absent situations of
4 collusion and fraud, based on the statute would they
5 have the ability to reject the results based on the
6 price?

7 A. I don't recall reading anything specific
8 like that in the statute.

9 Q. Okay. Thank you.

10 MS. CLARK: No more questions.

11 EXAMINER PIRIK: Thank you.

12 Mr. Garber?

13 MR. GARBBER: Yes, your Honor.

14 - - -

15 CROSS-EXAMINATION

16 By Mr. Garber:

17 Q. Good afternoon, Mr. Strom, my name is
18 Grant Garber, I represent FirstEnergy Solutions.

19 A. Good afternoon.

20 Q. Let's talk first about the load cap that
21 you propose. You propose a load cap because you
22 believe it encourages participation of bidders and
23 assures diversity of supply; isn't that correct?

24 A. That's correct.

25 Q. You haven't analyzed the effect of a load

1 cap or the effect of a load cap on bidder
2 participation, have you?

3 A. I'm not quite sure what you mean by
4 "analyzed" in that context. I have experienced some
5 auctions, I have discussed this concept with our, say
6 our auction consultant, auction manager, but I don't
7 know -- I wouldn't consider that an analysis but I
8 don't know for sure what you're considering analyzed.

9 Q. You haven't attempted to quantify the
10 effect of a load cap on bidder participation; is that
11 right?

12 A. That's correct.

13 Q. And you haven't attempted to quantify the
14 effect of the load cap on diversity of supply.

15 A. That's correct.

16 Q. You also haven't spoken with any
17 potential bidders in Duke's proposed MRO auction; is
18 that correct?

19 A. I don't think I would know if I had. I
20 don't know who might be a potential bidder.

21 Q. Let me ask it this way: You haven't
22 spoken with any Ohio certified CRES provider about
23 the issue of a load cap; isn't that correct?

24 A. No, I have not.

25 Q. In your testimony you cite load caps in

1 New Jersey and Ohio as support for your
2 recommendation. Let's talk about the New Jersey one
3 first.

4 A. Okay.

5 Q. As you acknowledge in your testimony,
6 that load cap was imposed on a statewide basis; isn't
7 that correct?

8 A. That's correct.

9 Q. And that means that in New Jersey the
10 load cap applied to a particular supplier as to all
11 New Jersey utilities, correct?

12 A. Would you direct me to my testimony.

13 Q. Sure. It's page 4, lines 13 to 14.

14 A. Okay. I'm sorry, I need to have the
15 question repeated.

16 MR. GARBBER: Could you please reread the
17 question.

18 (Record read.)

19 A. Yes, that's correct as far as it goes.

20 Q. And as far as you know under the New
21 Jersey load cap a supplier would be allowed to win
22 100 percent of the load as to a particular utility so
23 long as that supplier didn't exceed the aggregated
24 load cap; isn't that right?

25 A. I don't think that's correct, but

1 specific knowledge of the situation is fairly fuzzy
2 at that point. I think that there was -- that there
3 is some sort of a calculation that is done to
4 determine a company-by-company load cap also, but I
5 haven't really looked into that.

6 Q. So you're not able to tell us anything
7 more about the company-by-company calculation you're
8 talking about.

9 A. No, I can't.

10 Q. And this is with respect to a load cap
11 that you mention in your testimony, right?

12 A. That's correct.

13 Q. In your testimony you also cite three
14 FirstEnergy load caps in three FirstEnergy Ohio
15 cases. The first is in Case No. 04-1371. Are you
16 aware of whether the Commission rejected the results
17 of the auction that was approved in that case?

18 A. I believe they did.

19 Q. And are you aware whether the reason was
20 because the price that resulted from that auction was
21 too high?

22 A. I think that would be a fair summary of
23 the reason. It was a projection of future prices
24 based on factors that were known and a comparison of
25 the auction results to the projected future prices,

1 but yeah, I think that's a fair summary.

2 Q. The second case you cite is 05-936, are
3 you aware of whether that auction ever took place?

4 A. I don't believe that auction took place.

5 Q. And are you aware that the reason why it
6 didn't take place was because of insufficient bidder
7 participation?

8 A. I think that is an appropriate -- that's
9 an appropriate statement, but I don't think that it's
10 necessarily because of the load cap.

11 Q. But nonetheless, the reason the auction
12 didn't take place in that case was because of
13 insufficient bidder interest; isn't that right?

14 A. Yes.

15 Q. The third FirstEnergy Ohio case you cite
16 is from 10-388. You recall that there was a -- or
17 that case was initiated because of a stipulation,
18 correct?

19 A. Yes, that's correct.

20 Q. And do you recall that staff was a
21 signatory to that stipulation?

22 A. I would accept that. I don't recall for
23 sure, but I believe you're correct.

24 Q. I won't make you take my word for it.

25 MR. GARBBER: Your Honor, at this time may

1 we mark as FirstEnergy Solutions Exhibit 5 the
2 stipulation and recommendation filed in Case No.
3 10-388 on March 23rd, 2010?

4 EXAMINER PIRIK: The document is so
5 marked.

6 (EXHIBIT MARKED FOR IDENTIFICATION.)

7 MR. GARBER: May I approach the Bench?

8 EXAMINER PIRIK: Yes.

9 MR. GARBER: And may I approach the
10 witness?

11 EXAMINER PIRIK: Yes.

12 Q. (By Mr. Garber) Mr. Strom, I've just
13 handed you what's been marked as FirstEnergy
14 Solutions Exhibit 5. Do you recognize this document?

15 A. I have seen this document before, but I
16 wouldn't just automatically recognize it except for
17 the fact of reading through it and accepting your
18 characterization of it, yes.

19 Q. Can you flip to the, it's an unnumbered
20 page but near the back, the signature line for the
21 staff of the Public Utilities Commission of Ohio. Do
22 you see a signature on that line?

23 A. I see something that purports to be a
24 signature, yes.

25 Q. Do you have any idea whose signature that

1 is?

2 A. That probably would be Thomas McNamee.

3 Q. Would you then agree that at least based
4 on what you see there that staff was a signatory to
5 this stipulation?

6 A. Yes.

7 Q. And you'd agree that the purpose of this
8 stipulation, as with all stipulations, is to settle a
9 case; isn't that right?

10 A. Yes.

11 Q. You'd agree that this stipulation was
12 entered into in an attempt to accommodate diverse
13 interests among a variety of parties.

14 A. Yes.

15 Q. And you'd agree that this stipulation
16 reflects a compromise, most likely reflects a
17 compromise or give and take among the parties as to
18 their positions in the case.

19 A. I would agree.

20 Q. Do you recall whether staff filed
21 testimony in this case recommending a load cap? And
22 for the record, "this case" being 10-388.

23 A. I think we filed testimony in the
24 FirstEnergy MRO case recommending that. I don't know
25 about -- I don't remember if it was the same case

1 number continued and held over for the ESP
2 stipulation or if it was a different case, that's
3 where I'm kind of uncertain. And I'm also uncertain
4 because I didn't file testimony on the stipulation,
5 I'm not sure what testimony was filed that.

6 Q. Well, if you could turn to page 12 of the
7 document you have in front of you, the stipulation,
8 and paragraph 10, if you could read silently while I
9 read aloud. "The Commission may order a load cap of
10 no less than 80 percent on an aggregated load basis
11 across all auction products for each auction date
12 such that any given bidder may not win more than
13 80 percent of the tranches in any auction." Did I
14 read that correctly?

15 A. Yes.

16 Q. So in this paragraph the signatory
17 parties were not recommending that the Commission be
18 required to order a load cap; isn't that correct?

19 A. That's correct.

20 Q. They were merely proposing it as an
21 option for the Commission to consider with the use of
22 the phrase "may order"; isn't that right?

23 A. Yes, I agree.

24 Q. Could you turn to page 34 of the
25 stipulation.

1 MR. JONES: Your Honor, for the record
2 I'm going to note an objection here because Mr. Strom
3 has testified that he didn't participate in this
4 proceeding, he didn't file testimony in this
5 proceeding, so I don't think that he has the ability
6 or knowledge to answer these questions, I don't think
7 it's relevant to this proceeding, he wasn't involved
8 in that case to be able to tell him exactly what was
9 going on firsthand as to what the negotiations were
10 that led to the stipulation.

11 EXAMINER PIRIK: Mr. Garber.

12 MR. GARBER: Well, your Honor, if
13 Mr. Jones is willing to stipulate that the portion of
14 Mr. Strom's testimony that refers to this case will
15 be stricken, then I will withdraw questions with
16 respect to the stipulation. Otherwise, to the extent
17 that testimony is allowed to go into the record, I
18 believe I should be permitted to cross-examine the
19 underlying details related to a case that Mr. Strom
20 cites in his own testimony.

21 EXAMINER PIRIK: I'll overrule the
22 objection.

23 Q. If you could look at the first sentence
24 of the full paragraph on page 34, Mr. Strom, and read
25 silently while I read aloud. "This Stipulation is

1 submitted for purposes of this proceeding only, and
2 is not deemed binding in any other proceeding, except
3 as otherwise provided herein, nor is it to be offered
4 and relied upon in any other proceedings, except as
5 necessary to enforce the terms of this Stipulation."

6 Did I read that correctly?

7 A. Yes, I believe you did.

8 Q. And, Mr. Strom, you think the staff
9 should abide by this language; isn't that right?

10 MR. JONES: Your Honor, I'm going to
11 renew my objection here because what Mr. Strom
12 identified in his testimony was what the Commission
13 had ordered, not the stipulation that preceded the
14 order from the Commission. So he wasn't -- Mr. Strom
15 was not referring to the stipulation in his
16 testimony.

17 EXAMINER PIRIK: Mr. Garber.

18 MR. GARBER: Your Honor, I believe a
19 record or a review of the record in that case would
20 show that the stipulation formed the basis of the
21 Commission order, what the Commission truly did in
22 that case was approve the stipulation and so I think
23 to try to separate the Commission's ultimate order
24 from the context of the stipulation is sort of a
25 false exercise in distinction.

1 EXAMINER PIRIK: Objection overruled.

2 MR. GARBER: Maria, could you please
3 reread the question?

4 (Record read.)

5 A. Let me read the language again, just a
6 moment.

7 Yes, I would say so.

8 Q. Mr. Strom, the auction manager under
9 Duke's proposal is CRA; isn't that right?

10 A. That's the auction manager that they have
11 chosen at least for the initial auctions, yes.

12 Q. And that was the same auction manager
13 that the FirstEnergy companies used in Case 10-388;
14 isn't that correct?

15 A. That's correct.

16 Q. You don't object to Duke's use of CRA as
17 an auction manager in their proposal, right?

18 A. I do not.

19 Q. Do you agree that CRA is a well respected
20 auction manager?

21 A. Yes.

22 Q. And you have no reason to doubt their
23 competence and judgment with respect to managing
24 auctions; isn't that right?

25 A. I have no reason to doubt their

1 competence. There's nuances of the auction
2 management that can be subject to different opinions.
3 I think that they are definitely a competent auction
4 manager.

5 Q. Mr. Strom, are you aware of what CRA
6 concluded with respect to the results of the auction
7 in Case 10-388?

8 A. My recollection is that they concluded
9 the auction was successful.

10 Q. Do you recall that they concluded that
11 the auction was competitive?

12 A. I know they issued a report at the end of
13 the auction and the report lists a variety of things,
14 I don't recall all the specific things that it lists.

15 Q. Let me ask you this: Do you recall
16 whether they concluded that the winning prices that
17 resulted from that auction were reasonable?

18 A. I believe so.

19 Q. Mr. Strom, are you familiar with the
20 auction conducted in May 2009 regarding the
21 FirstEnergy Ohio utilities in Case 08-935?

22 A. Probably. I don't have things memorized
23 by case number. I suspect that would be the shorter
24 term auction.

25 Q. That's correct.

1 A. Okay. Yes.

2 Q. And do you recall that that auction did
3 not have a load cap?

4 A. Yes.

5 Q. Do you recall the number of registered
6 bidders that participated in that auction?

7 A. No, I don't.

8 Q. Does 12 sound about right?

9 A. I'm sorry, I don't recall.

10 MR. JONES: Your Honor, objection. Asked
11 and answered. He stated he did not know, he followed
12 back up with a question as to how many.

13 EXAMINER PIRIK: Objection noted but I
14 think he's answering the question to the best of his
15 ability, so he says he doesn't recall.

16 MR. GARBER: I'm not sure if there was a
17 question still pending.

18 EXAMINER PIRIK: No, I think he answered
19 it. He said he did not recall.

20 Q. Do you recall the number of winning
21 bidders in that case, in that auction?

22 A. No, I don't.

23 Q. Isn't it true that there were nine
24 winning bidders in that auction?

25 MR. JONES: Objection, your Honor.

1 EXAMINER PIRIK: Basis?

2 MR. JONES: He testified he didn't know
3 how many bidders there were.

4 EXAMINER PIRIK: That's true, when he
5 says he doesn't recall, I think that means he doesn't
6 recall. So you need to move on.

7 Q. Mr. Strom, the auction process that Duke
8 proposed is designed to select the least-cost bids
9 among participating bidders; isn't that right?

10 A. Can I try that again? Could I have it
11 reread?

12 Q. Sure.

13 A. Or restated, one or the other.

14 MR. GARBBER: Maria, can you reread it,
15 we'll try that first.

16 (Record read.)

17 A. I think that's generally, yeah, that's
18 correct. It's not so much the least-cost bids but
19 it's to drive the price down to the point where the
20 load is just full in which case all participants
21 would get the same price.

22 Q. In other words, the purpose is to allow
23 Duke to procure a hundred percent of its load at the
24 lowest price at which it's able to do so, right?

25 A. I believe that's the intent, yes. And I

1 think the design is consistent with what we've seen
2 it do in other auctions.

3 Q. And without a load cap any bidder or the
4 least-cost bidder would be allowed to supply
5 100 percent of the load; isn't that right?

6 A. Yes.

7 Q. Without a load cap a single bidder could
8 not supply 100 percent of the load, right?

9 THE WITNESS: Could I have that reread?
10 (Record read.)

11 Q. I'm sorry, with a load cap. Thanks for
12 that correction.

13 A. That would be correct.

14 Q. And so if there is a load cap, the
15 least-cost bidder would be allowed to supply, let's
16 assume that there's an 80 percent load cap, the
17 least-cost bidder would be allowed to supply
18 80 percent of the load, right, and then the remainder
19 of the load would have to go to the next highest cost
20 bidder; isn't that right?

21 A. No, I don't think so.

22 Q. And why do you not think so?

23 A. Your question presumes that there is a
24 single least-cost bidder and that may or may not be
25 the case.

1 Q. Let's assume that there's one least-cost
2 bidder and I want you to further assume that you have
3 one least-cost bidder and that the next bidder is
4 bidding a price that is higher than that lowest
5 price. Do you understand that assumption?

6 A. Well, I sort of understand the assumption
7 except that's not quite how the auction works. I
8 mean, all bidders bid the same price in any specific
9 round.

10 Q. Mr. Strom, you're not challenging the
11 credit requirements that Duke is proposing to apply
12 to bidders in its auction?

13 A. In my testimony? No, I'm not.

14 Q. And you have no reason to believe those
15 are inadequate, correct?

16 A. I have no reason to believe that.

17 Q. You're also not challenging the bidder
18 qualification process that Duke proposes in its
19 application; isn't that right?

20 A. No.

21 Q. And you have no reason to believe that
22 the bidder qualification process is inadequate.

23 A. No.

24 Q. I want to ask you some questions about
25 your testimony on page 3, Q and A 10, regarding the

1 4928.142 and the blend. You would agree that in
2 order to interpret that statute one has to consider
3 the policy objective that that statute was designed
4 to accomplish; isn't that correct?

5 A. I don't know for sure what policy
6 objective you're referring to. So I don't know how
7 to answer that question.

8 Q. Well, would you agree that a policy
9 objective of 4928.142 is to protect the interests of
10 customers?

11 A. You'd have to reference me to some
12 specific language somewhere. I don't think that that
13 sounds like an unreasonable policy, but I don't know
14 specifically where that might be delineated.

15 Q. Would you agree that a policy underlying
16 4928.142 is to ensure reliable service at the lowest
17 possible price?

18 A. Reliable service? Yes. Lowest possible
19 price? I'm not sure. Reasonably low price. I think
20 you're referring to -- it sounds almost like you're
21 referring to the statutory language on the policies
22 of the state and I don't have those in front of me so
23 I'm not quite sure if you are referring to those, if
24 you're quoting them correctly or not, I'm not sure.

25 Q. I'm not, but does that sound to you like

1 it's consistent with the policy that you believe
2 would underlie that statute? In other words, to the
3 extent you're purporting to interpret this statute
4 I'm asking you what you believe the policy of the
5 statute that you interpret would be. I'm asking you
6 I guess specifically would you believe a policy of
7 4928.142 is to protect customer interests?

8 A. I'm not testifying on --

9 MR. JONES: Your Honor, I'm going to
10 object to the question. It's beyond the scope. He
11 didn't testify as to what the policy objective of the
12 statute was. I mean, that's not in his testimony.
13 It's beyond the scope of his testimony.

14 EXAMINER PIRIK: Objection sustained.

15 Q. Mr. Strom, would you agree that in
16 drafting 4928.142 we can assume that the General
17 Assembly took care in choosing the words it would use
18 to include in that statute?

19 MR. JONES: Objection, your Honor.

20 Mr. Strom didn't take part in drafting the statute to
21 know what the discussion of the legislature was in
22 creating that statute.

23 MR. GARBBER: Your Honor, may I be heard?

24 EXAMINER PIRIK: I think you need to
25 rephrase the question. I'm going to sustain the

1 objection.

2 Q. Mr. Strom, would you agree that
3 interpretation of 4928.142 should begin with the
4 actual language of the statute?

5 THE WITNESS: I missed the intro to that
6 question. Could I have it reread, please?

7 (Record read.)

8 A. 4928.142(D) and (E)? Or are you trying
9 to expand it to the rest of -- the entirety of 142?

10 Q. I think with that question we can refer
11 to the entirety of 142.

12 A. Maybe I can help settle some of this. I
13 don't have any concern about the entirety of the
14 statute necessarily applying to the MRO, but all I'm
15 trying to do in my testimony is to look at the
16 language in (D) and to the extent that it may be
17 modified by (E) and say that this is what I
18 understand it to be saying.

19 Q. Mr. Strom, from your testimony you are
20 purporting to interpret 142(D) and (E); isn't that
21 right?

22 A. Yes.

23 Q. And in conducting that interpretation you
24 would agree that you should consider the actual
25 language of the statute, right?

1 A. Yes.

2 Q. Is it your testimony that the Commission
3 cannot order or cannot alter the blending proportions
4 in the second year of the proposed MRO?

5 A. No.

6 Q. Do you believe that the Commission -- so
7 you believe that the Commission can alter the
8 blending proportions beginning in the -- or, in the
9 second year of the proposed MRO.

10 A. You started the question with "beginning"
11 and then you changed it, I think you eliminated the
12 word "beginning in," just so it's in -- could we
13 clarify that? I want to make sure we don't get stuck
14 on semantics.

15 Q. Sure. Is it your testimony that the
16 Commission cannot alter the blending proportions in
17 the second year of the proposed MRO?

18 A. No, I don't think that's my testimony.

19 Q. So you believe the Commission can alter
20 the blending proportions in the second year of the
21 MRO.

22 A. Yes.

23 Q. Mr. Strom, you would agree that under
24 4928.142 the Commission can extend the blending
25 period up to ten years; isn't that right?

1 A. I believe so.

2 Q. And you agree that the Commission can
3 reduce the blending period to less than five years.

4 A. I don't see anything that specifically
5 prohibits it, so I believe that the Commission could
6 do that.

7 Q. In your prefiled testimony you state that
8 "any forecast" -- and I'll refer you to page 3, line
9 21, you state "...any forecast, no matter how well
10 constructed, is subject to error." Did I read that
11 right?

12 A. That's correct.

13 Q. Mr. Strom, you would agree that no
14 forecast can be a perfect prediction of the future.

15 A. No, I couldn't agree with that blanket
16 statement. I could forecast the winner of the Super
17 Bowl and I could be correct a hundred percent if I
18 got the prediction right. But that kind of thing
19 aside, if you're forecasting prices, quantities,
20 things far into the future, it's unlikely that you'll
21 accidentally get it right.

22 Q. With respect to -- related to that
23 answer, with respect to forecasts of future market
24 prices, you would agree that it's very difficult, if
25 not impossible, to predict future markets perfectly;

1 isn't that correct?

2 A. Yes, I would agree.

3 Q. And in fact, the only market prices that
4 one can know for sure are present and past prices,
5 correct?

6 A. Yes, I think so. Even those can be
7 tricky sometimes I believe.

8 Q. Under RC 4928.142(E) the Commission is
9 allowed to alter the blending proportions
10 prospectively, correct?

11 A. Correct.

12 Q. Would you expect that in making that
13 decision the Commission would have to review
14 forecasts of future market prices?

15 A. Correct. Yes, I would agree.

16 Q. And, in fact, the Commission currently
17 relies, well, I'll ask it this way: Electric and gas
18 companies are -- you are aware that electric and gas
19 companies are required to file long-term forecast
20 reports; isn't that right?

21 A. Yes.

22 Q. And isn't it true that long-term forecast
23 reports include ten-year forecasts of, among other
24 things, projected demand and load?

25 A. I believe you're correct, although I

1 don't personally review those very frequently. It's
2 been quite some time since I've actually looked.

3 Q. But to your knowledge long-term forecasts
4 reports do project projections of future demand and
5 load.

6 A. I believe so. And I would be willing to
7 accept that.

8 Q. And do you also recall the long-term
9 forecast reports also include forecasts of future
10 prices?

11 A. That, I don't know.

12 Q. Mr. Strom, you'd agree that overlapping
13 product terms, or that a competitive bid process that
14 features overlapping product terms can mitigate
15 volatility in market prices; isn't that correct?

16 A. Yes.

17 Q. And isn't it true that Duke's proposal
18 includes that?

19 A. I couldn't hear the end of that question.

20 Q. Isn't it true that Duke's proposal
21 includes that feature?

22 A. Not initially, but in the later years,
23 yes.

24 Q. Have you reviewed Mr. Judah Rose's
25 testimony in this case?

1 A. Not in its entirety. I did look at it,
2 aspects of it. Some I've seen, some I paid more
3 attention to than other parts, so I don't know how
4 you would consider that if I reviewed it.

5 Q. Did you pay attention to the portion of
6 his testimony that relates to his projections of
7 future power prices?

8 A. I recall reading that, yes.

9 Q. And do you recall that his projections
10 incorporate actual wholesale forward power prices?

11 A. Yes.

12 Q. And your understanding is that wholesale
13 forward power prices are actual prices paid for power
14 to be delivered in the future, right?

15 A. Yes.

16 Q. So is it fair to say those aren't simply
17 forecasts or projections?

18 A. Those prices themselves are not forecasts
19 or projections but the way I believe he's using them
20 is a forecast or projection.

21 Q. Have you conducted any projections of
22 future power prices in this case?

23 A. No.

24 Q. And do you have any reason to dispute the
25 price forecasts that Mr. Rose included in his

1 testimony?

2 A. No, and I didn't intend for my testimony
3 to dispute his testimony at all.

4 MR. GARBER: One moment, your Honor.

5 Thank you, your Honor, for that time.

6 Q. Very briefly, Mr. Strom, going back to
7 your testimony regarding the New Jersey load cap
8 rules, are you -- you're not able to cite to us here
9 today a specific rule that requires the company's
10 specific calculation you described; is that right?

11 A. No, I can't -- it's something that I
12 recall looking at on the BGS auction website, but I
13 can't lead you to a specific document without the
14 website in front of me.

15 Q. Your recollection is kind of fuzzy on
16 that point; is that fair to say?

17 A. I think that's fair, yes. And it's fair
18 to say that I could be incorrect in my recollection
19 or my interpretation of what I saw, but my
20 recollection is that I saw a fairly detailed
21 calculation that would be used to determine
22 company-by-company load cap.

23 Q. Would you accept, subject to check, that
24 there is no such requirement for a company-by-company
25 load cap?

1 A. That would be difficult for me to do with
2 the thing that I think I recall. It would be hard --
3 if there's some way that we could have a follow-up at
4 some point or something to show that yes, there
5 really is, or no, there really isn't.

6 I'm not -- I'm not really set on one
7 certain outcome as to whether New Jersey does require
8 it or it doesn't. I don't think it's really that
9 important for the purpose of my testimony, but I was
10 just trying to be truthful what I recall.

11 Q. If you could look back at what's been
12 marked as Solutions Exhibit 5, the stipulation in
13 Case 10-388 --

14 A. I'm sorry, what am I looking at?

15 Q. The stipulation.

16 A. Okay.

17 Q. In Case 10-388.

18 A. Page?

19 Q. Page 13, footnote 5, you and I had a
20 conversation about CRA being the auction manager
21 under both Duke's proposal and under the auction that
22 was conducted in this case, and that that manager was
23 CRA, and if you could read silently footnote 5 while
24 I read aloud. "The CPB manager believes that a load
25 cap imposed on the competitive bidding process is

1 unnecessary, risks the level of bidding participation
2 in the auction, and is detrimental to the bidding
3 process and its objectives." Did I read that
4 correctly?

5 A. Yes, you did.

6 Q. And CBP manager here refers to CRA; isn't
7 that right?

8 A. Yes, I believe it does.

9 MR. GARBER: Nothing further, your Honor.

10 EXAMINER PIRIK: Thank you.

11 Mr. Kurtz?

12 MR. KURTZ: Thank you, your Honor.

13 - - -

14 CROSS-EXAMINATION

15 By Mr. Kurtz:

16 Q. Good afternoon, Mr. Strom.

17 A. Good afternoon.

18 Q. I really want to ask you about your Q and
19 A No. 10 beginning on page 3 over to page 4, about
20 the blending.

21 A. Okay.

22 Q. Your ultimate conclusion is on page 4,
23 line 3, "...the Commission should not approve the
24 Company's MRO as proposed"; is that correct?

25 A. That's correct.

1 Q. What, then -- how, then, should the
2 company price electricity for people who don't shop
3 beginning January 1, 2012? What are the company's
4 options if this application is rejected?

5 A. Well, I believe if the Commission rejects
6 the application, that they should tell the company
7 what the deficiencies are and how they can be
8 corrected and then the company can resubmit.

9 Q. Resubmit a lawful MRO --

10 A. One that complies with the Commission's
11 requirements.

12 Q. Or a lawful ESP.

13 A. Yes.

14 Q. Okay. And I take it from your testimony
15 that the company's MRO as proposed is not lawful
16 because of the year 3 flash cut to a hundred percent
17 market determined upfront.

18 A. Yes, determined upfront. Yes.

19 Q. Okay. What would a lawful MRO look like?
20 What would the initial blending period be in a lawful
21 MRO application? Would it be a five-year initial
22 blend to start off with?

23 A. I think that's what the statute envisions
24 as a starting point. And with the ability for the
25 Commission to relook at the blending periodically

1 along the way.

2 Q. Beginning in year 2 they could alter the
3 blend?

4 A. Yes.

5 Q. Only if certain things happen could the
6 Commission alter that presumptive five-year blend;
7 isn't that right?

8 MS. SPILLER: Your Honor, I'm going to
9 object to the extent that Mr. Kurtz's line of
10 questioning feels a bit like friendly
11 cross-examination.

12 MR. KURTZ: Well, it isn't. The witness
13 testified that he believes the Commission could
14 shorten the MRO blending period in year 2 to
15 something less than five years and our position is
16 five years is the minimum, so I think Mr. Strom and
17 OEG do not see eye to eye on this so it is not
18 friendly.

19 EXAMINER PIRIK: Objection overruled.

20 Q. What is the standard for the, the
21 statutory standard for the Commission to alter
22 beginning in year 2 the five-year presumptive blend?

23 A. I believe that there's language about an
24 abrupt or significant change.

25 Q. To mitigate an abrupt or significant

1 change to a rate group or rate schedule?

2 A. That sounds familiar, yes.

3 Q. So it could be by -- do you know the Duke
4 rate schedules, RS, residential, DS, secondary,
5 primary, transmission, streetlight? It could be an
6 abrupt or significant change as to any one of those
7 rate schedules?

8 A. I haven't really thought it through to
9 whether a single rate schedule would be sufficient to
10 be considered an abrupt or significant change and
11 then alter the entire MRO because of that, no.

12 I'm just assuming an abrupt or
13 significant change in rates and I think the
14 Commission would have to determine if this single
15 rate schedule is enough to satisfy that.

16 Q. Do you think it would be possible to have
17 different blending periods for different rate
18 schedules depending on the abrupt or significant
19 effect on rates as to the particular rate schedules?

20 A. That's an area that I had not
21 contemplated. I think that would become -- it would
22 have the potential to become very difficult to
23 administer.

24 Q. And in any event, the Commission could
25 extend the blend up to ten years in order to mitigate

1 an abrupt or significant negative rate impact or rate
2 impact that would be detrimental to consumers. Isn't
3 that what you testified to, it could be up to ten
4 years?

5 A. Yes, it could be up to ten years. I
6 don't know it necessarily has to be an impact on
7 consumers, but yes.

8 Q. An MRO is irreversible for a utility,
9 isn't it? You can't go to an ESP?

10 A. That's my understanding.

11 Q. And going into a lawful MRO with a five
12 year presumptive blend is there any way for the
13 utility know whether the MRO would be a ten-year
14 blend, an eight-year blend, a five-year blend? Is
15 there any way going in up front they can know under a
16 lawful MRO how long the blending period would be?

17 MS. SPILLER: Your Honor, I'm going to
18 object to the characterization of a "lawful MRO" in
19 that it necessarily requires this witness to render
20 some form of legal opinion.

21 EXAMINER PIRIK: Can you rephrase the
22 question?

23 Q. Strike the word "lawful." Can you answer
24 the question? Is there any way they would know going
25 in how long the blending period would be?

1 A. No, I think that they should propose a
2 blending period that's in compliance with the statute
3 requirements and then the Commission can adjust that
4 so when you're going in, you don't know for sure how
5 long it might be.

6 Q. And in your opinion would the Commission
7 make its decision on whether or not to alter the five
8 year presumptive blend based on actual facts and
9 evidence as it existed in that particular year? In
10 other words, based upon the real world as it existed
11 rather than forecast?

12 A. I think the real world as it exists at
13 the time they make the decision, certainly there
14 would probably be some reliance on information, but I
15 think the forecast would be much more near term than
16 we're looking at here.

17 Q. We don't know what the Duke rates will be
18 at the end of 2011, do we, the standard offer rates?
19 The FPP changes quarterly, doesn't it?

20 A. I believe it does.

21 Q. And it could change up or down three more
22 times before the end of 2011; isn't that right?

23 A. I believe so, yes.

24 Q. So if that FPP -- do you know what the
25 most recent FPP did, how far it went down?

1 A. No, I don't.

2 Q. Okay. If it continued to go down
3 significantly, that would be a real world factor the
4 Commission would look at in an MRO case, wouldn't it?

5 A. Yes.

6 Q. All right. In an MRO the utility's
7 allowed to have four adjustments for prudently
8 incurred costs; is that correct? Prudently
9 incurred --

10 A. I know adjustments exist, the number four
11 I'm not sure about.

12 Q. Fuel, purchased power, environmental, and
13 advanced energy, is that a fair characterization of
14 the four adjustments?

15 A. I believe that sounds right.

16 Q. Now, those four adjustments are not
17 guaranteed. In other words, just because those costs
18 went up, there's no guaranteed recovery in an MRO, is
19 there?

20 A. I believe the Commission would have to
21 review those.

22 Q. Wouldn't the Commission have to review
23 them not only for prudence, but to determine whether
24 or not those adjustments would not result in a
25 prospectively, looking forward, whether or not those

1 adjustments would result in significantly excessive
2 earnings where the burden of proof would be on the
3 utility?

4 MS. SPILLER: Your Honor, I'm going to
5 object to the extent this question is well beyond
6 both staff comments and Mr. Strom's testimony that he
7 sponsors in this proceeding.

8 EXAMINER PIRIK: Mr. Kurtz?

9 MR. KURTZ: Well, I think it's under the
10 question under the picture, big picture of what a
11 lawful MRO would look like, and staff obviously
12 thinks what the company has filed does not comply
13 with the statute, and I think it's important for the
14 record for the Commission to understand what would be
15 lawful.

16 EXAMINER PIRIK: Objection overruled.

17 Q. Wouldn't there also be a prospective
18 significantly excessive earnings test under the MRO
19 statute?

20 A. I don't know.

21 Q. Did you review the Commission's recent
22 significantly excessive earnings test for Columbus &
23 Southern?

24 A. No, I did not.

25 Q. Do you know whether or not the Commission

1 would be obligated to apply the same standards for
2 the SEET test in an MRO versus an ESP?

3 A. I don't know.

4 Q. Is it possible, in your opinion, that the
5 Commission would look at the list of miscellaneous
6 factors that they consider in a SEET case and
7 determine that the threshold for overearnings would
8 be lower in an MRO than an ESP? Is that a
9 possibility?

10 MS. SPILLER: Your Honor, I'm going to
11 object. The witness has just indicated he doesn't
12 know the considerations. I think this question --

13 MR. KURTZ: I'll withdraw that question.

14 MS. SPILLER: Thank you.

15 Q. Other than the blending period is there
16 anything else in the company's application that you
17 have found to be unlawful that would require
18 rejection by the Commission?

19 A. I don't like the phrase "unlawful" so
20 much, but I did point out that staff is concerned
21 that the company may not be intending to comply with
22 the ongoing review of their MRO, I saw some language
23 there that seemed to imply that they did not intend
24 for that to take place, and be in compliance with the
25 rules of the Commission.

1 Q. In the staff comments, didn't the staff
2 comments recommend the company file an ESP?

3 A. Yes.

4 Q. Are you supporting those portions of the
5 staff comments?

6 A. I'm generally supporting, let's see, on
7 page 2 of my testimony I state on line 8 "As noted in
8 Staff's initial comments filed in this case," and so
9 forth that ESP "could offer significant advantage to
10 the Applicant, stakeholders, and the public at
11 large."

12 Q. Can you expand on that? Why could an ESP
13 do that?

14 A. I think an ESP allows greater flexibility
15 for consideration of a variety of different types of
16 considerations that an MRO does not.

17 Q. And an ESP is not irreversible whereas an
18 MRO is an irreversible decision.

19 A. That is correct.

20 MR. KURTZ: Thank you, your Honor.

21 MS. HOTZ: I have a few.

22 - - -

23 CROSS-EXAMINATION

24 By Ms. Hotz:

25 Q. Mr. Strom, you were shown a stipulation

1 and recommendation that was marked as FES No. 5. Did
2 you participate in the proceeding that that
3 stipulation and recommendation was filed under?

4 A. I'm not sure. As I tried to explain
5 before, I can't recall offhand if this stipulation
6 was -- I think I participated in the negotiation of
7 this stipulation.

8 Q. Oh, you did.

9 A. I filed testimony in the MRO case that
10 preceded this, and my hesitance was about whether or
11 not they were different cases. And I see the label
12 for this one says for electric security plan, so that
13 confirms that it's a different case. I didn't file
14 testimony in this ESP case.

15 MS. HOTZ: Okay. Thank you, that's all I
16 have.

17 EXAMINER PIRIK: Thank you.

18 Mr. White?

19 MR. WHITE: No questions, your Honor.

20 EXAMINER PIRIK: Mr. Oliker?

21 MR. OLIKER: I have no questions, your
22 Honor.

23 EXAMINER PIRIK: Mr. Hart?

24 MR. HART: No questions.

25 EXAMINER PIRIK: Mr. Montgomery?

1 MR. MONTGOMERY: No questions, your
2 Honor.

3 EXAMINER PIRIK: I think before we
4 proceed with the company why don't we take a
5 ten-minute break until 5:00 o'clock.

6 MS. SPILLER: Sure.

7 (Recess taken.)

8 EXAMINER PIRIK: We'll go back on the
9 record.

10 Ms. Spiller?

11 MS. SPILLER: Thank you, your Honor.

12 - - -

13 CROSS-EXAMINATION

14 By Ms. Spiller:

15 Q. Mr. Strom, are you aware that the
16 Commission has allowed a division among rate classes
17 in the past?

18 A. I'm not quite sure I know what you mean,
19 but I doubt I have much awareness of it. I don't
20 know what the question really means, a division of
21 rate classes.

22 Q. I'll provide a little more detail. It's
23 a question that Mr. Kurtz was asking you about,
24 different blending percentages for different rate
25 classes. Do you recall his questions, sir?

1 A. Generally, yes.

2 Q. Sir, do you recall that in the Cincinnati
3 Gas & Electric Company's market development plan,
4 that that transition plan ended for residential
5 customers in 2005 and nonresidential customers in
6 2004?

7 A. I don't specifically recall that, but I
8 do recall the concept that the market rate
9 development periods ended at different times for
10 different customer classes, yes.

11 Q. And, sir, you are not the staff witness
12 with regard to the riders that have been proposed by
13 the company relative to this proceeding, correct?

14 A. That's correct.

15 Q. You have been here, sir, for at least a
16 portion if not all of the hearing concerning this
17 proceeding, correct?

18 A. I have been here for most of it, yes.

19 Q. And you have heard testimony, sir, from
20 the witnesses that 60 percent of the load in Duke
21 Energy-Ohio's service territory is now served by
22 competitive retail suppliers, correct?

23 A. Yes.

24 Q. And you have no reason to dispute that
25 number, do you, sir?

1 A. No.

2 Q. And, sir, I understand that based upon a
3 revision to your testimony today that you are now
4 sponsoring section 2 of the staff comments, correct?

5 A. The intent was to -- this was a -- it's a
6 tough distinction to make. I'm sponsoring section 2
7 to the extent that it is addressed in my testimony
8 already. On page 2, question starting on line 7 and
9 answer starting on line 8, I reference a part of
10 section 2.

11 Q. So is any staff witness in this
12 proceeding sponsoring section 2 as contained in the
13 staff comments?

14 A. Not in its entirety.

15 Q. Sir, is it your opinion that Duke
16 Energy-Ohio should abandon its MRO application and
17 pursue an electric security plan?

18 A. Staff's preference would be to have an
19 electric security plan and negotiate a settlement if
20 at all possible.

21 Q. And you believe, sir, that in that
22 process you would build upon Duke Energy-Ohio's
23 current electric security plan which the staff has
24 described as successful, correct?

25 A. I'm not sure "build upon" -- that's what

1 the staff's comments say I believe. I'm not sure
2 "build upon" is necessarily the best choice of words.
3 Continue with another electric security plan is what
4 we would like to see.

5 Q. Sir, did you prepare the staff comments
6 filed in this case?

7 A. They were prepared under my direction.

8 Q. So you authorized the description of Duke
9 Energy-Ohio's current electric security plan as
10 successful, correct?

11 A. That's correct.

12 Q. Sir, is it, then, your opinion that an
13 electric security plan in which 60 percent of the
14 load is served by competitive retail suppliers is a
15 success for and provides value for Duke Energy-Ohio?

16 A. I think the company would have to be more
17 of a judge on whether they believe it provides value
18 to them. I think there is success in the fact that
19 retail shopping has taken place in Duke's service
20 territory. I think that is a successful aspect of
21 the ESP.

22 Q. And, sir, you have heard testimony today
23 in this proceeding that when Duke Energy-Ohio is
24 fully at market pricing, that that would enhance the
25 competitive arena, correct?

1 A. I've heard that testimony. I'm not sure
2 I totally understand it.

3 Q. Okay. That's fair.

4 Mr. Strom, there is no requirement under
5 Ohio law that Duke Energy-Ohio be limited to
6 providing standard service offer supply only through
7 an electric security plan, correct?

8 A. I believe that's correct. The statute
9 provides two alternatives.

10 Q. Sir, section 1 of the staff comments
11 address Duke Energy-Ohio's compliance with the
12 statutory and Commission rule filing requirements
13 applicable to Duke Energy-Ohio's MRO application?

14 A. Correct.

15 Q. And when you prepared your direct
16 testimony, sir, that was filed on December 28th,
17 you would have reviewed the staff comments that were
18 filed on December 7th, correct?

19 A. Yes.

20 Q. And you have no changes to section 1 of
21 the staff comments, correct?

22 A. That's correct.

23 Q. And, sir, when you prepared your direct
24 testimony in this case, you were aware of the
25 Commissions rules applicable to the MRO filing

1 requirements, correct?

2 A. Yes.

3 Q. And, sir, in compiling your direct
4 testimony in this case you would have included a
5 discussion of issues that you thought relevant to the
6 question of whether Duke Energy-Ohio's application
7 complies with the applicable statutory and Commission
8 rule filing requirements for an MRO, correct?

9 THE WITNESS: I might need that one read
10 back.

11 (Record read.)

12 A. Not necessarily all of them, no.

13 Q. So there are issues that you think
14 important to this determination, sir, that are not
15 set forth in your testimony?

16 A. There can be other issues that the staff
17 may not entirely agree with or may have problems with
18 or may choose to brief in its, you know, in a
19 briefing process that may not have been addressed in
20 my testimony.

21 Q. So in terms of the opinion -- strike
22 that.

23 In terms of the issues on which you offer
24 opinion, they are set forth in your direct testimony,
25 correct?

1 A. That's correct.

2 Q. Thank you.

3 The first statutory requirement addressed
4 in the staff comments and adopted by you, sir, in
5 your direct testimony is that concerning a fair,
6 open, and transparent competitive solicitation
7 process, correct?

8 A. Yes, that's the first item addressed in
9 the staff comments.

10 Q. And in this case, sir, Duke Energy-Ohio
11 is proposing a descending price clock, full
12 requirements auction, correct?

13 A. Yes.

14 Q. And that is the same structure of an
15 auction that has been approved by the Commission in
16 two prior instances, correct?

17 A. It's very similar. It's not precisely
18 exactly the same but it's a very similar concept,
19 yes.

20 Q. Those two prior instances, sir, were the
21 FirstEnergy cases --

22 A. Yeah.

23 Q. Its first ESP filed under Case No.
24 08-935, correct?

25 A. Again, as I said a couple other times,

1 I'm not sure about case numbers, but yes, FirstEnergy
2 has had -- has gone through this process before on a
3 couple of occasions, the first time was a little more
4 different than the more recent one which the more
5 recent one is similar to Duke's proposal.

6 Q. With regard to the second proposal
7 utilized by the FirstEnergy distribution utility
8 companies, it is a descending price clock, full
9 requirements auction, correct?

10 A. Yes.

11 Q. And, sir, you would agree that there have
12 about two successful descending price clock auctions
13 conducted on behalf of the FirstEnergy distribution
14 utility companies, correct?

15 A. Yes.

16 Q. And although you acknowledge that the
17 competitive bidding process plan described by Duke
18 Energy-Ohio is similar to that already approved by
19 the Commission and utilized by the FirstEnergy
20 companies, are you suggesting that it's not an
21 appropriate plan now?

22 A. No.

23 Q. So you do not -- it is not your opinion,
24 Mr. Strom, that the competitive bidding process plan
25 proposed by Duke Energy-Ohio is not open, fair, and

1 transparent, correct?

2 A. There might have been too many "nots" in
3 there, I'm not sure.

4 Q. Sure. And I'm happy to rephrase. Would
5 you agree with me, sir, that the competitive bidding
6 process plan proposed by Duke Energy-Ohio in its
7 application is open, fair, and transparent?

8 A. Yes.

9 Q. And, sir, you question -- you merely
10 question the use of this plan within the MRO because
11 you would prefer to see it executed under the ESP,
12 correct?

13 A. I don't know that I necessarily
14 question -- could you point me to a statement?

15 Q. Sure. On page 2 of staff comments, that
16 last sentence that you've adopted through your direct
17 testimony provides, "However, Staff notes that these
18 generation auction proposals were approved under an
19 Electric Security Plan, which has different
20 requirements and capabilities than a Market Rate
21 Offer." Correct?

22 A. Yes.

23 Q. So I'm just trying to understand, is it
24 the fact that this auction process is structured
25 within an MRO that causes you some concern?

1 A. No, it doesn't cause any concern as far
2 as the auction itself. There are aspects to it that
3 may be different under an ESP as opposed to a market
4 rate offer such as the company's proposal is to --
5 it's to CRA as an auction manager, in an ESP kind of
6 a setting where it's a short-term and you have a
7 single auction manager that would manage the auction
8 for several consecutive auctions, that may not be a
9 concern, but if it's under an MRO where you would
10 give a single auction manager control over this
11 process in perpetuity, that aspect may not be
12 appropriate after an MRO.

13 It's subtle distinctions like that that I
14 think may be important differences, but in general
15 the concept of conducting this kind of an auction to
16 solicit generation supply, I don't have any concern
17 about that.

18 Q. Thank you.

19 Mr. Strom, there is no requirement under
20 an ESP to procure generation supply through a
21 competitive auction or solicitation process, correct?

22 A. That's correct.

23 Q. And there is no requirement under an ESP
24 that the process for pricing generation supply be
25 open, fair, and transparent, correct?

1 THE WITNESS: Could I have that read
2 back, please?

3 (Record read.)

4 A. I don't think that those words
5 necessarily are applied in the ESP, but I think that
6 some of the concepts would still expect to hold true.

7 Q. Mr. Strom, you do not dispute that Duke
8 Energy-Ohio has provided a clear product definition
9 as required by the MRO provisions, correct?

10 A. That's correct.

11 Q. And you do not dispute, sir, that Duke
12 Energy-Ohio has proposed standardized bidding
13 evaluation criteria for the bids received under the
14 competitive bidding process as required by the MRO
15 provisions, correct?

16 A. That's correct.

17 Q. And, sir, in adopting staff comments you
18 also agree that Charles River Associates is an
19 independent third party that would, among other
20 things, design and administer the competitive bidding
21 process, correct?

22 A. Yes. Yes. I believe that they are an
23 independent third party auction manager that would be
24 appropriate to choose to use for some period of time
25 but not necessarily in perpetuity.

1 Q. Now, sir, with regard to the length of
2 time over which CRA may be retained or function as
3 the auction manager, you did not articulate that
4 concern in your direct testimony, did you?

5 A. Not directly, but I think I discussed the
6 process of ongoing review to be conducted by the
7 Commission under an MRO and that would be one item
8 that I would expect to be part of that process is who
9 would be the auction manager.

10 Q. Mr. Strom, you would agree with me that
11 the Midwest ISO is an independent regional
12 transmission organization approved by FERC, correct?

13 A. Yes.

14 Q. And, sir, it is your testimony that the
15 Midwest ISO has a FERC approved independent market
16 monitor, correct?

17 A. That's correct.

18 Q. And, sir, you would also agree that PJM
19 Interconnection, LLC is an independent RTO approved
20 by the FERC, correct?

21 A. That's correct.

22 Q. And through your direct testimony,
23 Mr. Strom, you agree that PJM has a FERC approved
24 independent market monitor, correct?

25 A. Yes.

1 Q. In adopting section 1 of the staff
2 comments, Mr. Strom, it is now your opinion that
3 there are significant issues associated with Duke
4 Energy-Ohio's transmission -- transition to PJM that
5 are unresolved, correct?

6 A. That's correct.

7 Q. Yet, sir, you do not identify any
8 unresolved issues in your direct testimony, do you?

9 A. No, I don't.

10 Q. In fact, sir, you don't identify any
11 issues regarding the RTO realignment in your direct
12 testimony, correct?

13 THE WITNESS: Can I have that question
14 reread, please?

15 (Record read.)

16 A. I believe that's correct.

17 Q. You know that the FERC has approved Duke
18 Energy-Ohio's withdrawal from the Midwest ISO,
19 correct?

20 A. My recollection is that it was a
21 conditional approval based upon various things that
22 were laid out in the order, but I do understand that
23 it has been approved.

24 Q. And, sir, are you aware that Duke
25 Energy-Ohio has submitted a compliance filing on

1 December 27, 2010, regarding the order to which you
2 just referred?

3 A. I have heard that. I don't recall having
4 seen it or know what's in it, though.

5 Q. You are aware, Mr. Strom, that the FERC
6 has approved Duke Energy-Ohio's fixed resource
7 requirement, or FRR plan, for the transitional period
8 between January, 2012 and May 31st, 2014, correct?

9 A. Yes, and again like the previous item,
10 it's not something that I have reviewed and am
11 familiar with, but I do understand that it has been
12 approved, yes.

13 Q. And, sir, it is your opinion that Duke
14 Energy-Ohio's application satisfies the statutory
15 requirement concerning the availability of electric
16 pricing information, correct?

17 A. Yes.

18 Q. With regard to the blending period, sir,
19 that you adopt in your direct testimony, it's your
20 opinion that the company's proposal may not comply
21 with the statute, correct?

22 A. It's my opinion that it does not, I think
23 that's consistent with "may not," but yes.

24 Q. Sir, you are not a lawyer, correct?

25 A. That's correct.

1 Q. And would you agree that the
2 interpretation of the statute is a function to be
3 conducted by this Commission?

4 A. Certainly.

5 Q. In adopting the comments that appear on
6 page 5 under section 5 of the staff comments it is
7 your opinion, sir, that the 29 month blending period
8 proposed by the company is better suited for
9 consideration within an ESP, correct?

10 A. That is correct.

11 Q. Sir, is it your opinion, then, that
12 customers under an ESP enjoy the benefits of lower
13 generation prices resulting from a 29-month blend to
14 full market prices but that customers under a market
15 rate offer cannot?

16 THE WITNESS: Could I have that reread,
17 please?

18 (Record read.)

19 A. Not necessarily. That may be an outcome,
20 it may not.

21 Q. The final section of the staff
22 comments -- I'm sorry, the final part of the staff
23 comments section 1 that you adopt through your
24 testimony discusses the Commission's rules applicable
25 to the MRO filing, correct?

1 A. That's correct.

2 Q. And this last section, paragraph 6 that
3 begins on page 5 concludes "Staff's recommendations
4 in these areas -- in these and other areas, to the
5 extent that Staff determines necessary, will be
6 addressed in Staff's testimony." Correct?

7 A. Yes. That's what it says.

8 Q. Sir, you do not offer any direct
9 testimony in this case regarding corporate
10 separation -- Duke Energy-Ohio's corporate separation
11 plan, correct?

12 A. That is correct, but I don't want the
13 incorrect implication to be derived from that so I'd
14 like to expand on that in that just because we don't
15 address -- I didn't address something in my testimony
16 doesn't necessarily believe that we think that the
17 company's proposal in its entirety in that area is
18 exactly what we think would be the best proposal.

19 It's just in consultation with attorneys
20 for the staff certain things were determined should
21 be addressed in staff testimony and the fact that we
22 don't address them doesn't necessarily mean that we
23 are in total agreement with the company's filing.

24 Q. But, sir, you've not at all articulated
25 any opinion whatsoever with regard to Duke

1 Energy-Ohio's corporate separation plan, correct?

2 A. I have not.

3 Q. And so, sir, you did not find it
4 necessary to include in your direct testimony any
5 discussion of Duke Energy-Ohio's corporate separation
6 plan, correct?

7 THE WITNESS: Can I have that reread,
8 please?

9 (Record read.)

10 A. I didn't include it. If we were to have
11 provided testimony in that area, it probably would
12 not have been me.

13 Q. Sir, you did not address the conversion
14 of the winning bid prices into retail rates through
15 your direct testimony, correct?

16 A. That's correct.

17 Q. And, sir, from that I can conclude that
18 you did not find it necessary to include in your
19 direct testimony the Duke Energy-Ohio proposal for
20 converting winning bid prices to retail rates,
21 correct?

22 A. I think that's a fair statement. Again,
23 with a caveat that the fact that we didn't choose to
24 put it in testimony doesn't necessarily believe that
25 we entirely agree with every aspect of the filing.

1 That aspect is not something that I personally
2 reviewed, so I don't know if there are areas of that
3 that staff may have some concerns about, but -- and
4 may want to raise testimony on brief, I don't know.

5 Q. But for purposes of testimony, sir, you
6 and Ms. Turkenton are the only witnesses to provide
7 testimony on behalf of staff in this proceeding,
8 correct?

9 A. That's correct.

10 Q. And, sir, this section that we are
11 discussing concerns staff's opinion as to Duke
12 Energy-Ohio's compliance with the statutory and
13 Commission rule filing requirements applicable to an
14 MRO, correct? Section 1.

15 THE WITNESS: I'm going to have to have
16 that reread, sorry.

17 (Record read.)

18 A. I'm not sure I really understand the
19 question. You might have to rephrase or break it
20 apart or something. I'm not following it.

21 Q. And I'm happy to rephrase. I'm just
22 trying to get an understanding of the purpose of
23 staff's comments as set forth in section 1, and as I
24 read them it is to address the company's compliance
25 with the statutory and Commission rule filing

1 requirements for an MRO, correct?

2 A. To some extent that's correct. The
3 compliance with the statutory requirements I think we
4 addressed very straightforwardly. In the compliance
5 with the Commission rules we simply pointed out where
6 they were addressed.

7 This may be a fine line that I'm trying
8 to draw here, but what we were pointing out was that
9 each of the rules was addressed. We didn't
10 necessarily agree with the company's method of
11 addressing it but that those aspects were addressed.

12 MS. SPILLER: I'm sorry, now I need the
13 answer read back.

14 (Record read.)

15 Q. But, sir, as I read both staff comments
16 and your direct testimony, there is no indication
17 that staff disagrees with Duke Energy-Ohio's
18 application insofar as it concerns compliance with
19 Commission rule requirements, correct?

20 MR. JONES: I'm going to object, your
21 Honor. I think this has been answered two or three
22 times now and we just keep running around the tree
23 here. He's already answered the question, she just
24 keeps on rephrasing it differently.

25 EXAMINER PIRIK: Ms. Spiller.

1 MS. SPILLER: Well, your Honor, I don't
2 know that this question has in fact been answered by
3 this witness.

4 EXAMINER PIRIK: I'll allow him to answer
5 this question but I do think that we seem to be going
6 around in the same circle. So do you want it reread
7 or do you want to --

8 MS. SPILLER: Could I have it reread,
9 yes, please, your Honor? Thank you.

10 (Record read.)

11 A. I don't think that's correct at all, and
12 in the interest of trying to speed some things along
13 I'd point out that we did have some concern that the
14 company was not intending to comply with ongoing
15 review requirements in the Commission rules, I did
16 point that out.

17 Q. (By Ms. Spiller) And we'll get there in a
18 moment, sir.

19 With regard -- strike that.

20 You recommend that Duke Energy-Ohio
21 include a load cap in its auction structure, correct?

22 A. If you hold on a moment so I can get my
23 specific language here.

24 Q. I believe it's on page 4.

25 A. Yes. The use of the load cap is

1 recommended, although we aren't recommending any
2 specific percentage.

3 Q. And there is no statutory requirement for
4 a load cap, correct?

5 A. That's correct.

6 Q. Sir, do you happen to have a copy of
7 section 4928.142 in front of you?

8 A. No, I don't.

9 MS. SPILLER: May I approach?

10 EXAMINER PIRIK: Yes.

11 MS. SPILLER: Thank you.

12 Q. Sir, if I may refer your attention,
13 please, to section 142(A)(1)(e), do you have that,
14 sir?

15 A. Yes. The evaluation of submitted bids,
16 is that what you're after?

17 Q. Yes, sir.

18 And what that section provides, sir, is
19 that it refers to the evaluation of the submitted
20 bids prior to the selection of the least-cost bid
21 winner or winners, correct?

22 A. That's correct.

23 Q. Would you agree with me, sir, that that
24 statutory language contemplates that there could be
25 one least-cost winner in the auction?

1 A. The statute doesn't necessarily
2 contemplate an auction. It's a competitive bidding
3 process, it could take a variety of forms. In some
4 forms a winner may be appropriate, in other forms
5 winners may be appropriate.

6 Q. That's fair. I will rephrase.

7 Would you agree, sir, that statutory
8 language contemplates that there could be one
9 least-cost winner of the competitive solicitation?

10 A. Some type of competitive solicitation,
11 yes.

12 Q. And your opinion regarding a load cap,
13 sir, is not a reason that the Commission could reject
14 Duke Energy-Ohio's application, correct?

15 A. I don't know if the Commission would
16 consider that important enough of an aspect to reject
17 the application or not, or if the Commission may
18 simply determine that it's important and include it
19 in its order accepting the MRO, or it could feasibly
20 reject the idea in its entirety. So I don't know,
21 the Commission can do a variety of things.

22 Q. To your knowledge, sir, is there a
23 Commission filing requirement applicable to MROs that
24 mandates a load cap?

25 A. I don't recall any, no.

1 Q. Sir, with regard to the blending period,
2 you believe that the Commission can shorten the
3 blending period to less than five years, correct?

4 A. I believe that that's a possibility that
5 the Commission can do, but I think if they were to
6 choose to do it, it should happen in the context of
7 no earlier than year 2, meaning at a time when they
8 are in the second year of the MRO.

9 Q. So in the second year of the MRO the
10 Commission could decide that Duke Energy-Ohio's
11 generation supply would be acquired fully through the
12 competitive process, correct?

13 A. I believe that's certainly a possibility,
14 that even more accelerated than what the company is
15 actually proposing in its up-front proposal, but I
16 think that it needs to be determined at a later time.

17 Q. And, sir, you have seen the results from
18 the FirstEnergy auction that was conducted in October
19 of 2010, correct?

20 A. Yes.

21 Q. And those auction results, sir, revealed
22 generation prices that are less than Duke
23 Energy-Ohio's current ESP price, correct?

24 A. I believe that's the case. I'm not that
25 familiar with Duke's current ESP price but I think

1 from all the testimony I've heard I believe that
2 would be the case, yes.

3 Q. And accelerating the Commission to full
4 market prices under Duke Energy-Ohio's MRO would
5 allow customers to realize the benefit of lower
6 generation prices, correct?

7 A. I don't know.

8 Q. I'm sorry?

9 A. I don't know.

10 Q. You don't know. If we were to assume,
11 sir, that the FirstEnergy auction results were a
12 proxy for market prices during the period in
13 question, and that would be 2011 through May of 2014,
14 would you agree that accelerating the transition to
15 market would allow Duke Energy-Ohio's customers to
16 realize lower generation prices?

17 MR. JONES: Objection. He already
18 answered he didn't know for Duke.

19 EXAMINER PIRIK: I'll allow him to answer
20 if he knows. If not, he'll say "I don't know."

21 A. I'm not sure why you say the period in
22 question is 2011 through 2014. I'm not sure I
23 understand that aspect of the question.

24 Q. Fair enough. With regard to the -- we
25 could focus, sir, on the FirstEnergy auction results

1 that would apply in 2012, '13, and '14. Are you
2 familiar with those numbers, sir?

3 A. I could not recite them to you.

4 Q. Would it be helpful if you looked at what
5 was marked I believe as Duke Energy-Ohio Exhibit 21?

6 A. I could take a look at that.

7 Q. Okay.

8 MS. SPILLER: May I approach, your Honor?

9 EXAMINER PIRIK: Yes.

10 MS. SPILLER: Thank you.

11 A. Okay.

12 Q. Sir, with regard to the period between
13 2012 and 2014 do you agree that the results of the
14 FirstEnergy auction are a fair proxy for market
15 prices for that period?

16 A. At the time of the auction, yes.

17 Q. And, sir, assuming that the FirstEnergy
18 auction results are a fair proxy for market prices
19 for 2012 through 2014, would you agree that a quicker
20 transition to full market prices as proposed by Duke
21 Energy-Ohio would enable its customers to realize
22 generation prices that are lower than its current
23 ESP?

24 A. I don't know how you can make that
25 determination today for something that won't happen

1 until a number of years from now. Yes, these are the
2 prices that FirstEnergy achieved in the most recent
3 auction, but I don't know that that necessarily has
4 any bearing on what Duke may achieve in an auction
5 two or three years from now.

6 Q. Sir, have you reviewed the testimony of
7 Brian Savoy submitted on behalf of Duke Energy-Ohio
8 in this proceeding?

9 A. I probably did, but I will need to be
10 refreshed on what the topic is.

11 Q. Do you recall, sir, that he had included
12 in his testimony a reference to Duke Energy-Ohio's
13 proposed ESP rate for the end of 2011 as being \$73.40
14 per kilowatt-hour?

15 A. I'm sorry, I don't recall.

16 Q. Sir, would you accept that number subject
17 to confirmation?

18 A. That he proposed that in his testimony?

19 Q. Yes, sir.

20 A. Yes, I'll accept it.

21 Q. Sir, with the assumption that Duke
22 Energy-Ohio's ESP for December 2011 would be 73.40
23 and that the FirstEnergy auction results are a fair
24 proxy for market prices, would you agree that an
25 acceleration to full market pricing by 2014 would

1 enable Duke Energy-Ohio's customers to realize lower
2 generation prices?

3 A. Well, I have to accept someone's
4 testimony that I don't recall, plus I also have to
5 accept a fair market proxy that I don't believe is
6 correct, if I accept those two things, then I guess
7 I'd have to be led to the conclusion that you're
8 asking for, but I have trouble accepting those.

9 Q. So, again, sir, I'm sorry, was your
10 answer that you, subject to your qualifications that
11 you would agree?

12 MR. JONES: Objection, your Honor. He
13 does not agree with his testimony.

14 EXAMINER PIRIK: I'll let the witness
15 state his answer.

16 A. Maybe we can make this easier. I'm
17 not -- I'd like to try to get it resolved. The
18 FirstEnergy auction prices I don't see as guarantees
19 of what Duke Energy may achieve in an auction several
20 years from now. I think that they show what the
21 price for generation is now that will be delivered in
22 the future.

23 But I think the results that Duke may
24 achieve in a future auction could be very different
25 than this. So that's why I'm having trouble

1 accepting this as a given because I just don't know
2 what those numbers might be in the future.

3 Q. Sir, would you agree with me that
4 affording customers lower generation prices provides
5 a benefit to those customers?

6 A. Yes.

7 Q. And you would agree with me, sir, that
8 there are some customers in Duke Energy-Ohio's
9 service territory who cannot switch to competitive
10 retail suppliers, correct?

11 A. I heard that discussed today for the
12 first time. I have no reason to dispute it.

13 Q. So for those customers who do not have
14 the ability to change or switch generation providers,
15 they particularly are benefited by the access to
16 lower generation prices as quickly as possible,
17 correct?

18 A. I think there's a logical conclusion
19 there, yes.

20 Q. Mr. Strom, with regard to your comments
21 and your opinion that it's not clear that Duke
22 Energy-Ohio intends to comply with Commission rules,
23 is it a fair characterization of your testimony to
24 state that you simply don't know whether Duke
25 Energy-Ohio intends to be subject to ongoing

1 Commission oversight?

2 A. That's somewhat fair except I sort of
3 picked up an indication that they don't intend to. I
4 would be more than happy to stipulate to the fact
5 that they do intend to. I just, I thought it needed
6 to be addressed because it seemed to, at least this
7 one specific thing that I pointed out, and the fact
8 that I couldn't find this directly addressed
9 anywhere, led me to believe that the company may not
10 intend to follow those competitive bidding rules --
11 or the ongoing MRO rules.

12 Q. And, sir, are those the ongoing MRO rules
13 set forth in the Ohio Administrative Code section
14 4901:1-35-11?

15 A. Yes.

16 Q. And those rules, sir, are applicable once
17 the MRO is approved, correct?

18 A. Yes.

19 Q. And annually, sir, after the MRO is
20 approved, Duke Energy-Ohio is required to submit
21 filings to the Commission regarding, among other
22 things, the conduct of the competitive bidding plan,
23 correct?

24 A. That's correct.

25 Q. These rules, sir, are not rules that are

1 required to be met to demonstrate -- strike that.

2 These are not the rules to which the
3 company's application for approval of an MRO is
4 subject, correct?

5 A. I think that's a fair characterization.
6 I just didn't want us to be in a situation where the
7 company may be thinking that it was getting a waiver
8 of those rule requirements through this MRO approval
9 process. It wasn't clear to me that the company had
10 any intention to comply with those rules later so I
11 thought I should mention it.

12 Q. You recommend, Mr. Strom, in your direct
13 testimony that the company adjust its proposed
14 auction schedule for the first two years of its MRO,
15 correct?

16 A. Are you talking about the chart that I --

17 Q. Yes, sir.

18 A. In my exhibits. Yes, not just the first
19 two years, but that is correct that it is for the
20 first two years plus additional years.

21 Q. With regard to the first year, you are
22 proposing that the company auction off ten tranches
23 of full requirements service under a 29-month
24 contract, correct?

25 A. Yes, that's correct. I do want to make

1 sure it's clear that my proposal doesn't mean that I
2 think this is the only way it should be done. I put
3 this proposal out as an example of other
4 possibilities, and my main concern here was to
5 introduce some blending into the proposal that the
6 company was putting forth that there's some -- having
7 some overlap in the various auctions that would take
8 place would blend the prices resulting from those
9 auctions so that you would have a more stable price
10 as an end result. But there are probably other
11 alternatives available.

12 Q. And this schedule, Mr. Strom, reflects
13 your opinion that the statute requires a five-year
14 blend to full market pricing, correct?

15 A. That's correct.

16 Q. And, Mr. Strom, would you agree with me
17 that if the Commission were to find that it can
18 accelerate the blend to market, that you through your
19 direct testimony do not provide any other bases on
20 which the Commission can rely in rejecting the
21 company's filing, correct?

22 THE WITNESS: I'm sorry, I didn't follow
23 that question.

24 (Record read.)

25 A. Other than what? Other bases? I don't

1 provide any other bases other than what?

2 Q. Well, sir, I guess, and I certainly don't
3 mean to revisit this issue, but I'm happy to do so.
4 To be clear, you've identified a load cap as a
5 recommendation for the Duke Energy-Ohio auction,
6 correct?

7 A. Yes.

8 Q. And that, sir, is not a filing
9 requirement such that if the Commission does not
10 accept your recommendation, the absence of a load cap
11 would not render this filing statutorily deficient,
12 correct?

13 A. That's correct. I think I see where
14 you're going now.

15 Q. Okay.

16 A. You're saying that the blending issue is
17 the one that I propose that would, if accepted by the
18 Commission, would be rationale for rejecting this
19 filing, but the other items that I put forth would
20 not necessarily be rationale for rejecting the
21 filing, but could be things that the Commission would
22 say you must do this or you must do that and then
23 Duke would determine whether or not it would comply
24 with those or accept those requirements. Is that
25 where you're going?

1 Q. Sir, you have identified the blending
2 period proposed by Duke Energy-Ohio as not in
3 compliance with the statutory or Commission rule
4 filing requirements relative to the approval of the
5 MRO, correct?

6 A. Yes.

7 Q. And that, sir, is the only issue that you
8 have identified on which the Commission could rely in
9 rejecting Duke Energy-Ohio's application for approval
10 of an MRO, correct?

11 A. I don't know that it's necessarily the
12 case. If my concern about the company's intention to
13 follow the Commission rules is correct, then it could
14 be I think a reason to reject it because if you
15 aren't going to follow the rules that the Commission
16 has developed, I think the Commission would be
17 reluctant to accept an MRO filing of that nature.

18 But from the statutory perspectives, yes,
19 the one issue of the blending and when it's to come
20 to an end.

21 Q. And, sir, I believe you agreed with me
22 that compliance with annual filings that are required
23 only after approval of the MRO are not relevant to
24 the preliminary decision of whether the MRO should be
25 approved, correct?

1 A. I don't know if I said that. It wasn't
2 exactly what I think I intended to say. But I
3 don't -- I think the Commission should expect the
4 company to comply with the rules absent the company
5 explicitly requesting a waiver. There was enough
6 concern there that I thought it should be mentioned
7 and hopefully elicit a response from the company that
8 yes, it does intend to comply with the rules.

9 But that is not a statutory requirement
10 that would -- that the Commission could rely on to
11 reject the MRO, I don't believe.

12 Q. And, sir, did you have the opportunity to
13 attend the hearing while Robert Lee from CRA was
14 testifying?

15 A. I know I was here for some of it. I'm
16 not sure if I was here for all of it or not.

17 Q. Do you recall, sir, whether you were
18 present for that part of Mr. Lee's testimony wherein
19 staff counsel asked him whether the Commission had
20 ongoing oversight of the MRO process after the
21 blending period?

22 A. I don't recall specifically, I'm sorry.

23 Q. Okay. Thank you.

24 MS. SPILLER: One moment, please, your
25 Honor.

1 No further questions, your Honor. Thank
2 you.

3 EXAMINER PIRIK: Thank you.

4 Redirect?

5 MR. JONES: If we could have a minute,
6 your Honor.

7 EXAMINER PIRIK: Yes.

8 (Discussion off the record.)

9 MR. JONES: Your Honor, I just have one
10 or two questions of Mr. Strom.

11 - - -

12 REDIRECT EXAMINATION

13 By Mr. Jones:

14 Q. Mr. Strom, is it your testimony that the
15 Commission cannot alter year 2 today?

16 A. That's correct.

17 Q. In the five-year blend that's required
18 under 4928.142(D), that five years can't be altered
19 today for year 2; is that your testimony?

20 A. For year 2 or year 3 or year 4, yes.
21 Today is not the time to alter it. The alteration is
22 supposed to happen at some later time no earlier than
23 year 2.

24 MR. JONES: That's all I have. Thank
25 you.

1 EXAMINER PIRIK: Thank you.

2 Any recross? Any recross?

3 MS. SPILLER: Oh, is it me?

4 EXAMINER PIRIK: Yes.

5 MS. SPILLER: That was quick.

6 - - -

7 RECROSS-EXAMINATION

8 By Ms. Spiller:

9 Q. Mr. Strom, just briefly, sir, your
10 opinion regarding when the Commission can effect a
11 change of the blending schedule is based upon your
12 reading of the statute and your consultation with
13 counsel, correct?

14 A. I'm not quite sure how I'm supposed to
15 answer that about consultation with counsel, but
16 really it was developed based on my own
17 understanding.

18 Q. And you would agree with me, sir, that
19 the interpretation and application of (D) and (E) of
20 Revised Code Section 4928.142 are a legal
21 determination for the Commission to make.

22 A. I do think that that is a legal
23 determination that the Commission will have to make
24 in its order in this case, yes.

25 MS. SPILLER: Thank you, sir.

1 Nothing further.

2 EXAMINER PIRIK: Thank you.

3 Thank you, Mr. Strom.

4 MR. JONES: Your Honor, at this time the
5 staff would move the admission of Staff Exhibits 2
6 and 3.

7 EXAMINER PIRIK: Any objections?

8 MS. SPILLER: No, your Honor.

9 MR. GARBER: Subject to the prior motions
10 to strike, no additional objections, your Honor.

11 EXAMINER PIRIK: Those objections are
12 noted and Staff Exhibits 2 and 3 will be admitted
13 into the record.

14 (EXHIBITS ADMITTED INTO EVIDENCE.)

15 EXAMINER PIRIK: With regard to FES
16 Exhibit 5.

17 MR. GARBER: Yes, your Honor, Solutions
18 moves FES Exhibit 5 into the record.

19 EXAMINER PIRIK: Objections?

20 MS. HOTZ: OCC objects on the basis that
21 it's full of information from a different proceeding
22 that is totally irrelevant to this case and the
23 counsel got what he needed on the record by reading
24 parts that were relevant.

25 MR. JONES: Your Honor, staff would also

1 join in that objection for the same reasons that
2 counsel was reading from the stipulation, he got the
3 parts in the record he wanted to get, it wasn't the
4 order that was referenced in Mr. Strom's testimony.

5 EXAMINER PIRIK: It wasn't the order that
6 was referenced?

7 MR. JONES: It was not. It was not.

8 EXAMINER PIRIK: You know, I do recognize
9 your objections and they are noted for the record,
10 but I think it makes the record clearer, you know,
11 even though he read them into the record, we could
12 take administrative notice of it anyway because it
13 was filed in a Commission docket, so we will mark it
14 as an exhibit and we will admit it. So for reference
15 purposes it will make citing easier.

16 (EXHIBIT ADMITTED INTO EVIDENCE.)

17 MR. JONES: Your Honor, I don't know if I
18 confused the record or not, but I was clarifying or
19 trying to clarify at least Mr. Strom referenced the
20 order in his testimony, I may have said something
21 differently a minute ago. But he referenced the
22 order in his testimony, I just wanted to make that
23 clear for the record.

24 EXAMINER PIRIK: Yes. Yes. And I think
25 on brief to the extent that there's a need to rely or

1 whatnot, those types of clarifications would be
2 appropriate.

3 MR. JONES: Thank you, your Honor.

4 EXAMINER PIRIK: I believe with the
5 exception of the one witness from Mr. Chamberlain, I
6 believe that concludes all of the witnesses for all
7 of the parties; is that correct?

8 MR. KUTIK: Are you going to go through
9 the admission of Mr. Montgomery's witness?

10 MR. MONTGOMERY: We can do it tomorrow
11 morning if you want, if you want to do it then,
12 that's fine.

13 EXAMINER PIRIK: If you're going to be
14 here, if you were planning on being here, we'll do
15 that.

16 MR. MONTGOMERY: I'll be here first thing
17 in the morning.

18 EXAMINER PIRIK: We'll do it tomorrow
19 morning.

20 MR. MONTGOMERY: Okay.

21 EXAMINER PIRIK: But now that we have
22 everybody here, we'll go off the record for a moment.

23 (Discussion off the record.)

24 EXAMINER PIRIK: We'll go back on the
25 record. Before we adjourn for the day we have set

1 the briefing schedule for Thursday, January 27th
2 for initial briefs and Thursday, February 3rd for
3 reply briefs. The parties are asked to e-mail all of
4 the other parties in the case with their briefs and
5 their reply briefs as well as the Examiners, and if
6 they're present in the building, to provide two hard
7 copies of their briefs to the Examiners, that would
8 be appreciated.

9 Confidential portions of any brief should
10 be attached to the back of the brief in a separate
11 document. You have to file a redacted and an
12 unredacted version of your brief. To the extent that
13 you can somehow separate that out in a separate
14 attachment to your brief, any specific issue, you
15 need to do whatever it takes in order to get the
16 maximum amount of your brief in the open record.

17 Our hope is that we don't have
18 confidential briefs and that we don't have those
19 arguments set forth in briefs, but to the extent you
20 have to do that, you'll do that. And you will serve
21 the Examiners two hard copies of the confidential
22 information on the day that the brief or the reply
23 brief, whatever it's contained in, are due at the
24 Commission.

25 Now that that's clear as mud. Does

1 anyone have any questions with regard to the briefing
2 schedule?

3 (No response.)

4 EXAMINER PIRIK: Okay, if you have any
5 questions feel free to give us a call, we will make
6 sure it's expedited.

7 We will reconvene tomorrow morning at
8 9:00 a.m.

9 (Thereupon, the hearing adjourned at 6:06
10 p.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Tuesday, January 18, 2011, and carefully compared with my original stenographic notes.

Maria DiPaolo Jones, Registered
Diplomate Reporter and CRR and
Notary Public in and for the
State of Ohio.

My commission expires June 19, 2011.

(MDJ-3778)

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1/19/2011 9:24:02 AM

in

Case No(s). 10-2586-EL-SSO

Summary: Transcript of Duke Energy Ohio for Approval of a Market Rate Offer hearing held on 01/18/11. electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Jones, Maria DiPaolo Mrs.