

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the :  
Application of Duke :  
Energy Ohio, Inc. for :  
Recovery of Program Costs, : Case Nos. 14-457-EL-RDR  
Lost Distribution Revenue, : 15-534-EL-RDR  
and Performance Incentives:  
Related to its Energy :  
Efficiency and Demand :  
Response Programs. :

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PROCEEDINGS

before Mr. Nicholas Walstra, Attorney Examiner, at  
the Public Utilities Commission of Ohio, 180 East  
Broad Street, Room 11-A, Columbus, Ohio, called at  
10:00 a.m. on Thursday, March 10, 2016.

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VOLUME I

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ARMSTRONG & OKEY, INC.  
222 East Town Street, Second Floor  
Columbus, Ohio 43215-5201  
(614) 224-9481 - (800) 223-9481  
Fax - (614) 224-5724

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APPEARANCES:

Duke Energy Ohio, Inc.  
By Ms. Amy B. Spiller  
Ms. Elizabeth H. Watts  
139 East Fourth Street, 1303 Main  
Cincinnati, Ohio 45202

On behalf of Duke Energy Ohio, Inc.

Boehm, Kurtz & Lowry  
By Mr. David F. Boehm  
and Ms. Jody Kyler Cohn  
36 East Seventh Street, Suite 1510  
Cincinnati, Ohio 45202

On behalf of the Ohio Energy Group.

Carpenter Lipps & Leland LLP  
By Ms. Kimberly W. Bojko  
280 North High Street, Suite 1300  
Columbus, Ohio 43215

On behalf of the Ohio Manufacturers'  
Association.

Carpenter Lipps & Leland LLP  
By Ms. Danielle M. Ghiloni  
280 North High Street, Suite 1300  
Columbus, Ohio 43215

On behalf of the Kroger Company.

Environmental Law & Policy Center  
By Ms. Madeline Fleisher  
21 West Broad Street, Suite 500  
Columbus, Ohio 43215

On behalf of the Environmental Law &  
Policy Center.

Ohio Partners for Affordable Energy  
By Ms. Colleen L. Mooney  
231 West Lima Street  
Findlay, Ohio 45839-1793

On behalf of the Ohio Partners for  
Affordable Energy.

APPEARANCES: (Continued)

Bruce J. Weston, Ohio Consumers' Counsel  
By Mr. Terry L. Etter  
and Ms. Kyle L. Kern  
Assistant Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, Ohio 43215-3485

Bricker & Eckler, LLP  
By Mr. Dane Stinson  
100 South Third Street  
Columbus, Ohio 43215-4291

On behalf of the Residential Consumers of  
Duke Energy Ohio, Inc.

Mike DeWine, Ohio Attorney General  
By Mr. John H. Jones  
and Ms. Natalia Messenger  
Assistant Attorneys General  
Public Utilities Section  
180 East Broad Street, 6th Floor  
Columbus, Ohio 43215

On behalf of the Staff of the PUCO.

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Thursday Morning Session,  
March 10, 2016.

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EXAMINER WALSTRA: We will go on the record. The Public Utilities Commission of Ohio has called for hearing at this time and place, Case Nos. 14-457-EL-RDR and 15-534-EL-RDR, both being In the Matter of the Application of Duke Energy Ohio, Incorporated, for Recovery of Program Costs, Lost Distribution Revenue, and Performance Incentives Related to its Energy Efficiency and Demand Response Programs.

My name is Nick Walstra. I'm the Attorney Examiner assigned by the Commission to hear this case. I'll begin by taking appearances of the parties. If the Company wants to go first.

MS. WATTS: Thank you, your Honor. Good morning. On behalf of Duke Energy Ohio, Amy B. Spiller and Elizabeth Watts, 139 East Fourth Street, Cincinnati, Ohio.

EXAMINER WALSTRA: You can go ahead, John.

MR. JONES: Good morning, your Honor. On behalf of the Commission Staff, Ohio Attorney General, Mike DeWine, Assistant Attorneys General, Natalia Messenger and John Jones.

1 EXAMINER WALSTRA: Thank you.

2 You can just go down the line.

3 MR. ETTER: Good morning, your Honor. On  
4 behalf of residential utility consumers, the Office  
5 of Ohio Consumers' Counsel, Bruce J. Weston,  
6 Consumers' Counsel, Terry L. Etter and Kyle L. Kern,  
7 Assistant Consumers' Counsel. We're at 10 West Broad  
8 Street, Suite 1800, Columbus, Ohio 43215. Also for  
9 OCC is Dane Stinson, Bricker & Eckler, 100 South  
10 Third Street, Columbus, Ohio 43215.

11 EXAMINER WALSTRA: Thank you.

12 MS. BOJKO: Thank you, your Honor. On  
13 behalf of the Ohio Manufacturers' Association,  
14 Kimberly W. Bojko, with the law firm Carpenter Lipps  
15 & Leland, 280 North High Street, Suite 1300,  
16 Columbus, Ohio 43215.

17 EXAMINER WALSTRA: Thank you.

18 MS. GHILONI: Good morning, your Honor.  
19 On behalf of the Kroger Company, Danielle M. Ghiloni,  
20 with the law firm of Carpenter Lipps & Leland, 280  
21 North High Street, Suite 1300, Columbus, Ohio 43215.

22 MS. KYLER COHN: Good morning, your Honor.  
23 On behalf of the Ohio Energy Group, David Boehm and  
24 Jody Kyler Cohn, from the law firm of Boehm Kurtz &  
25 Lowry, 36 East Seventh Street, Suite 1510,

1 Cincinnati, Ohio 45202.

2 EXAMINER WALSTRA: Thank you.

3 MS. MOONEY: On behalf of Ohio Partners  
4 for Affordable Energy, Colleen Mooney, 231 West Lima  
5 Street, Findlay, Ohio.

6 MS. FLEISHER: Good morning, your Honor.  
7 On behalf of the Environmental Law and Policy Center,  
8 Madeline Fleisher, 21 West Broad Street, Suite 500,  
9 Columbus, Ohio 43215.

10 EXAMINER WALSTRA: Thank you.

11 MS. WATTS: Your Honor, if I may, with  
12 respect to appearances?

13 EXAMINER WALSTRA: Yes.

14 MS. WATTS: There's an irregularity in the  
15 record and a little bit of a confusion, because there  
16 was an intervenor in this case in April of 2014 on  
17 behalf of an entity known as "OMAEG," and then  
18 intervention was granted thereafter to a party known  
19 as "OMA." And so, there's some confusion about  
20 OMAEG's and OMA's respective participation. I'd like  
21 to sort of understand where we are with that.

22 EXAMINER WALSTRA: Okay. Ms. Bojko, do  
23 you want to clarify?

24 MS. BOJKO: Sure, your Honor. Thank you.  
25 I think Counsel's right. There was an irregularity.

1 There was an error in some of the filings. The  
2 intervention was filed in one case. The problem also  
3 we have with this case, your Honor, is there's two  
4 cases that have not been consolidated, but yet we're  
5 hearing them together. So OMA is a party to 15-534  
6 and OMAEG did intervene in 14-457.

7 OMAEG is a subsidiary of OMA. OMA is the  
8 broader group. We have been participating and the  
9 Examiner granted our intervention as Ohio  
10 Manufacturers' Association and that's what our  
11 testimony is about and our comments were filed about.  
12 So consistent with those comments and the testimony,  
13 as well as the participation in 15-534, Ohio  
14 Manufacturers' Association is the party that's been  
15 recognized in these proceedings.

16 EXAMINER WALSTRA: Okay. Does that  
17 clarify things for you, Ms. Watts?

18 MS. WATTS: Well, just so long as the  
19 procedural error is somehow corrected, because it's  
20 my understanding that OMA never moved to intervene in  
21 this case. So, although OMA's intervention was  
22 granted, there was not a motion on behalf of OMA.  
23 And we have Ms. Bojko's representation that those are  
24 two distinct legal entities.

25 MS. BOJKO: I actually said one is a

1 subsidiary of the other. Your Honor, the case has  
2 proceeded, fully litigated, and an order was issued,  
3 and this issue was never raised before. But to the  
4 extent it's necessary to move that the Ohio  
5 Manufacturers' Association have standing in 14-457,  
6 again they are already in 15-534, but to the extent  
7 that Duke doesn't deem the Commission's order issued  
8 in 14-457 sufficient enough, we would move for OMA to  
9 be a party with all full rights as they have been  
10 participating since 2014.

11 EXAMINER WALSTRA: Okay. Anything else,  
12 Ms. Watts?

13 MS. WATTS: Only that I would correct  
14 Ms. Bojko's statement or differ with it in that it's  
15 not entirely clear that OMA, itself, has been  
16 participating since early 2014. But with the motion  
17 and presumably the Bench would grant that motion,  
18 then we're fine with that correction. I just want to  
19 call to your attention that there's a distinction  
20 between the two parties and some irregularity with  
21 respect to the record.

22 MS. BOJKO: Your Honor, Ohio  
23 Manufacturers' Association did file comments on  
24 June 17th, 2014, and reply comments thereafter as  
25 OMA, so they have been participating since mid-2014.

1 EXAMINER WALSTRA: Thank you for pointing  
2 out the distinction. I'll grant the motion and we  
3 can go forward as we have.

4 MS. BOJKO: Thank you.

5 EXAMINER WALSTRA: Any other issues before  
6 we get started?

7 MS. MOONEY: Yes, your Honor. There is  
8 one issue with OPAE's witness. David Rinebolt is not  
9 in the country this week. And we have asked that in  
10 lieu of his testimony not just being stipulated into  
11 the record, with the parties waiving cross, that he  
12 would be available Monday morning at 10:00 or  
13 whatever time we would want to start the hearing  
14 again on Monday morning.

15 EXAMINER WALSTRA: Ms. Watts?

16 MS. WATTS: Your Honor, as your Honor is  
17 aware as having received correspondence yesterday,  
18 the Company is here today ready to proceed. We have  
19 Company -- other Company employees and such that are  
20 here from Cincinnati and Charlotte.

21 And the request -- first of all, the date  
22 was set by agreement today; all the parties agreed to  
23 this being the hearing date. And the request to  
24 change Mr. Rinebolt's attendance only came to us two  
25 days ago, but we've not yet heard a reason why he is

1 not able to appear here today. So for all of --

2 MS. MOONEY: The fact that he's out of the  
3 country was the reason.

4 MS. WATTS: For all of those reasons, we  
5 would oppose any motion to have Mr. Rinebolt testify  
6 on Monday. And, moreover, we are not available on  
7 Monday.

8 EXAMINER WALSTRA: Okay.

9 MR. JONES: Your Honor, Staff would join  
10 Duke in opposing any continuance of the hearing next  
11 week for Mr. Rinebolt. OPAE was made aware of the  
12 timing of the hearing and that the hearing would  
13 continue until completed. We don't anticipate this  
14 hearing going beyond two days. It would be unusual  
15 to suspend the hearing for a particular witness to be  
16 available. At the time they filed testimony, at the  
17 time we moved the procedural schedule to have the  
18 hearing today, there was nothing brought up about  
19 Mr. Rinebolt not being available for the hearing  
20 today.

21 EXAMINER WALSTRA: Thank you.

22 Ms. Mooney, anything else?

23 MS. MOONEY: No. That's all I have.

24 MS. BOJKO: Your Honor, OMA would add that  
25 there was an offer to accept the testimony and waive

1 cross-examination and that was denied by Duke. And  
2 OMA would support OPAE's request to continue the  
3 hearing.

4 We can't always plan when our expert  
5 witnesses are unavailable. We have a scheduling  
6 issue today and we've tried to work it out with the  
7 intervening parties. And Duke has often had  
8 scheduling issues and we have been accommodating to  
9 them, as well as their travel plans out of the  
10 country in a recent case.

11 So I think that this has been done often.  
12 I think it was done in the FirstEnergy ESP case, AEP  
13 ESP case, and in the Pitzer-Duke case. So I think  
14 that accommodation can be made.

15 If they don't want to come back for  
16 another day of hearing, then I would request that  
17 Duke allow Mr. Rinebolt's testimony be entered into  
18 the record and stipulate to that testimony.

19 EXAMINER WALSTRA: Seeing that we already  
20 have, I think there's six total witnesses who have  
21 filed testimony, we are already looking at a full day  
22 and a likelihood of a second day. So if we do -- we  
23 will reconvene on a second day, probably next week,  
24 and we can work out a convenient time that works for  
25 parties who want to cross Mr. Rinebolt.



1 MS. WATTS: Your Honor, we actually  
2 anticipate being finished today by mid-afternoon. We  
3 don't see a need to reconvene.

4 EXAMINER WALSTRA: Okay. Regardless, I  
5 will give -- I do want you to have the opportunity to  
6 cross Mr. Rinebolt, and I want to give OP&E an  
7 opportunity to present their witness. So, at the  
8 conclusion of the hearing, we can work out a day next  
9 week to reconvene for that cross-examination.

10 MS. MOONEY: Thank you, your Honor.

11 MS. BOJKO: Your Honor, in light of Duke's  
12 comments, I guess I should make the Bench aware that  
13 OMA's witness is not available until -- I don't know  
14 what "mid-afternoon" means to Duke, but OMA's witness  
15 is not available until 3:30 today. I've asked all  
16 intervenor parties, except for Mr. Rinebolt, if he  
17 could go last and that has been agreed to.

18 I, as you did, anticipated that it would  
19 be that time of the day or a second day, tomorrow or  
20 whatever, so I did not deem it to be a problem, but  
21 since they're stating that we might be done by  
22 midday, I thought I should bring that to your  
23 attention.

24 EXAMINER WALSTRA: Okay. Thank you.  
25 We'll see how it proceeds and we can go from there.

1 MS. BOJKO: Okay. Thank you.

2 EXAMINER WALSTRA: Anything further before  
3 we get started?

4 Ms. Watts, you may call your first witness

5 MS. WATTS: Thank you, your Honor.  
6 Timothy Duff.

7 EXAMINER WALSTRA: Raise your right hand.

8 - - -

9 TIMOTHY J. DUFF

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

12 DIRECT EXAMINATION

13 By Ms. Watts:

14 Q. Sir, would you state your name, please.

15 A. Timothy J. Duff.

16 Q. Mr. Duff --

17 A. Timothy J. Duff. Sorry.

18 Q. Thank you.

19 By whom are you employed?

20 A. Duke Energy Business Services.

21 MS. WATTS: Your Honor, at this time, I  
22 would ask that Mr. Duff's Supplemental Direct  
23 Testimony be marked as Duke Energy Ohio Exhibit 1.

24 EXAMINER WALSTRA: So marked.

25 (EXHIBIT MARKED FOR IDENTIFICATION.)

1 Q. Mr. Duff, do you have what's just been  
2 marked as Duke Energy Ohio Exhibit 1 before you?

3 A. I do.

4 Q. Could you identify that, please?

5 A. It's my Supplemental Direct Testimony on  
6 behalf of Duke Energy Ohio.

7 Q. And did you prepare that testimony for  
8 this proceeding?

9 A. Yes.

10 Q. And are the -- is the information  
11 contained in that testimony true and accurate to the  
12 best of your knowledge?

13 A. Yeah. There are two corrections I need to  
14 make.

15 Q. Okay.

16 A. I've changed offices since this was  
17 written, so my new office address is 400 South Tryon  
18 Street. The "Charlotte, North Carolina" piece  
19 doesn't change. It's still Charlotte, North Carolina  
20 28202. And lines 8 through 10 can be stricken.

21 Q. And those are lines 8 through 10 on  
22 page 1?

23 A. Correct.

24 Q. Thank you.

25 With those changes, is the information in

1 your testimony true and accurate to the best of your  
2 recollection?

3 A. Yes.

4 Q. And if I were to ask you the questions  
5 contained therein again today, would your answers be  
6 the same?

7 A. Yes.

8 MS. WATTS: Mr. Duff is available for  
9 cross-examination.

10 EXAMINER WALSTRA: Thank you.

11 We'll just go down the line if that works.

12 MS. BOJKO: Your Honor, we did actually  
13 talk and have a witness -- or, a cross-examination  
14 order if that's okay with the Bench.

15 EXAMINER WALSTRA: Absolutely.

16 MS. BOJKO: I think OEG is going to start  
17 and then OMA and then Kroger and then OPAC, ELPC, and  
18 then OCC.

19 EXAMINER WALSTRA: And that's for all  
20 witnesses?

21 MS. BOJKO: Yes.

22 EXAMINER WALSTRA: Okay.

23 - - -

24 CROSS-EXAMINATION

25 By Mr. Boehm:

1 Q. Good morning, Mr. Duff.

2 A. Good morning.

3 Q. I'm David Boehm.

4 A. Good morning, Mr. Boehm.

5 Q. Mr. Duff, let's get right to it. I want  
6 to turn to page -- well, no. Let me go back.

7 Did you participate, either in person or  
8 by telephone, in negotiations with the Staff that  
9 resulted in the stipulation?

10 A. I participated in two meetings, on  
11 December 29th and December 30th.

12 Q. Okay. And were you the spokesman, the  
13 chief spokesman for Duke in those negotiations?

14 A. I don't know if there were any specific  
15 roles defined in the negotiations.

16 Q. Okay. Do you remember talking to  
17 Mr. Donlon from the Staff on that case in those  
18 conversations?

19 A. I believe Mr. Donlon was in those  
20 meetings, yes.

21 Q. Was Mr. Donlon the chief spokesman for the  
22 Staff in those negotiations?

23 A. Again, I don't think roles were assigned.

24 Q. Okay. Do you remember Mr. Donlon  
25 contributing to the conversations?

1           A.       As I said, Mr. Donlon was a participant in  
2 the call, yes.

3           Q.       Okay. In the very first meeting, and that  
4 was in October, wasn't it?

5           A.       I said I was present in two meetings.

6           Q.       Were you present in the first meeting?

7           A.       December 29th and December 30th were the  
8 meetings I was present in, Mr. Boehm.

9           Q.       Okay. And you had meetings actually  
10 before that, didn't you?

11          A.       I believe the Company had meetings with  
12 parties.

13          Q.       Okay. Who approached whom in those  
14 negotiations? Do you know?

15          A.       Again, I wasn't in the proceedings -- in  
16 those meetings, so I can't say who approached who.

17          Q.       Who initially made the offer, of the money  
18 offer that is part of the stipulation, the  
19 19 million?

20          A.       Again, I'm not aware. I can talk about  
21 the meetings that I participated in, but, at that  
22 time, the monetary value had already been determined.

23          Q.       By the time you were involved in the last  
24 two meetings -- or, in the second-to-last meeting,  
25 the monetary value had already been determined?

1           A.       It was -- that was what was being  
2 discussed, yes.

3           Q.       Okay. And nobody discussed anything other  
4 than that from the rest of the time?

5           A.       I can't speak to the rest of the time,  
6 Mr. Boehm. I told you what I can speak to, what I  
7 have direct knowledge of.

8           Q.       You said you were in the meetings in  
9 December, right?

10          A.       That's correct.

11          Q.       And those were the last two meetings, were  
12 they not?

13          A.       I believe those were the last two  
14 meetings.

15          Q.       Okay. In those two meetings that you  
16 participated in, did anybody speak of anything other  
17 than the 19-whatever-million dollars?

18          A.       There were a number of terms that were  
19 discussed in those meetings, yes.

20          Q.       But on the money, did anybody speak  
21 anything more of the \$19.75 million?

22          A.       There were discussions on all of the  
23 terms, Mr. Boehm.

24          Q.       I'm sorry, but you said something earlier,  
25 Mr. Duff, that I interpreted as saying that by the

1 time you were in the meeting they weren't discussing  
2 money anymore.

3 MS. WATTS: Objection. Misstates the  
4 witness's testimony.

5 EXAMINER WALSTRA: Okay. I think he's  
6 asking for clarification.

7 MR. BOEHM: Yeah.

8 A. I did not state that the stipulation or  
9 any numbers were final. All I'm saying is that when  
10 I started attending the meetings, the 19.75 was  
11 already being discussed.

12 Q. Already being discussed.

13 A. Correct.

14 Q. But it hadn't been settled on?

15 A. I don't think the settlement was final  
16 until it was filed with the Commission.

17 Q. And in those conversations, at least in  
18 the ones that you were involved in, did the  
19 Commission's Staff talk to you about their concerns  
20 on the appeal process, that their earlier ruling on  
21 whether or not banked savings could be used to get  
22 shared incentives, whether or not that ruling would  
23 be overturned?

24 A. I don't recall those discussions occurring  
25 in the meetings I attended, no.



1           Q.       Does the Company -- I know you're not a  
2 lawyer, but you certainly participated in  
3 questions -- or, in the conversations, Mr. Duff.  
4 This question about whether or not you can use banked  
5 savings for shared -- or, rather, banked -- yeah,  
6 banked savings, whether you can use that to meet the  
7 incentive versus the compliance, is that regarded as  
8 a legal question? Do you think that's a legal  
9 question?

10          A.       I'm not an attorney, so I can't say  
11 whether it's a legal question or not.

12          Q.       Well, let's put it this way: Do you  
13 regard it, at least partially, as a policy question?

14          A.       I believe it's the -- is a question about  
15 the interpretation of the stipulation that was  
16 approved by the Commission.

17          Q.       You think it's a question of an  
18 interpretation of the stipulation. And what  
19 stipulation is that?

20          A.       The stipulation that was approved in  
21 Case 11-4393.

22          Q.       Do you happen to have that with you?

23          A.       No, I don't.

24                 MR. BOEHM: If you will, for a minute,  
25 your Honor.

1 (Pause in the proceedings.)

2 Q. I guess I'm a little bit lost to know what  
3 part of the stipulation you're referring to,  
4 Mr. Duff.

5 A. The stipulation in 11-4393 modified the  
6 Company's -- the Company's application. The  
7 Company's application included the use of banked  
8 savings for the purpose of determining achievement  
9 level associated with the shared savings incentive  
10 structure.

11 Q. Right. So would it be paragraph (8) then?

12 MS. WATTS: Objection, your Honor. The  
13 witness doesn't have the document in front of him. I  
14 don't know how --

15 MR. BOEHM: May I approach the witness,  
16 your Honor?

17 EXAMINER WALSTRA: You may.

18 MR. BOEHM: It's a long way to get to you  
19 here.

20 Q. Would you take a look at that for a  
21 moment, Mr. Duff, and tell me which part you think  
22 we're interpreting?

23 A. As I said, the stipulation modified the  
24 Company's application. If you read the testimony  
25 supporting the stipulation, OCEA talks about the fact

1 that the Company could use banked savings as part of  
2 the application and that was included in the  
3 stipulation. It wasn't a term of the stipulation  
4 because it wasn't a modification to the application.

5 MS. BOJKO: Objection, your Honor.  
6 Mischaracterizes OCEA's comments that the witness is  
7 referring to.

8 EXAMINER WALSTRA: You can address that on  
9 cross, on your cross.

10 MS. BOJKO: Thank you.

11 Q. So, Mr. Duff, do I understand your answer  
12 to be that we're not really interpreting the  
13 stipulation in 11-4393, we're interpreting the  
14 testimony of the OCEA witness?

15 A. No. It was an OC -- it wasn't OCEA. What  
16 I'm discussing is the fact that the stipulation  
17 modified the Company's application. The  
18 modifications were it didn't change the banking  
19 provision, and the witnesses supporting the  
20 stipulation discussed the fact that banked savings  
21 were to continued to be used. It was again discussed  
22 in the Company's application in 13-431.

23 MS. BOJKO: Objection, your Honor.  
24 Speculation as to what OCEA thought or believed, and  
25 I move to strike his answer after he -- after the

1 first sentence when he started discussing what OCEA  
2 believed or thought or discussed.

3 MS. WATTS: And, your Honor, I do not  
4 believe that OMA was a member of OCEA at that time,  
5 so I don't know how Ms. Bojko could opine on that  
6 topic.

7 MS. BOJKO: Your Honor, that's the point  
8 exactly. I'm not opining. I'm suggesting that the  
9 witness is opining, which is speculation, which is  
10 not permitted as evidence in this case.

11 EXAMINER WALSTRA: Can you read back his  
12 answer for me.

13 (Record read.)

14 EXAMINER WALSTRA: I'm going to overrule.

15 Q. (By Mr. Boehm) Let me go back to my  
16 original question, Mr. Duff. Can you point to a  
17 paragraph or a sentence in this stipulation in  
18 11-4393 that you think that we're interpreting?

19 A. Again, the stipulation of what was  
20 approved?

21 Q. Yeah.

22 A. But the stipulation modified the Company's  
23 application. So no, the term "banking" isn't in this  
24 stipulation document.

25 Q. Thank you.

1 I'm going to jump around a little bit  
2 here. I know you'll be able to stay with me. I want  
3 to talk to a particular provision of the stipulation,  
4 and you and I spoke about this in your deposition,  
5 and it was the provision in the stipulation about  
6 what it was that the Company was agreeing to do or  
7 not to do with respect to using shared savings after  
8 2017. Okay? Do you remember those conversations?

9 A. I believe so.

10 Q. Okay. Do you have the stipulation in  
11 front of you, Mr. Duff?

12 A. I have my Supplemental Direct Testimony,  
13 Mr. Boehm.

14 Q. Well, I'd like to talk about the  
15 stipulation language in the stipulation, and I know  
16 when you and I spoke last time we were referring to  
17 your testimony, and I'm not saying that your  
18 testimony misstates the provision of the stipulation,  
19 but I would rather talk to you about the stipulation.

20 MR. BOEHM: Can Counsel make a copy --

21 MR. JONES: Your Honor, I have an extra  
22 one.

23 MR. BOEHM: Thank you, Mr. Jones.

24 EXAMINER WALSTRA: Thank you.

25 MS. BOJKO: Your Honor, a point of

1 clarification. Did Duke or Staff mark the joint  
2 stipulation as an exhibit?

3 EXAMINER WALSTRA: I do not believe it has  
4 been marked, no.

5 MR. BOEHM: If it will help things, I'll  
6 ask to have it marked as OEG No. 1, your Honor.

7 EXAMINER WALSTRA: Okay. So marked.

8 MS. MOONEY: Is that the stipulation in  
9 this case?

10 MR. BOEHM: In this case, yes. I'm sorry.

11 MS. MOONEY: The one between the Staff and  
12 -- it can't be OEG 1.

13 MS. WATTS: I was going to say, we would  
14 ask to have it marked as Joint -- Joint Staff and  
15 Company Exhibit 1.

16 MR. BOEHM: As long as we've got a title  
17 for it, that's fine.

18 EXAMINER WALSTRA: We'll mark it as Joint  
19 Exhibit 1.

20 (EXHIBIT MARKED FOR IDENTIFICATION.)

21 Q. (By Mr. Boehm) Are you sponsoring this  
22 exhibit, Mr. Duff?

23 A. That's probably a question for my  
24 attorneys, Mr. Boehm.

25 MR. BOEHM: Elizabeth, who is sponsoring

1 this?

2 MS. WATTS: Staff and the Company are both  
3 sponsoring it.

4 MR. BOEHM: Okay. Thank you.

5 Q. Mr. Duff, will you go to page 6 of the  
6 stipulation.

7 A. I'm there, Mr. Boehm.

8 Q. Okay. My copy does not have line numbers,  
9 but the third-to-last line, and it's provision a.,  
10 small a. of the stipulation, okay? You got that?

11 A. I'm there, Mr. Boehm.

12 Q. Okay. It says "Beginning in 2017, the  
13 Company will not file for recovery of the shared  
14 savings mechanism in any portfolio plan year after  
15 2014 in which banked savings have been used to meet  
16 the annual benchmark requirements." And then it goes  
17 on and says if any change in law happens, et cetera,  
18 the parties agree that Duke Ohio is permitted to seek  
19 shared savings consistent with that change, okay?

20 So I guess my question to you is,  
21 Mr. Duff, is about the meaning of that provision in  
22 your mind. Let's take the following example and this  
23 will seem familiar to you from the deposition: That  
24 in 2017, the Company meets exactly the compliance  
25 requirements of the Company -- or, the Commission

1 that year, whatever your plan will be, because there  
2 isn't any plan yet, am I correct, for -- after 2017?

3 A. That's correct.

4 Q. Yeah. So in that year you meet the  
5 requirements, without using any shared savings, okay,  
6 you meet it just in the shared savings that you --  
7 I'm sorry, without using any banked shared savings.  
8 You use just shared savings for that year and you  
9 meet the requirements for 2017. As you read this  
10 provision, could you then go into your banked savings  
11 and get incentives?

12 A. Mr. Boehm, I got to be honest, your  
13 question completely lost me. I don't know how you  
14 use shared savings to meet shared savings.

15 Q. I'm sorry. I misspoke if that's what I  
16 said. Let me try it again, okay?

17 In 2017, you use the savings that you have  
18 obtained or used -- achieved that year and you use  
19 those to reach whatever the mandate is and you're  
20 dead-on, okay? But then you go into your bank of  
21 energy savings and you use an amount from the bank  
22 that would entitle you otherwise to shared savings  
23 incentives. Does this prohibit that?

24 A. I can't answer your question because I  
25 don't know the mechanism. I can tell you what I



1 believe the stipulation says.

2 Q. Okay. Why don't you do that.

3 A. What it says is it prohibits the Company  
4 from putting forth a mechanism that would allow it to  
5 earn a shared savings incentive in any year that it  
6 has to use banked savings to meet its annual mandate.

7 Q. So going back to my example. If in the  
8 year we're talking about it doesn't use banked  
9 savings to reach compliance, it uses actual savings  
10 in that year, could it use banked savings to get a  
11 shared incentive -- an incentive on top of that?

12 A. It wouldn't need to, because if it hits  
13 the annual mandate with its actual annual  
14 achievements, then it's eligible for incentive.

15 Q. Is that your interpretation? Doesn't it  
16 have to exceed that mandate?

17 A. I believe it's "meets the annual mandate"  
18 is the verbiage, but the exact mechanism hasn't been  
19 put forth or approved for '17, so these are  
20 hypothetical questions, Mr. Boehm.

21 Q. Let's use the existing provision, okay, as  
22 an example. Let's assume it was the same as it is  
23 right now.

24 A. Yes.

25 Q. And let's use the facts of the hypo that I

1 just gave you and that you were using actual savings  
2 achieved in that year, and using those you meet the  
3 compliance level, right? Now, if, in fact, the  
4 mechanism is the same as it is now, you would be  
5 entitled to shared savings above that, up to  
6 15 percent, if you overachieve that mandate by say  
7 13 percent.

8 So let's assume in the hypothetical that  
9 you dip into your shared savings and you go over the  
10 using -- using those banked savings, you go over the  
11 amount that you achieved for that year; would you be  
12 able to get incentives?

13 MS. WATTS: Your Honor, I'm going to  
14 object, first because I think, if I understand  
15 Mr. Boehm's question, he's trying to characterize  
16 what would have been the Company's incentive  
17 mechanism absent the Commission's current order and  
18 the stipulation that's presently before the  
19 Commission for consideration and I don't think it was  
20 accurate, so I'd just like to enter that objection  
21 into the record.

22 EXAMINER WALSTRA: What is not accurate?

23 MS. WATTS: The way in which he  
24 characterized what would have been the incentive  
25 mechanism or what was the incentive mechanism that

1 was approved in Cases 4393 and 13-431.

2 MR. BOEHM: Your Honor, if I may, I'm  
3 positing a hypothetical that says we're using the  
4 incentive mechanism that's in force right now. It's  
5 a mechanism that Mr. Duff probably knows better than  
6 just about anybody else. And I'm saying if, in fact,  
7 that incentive mechanism still prevailed, okay, in  
8 2017, what does this language mean.

9 Does this language essentially prohibit  
10 them from getting any shared savings after 2017 or  
11 does it only prohibit them from getting shared  
12 savings after 2017 if they use banked savings to get  
13 to the compliance point.

14 THE WITNESS: That question I can answer.

15 MR. BOEHM: Okay.

16 A. The question is very simple. The Company  
17 is prohibited from having a mechanism that allows it  
18 to earn incentive in any year that it has to use bank  
19 to hit the compliance mandates. So if it falls short  
20 of the compliance mandates, it won't be eligible to  
21 have a mechanism that would give it a shared savings  
22 incentive.

23 Q. I'm asking you the question about case  
24 number two, where it doesn't use shared savings to  
25 hit compliance.

1           A.       You don't use shared savings to hit  
2 compliance, Mr. Boehm.

3           Q.       Banked savings. I'm sorry.

4           A.       If you don't use banked savings to hit  
5 compliance, then the Company could have a mechanism  
6 that would award it shared savings.

7           Q.       By using banked savings over the  
8 compliance number.

9           A.       I don't understand your question. If it's  
10 eligible -- what it's saying is that if we fall short  
11 of the annual mandates, you're ineligible to --

12          Q.       I understand that. You keep saying that  
13 over and over again, Mr. Duff. What I'm saying to  
14 you is what if you don't fall short, what if you  
15 actually achieve that in a particular year and you  
16 get up to your compliance number. Now, can you use  
17 banked savings to get shared incentives, shared  
18 savings?

19          A.       You don't need to use banked savings to  
20 get shared incentive, because you've hit your annual  
21 compliance mandate, Mr. Boehm.

22          Q.       No. You have to go over your annual  
23 compliance to get shared savings.

24          A.       Well, I think --

25          Q.       You have to go over it.

1           A.       Under the existing mechanism, yes, it says  
2     you have to go greater. So if you have one kilowatt  
3     hour greater, you're correct. But that's the  
4     existing mechanism. There has not been a mechanism  
5     put forward yet for 2017, Mr. Boehm.

6                   What this is saying is what -- how the --  
7     what we're prohibited from putting in the mechanism  
8     is that any new mechanism that is put forth will not  
9     allow the Company to earn a shared savings incentive  
10    if it has to use bank to meet its annual compliance  
11    obligation. The rest of it we don't know until we  
12    put a mechanism forward, in which I believe all the  
13    parties and the Commission would be a party to that  
14    case.

15          Q.       Mr. Duff, you're saying we don't know  
16    anything because we haven't put a mechanism forward,  
17    and then you're giving me a reading about what would  
18    happen after 2017 if we accepted your stipulation.

19          A.       Mr. Boehm, I'm saying what it would  
20    prohibit the mechanism from having.

21          Q.       But it would not prohibit you from  
22    getting -- getting shared savings in any and all  
23    situations; am I correct?

24          A.       No. It's not a prohibition of shared  
25    savings.

1 Q. All right. That's where I was going.

2 Mr. Duff, did you take any part in the  
3 calculation of the amounts of shared savings that the  
4 Company projected that it would get in 2015 and 2016?

5 A. Yes.

6 Q. Okay. And with respect to 2015, what is  
7 that number that you have projected?

8 A. I believe it's approximately \$15 million.  
9 I'd have to look at the exhibit.

10 Q. Was that always your projection?

11 A. No. That was the maximum projection.

12 Q. Okay. Isn't it true that Mr. Ziolkowski,  
13 in previous testimony, had forecasted that the number  
14 was 8-million-something?

15 A. Yes. As the Company has always done when  
16 it projects amounts in riders, it is always  
17 conservative with respect to the amount it projects.

18 Q. And are the numbers in for 2015?

19 A. Not yet.

20 Q. Actually, the year is closed out, right?

21 A. That's correct.

22 Q. Okay. So the numbers have not been  
23 calculated yet; is that correct?

24 A. The numbers are not final for 2015, no.

25 Q. So you don't know how those numbers

1 compare to either the \$8 million or the \$15 million  
2 that have been variously forecasted?

3 A. No, I do not.

4 Q. Okay. And isn't it true that 2016 is a  
5 matter of convenience since that's an unknown, a  
6 somewhat unknown commodity, was merely a duplication  
7 of the numbers that had been forecasted for 2015?

8 A. As stated in the exhibit, yes.

9 Q. So that if the 2015 numbers were off,  
10 let's say they really were 8 million instead of  
11 15 million, would you adjust your forecast for 2016?

12 A. Up or down, yes.

13 Q. Yeah. In these negotiations, Mr. Duff,  
14 did you, as the negotiations were going forward, did  
15 you make any analysis about whether or not those  
16 negotiations, as far as they were going and the way  
17 they were being held, complied with the standards for  
18 a stipulation, an acceptable stipulation in Ohio?

19 A. After the stipulation was shared with all  
20 the other parties and filed with the Commission, then  
21 I became familiar with the three-prong test.

22 Q. So while it was going on, you didn't know  
23 about the three-prong test?

24 A. Not -- not in definite detail, no.

25 Q. And how did you become familiar with the

1 three-prong test or whatever?

2 A. When I discussed supporting the  
3 stipulation, understanding what the stipulation was  
4 going to be judged on, I felt it important, so my  
5 legal team shared it with me.

6 Q. So that was after the fact, that was after  
7 the stipulation was filed.

8 A. Correct.

9 Q. Okay. So as the negotiations were going  
10 on, and as the parties became -- it became evident  
11 who the parties were in the case, you weren't, on an  
12 ongoing basis, analyzing whether or not you were  
13 proceeding in a manner that would satisfy the  
14 stipulation standards?

15 A. I performed no such analysis.

16 Q. Did Counsel explain to you, anywhere along  
17 the way, which of the parties represented the  
18 ratepayers?

19 MS. WATTS: Objection as to any  
20 communication between Counsel and the witness.

21 MR. BOEHM: Your Honor, it seems to me  
22 that the witness said that his understanding of the  
23 test, and I'm characterizing it I'm sure, Ms. Watts  
24 will correct me if I'm mischaracterizing it, that his  
25 understanding of the settlement and the stipulation



1 and its compliance with the test was derived from  
2 advice of Counsel. And if that's so, then it  
3 seems -- and he's on the stand supporting this, then  
4 it seems to me it's fair to understand what Counsel  
5 told him.

6 MS. WATTS: I disagree with Mr. Boehm  
7 quite vehemently. I think there's a difference  
8 between the witness explaining the basis of his  
9 understanding versus an actual conversation with  
10 Counsel which involves attorney-client privilege, and  
11 I certainly do not waive any aspect of discussion  
12 with my client.

13 EXAMINER WALSTRA: I'm going to sustain.

14 MR. BOEHM: Thank you.

15 Q. (By Mr. Boehm) Mr. Duff, are you familiar  
16 with the current statute that deals with these energy  
17 efficiency mandates commonly known as 221?

18 A. I know it exists. I mean, I know it's the  
19 basis, but it was kind of amended by 310.

20 Q. 310, yeah. And with respect to what the  
21 law requires as far as the mandates, in the year 2015  
22 and 2016, what is the mandate level required?

23 A. 4.2 percent cumulative.

24 Q. Mr. Duff, isn't it true that the statute  
25 says that if in 2015 or 2016 -- let's use 2016

1 because I believe the statute was enacted after you  
2 folks had submitted your plan for 2015, so let's take  
3 2016. Isn't it true that with respect to your  
4 historic -- Duke's historic performance on energy  
5 efficiency, if, in fact, that were sufficiently high  
6 in the past, you might not have any requirement at  
7 all in 2016?

8 A. That's correct.

9 Q. And what essentially the statute says, and  
10 correct me if I'm wrong, that in 2015 and 2016 an  
11 energy distribution utility shall achieve energy  
12 savings equal to the result of subtracting the  
13 cumulative energy savings achieved since 2009, from  
14 the product of multiplying the baseline from energy  
15 savings by 4 and two-tenths of 1 percent, and if the  
16 result is zero or less for the year in which the  
17 calculation is made, the utility shall not be  
18 required to achieve additional energy savings for  
19 that year. Doesn't it say that?

20 A. Subject to check, yes.

21 Q. Okay. So the question about whether or  
22 not there's a requirement for the year 2016, depends  
23 on the mathematics of essentially how much you've  
24 achieved historically in the past, right?

25 A. As I said, it's a 4.2 percent cumulative

1 requirement, yes.

2 Q. And isn't it true, Mr. Duff, that given  
3 your past achievements, the Company probably does not  
4 have an energy mandate for 2016 under this act?

5 A. Without doing the calculation --

6 Q. Yeah.

7 A. -- I would say it's very likely we would  
8 have one, but I can't say for sure.

9 Q. Okay. It's very unlikely that you would  
10 have one.

11 A. Correct.

12 Q. And in the absence of a required energy  
13 mandate, how would the Company determine how much  
14 energy efficiency projects it would promote and  
15 approve?

16 A. It's operating under its approved  
17 portfolio plan.

18 Q. Does it have an approved portfolio plan  
19 for 2016?

20 A. Yes.

21 Q. Have you forecasted an incentive for that  
22 year?

23 A. No.

24 Q. Okay. Did you participate in concocting  
25 or formulating the plan for 2016 that was approved?

1           A.       Yes.   The plan was approved in 2013,  
2   Mr. Boehm.

3           Q.       Okay.   And what -- what amount of energy  
4   savings did you forecast?   Do you know?

5           A.       Unfortunately, I can't tell you off the  
6   top of my head.

7                   MR. BOEHM:   Okay.   I have no further  
8   questions of this witness, your Honor.

9                   Thank you, Mr. Duff.

10                  THE WITNESS:   Thank you.

11                  EXAMINER WALSTRA:   Ms. Bojko, you're up  
12   next?

13                  MS. BOJKO:   Yes, your Honor.   Thank you.

14                                   - - -

15                                   CROSS-EXAMINATION

16   By Ms. Bojko:

17           Q.       Good morning, Mr. Duff.

18           A.       Good morning, Ms. Bojko.

19           Q.       I want to back up a little bit just so  
20   we're clear that you are Duke's witness sponsoring  
21   the stipulation filed in two cases, 14-457 and  
22   15-534; is that correct?

23           A.       Yes.

24           Q.       And you have been involved in the cases,  
25   both of these cases on behalf of Duke; is that

1 correct?

2 A. Yes.

3 Q. And as you mentioned to Mr. Boehm, you've  
4 participated in the settlement discussions leading up  
5 to the joint stipulation that was filed; is that  
6 correct?

7 A. To some extent, yes.

8 Q. And you're familiar with the proceeding  
9 leading up to the stipulation; is that correct?

10 A. Can you give me a little more definition  
11 on that, please?

12 Q. Sure. You understand that there was a  
13 proceeding that occurred prior to the filing of the  
14 joint stipulation, meaning that in 14-457 there was a  
15 procedural schedule set, there were comments and  
16 reply comments filed, and there was an order that was  
17 issued; is that correct?

18 A. I don't recall a procedural schedule being  
19 issued, but I do know that comments and reply  
20 comments were filed, but there was never a hearing or  
21 I don't believe any procedural schedule for 14-457.

22 Q. You don't believe that there was ever an  
23 Attorney Examiner entry that set the comments for  
24 filing, that gave dates to provide comments?

25 A. Not that I was aware of, no.

1 Q. You just think the parties just, sua  
2 sponte, filed comments on the same day?

3 A. Ms. Bojko, I'm just telling you what I'm  
4 aware of.

5 Q. Okay. But you are familiar that comments  
6 and reply comments were filed in 14-457?

7 A. Yes.

8 Q. And you're familiar that an order was  
9 issued in 14-457?

10 A. A Finding and Order was issued, yes.

11 Q. And you are aware that OMA was one of the  
12 parties that filed comments and reply comments in  
13 14-457; is that correct?

14 A. Yes.

15 MS. BOJKO: Your Honor, at this time, I  
16 would like to reserve OMA Exhibit 1 for our witness.  
17 So, at this time, I would like to have marked as OMA  
18 Exhibit 2 and OMA Exhibit 3, the initial comments of  
19 the Ohio Manufacturers' Association as Exhibit 2, and  
20 the reply comments of the Ohio Manufacturers'  
21 Association as Exhibit 3.

22 EXAMINER WALSTRA: So marked.

23 (EXHIBITS MARKED FOR IDENTIFICATION.)

24 MS. BOJKO: May I approach, your Honor?

25 EXAMINER WALSTRA: You may. This is in

1 the 457 case?

2 MS. BOJKO: Yes.

3 Q. Sir, do you have in front of you what's  
4 been marked as OMA Exhibits 2 and 3?

5 A. They haven't been marked. Yeah, I have  
6 two exhibits in front of me.

7 Q. Okay. Thank you. Well, if you would go  
8 ahead and mark for reference purposes, the comments  
9 would be OMA Exhibit 2, and the reply comments would  
10 be OMA Exhibit 3. Thank you.

11 A. Yup.

12 Q. Sir, do these appear to be the comments  
13 and reply comments filed by OMA in 14-457?

14 A. Yes.

15 Q. And you are familiar with the issues  
16 raised by OMA and the intervening parties in their  
17 comments; is that correct?

18 A. It's been a while, but yeah.

19 Q. Well, you're familiar with after the  
20 comments were filed, the Commission did, in fact,  
21 address the various issues raised by the parties in  
22 their comments; is that correct?

23 A. They issued a Finding and Order that's now  
24 subject to rehearing, I believe.

25 MS. BOJKO: Your Honor, at this time I'd

1 like to have marked as OMA Exhibit 4, the Finding and  
2 Order issued in Case No. 14-457-EL-RDR that the  
3 witness just referenced.

4 EXAMINER WALSTRA: So marked.

5 (EXHIBIT MARKED FOR IDENTIFICATION.)

6 MS. BOJKO: May I approach, your Honor?

7 EXAMINER WALSTRA: You may.

8 Q. Sir, do you have in front of you what's  
9 been marked as OMA Exhibit 4?

10 A. Yes.

11 Q. And is that the Finding and Order in  
12 Case No. 14-457-EL-RDR that you just referenced?

13 A. The one that the rehearing was granted  
14 for, yes.

15 Q. And the Commission order addressed --  
16 first of all, the Commission order was issued on  
17 May 20th, 2015; is that correct?

18 A. I believe that's the date, yes.

19 Q. And the Commission order addressed four  
20 issues raised by the intervenors in the comments on  
21 Duke's application; is that correct?

22 A. I can't tell you that it was four issues.  
23 It addressed some of the issues, yes.

24 Q. Okay. Well, let's go through. The  
25 Commission order addressed whether there should be a



1 cap on future shared savings incentive mechanisms  
2 implemented by Duke; is that correct?

3 A. I believe that was addressed, yes.

4 Q. And the order addresses whether there  
5 should be a cap on future shared savings incentive --  
6 excuse me. The order addresses the issue raised in  
7 the case regarding Duke's use of lifetime cost  
8 savings in the net present value of avoided costs,  
9 correct?

10 A. Yes.

11 Q. And that issue was raised by OMA in its  
12 comments; is that correct?

13 A. Yes.

14 Q. And the order addresses the actions of  
15 Duke regarding bidding resources into PJM; is that  
16 correct?

17 A. Yes.

18 Q. And that was another issue raised by OMA;  
19 is that correct?

20 A. Yes.

21 Q. And the order also addresses the  
22 utilization of banked savings to claim a shared  
23 savings incentive; is that correct?

24 A. Yes.

25 Q. That was another issue raised by OMA in

1 its comments?

2 A. Yes.

3 Q. And as a final matter, the order addressed  
4 the outstanding Staff audit of the 2013 costs. It  
5 made notes about that audit, it really wasn't a  
6 contested issue in the case; is that correct?

7 A. I believe so, yes, that's correct.

8 Q. Does the stipulation specifically address  
9 the issue raised in the case regarding Duke's use of  
10 lifetime costs savings in the net present value of  
11 avoided costs?

12 A. Which stipulation are you referring to?

13 Q. The joint stipulation that was filed in  
14 14-457.

15 A. No, it does not directly address it.

16 Q. Does the stipulation specifically address  
17 the bidding in of all available EE resources into  
18 PJM?

19 A. It's not part of the terms, no.

20 Q. Does the stipulation specifically address  
21 the crediting of proceeds received from bidding the  
22 EE resources into PJM to customers through the EE  
23 rider?

24 A. No.

25 Q. Does the stipulation specifically address

1 whether there should be a cap on future shared  
2 savings incentive mechanisms implemented by Duke?

3 A. No.

4 Q. But the stipulation does address the  
5 utilization of banked savings to claim a shared  
6 savings incentive; is that correct?

7 A. In a pretty unclear way, yes.

8 Q. You believe the joint stipulation is  
9 unclear?

10 A. No, no. The joint stipulation is clear.  
11 I'm sorry. The order. I thought you were talking  
12 about the order.

13 Q. The stipulation, the joint stipulation  
14 that has been marked as Joint Exhibit 1, does that  
15 address the utilization of banked savings?

16 A. It doesn't -- it says what the Company's  
17 prohibited from doing in 2017, beginning in 2017,  
18 yes.

19 Q. So the only issue that the stipulation  
20 specifically addresses that was a disputed issue and  
21 discussed in the Commission order in 14-457 is the  
22 utilization of banked savings to claim a shared  
23 savings incentive; is that correct?

24 A. Directly, I believe that's correct.

25 Q. And then, indirectly, the stipulation

1 does, in fact, address the Staff's audit and the  
2 timing of that audit; is that correct?

3 A. No. It directly addresses that,  
4 Ms. Bojko.

5 Q. Excuse me. It addresses the Staff audit,  
6 but that wasn't one of the disputed issues that the  
7 Commission actually ruled upon.

8 A. Again, the disputed issue -- that's your  
9 characterization. What I would say is that it does  
10 address the 2013 cost audit, yes.

11 Q. And the stipulation also addresses a  
12 shared savings incentive for 2016 which was not an  
13 issue in the 14-457 case; is that correct?

14 A. Yes.

15 Q. And the 14-457 order that you have in  
16 front of you that's been marked as OMA Exhibit 4,  
17 that order recognizes that the shared savings  
18 incentive expires at the end of 2015, unless  
19 interested parties decide the incentive is reasonable  
20 and effective and should continue; is that correct?

21 A. That's correct.

22 Q. And that has not happened; is that  
23 correct?

24 A. I believe the case is pending in front of  
25 the Commission, yes.

1 Q. Well, but the interested parties have not  
2 decided or agreed to that issue; is that correct?

3 A. No.

4 Q. So the continuation of the shared savings  
5 incentive for 2016 was not an issue within the scope  
6 of 14-457; is that correct?

7 A. No, it was not.

8 Q. 14-457 was about the recovery of the 2013  
9 EE costs; is that correct?

10 A. It had two matters in it. It was the  
11 true-up of 2013 and a projection for 2014.

12 Q. And the continuation of the shared savings  
13 incentive for 2016 is actually the subject of a  
14 separate proceeding that you just mentioned which is  
15 14-1580-EL-RDR; is that correct?

16 A. That is correct.

17 Q. And that case has been fully litigated and  
18 is pending before the Commission; is that correct?

19 A. Yes.

20 MS. BOJKO: Your Honor, at this time, I'd  
21 like to mark as OMA Exhibit 5, the Attorney Examiner  
22 Entry issued in Case No. 14-1580-EL-RDR, on June 1st,  
23 2015.

24 EXAMINER WALSTRA: So marked.

25 (EXHIBIT MARKED FOR IDENTIFICATION.)

1 MS. BOJKO: May I approach, your Honor?

2 EXAMINER WALSTRA: You may.

3 Q. Sir, do you have in front of you what's  
4 been marked as OMA Exhibit 5?

5 A. I do.

6 Q. Does this appear to be the Attorney  
7 Examiner Entry issued in 14-1580 on June 1st, 2015?

8 A. It does.

9 Q. And, sir, does this entry set forth a  
10 procedural schedule of a hearing on July 7th, 2015?

11 A. I believe it does, yes.

12 Q. And did you participate in that  
13 proceeding?

14 A. I did.

15 Q. And you testified, in fact; is that  
16 correct?

17 A. You should remember, Ms. Bojko.

18 Q. And do you recall OMA offered testimony in  
19 that proceeding; is that correct?

20 A. I believe so, yes.

21 MS. BOJKO: Your Honor, at this time, I'd  
22 like to mark as OMA Exhibit 6, the Direct Testimony  
23 of John Seryak on behalf of the Ohio Manufacturers'  
24 Association in Case No. 14-1580-EL-RDR.

25 EXAMINER WALSTRA: So marked.

1 (EXHIBIT MARKED FOR IDENTIFICATION.)

2 MS. BOJKO: May I approach?

3 EXAMINER WALSTRA: You may.

4 MS. WATTS: Your Honor, before we continue  
5 down this path, entering all of these historic  
6 documents into the record, it would be helpful to  
7 understand what Ms. Bojko's intentions are.

8 EXAMINER WALSTRA: Ms. Bojko?

9 MS. BOJKO: My intention is to perform  
10 cross-examination. I don't think I have to explain  
11 my legal strategy to Counsel, your Honor.

12 MS. WATTS: Well, then, I would object on  
13 the basis of relevance.

14 MR. JONES: I would object, your Honor.  
15 There's no foundation for this. It's not even  
16 relevant. It's a separate proceeding, not dealing  
17 with the issue of banked savings from shared savings.

18 MS. WATTS: And Mr. Duff can't  
19 authenticate any of these. These are Commission  
20 records and there's really no reason to mark them as  
21 exhibits. They can always be referred to.

22 MS. BOJKO: Now may I respond, your Honor?

23 EXAMINER WALSTRA: Yes.

24 MS. BOJKO: With regard to the relevance,  
25 the witness just testified that the issue in 14-1580

1 is, in fact, addressed in the joint stipulation, that  
 2 there is a reference to the shared savings incentive  
 3 and the continuation of 2016 in the joint  
 4 stipulation, and it was not a case or an issue in  
 5 14-457. So I am continuing on the line of  
 6 questioning about the relevancy and how these cases  
 7 overlap. If I'm allowed to continue, I think that  
 8 foundation will be clearly set forth and the  
 9 relevance.

10 EXAMINER WALSTRA: Ms. Watts?

11 MS. WATTS: I'm going to withhold further  
 12 objection. I think the witness can probably respond.

13 EXAMINER WALSTRA: Okay.

14 MS. BOJKO: Thank you, your Honor.

15 Q. (By Ms. Bojko) Sir, do you have in front  
 16 of you what's been marked as OMA Exhibit 6?

17 A. Yes, I do.

18 Q. Does this appear to be the testimony that  
 19 was filed in 14-1580 that you participated in?

20 A. Yes, it is. As you remember, I found a  
 21 number of errors in it.

22 Q. You were present at that hearing; is that  
 23 correct?

24 A. Yes.

25 Q. And OMA's witness testified in that case



1 that Duke's shared savings incentive mechanism is not  
2 reasonable, is not effective, and should not be  
3 continued in 2016; is that correct?

4 A. That was his testimony, yes.

5 Q. And he testified that a 2016 shared  
6 savings mechanism would not benefit customers because  
7 the savings were costly to achieve and the mechanism  
8 currently in place does not encourage Duke to exceed  
9 its benchmarks in years 2013 and '14; is that  
10 correct?

11 A. That was his contention.

12 Q. And even though that -- that proceeding is  
13 still pending I think you mentioned, is that correct,  
14 or your counsel mentioned?

15 A. I believe it is still pending, yes.

16 Q. And even though that proceeding is still  
17 pending, the stipulation addresses this issue and  
18 states that parties agree that Duke will forgo  
19 receiving an incentive for 2016; is that correct?

20 A. That's where I disagree with you,  
21 Ms. Bojko. The stipulation says, as part of the  
22 terms, Duke is forgoing collecting any shared savings  
23 incentive. It doesn't deal with whatever is approved  
24 in 14-1580. It's a separate issue. That's why it  
25 wasn't listed as part of the case as being resolved.

1 MS. BOJKO: Your Honor, at this time, may  
2 I have marked as OMAEG Exhibit 7 --

3 MS. WATTS: Your Honor, is this --

4 MS. BOJKO: I'm sorry. OMA Exhibit 7.

5 MS. WATTS: Thank you.

6 MS. BOJKO: -- an interrogatory titled  
7 OCC-INT-02-001, and the response from Duke dated  
8 February -- well, the request is dated received  
9 February 19th, 2016.

10 EXAMINER WALSTRA: So marked.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 MS. BOJKO: May I approach, your Honor?

13 EXAMINER WALSTRA: You may.

14 Q. Sir, do you have in front of you what's  
15 been marked as OMA Exhibit 7?

16 A. I do.

17 Q. And is this a Duke response to OCC  
18 Interrogatory 02-001?

19 A. Yes.

20 Q. And you are listed as the person  
21 responsible for the response; is that correct?

22 A. That's correct.

23 Q. And the request asks Duke to explain why  
24 14-1580-EL-RDR was not included as part of the  
25 stipulation filed, was not a case number on the

1 stipulation; is that correct?

2 A. That's correct.

3 Q. And -- let's back up. The joint  
4 stipulation was only filed in 14-457 and 15-534; is  
5 that correct?

6 A. That is correct.

7 Q. And at the end of the response you state  
8 that -- or, the response states that Duke did not  
9 include, in the stipulation, this case, because the  
10 intent was to resolve the calculation of the shared  
11 savings incentive for '13 and '14; however, it says  
12 while a term of the stipulation requires the Company  
13 to forgo earning a shared savings, the stipulation  
14 was not intended to resolve the case; is that  
15 correct?

16 A. Well, it's incorrect because you said  
17 Duke, that Duke put the stipulation in. It wasn't  
18 just a Duke stipulation. There were multiple parties  
19 to the stipulation. But, other than that, the  
20 verbiage is correct.

21 Q. Thank you for that clarification. I was  
22 paraphrasing.

23 So this is Duke's response, though, to the  
24 question; is that correct?

25 A. That is correct.

1 Q. Okay. So this response recognizes that  
2 the stipulation does, in fact, address a shared  
3 savings for 2016, a shared savings incentive for  
4 2016; is that correct?

5 A. It says the Company will forgo one.

6 Q. So it addresses 2016 shared savings?

7 A. It addresses whether the Company will  
8 collect shared savings, yes.

9 Q. Okay. And to collect shared savings in  
10 2016, the Company would have to have a shared savings  
11 mechanism in place; is that correct?

12 A. It really wouldn't matter if it was in  
13 place or not. Because if it is in place and it could  
14 earn shared savings, it's forgoing it; and if it's  
15 not in place, it's a moot point, it would have  
16 forgone it.

17 Q. I don't think you heard my question  
18 correctly. I said in order for the Company to  
19 collect a shared savings incentive, there would have  
20 to be a mechanism in place; is that correct?

21 A. Yes.

22 Q. And when calculating in the stipulation  
23 the 55 million possible shared savings incentive  
24 number in the stipulation, you did, in fact,  
25 associate \$15 million with 2016; is that correct?

1 A. That's correct.

2 Q. And you associated 15 million with 2016  
3 even though the shared savings incentive mechanism  
4 expired at the end of 2015; is that correct?

5 A. The Company felt it put on a strong case  
6 in 14-1580 and it was likely going to have that  
7 shared savings incentive, yes.

8 Q. That's an assumption Duke made. The  
9 Commission has not decided that Duke's shared savings  
10 incentive will, in fact, continue in 2016; is that  
11 correct?

12 A. That's correct.

13 Q. And you also stated that this was a  
14 concession of the Company; is that correct?

15 A. It was part of the terms that, yes, the  
16 Company viewed as a concession.

17 Q. And just going back to something you said  
18 a little bit ago. You said there's multiple parties  
19 to the stipulation. You're referring to Duke and  
20 Staff; is that correct?

21 A. That's correct.

22 Q. There are no other parties to the  
23 stipulation.

24 A. That signed the stipulation, you're  
25 correct. There are only two that signed it.

1 Q. Well, there were no other parties invited  
2 to discuss the stipulation before it was entered into  
3 between Staff and Duke; is that correct?

4 A. I believe it was shared with parties  
5 before it was finalized and filed with the  
6 Commission.

7 Q. Were parties involved in the negotiation  
8 of the stipulation prior to Staff and Duke arriving  
9 at an agreement to its terms?

10 A. Not to my knowledge.

11 Q. Let's go back to 14-457. After an order  
12 was issued in 14-457, Duke and OPAC filed for a  
13 rehearing; is that correct?

14 A. I think a couple parties filed for a  
15 rehearing, but Duke and OPAC were two parties that  
16 did, yes.

17 Q. And I think you mentioned today that that  
18 rehearing is still pending?

19 A. I believe so, yes.

20 MS. BOJKO: Your Honor, at this time, I'd  
21 like to mark as OMA Exhibit 8, the Entry on Rehearing  
22 issued in Case No. 14-457-EL-RDR on July 8th, 2015.

23 EXAMINER WALSTRA: So marked.

24 (EXHIBIT MARKED FOR IDENTIFICATION.)

25 MS. BOJKO: May I approach?

1 EXAMINER WALSTRA: You may.

2 Q. Do you have in front of you what's been  
3 marked as OMA Exhibit 8, sir?

4 A. I do.

5 Q. Is this the Entry on Rehearing that the  
6 Commission issued in 14-457 that you've referenced  
7 today?

8 A. Yes, it is.

9 Q. And the rehearing is still pending as you  
10 pointed out; is that correct?

11 A. That's correct.

12 Q. And the Commission granted rehearing in  
13 order to give itself more time to consider the  
14 issues; is that correct?

15 A. That's what it says.

16 Q. And this is typical practice of the  
17 Commission to grant rehearing for further  
18 consideration of the issues; is that correct?

19 A. My understanding is when they think  
20 they've found additional information that may cause  
21 them to change their finding or order that they  
22 consider that. So that's my understanding of what  
23 they're doing.

24 Q. Well, you are aware that the Commission  
25 must grant or deny any appli -- do some kind of act

1 on an application for rehearing within 30 days or  
2 it's deemed denied; is that correct?

3 MR. JONES: Objection, your Honor. This  
4 witness is not an attorney. He doesn't practice and  
5 know the procedures of the Commission.

6 EXAMINER WALSTRA: Overruled. If he  
7 knows, he can answer.

8 A. I was not aware of that, but subject to  
9 check.

10 Q. And just so we're clear, you are a  
11 regulatory expert testifying for Duke and you are  
12 testifying that you have knowledge of Commission  
13 proceedings; is that correct?

14 A. Well, proceedings that I've participated  
15 in, yes.

16 Q. And you've testified numerous times in  
17 front of the Commission; is that correct?

18 A. I have.

19 Q. So I'm not asking for your legal opinion.  
20 I'm asking for your regulatory opinion as an expert  
21 witness for Duke. Is it your understanding that a  
22 Commission order is the law and is valid until it is  
23 either overturned by the Supreme Court or the  
24 Commission revisits the issue and issues a new order  
25 on the same subject matter?



1 MR. JONES: Your Honor, I would object  
2 again. She's asking legal questions. He's not an  
3 attorney. He doesn't practice law before the courts  
4 or before the Commission as an advocate, so I would  
5 object as to asking for a legal opinion.

6 MS. WATTS: We join in that objection,  
7 your Honor.

8 MS. BOJKO: And, your Honor, I prefaced my  
9 question with in your regulatory experience, not as  
10 an attorney. His expert regulatory opinion is what  
11 I'm asking.

12 EXAMINER WALSTRA: You can speak to your  
13 understanding.

14 A. I'm going to say I'm not a lawyer. You  
15 said "is it law," so just the fact that you asked the  
16 question "is it law," I don't want to say whether  
17 it's law or not.

18 Q. Fair enough. I'll rephrase.

19 In your regulatory opinion, does Duke  
20 follow a Commission order and is Duke expected to  
21 follow a Commission order until it's overruled by the  
22 Supreme Court or until the Commission issues a new  
23 order on the same subject matter changing its  
24 position?

25 A. I believe that's correct.

1 Q. Let's talk about 15-534 for a minute. The  
2 joint stipulation was filed in 15-534 as we've  
3 discussed; is that correct?

4 A. Yes.

5 Q. And 15-534 is a case about the recovery of  
6 2014 energy efficiency costs and, to be more specific  
7 as you clarified to me earlier, it's a true-up of  
8 2014 costs and it would include a projection of 2015  
9 costs; is that correct?

10 A. That's correct.

11 Q. And you're also aware that the Commission  
12 established a procedural schedule in that case for  
13 parties to file comments or reply comments; is that  
14 correct?

15 A. Yes.

16 Q. And you are aware that parties did file  
17 comments and reply comments in 15-534, as you note on  
18 page 2, line 19, of your testimony; is that correct?

19 A. Let me check on the "page 2, line 19,"  
20 thing, but subject to check. It says "comments." I  
21 don't know about reply comments, but it says  
22 "comments."

23 Q. And you are aware that OMA was one of the  
24 parties that filed comments in that case; is that  
25 correct?

1           A.           I believe so.

2                   MS. BOJKO: Your Honor, at this time, I'd  
3 like to have marked as OMA Exhibit 9, the Comments of  
4 the Ohio Manufacturers' Association filed in Case  
5 No. 15-534-EL-RDR, on June 17th, 2015.

6                   EXAMINER WALSTRA: So marked.

7                   (EXHIBIT MARKED FOR IDENTIFICATION.)

8                   MS. BOJKO: May I approach?

9                   EXAMINER WALSTRA: You may.

10                  MR. BOEHM: Your Honor, if I may interrupt  
11 just for a moment for a matter of clarification, and  
12 I maybe show know this but I'm not sure. Are the  
13 comments that the parties filed in these two cases a  
14 part of the record in this case?

15                  EXAMINER WALSTRA: Yes.

16                  MR. BOEHM: Okay. So if I wanted to refer  
17 to my comments, I don't have to have them introduced  
18 into evidence in this case.

19                  MR. JONES: I would object to that, your  
20 Honor. It's not automatically admitted into this  
21 proceeding. They have to move for admission of those  
22 exhibits. Just because they're in the docket doesn't  
23 mean they're automatically in the record in this  
24 case.

25                  MR. BOEHM: That's an interesting

1 interpretation, Mr. Jones.

2 MR. JONES: Well, we practice law around  
3 here, Mr. Boehm.

4 MR. BOEHM: I'm sorry?

5 MR. JONES: We always move for admission  
6 of anything you want into the record of this case, of  
7 any case before the Commission.

8 MR. BOEHM: I don't know about that.

9 MR. JONES: It's not a new revelation.

10 MR. STINSON: I would agree with Mr. Boehm  
11 that the documents that are filed in the docket are  
12 part of the record in this proceeding. They'll  
13 actually be forwarded to the Supreme Court upon  
14 appeal.

15 MR. JONES: Do you have any authority for  
16 that to cite that anything in the docket is  
17 automatically admitted into the evidentiary record of  
18 the proceedings of the Commission?

19 MR. STINSON: I know that it goes to the  
20 Supreme Court and the Justices will consider what's  
21 in the record as this moves forward.

22 MR. BOEHM: If, in fact, the Commission  
23 asks for comments and considers those comments, the  
24 act of consideration, it seems to me, presumes that  
25 it's a matter of the record because the Commission

1 can't consider things that aren't in the record.

2 MS. WATTS: Mr. Boehm -- I'm sorry, your  
3 Honor, may I be heard?

4 EXAMINER WALSTRA: Go ahead.

5 MS. WATTS: If Mr. Boehm's contention is  
6 correct, then all of the exhibits that Counsel has  
7 just admitted into the record, from 2 through 9, are,  
8 therefore, redundant, because they're all documents  
9 that are in the record and there's no point in  
10 marking them and having them offered into the record.

11 MR. BOEHM: Well, it's one of the reasons  
12 why I asked the question, your Honor.

13 EXAMINER WALSTRA: Ms. Bojko --

14 MR. BOEHM: Ms. Bojko, I think, is  
15 exercising extreme caution here, which I would do in  
16 her circumstance, I think, except I was sitting here  
17 having only practiced in this forum for 40 years and  
18 I thought they were a part of the record. If not, I  
19 would be happy to make a motion to have all of our  
20 comments admitted into the record, but it's up to  
21 your Honor. If it's your ruling that they're not  
22 part of the record, then I want to take care of that.

23 EXAMINER WALSTRA: Ms. Bojko.

24 MS. BOJKO: Your Honor, you're putting me  
25 in a difficult position. I have to agree with

1 Mr. Jones in this case. You have to admit them into  
2 the record and that's why I'm going through the  
3 process that I'm going through right now. So all  
4 parties can request that their comments be admitted.  
5 I'm choosing to do mine through this witness.

6 You can make a motion.

7 MR. BOEHM: If it's not untimely, your  
8 Honor, I make the motion now that all of our comments  
9 be part of the record in this case. I don't know why  
10 we need Mr. Duff to qualify them to be admitted.

11 MS. WATTS: And, your Honor, I would agree  
12 with that. If we're going to want to mark and admit  
13 comments, we will want to do the same, but I don't  
14 know that Mr. Duff has any role in that process and  
15 he certainly doesn't authenticate the documents,  
16 they're not his documents.

17 MR. BOEHM: I agree.

18 MS. BOJKO: Your Honor, I mean, I can use  
19 the comments to cross-examine a witness, that's what  
20 I'm doing, I'm using them as issues raised in  
21 comments personally, and that's how I'm going to  
22 proceed and I'm doing it in a proper procedural  
23 manner. If other people want to move their comments,  
24 that's a separate matter than my cross-examination of  
25 this witness.

1 MR. JONES: Your Honor, I would second  
2 that, and I would say it's inappropriate to ask for a  
3 blanket admission of all comments filed in the  
4 record. It has to be comments, like Ms. Bojko is  
5 following the proper procedure, in moving for, you  
6 know, as to the comments that OMA had filed in the  
7 proceeding.

8 MR. BOEHM: Your Honor, I'm sorry, I'm not  
9 one to criticize Ms. Bojko, but I don't know why --

10 MS. BOJKO: I didn't say that, first of  
11 all.

12 MR. BOEHM: -- but I don't know why  
13 Mr. Duff needs to authenticate my comments.

14 MS. WATTS: Mr. Duff cannot authenticate  
15 anyone's comments.

16 MR. BOEHM: I'm going then to the comments  
17 of Mr. Jones. If this is the right way, it baffles  
18 me as to why it's the right way.

19 MS. BOJKO: Well, first of all, there's no  
20 authentication needed. It's a public record. It was  
21 filed at the Commission. Public records are  
22 self-authenticating. So let's get the authentication  
23 thing out of the way. That's not an appropriate  
24 objection.

25 I am using my comments in my

1 cross-examination. That does not preclude any other  
2 parties from making any other motions. I'm not going  
3 to go as far as Mr. Jones in saying that my process  
4 is right and theirs is wrong. I believe I'm  
5 following the procedural requirements of the  
6 Commission in doing what I need to do for my  
7 client, you know, and it's proper.

8 They can choose to do what else they need,  
9 but I do think the comments need to be admitted into  
10 the docket. Not every piece of paper filed at the  
11 Commission is a piece of evidence that's admitted  
12 into the record.

13 MS. SPILLER: But, your Honor, if I may.  
14 I think we're blurring the lines here between  
15 authenticity and admissibility, which is the second  
16 prong necessary for an evidentiary submission.  
17 Mr. Duff cannot authenticate OMA's comments. He  
18 certainly can't opine as to their admissibility;  
19 that's for the Bench to determine.

20 So I think, you know, Mr. Boehm asked  
21 about why it's necessary as opposed to just taking a  
22 blanket reference to everything that's been filed in  
23 the record. I think it's for the Bench to determine  
24 admissibility in respect of the issues before it  
25 today.



1 MR. JONES: Your Honor --

2 MS. BOJKO: Your Honor, I'm going to  
3 object to Ms. Spiller. There's one attorney  
4 representing each party allowed to speak to  
5 objections or motions at one time when a particular  
6 witness is on the stand. Ms. Watts has been  
7 objecting. She's been the counsel of record for  
8 Duke. It is not appropriate for them to tag-team and  
9 have multiple attorneys making arguments on behalf of  
10 the same party.

11 MR. JONES: Your Honor, I have comments to  
12 make, too, here.

13 EXAMINER WALSTRA: Go ahead, Mr. Jones.

14 MR. JONES: Each party has to identify  
15 those comments, lay the foundation that those are  
16 their comments in fact, in the process of moving for  
17 identification and admission of those documents.  
18 There's been no foundation yet for anyone identifying  
19 who's filed comments, that those are their comments  
20 in fact, and they're asking for that to be marked,  
21 and then go through the process of laying the  
22 foundation, are these the comments filed by, for  
23 example, OMA, OEG, et cetera, and then, you know,  
24 laying that foundation necessary for admission.

25 MR. BOEHM: We seem to have drilled into a

1 rotten thing that's been laying in the ground all  
2 this time. You know, if this is -- I don't know how  
3 I can authenticate our comments. It's signed by my  
4 secretary, okay?

5 MS. BOJKO: It's a public document. You  
6 don't need to authenticate it.

7 EXAMINER WALSTRA: As to the documents in  
8 the cases that are before the Commission today,  
9 certainly they are a part of the docket, they've been  
10 filed, and the Commission has looked over them in  
11 making previous rulings -- or, entries, something  
12 that, at the least, the Commission can take  
13 administrative notice of.

14 If someone wants to move for particular  
15 comments for the Commission to take administrative  
16 notice of, we can do that. If you want to use it as  
17 a part of your cross-examination so he has something  
18 to reference to, I understand that. So if a party  
19 wants to move to have it made as part of the record  
20 as part of their cross-examination, we can do that.  
21 Otherwise, we'll proceed accordingly.

22 MS. BOJKO: Thank you, your Honor. May I  
23 continue my cross-examination?

24 EXAMINER WALSTRA: You may.

25 MS. BOJKO: May I have the last question

1 reread?

2 (Record read.)

3 Q. (By Ms. Bojko) Mr. Duff, do you have in  
4 front of you what's been marked as OMA Exhibit 9?

5 A. Yes.

6 Q. And do these appear to be OMA's comments  
7 filed in 15-534?

8 A. Yes. I remember because they didn't  
9 correct the error that Mr. Seryak had presented in  
10 the 14-580 case in his testimony.

11 MS. BOJKO: Objection, your Honor. I move  
12 to strike. I asked him if these appear to be the  
13 comments filed in the case.

14 EXAMINER WALSTRA: Overruled.

15 Q. You are familiar with the issues that were  
16 set forth in the comments apparently; is that  
17 correct?

18 A. Yes.

19 Q. And it's your understanding, sir, that the  
20 case is still pending at the Commission; is that  
21 correct?

22 A. Yes.

23 Q. And the stipulation in -- the joint  
24 stipulation that was filed in 14-457 and 15-534 only  
25 resolves the shared savings level for the 2013 costs.

1           A.       I don't know if I would say it that way,  
2       Ms. Bojko. I think the stipulation comes up with a  
3       number to resolve the '13 and '14 shared savings.  
4       It's not a calculation.

5           Q.       Okay. And I think I misspoke anyway. The  
6       issue that the joint stipulation is resolving in the  
7       15-534 case is the shared savings level for 2014  
8       costs; is that correct?

9           A.       It resolves the shared savings associated  
10      with 2014 and it also puts a timeline on the audit of  
11      2014 costs.

12          Q.       Besides those two issues, does it -- does  
13      the joint stipulation purport to resolve any other  
14      issues in the 15-534 case?

15          A.       I don't believe so.

16          Q.       And page 2 of your testimony, line 19,  
17      filed in the case before us, the 14-457 --

18          A.       Yeah.

19          Q.       -- and 15-543, you refer on line 19 to a  
20      procedural schedule. Do you see that?

21          A.       Yeah.

22          Q.       And you're aware that the procedural  
23      schedule established an opportunity to take comments  
24      in 15-534; is that correct?

25          A.       I was referring to the hearing, a hearing

1 and witnesses, et cetera.

2 Q. Okay. So you do recognize that there was  
3 a procedural schedule established to take comments.

4 A. Yes.

5 Q. Just there was never a hearing established  
6 to take comments.

7 A. Or testimony schedule, yes, that's  
8 correct.

9 Q. And in your expert opinion, practicing --  
10 or, filing witness testimony before the Commission,  
11 does every Commission proceeding go to hearing?

12 A. I don't believe so.

13 Q. In fact, 14-457 was a paper hearing, so to  
14 speak, comments, reply comments were filed, and then  
15 the Commission issued a decision without a  
16 hearing; is that correct?

17 A. I think that was one of the things pointed  
18 out in the application for rehearing, yes.

19 Q. Page 3, line 11 of your testimony, here  
20 the Company would not seek to establish a shared  
21 savings mechanism that would entitle them to earn an  
22 incentive if the Company used banked savings to meet  
23 the annual mandate; is that correct?

24 A. Do you want me to read the whole clause  
25 or --

1 Q. I'm paraphrasing. Is that what this  
2 provision is to mean?

3 A. Beginning 2017, yeah. This is the  
4 questioning that Mr. Boehm asked.

5 Q. Right. And in response to Mr. Boehm, you  
6 said that it prohibits the Company from putting forth  
7 a mechanism to use banked savings to get an  
8 incentive; however, there is an exception provided  
9 for in the stipulation; is that correct?

10 A. The stipulation says that if there are  
11 changes to law, regulation, or order regarding shared  
12 savings, then the Company -- then obviously the  
13 Company could potentially put forward a mechanism,  
14 yes.

15 Q. So it's not an outright prohibition to  
16 seeking a shared savings incentive using banked  
17 savings in the future; is that correct?

18 A. No, it's not.

19 Q. And Duke is permitted to seek a shared  
20 savings incentive consistent with any change in law.  
21 Could that change in law occur prior to 2017?

22 A. Yes, I believe it was change in law from  
23 the time the stipulation was signed.

24 Q. And Duke is permitted to seek a shared  
25 savings incentive consistent with any change in

1 regulation; could that change in regulation occur  
2 prior to 2017?

3 A. Yes. Again, I think it's the standard.  
4 Anything after the stipulation was signed.

5 Q. And would your answer be the same with  
6 regard to a change in order?

7 A. Yes.

8 Q. So if the Commission found in Duke's favor  
9 with regard to the rehearing and the Commission said  
10 Duke could earn an incentive on banked savings, the  
11 provisions would be triggered because there was a  
12 change in the order; is that correct?

13 A. Can you talk about the time period you're  
14 talking about?

15 Q. Sure. If, after the stipulation was  
16 approved, and then the Commission found in Duke's  
17 favor with regard to the rehearing in 14-457, that  
18 would trigger this provision and Duke could ask for a  
19 shared savings mechanism in 2017 and beyond; is that  
20 correct?

21 A. It could -- well, again, it doesn't have  
22 an approved shared savings mechanism. So it could  
23 put forward a mechanism that would allow it to earn  
24 an incentive in a year that it didn't -- that it did  
25 have to use bank to meet an annual mandate if there

1 was a change.

2 Q. If there was a change. So if there was a  
3 change, if the Commission ruled on a shared savings  
4 incentive mechanism for 2016 in Case 14-1580, then  
5 this provision would be triggered and Duke could then  
6 apply for a shared savings incentive mechanism that  
7 would utilize banked savings; is that correct?

8 A. For 2016, it's agreed to forgo regardless  
9 of the outcome of the 14-1580 case.

10 Q. But does the stipulation specifically say  
11 that if the Commission issues an order, that order is  
12 excepted from the triggering provision in the  
13 stipulation?

14 A. No, but it also doesn't say that the  
15 Commission and parties would agree upon such a  
16 mechanism. It just doesn't prohibit the Company from  
17 proposing one.

18 Q. And if the Commission decided the shared  
19 savings issue in 14-1580, then the Company is not  
20 prohibited from requesting one in 2017, per the  
21 stipulation language; isn't that correct?

22 A. The Company is prohibited -- the 14-1580  
23 case had a number of issues discussed in the  
24 calculation, so caps, the ability to use banked  
25 savings. Depending on the wording of the 14-1580



1 order, that could be used to factor in into whatever  
2 mechanism the Company would propose to be in place in  
3 2017 and beyond.

4 Q. Thank you.

5 Let's turn to page 2, line 14 of your  
6 testimony. Here you state that the audit is still  
7 open. Do you see that?

8 A. Page 2, line 14?

9 Q. Yes.

10 A. Yes.

11 Q. Here you're referring to paragraph (13) of  
12 the Commission order issued in 14-457 that addressed  
13 the Staff audit; is that correct?

14 A. Just a second. You're moving me around,  
15 Ms. Bojko.

16 Q. It's OMA Exhibit --

17 A. Paragraph (13), not (3).

18 Q. I'm sorry. I thought I said (13).

19 A. I thought you said (3).

20 Q. Okay. Staff is currently performing the  
21 audit of the 2013 costs which are trued-up  
22 annually; is that correct?

23 A. It's still open. You'd have to ask Staff  
24 that.

25 Q. Well, to your knowledge, Staff is

1 performing -- still performing the audit; is that  
2 correct?

3 A. I know the audit is still open. I can't  
4 tell you what Staff is doing with respect to the  
5 audit. That would be better served asking Staff.

6 Q. Well, Duke hasn't received any findings of  
7 the audit performed by Staff, have they?

8 A. That's why I said it's still open, yes.

9 Q. Let me try again. Duke has not yet  
10 received findings from Staff regarding the audit; is  
11 that correct?

12 A. That's correct.

13 Q. And you don't believe that the order that  
14 the Commission entered into or issued on -- in OMA  
15 Exhibit 4, you don't believe that that order is valid  
16 or a final order until the Staff completes its  
17 audit; is that correct?

18 A. In terms of coming up with the ultimate  
19 impact, and then additionally you have the rehearing  
20 that's out there, I think it's not a final order  
21 because you can't calculate the rates until you have  
22 that audit closed.

23 Q. So if the Commission issues another order  
24 in 14-457, that could also trigger the provision  
25 regarding the shared savings incentive for 2017 and

1 beyond; is that correct?

2 A. Again, depending upon the nature of the  
3 order.

4 Q. Let's turn now to Case 11-4393. You have  
5 referenced that case. You referenced a stipulation  
6 in 4393. Do you recall that?

7 A. Yes.

8 Q. Do you still have the stipulation before  
9 you?

10 A. I sure do.

11 MS. BOJKO: Your Honor, at this time, can  
12 we have marked as OMA Exhibit 10, the Stipulation and  
13 Recommendation filed in 11-4393-EL-RDR?

14 EXAMINER WALSTRA: So marked.

15 (EXHIBIT MARKED FOR IDENTIFICATION.)

16 MS. BOJKO: I don't believe Mr. Boehm  
17 marked it. May I approach, your Honor?

18 EXAMINER WALSTRA: You may.

19 Q. Do you have in front of you what's been  
20 marked as OMA Exhibit 10?

21 A. Yes.

22 Q. Is this the Stipulation and Recommendation  
23 filed in Case No. 11-4393-EL-RDR on November 18th,  
24 2011, that you referenced earlier today?

25 A. Yes.

1 Q. And it's your understanding, I think you  
2 said this earlier, that this stipulation modified the  
3 Company's application; is that correct?

4 A. That's correct.

5 Q. And you said earlier, I just want to lay  
6 some foundation, you stated earlier that banked  
7 savings was not explicitly addressed in this  
8 stipulation; is that correct?

9 A. Because it wasn't changed; that's correct.

10 Q. And isn't it true that the stipulation  
11 explicitly refers to the incentive mechanism as  
12 proposed by OCEA in their 9/21/11 comments that you  
13 referenced earlier today?

14 A. Yes.

15 Q. And that's on page --

16 A. 4, I believe.

17 Q. Page 4. So when you discussed earlier in  
18 your words, I believe, that I had objected to,  
19 "witnesses supporting the stipulation discussed...."  
20 So this is the comments that you were talking  
21 about; is that correct?

22 A. The OCEA comments in this case, yes.

23 Q. Okay. And this is the reference on  
24 page 4 of the stipulation that you're referring to  
25 when you said that comment?

1           A.       Correct.

2                   MS. BOJKO: Your Honor, at this time, may  
3 I have marked as OMA 11, the Comments by Members of  
4 the Ohio Consumer and Environmental Advocates filed  
5 in Case No. 11-4393-EL-RDR, filed on September 21st,  
6 2011.

7                   EXAMINER WALSTRA: So marked.

8                   (EXHIBIT MARKED FOR IDENTIFICATION.)

9                   MS. BOJKO: May I approach?

10                  EXAMINER WALSTRA: You may.

11           Q.       Sir, do you have in front of you what's  
12 been marked as OMA Exhibit 11?

13           A.       Yes.

14           Q.       Does this appear to be comments filed by  
15 members of the Ohio Consumer and Environmental  
16 Advocates, what you had referenced as "OCEA's  
17 comments" and that's what's referenced on page 4 of  
18 the 11-4393 stipulation?

19           A.       I believe they filed multiple comments. I  
20 think there were also reply or supplemental comments  
21 filed, so I'm not sure which one I was referencing,  
22 whether it's this set or another. But I believe if  
23 you look at the record they filed multiple comments.

24           Q.       But doesn't the stipulation that you  
25 referred to reference comments filed on September

1 21st, 2011?

2 A. Let me doublecheck that.

3 Yes, it does.

4 Q. And the comments that I've marked as OMA  
5 Exhibit 11 are, in fact, those comments referenced in  
6 the 4393 stipulation on page 4; is that correct?

7 A. Yes.

8 Q. On page 8 of OCEA's comments, isn't it  
9 true that when discussing the mechanism in their  
10 comments, OCEA proposed a lower incentive percentage,  
11 only give an incentive if exceeds compliance mandates  
12 and a cap?

13 A. Yes.

14 Q. And although OCEA references the SAW  
15 program and an incentive, OCEA proposes to eliminate  
16 the SAW program and incentive; is that correct?

17 A. On page 8, I'm not seeing where they say  
18 eliminate the SAW provision.

19 Q. If you turn over to page 9. At the top of  
20 page 9 it says "OCEA supports the elimination of  
21 Duke's complicated Save-a-Watt incentive"; is that  
22 correct?

23 A. I do see that, yes.

24 Q. And isn't it true that OCEA does not  
25 discuss banking the incentives from the SAW program

1 and using them to claim a future level of incentive  
2 if they don't meet statutory benchmarks in these  
3 comments that were filed on September 21st, 2011?

4 A. I don't see it saying that it does or  
5 doesn't. It says "The Company states that its banked  
6 savings would be used for compliance and for  
7 determining the percentage of net benefit it  
8 retains."

9 Q. Does it says anywhere in this document  
10 that the banking of incentives from -- that the  
11 incentives from that SAW program should be banked and  
12 then used later after 2011 to claim a future level of  
13 incentive if the Company doesn't meet its statutory  
14 benchmarks?

15 A. No, it does not say that.

16 Q. Isn't it true that banked savings was also  
17 not discussed in the Commission order issued in  
18 11-4393?

19 A. I don't believe it was explicitly  
20 discussed, no.

21 MS. BOJKO: Your Honor, at this time, I'd  
22 like to mark as OMA Exhibit 12, the Opinion and Order  
23 issued in Case No. 11-4393-EL-RDR, issued on  
24 August 22nd, 2012.

25 EXAMINER WALSTRA: So marked.

1 (EXHIBIT MARKED FOR IDENTIFICATION.)

2 MS. BOJKO: May I approach, your Honor?

3 EXAMINER WALSTRA: You may.

4 Q. Sir, do you have in front of you what's  
5 been marked as OMA Exhibit 12?

6 A. Yes, I do.

7 Q. And is this an Opinion and Order that was  
8 issued by the Commission in 11-4393?

9 A. Yes, it is.

10 Q. And, sir, did you file testimony in this  
11 case?

12 A. Yes, I did.

13 Q. And you stated earlier you don't believe  
14 anywhere in this order that the Commission talked  
15 about banked savings; is that correct?

16 A. No. It approved the stipulation which  
17 referenced the OCEA comments which does reference the  
18 ability to use banked savings.

19 Q. But we also established that the OCEA  
20 comments do not discuss banked savings and utilizing  
21 those banked savings for a future claim of an  
22 incentive if the Company doesn't meet its benchmark;  
23 isn't that correct?

24 A. No. It references my testimony with  
25 respect to when it talks about banked savings.



1 Q. Okay. Let's take a step back. First of  
2 all, the stipulation that you directed us to,  
3 11-4393, references OCEA comments filed on  
4 September 21st, 2011; is that correct?

5 A. That's correct.

6 Q. And this stipulation does not talk about  
7 banked savings; is that correct?

8 A. No.

9 Q. And the order issued in this case does not  
10 use the words "banked savings"; is that correct?

11 A. It does not.

12 Q. And the OCEA comments do not use the words  
13 "banked savings" with regard to banking those savings  
14 to use for compliance after 2012 if the Company  
15 doesn't meet its benchmarks.

16 A. It does. On page 8.

17 Q. Well, if we -- let's go back.

18 It says "Under Duke's proposal, it would  
19 receive no incentive when it fails to achieve the  
20 targets" of the statutory mandate; is that correct?

21 A. The Company states that its banked savings  
22 benefits which it achieves -- I'm sorry. "The  
23 Company states that its bank savings would be used  
24 for compliance and for determining the percentage of  
25 net benefit it retains."

1 Q. It says the Company states that. OCEA  
2 doesn't state that. Isn't that true?

3 A. In their requested modifications, they're  
4 agreeing to the application absent those  
5 modifications.

6 Q. It doesn't say that in here. It doesn't  
7 say you can bank the savings and use it after 2011 if  
8 the Company doesn't meet its benchmark, does it?

9 MR. JONES: Objection, your Honor. She's  
10 arguing with the witness.

11 MS. WATTS: And, your Honor, I would join  
12 in that objection. If she could just dial it back a  
13 little bit, we'd appreciate it.

14 EXAMINER WALSTRA: Go on, Ms. Bojko.

15 MS. BOJKO: Thank you, your Honor.

16 Q. I thought you had already agreed to this,  
17 so if you have not -- OCEA, in its comments, are  
18 stating that that's what the Company requested, and  
19 that OCEA is saying that the incentive mechanism  
20 should be a lower incentive percentage --

21 MR. JONES: I would have to object, your  
22 Honor. Counsel is now testifying for the record.

23 MS. BOJKO: Your Honor, I'm asking if this  
24 is what the OCEA comments, that he's referred to many  
25 times today, says.

1 MR. JONES: It's testimony.

2 EXAMINER WALSTRA: Overruled.

3 A. Can you repeat the question, Ms. Bojko?

4 Q. Sure. When discussing the mechanism in  
5 their comments, isn't it true that OCEA proposed a  
6 lower incentive percentage, only giving an incentive  
7 if Duke exceeds the compliance mandates, and they  
8 also propose a cap; is that correct?

9 A. They actually, in the stip -- so their  
10 recommendations, you're right, they do propose a  
11 lower incentive which was adopted. But, as they  
12 acknowledge, the intent was that we would be able to  
13 use banked savings for the purpose of both compliance  
14 and determining the net benefit for savings. They're  
15 acknowledging exactly what the mechanism was proposed  
16 and was not to be modified for. They don't suggest  
17 that that shouldn't be the case.

18 MS. BOJKO: Your Honor, I move to strike.  
19 He cannot speculate as to OCEA's intent. The whole  
20 point of my question is what he is saying is not  
21 located in the four corners of the document.

22 MR. JONES: I'm going to object, your  
23 Honor. She opened the door with the question.

24 MS. WATTS: Absolutely.

25 EXAMINER WALSTRA: Overruled.

1 Q. Okay. Isn't it true that OCEA, in its  
2 comments, only states that Duke gets an incentive if  
3 they exceed their benchmark?

4 A. And proposed no modifications for that  
5 reason.

6 Q. So if OCEA is only stating that Duke  
7 should get an incentive if it exceeds the benchmarks,  
8 it can in no way also agree to use banked savings to  
9 reach an incentive if it doesn't ever achieve the  
10 benchmarks; isn't that correct?

11 A. That's not true, Ms. Bojko.

12 Q. But what you're stating, the intent is not  
13 in this document; is that correct?

14 A. The intent was these were the  
15 modifications that were to be made. The stipulation  
16 then spelled out the actual modifications to the  
17 Company's application. The application clearly  
18 included, as acknowledged by the OCEA comments, that  
19 banked savings would be used for the purposes of  
20 determining compliance as well as the net benefit  
21 savings that it was allowed to earn as incentive.

22 Q. And just so we're clear, the stipulation  
23 references the OCEA comments; is that correct?

24 A. That's correct.

25 Q. And the OCEA comments in no way say that

1 they support the Company using the banked savings for  
2 meeting or for exceeding and establishing, claiming  
3 an incentive level in 2012; isn't that correct?

4 A. No, I don't agree with that.

5 MS. BOJKO: Your Honor, at this time, may  
6 I have marked as OMA Exhibit 13, Mr. Duff's testimony  
7 filed in 11-4393.

8 EXAMINER WALSTRA: So marked.

9 (EXHIBIT MARKED FOR IDENTIFICATION.)

10 MS. BOJKO: May I approach, your Honor?

11 EXAMINER WALSTRA: You may.

12 Q. And just to clarify something, Mr. Duff,  
13 could you go to the stipulation that was marked as  
14 OMA Exhibit 10, on page 4. I think there was  
15 confusion. I want to make sure I understand your  
16 testimony correctly. Here it says that what is being  
17 adopted is the incentive mechanism that includes  
18 shared savings as proposed by members of the OCEA in  
19 comments submitted to the Commission in this  
20 proceeding on September 21st, 2011; is that correct?

21 A. On page 4 of the stipulation?

22 Q. In 11-4393. I think you mentioned  
23 something about they adopted Duke's proposal and this  
24 clearly says that the stipulation adopts OCEA's  
25 proposal; is that correct?

1           A.       It says that it adopts the shared savings  
2 as proposed by members of the OCEA, yes.

3           Q.       And as proposed in the comments that we  
4 just discussed.

5           A.       Exactly. Which acknowledged the ability  
6 to use banked savings.

7           Q.       It acknowledged the Company's position,  
8 but then it recommended that the Company only receive  
9 incentives if they exceed the statutory  
10 benchmark; isn't that correct?

11          A.       No, that's not correct. I was in the  
12 discussions when the settlement was negotiated.

13                 MR. JONES: I would object, your Honor.  
14 This has been asked and answered. We've been plowing  
15 this field now for a little bit.

16                 MS. WATTS: Yeah, this is asked and  
17 answered a number of times now.

18                 EXAMINER WALSTRA: I think he did just  
19 answer.

20                 MS. BOJKO: Well, your Honor, I object to  
21 his hearsay comment and move to strike, and I can't  
22 believe that the Company is not objecting to him  
23 disclosing confidential settlement discussions.

24                 But my question went to the document and  
25 it was a new question because he said previously that

1 the stipulation adopted the Company's proposal, and I  
2 was asking him about the specific language in the  
3 stipulation that says it is adopting the shared  
4 savings incentive as proposed by members of OCEA

5 EXAMINER WALSTRA: I think the document  
6 speaks for itself. We can go forward.

7 MS. BOJKO: Thank you, your Honor.

8 Q. (By Ms. Bojko) Let's turn to your  
9 Supplemental Direct Testimony filed in 11-4393. This  
10 is the document that you were discussing with -- you  
11 were discussing this case with Mr. Boehm and I  
12 believe you stated that you had not talked or  
13 discussed about the three criteria of the  
14 stipulation; is that correct? Or did I mishear you?

15 A. No. He said did I do any analysis  
16 regarding the three-prong test, Ms. Boehm --  
17 Ms. Bojko, sorry.

18 Q. So you do agree with me that you actually  
19 submitted Supplemental Direct Testimony in this case  
20 supporting the stipulation and using the three prongs  
21 to do that support; is that correct?

22 A. That's correct.

23 Q. And in this testimony, on page 2 of this  
24 testimony, isn't it true that you state, let me find  
25 it for you. Line 19. "The incentive mechanism does

1 not apply until the Company has exceeded its target  
2 for annual compliance with the Commission's  
3 regulations for energy efficiency." Did I read that  
4 correctly?

5 A. It says that, yes.

6 Q. And this testimony was filed after the  
7 stipulation that we've been discussing; is that  
8 correct?

9 A. I would have to look at the date on it.

10 Q. Well, it's testimony in support of the  
11 stipulation.

12 A. I believe so, yes. I just wanted to check  
13 the date, Ms. Bojko.

14 MS. BOJKO: Okay. Your Honor, the witness  
15 has been on the stand for a couple hours. I'm at a  
16 breaking point, changing topics, if that's helpful.  
17 Otherwise, I can continue.

18 EXAMINER WALSTRA: Yeah, I think we could  
19 probably use a 10-minute break. Does that work?

20 MS. BOJKO: Sure.

21 EXAMINER WALSTRA: Off the record.

22 (Recess taken.)

23 EXAMINER WALSTRA: We'll go back on the  
24 record.

25 Ms. Bojko.



1 MS. BOJKO: Thank you, your Honor.

2 Q. (By Ms. Bojko) Mr. Duff, right before the  
3 break we were talking about your Supplemental Direct  
4 Testimony filed in 11-4393 that was marked as OMA  
5 Exhibit 13. Do you recall that?

6 A. Yes.

7 Q. And isn't it true that in your testimony  
8 you do not use or discuss banked savings?

9 A. No. Again, it wasn't explicitly  
10 referenced in the stipulation.

11 Q. Isn't it true that Case 15-1480 litigated  
12 the 11-4393 stipulation with regard to whether the  
13 shared savings incentive could continue?

14 A. Can you repeat that question?

15 Q. Sure. Isn't it true that Case 15-1480  
16 that you participated in that went to hearing,  
17 litigated the interpretation and issues contained in  
18 the 11-4393 stipulation with regard to whether a  
19 shared savings incentive should continue into 2016?

20 A. Yes, it was litigation regarding the  
21 appropriateness and reasonableness of continuing the  
22 existing shared savings mechanism, that's correct.

23 MS. WATTS: Excuse me, your Honor.

24 Mr. Duff may wish to turn his mic on.

25 THE WITNESS: Sorry.

1 MS. BOJKO: Maybe I should leave mine off.

2 Q. Isn't it true that 11-4393 was not  
3 referenced in your testimony in Case 14-457 regarding  
4 the joint stipulation?

5 A. No. My testimony regarding the  
6 stipulation was supporting the stipulation in 14-457  
7 and 15-534.

8 Q. So you're agreeing with me that it did not  
9 reference 11-4393.

10 A. Not to my knowledge.

11 Q. And isn't it true that the 11-4393  
12 stipulation was not referenced in the joint  
13 stipulation in 14-457 and 15-534?

14 A. Correct.

15 Q. And isn't it true that the Company  
16 requested \$11.6 million of shared savings in 2013  
17 when they didn't meet their statutory benchmarks?

18 A. Consistent with the approved shared  
19 savings incentive mechanism, the Company did, I  
20 believe, subject to check, request approximately  
21 \$11.6 million of shared savings incentive.

22 Q. And isn't it true that the Company  
23 requested approximately \$13 million of shared savings  
24 incentives for 2014 when the Company didn't meet  
25 their statutory benchmarks?

1           A.       Again, consistent with the calculation  
2 mechanism, the Company did request, I believe it was  
3 about \$12.6 million, but that's subject to check.

4           Q.       And so, by my estimates, it was  
5 approximately \$24.4 million requested by the Company  
6 through the energy efficiency rider for years 2013  
7 and '14; is that accurate?

8           A.       I believe that's correct, yes.

9           Q.       And isn't it true that to address those  
10 two years, the joint stipulation contains a  
11 \$19.75 million negotiated number?

12          A.       I believe so, yes.

13          Q.       So this was a black box settlement; is  
14 that correct?

15          A.       Can you define the term "black box,"  
16 Ms. Bojko?

17          Q.       Well, there's no -- the \$19.75 million is  
18 to cover the shared savings for both years, it's not  
19 split among the years; is that correct?

20          A.       The 19.75 was the term of the stipulation  
21 designed to resolve the Company's shared savings for  
22 calendar year 2013 and 2014, yes.

23          Q.       There was something you said to Mr. Boehm.  
24 I thought you said for 2016 you would adjust your  
25 forecast if the 2015 numbers came out differently

1     than projected.   You're not currently -- well, did  
2     you say that?

3           A.       Yes.   He was asking about what was -- what  
4     was projected in an exhibit that was provided in  
5     discovery.

6           Q.       Okay.   So you're not currently collecting  
7     for a projected 2016 shared savings incentive through  
8     the rider, are you?

9           A.       No.   The projection for 2016 has not been  
10    filed yet.

11          Q.       But with regard to the settlement, you are  
12    assuming \$15 million associated with an incentive for  
13    2016; is that correct?

14          A.       At the time of discussing the stipulation  
15    and all the terms, it -- we tried to quantify what a  
16    probable amount of maximum shared savings for the  
17    Company would be in 2016, and we used 2015 as a  
18    proxy, because that was the filed number that we  
19    could use.

20          Q.       During that decision-making where you  
21    decided to use 2015 as a proxy, it was your  
22    understanding that the shared savings incentive  
23    mechanism expired at the end of 2015, correct?

24          A.       As I said, I felt we put on a good case  
25    and that was a fair characterization of what the

1 maximum could be if the Commission came back and  
2 continued the shared savings mechanism, yes.

3 Q. But as of today, the shared savings  
4 incentive mechanism of Duke did, in fact, expire at  
5 the end of 2015, correct?

6 A. That's correct.

7 MS. BOJKO: Your Honor, at this time, may  
8 I have marked as OMA Exhibit 14, Duke's discovery  
9 response to OCC-INT-02-010, as well as the  
10 supplemental response that was provided to that same  
11 interrogatory.

12 EXAMINER WALSTRA: So marked.

13 (EXHIBIT MARKED FOR IDENTIFICATION.)

14 MS. BOJKO: May I approach, your Honor?

15 EXAMINER WALSTRA: You may.

16 Q. Sir, do you have in front of you what's  
17 been marked as OMA Exhibit 14 which is a Duke  
18 discovery response to OCC Interrogatory 02-010 and  
19 the supplemental response?

20 A. Yes.

21 Q. And, sir, do you recognize this to be a  
22 Duke Energy Ohio response to a discovery request in  
23 this proceeding?

24 A. Yes.

25 Q. And you have no reason to question the

1 accuracy of this discovery response, do you?

2 A. Not to my knowledge.

3 Q. Sir, is it your understanding that,  
4 originally, Duke responded to OCC's interrogatory  
5 that there were only two meetings held with Staff?

6 A. I remember that from the deposition, yes.

7 Q. And then, in the deposition, we all  
8 learned that there might have been multiple meetings,  
9 and Duke subsequently supplemented their discovery  
10 response; is that correct?

11 A. I don't know how you learned it, but yes,  
12 the interrogatory response was supplemented for  
13 correct information.

14 Q. So it's your understanding, sir, that Duke  
15 had a total of four meetings with Staff prior to  
16 reaching an agreement?

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

18 Q. And you stated earlier today that you  
19 participated in two of those meetings; is that  
20 correct?

21 A. I was on the telephone for the 29th and  
22 the 30th.

23 Q. And you also stated that to your knowledge  
24 there were no intervening parties in the two you  
25 participated in as well as the other two?

1           A.       I said not to my knowledge, but I wasn't  
2       in the room, so I couldn't say.

3                   MS. BOJKO:   Your Honor, at this time, may  
4       I have marked as OMA Exhibit 15, Duke's response to  
5       OCC Interrogatory 03-017.

6                   EXAMINER WALSTRA:   So marked.

7                   (EXHIBIT MARKED FOR IDENTIFICATION.)

8                   MS. BOJKO:   May I approach?

9                   EXAMINER WALSTRA:   You may.

10          Q.       Sir, do you have in front of you what's  
11       been marked as OMA Exhibit 15?

12          A.       Yes.

13          Q.       Does this appear to be Duke's response to  
14       OCC Interrogatory 03-17?

15          A.       It appears to be, yes.

16          Q.       Dated March 1st, 2016, as the date  
17       received?

18          A.       Yes.

19          Q.       And do you have any reason to challenge or  
20       object to the accuracy of this document?

21          A.       I didn't provide the answer, so no.

22          Q.       But you have no reason to believe it's not  
23       true and accurate?

24          A.       I have no reason to believe.

25          Q.       Does this discovery request ask if any

1 intervening parties were invited to one or both of  
2 the meetings identified in response to OCC's prior  
3 interrogatories?

4 A. Yes, it does.

5 Q. And does the response say no, they were  
6 not?

7 A. Yes, it says no.

8 MS. BOJKO: Your Honor, may I have marked  
9 as OMA Exhibit 16, Duke's response to OCC  
10 Interrogatory 03-018?

11 EXAMINER WALSTRA: So marked.

12 (EXHIBIT MARKED FOR IDENTIFICATION.)

13 MS. BOJKO: May we approach, your Honor?

14 EXAMINER WALSTRA: You may.

15 Q. Sir, do you have in front of you what's  
16 been marked as OMA Exhibit 16?

17 A. Yes.

18 Q. And does that appear to be a discovery  
19 response from Duke?

20 A. Yes.

21 Q. And you have no reason to challenge the  
22 accuracy of Duke's response in this data request, do  
23 you?

24 A. No.

25 Q. And does this data response ask if



1 intervening parties participated in one or both of  
2 the meetings identified in previous discovery  
3 responses?

4 MR. JONES: Your Honor, I'm going to have  
5 to object. There's no foundation for this that he's  
6 ever seen this before, that he's the one that  
7 prepared this. He doesn't have any personal  
8 knowledge of it. There's no foundation. He's just  
9 reading what's being handed to him at this point and  
10 that's improper.

11 EXAMINER WALSTRA: Ms. Bojko.

12 MS. BOJKO: Your Honor, he actually did  
13 say that to his knowledge he did not believe that any  
14 intervening parties were invited or participated, and  
15 he said that that was to his knowledge, so I'm  
16 following that up with actual Duke data responses.  
17 He is the Duke representative testifying here today,  
18 so he is the appropriate Duke employee to ask these  
19 questions of. He is representing Duke and he's  
20 supporting the joint stipulation. And he also  
21 testified to the three prongs of the test which this  
22 is directly related to.

23 MS. WATTS: Your Honor, may I be heard?

24 EXAMINER WALSTRA: Go ahead.

25 MS. WATTS: First of all, Ms. Bojko has

1 mischaracterized Mr. Duff's testimony, so I would  
2 like to enter an objection with regard to that.

3 Secondly, certainly Ms. Bojko is entitled  
4 to ask Mr. Duff about what he knows about these  
5 meetings and what he heard or observed or what have  
6 you, but these documents were not prepared by him, he  
7 has no knowledge about the content or the responses  
8 that are in here. He can certainly affirm that the  
9 Company responds truthfully and honestly to  
10 discovery, but, beyond that, these are not his  
11 documents, and this is not a proper way to try and  
12 get them into evidence.

13 MS. BOJKO: Your Honor, may I respond?

14 EXAMINER WALSTRA: Go ahead.

15 MS. BOJKO: The Company can't put "Legal"  
16 on the bottom of all discovery responses to somehow  
17 shield them from being used or entered into evidence  
18 in a case.

19 If the witness is here testifying to the  
20 joint stipulation, he is testifying specifically to  
21 the three prongs of the test on page 4 of his  
22 testimony. It says please identify the criteria used  
23 by the Commission. He goes on to talk about  
24 knowledgeable and capable parties and whether he  
25 believes they met the test.

1           This goes to the parties that were  
2 involved in the negotiations and the knowledge and  
3 capability of those parties and the negotiating power  
4 of those parties. It goes directly to his testimony.  
5 And just because the Company put "Legal" on it, they  
6 can't prevent the Company's own witness supporting  
7 the stipulation from answering these questions.

8           EXAMINER WALSTRA: I think he has been  
9 answering to the best of his knowledge, but I don't  
10 know that these have been -- they don't really  
11 counteract what he has been saying necessarily. But  
12 I'll let you continue to go forward, but I think he  
13 has been answering to the best of his knowledge.

14           MS. BOJKO: Thank you.

15           Q.        (By Ms. Bojko) I think there was a pending  
16 question. Did any intervening -- Duke responded that  
17 no intervening party participated in the meetings as  
18 indicated in the Duke response; is that correct?

19           A.        Yeah, but the question says "one or both  
20 of the meetings." I don't know if those are  
21 referencing the meeting I was in attendance of, so I  
22 really can't speculate, but the Company's response  
23 was "no."

24           Q.        Okay. You raise a good point.

25           MS. BOJKO: Your Honor, at this time, I'd

1 like to mark as OMA Exhibit 17, Duke's responses to  
2 discovery of OCC-POD-03-006 and OCC-POD-03-007, which  
3 appear to be -- oh. Excuse me, your Honor.

4 Q. I'll just ask you the question, sir. Do  
5 you know whether Duke updated or issued supplemental  
6 discovery responses answering the question you just  
7 posed regarding the two additional meetings that were  
8 not initially disclosed to the parties?

9 A. I don't know.

10 Q. Do you know whether -- I thought you said  
11 earlier, but now you're saying you don't know. So,  
12 to your knowledge, is it your -- strike all that.

13 Is it your understanding that intervening  
14 parties were not invited to the four settlement  
15 meetings?

16 A. I don't know. I can speak to the two  
17 meetings that I was a party to, and that's what my  
18 previous answer was with regards to.

19 Q. Okay. And those were my questions. I was  
20 just asking you about the two meetings you were  
21 invited to. And then you suggested, I believe, that  
22 there were additional meetings and said the discovery  
23 responses I provided to you went beyond the two that  
24 we were discussing; is that correct?

25 MR. JONES: I am going to have to object,

1 your Honor. This is asked and answered, like, three  
2 or four times now.

3 EXAMINER WALSTRA: I think she's just  
4 asking for clarification.

5 A. Well, you lost me, so you're going to have  
6 to clarify your question. I'm sorry.

7 Q. Well, I was focusing -- I provided you two  
8 discovery responses about the two meetings you were  
9 in attendance at; is that correct?

10 A. If you go back to OMA Exhibit 14, it lists  
11 two of the meetings that I was in, the 29th and the  
12 30th, yes.

13 Q. Okay. And then in response to one of my  
14 questions you said this doesn't reference the other  
15 two meetings; is that correct?

16 A. Well, it doesn't reference any meetings.  
17 It says "one or both." I don't know -- I didn't  
18 prepare the answer, so I'm not sure what the question  
19 was referencing and I'm not sure which meetings it's  
20 referencing. That was my clarification, Ms. Bojko.

21 Q. But the discovery responses clearly  
22 reference two meetings, one or both, and those  
23 meetings were what was disclosed by Duke in the  
24 discovery response that we just provided, and I'll  
25 find it so you have a source. It was in OMA

1 Exhibit 14; is that correct?

2 A. Yes. But again, I was only in one of  
3 those meetings listed, so I can't answer.

4 Q. Okay.

5 A. The meeting on the 30th that I was in  
6 attendance of, no, I do not believe so. But the  
7 other -- the other meetings, I can't answer to it,  
8 the one on the 28th.

9 Q. Okay. And just so the record is clear,  
10 OMA Exhibit 16 and OMA Exhibit 15 both reference  
11 OCC-INT-02-010; is that correct?

12 A. Yes.

13 Q. So when Duke responded to those, it's fair  
14 to assume they were talking about the two meetings  
15 that were referenced in OCC Interrogatory 01-010?

16 A. Yes. And what I'm saying is I can't  
17 answer to the meeting on the 28th. I can answer with  
18 respect to the meeting on the 30th, Ms. Bojko.

19 Q. And so, to your knowledge -- or, you can't  
20 speak to whether there were intervenor parties  
21 invited to any of the other meetings.

22 A. I can't speak to whether they were invited  
23 to any of the meetings. I can speak to whether, to  
24 my knowledge, there were no other intervening parties  
25 at the meeting on the 30th listed here.

1 Q. Sir, to your knowledge, did Duke have any  
2 settlement meetings with any other parties and Staff  
3 prior to the stipulation being filed?

4 A. I believe they had one, but I'm not  
5 positive. I wasn't there.

6 Q. Prior to the stipulation being filed?

7 A. I think -- well, they circulated it. I  
8 don't know if there was a meeting or not. I know  
9 they circulated the proposed stipulation with  
10 intervening parties, but I can't speak to whether  
11 there was a meeting or not.

12 Q. Mr. Duff, do you recall being deposed on  
13 March 1st, 2016, in this proceeding?

14 A. Yes.

15 Q. And in that deposition were you under  
16 oath?

17 A. Yes.

18 MS. BOJKO: Your Honor, I apologize. I'm  
19 trying to show the witness a transcript. I was  
20 trying to conserve paper and assumed there was other  
21 copies of the deposition transcript and there are  
22 not. May I approach, your Honor?

23 EXAMINER WALSTRA: You may.

24 MS. BOJKO: Page 77.

25 MS. WATTS: Counsel, do you have a

1 reference in the transcript?

2 MS. BOJKO: Page 77, line 2.

3 Q. Sir, in your deposition was this question  
4 posed to you by myself: "And I know you stated that  
5 you did not have any other meetings, but, to your  
6 knowledge, did Duke have any settlement meetings with  
7 any other parties and Staff?"

8 "To my knowledge, no, but, again, I don't  
9 know. Particularly on the Staff, I have no idea."

10 A. That's what I said.

11 Q. Did I read that correctly?

12 A. Yes.

13 MR. JONES: I object, your Honor. This is  
14 improper impeachment.

15 MS. BOJKO: Your Honor, it wasn't  
16 improper. He said before he didn't know and in his  
17 deposition he said no.

18 THE WITNESS: I said I believe. I said "I  
19 don't know."

20 MS. BOJKO: "I don't know."

21 THE WITNESS: Isn't that what I just I  
22 said?

23 MS. BOJKO: "To my knowledge, no." He  
24 said "To my knowledge, no."

25 MR. JONES: Your Honor, I move to strike



1 this. There's no inconsistency established here by  
2 what was just done.

3 EXAMINER WALSTRA: Overruled.

4 Q. (By Ms. Bojko) During the four meetings  
5 did Duke distribute any documents to your knowledge?

6 A. I was on the phone, so I don't know  
7 whether documents were distributed or not.

8 Q. Did you have any documents in front of  
9 you?

10 A. I had a document, yes, that was received.

11 Q. You don't know if that document was given  
12 to Staff or not?

13 A. I don't know for sure, no.

14 MS. BOJKO: Your Honor, at this time, may  
15 I have marked as OMA Exhibit 17, Duke's responses to  
16 OCC-POD-03-006 and -007.

17 EXAMINER WALSTRA: So marked.

18 (EXHIBIT MARKED FOR IDENTIFICATION.)

19 Q. Do you have in front of you what's been  
20 marked as OMA Exhibit 17?

21 A. Yes.

22 Q. Does this appear to be a Duke response to  
23 OCC-POD-03-006 and -007?

24 A. It does.

25 Q. And in response to a question of whether

1 any -- or, to produce any documents distributed in  
2 the settlement discussions, did Duke respond "not  
3 applicable"?

4 MS. WATTS: Your Honor, if I could just  
5 pose an objection because Mr. Duff doesn't have the  
6 interrogatory response 03-019, so he's got an  
7 incomplete document to look at here in order to  
8 respond accurately.

9 MS. BOJKO: I could provide that to him,  
10 your Honor, if necessary.

11 EXAMINER WALSTRA: Please.

12 MS. BOJKO: May I approach, your Honor?

13 EXAMINER WALSTRA: You may.

14 Q. Mr. Duff, it appears that 03-019 is  
15 referencing a meeting that you actually participated  
16 in; is that correct?

17 A. December 29th, yes.

18 Q. And in response --

19 A. Just one correction. The question says  
20 "December 29th, 2016." It should be "2015,"  
21 Ms. Bojko.

22 Q. I'm sorry, what should be "2015"?

23 A. It says "the PUCO Staff on December 29th,  
24 2016." I'm just trying to make sure it's accurate.

25 Q. Sure. With that clarification, does it

1 appear that Duke responded that there were not any  
2 documents distributed in that settlement discussion?

3 A. The response says "N/A." I don't know --  
4 I didn't write it, so I can't say what "N/A" means.

5 Q. As a Duke employee, you don't know what  
6 Duke might have been referencing when they put "N/A"?

7 A. I don't know with respect to this  
8 question. "N/A" can mean "not applicable," but I  
9 didn't write this answer.

10 MR. JONES: Your Honor, I'm going to have  
11 to object. She's calling for speculation. Clearly,  
12 he doesn't know what that means.

13 EXAMINER WALSTRA: If we can just move  
14 forward.

15 Q. Do you know when Duke and Staff reached an  
16 agreement in this proceeding, in the joint  
17 stipulation proceeding?

18 A. I think the final agreement was reached  
19 prior to being filed on I believe it was January 6th,  
20 but . . .

21 Q. Do you believe that -- do you know when  
22 the document was distributed to other parties?

23 A. Sometime shortly after the New Year, I  
24 believe. But I didn't distribute it, so I don't know  
25 off the top of my head, no.

1 Q. Do you know whether the document changed  
2 from the day it was distributed to intervening  
3 parties and the day it was filed in the docket?

4 A. I don't believe the Company nor the Staff  
5 received any feedback on the document.

6 Q. That's not what I asked. I asked if it  
7 changed between --

8 A. No, because I don't believe they received  
9 any feedback.

10 Q. So it's your understanding that the  
11 agreement, then, was reached between Duke and Staff  
12 when it was distributed to the parties on December  
13 30th, 2015?

14 A. I believe tentative to any potential  
15 changes that parties would have suggested.

16 Q. Okay. I thought you told me final  
17 agreement was reached when it was filed, but I'm  
18 asking if the document changed from when it was  
19 distributed on December 30th, 2015, to when it was  
20 filed on January 6th, 2016.

21 A. And I said --

22 MR. JONES: Objection. Asked and  
23 answered, your Honor.

24 MS. WATTS: Three times.

25 EXAMINER WALSTRA: I think he has

1 basically answered.

2 MS. BOJKO: Well, your Honor, he keeps  
3 saying subject to intervenors, and I'm not talking  
4 about intervenors, I'm talking about the Staff and  
5 Duke. I'm not talking about feedback from  
6 intervenors and that's what he keeps interjecting in  
7 his answer that I don't think is responsive to my  
8 question.

9 EXAMINER WALSTRA: I think he has answered  
10 that it has not changed from the time it was  
11 distributed to the time it was filed.

12 A. Exactly. No feedback was given to change  
13 it before it was finalized.

14 Q. Including feedback among Staff; is that  
15 fair?

16 A. I don't know. Again, I can speak -- I  
17 can't speak to all the discussions because I wasn't  
18 privy to them. I know that the document was  
19 distributed to parties and I don't believe any  
20 modifications were made based off of their feedback.  
21 So the final version that was agreed to, I believe  
22 was the same version that was circulated.

23 Q. And testifying here today, you weren't  
24 involved directly in the discussions between Staff  
25 and Duke regarding this document; is that correct?

1           A.       Not directly in terms of the circulation  
2 of it and the finalization of it, no.

3           Q.       And you weren't involved in any  
4 discussions that may or may not have occurred between  
5 Duke and any intervening parties; is that correct?

6           A.       Not directly, no.

7           Q.       And you weren't involved in any  
8 discussions that may or may not have occurred between  
9 Staff and any intervening parties, correct?

10          A.       No, not to my knowledge.

11          Q.       And you weren't involved in any  
12 discussions with Staff between December 30th, 2015,  
13 and January 6th, 2016; is that correct?

14          A.       I was not.

15          Q.       Is it fair to say that you were not privy  
16 to any comments or feedback that intervenors provided  
17 to Staff and Duke regarding the stipulation that was  
18 circulated on December 30th?

19          A.       I did not receive any feedback, no.

20          Q.       So what I'm understanding is you were  
21 involved in two discussions between Staff and Duke  
22 and that's it; is that fair?

23               MR. JONES: Objection. Asked and  
24 answered, your Honor.

25               EXAMINER WALSTRA: Overruled.

1           A.       I participated in two meetings with Staff,  
2 discussing the elements of the stipulation, yes.

3           Q.       And no others; is that correct?

4           A.       No, I did not.

5           Q.       And it's your understanding that the  
6 stipulation was provided to parties on December 30th,  
7 and that it was filed on January 6th, which gave the  
8 the parties three business days to review the  
9 document before it was filed; is that correct?

10          A.       The timeline sounds correct, subject to  
11 check, but again, I didn't distribute it, but I do  
12 believe the January 6th date was the date it was  
13 filed, yes.

14                 MS. BOJKO: Your Honor, at this time, I've  
15 marked as OMA Exhibit 18, Duke's discovery responses  
16 to OCC Interrogatory 02-011, and the supplemental  
17 response provided as well.

18                 EXAMINER WALSTRA: So marked.

19                 (EXHIBIT MARKED FOR IDENTIFICATION.)

20          Q.       Do you have in front of you what's been  
21 marked as OMA Exhibit 18?

22          A.       I do.

23          Q.       Does this appear to be Duke's responses to  
24 OCC Interrogatory 02-011 and then the supplemental  
25 response to the same interrogatory?

1           A.       Yes, it does.

2           Q.       And is this again referring back to the  
3           interrogatory that was previously marked as OMA  
4           Exhibit 14 which was OCC Interrogatory 02-010?

5           A.       Yes.

6           Q.       But even though it references  
7           Interrogatory 02-010, which only referenced two  
8           meetings, December 28th and December 30th, this  
9           interrogatory first references the December 28th  
10          meeting, and then in the supplemental response it  
11          refers to four meetings; is that correct?

12          A.       That's correct.

13          Q.       And it appears that two of the four  
14          meetings were by teleconference; is that your  
15          understanding?

16          A.       Yes, that's what it says.

17          Q.       And if you look at Interrogatory 02-011,  
18          the attendees at the December 28th meeting appear to  
19          be different than the attendees listed on OCC  
20          Interrogatory 02-011 Supplemental. Do you know why?

21                 MR. JONES: You're Honor, I'm going to  
22          have to object again. This witness has said, like,  
23          15 times that he was involved in the meetings on the  
24          29th and 30th. And we keep on going over this as to  
25          other dates and other days and who were present and



1     ba, ba, ba. You know, having him repeat the words on  
2     a page he has no personal knowledge of. He didn't  
3     respond to this. He wasn't involved in that meeting  
4     on the 28th. And we just keep on going over this.  
5     It's improper and I object.

6                 EXAMINER WALSTRA: Ms. Bojko, if you have  
7     questions about the meetings that he attended, I  
8     think that would be the relevant testimony here.

9                 MS. BOJKO: Well, your Honor, may I  
10    respond? This is the only Duke witness and he is  
11    providing testimony on the joint stipulation and he  
12    is providing testimony on the three criteria that  
13    this Commission has to consider.

14                Again, just because Duke chooses to put  
15    "Legal" on the bottom of a document or they put --  
16    they choose not to call a different witness that has  
17    more knowledge than this witness about certain  
18    factors, doesn't make it that this isn't relevant  
19    evidence that the Commission should consider, and it  
20    doesn't mean that we can't ask him on  
21    cross-examination if he knows.

22                I asked if he knew why there was a  
23    difference in the listed attendees. I didn't ask for  
24    Duke's position. I asked if he personally knew why  
25    there would be a different listing of attendees at

1 the meetings listed on the two pages.

2 MR. JONES: Your Honor, I object because  
3 the Rules of Evidence are somewhat applicable to the  
4 our proceedings here. And again, the Rules of  
5 Evidence provide that if you have personal knowledge,  
6 you can testify to something. He doesn't have any  
7 personal knowledge as to the meeting on the 28th. He  
8 said that, like, 15 times already. So it's improper  
9 for her to cross-examine him on that date, who was  
10 present, and reading words on a page, on a document  
11 he didn't prepare. I mean, this is just an  
12 opportunity to dump documents into the record and  
13 it's improper.

14 EXAMINER WALSTRA: If you have a question  
15 about his personal knowledge, you can ask that, as  
16 opposed to just reading these responses into the  
17 record. I don't think that's relevant here. But if  
18 you have a question about his personal knowledge.

19 MS. BOJKO: Your Honor, I didn't think I  
20 was reading. I asked him if he knew, personally if  
21 he knew why the attendees would be listed differently  
22 on OCC Interrogatory 02-011 versus 02-011  
23 Supplemental.

24 EXAMINER WALSTRA: If he knows, he can  
25 answer.

1           A.       I didn't prepare either response, so I  
2 don't know, Ms. Bojko.

3           Q.       Okay. Let's talk specifically about the  
4 one that you are listed on. You are listed on  
5 December 29th as being a participant in the  
6 teleconference; is that correct?

7           A.       That's correct.

8           Q.       Okay. And if you look at Interrogatory  
9 02-011, the attendees of the teleconference for  
10 December 29th are different than the attendees for  
11 the teleconference listed on December 29th. Do you  
12 know why?

13          A.       I don't see any reference to a meeting on  
14 the 29th, listed in OCC Interrogatory 02-011.

15          Q.       Well, that's the second meeting. If you  
16 look at, go back to the reference of Interrogatory  
17 02-010, it's OMA Exhibit 14. There are two meetings.  
18 One it says is in person, December 28th, and the  
19 other one it says it's December 30th, 2015.

20          A.       Yes.

21          Q.       And then if you look at Interrogatory  
22 02-011, the first meeting is December 29th, and  
23 that's where it even says Amy Spiller was present. I  
24 don't think she could be present and on the  
25 teleconference. So the assumption is the attendees

1 participating in the teleconference is a reference to  
2 the December 30th teleconference.

3 A. You said 29th, the first time, but that's  
4 okay, I understand what you're trying to get at now.

5 I don't know. Again, it was a  
6 teleconference. I was a participant. I didn't  
7 prepare the attendee list, nor did I create the  
8 attendee list. I can't tell you why it's different.

9 Q. Okay. And just so the record is clear, I  
10 apologize. So you believe the second paragraph  
11 on 02-011 is with regard to the December 30th  
12 teleconference that you were, in fact, a participant  
13 in; is that correct?

14 A. Yes, because the original Interrogatory  
15 02-010 referred to the 28th and the 30th.

16 Q. And the December 30th, 2015, on OCC  
17 Interrogatory 02-011, even though you were in  
18 attendance on the teleconference, your name is not  
19 listed as being a participant on 02-011?

20 A. Again, I didn't prepare the response. I  
21 don't know why.

22 Q. And if we turn to page 7 of the  
23 stipulation. Do you have that in front of you, sir?

24 A. You're talking about the stipulation in  
25 this proceeding, correct?

1 Q. Yes, the joint stipulation.

2 A. There's a lot of stipulations you've put  
3 in front of me.

4 Q. The stipulation filed in 14-457. Do you  
5 have that in front of you?

6 A. Yes, I do.

7 Q. Could you turn to page 7, please?

8 A. Yes.

9 Q. Provision b. Do you see that?

10 A. Yes.

11 Q. It states that Staff will accept  
12 application and 2013 cost recovery as filed. Do you  
13 see that?

14 A. Yes.

15 Q. And this provision, however, means except  
16 as modified by the joint stipulation; is that  
17 correct?

18 A. I would think so, yes. Again, I didn't  
19 write the verbiage, but that would be my  
20 understanding, yes.

21 Q. And you also believe that this provision  
22 would mean except as determined by the results of the  
23 Staff's audit; is that correct?

24 A. It doesn't say that, but that's part of  
25 the resolution of the case, I believe.

1 MS. BOJKO: Your Honor, if I could have  
2 two minutes, then I may be finished.

3 EXAMINER WALSTRA: All right.

4 (Pause in the proceedings.)

5 Q. I want to clarify one thing, Mr. Duff.  
6 Are you aware that in Case 15-534, where the joint  
7 stipulation was filed, that there were both comments  
8 and reply comments filed by parties?

9 A. I said that earlier, yes.

10 Q. Okay. I thought we just talked about  
11 comments. You did say reply comments.

12 A. I said that that was what was -- you said  
13 what was referenced in my testimony, and it only made  
14 reference to comments, not reply comments. I just  
15 wanted to clarify that.

16 Q. Okay. But it is your understanding that  
17 the Commission provided for both the filing of  
18 comments and reply comments.

19 A. I believe that's correct, subject to  
20 check.

21 Q. Thank you for that clarification.

22 MS. BOJKO: With that, your Honor, I have  
23 no further questions of Mr. Duff. Thank you so much.

24 Thank you so much for your time, Mr. Duff.

25 THE WITNESS: Thank you.

1 EXAMINER WALSTRA: We'll break for lunch.

2 (At 1:10 p.m. a lunch recess was taken  
3 until 2:10 p.m.)

4 - - -

5 Thursday Afternoon Session,  
6 March 10, 2016.

7 - - -

8 EXAMINER WALSTRA: We'll go back on the  
9 record.

10 I remind you that you are still under  
11 oath.

12 Go ahead.

13 - - -

14 CROSS-EXAMINATION

15 By Ms. Ghiloni:

16 Q. Good afternoon, Mr. Duff.

17 A. Good afternoon.

18 Q. My name is Danielle Ghiloni. I'm here  
19 representing the Kroger Company. You stated earlier  
20 that you are aware of the criteria used by the  
21 Commission in reviewing the stipulation, correct?

22 A. Yes.

23 Q. And the first criterion is that the  
24 stipulation be the product of serious bargaining  
25 among capable and knowledgeable parties, correct?

1 A. Yes.

2 Q. And you believe that the terms of the  
3 stipulation are concessions that are made by Duke,  
4 correct?

5 A. I think there were concessions made by  
6 Duke, but I think there are a number of terms in the  
7 stipulations.

8 Q. So some of the terms are concessions that  
9 were made by Duke.

10 A. I would characterize that as correct, yes.

11 Q. According to the first term of the  
12 stipulation, Duke will recover 19.75 million for its  
13 shared savings incentive mechanism under the energy  
14 efficiency and demand response portfolio for the 2013  
15 and '14 years; is that correct?

16 A. That is correct.

17 Q. And this is in contrast to an estimated  
18 24.5 million that the Company believes it is entitled  
19 to, correct?

20 A. That's correct.

21 Q. So you believe this term is a concession,  
22 correct?

23 A. It's a way to resolve it, yes.

24 Q. But is it a concession of the Company?

25 A. Yes.



1 Q. Additionally, the second term of the  
2 stipulation states that Duke will forgo recovery of a  
3 shared savings incentive during the 2015 and 2016  
4 calendar years, correct?

5 A. Correct.

6 Q. And again, this is in contrast to an  
7 estimated amount of future shared savings that the  
8 Company believes it would be entitled to absent the  
9 stipulation, correct?

10 A. It is a concession versus what the Company  
11 believes it was entitled to, yes.

12 Q. Okay. So you do characterize this term as  
13 a concession as well?

14 A. Yes.

15 Q. Now, if Duke cannot use banked savings to  
16 claim a shared savings incentive in 2013 or 2014,  
17 then the shared savings incentive number would be  
18 zero; is that correct?

19 A. If the banked savings, as the mechanism  
20 was approved, were not allowed to be used, then, yes,  
21 Duke would not be eligible for incentive.

22 Q. Okay. So it would not be entitled to the  
23 24.5 million that your Company --

24 A. That's correct, that's what the mechanism  
25 would calculate the Company is entitled to for shared

1 savings.

2 Q. So similarly, for 2015, if Duke cannot use  
3 banked savings to claim a shared savings incentive,  
4 then the shared savings incentive number would be  
5 zero for 2015, correct?

6 A. 2015 is a little bit more in question  
7 because of the Commission's ruling in the FirstEnergy  
8 case regarding the ability to earn a shared savings  
9 incentive for not exceeding the annual mandate, but,  
10 rather, exceeding the cumulative 4.2 percent mandate.

11 Q. And as for 2016, there currently is no  
12 shared savings incentive mechanism approved, correct?

13 A. Yes. It's currently pending.

14 Q. Because the shared savings incentive  
15 expired at the end of 2015.

16 A. That's correct.

17 Q. So, currently, the shared savings  
18 incentive number, it's zero for 2016 because there is  
19 no mechanism, correct?

20 A. Until the case is resolved, correct.

21 Q. Okay. And there is a possibility that if  
22 Duke cannot use banked savings to meet its incentive  
23 in 2015 or 2016, there's a possibility that the  
24 shared savings incentive number would be zero for  
25 those two years as well, correct?

1           A.       Again, that's a little bit less clear  
2 because of the FE ruling, but I think that could be  
3 one potential outcome, yes.

4           Q.       So you would agree that the term in the  
5 stipulation providing for the 19.75 million in 2013  
6 and '14, then, is a concession for the Company only  
7 if banked savings are allowed to be used to claim a  
8 shared savings incentive, right?

9           A.       I would say that the -- with respect to  
10 the 24.6 that the mechanism would calculate, the  
11 19.75 would be less than that, and then yes, a  
12 concession.

13          Q.       It would be less of a concession.

14          A.       It would be less than the \$24.5 million,  
15 so it would be a concession, yes.

16          Q.       If the 19 -- if you weren't allowed to use  
17 banked savings to claim a shared savings incentive,  
18 then you would be at zero, correct?

19          A.       For '13 and '14, if the mechanism did not  
20 allow --

21          Q.       Yes.

22          A.       -- banked savings to be used as it was  
23 approved, yes, the mechanism would entitle us to  
24 zero.

25          Q.       That would entitle you to zero. So

1 requiring a payment of 19.75 million is not a  
2 concession by the Company, correct, because if you --  
3 if you say that banked savings were not allowed, then  
4 the Company would only be entitled to zero.

5 A. The Company believes it was entitled to  
6 the \$24.5 million.

7 Q. Correct. But I asked if banked savings  
8 were not allowed to be used, then the Company would  
9 be entitled to zero and, therefore, the 19.75 million  
10 in the stipulation, would that be a concession or no,  
11 if you were entitled to zero to begin with?

12 A. You're looking at -- you're looking at --  
13 a concession is when you believe you know what the  
14 outcome is going to be, and that's what we believe  
15 the outcome to be, so we view it as a concession. To  
16 your point, if the incentive was zero, then yes, the  
17 19.75 would be more than zero.

18 Q. So your belief that it's a concession is  
19 based on your belief that banked savings are allowed  
20 to be used to claim a shared savings incentive then?

21 A. For '13 and '14, yes, that's correct.

22 Q. Okay. So an additional term of the  
23 stipulation states that the Company's energy  
24 efficiency programs for the 2013 through 2016  
25 calendar years will remain subject to the

1 Commission's Evaluation, Measurement and Verification  
2 process; is that correct?

3 A. That's correct.

4 Q. Okay. And these energy efficiency  
5 programs are subject to the Commission's Evaluation,  
6 Measurement and Verification process regardless of  
7 the stipulation, correct?

8 A. That's correct.

9 Q. So this term does not require Duke to  
10 engage in any additional process.

11 A. Not to my knowledge, unless their rules  
12 change.

13 Q. So you would not consider this term a  
14 concession by the Company.

15 A. No.

16 Q. Okay. Another term in the stipulation is  
17 that the Company will retire 150,000-megawatt hours  
18 of its banked energy savings that have never been  
19 used, correct?

20 A. That's correct.

21 Q. Okay. And those 150,000-megawatt hours  
22 were not used as part of the \$19.75 million  
23 calculation, correct?

24 A. They were an approximate reduction in the  
25 banked savings. But it's not -- there was no

1 calculation that derived the 150, but it was  
2 associated with that, yes.

3 Q. Okay. If Duke continues to not be  
4 permitted to use banked savings to claim an  
5 incentive, per the order in effect today, then those  
6 150,000-megawatt hours wouldn't be able to be used  
7 anyways, correct?

8 A. I guess that's -- there hasn't been a  
9 ruling on the '15 case, so I -- which the 15-534 was  
10 trueing up '14, so there was the potential, again,  
11 for the use of bank. So I don't -- I think it's more  
12 than just the '14 case to answer your question.

13 Q. So however, again, if banked savings were  
14 not permitted to be used, then the 150,000 megawatts  
15 wouldn't be able to be used anyways.

16 A. Well, if there is no bank, then banked  
17 savings can't be used --

18 Q. Right?

19 A. -- then the bank would just maintain what  
20 it would be. But it doesn't preclude it, I guess,  
21 from being used in the future. I can't really  
22 speculate because, again, we believe banked savings  
23 should be used.

24 Q. Okay. So, again, you would characterize  
25 this as a concession made by the Company?

1 A. That there's a reduction in the bank, yes.

2 Q. But, again, this is a concession only if  
3 you take the assumption that banked savings are  
4 permitted to be used in the shared savings  
5 calculation, correct?

6 A. Again, part of the overall resolution,  
7 yes.

8 Q. The signatory parties -- switching topics  
9 for a second. The signatory parties to the  
10 stipulation in this case you've established are Duke  
11 and PUCO Staff, correct?

12 A. That's what the stipulation says, yes.

13 Q. So the bargaining in the stipulation  
14 occurred between these two parties.

15 A. These two parties agreed to the  
16 stipulation.

17 Q. Okay. And you reference, page 6, line 23,  
18 of your testimony, the "thoughtful deliberation and  
19 discussion by the parties," and when you say that  
20 you're referring to Duke and the PUCO Staff; is that  
21 correct?

22 A. Just a second. Can you give me a line  
23 reference?

24 Q. Yes. I apologize. Page 6, line 23.

25 A. I'm sorry. I'm looking at the wrong

1 Supplemental Direct Testimony.

2 Q. It's going to be Duke 1.

3 A. Sorry. I've got it now. It just took me  
4 a minute.

5 Q. The sentence starts on line 21.

6 A. Let's see. So I think that with respect  
7 to the discussions that I was a party to, it was the  
8 Company and the Staff, but I'm aware that other  
9 parties received the document with an opportunity to  
10 weigh in. So I think it could be construed as  
11 potentially a larger group because it doesn't say  
12 "signatory parties."

13 Q. Okay. Going back to the Commission's  
14 criteria regarding the reasonableness of a  
15 settlement. The second criterion relates to whether  
16 the settlement violates any important regulatory  
17 principle or practice, correct?

18 A. Correct.

19 Q. And you stated that you believe the  
20 stipulation provides finality to all issues, correct?  
21 That's in page 5 of your testimony.

22 A. Let's see. Can you --

23 Q. I'm sorry. Lines 10 and 11.

24 A. Well, I think you've simplified it a  
25 little bit. I'll read it. It says "Among other



1 things, the Stipulation serves to resolve the issues  
2 on rehearing in this proceeding, thereby providing  
3 finality in respect of the amount to be recovered  
4 from customers relative to the Company's EE/PDR  
5 portfolio for 2013." So I think you said "all  
6 issues," which this is definitely very specific.

7 Q. Yes. I paraphrased. I apologize. Thank  
8 you for that.

9 But this doesn't include all issues that  
10 were raised by parties other than the Company,  
11 correct?

12 A. It didn't -- I didn't say that, but, I  
13 mean, I think there were other issues raised, yes.

14 Q. Okay. So you believe it resolves the  
15 issues on rehearing, but not necessarily all -- not  
16 necessarily the issues that were raised by all of the  
17 parties.

18 A. I think that's a fair characterization.

19 Q. And that's because, as you indicated to  
20 Ms. Bojko, not all the parties were part of the  
21 settlement discussions, correct?

22 A. That's not what I said to Ms. Bojko. I  
23 said I wasn't aware. In the meetings I participated  
24 in, I wasn't aware of any discussions. I'm also  
25 aware that they didn't have any feedback on the draft

1 of the stipulation.

2 Q. So when you look at this sentence, you  
3 are -- you do agree, though, that the issues raised  
4 by all parties were not necessarily resolved in the  
5 stipulation.

6 A. I believe it resolved the issue relative  
7 to the recover -- the amount to be recovered from  
8 customers relative to the Company's EE/PDR portfolio.

9 Q. Okay.

10 A. So it's specifically the amount to be  
11 recovered.

12 Q. Okay. You have testified that you are  
13 aware of the history of Duke's 2013 recovery case and  
14 that's Case No. 14-457, correct?

15 A. Yes, the one that the stipulation is  
16 intended to resolve.

17 Q. Yes. And it's your understanding that the  
18 Commission issued an order in that case, as we  
19 discussed previously.

20 A. An Order and Finding, yes.

21 Q. And the order issued by the Commission in  
22 that case states that Duke's application should be  
23 approved with the modification that banked savings  
24 cannot be used to reach the shared savings  
25 achievement level, correct?

1 A. Let me get to that document.

2 Q. It's OMA 4. I apologize. It's page 5.

3 A. It says "Therefore, the Commission finds  
4 Duke's use of banked savings to claim an incentive is  
5 improper."

6 Q. But the proposed stipulation provision  
7 related to the 19.75 million to Duke, for the shared  
8 savings mechanism, includes banked savings, correct?

9 A. Again, the amount -- the amount of 19.75  
10 is an amount designed to resolve the issue. It's not  
11 a calculated shared savings number.

12 Q. Correct. But as we just discussed, the  
13 2013-2014, if you were not to include banked savings  
14 in those years, the recovery would be zero, correct?

15 A. That's correct, under the mechanism.

16 Q. Under the mechanism.

17 A. Yes.

18 Q. And that would be not using banked  
19 savings.

20 A. Again, the order is up for  
21 reconsideration, I believe, on rehearing. So I think  
22 the parties may have been made aware of different  
23 facts in the matter. The 19.75 was designed to  
24 resolve the disagreement, I believe.

25 Q. Okay. So moving on with that, you state

1 in your testimony that the order was not final  
2 because the Commission left Staff's audit open and  
3 granted applications for rehearing, correct?

4 A. That's correct.

5 Q. However, though, language related to  
6 Staff's audit is in a paragraph separate from the  
7 paragraph related to the use of banked savings to  
8 reach the shared savings incentive, correct? And  
9 that's on this OMA 4, page 5.

10 A. Yes, as we talked about earlier, it's  
11 paragraph (13).

12 Q. Paragraph (13). And the paragraph related  
13 to use of banked savings is in paragraph (12),  
14 correct?

15 A. There's actually -- paragraph (3) also  
16 includes significant language about how the mechanism  
17 was approved and it explicitly says that it's -- that  
18 "Further, Duke is permitted to bank energy savings  
19 that are not used towards the benchmark or the shared  
20 savings in a given year." So that's where there was  
21 some confusion that was presented in the application  
22 for rehearing. I think it's less than clear.

23 Q. But paragraph (13) related to Staff's  
24 audit, relates to a true-up of the calculation of the  
25 rider rate for the 2013 costs, correct?

1 A. Yes.

2 Q. Okay. And then finally, the third  
3 criterion of the three-prong test requires that the  
4 stipulation benefits consumers and the public  
5 interest, correct?

6 A. Yes.

7 Q. Duke failed to meet its energy efficiency  
8 benchmarks in 2013 and '14, correct?

9 A. No, that's not correct.

10 Q. Absent the use of banked savings.

11 A. That's correct.

12 Q. Okay. If the Company is not permitted to  
13 use banked savings to reach its shared savings  
14 incentive, their amount would be zero. We  
15 established that, correct?

16 A. Again, that's correct.

17 Q. And the stipulation allows for recovery of  
18 19.75 million for those two years, correct, for '13  
19 and '14?

20 A. The stipulation resolves a large number of  
21 issues, and yes, the resolution of the shared savings  
22 incentive for 2013 and '14 is covered by \$19.75  
23 million, that's correct.

24 Q. So customers, though, would pay less for  
25 the shared savings incentive than they would through

1 the stipulation if the Company was not permitted to  
2 use banked savings to reach its shared savings  
3 incentive level.

4 A. Depending on how the case came out, yes.

5 Q. Mr. Duff, you previously discussed, with  
6 Ms. Bojko, PUCO Case No. 15-534, correct?

7 A. To some extent, yes.

8 Q. And that case concerns basically a true-up  
9 of the 2014 energy efficiency costs, correct?

10 A. Again, we'll go through this again. It  
11 contains a '14 true-up and a '15 projection.

12 Q. Okay. Thank you for that clarification.

13 And the PUCO established a procedural  
14 schedule for parties to file comments and reply  
15 comments in that case, correct, as you indicated  
16 earlier?

17 A. I believe so, that's correct, yes.

18 Q. You are aware that parties filed comments  
19 and reply comments in that case, as you noted  
20 earlier, correct?

21 A. Yes.

22 Q. And Kroger was one of the parties that  
23 filed comments in that case?

24 A. Subject to check. I don't remember  
25 whether they were a party or not.

1 MS. GHILONI: Okay. Your Honor, at this  
2 time, I would like to mark as Kroger Exhibit 1,  
3 Kroger's comments filed in PUCO Case No.  
4 15-534-EL-RDR, and I would also like to mark as  
5 Kroger Exhibit 2, Kroger's reply comments filed in  
6 PUCO Case No. 15-534-EL-RDR.

7 EXAMINER WALSTRA: So marked.

8 (EXHIBITS MARKED FOR IDENTIFICATION.)

9 MS. GHILONI: May we approach?

10 EXAMINER WALSTRA: You may.

11 Q. I've handed you what's been marked as  
12 Kroger Exhibit No. 1 and Kroger Exhibit No. 2. Do  
13 these appear to be the comments of the Kroger Company  
14 filed in PUCO Case No. 15-534 and the reply comments  
15 of the Kroger Company filed in PUCO Case No. 15-534?

16 A. They do.

17 Q. And you are aware of the issues raised in  
18 that case?

19 A. Vaguely. I would have to review the  
20 comments in detail before I could speak accurately,  
21 but yeah, vaguely.

22 Q. Okay. And one of the issues raised  
23 related to the Company's recovery of a shared savings  
24 mechanism for 2014?

25 A. That's correct.

1 Q. Which would include a discussion of banked  
2 savings and whether or not that could be included in  
3 that mechanism?

4 A. That's correct.

5 Q. Okay. And that issue was raised by Kroger  
6 in its comments?

7 A. That's correct.

8 Q. Okay. And that issue is also addressed in  
9 the stipulation to this proceeding, the use of banked  
10 savings?

11 A. No, I don't think it -- the stipulation  
12 doesn't talk about banked savings. It resolves the  
13 shared savings amount.

14 Q. Okay. It talks about the shared savings  
15 amount.

16 A. It's two distinct things, yes.

17 Q. I apologize. Additionally, you spoke with  
18 Ms. Bojko and indicated that you're familiar with  
19 PUCO Case No. 14-1580; is that correct?

20 A. That's correct.

21 Q. Okay. And in that case, Duke filed an  
22 application for continuation of the shared savings  
23 cost recovery mechanism through 2016; is that  
24 correct?

25 A. That's correct.



1 Q. And you are aware that parties filed  
2 comments and reply comments in that case, correct?

3 A. Yes.

4 Q. And Kroger was one of those parties who  
5 filed comments?

6 A. Yes, I believe so.

7 MS. GHILONI: Your Honor, at this time,  
8 I'd like to mark as Kroger Exhibit 3, Kroger's  
9 comments filed in PUCO Case No. 14-1580.

10 EXAMINER WALSTRA: So marked.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 MS. GHILONI: I would also like to have  
13 marked as Kroger Exhibit 4, Kroger's reply comments  
14 filed in Case No. 14-1580.

15 EXAMINER WALSTRA: So marked.

16 (EXHIBIT MARKED FOR IDENTIFICATION.)

17 MS. GHILONI: May we approach?

18 EXAMINER WALSTRA: You may.

19 Q. I've handed you what's been marked as  
20 Kroger Exhibit No. 3 and No. 4. Do the documents  
21 appear to be the initial comments of the Kroger  
22 Company filed in PUCO Case No. 14-1580, and the reply  
23 comments of the Kroger Company filed in PUCO Case  
24 No. 14-1580?

25 A. That's what they say.

1 Q. And you are aware of the issues raised in  
2 that case, correct?

3 A. Yes.

4 Q. And one of the issues raised relates to  
5 whether the Company will collect shared savings for  
6 2016 --

7 A. That's correct.

8 Q. -- continuation of the shared savings  
9 incentive --

10 A. That's correct.

11 Q. -- for 2016. And that issue was raised by  
12 Kroger in its comments?

13 A. Subject to check.

14 Q. And that is also an issue in this  
15 proceeding is a shared savings mechanism, correct,  
16 and how to calculate that mechanism, what should be  
17 included in it.

18 A. I think it talks about -- it talks  
19 about -- there should be a cap on the shared savings  
20 in '16. It talks about whether or not Duke should be  
21 permitted to accrue a 5 percent shared savings  
22 incentive in circumstances where it merely meets the  
23 compliance benchmark. I'm just citing a couple of  
24 them.

25 Q. And on page 7 of the reply comments --

1           A.       Yes.

2           Q.       -- lines 3 to 5 at the top, does it  
3 include the fact that -- Kroger's argument that Duke  
4 should not use banked savings to earn shared savings  
5 in a year in which it has failed to meet its energy  
6 efficiency benchmark?

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

8           Q.       Similar to an argument that's made in this  
9 proceeding, correct?

10          A.       I guess I -- which case were you referring  
11 to, the 14 or the 15?

12          Q.       Well, the stipulation at issue in this  
13 case, which combines both of those cases.

14          A.       Did Kroger file testimony? I didn't know  
15 Kroger stated what its position was around the  
16 stipulation.

17          Q.       It filed comments which were -- that were  
18 just Kroger exhibit --

19          A.       On the stipulation? I'm sorry. I thought  
20 that was on the 14 --

21          Q.       I apologize, that was on that case as  
22 well, yes.

23          A.       I was going to say, that's what I was  
24 trying to get you to clarify.

25          Q.       Yes. I apologize.

1           A.       That's correct.

2                   MS. GHILONI:   Okay.   I have no further  
3 questions, your Honor.

4                   EXAMINER WALSTRA:   Thank you.

5                   Ms. Mooney.

6                                   - - -

7                                   CROSS-EXAMINATION

8   By Ms. Mooney:

9           Q.       Let me take you to page 2 of your  
10 testimony where you discuss the application for  
11 rehearing that apparently triggered the stipulation  
12 that's at issue in this case.

13          A.       So what line number?

14          Q.       Well, you begin the discussion on line 13,  
15 page 2, discussing the Finding and Order -- the  
16 Commission's Finding and Order of May 20th, 2015.  
17 And then you say that the case wasn't final because  
18 the Commission granted an application for rehearing  
19 filed by Duke and Ohio Partners for Affordable  
20 Energy.

21          A.       That's correct.

22          Q.       And the stipulation is the product, at  
23 least in part, of the application for rehearing that  
24 was filed by Duke; is that correct?

25          A.       Are you referring to a specific line in

1 the testimony or can you rephrase the question?

2 Q. Yeah. I just said I'm on page 2 and we're  
3 talking from 13 to 20. Your answer to that question.

4 A. Are you referring to the line that says  
5 "The Stipulation, if approved, would resolve the  
6 issues currently on rehearing and thus conclude this  
7 proceeding?"

8 Q. I'm referring to the entire answer that  
9 refers to the application for rehearing filed by Duke  
10 and Ohio Partners for Affordable Energy and then  
11 going on to say that the stipulation concludes the  
12 issues that were raised, resolves the issues that  
13 were raised on rehearing.

14 A. I believe it does.

15 Q. Does it resolve the issues raised on  
16 rehearing by Ohio Partners for Affordable Energy?

17 A. My recollection is that OP&E argued that a  
18 cap should be placed on shared savings. This puts a  
19 finite value on shared savings as well as says that  
20 the Company's forgoing shared savings in '15 and '16.  
21 So I believe that resolves the concern about the  
22 uncertainty around the amount of shared savings.

23 Q. Does the stipulation discuss whether or  
24 not there should be a cap on shared savings for Duke?

25 A. It came up with a finite value to -- that

1 was associated with 2013 and 2014.

2 Q. Was OPAE invited to any of the settlement  
3 discussions that led to the stipulation?

4 A. As I told, I believe it was Ms. Bojko, I  
5 wasn't -- wasn't the one that invited people, so I  
6 can't answer that question.

7 Q. Was there a concern while you were --  
8 while Duke was coming up with the stipulation with  
9 the Staff, that others, like OPAE, who had actually  
10 filed an application for rehearing was not part of  
11 the negotiations between the Staff and Duke?

12 A. I believe that's why the stipulation was  
13 shared with OPAE prior to it being -- prior to it  
14 being finalized and filed with the Commission.

15 Q. It was shared prior to being filed. It  
16 was not -- the stipulation was not shared with OPAE  
17 prior to the stipulation --

18 MS. WATTS: Objection, your Honor.  
19 Counsel is testifying.

20 Q. Was the stipulation shared with OPAE --

21 EXAMINER WALSTRA: Sustained.

22 Q. Was the stipulation shared with OPAE prior  
23 to it being concluded between the Staff and --

24 A. Yes, as I said, a draft of the stipulation  
25 was circulated with all the parties, with the

1 opportunity to weigh in. My understanding is that no  
2 input or feedback was given, and so it stayed in its  
3 current state, but the opportunity was there to  
4 provide feedback, therefore it was not final.

5 MS. BOJKO: Objection, your Honor. I move  
6 to strike his answer. He's now testifying to  
7 something different than what he testified  
8 previously. But he said he wasn't aware previously  
9 whether parties responded or not, and now he's  
10 mischaracterizing the record by saying that no  
11 parties responded, and that's just simply not true.

12 EXAMINER WALSTRA: I'm going to overrule.

13 Q. And we've already got on the record the  
14 number of business days that were involved between  
15 the circulation of the draft stipulation which was  
16 not changed at all from the time it was filed; is  
17 that correct?

18 A. I believe it was established, yes, that it  
19 was filed on the 6th.

20 Q. It was filed on the 6th and circulated on?

21 A. I believe right around the New Year.

22 Q. December 30th, and there's some holidays  
23 in there, too, December 30th, 31st, January 1st.

24 A. Again, you asked for the dates,  
25 Ms. Mooney. Those were the dates.

1 Q. Well, it seems to be significant that it  
2 was circulated.

3 A. Yes. Parties had an opportunity to give  
4 feedback. And again, since there were no changes, my  
5 understanding was there was no feedback.

6 MS. BOJKO: Objection, your Honor, as  
7 speculation as to what parties did or did not know  
8 and it mischaracterizes the evidence that's actually  
9 in the record.

10 EXAMINER WALSTRA: Overruled.

11 Q. Would you agree with me that the  
12 stipulation essentially annuls the Commission's  
13 Finding and Order that was issued on May 20th with  
14 regard to the use of banked savings to earn a shared  
15 savings incentive?

16 A. No.

17 Q. And why not?

18 A. Because the Company isn't being rewarded  
19 shared savings. It's being rewarded \$19.75 million  
20 to resolve the issue. It's an amount associated with  
21 the '13 and '14 incentive, but it's not a calculated  
22 shared savings amount that would rely on banked  
23 savings.

24 Q. So it resolves the issue by giving Duke  
25 \$19.75 million.



1           A.           That's one of the terms.

2           Q.           And it doesn't resolve any issue that OP&E  
3           raised, except to the extent that because you've  
4           got -- Duke has been awarded the 19.75 million, that  
5           will cap the shared savings for 2013-2014.

6                       MR. JONES:   Objection.   Asked and  
7           answered.

8                       EXAMINER WALSTRA:   You can answer, go  
9           ahead.   Overruled.

10          A.           The whole purpose of the cap is to get  
11          finality on the maximum amount that could be awarded.  
12          It gives finality for the '13 and '14 total, as well  
13          as for '15 and '16.

14          Q.           And OP&E was not part of the negotiations  
15          that led to the 19.75 million figure.

16                       MR. JONES:   Objection.   Asked and  
17          answered.

18                       EXAMINER WALSTRA:   Overruled.

19          A.           I think I have answered that.   I don't  
20          know whether they were a part of the discussions.  
21          They were not at the meetings I was participating in.

22                       MS. MOONEY:   That's all I have.   Thank  
23          you, your Honor.

24                       EXAMINER WALSTRA:   Thank you.

25                       Ms. Fleisher?

1 MS. FLEISHER: No questions, your Honor.

2 EXAMINER WALSTRA: Thank you.

3 OCC.

4 - - -

5 CROSS-EXAMINATION

6 By Mr. Stinson:

7 Q. Just a few questions, Mister -- I'm sorry,  
8 I should know your name by now.

9 (Laughter.)

10 A. Duff.

11 Q. Mr. Duff. Some clean-up, first. I  
12 believe -- well, let's just turn to your testimony  
13 first. On page 1, question 8, answer on line 10, you  
14 indicated that you filed direct testimony in this  
15 proceeding. You did not file direct testimony.

16 A. No. That's why the first thing I did was  
17 strike that when I gave corrections to my testimony,  
18 Mr. Stinson.

19 Q. And on the cover page, it would not be  
20 supplemental testimony.

21 A. That's a legal question I can't answer.

22 Q. This is the first testimony you've filed  
23 in either Case Nos. 14-457 and 15-534, correct?

24 A. That's correct.

25 Q. Just for some background here, about the

1 stipulation filed in the case, Joint Exhibit 1.

2 A. Yes.

3 Q. The only two parties to sign the  
4 stipulation are Duke and PUCO Staff, correct?

5 A. That's the two signatory parties, yes.

6 Q. And the other intervening parties in the  
7 case are the Ohio Consumers' Counsel, OMA -- if you  
8 don't understand these acronyms, let me know.

9 A. No, I'm familiar. Thanks.

10 Q. -- OPAC, OEG, ELPC, and Kroger, correct?

11 A. That's correct.

12 Q. And if I refer to the "intervening  
13 parties," you'll understand that I am referring to  
14 those parties, correct?

15 A. Yes.

16 Q. And none of those intervenors signed the  
17 stipulation, correct?

18 A. No. As I said before, there are only two  
19 signatory parties.

20 Q. And when the stipulation refers to  
21 "parties" or "signatory parties," it's just referring  
22 to Staff and Duke, correct?

23 A. Again, I think that's correct. If it's  
24 "Parties" with a capital or it says "signatory  
25 parties," then I think that's the same thing, yes.

1 Q. Thank you.

2 The second paragraph on page 3 of the  
3 stipulation.

4 A. Yes, sir.

5 Q. States that the "Stipulation is the  
6 product of serious bargaining among capable,  
7 knowledgeable Parties"; is that correct?

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

9 Q. And only Staff and Duke were involved in  
10 the bargaining that led to the stipulation, correct?

11 A. Again, I think it depends on -- I think it  
12 depends on your view of the ability to potentially  
13 review and provide feedback. But with respect to --  
14 with respect to the parties that I'm aware of that  
15 negotiated, I would say that it is the Staff and the  
16 Company.

17 Q. And specifically, the stipulation that was  
18 circulated December 30th of 2015, that was between  
19 the Staff and the Company.

20 A. The draft that was circulated for feedback  
21 originated from the Staff and the Company, yes.

22 Q. Later in the same paragraph it states "The  
23 Stipulation represents a comprehensive compromise of  
24 issues raised by Parties with diverse interests."  
25 With the capitalization of "Parties" there, that

1 would mean the compromise between PUCO Staff and  
2 Duke's diverse interests, correct?

3 A. I believe it could be construed that way,  
4 yes.

5 Q. Well, you indicated before that "Parties"  
6 represented Duke and Staff, correct, they're the  
7 parties to the stipulation?

8 A. Yes. Again, I think that given the fact  
9 that people had an opportunity to give feedback --

10 MR. STINSON: Could I have answer the  
11 reread, please.

12 (Record read.)

13 MR. STINSON: I move to strike everything  
14 after "yes," your Honor. Nonresponsive to the  
15 question.

16 EXAMINER WALSTRA: Overruled.

17 THE WITNESS: Can I finish my answer? He  
18 interrupted.

19 EXAMINER WALSTRA: Go ahead.

20 A. Given the fact that other parties had a  
21 chance to give feedback on the draft of the  
22 stipulation, I think that would cover a diverse  
23 interest group beyond just the signatory parties.

24 Q. Well, going back to my original question  
25 then, "Parties," with a capital P, refers to, from

1 your prior testimony, to the Staff and Company,  
2 correct?

3 A. I believe that's how it's defined.

4 Q. Thank you.

5 MR. STINSON: Just a second, please.

6 May I approach, your Honor?

7 EXAMINER WALSTRA: You may.

8 Q. Do you have a copy of your deposition,  
9 Mr. Duff?

10 A. No, unfortunately I do not, Mr. Stinson.

11 MR. STINSON: Do you have a copy,  
12 Elizabeth?

13 MS. WATTS: I do.

14 MR. STINSON: We'll be looking at page 19.

15 MS. WATTS: Do you have a line?

16 Q. For reference, I'll be reading from line 6  
17 through line 24.

18 A. Okay. You said you want me to read it?

19 Q. No. I'll do that for you. I've handed  
20 you a document. Is that the stipulation -- or, is  
21 that your deposition from March 1st of 2016 in this  
22 proceeding?

23 A. Yes.

24 Q. And that deposition was taken under oath?

25 A. Yes.

1           Q.       And starting at page 19, line 6, there's  
2       the question: "Okay. And then the next sentence on  
3       page 3 of the stipulation states that 'The  
4       stipulation represents a comprehensive compromise of  
5       issues raised by parties with diverse interests.' Do  
6       you see that?"

7                    "Yes."

8                    "What does that sentence mean?"

9                    "It means it was a large compromise of  
10       issues, that based off of the definition of parties  
11       that the Commission Staff and the company were able  
12       to resolve with a comprehensive compromise. And,  
13       obviously, the company and Commission's Staff's  
14       interest vary."

15                   "Question: So it's just the diverse  
16       interest between Duke Energy Ohio and the PUCO Staff  
17       and not necessarily the diverse interests involved  
18       with any of the intervenors in the case, correct?"

19                   "I think we took into account things that  
20       were brought up in the dockets, but, yes, the direct  
21       resolution was between the Commission Staff and the  
22       company."

23                   Did I read that correctly?

24           A.       That's correct.

25                   MS. WATTS: And, your Honor, I interpose

1 an objection because I don't think anything in the  
2 deposition is different than what Mr. Duff testified  
3 to. So if this an effort to impeach Mr. Duff, it's  
4 been highly unsuccessful.

5 MR. STINSON: Mr. -- I'm sorry, your  
6 Honor, but the issues are different there, that in  
7 Mr. Duff's testimony he went beyond just the parties,  
8 he indicated there are other persons that could have  
9 taken part.

10 THE WITNESS: No. I think you're  
11 mischaracterizing what I said, Mr. Stinson.

12 MR. STINSON: I'm waiting for a ruling  
13 from the Bench.

14 EXAMINER WALSTRA: I'm going to overrule,  
15 Ms. Watts.

16 MS. WATTS: Then, your Honor, may the  
17 witness be permitted to finish his response?

18 MR. STINSON: I don't believe there's a  
19 question, your Honor. I would object to the witness  
20 posing his comments to an objection.

21 EXAMINER WALSTRA: You can bring it up on  
22 redirect.

23 MS. WATTS: Thank you, your Honor.

24 MR. STINSON: May I approach, your Honor?

25 EXAMINER WALSTRA: You may.



1 Q. (By Mr. Stinson) You have to bear with me,  
2 Mr. Duff. I've eliminated many of my questions  
3 because they've been asked earlier.

4 A. I'll gladly bear with that.  
5 (Laughter.)

6 Q. Unless you want to answer them again.  
7 (Laughter.)

8 Q. Okay. Let's go back to your testimony.

9 A. Yes, sir.

10 Q. On page 1, you state that you believe the  
11 stipulation in this case meets what's generally  
12 referred to as the three-prong test the Commission  
13 uses to consider partial stipulations, correct?

14 A. Yes.

15 Q. And the first prong you discuss is whether  
16 the stipulation is the product of serious bargaining  
17 among knowledgeable parties; is that correct?

18 A. Yes.

19 Q. And, as you indicated before, you were  
20 involved in negotiations on December 29th and 30th,  
21 correct?

22 A. That's correct.

23 Q. By telephone?

24 A. That's correct.

25 Q. Was Staff Witness Patrick Donlon present

1 during those telephonic negotiations?

2 A. I believe he was, yes.

3 Q. And did any representative of any  
4 intervenor identify themselves on the telephone as  
5 being a representative of an intervenor?

6 A. No, not that I heard.

7 Q. And just some other housekeeping things.  
8 On page 2, line 17 of your testimony.

9 A. Yes.

10 Q. And you state that "The Stipulation, if  
11 approved, would resolve the issues currently on  
12 rehearing and thus conclude this proceeding." And  
13 just for clarification by "this proceeding" you mean  
14 Case No. 14-457?

15 A. Yes.

16 Q. On page 3, you go through some of the  
17 terms of the stipulation, and I'll address some, but  
18 not all of those. We've been over before the first  
19 term that you discuss is the collection of the  
20 \$19.75 million from customers for the shared savings  
21 incentive for the calender years 2013 and '14  
22 correct?

23 A. Yes.

24 Q. And is that a pretax amount?

25 A. The number will not be grossed up for

1 taxes.

2 Q. We've talked a lot today about No. 3 on  
3 page 7.

4 A. I see it.

5 Q. What happens in 2017.

6 A. Again, I don't think it's prescriptive on  
7 what happens in 2017. I think it's prescriptive on  
8 what does not happen in 2017.

9 Q. I understand that. I just want to clarify  
10 that for myself and for the record.

11 A. Yes.

12 Q. My understanding is that there's been no  
13 mechanism determined yet for the shared savings for  
14 2017, correct?

15 A. That's correct.

16 Q. And we only know -- what we know is that  
17 Duke -- that if Duke does not meet the benchmarks for  
18 that year, it will not use banked amounts for  
19 purposes of shared savings, correct?

20 A. It would not -- no, that's not correct.  
21 If it -- if it has to use banked savings to meet its  
22 annual benchmarks, it would not be eligible to earn  
23 an incentive.

24 Q. Okay. Thank you. And, beyond that,  
25 everything else is on the table in determining what

1 the new mechanism would be, correct?

2 A. Correct. Provided it complies with the  
3 laws, but yes.

4 Q. Well, that was my next question. There's  
5 the provision, too, the exception that if there is a  
6 change in any law or regulation or order, that would  
7 negate what we just talked about, correct?

8 A. Correct.

9 Q. And when you talk about "order," you would  
10 mean any order the Commission may issue in a  
11 proceeding with other utilities in the state?

12 A. I think it would be -- I think -- it  
13 doesn't really define it. I think it would be an  
14 order regarding shared savings. So if it's  
15 pertaining to -- it doesn't specify just to Duke  
16 Energy, no.

17 Q. Okay. In any event, though, Duke Energy  
18 would have to come back before the Commission --

19 A. That's correct.

20 Q. The next term discusses the program costs  
21 and lost distribution revenues in the application  
22 filed in 14-457, correct?

23 A. That's correct.

24 Q. And the provision provides that Commission  
25 Staff accepts the Company's application of recovery

1 of those program costs and lost distribution  
2 revenues, correct?

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

4 Q. And the PUCO approved Duke's application  
5 to collect program costs and lost distribution  
6 revenues in the Finding and Order issued in 14-457,  
7 issued May 20th, correct?

8 A. No. It was subject to the audit being  
9 finalized.

10 Q. Subject to the audit.

11 A. That's correct.

12 Q. You may have answered this. The next term  
13 involves the audit to be completed in 15-534 within  
14 six months. Do you know the status of that audit?

15 A. I believe it's still open.

16 Q. Did you know the status of it as of  
17 December 30th or its processing?

18 A. It was open at that time, too.

19 Q. The next term is that Duke's energy  
20 efficiency programs for 2013 through 2016 are still  
21 subject to the PUCO's Evaluation, Measurement and  
22 Verification process, correct?

23 A. That's correct.

24 Q. And those programs would still be subject  
25 to the PUCO's EM&V process with or without the

1 stipulation, correct?

2 A. That's my understanding, yes.

3 Q. So that provision doesn't put any  
4 additional process on Duke's programs, correct?

5 A. Not to my knowledge, no.

6 Q. I believe on page 20, then --

7 A. There wasn't a page 20 on mine.

8 Q. I just saw that. I think I have a typo  
9 here. Line 20, page 4.

10 A. Line 20, page 4, you said?

11 Q. Yes.

12 A. Okay.

13 Q. You talk about some of the concessions.

14 A. Yes.

15 Q. And beginning on line 21, you talk about  
16 the risk of protracted litigation, correct?

17 A. Yes.

18 Q. And let's talk about that. If the  
19 Commission affirms its May 20th, 2015 order in  
20 14-457, there is potential litigation; is that what  
21 you're talking about?

22 A. Yes.

23 Q. And if the Commission were to reverse  
24 itself from that May 20th, 2015 order, there would  
25 still be the potential of appeal from one or more of

1 the intervening parties, correct?

2 A. That's always a potential, yes, correct.

3 Q. And would you agree with me that the  
4 filing of this stipulation has also resulted in  
5 additional litigation?

6 A. I don't necessarily think so, because it's  
7 resolving a couple of cases.

8 Q. I can't hear you.

9 A. It's resolving a couple of cases, so I  
10 wouldn't say it's resulted in additional litigation,  
11 no.

12 Q. But absent the stipulation, we wouldn't be  
13 here all day today and probably tomorrow, litigating  
14 whether the stipulation passed the three-part test,  
15 correct?

16 A. Again, I can't speculate what would have  
17 gone on. The -- obviously today's litigation is  
18 regarding the stipulation, but I think there's a good  
19 chance there would have been litigation associated  
20 with 14-457 and 15-534 regarding the shared savings.  
21 As a number of the attorneys pointed out, there was a  
22 number of comments, again, raised about the banking  
23 issue.

24 Q. Well, we've already discussed that there  
25 could be additional litigation from the Commission's

1 reversal or affirmance of its order, it's May 20th  
2 order, and today we are here directly responsive to  
3 the stipulation filed in this proceeding, correct?

4 A. That's why we're here today.

5 Q. Thank you.

6 And if this stipulation is approved by the  
7 Commission, couldn't there be further litigation  
8 through an appeal of that order?

9 A. I'd like to think not, but, obviously,  
10 it's a possibility.

11 Q. And again, you indicated that there could  
12 still be, regardless of the stipulation, further  
13 litigation in 14-457 and 15-534, correct?

14 A. Again, I think there -- I don't  
15 necessarily think it would be on the Company's behalf  
16 if the stipulation is accepted, but I can't speak for  
17 other parties, no, Mr. Stinson.

18 Q. But that's a possibility.

19 A. Yes, obviously, it would be a possibility.

20 Q. On page 5, line 16.

21 A. Yes, sir.

22 Q. You indicate that the stipulation resolves  
23 any disagreement regarding Duke's ability to collect  
24 shared savings from customers over the final two  
25 years of the EE/PDR portfolio, correct?



1 A. Yes.

2 Q. And what that really means, isn't it, that  
3 it resolves a disagreement between Duke and PUCO,  
4 correct, or PUCO Staff?

5 A. I don't necessarily think that's the case.

6 Q. None of the other parties have signed the  
7 stipulation, correct?

8 A. Again, there were two signatory parties,  
9 that's correct. You're asking what I testified to,  
10 though, and that's not what I said.

11 Q. On page 6, line 10.

12 A. Yes, sir.

13 Q. You state "If one were to assume that the  
14 Company prevailed on its legal challenges related to  
15 its shared savings incentive mechanism, the amounts  
16 recovered from customers would be significantly in  
17 excess of the amount the Company will recover for  
18 such an incentive if the Stipulation is approved,"  
19 correct?

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

21 Q. Yet, there are no legal challenges  
22 currently, correct?

23 A. I guess I think a request for rehearing,  
24 that's what I view as a legal challenge, yes.

25 Q. There's no certainty, correct, that Duke

1 would prevail on its application for rehearing before  
2 the PUCO?

3 A. I think Duke put together a very strong  
4 application case, but no, there's no certainty.

5 Q. Let's make the opposite assumption that  
6 you made in your testimony. I'd like you to assume  
7 that the PUCO denies Duke's application for  
8 rehearing, and Duke -- I'm sorry. Let me back up.

9 Assume the PUCO denies Duke's application  
10 for rehearing. Would customers pay more or less for  
11 the shared savings incentive than they would through  
12 the stipulation?

13 A. I think that's uncertain. If the  
14 stipulation kind of blew up, then you still have the  
15 2015 issue out there, which I said was kind of  
16 muddled by that FirstEnergy order.

17 Q. But if the PUCO disallowed the use of  
18 banked savings for purposes of shared savings, there  
19 would be no shared savings.

20 A. Again, I think it depends on what the  
21 annual benchmark is defined as. And that FirstEnergy  
22 case leads me to believe that they're comfortable  
23 with the -- with a company earning shared savings in  
24 a year that they don't achieve the annual benchmark.

25 Q. Just a little bit more, Mr. Duff.

1           You indicated earlier that you were  
2 involved in Case No. 11-4939, correct?

3           A.       No. It's 4393, Mr. Stinson.

4           Q.       I'm sorry. 4393. And you filed testimony  
5 in that case, correct?

6           A.       I think multiple sets, yes.

7           Q.       And I think OMA Exhibit 13 was your  
8 testimony in that proceeding, right?

9           A.       It was one of my pieces of testimony, yes,  
10 Mr. Stinson.

11          Q.       And on page 1 of that testimony, you begin  
12 to discuss the three-part test for approval of  
13 partial stipulations, correct?

14          A.       Yes.

15          Q.       Were you involved in negotiations in that  
16 proceeding, 11-4393?

17          A.       Yes.

18          Q.       And going to Exhibit 10 which is the  
19 stipulation in that proceeding.

20          A.       Just a second. I've got a big pile of  
21 papers here. Got it. Sorry.

22          Q.       On pages 8 through 10 of that stipulation  
23 there are several signatory parties, are there not?

24          A.       Yes.

25          Q.       And isn't it true that during the

1 negotiating process those parties did contribute to  
2 the negotiation process and participated in  
3 negotiation meetings?

4 A. Yes and no. It was kind of an odd thing,  
5 Mr. Stinson. I know you weren't part of the history.  
6 A number of the parties negotiated as part of OCEA  
7 and then they signed as individual parties. So it's  
8 not necessarily that case. I just want to make sure  
9 you understand the distinction.

10 Q. But those parties were involved in the  
11 negotiation meetings, correct?

12 A. As the united OCEA organization, yes.

13 Q. And they were involved in the actual  
14 drafting of the stipulation, correct?

15 A. I believe so, yes.

16 MR. STINSON: I believe that's all, your  
17 Honor. Thank you.

18 EXAMINER WALSTRA: Do you have any  
19 redirect or do you need a minute?

20 MS. WATTS: Yes, your Honor. I think we  
21 can be pretty brief, but may we take a 5-minute  
22 break?

23 EXAMINER WALSTRA: Absolutely.

24 (Recess taken.)

25 EXAMINER WALSTRA: Back on the record.

- - -

REDIRECT EXAMINATION

By Ms. Watts:

Q. Good afternoon, Mr. Duff.

A. Good afternoon.

Q. Now, Counsel for OMA has raised a number of issues with respect to previous dockets. So, in order to be clear on the Company's position, I want to walk you through some of the matters in those previous dockets, okay?

A. Okay.

Q. So let me ask you, first, prior to the current cost recovery mechanism, the Company had a cost recovery mechanism called "Save-a-Watt," correct?

A. That's correct.

Q. Do you recall in what case that mechanism was approved?

A. I don't know the case that the mechanism was approved. I know the case that the mechanism was closed and resolved under, yes.

Q. Okay. Can you tell me what case that was?

A. That's 12-1857.

Q. Okay. And very briefly because it's not entirely pertinent, but just to show the -- we're

1 going to talk about the history of banked savings.

2 So I want you to explain briefly how the cost

3 recovery mechanism worked under Save-a-Watt.

4 MS. BOJKO: Objection, your Honor. This  
5 is beyond the scope of cross. Nobody talked about  
6 Case 12-1857. Counsel's just admitted that it's a  
7 bit irrelevant, and it is irrelevant, and it's beyond  
8 the scope of cross.

9 MR. STINSON: OCC joins.

10 MS. WATTS: Mr. Rinebolt has a lengthy  
11 discussion about this history in his testimony, but  
12 in order to understand the progression that we've  
13 been discussing here today, it's important to start  
14 there.

15 MS. BOJKO: Your Honor, if I may respond.  
16 Whether Mr. Rinebolt does or does not have something  
17 in his testimony is not for this witness to speak to  
18 and certainly not on redirect. It has to be within  
19 the scope of cross and this is clearly outside the  
20 scope of cross.

21 EXAMINER WALSTRA: Ms. Watts, I don't see  
22 how Mr. Rinebolt's testimony is relevant for  
23 redirect.

24 MS. WATTS: Okay. Well, we can start with  
25 4393 then, because we've certainly discussed that at

1 length today.

2 EXAMINER WALSTRA: Okay.

3 Q. (By Ms. Watts) Okay. So, Mr. Duff, 4393  
4 was the next cost recovery mechanism that was  
5 proposed after Save-a-Watt, correct?

6 A. That's correct.

7 Q. And were there -- was it the Company's  
8 understanding that it was permitted to carry banked  
9 energy savings from the Save-a-Watt mechanism into  
10 that next mechanism?

11 A. Yes, it was. When -- in the closing of  
12 the Save-a-Watt mechanism in Case 12-1857, an amount  
13 of banked savings that was not used under the  
14 Save-a-Watt mechanism, despite the fact the Company  
15 had to overcomply by more than any other utility in  
16 the state, 25 percent versus 15, the Company did have  
17 excess savings that were banked, and then to be able  
18 to be used for the purposes of determining incentive  
19 under the 11-4393 mechanism.

20 MS. BOJKO: Objection, your Honor. And I  
21 move to strike his entire answer. He just now got in  
22 what he wanted to get in regarding 12-1857. It is  
23 beyond the scope of cross. And if we allow it, then,  
24 your Honor, we're going to have to reopen this issue.

25 I purposely did not ask about this issue.

1 I did not bring in the cases about this issue. And  
 2 if we allow it on redirect, then it will have to be  
 3 available for recross, and it's definitely beyond the  
 4 scope of cross and it was intentionally not  
 5 discussed. And now it's trying to -- Ms. Watts is  
 6 trying to bring it in here under the illusion of a  
 7 separate question, but the witness's response was  
 8 back to the 12-1857 case, which is beyond the scope  
 9 of cross.

10 EXAMINER WALSTRA: Ms. Watts.

11 MS. WATTS: Your Honor, we are starting  
 12 with 4393, which has been discussed at length today,  
 13 and the numbers that are included in that application  
 14 include dollar value -- shared savings from the  
 15 Save-a-Watt mechanism and that is -- builds a  
 16 foundation for the dispute that's been going on all  
 17 day today. So if we can't talk about that, there's  
 18 an awful big elephant in the room that we're  
 19 overlooking.

20 EXAMINER WALSTRA: Overruled.

21 Q. (By Ms. Watts) So, Mr. Duff -- I forget  
 22 where we left off.

23 A. You lost me on that one.

24 Q. Okay. So some of the banked energy  
 25 savings from the Save-a-Watt mechanism was included



1 in the application in 4393, correct?

2 A. The ability to use the banked savings that  
3 were achieved during the course of Save-a-Watt, I  
4 won't mention any dockets, but yes, during  
5 Save-a-Watt there were excess savings that were the  
6 basis for the bank.

7 Q. Okay. And in the Company's application,  
8 in 4393, is that explained in your testimony?

9 A. It is. It was also discussed at great  
10 lengths in the hearing. Mr. Boehm cross-examined  
11 myself and the Commission Witness Sheck about the  
12 Company's ability to use banked savings. So it was a  
13 known part of the application and the result of the  
14 stipulation.

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

16 EXAMINER WALSTRA: You may.

17 MS. WATTS: I'd ask to have the Company's  
18 application in 4393 marked as Duke Energy Ohio  
19 Exhibit 2.

20 EXAMINER WALSTRA: So marked.

21 (EXHIBIT MARKED FOR IDENTIFICATION.)

22 Q. Mr. Duff, is that the application in  
23 Case 11-4393?

24 A. Yes, it appears to be.

25 Q. And are you familiar with that document?

1 A. Yes.

2 Q. And did that document include your  
3 testimony?

4 A. It did.

5 Q. And would you turn to your testimony in  
6 that document, please?

7 A. Yes.

8 Q. Would you point out in your testimony  
9 where you specifically called out the use of banked  
10 energy savings to calculate shared savings?

11 MS. MOONEY: Your Honor, I object. We've  
12 had previous testimony that the application in  
13 11-4393, with regard to the shared savings incentive,  
14 was not accepted, and that the OCEA comments were the  
15 basis of what ultimately ended up being the shared  
16 savings incentive, not the application. So I think  
17 what they're doing is simply trying to confuse the  
18 record. It really doesn't matter what the  
19 application said, because the application is  
20 irrelevant to what actually ended up being the shared  
21 savings incentive.

22 MR. BOEHM: Your Honor, OEG would join in  
23 that objection. This is ancient history. It has  
24 nothing to do with our -- this was a failed  
25 application on their part. They didn't get what they

1 wanted to do. I don't know why it's relevant to this  
2 case.

3 MS. BOJKO: Your Honor, OMA also joins in  
4 that objection. The question misstates the evidence  
5 that's already been put forth to the Bench and it's  
6 in violation of Rules 103(C) and 611(A).

7 MS. WATTS: Your Honor, may I be heard?

8 EXAMINER WALSTRA: You may.

9 MS. WATTS: This part of this testimony is  
10 at the very heart of what we've been discussing and  
11 what is at stake in this case. There's been a  
12 misunderstanding about what happened in 4393 that is  
13 what we have essentially been discussing all day  
14 long.

15 The other parties, on cross-examining  
16 Mr. Duff, have attempted to portray their view of how  
17 all this occurred and what is really meant by the  
18 4393 decision, and that's at the heart of what all  
19 the parties disagree about. We should be able to  
20 present our view of exactly what happened in that  
21 case.

22 EXAMINER WALSTRA: I'm going to allow it.

23 MS. WATTS: Thank you.

24 A. Just a second. Let me get back there. It  
25 was the Q and A beginning on line 14 of page 7.

1 MS. BOJKO: I'm sorry. Which document are  
2 you on, sir?

3 THE WITNESS: My direct testimony in the  
4 11-4339 case, Ms. Bojko.

5 MS. MOONEY: You also filed another piece  
6 of testimony in that case, didn't you, in support of  
7 the stipulation?

8 THE WITNESS: Who's asking my questions?  
9 I'm trying to make sure I'm on --

10 MS. MOONEY: Your Honor, they're just  
11 trying to confuse the record here. The application  
12 in 11-4393 --

13 MS. WATTS: Colleen, do you have an  
14 objection?

15 MS. MOONEY: Yes, I'm objecting.

16 EXAMINER WALSTRA: What's your objection?

17 MS. MOONEY: I've already objected. We've  
18 all objected. There's no reason to talk about the  
19 application. It wasn't --

20 EXAMINER WALSTRA: Overruled.

21 MS. BOJKO: Your Honor, may I have a point  
22 of clarification? I heard the question asking about  
23 the application and then I heard the witness talking  
24 about the testimony. So I was merely asking what  
25 document he was referencing. I think he's

1     referencing his testimony attached to the  
2     application, which is different than the question  
3     which was with regard to the application. It might  
4     be confusing.

5             EXAMINER WALSTRA: Okay.

6             MS. MOONEY: And the reason that I started  
7     talking because I believe he filed testimony also in  
8     support of the stipulation that is different  
9     testimony in 11-4393 than his testimony filed with  
10    the application. So this is --

11            MS. WATTS: We'll get to that, Colleen.  
12    Thank you for that clarification.

13            MS. MOONEY: Well, then, when you refer to  
14    his testimony say "your testimony filed with the  
15    application," because he filed other --

16            MS. WATTS: The additional testimony is  
17    called "Supplemental." So when I get there, I'll  
18    refer to it appropriately.

19            EXAMINER WALSTRA: Go ahead.

20            Q.        (By Ms. Watts) So, Mr. Duff, referring to  
21    your testimony which was filed with the application  
22    in 11-4393. Again, what page did you want to direct  
23    us to?

24            A.        Page 7. The Q and A begins on line 14.

25            Q.        And exactly what did that Q and A say?

1           A.       It says that the Company will have the  
2           ability to use its banked savings for the purposes of  
3           determining its achievement level. I can read the  
4           verbatim, but that's what it says.

5           Q.       Well, it might be helpful to have it in  
6           the record.

7           A.       Sure. "Please discuss how the Companies  
8           banked energy efficiency impacts will be applied with  
9           respect to both reaching compliance with its annual  
10          efficiency targets, as well as with respect to its  
11          ability to earn incentive."

12                   "The impacts that are currently reflected  
13          in Duke Energy Ohio's impact bank are program impacts  
14          or efficiency savings that at no point have been used  
15          to meet the company's annual compliance target or  
16          used with respect to the calculation of company  
17          incentive with respect to Save-a-Watt. For this  
18          reason the company believes that it should have the  
19          ability to use these impacts for the purposes of both  
20          meeting the annual compliance target and for  
21          establishing a level of achievement for the purposes  
22          of determining the level of its earned shared savings  
23          incentive. While the impacts will be used for these  
24          two purposes, the company's proposed rider will not  
25          reflect any costs associated with the achievement of

1 these banked savings."

2 Q. Okay. Thank you, sir.

3 Now, in that docket there was a group,  
4 sort of a joint party called "Members of the Ohio  
5 Consumer and Environmental Advocates"?

6 A. OCEA, yes.

7 Q. Yeah. OCEA filed comments in that docket?

8 A. That's correct.

9 Q. And OMA put those before you earlier  
10 today, and had that marked as OMA Exhibit 11,  
11 correct?

12 A. That's correct.

13 Q. And OCEA made some recommendations in  
14 their comments to the Commission, correct?

15 A. Yes.

16 Q. And can you characterize your  
17 understanding of what those recommendations were?

18 A. Sure.

19 MS. BOJKO: Objection, your Honor. This  
20 witness does not represent OCEA. He cannot testify  
21 to what he believes the intentions or the  
22 representations of OCEA are.

23 MS. WATTS: That was not my question,  
24 Counsel.

25 EXAMINER WALSTRA: Overruled.

1           A.           I'm sorry. Can you repeat the question?

2           Q.           Would you tell me what your understanding  
3 of OCEA's comments were?

4           A.           OCEA had a -- was struggling with the  
5 level of incentive, the maximum level of shared  
6 savings. And so, there was a reduction in the shared  
7 savings incentive structure associated with the  
8 15 percent over-achievement. That was -- that was  
9 the primary change to the -- to the mechanism that  
10 was adopted in the stipulation from their comments.

11                   MS. BOJKO: Objection, your Honor. I move  
12 to strike his response. He now is speculating. He  
13 even used the words "OCEA was struggling." That is  
14 clearly a subjective term and that is speculating as  
15 to the motives of OCEA and what they may or may not  
16 have said or used to write their comments or their  
17 underlying beliefs or intentions, and that's  
18 inappropriate testimony from Duke.

19                   EXAMINER WALSTRA: I believe he's  
20 testifying to his understanding, not OCEA's  
21 understanding or their actual beliefs, but his  
22 understanding, so I'm going to overrule.

23           Q.           (By Ms. Watts) So looking at the document  
24 itself.

25           A.           Yes.



1 Q. There's a section entitled "Shared Savings  
2 Mechanism." Do you see that? It's on page 8.

3 A. Yes. "Shared Savings Incentive."

4 Q. Sorry.

5 EXAMINER WALSTRA: Is this on the comments  
6 or is this on the --

7 MS. WATTS: OCEA's comments, yeah. OMA  
8 Exhibit 11.

9 Q. So if I'm understanding you correctly, the  
10 first recommendation was to -- or, the first  
11 recommendation you were discussing was the  
12 recommendation to reduce the potential incentive from  
13 15 percent to 13 percent?

14 MS. BOJKO: Objection, your Honor.  
15 Counsel is leading the witness on redirect.

16 EXAMINER WALSTRA: Overruled.

17 A. Yes. Essentially, they had a problem with  
18 the 115 percent -- or, the 115 percent earning a 115  
19 -- earning a 15 percent net benefit when it achieved  
20 that 115 percent.

21 Q. Okay. And what was the next  
22 recommendation?

23 A. So when they go through, as you said,  
24 Section B summarizes what the Company proposed, which  
25 includes the bank. And then they talk about what

1     their modifications, their suggested modifications  
2     would be, and that we should ensure that the  
3     incentive excludes avoided -- alleged avoided costs  
4     from T&D projects.

5             Second, the Commission should adjust the  
6     tiers so that small incremental increases do not  
7     produce large changes in the amount of incentive  
8     received, such as "big steps."

9             And third, the Commission should adjust  
10    the savings percentage so the utility collects a  
11    maximum of 13 percent of the net benefits from the  
12    energy efficiency programs when it exceeds the  
13    targets by 15 percent.

14            MS. BOJKO:  Objection, your Honor.  This  
15    is way beyond cross-examination.  Not one of the  
16    intervening parties asked any questions about the  
17    programs and the problems with the programs that  
18    Mr. Duff just testified to.

19            THE WITNESS:  It's not the programs.  It's  
20    the incentive mechanism.

21            MR. BOEHM:  OEG will join in the  
22    objection.

23            EXAMINER WALSTRA:  Noted.  I'm going to  
24    overrule.

25            MS. WATTS:  Thank you, your Honor.

1 Q. (By Ms. Watts) Did you finish your answer?

2 A. Yes. So those were the three  
3 recommendations that they had to change the Company's  
4 application for incentive, yes.

5 Q. Okay. And was it your understanding,  
6 having been involved in discussions with the parties  
7 after this, that the stipulation that was drafted  
8 included essentially the Company's -- what the  
9 Company put forward as a shared savings mechanism  
10 with adjustments as recommended by OCEA?

11 A. Yes, it is. And, in fact, that was  
12 reinforced in the Company's 13-431 portfolio case  
13 when the Company reiterated how banked savings were  
14 going to be used, and no parties took exception with  
15 the reiteration of how it was going to be used.

16 MS. BOJKO: Objection, your Honor. He is  
17 now going into another case, 13-431, which is  
18 completely outside the scope and now he's making  
19 speculative comments about whether people objected or  
20 didn't object without the benefit of that evidence.  
21 And I think he's frankly misstating parties'  
22 positions in that case. I move to strike his answer  
23 with regard to 1341.

24 MR. BOEHM: Your Honor, we would join in.  
25 This is the weirdest sort of parol evidence. We're

1       supposed to read Commission orders in light of what  
2       the Company thought people said in discussions. The  
3       Commission's orders are the Commission's orders. The  
4       stipulations are the stipulations.

5               That a witness could come back and,  
6       particularly in this way, say, well, this is really  
7       what it meant because Joe Blow said that over there.  
8       It's just -- it opens this thing up to endless  
9       speculation.

10              MS. BOJKO: And hearsay, your Honor.

11              EXAMINER WALSTRA: I'm going to sustain  
12       it. There is hearsay and some speculation that went  
13       into his answer and it's starting to dive away from  
14       the point at hand.

15              MS. BOJKO: Thank you, your Honor.

16              Q.        (By Ms. Watts) Let's stick with 4393.

17              A.        Yes.

18              Q.        So then the parties entered into a  
19       stipulation, correct?

20              A.        That's correct.

21              Q.        And then the Commission adopted and  
22       approved that stipulation, correct?

23              A.        That's correct.

24              Q.        Okay. And then, subsequently, the Company  
25       was required to file an additional case to continue

1 its shared savings mechanism forward, correct?

2 A. It was required to file a portfolio plan  
3 in the interim of the approval of the incentive  
4 mechanism.

5 Q. Okay. So I'm going to cut to the chase  
6 here because we've spent a lot of time on this. The  
7 Company's understanding was, up until the  
8 Commission's order came out in the 457 case, the  
9 Company's understanding was that it was entitled to  
10 use banked shared savings -- banked savings to  
11 calculate shared savings for purposes of achieving an  
12 incentive, correct?

13 MS. BOJKO: Objection, your Honor.  
14 Counsel just led the witness by telling the witness  
15 what the Company's position is. If she has a  
16 question about what the Company's position is from a  
17 Company representative, she should ask the Company  
18 representative and not lead the witness into what she  
19 believes the position is of one of the parties.

20 EXAMINER WALSTRA: I'm going to sustain.

21 MS. WATTS: Your Honor, we've been through  
22 all of this today, ad nauseam, so I'm just trying to  
23 be efficient here.

24 EXAMINER WALSTRA: I understand.

25 Q. (By Ms. Watts) Okay. Mr. Duff, prior to

1 the Commission's order in the 11 -- in the 14-457  
2 case, what was your understanding of how the Company  
3 was entitled to calculate the use of banked savings  
4 for purposes of calculating the shared savings  
5 incentive?

6 A. My understanding, and as the Company's  
7 filings in all of the subsequent annual energy  
8 efficiency rider filings showed, the Company was  
9 keeping track of an incentive bank that reflected the  
10 balance of banked savings that could be used for  
11 incentive.

12 Q. Okay. And so, when the Commission's order  
13 came out in the 457 case, the Company filed an  
14 application for rehearing, correct?

15 A. That's correct.

16 Q. And the Company, in that application for  
17 rehearing, reiterated the position it had been taking  
18 through 11-453 and 13-431 with respect to shared  
19 savings, correct?

20 A. Yes. The Company provided the historical  
21 facts regarding the approval and maintained approval  
22 of the bank and provided that in the application for  
23 rehearing, yes.

24 Q. Okay. And so, the point I've been trying  
25 to understand is, and I'll ask you to tell me this,

1 when you were involved, the two meetings that you've  
2 discussed you were involved in where the stipulation  
3 was being discussed with the Staff, what was it that  
4 the Company gave up with respect to 457?

5 A. With respect to 457, the Company believes  
6 it gave up a higher shared savings amount. It's hard  
7 to look at 457 in isolation because of the  
8 comprehensive nature of the stipulation. The 19.75  
9 was not broken out by year, but I believe, based off  
10 of the Q and A I was asked earlier, it was  
11 approximately 11.6 or 8 million dollars of shared  
12 savings that under the banking mechanism the Company  
13 was entitled to and it filed for in 14-457.

14 Q. And the Company -- and you, as a  
15 representative of Duke Energy Ohio, believe the  
16 Company was entitled to that in good faith, correct?

17 A. I do, through and through.

18 Q. Okay. And then in addition to the shared  
19 savings that it gave up with respect to 2013 and  
20 2014, the Company then agreed to give up even more  
21 than that, correct?

22 A. That's correct.

23 Q. And what, in addition, did the Company  
24 give up?

25 A. The Company agreed to forgo the ability to

1 earn an incentive regardless of the outcome of the  
2 Commission's consideration on rehearing for '15 and  
3 '16. As I mentioned before, there's also some lack  
4 of clarity regarding whether bank would have to be  
5 used anyway for 2015 given Senate Bill 310. So the  
6 Company views itself giving up significant amounts of  
7 shared savings incentive beyond the 19.75 that was  
8 designed to resolve '13 and '14.

9 Q. And, Mr. Duff, with respect to 11-4393,  
10 was OMA a party in that case?

11 A. No, they were not.

12 Q. Thank you.

13 You testified earlier in respect to a  
14 question regarding how the Company projects its  
15 potential shared savings in the future?

16 A. Yes.

17 Q. And you, I believe, testified that the  
18 Company projects conservatively?

19 A. Yes. The question was how come in the  
20 Company's application it had originally projected  
21 \$8.6 million, I think was the number that was put  
22 out. It was lower than the ultimate amount that the  
23 Company requested in the true-up. And that's because  
24 when the Company projects, in order to avoid  
25 overcollecting incentive from the customer, it



1 assumes a lower value than the maximum that it could  
2 potentially earn.

3 Q. And in that way, the dollars remain in the  
4 customer's pocket as opposed to the Company's pocket.

5 A. That's correct.

6 Q. And does the Company historically do  
7 better than what its projection is?

8 A. Yes. Historically, the utility has  
9 exceeded its projection from both a -- on a kWh and  
10 kW standpoint, as well as doing it at a lower cost  
11 than what had been projected.

12 Q. Do you recall some questions from  
13 Mr. Stinson about your -- let's turn to your  
14 testimony, actually, to be more specific, your  
15 testimony in this proceeding.

16 A. Okay. The supplemental direct testimony?

17 Q. Correct.

18 A. Okay.

19 Q. I believe Mr. Stinson was asking you  
20 questions and actually reiterated his question to you  
21 in a deposition earlier, correct?

22 A. Yes. I think he was making -- trying to  
23 make the point and I felt he was mischaracterizing my  
24 answer regarding the parties. As I agreed in my  
25 initial answer that the stipulation defined

1 "signatory parties" and "parties" as being the below  
2 signed parties. It does that on page 1.

3 But when he was asking me about a specific  
4 section, I said that the -- when he was talking about  
5 "with diverse interests," all I was trying to say is  
6 I don't know what other parties' interests were being  
7 represented by the Staff and that's all I -- or by  
8 the Company.

9 All I knew -- all I wanted to say was that  
10 since I didn't know if there were any other  
11 conversations, I couldn't represent that. But, as  
12 was pointed out, when it says "Parties" or "Signatory  
13 Parties," those parties would be the PUCO Staff and  
14 the Company because they were, in fact, the only two  
15 parties to sign the stipulation.

16 MS. WATTS: I have nothing further. Thank  
17 you, your Honor.

18 EXAMINER WALSTRA: Thank you.

19 Mr. Boehm

20 MR. BOEHM: No, thank you, your Honor.

21 EXAMINER WALSTRA: Ms. Bojko.

22 MS. BOJKO: Yes, your Honor.

23 - - -

24 RECROSS-EXAMINATION

25 By Ms. Bojko:

1 Q. Good afternoon, Mr. Duff.

2 A. Good afternoon.

3 Q. Where to begin. Let's start with in your  
4 regulatory experience, can a party choose to  
5 participate in one proceeding and choose not to  
6 participate in another proceeding?

7 A. I think a party can choose whatever they'd  
8 like to do. I think it makes sense that if you're  
9 trying to get involved in a case that you're involved  
10 from the start, but that's my own opinion.

11 Q. In this case you're saying the start of  
12 this historical manifestation was 2009 for the  
13 Save-a-Watt program; is that right?

14 A. Actually, I believe you brought it up.  
15 The basis for the bank began with Save-a-Watt, but  
16 the basis for the shared savings and the use of  
17 banking begins with the 11-4393, of which OMA was not  
18 a party.

19 Q. Right. And the Commission approved the  
20 11-4393 stipulation that modified the application; is  
21 that correct?

22 A. Yes, the three modifications suggested by  
23 OCEA, yes.

24 Q. And in your experience, once the  
25 stipulation is approved by the Commission and there's

1 a Commission order, then that Commission order is  
2 binding and any party can read the stipulation and  
3 act underneath the stipulation; is that correct?

4 A. I would assume.

5 Q. And just so we're clear, 11-4393, there  
6 was no language about the banked savings; is that  
7 correct?

8 A. In the Company's testimony explaining the  
9 application and in OCEA's comments it referenced the  
10 bank and made no modifications to the use of bank,  
11 that's correct.

12 MS. BOJKO: Your Honor, I move to strike  
13 as nonresponsive. That wasn't my question. I asked  
14 if the stipulation referenced the word "banked" in  
15 11-4393.

16 THE WITNESS: And I answered that.

17 MS. BOJKO: There's a pending motion.

18 EXAMINER WALSTRA: You can clarify.

19 A. I answered that earlier. No, the term  
20 "banked" is not in the stipulation.

21 Q. And, sir, you referenced a couple times  
22 today a FirstEnergy proceeding, and you're  
23 referencing FirstEnergy's amended portfolio approved  
24 in December 2014; is that correct?

25 A. I believe that's correct, yes.

1           Q.       So that portfolio that you -- I think you  
2       called it a recent decision --

3                   MS. WATTS:   Your Honor, I object to this  
4       line of questioning.   We did not discuss FirstEnergy  
5       in redirect.

6           Q.       Actually, your Honor, he did.   He stated,  
7       and I quote that -- there's a question as to whether  
8       banked had to be used for 2015 in light of Senate  
9       Bill 310 and the decision of the Commission, and he's  
10      referring to the FirstEnergy decision.

11                   EXAMINER WALSTRA:   Overruled.

12          A.       So with respect to Senate Bill 310 and  
13      that order, it says that the compliance mandate for  
14      the Company is 4.2 percent cumulative.

15          Q.       That's not what my question was.   My  
16      question was are you referring to the FirstEnergy  
17      decision and the Commission order -- or, the  
18      FirstEnergy POR and the Commission order issued in  
19      December 2014?

20          A.       Yes.

21          Q.       Okay.   And December 2014, that was a  
22      year-and-a-half ago; is that correct?

23          A.       Approximately -- no, it wasn't a  
24      year-and-a-half ago.   Ms. Bojko, it was December.  
25      It's March.

1 Q. No. December 2014.

2 A. Exactly. So --

3 Q. It's March 2016. A year and three months.

4 A. I believe that's -- I believe that's a  
5 year and a quarter, but we won't get into semantics.

6 Q. Excuse me. I stand corrected. Instead of  
7 a year and six months, it was a year and three  
8 months.

9 A. Yeah. I think I would consider it a  
10 recent order. It pertains to their existing  
11 portfolio.

12 Q. Okay. That's what I want to make sure  
13 you're talking about when you keep talking about this  
14 recent FirstEnergy order. So this recent FirstEnergy  
15 order, this order was not mentioned in your testimony  
16 that you filed in support of the stipulation; is that  
17 correct?

18 A. No, it had nothing to do with the  
19 stipulation.

20 Q. Thank you.

21 You mentioned that the Company typically  
22 tries to exceed projections; do you recall that?

23 A. Yes.

24 Q. And you're talking about your projections  
25 to meet your statutory mandate?

1           A.       No. The portfolio was approved all along,  
2       which is another fact showing that the Company's  
3       projections were short of the annual mandates.

4           Q.       Right. So that's what I want to make sure  
5       that when you say "exceed projections," the Company  
6       still did not meet its statutory mandates in 2013,  
7       '14, and '15; is that correct?

8           A.       We don't know on '15, yet, Ms. Bojko. We  
9       did have to use compliance bank to meet the mandates  
10      in '13 and '14.

11          Q.       And I think you said something different  
12      on recross than you did earlier, so I want to make  
13      sure I understand. You believe that the  
14      \$19.75 million does represent shared savings for 2013  
15      and '14?

16          A.       It's an amount designed to resolve the  
17      shared savings incentive for 2013 and '14. It was  
18      not a calculated shared savings number.

19          Q.       Right. But the shared savings mechanism  
20      was used to develop the 19.75 number.

21          A.       No, it was not.

22          Q.       So you don't believe that the stipulation  
23      and the mechanism -- excuse me, that the mechanism  
24      established in the stipulation in Case 11-4393 was  
25      used to develop the \$19.75 million?

1           A.       It could have been used in the basis of  
2       determining the general magnitude, but if the  
3       mechanism had been used it would have been  
4       24.5 million, Ms. Bojko, as we discussed earlier.

5           Q.       You still remember being deposed on --

6           A.       Yeah. Yes.

7           Q.       -- March 1st, 2016?

8           A.       Yes.

9           MS. BOJKO: May I approach, your Honor?

10          EXAMINER WALSTRA: You may.

11          Q.       I'm on pages 52 and 53. On the bottom of  
12       page 52, starting with line 18. "And which  
13       methodology -- or which stipulation are you referring  
14       to when you talk about methodologies?"

15                 "Answer: It was a stipulation that was  
16       supported in case 11-4393 that established the shared  
17       savings mechanism."

18                 "Question: But that methodology, was it  
19       used to develop the \$19.75 million in the  
20       stipulation, correct?"

21                 "That's correct."

22                 Did I read that correctly, sir?

23          A.       You're taking it out of context.

24          Q.       Did I read that correctly, sir?

25          A.       You read it correctly --



1 Q. Thank you.

2 A. -- but it's not in context.

3 MS. BOJKO: May I approach, your Honor?

4 EXAMINER WALSTRA: You may.

5 Q. Now, unfortunately, I didn't want to have  
6 to do this, but I'm going to now take your attention  
7 to 12-1857.

8 A. Sure.

9 MS. WATTS: Your Honor, we're now going  
10 into a case that Counsel for OMA was arguing earlier  
11 would not be relevant in this proceeding, so I don't  
12 know how this is happening. And it's certainly not  
13 relevant to anything I asked on redirect.

14 MS. BOJKO: Your Honor, I begged, I  
15 pleaded, I asked that the testimony be stricken, and  
16 it wasn't, and Counsel kept continuing to ask  
17 questions that alluded to these responses, and he did  
18 testify to 12-1857 a couple different times and what  
19 the stipulation and the references did or did not do.  
20 And I think it's only fair to get the whole story.  
21 Otherwise, I'll be happy to go back and move to  
22 strike all of the cross-examination and all the  
23 responses that reference 12-1857.

24 EXAMINER WALSTRA: You can proceed, but  
25 don't stray too far.

1 Q. (By Ms. Bojko) The stipulation that you  
2 filed, the joint stipulation in 14-457, does not  
3 reference 12-1857; is that correct?

4 A. Not directly.

5 Q. And isn't it true that your testimony  
6 filed in 14-457 does not reference 12-1857; is that  
7 correct?

8 A. No. It references 14-457 and 15-534.

9 Q. Right. It does not reference, in your  
10 testimony, the Case 12-1587 -- or, I'm sorry, 1857.

11 A. My supplemental direct testimony in this  
12 proceeding does not reference 12-1857, no.

13 Q. And isn't it true, sir, that the  
14 stipulation filed in 12-1857 only discusses using  
15 banked savings to meet compliance?

16 A. No. There's an exhibit in the ultimate  
17 filing that shows the remaining banked amount. I  
18 can't speak to the verbiage of the stipulation  
19 because I don't have it in front of me, but I know  
20 one of the exhibits explicitly says banked savings to  
21 be used for future incentive calculations.

22 Q. We're talking about the stipulation.  
23 There was a stipulation, right?

24 A. Yeah.

25 Q. And the stipulation does not contain any

1 exhibits; is that correct?

2 A. Subject to check, I'll take your word for  
3 it.

4 Q. And the stipulation modifies the  
5 application that was filed in 12-1587; is that  
6 correct?

7 A. In certain ways, yes.

8 Q. 12-1857. Sorry. 12-1857.

9 A. As I said, it modified certain provisions  
10 of the Company's application, yes.

11 MS. WATTS: Your Honor, I'm going to  
12 object just because the witness doesn't have any of  
13 these documents in front of him, so.

14 MS. BOJKO: Your Honor, I tried to get out  
15 of doing this --

16 EXAMINER WALSTRA: He seems to understand.  
17 You understand --

18 THE WITNESS: I can -- I remember that  
19 there was a stipulation that modified the  
20 application. I don't know the specifics, though,  
21 your Honor.

22 MS. BOJKO: It's all right. I have  
23 copies, your Honor. I'd like to mark, at this time,  
24 OMA Exhibit 19. May I approach, your Honor?

25 EXAMINER WALSTRA: You may.

1 (EXHIBIT MARKED FOR IDENTIFICATION.)

2 Q. Do you have in front of you what's been  
3 marked as OMA Exhibit 19?

4 A. Yes.

5 Q. And is that the stipulation that you  
6 referenced in 12-1857?

7 A. I think I referenced an order. I don't  
8 remember -- I think you were asking me about a  
9 stipulation.

10 Q. Okay. You're familiar with the  
11 stipulation filed in 12-1857?

12 A. I've got it and I know it was filed, yes.

13 Q. And, sir, isn't it true that in the  
14 stipulation on page 5 --

15 A. Yes.

16 Q. -- of 12-1857 that the No. 4 item says  
17 "However, the Company will not and has not included  
18 any avoided costs associated with those banked  
19 impacts for the purposes of determining the incentive  
20 in this proceeding, nor will it do so in future  
21 shared savings incentive calculations"?

22 A. Yes. That's pertaining to avoided costs  
23 not kWh impacts which are used to determine your  
24 benchmark achievement.

25 Q. And, sir, you're familiar with the order,

1 you stated, in 12-1857?

2 A. Again, I know there was an order approving  
3 the stipulation. I don't have the order in front of  
4 me, no.

5 MS. BOJKO: Your Honor, at this time, may  
6 I mark as OMA Exhibit 20, the Opinion and Order  
7 issued in Case No. 12-1857-EL-RDR?

8 EXAMINER WALSTRA: So marked.

9 (EXHIBIT MARKED FOR IDENTIFICATION.)

10 Q. Isn't it true, sir, that on -- sorry. Do  
11 you have in front of you what's been marked as OMA --

12 A. Yes, I do. Thank you.

13 Q. Isn't it true that on page 3, the  
14 Commission's order summarizes the positions of the  
15 comments of the parties, and in the last paragraph,  
16 before the summary of the stipulation, it refers to  
17 OP&E's position and states that "OP&E argues that it  
18 is inappropriate to use pre-2009 banked incentives  
19 for purposes of calculating the incentive earned by  
20 Duke under the rider DR-SAW mechanism"?

21 A. Yes.

22 Q. And that OCC agrees with that position in  
23 its reply comments?

24 A. Yes, that's what term (4) on the next page  
25 resolved. There were no avoided costs used in the --

1 from banked savings in the determination of the SAW  
2 mechanism incentive.

3 Q. Well, this, on page 3, it's talking about  
4 the use of pre-2009 banked incentives for purposes of  
5 calculating the incentive earned.

6 A. That's correct. Under SAW.

7 Q. Okay.

8 A. It says "DR-SAW." And there were none,  
9 that's correct.

10 Q. And isn't it true that the application in  
11 12-1857 does not discuss using banked savings to  
12 claim an incentive?

13 A. The Company didn't use banked savings in  
14 '12, during the Save-a-Watt period, to claim  
15 incentive. It established a bank to be carried  
16 forward.

17 Q. So my statement is true that it did not  
18 discuss using the banked savings to claim an  
19 incentive; is that correct?

20 A. That's correct, because no savings were  
21 used in Save-a-Watt to claim an incentive.

22 Q. And, sir, you filed testimony in 12-1857,  
23 didn't you?

24 A. Yes, I did.

25 Q. And you also did not address in your

1 testimony using banked savings to claim an incentive;  
2 isn't that correct?

3 A. In Save-a-Watt, which was Case 12-1857,  
4 the Company didn't use banked savings to determine  
5 its incentive level.

6 Q. So the answer to my question --

7 A. So there was no reason to testify about  
8 it. The answer is yes, it was not in my testimony.

9 Q. Thank you.

10 A. I want to add that's subject to check,  
11 because I don't have my testimony in front of me, but  
12 I don't recall.

13 Q. I have it with me if you'd like --

14 A. No, no. I said "subject to check." I  
15 don't want to check. I'm just saying it wasn't used,  
16 so there would have been no reason for it to be in  
17 there, but I didn't review it, so I don't want to say  
18 I did.

19 MS. BOJKO: Thank you, your Honor. I have  
20 no further questions.

21 Thank you, Mr. Duff.

22 THE WITNESS: Thank you, Ms. Bojko.

23 EXAMINER WALSTRA: Ms. Ghiloni?

24 MS. GHILONI: No questions, your Honor.

25 EXAMINER WALSTRA: Thank you.

1 Ms. Mooney?

2 MS. MOONEY: No questions.

3 EXAMINER WALSTRA: Ms. Fleisher?

4 MS. FLEISHER: No questions, your Honor.

5 EXAMINER WALSTRA: Mr. Stinson?

6 MR. STINSON: I just have one and it's  
7 just a clarification issue.

8 - - -

9 RECROSS-EXAMINATION

10 By Mr. Stinson:

11 Q. Duke Exhibit 2, I think you read a lengthy  
12 statement from the bottom of page 7 to the top of  
13 page 8. And I believe at line 5 on page 8, you read  
14 "banked savings."

15 A. I'm sorry, which are you -- which -- is  
16 that 11-4393?

17 Q. Yeah.

18 A. I'm sorry. It wasn't marked, the one  
19 that's in front of me.

20 Q. It's the application for cost recovery.

21 A. Yes. Yeah, I've got it in front of me.

22 Q. It's my understanding that on page 8, line  
23 5, when you were reading the statement, you read  
24 "banked savings" on line 5.

25 A. "Banked impacts."



1 MR. STINSON: Thank you.

2 EXAMINER WALSTRA: Is that all,

3 Mr. Stinson?

4 MR. STINSON: I'm sorry. Yes.

5 EXAMINER WALSTRA: Thank you, Mr. Duff.

6 THE WITNESS: Thank you.

7 EXAMINER WALSTRA: We'll go through  
8 exhibits.

9 MS. WATTS: Your Honor, we would move  
10 Joint Exhibit 1, Duke Energy Ohio 1, and Duke Energy  
11 Ohio 2, please.

12 MS. BOJKO: Your Honor, I would ask that  
13 we hold off on moving Joint Exhibit 1 until the  
14 second witness testifying to Joint Exhibit 1 actually  
15 testifies.

16 EXAMINER WALSTRA: Any objections?

17 MS. WATTS: No objection.

18 EXAMINER WALSTRA: Otherwise, any  
19 objections?

20 Duke Exhibits 1 and 2 will be admitted.

21 (EXHIBITS ADMITTED INTO EVIDENCE.)

22 MS. BOJKO: Your Honor, at this time, OMA  
23 moves Exhibits 2, 3, 6, 7, 9, 10, 11, 13 through 18,  
24 and OMA also asks the Bench to take administrative  
25 notice of OMA's reply comments filed in 15-534 which

1 is the case that the joint stipulation is filed under  
2 as those were not discussed in cross, but we ask for  
3 administrative notice.

4 MS. WATTS: Your Honor, could we have  
5 those numbers again? I'm sorry.

6 MS. BOJKO: 2, 3, 6, 7, 9, 10, 11, 13  
7 through 18. And administrative notice of reply  
8 comments in 15-534. Oh, I'm sorry, and the new ones  
9 that we just did which are 19 and 20.

10 MS. WATTS: I have no objection, your  
11 Honor.

12 EXAMINER WALSTRA: Mr. Jones, any  
13 objection?

14 MR. JONES: No objection, your Honor.

15 MS. WATTS: And, your Honor, if your Honor  
16 approves, we're going to cut Mr. Duff loose to head  
17 to the airport.

18 EXAMINER WALSTRA: No problem at all.

19 MS. WATTS: Thank you.

20 EXAMINER WALSTRA: Thank you.

21 MS. BOJKO: Your Honor, may I note for the  
22 record the reasoning I'm not moving the other ones is  
23 because they're Commission orders that don't need to  
24 be moved.

25 EXAMINER WALSTRA: Those will be admitted

1 and we will take administrative notice of OMA's reply  
2 comments in 15-534, is that what it was?

3 MS. BOJKO: 15-534, yes. Thank you, your  
4 Honor.

5 (EXHIBITS ADMITTED INTO EVIDENCE.)

6 EXAMINER WALSTRA: Do we want to take a  
7 5-minute break?

8 MR. BOEHM: That would be great.

9 MS. BOJKO: I think there are more  
10 exhibits.

11 EXAMINER WALSTRA: Oh, that's right.  
12 There are, aren't there. My apologies.

13 MS. GHILONI: Your Honor, at this time,  
14 Kroger moves to admit Exhibits 1 through 4.

15 EXAMINER WALSTRA: Are there any  
16 objections?

17 MS. WATTS: No, your Honor. I'd just like  
18 to understand to the extent comments are relevant,  
19 will you be asking us to always mark comments and  
20 offer them as exhibits, or can we refer to comments  
21 in a docket that's filed at the Commission otherwise?

22 MR. BOEHM: Excuse me. I'm not sure I  
23 understood the question, Elizabeth.

24 MS. BOJKO: She's asking if we now have to  
25 do exactly what she argued against earlier.

1 MS. WATTS: I did argue against it. I'm  
2 trying to understand where we ended up, because I  
3 wasn't clear. I don't have any objection to these.  
4 I just want to understand how I need to proceed in  
5 the future.

6 EXAMINER WALSTRA: Right. I think it  
7 would be best if we have them admitted. I think it  
8 clears up the record and makes things -- especially  
9 now that these are exhibits, it makes reference  
10 points easier and makes the record clear.

11 MS. WATTS: Perfect. Thank you.

12 (EXHIBITS ADMITTED INTO EVIDENCE.)

13 MR. BOEHM: With that in mind, your Honor,  
14 I would move for the admission of OEG's comments as  
15 OEG No. 1.

16 MS. BOJKO: Which ones?

17 MR. BOEHM: 15-534.

18 EXAMINER WALSTRA: Those will be admitted.

19 (EXHIBIT MARKED FOR IDENTIFICATION.)

20 (EXHIBIT ADMITTED INTO EVIDENCE.)

21 MS. MOONEY: Well, in that case, I'll move  
22 for the admission of OPAE's comments in 15-534 and  
23 14-457, whatever they were. I believe OPAE has filed  
24 comments and reply comments in the two dockets that  
25 we're having a hearing on the stipulation. In that

1 case, I would move for the admission of those  
2 comments.

3 EXAMINER WALSTRA: OPAE Exhibit 1 will be  
4 the comments, OPAE's comments in 14-457, and OPAE  
5 Exhibit 2 will be OPAE's comments in 15-534.

6 (EXHIBITS MARKED FOR IDENTIFICATION.)

7 MS. MOONEY: Thank you.

8 EXAMINER WALSTRA: And those will be  
9 admitted.

10 (EXHIBITS ADMITTED INTO EVIDENCE.)

11 MS. WATTS: Your Honor, we would move Duke  
12 Energy Ohio's comments that were filed with the  
13 Commission on July 2nd, 2014, as Duke Energy Ohio  
14 Exhibit 3.

15 MS. BOJKO: I'm sorry, which case?

16 MS. WATTS: 457.

17 EXAMINER WALSTRA: 457.

18 Those will be admitted.

19 (EXHIBIT MARKED FOR IDENTIFICATION.)

20 (EXHIBIT ADMITTED INTO EVIDENCE.)

21 MS. WATTS: We'll check to see if we filed  
22 comments in 534. I'm not sure if we did.

23 MR. BOEHM: We're going to take a 5-minute  
24 break?

25 EXAMINER WALSTRA: We're going to take a

1 5-minute break. We'll go off the record.

2 (Recess taken.)

3 EXAMINER WALSTRA: We'll go back on the  
4 record.

5 MR. BOEHM: Your Honor, on behalf of OEG,  
6 we'd like to call Mr. Stephen Baron as a witness.

7 EXAMINER WALSTRA: Raise your right hand.

8 (Witness sworn.)

9 (EXHIBIT MARKED FOR IDENTIFICATION.)

10 - - -

11 STEPHEN J. BARON

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

14 DIRECT EXAMINATION

15 By Mr. Boehm:

16 Q. Mr. Baron, do you have in front of you  
17 what's been marked for identification as OEG  
18 Exhibit No. 2?

19 A. Yes.

20 Q. Okay. And is this the testimony that was  
21 filed for you in this case?

22 A. Yes.

23 Q. Okay. And do you have any changes or  
24 corrections?

25 A. None that I'm aware of, no.

1 Q. Okay. And if I were to ask you the  
2 questions contained herein, would your answers be the  
3 same?

4 A. Yes.

5 Q. And are they true and correct to the best  
6 of your knowledge?

7 A. Yes.

8 MR. BOEHM: Your Honor, we submit the  
9 witness for cross-examination.

10 EXAMINER WALSTRA: Thank you.

11 Ms. Spiller.

12 MS. SPILLER: Thank you, your Honor.

13 - - -

14 CROSS-EXAMINATION

15 By Ms. Spiller:

16 Q. Good evening, Mr. Baron. How are you?

17 A. I'm doing fine. Thank you.

18 Q. I'm going to start with what I believe I  
19 just heard your Counsel ask when he identified OEG  
20 Exhibit 2. I believe he said that this was testimony  
21 prepared for you; is that correct?

22 A. I may I have missed that. I prepared the  
23 testimony.

24 Q. Okay. Thank you.

25 A. I thought he meant filed, but . . .

1 Q. And did anyone assist in the preparation  
2 of your testimony, sir?

3 A. It was reviewed by Counsel.

4 Q. Okay. And, sir, on page 2 of your  
5 testimony, beginning on line 10, you identify two  
6 Duke Energy Ohio proceedings concerning energy  
7 efficiency in which you have previously submitted  
8 testimony on behalf of OEG, correct?

9 A. Yes.

10 Q. And other than those two proceedings and  
11 the proceedings here, you have not offered testimony  
12 in any other Duke Energy Ohio energy efficiency  
13 proceedings, correct?

14 A. I believe that's correct, yes.

15 Q. And with regard to Case No. 14-457, sir,  
16 when were you first retained?

17 A. I -- it was sometime this year, I just --  
18 I don't recall the date.

19 Q. And with regard to Case No. 15-534, would  
20 your answer be the same, that you were retained  
21 sometime in 2016?

22 A. Yes. The two cases that are the subject  
23 of my testimony -- you're speaking of this case that  
24 we're in today?

25 Q. Yes, sir.



1           A.       It would have been the same time.

2           Q.       And what have you prepared, Mr. Baron, for  
3 purposes of preparing OEG Exhibit 2, your direct  
4 testimony?

5           A.       Well, I prepared the testimony, I reviewed  
6 documents, various -- some of the orders of the  
7 Commission, some Duke filings in prior energy  
8 efficiency proceedings. As I said, Commission  
9 orders, and discovery responses by the Company.

10          Q.       And when you say "discovery" --

11          A.       And -- excuse me. And the statute.

12          Q.       And when you say "discovery responses,"  
13 are those discovery responses that were filed in  
14 connection with Cases 14-457 and 15-534?

15          A.       Yes. But I believe I also reviewed some  
16 discovery responses. Actually, I think it was 457,  
17 but it would have been earlier -- responses in the  
18 earlier proceeding.

19          Q.       So, fair to say, Mr. Baron that when you  
20 filed your direct testimony in this proceeding, you  
21 understood the procedural history of Case 14-457?

22          A.       Well, I -- I was familiar with  
23 particularly the Commission's order that is subject  
24 -- in which they -- the Commission found that banked  
25 energy savings would not be -- could not be used for

1 purposes of an incentive calculation.

2 Q. And you understand, sir, that that order  
3 is now out for rehearing by the Commission, correct?

4 A. Yes. And, in fact, I did review Duke's  
5 request for rehearing.

6 Q. On page 3 of your direct testimony,  
7 Mr. Baron, you summarize certain provisions of the  
8 stipulation filed in this case and which has been  
9 identified as Joint Exhibit No. 1, correct?

10 A. Yes.

11 Q. You do not, sir, attempt to identify or  
12 summarize every term and condition of the  
13 stipulation, do you?

14 A. That is correct. The primary focus of my  
15 testimony and my opposition to the stipulation  
16 concerns the 19.75 million associated with, as I  
17 understand it, the 2013 and '14 shared incentive  
18 savings.

19 Q. And, sir, you say your primary focus and  
20 the primary purpose of your testimony is the dollar  
21 amount, but can we -- would you agree with me that  
22 really the sole focus of your opposition to the  
23 stipulation, as reflected in your direct testimony,  
24 is the payment of \$19.75 million?

25 A. Yes. But I wouldn't -- the only -- the

1     only change to what you say is I wouldn't  
2     characterize it as just the dollar amount. It's the  
3     issue as a matter of policy and principle, but it's  
4     associated with the shared incentive savings result  
5     or the amount in the stipulation.

6           Q.     And that the policy or principle is one,  
7     sir, that you've previously expressed on behalf of  
8     OEG, that you do not believe incentive payments  
9     should be awarded absent exceeding the statutory  
10    benchmarks for EE/PDR, correct?

11          A.     Yes, I have taken that position. And I  
12    think in a prior case on the issue of whether the  
13    incentive mechanism should be extended, I addressed  
14    some alternative approaches, but my primary  
15    recommendation was not to permit a shared incentive  
16    mechanism, and for the future.

17          Q.     And, sir, in fact, that was a position  
18    that you asserted on behalf of OEG in connection with  
19    Case 11-4393 that's been referenced a great deal  
20    today, correct?

21          A.     I believe so.

22          Q.     And the Commission did not adopt your  
23    recommendations in that case, did they?

24          A.     In 4393, that's correct. I think the case  
25    I was thinking of, and I -- I don't have my

1 testimony, but it might have been the 14-1580 case,  
2 which I think was -- I testified in last year.

3 Q. And that case, sir, concerned continuing  
4 an incentive mechanism through 2016, the final year  
5 of the Company's approved EE/PDR portfolio, correct?

6 A. Yes. And that's what I was referencing to  
7 in answer to your prior questions.

8 Q. Mr. Baron, you would agree with me that  
9 Ohio law allows an electric distribution utility,  
10 such as Duke Energy Ohio, to meet the annual EE  
11 benchmark using banked savings, correct?

12 A. Yes.

13 MR. BOEHM: Objection, your Honor.

14 THE WITNESS: Sorry.

15 MR. BOEHM: Objection. The witness is not  
16 a lawyer. And if Counsel would like to refer to a  
17 particular law that she believes allows this, maybe  
18 he can render an opinion, but I don't think he can.  
19 He's not a lawyer.

20 MS. SPILLER: Your Honor, I'm not asking  
21 for a legal opinion. Mr. Baron has testified at  
22 length in these proceedings, he's been identified or  
23 held out by the OEG as an expert in respect of energy  
24 efficiency and peak demand reduction, and he talks  
25 about the use of the bank in respect of energy

1 efficiency mandates. I'm simply asking for his  
2 opinion in the arena as a regulatory specialist.

3 EXAMINER WALSTRA: Overruled.

4 MS. SPILLER: Thank you.

5 A. And, again, your question and my answer  
6 was referring to the use of banked savings for the  
7 purpose of meeting the mandate, not the issue that  
8 I'm addressing in my testimony which is the shared  
9 incentive mechanism.

10 Q. Okay. Sir, you mentioned earlier that  
11 you're aware that the Commission had granted  
12 rehearing of its order that was filed in May of last  
13 year in Case 14-457. You would agree with me, sir,  
14 that in your experience with regulatory proceedings  
15 that that outcome will be either an affirmation by  
16 the Commission of its prior order or a revision of  
17 that prior order.

18 MR. BOEHM: Objection, your Honor. Again,  
19 this is -- this is a line of legal -- obviously,  
20 there are other outcomes, but she's -- Counsel is  
21 setting up the witness as, again, a legal expert.  
22 He's not qualified.

23 MS. SPILLER: Again, your Honor, I'm not  
24 asking for legal opinions. If Mr. Boehm believes  
25 that there's some outcome other than affirmation or

1 modification, he can elicit that on redirect  
2 examination. Again, this is an expert witness in  
3 respect of regulatory proceedings.

4 EXAMINER WALSTRA: Overruled.

5 MS. SPILLER: Thank you, your Honor.

6 A. Well, in my experience, as a general  
7 matter, in regulatory proceedings that I'm involved  
8 in throughout the United States and at the FERC, when  
9 there's an application for rehearing, the regulatory  
10 commission can either reject the application in terms  
11 of making modifications to it, the original order, or  
12 the regulatory commission can modify its original  
13 order. That's generally my experience. I honestly  
14 don't recall seeing that in Ohio, but that's my  
15 experience broad-based.

16 Q. And when you describe, sir, rejecting in  
17 terms of modification, would you agree with me that  
18 that is synonymous with affirming the initial  
19 decision?

20 MR. BOEHM: Your Honor, I'm going to  
21 object again. These are solid legal questions.  
22 We've got an economic -- a witness who is an  
23 economist, a very good economist, and we're just  
24 getting legal questions, what effect does this have,  
25 what effect does that have. It's just outside his

1 purview.

2 MS. SPILLER: I'm asking the witness to --  
3 I'm interested in understanding testimony that he  
4 just rendered; in other words, what does it mean to  
5 reject in terms of modifying the stipulation.

6 EXAMINER WALSTRA: Overruled.

7 MS. SPILLER: Thank you.

8 A. As a -- as a general matter, based on my  
9 understanding as a nonlawyer, I would characterize a  
10 decision by a regulator on a rehearing application,  
11 when the Commission decides to continue with its  
12 original findings in all aspects as a rejection of  
13 the pleading for reconsideration or rehearing.

14 Now, generally, my experience in other  
15 jurisdictions and at the FERC is it's -- that  
16 there's -- it sometimes can be characterized as a  
17 request for rehearing or reconsideration, but my  
18 general understanding as a regulatory witness or  
19 expert is you either accept or reject one or all of  
20 the arguments requested for reconsideration.

21 Q. And having reviewed documents in Case  
22 14-457 for purposes of preparing your direct  
23 testimony in this case, are you aware of any  
24 indication that the Commission has given to date as  
25 to the ultimate content of its entry on rehearing?

1           A.       I'm not aware of anything.

2           Q.       And, Mr. Baron, your attorney has just  
3 indicated or reminded us that you are an economist by  
4 training.

5           A.       That's correct, yes.

6           Q.       And you would agree with me that risk can  
7 have a quantitative factor associated with it?

8           A.       Well, if your question is can -- can a  
9 party, can an individual make a quantification of  
10 risk, the answer is yes, in some fashion.

11          Q.       Okay. And you would agree with me that  
12 one can attempt to mitigate that quantification of  
13 risk by entering into a settlement.

14          A.       Well, I don't know if I agree with that.  
15 I would say for any given -- let's take the issue at  
16 hand. Whether the Commission changes its position  
17 regarding its decision in the 14-0457 case with  
18 respect to disallowing the use of banked savings for  
19 the purposes of whether you -- the Company had made  
20 sufficient -- met the threshold for incentive, a  
21 party can assess that risk.

22                   Mitigation is a different matter. It's  
23 obviously -- so I think I -- maybe I'm not sure I  
24 understood your question fully, but you can assess  
25 risk, you can assess a risk, you can put a



1 quantification on it, you can put an expected outcome  
2 on it. Mitigation is really an entirely different  
3 matter and that is are there mechanisms, actions,  
4 what have you, that can be used to potentially change  
5 the outcome or change the result.

6 Q. And a settlement is one of those actions  
7 or methods that could be used to change the outcome  
8 or the result, correct?

9 A. Well, certainly if all the parties in the  
10 case agree to a settlement, that would -- that would  
11 probably change that, likely change the outcome,  
12 though not necessarily if the Commission didn't  
13 accept the settlement. In the case of a settlement  
14 between the utility, Duke, and one party, the Staff,  
15 I don't know whether that changes -- how that changes  
16 the risk for any of the other parties.

17 Q. Sir, are you saying then that partial  
18 settlements do not function to mitigate, to any  
19 degree, risk that a party to a regulatory proceeding  
20 believes it's facing?

21 A. Well, a partial settlement can still be  
22 among all the parties. And I would grant you, agree  
23 with this: Obviously, if the Commission were to  
24 accept the settlement at issue in this case, for  
25 example, that might change some outcome, though, to

1 the extent that that decision by the Commission to  
2 accept the settlement could be appealed, and I don't  
3 know the legal aspects of that, it may not have that,  
4 you know, it may change the risk, but it still may be  
5 an open question as to what the quantification of the  
6 outcome is going to be.

7 Q. Let's turn to page 5 of your testimony,  
8 sir. Midway through your answer, and I'm going to  
9 focus on the testimony that begins on line 11.  
10 Therein you reference the amounts that Duke Energy  
11 Ohio sought for purposes of a shared savings  
12 incentive for both 2013 and 2014 calendar years,  
13 correct?

14 A. Yes.

15 Q. And, sir, in looking at your testimony,  
16 you did not disagree with those quantifications in  
17 the sense that you did not perform any additional  
18 analyses of the numbers, correct?

19 A. That is correct. In other words, given  
20 the -- if one were to accept the way the Company  
21 originally filed its true-up calculations for 2013  
22 and '14, which relied on savings from its incentive  
23 bank of energy savings, it would produce those  
24 numbers. I haven't made any analysis of the actual  
25 avoided costs savings that that would be applied to.

1 I'm not challenging that, per se.

2 Q. Okay. And, Mr. Baron, I would ask you,  
3 for purposes of this next question, to assume the  
4 following: First, that the Commission granted the  
5 Company's application for rehearing and allowed it to  
6 utilize the bank for purposes of calculating a shared  
7 savings incentive; I'd ask you further to assume that  
8 the Commission approved the Company's calculated  
9 shared savings incentives for 2013 totaling a  
10 combined \$24.6 million.

11 Mr. Baron, with those two assumptions in  
12 mind, you would agree with me that customers, subject  
13 to rider EE/PDR, would pay those incentive amounts,  
14 correct?

15 A. Certainly based -- as I understood your  
16 hypothetical, it would be my understanding that based  
17 on such a Commission decision, it would be included  
18 in the rider. Now, whether that decision could be  
19 appealed by one or more parties and that outcome  
20 changed, I can't speculate on it.

21 Q. But you would agree that the Commission  
22 order approving the shared savings calculation of  
23 \$24.6 million for 2013 and 2014, would be paid by  
24 customers subject to the rider, correct?

25 MR. BOEHM: Again, your Honor, I object.

1 The question is if you lost, would you have to pay;  
2 yes. And if you lost to the extent of \$24 million,  
3 would you have to pay \$24 million; yes. I don't  
4 think it's probative of anything and it's certainly  
5 not in line of what the witness's testimony has been.

6 MS. SPILLER: And, your Honor, if  
7 Mr. Boehm would like to be sworn, I'd be more than  
8 happy to elicit testimony from him. I was simply  
9 asking this witness concerning his testimony, and he,  
10 in fact, is discussing the incentive calculations.

11 EXAMINER WALSTRA: Overruled.

12 MS. SPILLER: Thank you.

13 A. Your question essentially boils down to  
14 the Company filed for 24.5 or -6 million dollars of  
15 shared incentive savings, and the question to me is  
16 if the Commission accepted that, would that be  
17 included in rates and that would be my understanding.

18 Q. And, Mr. Baron, with respect to 2015,  
19 calendar year 2015, you heard testimony from Mr. Duff  
20 earlier told that the Company is projecting a shared  
21 savings incentive under what it believes to be the  
22 appropriate mechanism ranging from either \$8 million  
23 to \$15 million, correct?

24 A. I have heard that testimony.

25 Q. And again, sir, would you agree with me

1 that if the Commission were to adopt the Company's  
2 shared savings incentive mechanism, as it described  
3 in Case 11-4393, and accepted the Company's  
4 calculation of a shared savings incentive that,  
5 again, customers would pay that under rider EE/PDR?

6 A. If you want me to assume hypothetically  
7 that the Company had shared incentive savings of  
8 between 8 million and 15 million, and that the  
9 Commission reversed itself on its findings in the  
10 14-0457 case, that prior banked savings should not be  
11 used for determining whether Duke achieved the  
12 incentive threshold, if you want me to assume those  
13 things, then I think it logically would follow or  
14 arithmetically follow that the -- assuming that the  
15 Commission agreed with everything else in the filing,  
16 that those would be included.

17 Now, whether that, you know, that's -- to  
18 me, that's neither here nor there. That's -- the  
19 Commission has determined in its order, and for good  
20 reasons which I agree with, that it's bad policy to  
21 include those banked savings for the purpose of  
22 assessing whether a utility has met its threshold  
23 obligations to obtain an incentive. But if the  
24 Commission changes its mind, obviously, anything  
25 could happen.

1 Q. And, Mr. Baron, OEG members in the Duke  
2 Energy Ohio service territory are currently subject  
3 to rider EE/PDR, correct?

4 A. That's my understanding, yes.

5 Q. Sir, I'd like to turn to page 7 of your  
6 testimony. And the question that appears beginning  
7 on line 4, you criticize, and I'm going to paraphrase  
8 and ask you to agree with the paraphrasing, you  
9 criticize the Company for using the bank because it  
10 overcomplicated specifically in 2009 and 2010, correct?

11 A. No. I'm not criticizing the Company  
12 there. I'm explaining why I believe the Commission's  
13 decision to disallow the use of banks, prior banked  
14 savings for the purposes of whether or not the  
15 Company can obtain an incentive, shared savings  
16 incentive, is a reasonable policy. And this  
17 is another -- and I've cited another reason, in my  
18 view, as to why the Commission's policy is  
19 reasonable.

20 Q. So do you believe that the Company should  
21 or should -- that the Company should not have  
22 obtained energy efficiency savings when they were  
23 readily achievable?

24 A. No. I'm not making any statement of that.  
25 I'm simply explaining that what the Company has been

1     able to do is use prior banked savings in its  
2     incentive bank that were relatively, on a relative  
3     basis, easy to obtain and has, in effect, converted  
4     those into dollars that would have been much harder  
5     to obtain on an actual basis in 2013 and '14. I  
6     think it's a reasonable observation.

7           Q.       And, sir, you have not, in your testimony,  
8     at all attempted to analyze or assess what customers  
9     would have paid had the Company not overcomplied with  
10    the EE mandates in periods such as 2009 and 2010,  
11    when such overachievement was more readily -- was  
12    more readily available?

13          A.       No, I haven't done any calculation. I  
14    didn't -- I don't think it's any -- it certainly  
15    isn't relevant or necessary to the point that I'm  
16    making on page 7 of my testimony.

17          Q.       Sir, are you aware that the annual EE/PDR  
18    compliance obligations increase year over year in  
19    Ohio?

20          A.       Yes.

21                   MS. SPILLER: One moment, please, your  
22    Honor.

23                   No further questions, your Honor.

24                   EXAMINER WALSTRA: Thank you.

25                   Mr. Jones.

1 MR. JONES: Thank you, your Honor.

2 - - -

3 CROSS-EXAMINATION

4 By Mr. Jones:

5 Q. Good afternoon, Mr. Baron.

6 A. Good afternoon.

7 Q. I'm counsel for Staff. I have a few  
8 questions for you.

9 As to the Company's current portfolio  
10 plan, do you know how long that's been in effect and  
11 when it expires?

12 A. My -- I think -- I haven't really studied  
13 that, but I think I recall hearing maybe it was  
14 approved in 2013 and the plan would expire, I thought  
15 in the end of two-thousand -- well, I don't know when  
16 it expires.

17 Q. Okay. Fair enough. Let me ask you, being  
18 an expert in economic theory, would you agree with me  
19 that there can be exceptions to any sound policy?

20 A. I'm sorry. I missed the last part of your  
21 question.

22 Q. Can there be exceptions to any sound  
23 policy?

24 A. Yes, I think just as a general matter. It  
25 doesn't require economics to understand that there



1 can be.

2 Q. Okay. And would it be your opinion that a  
3 statutory change could create an extenuating  
4 circumstance that would be an exception to sound  
5 policy?

6 A. Well, certainly if a statutory -- if the  
7 statute changed an existing policy and a  
8 regulatory commission was obligated to follow the  
9 statute, that would be a change.

10 Q. And are you familiar with Senate Bill 310?

11 A. I have reviewed it, yes.

12 Q. Okay. And do you recall when that came  
13 into effect?

14 A. I think it was in 2014. Let me see if I  
15 have a date. September 2014, I believe, if I'm  
16 reading it right.

17 Q. And that would have come into effect after  
18 the time that the portfolio plan began, right?

19 A. Yes, that's my understanding.

20 Q. Okay. Senate Bill 310, would you agree  
21 that that provided that a utility, like Duke, would  
22 either have to amend their portfolio plan within a  
23 certain time; if not, they would have to continue for  
24 the duration of when it was approved for?

25 A. I think I do recall something to that

1 effect. I don't recall. I'd have to review the  
2 document that I have to be able to answer it, but I  
3 do understand that the provisions in Senate Bill 310  
4 changed, and there was some discussion of that today,  
5 changed the mandate for 2015 and '16.

6 Q. And do you recall, though, that there was  
7 a window that provided as to a utility being able to  
8 amend their portfolio plan within the effective date  
9 of Senate Bill 310?

10 A. I recall some language. I didn't focus on  
11 it. I just vaguely recall some language to that  
12 effect, but I don't remember the specifics.

13 MR. JONES: Okay. That's all I have, your  
14 Honor. Thank you.

15 Thank you, Mr. Baron.

16 THE WITNESS: Thank you.

17 EXAMINER WALSTRA: Any redirect?

18 MR. BOEHM: No redirect.

19 EXAMINER WALSTRA: Thank you, Mr. Baron.

20 THE WITNESS: Thank you, your Honor. I  
21 appreciate it.

22 EXAMINER WALSTRA: Mr. Jones, you can call  
23 your witness.

24 MR. JONES: At this time, Staff would call  
25 Patrick Donlon to the stand, please.

1 EXAMINER WALSTRA: Raise your right hand.

2 MS. BOJKO: I'm sorry. Did we move -- did  
3 I miss, did we move --

4 EXAMINER WALSTRA: No. I missed that.  
5 Sorry. Thank you.

6 Would you like to move your exhibit?

7 MR. BOEHM: Oh, yes. Excuse me, your  
8 Honor. I move for the admission of OEG No. 2,  
9 please. I want to thank everybody again for their  
10 accommodation for letting Mr. Baron going on early.

11 EXAMINER WALSTRA: Any objections?

12 It will be admitted.

13 (EXHIBIT ADMITTED INTO EVIDENCE.)

14 EXAMINER WALSTRA: I ran out of room on my  
15 exhibit sheet, Ms. Bojko, so I apologize.

16 MS. BOJKO: Would you like another one,  
17 your Honor?

18 EXAMINER WALSTRA: I'm all right.

19 Whenever you're ready, Mr. Jones.

20 MR. JONES: Thank you, your Honor.

21 Does everybody have a copy of the  
22 stipulation and also Mr. Donlon's testimony?

23 MS. BOJKO: Yes.

24 MS. WATTS: Yes.

25 (EXHIBIT MARKED FOR IDENTIFICATION.)

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PATRICK DONLON

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

DIRECT EXAMINATION

By Mr. Jones:

Q. Would you state your name for the record,  
please.

A. Patrick Donlon.

Q. And where are you employed?

A. Public Utilities Commission of Ohio.

Q. And what is your job title and  
responsibilities?

A. Director of Rates and Analysis, and I  
oversee all aspects of the Rates and Analysis  
Department.

Q. And did you have an opportunity to prepare  
direct testimony or have it prepared at your  
direction?

A. I did.

Q. I want you to refer to Staff Exhibit 1 and  
please identify that document, please.

A. It's my direct testimony.

Q. And was Staff Exhibit 1 prepared by you?

A. Yes.

1 Q. And do you have any changes or additions  
2 to make to that testimony?

3 A. Yes. I have two typos on page 3. It  
4 would be on line 19 and line 20 -- 21. 19 and 21. I  
5 put "EDR" where it should be "RDR" on the case  
6 number.

7 Q. So the changes you're indicating for the  
8 record would be on Staff Exhibit 1, page 3, line 19,  
9 where it refers to the case number in this proceeding  
10 as 14-457-EL-RDR; is that correct?

11 A. That's what it should be, yes.

12 Q. That's what it should be.

13 And further then, on line 21 of the same  
14 page, with Case No. 15-534-EL-RDR is the  
15 correction; is that correct?

16 A. Correct.

17 Q. Okay. Now, if I were to ask you the same  
18 questions contained in Staff Exhibit 1, would your  
19 answers be the same?

20 A. Yes.

21 Q. Also, I want you to refer to what's marked  
22 as Joint Exhibit 1, and could you please identify  
23 that document for the record, please?

24 A. That's the Stipulation and Recommendation  
25 in this case.

1 Q. And the Stipulation and Recommendation,  
2 did you have a role, on behalf of Staff, with the  
3 discussions and development of this Stipulation and  
4 Recommendation?

5 A. I did.

6 Q. Who are the parties that executed this  
7 stipulation?

8 A. The signatory parties are Staff and Duke  
9 Energy Ohio.

10 Q. And are they the parties that are  
11 sponsoring the stipulation, Joint Exhibit 1, today?

12 A. Yes.

13 Q. And for Staff Exhibit 1, then, you're also  
14 indicating in that that you're sponsoring the  
15 Stipulation and Recommendation marked as Joint  
16 Exhibit 1; is that correct?

17 A. Yes.

18 Q. And what issues and what cases are  
19 resolved here for purposes of the Stipulation and  
20 Recommendation?

21 A. It's Case No. 14-457-EL-RDR,  
22 15-534-EL-RDR, and it is all of the bullet-point list  
23 that I spell out in page 3 and going into page 4 of  
24 my testimony.

25 MR. JONES: Okay. Your Honor, with that

1 then, I would offer Mr. Donlon for cross-examination.

2 EXAMINER WALSTRA: Thank you.

3 Mr. Boehm.

4 MR. BOEHM: Thank you, your Honor.

5 - - -

6 CROSS-EXAMINATION

7 By Mr. Boehm:

8 Q. Mr. Donlon, I think you know that I am the  
9 attorney for the Ohio Energy Group.

10 When you became involved in these  
11 negotiations with respect to -- well, first of all,  
12 who reached out to whom for -- for this first  
13 negotiating session when you first met with the  
14 Company? Did they ask you to talk to them? Did you  
15 ask to talk to them?

16 A. I guess the first meeting where this came  
17 up, I wasn't actually involved in. I think it came  
18 out of a conversation at a high level with Jason  
19 Rafeld and members of the Company on multiple issues.  
20 So I don't know who actually called for that and I'm  
21 not sure that this was the reasoning for that first  
22 meeting.

23 Q. And you said a name that I'm not familiar  
24 with. Jason who, please?

25 A. Jason Rafeld. He's our Chief of Staff for

1 the Public Utilities Commission of Ohio.

2 Q. He's the Chief of Staff. As best you  
3 recall or to the best of your knowledge, he was the  
4 first contact, is that right, with the Company?

5 A. Yes, but I'm not saying -- I don't know  
6 if -- who brought up the topic --

7 Q. Okay.

8 A. -- in that meeting.

9 Q. You don't know whether it was the  
10 Company -- when you say "brought up the topic in the  
11 meeting," I'm asking essentially who brought up the  
12 meeting, who decided there was going to be a meeting?

13 A. Again, from my understanding, it was a  
14 meeting to cover multiple topics, not just this one.  
15 I don't know who called or asked for the meeting.

16 Q. Do you remember what the other topics  
17 were?

18 A. I wasn't in the room.

19 Q. Have you read the Company's response to  
20 OCC's second set of interrogatories, 02-011?

21 A. I've read them. I don't have them  
22 memorized.

23 Q. Okay. Concerning the meeting on December  
24 the 28th -- by the way, which meeting was it you  
25 weren't at?



1           A.           The one that in their interrogatory  
2 doesn't have myself listed which was -- I don't know  
3 when that date was. I don't have the dates  
4 memorized.

5                       MS. BOJKO: Excuse me, Mr. Boehm. Are you  
6 talking about OMA Exhibit 18?

7                       MR. BOEHM: Yeah. Excuse me.

8           Q.           With respect to December 23rd and then  
9 December 29th and then December 30th, and I  
10 understand this isn't your reply, this is the  
11 Company's reply. The Company says "Attendees for  
12 Staff include but may not be limited to." Okay? Do  
13 you know who, besides the people that are listed on  
14 here, were at that meeting?

15          A.           I don't have it in front of me, so I'm not  
16 a hundred percent sure who is listed, but in the  
17 first meeting there's -- let's see. The 28th, from  
18 Staff, and we didn't take attendance so this is off  
19 of my memory, Jason Rafeld was in it, myself, Theresa  
20 White, Ray Strom, Kristen Braun, Bob Wolfe was in one  
21 but not the other due to vacation, and Karen Stone  
22 and Pat Tully may also have been in there, but I'm  
23 not sure.

24          Q.           Did you say Karen Stone?

25          A.           They are the Chief of Staff's

1 administrative assistants and representatives, so I  
2 don't know if they were in or out of those meetings,  
3 so.

4 Q. Okay.

5 A. There might have been one or two other  
6 Staff. I'm not a hundred percent sure. I'm can't  
7 remember if we had David Lipthratt and Suzanne  
8 Williams from accounting in there as well.

9 Q. And with respect to the next meeting --  
10 here, I'm going to give this to you.

11 MR. BOEHM: May I approach the witness,  
12 your Honor?

13 EXAMINER WALSTRA: You may.

14 Q. I'm handing you OMA Exhibit No. 18, which  
15 is the response of the Company in 14-547 to the OCC's  
16 second set of interrogatories.

17 A. Thank you.

18 Q. So let's look at December 29th then, which  
19 is qualified by the response that the "Attendees for  
20 the Staff include but may not be limited to." Will  
21 you look at that list of people and tell me whether  
22 there's anybody else that was there among the "may  
23 not be listed"?

24 A. Again, this is off of memory as we don't  
25 take attendance on all of our meetings. I want to

1 say Suzanne Williams and/or David Lipthratt were also  
2 there, and perhaps Kristen Braun, but I'm not a  
3 hundred percent sure.

4 Q. And Suzanne Williams again, what's her  
5 position?

6 A. She is a PUA 2, which is a manager under  
7 David Lipthratt, which he is the Chief of Regulatory  
8 Services. I always get his and Tammy's mixed up of  
9 which one they're chiefs over.

10 Q. Okay. Now, concerning David -- I'm sorry.

11 A. Lipthratt.

12 Q. Are you saying Lip --

13 A. L-i-p-t-h-r-a-t-t.

14 Q. Okay.

15 A. I could be pronouncing it wrong.

16 Q. Was he the superior of everybody else in  
17 this event? Would he be the top-ranking Staff  
18 member?

19 A. No, that would be me.

20 Q. That would be you. Okay. He works for  
21 you.

22 A. Yes. Except for when Jason is in the --  
23 well, he still works for me, but the meetings that  
24 Jason was involved in, Jason is our top Staff.

25 Q. Jason is the ranking guy.

1           A.       Yes.

2           Q.       And with respect to the last meeting,  
3       December 30th, would you fill that in for us, as  
4       well, please?

5           A.       That is probably correct. Again, I think  
6       Suzanne Williams might have been in the room as well.

7           Q.       Do you have any idea why these people  
8       weren't named among the attendees?

9           A.       This was conference calls and, like I  
10       said, there wasn't an attendance made. They aren't  
11       the main people in the energy and efficiency, and  
12       they probably didn't actually speak during the  
13       meeting, so I would guess that it could have easily  
14       been forgotten that they were there.

15          Q.       And on behalf of the Company, was there a  
16       main spokesman on behalf of the Company?

17          A.       Main spokesperson, I think all of them  
18       spoke at different times. I'm not sure there was a  
19       main spokesperson.

20          Q.       Did you get the impression that one or  
21       another was the ranking Duke person at the meeting?

22          A.       My understanding is, I don't know where  
23       the different -- what the ranking is between Amy and  
24       Lee, but my understanding is they're the two senior  
25       employees for Duke in this meeting.

1 Q. Okay. So since the status of the case at  
2 the time of the meeting was that there was an order  
3 of the Commission essentially disallowing the  
4 24 million that the Company wanted, I'm assuming they  
5 had the opening volley, right?

6 A. Actually, I think you're incorrect on your  
7 dollar amount --

8 MR. JONES: I object, your Honor. He's  
9 mischaracterizing -- he's including '13 and '14.

10 EXAMINER WALSTRA: Mr. Donlon can clarify.

11 A. So the 24,000 is for '13 and '14.

12 Q. Thank you. Excuse me.

13 A. So it would have been roughly \$11 million  
14 for the '13 in that Opinion and Order. But, again,  
15 that Opinion and Order was still open.

16 Q. You say "still open." There was a --

17 A. It was opened for rehearing, so it wasn't  
18 a final order.

19 Q. Okay. What was the Company's opening  
20 proposition to you?

21 A. Their -- some of the negotiations had  
22 already happened, so I don't know what their  
23 necessarily opening point was, but their litigation  
24 standpoint was 55 million.

25 Q. Now, when you say their position was

1 55 million -- we'll go back to that in a minute.

2 You say you weren't there at the opening.  
3 Is that because you weren't at the first meeting or  
4 was there other conversations in addition?

5 A. I wasn't at the first meeting.

6 Q. Insofar as you know, those were the only  
7 prior conversations.

8 A. Staff had a lot of discussions internally  
9 after that first meeting before we met with them.

10 Q. But as far as meeting with the Company,  
11 that was the only prior meeting.

12 A. To my knowledge.

13 Q. And in these proceedings, whom, in your  
14 mind, were you representing? What interests were you  
15 representing?

16 A. Staff's, which Staff represents the entire  
17 state of Ohio. We represent the lowest of the low  
18 income, the highest of the high income, every single  
19 company that exists in Ohio, no matter how big, how  
20 small, the utilities. Staff is the neutral  
21 arbitrator of the state of Ohio and we look out for  
22 the short-term and long-term benefits for all of the  
23 energy needs of Ohio.

24 Q. So with respect to the OCC, for instance,  
25 and their claim to represent residential customers,

1 you believe that the Staff has a preemptive right to  
2 represent the residential customers?

3 MR. JONES: Objection. Mischaracterizes  
4 the testimony.

5 MR. BOEHM: Well, I'm asking.

6 EXAMINER WALSTRA: He can clarify.

7 Q. Do you believe that?

8 A. I don't know if "preemptive," I don't know  
9 what you mean by "preemptive," but Staff has a due  
10 diligence to protect and serve the entire state of  
11 Ohio.

12 Q. So that if the OCC with respect to any  
13 particular position, if the OCC takes the position  
14 that a settlement is wrong, is not fair, and the  
15 Staff takes the position the settlement is fair, then  
16 the Staff position prevails?

17 MR. JONES: Objection.

18 MR. BOEHM: It's a question.

19 MR. JONES: Misstates --

20 MR. BOEHM: It's a question. Is that what  
21 you believe.

22 EXAMINER WALSTRA: I'm trying to  
23 understand your question.

24 MR. JONES: Yeah.

25 MR. BOEHM: My question, your Honor, is

1 here's an agency that claims that they've made a  
2 settlement on behalf of everybody in Ohio, including  
3 all of the residential customers. We have a  
4 statutory representative of the residential customers  
5 on behalf of the OCC. And I'm asking what happens  
6 when the OCC thinks that a settlement is wrong and  
7 the Staff thinks the settlement is right; whose  
8 position prevails?

9 MS. WATTS: Your Honor, I object as well  
10 because it calls for a legal conclusion. That's  
11 something the Commission would determine.

12 MR. JONES: That's correct.

13 EXAMINER WALSTRA: I think it's asking for  
14 a legal conclusion. They're both parties in this  
15 case.

16 MR. BOEHM: Okay.

17 Q. (By Mr. Boehm) When you were negotiating  
18 this settlement, Mr. Donlon, did it occur to you that  
19 there was a statutory representative of the  
20 residential customers that might be consulted?

21 A. Yes, and they were.

22 Q. And they were consulted in what respect?

23 A. All parties saw the stipulation prior to  
24 it being filed or at least were sent the file. I  
25 don't know if they opened it.



1 Q. So you entered into a stipulation and then  
2 you sent it to everybody, is that it?

3 A. Well, it wasn't signed until after all  
4 parties had a chance to view it. There were no  
5 responses. Then it was filed.

6 MS. BOJKO: Objection, your Honor.  
7 Mischaracterizes the evidence in the record.

8 EXAMINER WALSTRA: Overruled.

9 Q. And when -- okay. So there is a  
10 stipulation between you and the Company, and you've  
11 arrived at it, but nobody signed it, right? And at  
12 that time you sent it out to everybody, right? And  
13 what did you say to everybody?

14 A. I don't remember the exact terms of the  
15 e-mail. I didn't send it. Our legal representation  
16 sent it, so I can't tell you exactly verbatim what it  
17 was. It had a time frame, I want to say by noon of  
18 January 6th, to respond if anyone had any comments or  
19 concerns, but I'm definitely paraphrasing that.

20 Q. Okay. But the parties, in any event, were  
21 informed that the amount of the agreement, the 19.75,  
22 that was not to be discussed, that was done, right?

23 A. Absolutely not.

24 MR. JONES: Objection.

25 Q. They didn't say that?

1 MR. JONES: Again, he's misstating the  
2 facts, facts that are not in the record.

3 MR. BOEHM: Your Honor, I'm asking him  
4 questions. I'm asking for a "yes" or "no" answer.  
5 Fair enough. I'm not testifying. If he thinks I'm  
6 full of it, he can tell me.

7 EXAMINER WALSTRA: Can you re-ask the  
8 question?

9 Q. With respect to the 19.75 number in the  
10 settlement, were parties informed that that was still  
11 negotiable at the time you sent the document out to  
12 them?

13 A. It was -- the whole document was  
14 negotiable at that point.

15 Q. And they were told that?

16 A. Again, I don't know exactly what the  
17 e-mail said, but it was here is a proposal, let us  
18 know your comments. And that's very much  
19 paraphrasing as I did not read it and I don't  
20 remember verbatim what the e-mail said.

21 I did not write it. I believe I said "I  
22 did not read it." I did not write it.

23 Q. Do you believe that the Staff also  
24 represents large and small industrial and commercial  
25 customers?

1           A.       I do.

2           Q.       And let's assume that the Staff decides  
3       that something is beneficial to those customers and,  
4       yet, the only representatives of those customers in a  
5       particular case believe it's a bad deal; whose  
6       opinion prevails then?

7                   MS. WATTS:  Objection, your Honor.

8                   MR. JONES:  Same objection, your Honor.  
9       He's going to the same place, a legal conclusion.

10          Q.       Well, let me ask you as a matter of fact,  
11       Mr. Donlon.  As far as you know, do all of the  
12       intervenors in this case that purport to represent  
13       industrial customers, do all of those parties oppose  
14       the settlement?

15          A.       In this case?

16          Q.       Yes.

17          A.       In this case, as you're the one  
18       representing that and you've put a witness on the  
19       stand, yes, you're objecting to that.  And that's  
20       what the Commission's job is to do is to weigh those  
21       facts.

22          Q.       Did you believe going into this proceeding  
23       that you were on the same side as the Company?  Did  
24       you believe that you represented the Company as well?

25          A.       We represent all of Ohio and weigh

1 everyone's interests in Ohio and Ohio's energy needs  
2 equally.

3 Q. I thought that was the Commission that did  
4 that. That's you guys, huh?

5 MS. WATTS: Objection.

6 MR. JONES: Objection, your Honor.  
7 Argumentative with the witness.

8 EXAMINER WALSTRA: Sustained.

9 Q. Do you believe that you represent the  
10 Company's interest in this case?

11 MR. JONES: Objection. Asked and  
12 answered.

13 MR. BOEHM: I don't believe it was, your  
14 Honor.

15 EXAMINER WALSTRA: Go ahead.

16 A. Again, I believe that Staff's job is to  
17 look at the well-being of Ohio's energy needs as a  
18 whole, and that's what we do, and we advise the  
19 Commission on that through our positions.

20 Q. Let me ask one more time, Mr. Donlon. Do  
21 you believe that in this proceeding you represent the  
22 interests of the Company as well as everybody else?

23 MR. JONES: Objection. Asked and  
24 answered, your Honor.

25 MR. BOEHM: He's not --

1 EXAMINER WALSTRA: Sustained.

2 MR. BOEHM: -- he's telling me all these  
3 goody things the Commission does. I want to know who  
4 he represents in this case.

5 EXAMINER WALSTRA: He has answered that.  
6 Sustained.

7 MR. JONES: Your Honor, I'd ask the Court  
8 to have Mr. Boehm refrain from badgering the witness,  
9 please.

10 MR. BOEHM: Your Honor, if I may address  
11 the Commission on this absolutely extraordinary  
12 position. We have a case here, we have a case here  
13 where the Commission and its Staff has come  
14 forward --

15 MR. JONES: Objection. Is there a  
16 question before the witness?

17 MR. BOEHM: I'm making a statement.

18 MS. WATTS: I object, too. We're not  
19 doing closing argument right now, your Honor.

20 EXAMINER WALSTRA: If you have a question  
21 for Mr. Donlon, go ahead.

22 MR. BOEHM: Let me go forward, your Honor.

23 Q. (By Mr. Boehm) I'm going to take your  
24 answer to mean, Mr. Donlon, that you do represent the  
25 interests of the Company in this case as well. Is

1     that fair?

2                   MR. JONES:  Objection, your Honor.  I  
3     mean, we're going down the same path.  Same  
4     objection.

5                   MR. BOEHM:  He has not given me an answer  
6     to this, Counsel.

7                   MR. JONES:  He has answered, your Honor.

8                   MR. BOEHM:  No, he hasn't.  He's told --

9                   MR. JONES:  This is inappropriate.

10                  MR. BOEHM:  I want to know who he  
11     represents.  It is fair to understand, in a case  
12     where we're talking about a settlement between  
13     parties, to understand whom the parties represent,  
14     and I haven't gotten an answer.  I've asked three  
15     times does he believe he represents the Company, and  
16     none of the three times has he answered.

17                  MR. JONES:  I object.  He just doesn't  
18     accept the answer, your Honor.

19                  EXAMINER WALSTRA:  He's given the same  
20     answer about who the Staff represents as a whole and  
21     he's answered that sufficiently several times now.

22                  Q.        (By Mr. Boehm) Do you believe, Mr. Donlon,  
23     going into this conversation, that you represented a  
24     party adverse to the interests of the Company?

25                  A.        The conversation we're having now or the

1 conversation for the settlement?

2 Q. The settlement.

3 THE WITNESS: Can you repeat that  
4 question?

5 (Record read.)

6 A. I'd say we definitely had a difference of  
7 opinions and different objectives, absolutely.

8 Q. So you say you believe you were adverse to  
9 the Company?

10 A. Yes.

11 Q. And why, Mr. Donlon, may I ask you, did  
12 you not call in the other intervenors in this case,  
13 prior to arriving at a settlement with the Company?

14 A. It just didn't happen that way.

15 Q. It just didn't happen that way.

16 Let me ask you something, Mr. Donlon.  
17 Let's assume that all of the intervenors in this case  
18 got together, the OMA and Kroger and OEG and the OCC,  
19 and we got together in a room and we negotiated a  
20 settlement, a stipulation; you weren't involved, the  
21 Company wasn't involved. Do you think if we  
22 presented that stipulation to the Commission, that  
23 would be a legitimate stipulation that they should  
24 consider?

25 MR. JONES: Objection. Speculation, your

1 Honor.

2 MS. WATTS: Objection. Calls for a legal  
3 conclusion because the Commission would make that  
4 determination.

5 EXAMINER WALSTRA: I agree it does call  
6 for a legal conclusion.

7 Q. Have you read the statute with respect to  
8 stipulations, Mr. Donlon? Do you know it?

9 A. I wouldn't say that I've read it verbatim.

10 Q. But you're testifying today that this  
11 stipulation complies with that, aren't you?

12 A. That it complies with the three-prong  
13 test.

14 Q. The three-prong test for determining  
15 whether or not it's a valid stipulation, right?

16 A. Correct.

17 MR. JONES: Your Honor, I'm going to  
18 object again because Counsel is referring to a  
19 statute, and I don't believe there is such a statute.  
20 So if we're going to have a discussion about that,  
21 I'd like to know what it is.

22 Q. Let's go back. It's not a statute. It's  
23 an Ohio Administrative Code section. 4901-1-30, are  
24 you familiar with that?

25 A. I'm familiar with the three-prong test. I



1 will not say I've read that code verbatim.

2 Q. Isn't the three-prong test a test to  
3 determine whether or not a stipulation is valid under  
4 the statute I just named -- or, I'm sorry, the rule I  
5 just named? Isn't that what it is?

6 A. Subject to check.

7 Q. Okay. But you're saying you didn't read  
8 the rule.

9 A. I said I haven't read the rule verbatim.

10 Q. Don't you think that would have been a  
11 good idea before you got on the stand and testified  
12 that this is --

13 MR. JONES: Objection. Argumentative,  
14 your Honor.

15 MR. BOEHM: I'd like to finish my question  
16 before the objections come flying, your Honor.

17 EXAMINER WALSTRA: I think you've made  
18 your point.

19 MR. BOEHM: I'm going to try to get this  
20 again. I just want to make sure I understand the  
21 witness's answer.

22 Q. (By Mr. Boehm) In respect of the  
23 hypothetical that I just gave you about a stipulation  
24 entered into by all the intervenors in this case,  
25 whether or not that would be a valid stipulation

1 under your understanding of the statute or this rule  
2 that you're testifying to today, you don't have an  
3 opinion about that?

4 MS. WATTS: Your Honor, that's the  
5 question we objected to that was sustained.

6 MR. JONES: It's already been sustained,  
7 your Honor.

8 Q. Tell me, Mr. Donlon, do you or any of your  
9 clients -- will you or any of your clients have to  
10 pay any of the charges that may result from this  
11 stipulation?

12 A. Since I personally live in the AEP service  
13 territory, I will not be paying this. There are -- I  
14 would say absolutely our clients would.

15 Q. And "your clients," who are those clients  
16 again?

17 A. The state of Ohio.

18 Q. The state of Ohio.

19 MR. BOEHM: I have no further questions,  
20 your Honor.

21 EXAMINER WALSTRA: Thank you.

22 Ms. Bojko.

23 MS. BOJKO: Yes. Thank you, your Honor.

24 - - -

25

CROSS-EXAMINATION

By Ms. Bojko:

Q. Good afternoon -- or, good evening, Mr. Donlon. Your understanding of the Commission's mission is to assure all residential and business consumers access to adequate, safe, and reliable utility services at fair prices, while facilitating an environment that provides competitive choices; is that right?

A. Yes.

Q. And you have been involved -- well, I'm not sure when you became involved, so I'll take a step back. Were you involved in 14-457 prior to the joint stipulation being negotiated on either October 20th or December 28th?

A. Indirectly.

Q. Would your answer be the same for 15-534?

A. Yes.

Q. Regarding the joint stipulation in this case, your involvement is with regard to three meetings, as I understand it, on December 28th, 29th, and 30th; is that correct?

A. And other internal meetings.

Q. And you were familiar with the procedural posture of the case before the stipulation was

1 entered into, meaning you understood that comments  
2 had been filed and that an order had been issued and  
3 rehearing had been granted on that; is that fair?

4 A. Correct.

5 Q. And, sir, you were aware that the parties  
6 sitting around the table were actually intervening  
7 parties in one or both of these cases; is that  
8 correct?

9 A. Correct.

10 Q. And the order that was issued in 14-457 on  
11 May 20th, 2015, denied Duke's request to utilize  
12 banked savings to claim a shared savings incentive,  
13 correct?

14 A. For 2013 only.

15 Q. Did you have a reason to believe that the  
16 Commission would revise its order and allow banked  
17 savings to be used for a claimed shared savings  
18 incentive?

19 A. I can't -- the entry was open for  
20 rehearing, as well as the fact that due to 310 and  
21 the issuance of that and Duke being unable to amend  
22 their portfolio once the September date had passed,  
23 and it coming to light that they had a different  
24 understanding than Staff did of how the banked  
25 savings would work, that that created a unique

1 opportunity -- unique circumstances and that Staff  
2 felt the Commission may take that into light.

3 Q. Well, Senate Bill 310 had already been  
4 effective prior to the May 20th, 2015 order; is that  
5 correct?

6 A. That is correct. However, the  
7 understanding of how they were using their banked  
8 savings and set up their portfolio plan was not  
9 explicitly understood by Staff.

10 Q. By the Staff, but you're not speaking for  
11 the Commission and when they issued their May 20th,  
12 2015 order; is that correct?

13 A. Staff cannot speak for the Commission.

14 Q. And referring to -- Duke made the choice  
15 to not file to amend its energy efficiency portfolio  
16 by the date outlined in Senate Bill 310; is that  
17 correct?

18 A. Yes, but that was before they had the  
19 opportunity -- before their, if I have my dates  
20 correct, that was before -- the amended -- the piece  
21 where they would have had to amend was before it came  
22 to light that Staff and the Company had a major  
23 disagreement on how they were using their bank.

24 Q. Well, isn't it fair that the issue had  
25 been before the Commission a long time before

1 September, in that parties had already filed comments  
2 and reply comments in the case?

3 A. Yes, but to my understanding that issue  
4 hadn't been brought to light, the exact piece of it.

5 Q. Well, the issue had been brought to light  
6 by the comments that were shown and entered into  
7 evidence today by the intervening parties; is that  
8 correct?

9 A. I'm not sure.

10 Q. And isn't it also true that the issue  
11 regarding Senate Bill 310 had been brought to light  
12 in Case 14-1580?

13 A. I didn't do an extensive review of that  
14 case before this one, so I don't know if the  
15 particulars about how they were using the bank was in  
16 that case or not. I think it may have been.

17 Q. And the order in 14-457 also discussed the  
18 outstanding Staff audit for the 2013 costs; is that  
19 correct?

20 A. It said that it would still be open to  
21 that.

22 Q. And I think this question was punted to  
23 you, sir, by Mr. Duff. Is Staff currently performing  
24 the audit of the 2013 costs?

25 A. '13 costs, no.

1 Q. Staff has completed that audit?

2 A. Yes.

3 Q. Has Staff filed the audit in the docket?

4 A. No, they did not.

5 Q. When did Staff complete that audit?

6 A. The exact date, I don't know. In the  
7 past, with the energy efficiency, often Staff just  
8 filed a letter stating they completed it and there  
9 had never been an issue with that in the past. So  
10 once the stipulation had been completed, I moved  
11 resources to other areas since our Staff is very busy  
12 right now and shorthanded.

13 Q. We can appreciate that.

14 But, so, I guess -- so did the letter get  
15 filed or you're saying it didn't, you decided not to  
16 file the letter.

17 A. Correct.

18 Q. And in that letter any problems that the  
19 Staff found with the audit would be contained in that  
20 filing, is that correct, any disallowances or  
21 questions from discovery responses, things of that  
22 nature?

23 A. Correct.

24 Q. Going back to the entry on rehearing that  
25 was issued in 14-457. It's your understanding that

1 the Commission typically or regularly grants  
2 rehearing to allow itself more time to consider  
3 evidence for a hearing that had been filed; is that  
4 fair?

5 A. That's fair.

6 Q. And it's your belief, as Director of  
7 Utilities, that a Commission order is valid until it  
8 is overturned by either the Supreme Court or until  
9 the Commission revisits the issue and issues a new  
10 order on the same subject; is that correct?

11 MR. JONES: I object. The witness is not  
12 an attorney. It's calling for a legal opinion.

13 MS. BOJKO: I thought I said in his  
14 capacity as Director.

15 EXAMINER WALSTRA: If you know.

16 A. One, I'm Director of Rates and Analysis.

17 Q. Sorry.

18 A. That's all right. You said "Utilities."  
19 It used to be "Utilities" and we merged groups. But  
20 yes, that is my understanding.

21 Q. And the stipulation, the joint stipulation  
22 was also filed in Case 15-534; is that correct?

23 A. Yes.

24 Q. And that case is about the 2014 energy  
25 efficiency costs; is that correct?



1 A. Correct.

2 Q. And is Staff performing an audit on the  
3 2014 costs?

4 A. Yes.

5 Q. Is that audit complete?

6 A. No, it is not. But it will be done before  
7 June 6th of '16 per the stipulation.

8 Q. And you, sir, are aware that intervening  
9 parties filed comments and reply comments in  
10 15-534; is that correct?

11 A. Yes.

12 Q. And that case is still pending before the  
13 Commission?

14 A. That is my understanding.

15 Q. There were a lot of cases discussed today.  
16 I'm not going to go through all of them for you. I  
17 wanted to understand, you said you were indirectly  
18 involved in 15-1480; is that correct?

19 A. Correct.

20 Q. And were you involved in 11-4393?

21 A. Not at the time that it was going on, but  
22 now that I'm in charge of the people in that  
23 department, you know, the outcome of that case and  
24 items of that nature, but the specifics of what  
25 happened during the negotiations I would not be aware

1 of.

2 Q. So you've read the stipulation in that  
3 case?

4 A. I'm not sure I've read the stipulation as  
5 much as been ramped up to speed by my Staff.

6 Q. And is it your understanding that the  
7 shared savings incentive mechanism expired at the end  
8 of 2015?

9 A. It was open for negotiations in the, what  
10 was it, the 1580 case -- or, 1280, whatever that  
11 other case is, sorry.

12 Q. First, the stipulation in 11-4393 said it  
13 would expire unless the parties met and discussed,  
14 I'm paraphrasing, and decided it was reasonable and  
15 beneficial for customers to move forward; is that  
16 correct?

17 MS. WATTS: Objection. That  
18 mischaracterizes the document significantly.

19 MS. BOJKO: I did not intend to do that.

20 MR. JONES: Your Honor, the filings by the  
21 Staff speak for themselves as far as what the  
22 comments were for the case.

23 EXAMINER WALSTRA: I understood that's a  
24 filing. I think it's already part of the record at  
25 this point.

1 MS. BOJKO: Fair enough. Thank you.

2 Q. So it's your understanding that Duke and  
3 Staff had a total of four meetings with Staff prior  
4 to reaching an agreement; is that correct?

5 A. Yes.

6 Q. And, to your knowledge, no intervening  
7 parties were invited to those four meetings between  
8 Staff and Duke?

9 A. Not to my knowledge.

10 Q. And, to your knowledge, no intervening  
11 parties participated in those four meetings between  
12 Duke and Staff?

13 A. No, they did not.

14 Q. And during these four meetings did you  
15 receive any documents from Duke?

16 A. Not that I know of.

17 Q. When did Staff and Duke reach an agreement  
18 on the joint stipulation?

19 A. January 6th, about 4:00.

20 Q. When did Staff agree to the terms of the  
21 stipulation that was ultimately filed on January 6th?

22 A. We agreed with the Company, subject to  
23 intervenors' involvement, on January 30th, probably  
24 around 2:00 or 3:00 in the afternoon.

25 Q. Did you mean December 30th?

1 A. Did I say "January"?

2 Q. Yes.

3 A. Sorry.

4 Q. Okay. And so, after you reached an  
5 agreement around 2:00 or 3:00 on December 30th,  
6 that's when you believe that the stipulation that you  
7 had agreed to in principle was forwarded to  
8 intervening parties?

9 A. Yes.

10 Q. And you referred to it a little bit with  
11 Mr. Boehm about that exact e-mail. Isn't it true  
12 that that e-mail sent around the draft stipulation  
13 and asked parties to review it and let Staff know by  
14 noon on Wednesday, January 6th, whether your client  
15 has an interest in being a signatory party?

16 MS. WATTS: Objection. The witness has  
17 already said he did not review -- that the e-mail was  
18 sent by someone else, and it was only his  
19 understanding of what was possibly in it.

20 EXAMINER WALSTRA: I believe that was his  
21 testimony.

22 Q. Were you CC'ed on the e-mail, sir?

23 A. Yes.

24 Q. So you did actually receive the e-mail.

25 A. Yeah. I just don't remember verbatim as I

1       stated earlier.

2                   MS. BOJKO:   Your Honor, may I approach?

3                   EXAMINER WALSTRA:   You may.

4                   MS. BOJKO:   Well, first, your Honor, I  
5       guess I'd like to have marked as OMA Exhibit 21, an  
6       e-mail correspondence from Staff to intervening  
7       parties and OMA's response to that.

8                   EXAMINER WALSTRA:   So marked.

9                   (EXHIBIT MARKED FOR IDENTIFICATION.)

10                  MS. BOJKO:   May we approach, your Honor?

11                  EXAMINER WALSTRA:   You may.

12                  Q.       Sir, do you have in front of you what's  
13       been marked as OMA Exhibit 21?

14                  A.       Yes.

15                  Q.       Does the bottom portion of the e-mail  
16       refresh your recollection of the e-mail that was  
17       forwarded by John Jones, Attorney General with the  
18       Commission, to intervening parties, Duke, and copied  
19       a number of Staff, three Staff personnel?

20                  THE WITNESS:   Can you reread that?   I was  
21       reading the e-mail.

22                  MS. BOJKO:   My apologies.

23                  THE WITNESS:   No, it's all right.

24                  (Record read.)

25                  MR. JONES:   Your Honor, I guess I'm going

1 to have to object. This exhibit, it is not something  
2 that was authored by Mr. Donlon. It was authored by  
3 Staff's counsel, myself, John Jones. For that  
4 purpose, I don't think it's appropriate. It's an  
5 e-mail communication with other parties to the case,  
6 as to the circulating of the draft stipulation.

7 MS. BOJKO: Your Honor, Mr. Donlon's  
8 copied on the e-mail. He has knowledge of the  
9 e-mail. The e-mail is appropriate. It's not talking  
10 substantive issues. Once a non-attorney is copied on  
11 it, it is a public record at the Commission as well.

12 MS. WATTS: Your Honor, I object as well.  
13 I'm not questioning whether it's a public record or  
14 not. I'm questioning whether it can be used as the  
15 basis for questioning of Mr. Donlon because the fact  
16 that he's merely copied on it doesn't indicate that  
17 he has any knowledge of the content.

18 MR. JONES: And, your Honor, I don't want  
19 to make myself a witness in this proceeding. I mean,  
20 this is me communicating to somebody. I mean, does  
21 that make me a witness in this proceeding?

22 MS. BOJKO: Your Honor, Mr. Donlon's  
23 actually made quite a few assertions and claims about  
24 what this e-mail actually said in the  
25 cross-examination of Mr. Donlon. We've heard from

1 Mr. Duff, as well, as to what was actually provided  
2 to the intervening parties and what it says and the  
3 requests that were made therein.

4 And this is now actually the evidence that  
5 shows the exact words and actually contradicts all of  
6 the previous testimony regarding the request for  
7 comments and feedback that we've heard continuously  
8 throughout the day.

9 MR. JONES: That's a misstatement, your  
10 Honor. It's consistent with the characterization  
11 Mr. Donlon gave in testimony already today.

12 MS. WATTS: And, likewise, consistent with  
13 Mr. Duff's testimony.

14 MS. BOJKO: That's debatable, your Honor.

15 MR. STINSON: Your Honor, nonetheless, it  
16 is the best evidence as to what was submitted and  
17 what was circulated than what's been testified to  
18 today. It's highly relevant.

19 EXAMINER WALSTRA: I'm going to allow it.

20 MS. BOJKO: Thank you.

21 MS. MOONEY: Mr. Duff went on and on about  
22 it.

23 MS. BOJKO: Thank you, your Honor. I  
24 think there's a question pending.

25 THE WITNESS: I have no idea what it is.

1 I'm sorry.

2 MR. JONES: Can I make a clarification  
3 here? Is this to refresh his memory or what's this  
4 document being used for? To refresh his memory?

5 MS. BOJKO: Your Honor, Mr. Duff at length  
6 talked about the feedback -- or, he actually said the  
7 opposite, he said that nobody responded to the  
8 request for feedback.

9 EXAMINER WALSTRA: I mean, are you  
10 asking -- is this for the purposes of reflection?

11 MS. BOJKO: He's copied on the e-mail.  
12 I'm asking him about the e-mail.

13 MR. JONES: Your Honor, he's already  
14 characterized the e-mail and now she's asking him to  
15 refresh his recollection as to the wording of the  
16 e-mail. So now he's had a chance to review that and  
17 now he can testify.

18 MS. WATTS: And, your Honor, I would note  
19 that Mr. Duff is not copied on any of this, so I  
20 don't see how it relates to his testimony in that  
21 way.

22 MS. BOJKO: Well, your Honor, that's why  
23 we didn't use it to impeach Mr. Duff and his claims  
24 that nobody responded. But Mr. Donlon is actually  
25 copied on this e-mail so he is the appropriate



1 witness to discuss this. He did state that he -- he  
2 tried to paraphrase what the actual e-mail said, and  
3 he said he didn't have it in front of him, so I'm  
4 putting it in front of him.

5 MR. JONES: To refresh his recollection of  
6 the e-mail? I think that's the purpose of it, your  
7 Honor.

8 EXAMINER WALSTRA: And this was brought up  
9 after he said he couldn't remember the specifics, so  
10 as to the e-mail from his attorney, you have  
11 referenced the bottom portion of it?

12 MS. BOJKO: Actually, it's not  
13 attorney-client communications because it went to --

14 EXAMINER WALSTRA: I'm not saying that.  
15 I'm just saying in terms of what we're talking about,  
16 are you talking about the e-mail --

17 MS. BOJKO: For this question. I'll get  
18 into the rest in a minute, your Honor.

19 EXAMINER WALSTRA: Okay.

20 MS. BOJKO: He also spoke to the rest and  
21 Mr. Duff did as well. So I think this information is  
22 highly relevant and it goes to the first, second, and  
23 third prongs of the test. It also goes to the  
24 credibility of the testimony that we've heard today  
25 about what e-mail was exactly sent to parties and who

1 chose to respond or who didn't choose to respond.  
2 That statement was made by Mr. Duff at least three  
3 times, four times.

4 MR. STINSON: Your Honor, Mr. Donlon is  
5 the person who's testifying here today, supporting  
6 the stipulation, who has the knowledge as to what  
7 happened and when it happened, and we should be able  
8 to show that for the record. I don't think  
9 the parties -- the signatory parents should be  
10 permitted to hide behind any allegations that can be  
11 easily proved by the e-mail.

12 MR. JONES: Your Honor, nobody is hiding  
13 here. And, like I said, you can get different  
14 interpretations of this e-mail. I mean, the intent  
15 was to share it with other parties to get feedback as  
16 to what they were proposing in exchange.

17 MS. BOJKO: And I just object to that  
18 characterization.

19 EXAMINER WALSTRA: I'm going to allow it.

20 MS. BOJKO: I still think there was a  
21 question pending. I'm not sure if there was.

22 MR. JONES: Your Honor, I'm going to make  
23 an additional objection for the record. Again, this  
24 would be hearsay. It's not a statement made by  
25 Mr. Donlon; it's a statement made by his Counsel.

1 Mr. Donlon can't climb in my head and understand my  
2 thoughts and interpret my language.

3 EXAMINER WALSTRA: That's understood. I  
4 don't think he's being asked to do that at this time.

5 (Record read.)

6 A. Again, I have no -- I have no reason to  
7 think anything has been altered in this e-mail.

8 Q. And the e-mail states that Staff and Duke  
9 have been having settlement agreements and they've  
10 captured them in the attached document, and that they  
11 believe that this draft resolves all issues. And  
12 then the e-mail goes on to say "Please review the  
13 attached proposed settlement draft and let me know by  
14 noon on Wednesday, January 6, 2016, whether your  
15 client has an interest in being a signatory  
16 party"; is that correct?

17 A. That is what the piece of paper you put in  
18 front of me says.

19 Q. And in this document, it does not ask  
20 parties to negotiate or invite them to a settlement  
21 discussion; is that correct?

22 A. Not in that specific language, but I think  
23 it was the intent to have some discussion if people  
24 wanted it, by Staff anyways.

25 Q. And I think you stated earlier that you,

1 Staff and Duke, arrived at a decision at 2:00 or 3:00  
2 on December 30th to move forward with the settlement  
3 and the terms that appeared in this draft  
4 stipulation; is that correct?

5 A. Yes.

6 Q. And then at 3:19, on Wednesday  
7 December 30th, this was sent to intervening parties;  
8 is that correct?

9 A. Yes. Once we had come to an agreement  
10 between -- a rough agreement between the parties,  
11 then we sent out the stipulation.

12 Q. And a request was asked for parties to  
13 review this and provide whether they have an interest  
14 in being a signatory party within two-and-a-half,  
15 three business days over the holidays; is that  
16 correct?

17 A. I'd have to look at exact --

18 MR. JONES: I would object as to, I mean,  
19 the calendar speaks for itself, your Honor. I don't  
20 have a calendar in front of me that tells us the  
21 holidays between the 30th and 6th. We're throwing  
22 around different days here.

23 MS. BOJKO: Your Honor, I'd be happy to  
24 clarify.

25 MR. JONES: I think the calendar speaks

1 for itself, your Honor.

2 EXAMINER WALSTRA: I think the calendar  
3 does speak for itself. Do you have a clarifying  
4 question for that?

5 Q. (By Ms. Bojko) Well, I want to know what  
6 else is going on. So we have New Year's Eve coming  
7 up where people have Friday off, they have the  
8 weekend, and then they have Monday and Tuesday; is  
9 that --

10 MS. WATTS: Objection, your Honor.  
11 Counsel can't possibly know who's working and who's  
12 not. I object to the characterization of what  
13 people's schedules are.

14 MR. JONES: I would object, too, your  
15 Honor.

16 MS. BOJKO: I didn't say schedules. I'm  
17 trying to figure out what's going on in this time  
18 period.

19 MS. WATTS: Well, you suggested that  
20 people have New Year's Eve off. I don't know about  
21 you, but I did not. So, you know, I don't think  
22 that's necessarily true.

23 MS. BOJKO: I actually counted New Year's  
24 Eve as a business day. Even though some offices were  
25 closed, I counted that as a business day.

1 EXAMINER WALSTRA: I understand what  
2 they're saying. You can go forward.

3 Q. (By Ms. Bojko) So the 31st was a business  
4 day, Friday the 1st was a holiday, then there were  
5 two weekend days, and Monday was the second business  
6 day, Tuesday was the third business day, and you  
7 requested a response by noon on January 6th; is that  
8 fair?

9 A. Subject to check the actual days of the  
10 week, sure, yes.

11 Q. And, sir, were you also aware, which I  
12 think you were because I think I saw you sitting,  
13 during this time period the Commission also had, and  
14 all the intervening parties at this table were  
15 involved in another hearing at the Commission that  
16 was going forward and that hearing was the AEP  
17 Purchase Power Agreement proceeding, 14-1693; is that  
18 correct?

19 A. Yes.

20 Q. I thought you said earlier that people did  
21 not or parties chose not to provide feedback or not  
22 to respond. Is that what you indicated earlier?

23 A. I don't think I used the words "chose."  
24 No one responded by noon. In fact, I think the first  
25 e-mail was yours, back to Mr. Jones, at 6:08, after

1 the stipulation had been filed.

2 Q. Yes, at 6:08. I actually -- are you aware  
3 there were several parties that drafted e-mails in  
4 response while they were sitting in the AEP Purchase  
5 Power Agreement hearing?

6 MR. JONES: I would object as to relevance  
7 to other hearings going on and where people are  
8 sitting, your Honor.

9 MS. BOJKO: Your Honor, it's very relevant  
10 of the time period and the factors of the stipulation  
11 test and how much time was provided to parties and if  
12 there was true negotiation and bargaining. There's  
13 been a lot of claims and assertions and testimony  
14 today that parties had a fair opportunity to  
15 negotiate and bargain and this contradicts.

16 MR. JONES: Your Honor --

17 EXAMINER WALSTRA: I don't think  
18 Mr. Donlon is aware of who's drafting e-mails during  
19 what hearings.

20 MS. BOJKO: I asked if he knew.

21 EXAMINER WALSTRA: If he knows, he can  
22 answer.

23 A. I don't know where anyone writes any of  
24 their e-mails.

25 Q. Okay. And isn't it true, which is

1 evidenced -- and so, you are aware that there were  
2 multiple parties that did, in fact, respond to this  
3 request, maybe not by the noon deadline, but there  
4 were other parties besides OMA that responded to this  
5 request, correct?

6 A. Multiple parties responded after your -- I  
7 want to say yours was the first one to come through,  
8 and I'm only using this as the 6:08 from the e-mail  
9 you provided, so. Yes, multiple e-mails came after  
10 you sent the first one.

11 Q. And isn't it true that parties, such as  
12 OMA, explained their concerns of the timing of  
13 providing this stipulation when no party was aware,  
14 prior to receiving this stipulation on the 30th, that  
15 the discussions were even ongoing, and people  
16 explained their concerns with the timing and the  
17 request to have the quick turnaround with three  
18 business days, plus the AEP PPA going on?

19 MR. JONES: I object, your Honor. She's  
20 testifying in the record here. It's inappropriate.

21 MS. BOJKO: No. Actually, your Honor, I  
22 asked him if people made those responses and feedback  
23 back to Mr. Donlon who was on these e-mails.

24 EXAMINER WALSTRA: Overruled.

25 THE WITNESS: Can you repeat the question,



1 please?

2 (Record read.)

3 MS. WATTS: And, your Honor, I'd like to  
4 interpose an objection as well, because apparently on  
5 this particular day, Mr. Bojko was representing  
6 OMAEG, and so it's unclear to me who's on first on  
7 this particular day, but it appears not to have been  
8 OMA.

9 MS. BOJKO: Your Honor, that's just  
10 inappropriate.

11 EXAMINER WALSTRA: I'm going to overrule.

12 THE WITNESS: I'm sorry. What?

13 EXAMINER WALSTRA: You can answer the  
14 original question.

15 A. Those statements were made after the  
16 stipulation had been filed.

17 Q. And is it reasonable to assume that  
18 parties may not have known the stipulation was filed  
19 when they sent their response?

20 A. Parties made that claim in some of their  
21 responses.

22 Q. And isn't it also true that OMA did, in  
23 fact, make a couple suggestions, albeit technical  
24 kind of changes, to the stipulation through this  
25 e-mail received, to the companies?

1           A.       I'll have to reread this e-mail.

2                   According to the e-mail you provided, yes.

3           Q.       Do you have in front of you Joint  
4 Exhibit 1?

5           A.       The stipulation, yes.

6           Q.       Could you turn to page 7, please. Section  
7 b. of the stipulation. Are you there?

8           A.       Yes.

9           Q.       This states that Parties agree that Staff  
10 will accept Duke's application and 2013 cost recovery  
11 as filed. I'm assuming that this statement means, to  
12 Staff, except as modified by the stipulation; is that  
13 correct?

14          A.       Yes. And this is specifically talking  
15 about the cost recovery, the rider.

16          Q.       Okay. And even though there's a reference  
17 to 2013 cost recovery as filed, this statement is  
18 also except as modified with regard to the audit that  
19 was currently being performed; is that correct?

20          A.       I think I'll refer to Mr. Duff's comments  
21 on this.

22          Q.       And he told me to ask Staff, that's why  
23 I'm asking you. He said that he was not sure what  
24 you thought it meant, and so I'm asking you.

25          A.       My understanding he said that to ask Staff

1 about the timing of when we'd actually complete the  
2 '14.

3 Q. Okay. So am I right that when Staff  
4 executed the stipulation, they believed that the  
5 application was being modified by the stipulation and  
6 also would be subject to the ultimate audit and  
7 true-up that would be performed pursuant to that  
8 audit of the 2013 costs?

9 A. Can you rephrase that?

10 Q. Sure. Sure.

11 A. Too many thirteens in there.

12 Q. I'm looking at the -- I guess the  
13 statement is that the parties agree that Staff will  
14 accept Duke's application and 2013 cost recovery as  
15 filled in 14-457, but it's my understanding that  
16 there would be two exceptions to that: One being  
17 except as modified by the stipulation; and two being  
18 except as modified by the results of the audit that  
19 Staff was currently undergoing for the 2013 costs.

20 A. No. That -- no. It would be accepting  
21 the '13 as filed.

22 Q. So not as modified by the stipulation and  
23 regardless --

24 A. As modified by the stipulation, but not  
25 dependent on the audit.

1           Q.       So you believe that this stipulation took  
2 away Staff's right to audit the 2013 costs and took  
3 away Staff's ability to disallow or recommend  
4 disallowances with regard to the 2013 costs?

5           A.       We had already completed the audit. It  
6 wasn't filed. We had completed the audit, so that is  
7 -- we are accepting that as filed, their rider costs  
8 as filed.

9           Q.       Okay. Well, that's -- okay.  
10                    You're obviously familiar that when Staff  
11 does these audits, they ask numerous discovery  
12 requests of the companies, right?

13          A.       (Witness nods.)

14          Q.       And through --

15                   THE COURT REPORTER: Is that a "yes"?

16                   THE WITNESS: Oh. Yes. Sorry. I wasn't  
17 sure if she was actually done with the question.

18                   MS. BOJKO: I took his nod as a "yes."

19                   THE COURT REPORTER: I did, too, but I  
20 can't take his nod as a "yes" for the record.

21                   THE WITNESS: I apologize. Yes.

22                   MS. BOJKO: Me too. Sorry.

23                   THE COURT REPORTER: It's okay.

24          Q.       And that happened in this case; is that  
25 correct?

1           A.       Yes.

2           Q.       And through that discovery process, the  
3 Staff looks in great detail at the expenses and the  
4 costs that Duke is flowing through the rider; is that  
5 fair?

6           A.       Yes, besides "great detail" is relative,  
7 so.

8           Q.       And when, through that discovery, Staff  
9 questioned certain expenses that were being flowed  
10 through the energy efficiency rider, and when Duke  
11 filed a response the Company, at times, said you are  
12 correct, we will remove that expense, that was  
13 an unintentional expense included in the rider costs.  
14 Do you recall seeing any of those?

15          A.       I'm not -- I don't recall any of those  
16 particularly, but I did not do the audit myself, that  
17 would have been my Staff.

18          Q.       Okay. Well, let me ask you from your  
19 perspective. If that occurred and Duke said that  
20 Staff was right and there was an error and that costs  
21 should not have been included, is Staff still  
22 accepting Duke's costs and expenses as filed in the  
23 application regardless of whether Duke admitted  
24 errors and said those would be pulled out of the  
25 rider?

1           A.       I think the stipulation speaks for itself  
2 there.

3           Q.       "Speaks for itself" meaning Staff is  
4 accepting the as-filed 2013 cost recovery, and if the  
5 utility included errors that Staff is nonetheless  
6 adopting the application and the rates and expenses  
7 and costs as filed by Duke; is that correct?

8           A.       Yes.

9                   MS. BOJKO: Thank you, your Honor. I have  
10 no further questions.

11                   EXAMINER WALSTRA: Thank you.

12                   MS. BOJKO: Thank you, Mr. Donlon.

13                   THE WITNESS: Thank you.

14                   EXAMINER WALSTRA: Ms. Ghiloni.

15                   MS. GHILONI: No questions, your Honor. I  
16 apologize.

17                   EXAMINER WALSTRA: Mr. Stinson.

18                   MR. STINSON: Thank you, your Honor.

19                               - - -

20                               CROSS-EXAMINATION

21 By Mr. Stinson:

22           Q.       Good evening, Mr. Donlon.

23           A.       Good evening.

24           Q.       Hopefully just a few questions here. What  
25 did you review to prepare for your testimony today?

1           A.       The -- all of the intervening questions,  
2       the intervenors' testimony, Mr. Duff's testimony, the  
3       stipulation, some of the historical cases, filings,  
4       various other documents that I can't necessarily  
5       think of which ones right now.

6           Q.       What do you mean by "intervening  
7       questions"?

8           A.       The interrogatories.

9           Q.       Oh, the discovery responses?

10          A.       Yes.

11          Q.       And you also reviewed Mr. Gonzalez's  
12       testimony?

13          A.       Over the weekend, I did.

14          Q.       And, Mr. Donlon, you said you're Manager  
15       of the Rates and Analysis Department for the PUCO,  
16       correct?

17                   MS. BOJKO: Director.

18          A.       As Ms. Bojko said, I'm the Director.

19                   (Laughter.)

20          A.       That's semantics.

21          Q.       I'll note that on my question, Mr. Donlon.  
22                   And what are your major job  
23       responsibilities as Manager -- as Director?

24          A.       I oversee the department. So my  
25       department includes power siting, forecasting, energy

1 efficiency and renewables, some administration,  
2 rates, tariffs, finance, depreciation. I feel like  
3 I'm missing something else that we do as well in the  
4 department. And then my job is to make sure the  
5 department is working as a whole, provide guidance  
6 where it's needed, and make sure I'm keeping the  
7 Chief of Staff up to speed on everything that's going  
8 on in my department.

9 Q. Is the Chief of Staff your immediate  
10 supervisor?

11 A. Yes.

12 Q. And what were your specific  
13 responsibilities with respect to the stipulation  
14 filed in this proceeding?

15 A. Once -- advising the Chief of Staff on  
16 discussing some information; and then once he stepped  
17 out of the negotiations, lead the negotiations from  
18 Staff's point of view with heavy assistance from my  
19 Staff.

20 Q. And the Chief of Staff is Jason Rafeld?

21 A. Correct.

22 Q. And what are his general duties?

23 A. On a broad scale and simplistically, he  
24 keeps the Commission running on a daily basis, and  
25 sets policy for Staff as we advise him, and he makes



1 all the financial decisions.

2 Q. Is he also responsible for communicating  
3 with the Commissioners about the pending cases?

4 A. I can't speak to that. Well, pending  
5 cases, no.

6 Q. He doesn't discuss with the Commissioners,  
7 pending cases?

8 A. I can't speak to what Mr. Rafeld does when  
9 I'm not with him.

10 Q. And you stated that Mr. Rafeld, at one  
11 point, was handling the negotiations in this matter  
12 for the stipulation; is that correct?

13 A. As we've discussed, the first meeting that  
14 started these negotiations, Mr. Rafeld was, at least  
15 according to this since I wasn't in the room,  
16 Mr. Rafeld was the only attendee from Staff.

17 Q. Would you disagree that that meeting was  
18 held October 20th, 2013?

19 A. I don't know when it was held. Subject to  
20 the Interrogatory 2-010. OMA Exhibit 18.

21 Q. Do you remember when you first had a  
22 conversation with Mr. Rafeld about the proposed  
23 stipulation?

24 A. It probably would have been after that  
25 meeting. The exact day, I don't know. We meet on a

1 daily basis about hundreds of thousands of topics.

2 Q. There's been a lot of testimony today  
3 about the 19.75 million figure. When did you first  
4 learn about that figure as a part of the stipulation?

5 A. That became -- that was a negotiated  
6 amount. There was -- it wasn't a finalized number  
7 when I first heard about it. So there was still  
8 discussion. It was close to that range, but it  
9 wasn't a finalized number yet.

10 Q. Well, my question was, do you recall when  
11 you first heard about the \$19.75 million figure?

12 A. When we finalized that number?

13 Q. No. When that number first came to your  
14 attention, whether it was finalized or not.

15 A. Well, again, it was -- there was a lot of  
16 negotiations back and forth, so that number, I mean,  
17 it may have been brought up, it may have moved, there  
18 was a lot of moving numbers throughout the  
19 settlement.

20 Q. But my question was when. Was it after  
21 the October 20th meeting, before the December 28th  
22 meeting?

23 A. Again, that firm number, I'm not sure  
24 exactly when that was discussed. It didn't become  
25 finalized at least before the other parties had a

1 chance to, until really the 30th, because the entire  
2 negotiations were coming back and forth on different  
3 things. So that exact number, I can't tell you when  
4 that first appeared, because we might have discussed  
5 it, moved off of it and then came back to it. I just  
6 don't remember specifics.

7 Q. My question is, do you recall when you  
8 first learned of the \$19.75 million figure?

9 A. Again, I can't give you an exact time. I  
10 think by the 30th -- the 29th we were pretty close to  
11 that number, but I'm not sure, or during the  
12 29th meeting we came to that number, but I'm not  
13 exactly sure. There was a lot of negotiations.  
14 There were a lot of numbers thrown around just on  
15 Staff's side of where we should be.

16 Q. Mr. Rafeld, did he give you the -- was he  
17 the first to give you the \$19.75 million figure?

18 A. It was a negotiated amount. There's a lot  
19 of give and take back and forth just within Staff and  
20 having negotiations or discussions between Staff in  
21 various meetings that the Company was not a part of.

22 Q. Again, my question is very simple. I just  
23 want to know if Mr. Rafeld was the person who first  
24 gave you the \$19.75 million figure without --

25 MR. JONES: Objection. It's been asked

1 and answered several times, your Honor.

2 MR. STINSON: He's evaded it each time,  
3 your Honor. Talking about back and forth, this and  
4 that.

5 MS. WATTS: Objection to the  
6 characterization of evasion, and it has been asked  
7 and answered.

8 MR. JONES: He's testified --

9 EXAMINER WALSTRA: Sustained. I think  
10 he's answered to the best of his knowledge.

11 Q. (By Mr. Stinson) You went through several  
12 persons' names with Mr. Boehm, and I want to talk a  
13 little bit about those persons as well. I believe  
14 you mentioned Theresa White. Would it be correct for  
15 me to refer to the people that Mr. Boehm mentioned  
16 as, like, your negotiating team or your team for this  
17 proceeding, just so we have a reference point?

18 A. Sure. That works.

19 Q. Okay. Let's talk about the negotiating  
20 team. You mentioned a Theresa White, I believe.  
21 What's her position?

22 A. She's the Deputy Director of the Rates and  
23 Analysis Department.

24 Q. And did she have a specific responsibility  
25 with respect to these negotiations?

1           A.       She's really the number two person in the  
2 department.

3           Q.       And Natalia Messenger, she's an Assistant  
4 Attorney General; is that correct?

5           A.       Correct.

6           Q.       And, of course, Mr. Jones is also an  
7 Assistant Attorney General.

8           A.       Correct.

9           Q.       And Ray Strom, what's his position?

10          A.       He's the Chief of Power Siting, and  
11 Renewables, and Energy Efficiency. It might be  
12 Renewables, Energy Efficiency, and Power Siting. I'm  
13 not sure which way that goes.

14          Q.       And did he have any specific  
15 responsibilities with respect to the stipulation  
16 negotiations?

17          A.       We may be able to get through -- cut  
18 through a lot of this. My management style is to be  
19 all-inclusive. So, you know, no one necessarily --  
20 while I make the financial decision of where our  
21 department is going, I'm going to listen to all of my  
22 Staff. They have equal voices and we discuss  
23 everything openly at those times or at least  
24 internally.

25          Q.       So your response is that they -- the

1 members of the team don't have specific  
2 responsibilities in the negotiation?

3 A. I would say we're all fairly equal in our  
4 discussions, in listening and negotiating all the  
5 terms, and I listen to all of them on the various  
6 topics that they weigh in on.

7 Q. And who is -- what is Robert Wolfe's  
8 position?

9 A. He is a Utility Specialist 3.

10 Q. And Kristen Braun?

11 A. Kristen Braun is a -- what is -- admin --  
12 she's a -- I forget the first term. She's the  
13 Manager of the Renewables and Energy Efficiency.

14 Q. Thank you.

15 We've already talked a bit about your  
16 involvement in the stipulation, we won't go over that  
17 again, but were you the person who gave the final  
18 approval for Staff to sign the stipulation?

19 A. Ultimately, the final approval came from  
20 Jason Rafeld.

21 Q. And just to be clear, you mentioned  
22 briefly the October 20th meeting that Mr. Rafeld  
23 attended. There were the three other meetings that  
24 have been mentioned today, December 28th, 29th, and  
25 30th, and you did attend all of those meetings,

1 correct?

2 A. The last three, correct.

3 Q. And I believe the first, December 28th,  
4 was in person, and the 29th and 30th were by  
5 telephone?

6 A. Correct.

7 Q. Did you participate in any other meetings  
8 with Duke regarding settling these cases?

9 A. Not to my recollection.

10 Q. And no other negotiation meetings were  
11 held in these proceedings; is that correct?

12 A. Not to my recollection. With the Company,  
13 with Duke. I mean, Staff had their own internal  
14 discussions.

15 Q. And the intervening parties in these  
16 proceedings, tell me if you don't understand the  
17 acronyms, I'm sure that you do, I'll just go through  
18 them quickly, the intervening parties are OCC, OMA,  
19 OEG, OPAE, Kroger, and ELPC, correct?

20 A. Subject to check, it's my understanding.

21 Q. And you understand that I mean those  
22 individual parties when I mention the "intervening  
23 parties"?

24 A. Yes.

25 Q. Okay. Just to clarify things, none of the

1     intervening parties were -- let me back up.

2                 None of the intervening parties were  
3     present at the negotiation sessions held December  
4     28th, 29th, and 30th, correct?

5             A.       No, they were not.

6             Q.       And none were invited to those meetings,  
7     correct?

8             A.       No, they were not.

9                 MR. STINSON: May I approach, your Honor?

10                EXAMINER WALSTRA: You may.

11                MR. STINSON: I'd like to have this marked  
12     as OCC Exhibit 1.

13                EXAMINER WALSTRA: So marked.

14                (EXHIBIT MARKED FOR IDENTIFICATION.)

15             Q.       I'll give you an opportunity to review  
16     those pages, Mr. Donlon. Let me know when you're  
17     ready.

18             A.       Depending on the questions, you can go  
19     forward.

20                MR. JONES: Again, your Honor, I'm going  
21     to object to this exhibit. Again, it contains  
22     hearsay. This is not anything that Mr. Donlon  
23     prepared and there's comments here by Counsel. I  
24     mean, we're talking about many days of different  
25     communications here going on and I don't think it's



1 appropriate.

2 MR. STINSON: Well, your Honor, I think  
3 we've discussed it before with respect to the exhibit  
4 that Ms. Bojko presented just a few moments ago.  
5 Working from the back, the string of e-mails, the  
6 first is the same that was in Ms. Bojko's OMA  
7 exhibit. The other e-mails are the string and give  
8 reference to the timing of the process of the  
9 negotiations and subsequent actions and it gives  
10 context to what occurred and the reason things did  
11 occur.

12 MR. JONES: Your Honor, I don't even think  
13 that all the communications are here. This is not  
14 even all of the communication that went back between  
15 the parties and Staff. I can see at least one or two  
16 e-mails that are missing here, so this is not all the  
17 communications.

18 MR. STINSON: It's not represented to be  
19 all communications, your Honor. It's represented to  
20 be communications in the string of e-mails.

21 MR. JONES: So selective communications,  
22 your Honor. I object.

23 MS. WATTS: And I join in the objection  
24 and I agree it's hearsay. And I think if Mr. Donlon  
25 can be asked independently about some of the events

1 that occurred during this time, that's a different  
2 question. But the document, itself, being offered to  
3 prove the truth of the matter asserted, is purely  
4 hearsay.

5 MR. STINSON: Your Honor, if the objection  
6 would have been withheld to when I started asking the  
7 questions, that might have been easier.

8 EXAMINER WALSTRA: Mr. Donlon previously  
9 testified about the e-mail that originally went out.  
10 He testified about Ms. Bojko being the first  
11 respondent. But again, this appears to be selective.  
12 I don't even see Mr. Donlon responding to any of  
13 these e-mails. And I think he has already testified  
14 that there were responses. But going into specifics  
15 and what all those were --

16 MR. STINSON: If I could, your Honor.  
17 It's going to show that indeed OCC responded, OCC  
18 responded before Ms. Bojko responded. Other parties  
19 responded. It goes to show that there were  
20 arrangements made to have a meeting after the  
21 stipulation was filed. And it also provides what  
22 issues were on the table in that stipulation -- or,  
23 in the negotiation session, and that's going to the  
24 heart of the matter, your Honor.

25 What we're trying to decide here is

1 whether there is serious bargaining. And if we have  
2 a position or a process where intervening parties are  
3 kept from the initial negotiations, and then they're  
4 presented with a draft stipulation that they're told  
5 they may sign by January 6th at noon, and then  
6 there's subsequent communications to try to arrange  
7 other meetings. And then when OCC asks if the  
8 \$19.75 million is on the table, the response is but  
9 everything else was open for negotiation -- open for  
10 discussion.

11 MR. JONES: I'm going to object.

12 MR. STINSON: And that's probative, your  
13 Honor, and goes to the seriousness of the bargaining  
14 of the partial stipulation.

15 EXAMINER WALSTRA: Mr. Jones.

16 MR. JONES: Counsel is giving testimony.  
17 I object. Counsel is testifying.

18 MR. STINSON: Your Honor, it's not  
19 testimony. It's showing why this is probative.  
20 Mr. Donlon, as we indicated before, is the one person  
21 that has been offered in this proceeding who has been  
22 copied on the e-mails, who has been a part of the  
23 process, who can testify to what actually went on.  
24 This is the best evidence we have.

25 MS. WATTS: And, your Honor, it might be

1 probative if one of the witnesses was somebody who  
2 sent or received any of these e-mails, but Mr. Donlon  
3 was only copied on them, and we don't even know if he  
4 actually read them.

5 MR. STINSON: Your Honor, it goes to the  
6 fact that these were the e-mails that were sent to  
7 the parties and caused the parties to react or not to  
8 react.

9 MR. JONES: By Counsel, but not by Staff,  
10 your Honor.

11 MR. STINSON: They're still the e-mails  
12 that went to the parties.

13 MS. BOJKO: Your Honor, OMA supports the  
14 arguments and the admission of the e-mails.  
15 Actually, Mr. Donlon did receive the e-mails. He  
16 stated that he was part of the settlement  
17 discussions. He testified to whether people provided  
18 feedback or not. So this is directly responsive to  
19 the testimony provided by him as well as Mr. Duff  
20 earlier today. Mr. Duff was not on these e-mails, so  
21 we could not use Mr. Duff as the witness responsible,  
22 but Mr. Donlon is and was part of the process.

23 MR. STINSON: The February 16th e-mail,  
24 your Honor, the last one on the front of the cover  
25 shows that the \$19.75 million was not open for

1 discussion, and Mr. Donlon has previously stated that  
2 everything was open for discussion. I don't know if  
3 it's proper for Mr. Donlon to have discussions with  
4 his counsel at this point.

5 MS. MOONEY: Your Honor, OP&E also would  
6 like to see the admission of this document. It also  
7 reflects OP&E's position, at least our e-mail that we  
8 did not understand the stipulation was going to be  
9 filed, when it was filed, that we did not have -- had  
10 no idea that it was going to be filed. We certainly  
11 had not been able to give any feedback.

12 But there's so much testimony, when we  
13 asked Mr. Duff, when we asked Mr. Donlon, there's  
14 been so much testimony that yes, all the parties were  
15 given the draft of the stipulation, and they're  
16 saying before it was filed, and they're saying this  
17 in response to the idea that there was negotiations,  
18 that it satisfies the first prong of the three-part  
19 test. So how this could not be extremely relevant to  
20 whether or not this stipulation satisfies the  
21 three-part test, I don't know what else could be.

22 MR. JONES: Your Honor, best evidence --

23 EXAMINER WALSTRA: I'm going to sustain.  
24 All this evidence came in after the stipulation was  
25 filed, all these e-mails, after the parties, the

1 sponsoring parties filed the stipulation. So I don't  
2 think it goes towards the three-prong test, or it's  
3 not relevant as they filed the stipulation saying  
4 that everything had occurred. This all occurs after  
5 the stipulation is filed.

6 MR. BOEHM: Your Honor, I think that's the  
7 point. That's one of the points.

8 MS. MOONEY: That's the point.

9 MR. BOEHM: It happened after the  
10 stipulation was filed.

11 MS. MOONEY: There was no negotiations  
12 with anybody.

13 MR. BOEHM: Yeah.

14 MS. MOONEY: That's the whole point.

15 MR. JONES: Objection. Mischaracterizes  
16 the evidence, your Honor, as to what occurred between  
17 the 30th and the 6th. And like I said, there was  
18 opportunity provided. It was their choice as to when  
19 they wanted to respond. It wasn't like they had to  
20 respond on Wednesday evening. They could have  
21 responded Tuesday evening. It was planned that way.

22 MS. MOONEY: No.

23 MS. BOJKO: No, your Honor, that is  
24 absolutely untrue.

25 EXAMINER WALSTRA: Stop. Stop.

1 MR. STINSON: Your Honor, that's why we're  
2 offering this to get rid of the attorneys' testimony  
3 in this matter about what was going on or speculation  
4 from witnesses about what was said in an e-mail.  
5 These are the e-mails. That's what we're showing,  
6 what happened before and what happened or didn't  
7 happen afterwards, before or after the stipulation  
8 was filed on January 6th.

9 MR. BOEHM: In these cases, your Honor,  
10 it's very awkward because these communications take  
11 place between attorneys and it's very difficult for  
12 all of us to get up on the stand and say this is what  
13 happened, without, you know, sort of throwing the  
14 proceeding into a cocked hat. This is the next-best  
15 thing about what happened. I know if I wanted to get  
16 up and take the stand, there would be objections, the  
17 roof would go off the building.

18 MS. BOJKO: Your Honor, may I add one  
19 thing? I actually objected to both Mr. Duff and  
20 Mr. Donlon testifying to what parties did or did not  
21 do in response to this alleged e-mail and alleged  
22 request for feedback. And when I objected, it was  
23 admitted over my objection. So it's only fair, it  
24 goes to the credibility of the statements, the truth  
25 of the matter of the statements that the actual

1 evidence speaks instead of the witnesses with regard  
2 to how the other parties responded or didn't respond  
3 to the e-mails presented.

4 And I would also note as far as the time  
5 of this document being filed or not, many of us did  
6 not know the document had been filed because, as you  
7 know, there's a delay in DIS and receiving  
8 notifications of whether something is filed or not.  
9 So I don't think that that goes to whether parties  
10 knew or didn't know that the document had been filed.  
11 We did not know the document was filed when that  
12 e-mail was sent and I think that is evident by the  
13 e-mail.

14 So, I mean, I think that that's an  
15 improper characterization of parties' positions, and  
16 because the Company and Staff were able to put in  
17 what they believe other parties did and how they  
18 believe the other parties reacted, this is probative  
19 evidence about how the parties actually acted.

20 MR. JONES: See, your Honor, that's why  
21 this is hearsay. You get all these different  
22 interpretations of these e-mails. It doesn't give  
23 probative value here for this proceeding.

24 EXAMINER WALSTRA: I am going to sustain.  
25 You can question Mr. Donlon as to his knowledge and



1 his personal understanding, but again, these occurred  
2 after the filing. It is selective and it is hearsay  
3 from multiple people. So if you want to ask to his  
4 personal knowledge.

5 MR. STINSON: I would like to make a  
6 formal proffer of OCC Exhibit 2, your Honor.

7 EXAMINER WALSTRA: Noted.

8 MS. BOJKO: Your Honor, I'm sorry, may I  
9 ask a clarification?

10 EXAMINER WALSTRA: Yes.

11 MS. BOJKO: What time period are you  
12 saying that you believe the stip was filed? I mean,  
13 is that what we're going off of, the time stamp, or  
14 when it was posted on docketing?

15 EXAMINER WALSTRA: I realize it was posted  
16 at the end of the day on January 6th, so assuming  
17 people probably wouldn't get the understanding until  
18 the 7th. But I'm sustaining the objection for  
19 multiple reasons, not just that it was after the  
20 fact.

21 MS. BOJKO: Thank you for the  
22 clarification.

23 Q. (By Mr. Stinson) Mr. Donlon, are you aware  
24 of another meeting that was arranged on January 27th,  
25 2016?

1           A.       Subject to check the date, if you're  
2       referring to the meeting with all the intervening  
3       parties, yes, there was a meeting after that on that  
4       date, subject to check the actual date.

5           Q.       Did you receive any e-mails that scheduled  
6       that meeting, Mr. Donlon?

7           A.       I'm sure I did.

8           Q.       And was that e-mail received by you on  
9       January 27th?

10          A.       I cannot speak to when or what date I  
11       received certain e-mails. I get over a hundred a day  
12       easily.

13          Q.       And can I refresh your memory by looking  
14       at OCC Exhibit 1, the e-mail that was sent  
15       January 15th?

16          A.       Which page of that e-mail chain?

17          Q.       Pardon me?

18          A.       Which page of the e-mail chain?

19          Q.       It's -- the date of the e-mail is at  
20       page 5.

21          A.       Thank you.

22                    Yes, that is the date that was on the  
23       e-mail.

24          Q.       And you were copied on that e-mail,  
25       correct?

1 A. Correct.

2 Q. And did you also receive an e-mail from  
3 OCC on January 6th, indicating that they would like  
4 time to -- would like to have a meeting with all the  
5 parties to discuss the stipulation?

6 A. Yes. And that was -- we received that  
7 after we filed the stipulation.

8 Q. And that was received on January 6th; is  
9 that correct?

10 A. Yes.

11 Q. Would you agree it was filed -- it was  
12 dated as January 6th at 5:45 p.m.?

13 A. That is what it says on the document you  
14 provided me.

15 Q. That would be on page 7?

16 A. Yes, sir.

17 Q. And did OCC indicate at that time that  
18 they had a number of questions relating to the terms  
19 of the stipulation?

20 A. Give me a minute to reread it. That is  
21 what the -- what it says in the document you  
22 provided.

23 Q. And did OCC also indicate that it would be  
24 in a position to make a recommendation to our  
25 management after it had received answers to their

1 questions?

2 A. Yes, that's what it says in the document  
3 you provided.

4 Q. And on the same day, by e-mail dated June  
5 -- I'm sorry, January 6th, 2016, at 6:41 p.m., the  
6 Ohio Partners for Affordable Energy also indicated  
7 that there should be a meeting for the parties to  
8 discuss these cases; is that correct?

9 A. That is what it says, yes.

10 Q. Who all attended the meeting, the  
11 January 27th meeting we were talking about?

12 A. I don't have a list in front of me. Most  
13 of the parties. I know Mr. Boehm was not  
14 represented. Other than that, I think all the  
15 parties were represented from exactly who was in the  
16 room in the meeting on the 27th. I can't recall  
17 exactly.

18 Q. So representatives for all intervenors  
19 were present, correct?

20 A. I know Mr. Boehm was not represented.

21 Q. Okay. And you were there for Staff; is  
22 that correct?

23 A. Yes.

24 Q. And the Company was represented?

25 A. Yes.

1 Q. Who else was there for Staff?

2 A. Again, our legal representative of John  
3 Jones and Natalia. Theresa White was probably there,  
4 I'm guessing Ray Strom, Bob Wolfe, Kristen Braun,  
5 maybe Suzanne Williams, maybe David Lipthratt, but  
6 that's all assuming they were all there. They would  
7 have been invited, but I don't know what their  
8 schedules were and I can't remember exactly if they  
9 were there or not.

10 Q. So there was a good Staff contingent,  
11 right?

12 A. We normally travel heavy.

13 Q. Was Mr. Rafeld there?

14 A. No, he was not.

15 Q. Now, that meeting did not result in any  
16 changes to the draft stipulation; is that correct?

17 A. No, it did not.

18 Q. And were the intervening parties at that  
19 meeting informed that certain provisions of the  
20 stipulation would not be subject to negotiation?

21 A. No, they were not.

22 Q. Specifically, the intervening parties were  
23 not told that the \$19.75 million figure we've been  
24 discussing was not subject to negotiation?

25 A. No. What they were told was it would be

1 hard to move off that number. But, in my  
2 interpretation, "hard to move off that number" is not  
3 non-negotiable.

4 Q. And is it true that a second meeting was  
5 offered to be held?

6 A. I believe there was talk about a second  
7 meeting, but then it never came to proficient -- or,  
8 it never came. Fruition.

9 Q. Did you receive an e-mail message from  
10 Kyle Kern from OCC on February 16, 11:59 a.m.,  
11 addressing the potential meeting at a second meeting?

12 A. According to the document you provided,  
13 yes.

14 Q. And isn't it true that Ms. Kern asked  
15 "could you please clarify if it is the Staff's  
16 intention that the substantive elements of the  
17 stipulation (including the \$19.75 million shared  
18 savings figure) are not up for negotiation?"

19 A. That is what it says in this document you  
20 provided.

21 Q. And Staff responded to that question, is  
22 that correct, on --

23 MR. JONES: Your Honor, I'm going to have  
24 to object to this line of questioning. Originally,  
25 he started off about refreshing his memory and now

1 we're just reading all the e-mails into the record.  
2 So, I mean, you sustained the objection. Now he's  
3 just indirectly getting around the objection that was  
4 sustained.

5 MS. WATTS: And I join in the objection  
6 because essentially what he's doing is backdooring  
7 the document into the record over the sustained  
8 objection.

9 MR. JONES: He's backdooring the ruling.

10 MR. STINSON: Your Honor, I'm just  
11 inquiring of his personal recollection. He's the  
12 person who received the e-mails and, in fact, he just  
13 indicated that the response at the January 27th  
14 meeting was that it would be hard to move off the  
15 figure, and that's the next question that I want to  
16 inquire about with respect to the February 16th  
17 e-mail that contains the same language.

18 MR. JONES: So it's consistent.

19 EXAMINER WALSTRA: Right. So, I mean, you  
20 already have that language.

21 MR. STINSON: Well, I had that language  
22 with the caveat, the important caveat that's very  
23 probative in this case, that explains what "hard to  
24 move off" is.

25 EXAMINER WALSTRA: Is that your question?

1 MR. STINSON: No.

2 Q. (By Mr. Stinson) The question is, is that  
3 the position of Staff was that it's hard to move off  
4 the 19.75 million figure, but everything else was  
5 open for discussion; is that the position?

6 EXAMINER WALSTRA: You can answer now.

7 A. That's what I said before. Everything was  
8 open. It's hard to move off the 19.75. The other  
9 items are probably easier to discuss, but the 19.75  
10 would be hard to move off of.

11 Q. But everything else was open for  
12 discussion, correct?

13 MS. WATTS: Asked and answered.

14 MR. JONES: Objection. It's not his  
15 statement.

16 MR. STINSON: Your Honor --

17 MR. JONES: He has no personal knowledge  
18 of making the statement --

19 MR. STINSON: Your Honor, he received the  
20 e-mail, he was testifying as to the e-mails, and that  
21 is the position, he read the position that was given  
22 to the Staff -- to the intervening parties.

23 EXAMINER WALSTRA: Overruled.

24 A. Again, I guess your interpretation of that  
25 line and my interpretation are different. Mine is



1 that the 19.75 will be hard to move off. The other  
2 items are open for discussion and much easier for  
3 Staff and the Company to probably get to some  
4 agreement on.

5 Q. And my question was -- first of all, it's  
6 for the Commission or the Court to determine what the  
7 language may or may not mean, but the language --

8 MR. JONES: I'm going to object, your  
9 Honor. It's not his language. It's my language.  
10 It's not the witness's language. It's hearsay.

11 MR. STINSON: Your Honor, it's language  
12 that the parties relied on in this proceeding.

13 MS. WATTS: That may well be, but that  
14 doesn't make it anything other than hearsay,  
15 Mr. Stinson.

16 EXAMINER WALSTRA: If you could rephrase  
17 the question.

18 Q. (By Mr. Stinson) Why was it hard to move  
19 off the \$19.75 million figure?

20 A. At that point we had a signed stipulation  
21 between the Company and Staff, and that was a  
22 long-fought, negotiated number.

23 Q. And why was it easier to discuss  
24 everything else?

25 A. Some of those, I think the other

1 discussion topics would be simpler to have moved and  
2 depending on what those topics were, so, and to move  
3 the Company on. That 19.75 was a very hard-fought,  
4 long-debated number.

5 Q. And that's going to the heart of the  
6 stipulation, correct?

7 A. Well, every stipulation should be looked  
8 at in totality.

9 Q. And that 19.75 figure that was included in  
10 the stipulation that was filed -- first of all, it  
11 was included in the draft stipulation of  
12 December 30th, correct?

13 A. Correct.

14 Q. And it was also included in the  
15 stipulation filed January 6th, correct?

16 A. Correct.

17 Q. And that figure was only negotiated  
18 between Staff and the Company, correct?

19 A. Correct.

20 Q. Why was it necessary for the stipulation  
21 to be filed by January 6th?

22 MR. JONES: Objection. There's no  
23 evidence to say it was necessary.

24 EXAMINER WALSTRA: The witness can  
25 clarify.

1           A.       I'm not sure if it was the necessity of  
2     it.

3           Q.       Why was it requested to be filed by  
4     January 6th?

5                   MS. WATTS:  Objection.  There's no  
6     evidence to suggest it was requested to be filed by  
7     January 6th.

8                   MR. STINSON:  There's been evidence, even  
9     from Ms. Bojko's document, that you have to file --  
10    you have to contact or --

11                   EXAMINER WALSTRA:  Overruled.

12                   MR. STINSON:  Thank you.

13           A.       I'm not sure there really was a necessity  
14    or a reason.  It's how it was determined.

15           Q.       There was no looming deadline to be met?

16           A.       Not that I can recall.

17           Q.       We talked about the order that was issued  
18    May 20th of 2015 in Case No. 14-457, and isn't it  
19    correct that the PUCO's order in that case prohibited  
20    Duke's use of banked savings for the purpose of  
21    shared savings?

22           A.       For 2013, but not the other years that are  
23    discussed in the stipulation.

24           Q.       And did Staff agree with that order?

25           A.       Staff's comments in that -- leading up to

1 that case will speak for themselves.

2 Q. Pardon me?

3 A. I said -- I would say Staff's comments in  
4 that case will speak for themselves.

5 Q. Did the Staff file comments in 14-457?

6 A. I would have to check to verify.

7 Q. Would you accept, subject to check, that  
8 Staff did not file comments?

9 A. Subject to check.

10 Q. And the Staff did not file comments in  
11 15-534?

12 A. Subject to check then. I really . . .

13 MR. JONES: Objection. If he knows.  
14 Whether or not he knows or not.

15 MR. STINSON: I thought he answered.

16 EXAMINER WALSTRA: I think he said subject  
17 to check that he did not know, right?

18 THE WITNESS: He said we didn't, that  
19 would you accept, subject to check, that we didn't  
20 file. And I said subject to check I would accept  
21 that. Honestly, I would have assumed we did, but I  
22 don't know.

23 EXAMINER WALSTRA: Fair enough.

24 Q. (By Mr. Stinson) Now, Mr. Donlon, based  
25 upon your experience, do you know of any other cases

1 in which Staff has negotiated a settlement after the  
2 PUCO's issued an order?

3 A. I believe there have been some over the  
4 history of the Commission, but I can't think of any  
5 specific examples and I wasn't a part of any that I  
6 can think of.

7 Q. I'm going to go to your testimony now,  
8 Mr. Donlon. Just some background. On page 4,  
9 line 14, you mention the term "signatory parties,"  
10 correct?

11 A. Yes.

12 Q. And by that term, you mean Staff and the  
13 Company, correct?

14 A. Yes.

15 Q. Now, at page 4, line 20, you state that  
16 "The terms of the stipulation represent serious  
17 bargaining between the parties...." And by "the  
18 parties" there do you mean Staff and the Company?

19 A. Yes.

20 Q. And you go on to say "serious bargaining  
21 between the parties to find a mutually acceptable  
22 resolution to the issues addressed in the  
23 stipulation..., " correct?

24 A. Correct.

25 Q. And by "mutually" are you referring again

1 to Staff and the Company?

2 A. Correct.

3 Q. And then you conclude that statement --  
4 back up a bit, "to find a mutually acceptable  
5 resolution to the issues addressed in the stipulation  
6 for all parties." By the use of "parties" are you  
7 still referring to Duke Energy and the Staff?

8 A. Yes.

9 Q. Again, at page 4, line 22, you state that  
10 "Through the stipulation, concessions were made by  
11 both parties to mitigate the litigation risk inherent  
12 in this proceeding and any future appeal," correct?

13 A. Correct.

14 Q. Now, by the time the stipulation was  
15 filed, the parties already had litigated the shared  
16 savings issue in Case No. 14-457, correct?

17 A. In that case, yes.

18 Q. So there's no litigation risk remaining in  
19 that case before the PUCO, correct?

20 A. Not necessarily since it was still open on  
21 rehearing.

22 Q. So there could be a subsequent hearing  
23 held?

24 A. Correct.

25 Q. And a subsequent appeal?

1           A.       Correct.

2           Q.       Now, filing the stipulation in these  
3 proceedings also caused litigation, correct?

4           A.       I'm sorry. Can you repeat that?

5           Q.       The filing of the stipulation caused  
6 further litigation on the three-prong test?

7           A.       It has.

8           Q.       That's why we're here, right?

9           A.       Correct.

10          Q.       Are you speculating that there might be a  
11 further appeal of the Commission's May 20th order in  
12 14-457?

13          A.       What this comment also takes into account  
14 is trying to resolve the shared savings debate that  
15 we've been having, going forward. So it's not just  
16 that case, it's also solving the shared savings  
17 debate in '14, '15, '16, and then '17 and beyond, and  
18 so it's trying to put all of that to bed in this  
19 stipulation.

20          Q.       And is it Staff's belief that if the  
21 stipulation -- is it Staff's belief that the stip --  
22 Staff entered the stipulation for the purpose of  
23 avoiding an appeal by the Company of the May 20th,  
24 2015 order?

25          A.       Can you rephrase that, please?

1           Q.       The question is, was Staff's intent, in  
2 entering the stipulation, to avoid an appeal by the  
3 Company from the Commission's May 20th order in  
4 14-457?

5           A.       As I just said, I think it's Staff  
6 intention to actually settle the shared savings issue  
7 going forward. So not just in that case, but also in  
8 the, and I'm not going to use case numbers, I'm going  
9 to use years, but the shared savings for 2013, '14,  
10 '15, '16, and '17 and beyond. The goal was to settle  
11 all of the shared savings arguments that all the  
12 parties here, intervening and signatories, have been  
13 having.

14          Q.       Didn't the shared savings mechanism end  
15 with calendar year 2015?

16          A.       No. It was open for debate in '16, but  
17 also when they come in, when Duke files for their  
18 2017 portfolio plan, shared savings could be on the  
19 table then again.

20          Q.       Now, if the PUCO granted Duke's entry on  
21 rehearing, one or more of the intervening parties  
22 could appeal that order to the Supreme Court,  
23 correct?

24                   MR. JONES: Objection. He's not an  
25 attorney, your Honor.



1 Q. Based upon your massive experience with  
2 the PUCO and your knowledge of the process,  
3 Mr. Donlon.

4 A. That's my understanding.

5 Q. And if the PUCO approves the Stipulation  
6 and Recommendation, based upon your experience,  
7 Mr. Donlon, one or more of the intervening parties  
8 could appeal that order as well, correct?

9 A. That's my understanding.

10 Q. On page 5, line 10 of your testimony, you  
11 state that "The stipulation resolves how Duke will  
12 address the calculation of shared savings concerning  
13 its EE/PDR portfolio going forward," correct?

14 A. That is correct.

15 Q. And isn't it true that the PUCO's Finding  
16 and Order of May 20th, 2015, in Case No. 14-457, also  
17 resolves that issue by finding that Duke can use  
18 banked savings to meet the statutory EE/PDR  
19 benchmarks, but not to increase percentage of shared  
20 savings it receives?

21 MR. JONES: I would object, your Honor.  
22 It's calling for a legal conclusion as to the hearing  
23 process. He's not an attorney.

24 Q. Well, based upon your understanding.  
25 You've read the order, the May 20th order, right,

1 Mr. Donlon?

2 EXAMINER WALSTRA: You can speak to your  
3 understanding.

4 A. Yes, I read that order.

5 Q. And you're aware of its contents?

6 A. Yes.

7 Q. And based upon your review of the order,  
8 based upon your experience, do you also believe that  
9 the May 20th order resolves that issue by finding  
10 that Duke can use banked savings to meet the  
11 statutory EE/PDR benchmarks, but not to increase  
12 percentage of shared savings it receives?

13 MR. JONES: I object to the form of the  
14 question, your Honor. It's almost stating like the  
15 May order was a final order. It's not a final order.  
16 Counsel knows that and he's asking that question.

17 EXAMINER WALSTRA: If you know, to your  
18 understanding.

19 A. Okay. It's my understanding, one, the May  
20 order was still open on rehearing for those issues  
21 that Duke and OP&E raised concerning shared savings;  
22 as well as that was resolving the '13 case, not  
23 necessarily all of them. And Duke also is in a  
24 unique situation due to not being able to amend their  
25 portfolio plan in '15 and '16 due to 310. And those

1 issues coming to light, Staff felt could sway the  
2 Commission.

3 Q. I didn't hear the last part.

4 A. Those issues and the unique circumstance  
5 that Duke was under, Staff felt could sway the  
6 Commission's decision.

7 Q. Is that rationale anywhere in the  
8 stipulation?

9 A. No, it is not.

10 Q. But considering that Staff's --  
11 considering that the Commission's order of May 20th,  
12 2015, related to the shared savings for 2013,  
13 couldn't resolution of that issue, as in the  
14 May 20th order, serve as precedent for all the  
15 subsequent cases you discussed?

16 A. As I said --

17 MR. JONES: Objection, your Honor. Again,  
18 it calls for -- there's already been testimony about  
19 the uncertainty of what could happen going forward  
20 from May 20th. That's already been testified to. So  
21 it's misstating the evidence in giving the question.

22 MR. STINSON: Your Honor, the witness has  
23 testified that one of the reasons for this  
24 stipulation is that it's going to resolve all cases  
25 going forward. The stipulation will be the

1 precedent. If he can answer that question, if he can  
2 give that testimony, he can certainly or should be  
3 able to answer whether a Commission's order in a  
4 proceeding will serve as future precedent for the  
5 same other orders in the same other proceedings.

6 MR. JONES: And, your Honor, he's already  
7 testified there's uncertainty as to what the  
8 Commission will do on rehearing.

9 MR. STINSON: It's a hypothetical, your  
10 Honor.

11 MS. WATTS: And, your Honor, we've covered  
12 this territory over and over again.

13 MR. STINSON: I don't think so, your  
14 Honor. This is related to Mr. Donlon's testimony.

15 EXAMINER WALSTRA: I think we are getting  
16 close to being repetitive on this. But, as to this  
17 question, you can speak to your understanding.

18 THE WITNESS: Can I have the question  
19 repeated, please?

20 (Record read.)

21 A. So as I was saying in my previous answer,  
22 Staff felt that the unique circumstances that Duke  
23 was under, because of 310, might sway the Commission,  
24 decided that the stipulation would be in the best  
25 interest and entered into the stipulation. The

1 Commission will have the right to determine if they  
2 agree with this or not.

3 MR. STINSON: Move to strike, your Honor,  
4 as totally nonresponsive.

5 EXAMINER WALSTRA: Overruled.

6 MR. STINSON: Can I have my question  
7 reread again?

8 (Record read.)

9 Q. Now, my question, Mr. Donlon, is that if  
10 the stipulation can serve as a model going forward,  
11 couldn't the Commission's May 20th order, if affirmed  
12 on rehearing by the Court, couldn't that also serve  
13 as the model going forward?

14 MR. JONES: Objection. Speculating.

15 MS. WATTS: Objection. Asked and  
16 answered.

17 MR. JONES: Asked and answered.  
18 Speculative as to what will happen going forward.

19 MR. STINSON: Your Honor --

20 EXAMINER WALSTRA: I think he can answer  
21 as to the hypothetical if it were affirmed.

22 THE WITNESS: Do I answer?

23 EXAMINER WALSTRA: Yeah.

24 A. What I would say to that is the  
25 stipulation isn't serving as a model because Duke has

1     agreed to it, so they will do it. A precedent is a  
2     precedent. And yes, it could serve as a precedent.  
3     But this is getting Duke to actually agree to it and  
4     they won't fight it every single case going forward  
5     and fight that precedent.

6           Q.       But the intervening parties could fight  
7     that precedent, the stipulation precedent, correct?

8           A.       You would like the companies to use banked  
9     savings for shared savings?

10          Q.       Aren't the intervening parties here  
11     fighting the stipulation? My question is going to  
12     the stipulation.

13          A.       I guess if you could rephrase your -- I  
14     thought you said you'd fight the precedent, so I  
15     wasn't sure what precedent you're talking about.

16          Q.       I was talking about the precedent from the  
17     stipulation. You're talking about -- let me --

18                 MR. STINSON: Could you reread the  
19     question that was posed?

20                 (Record read.)

21          Q.       I wasn't referring to the order. I was  
22     referring to the intervening parties could oppose and  
23     are opposing this proposed stipulation, correct?

24          A.       What precedent within the stipulation are  
25     you referring to?

1           Q.       You have already -- let me ask a different  
2 question.

3                    Let me move on, Mr. Donlon. See where we  
4 are.

5                    Just a few more, Mr. Donlon.

6                    Now, I think you stated earlier that the  
7 shared savings mechanism for 2016 is at issue in  
8 Case No. 14-1850, correct?

9           A.       Sounds like it's the right case number.

10          Q.       And this stipulation was not filed in that  
11 case number, correct?

12         A.       No, it was not.

13          Q.       Do you know what Staff's position  
14 regarding the use of banked savings in the 14-1850  
15 case is?

16         A.       I don't remember exactly if we filed in  
17 that case.

18                   MR. STINSON: May I approach, your Honor?

19                   EXAMINER WALSTRA: You may.

20                   MR. STINSON: I'm sorry. I misspoke. The  
21 case number is 14-1580, not 1850. You still know  
22 what I'm talking about?

23         A.       Uh-huh.

24                   MR. STINSON: I'd like to have this marked  
25 if I could, your Honor, as OCC Exhibit 2.

1 EXAMINER WALSTRA: So marked.

2 (EXHIBIT MARKED FOR IDENTIFICATION.)

3 Q. The page reference, Mr. Donlon, will be  
4 page 6. If I could direct your attention to page 6.  
5 First of all, these are Staff's reply comments in  
6 Case No. 14-1580?

7 A. It's what it says, yes.

8 Q. I believe you indicated earlier that you  
9 were involved in that case?

10 A. At least indirectly I'm involved in all of  
11 them that my direct Staff is involved in.

12 Q. And you had supervision over that Staff in  
13 this proceeding?

14 A. Yes.

15 Q. Now, on page 6, the first full paragraph,  
16 is it true that it states "If the Commission were to  
17 approve the Company's request for an extension of the  
18 cost recovery and a shared savings mechanism for  
19 2016, Staff recommends the following modifications to  
20 the Company's Plan:

21 The Company should not be allowed to use  
22 accrued banked savings to earn shared savings in a  
23 future year. The primary purpose of allowing the use  
24 of banked savings to meet energy efficiency  
25 requirements, is to provide recognition that the



1 currently required energy efficiency savings have  
2 already been achieved by the Company in a prior  
3 period. This has no relationship to the purpose of  
4 shared savings, which is to incentivize the Company  
5 to optimize its implementation of its portfolio plan  
6 in the current period. Therefore, in 2014 and going  
7 forward, the Company should only be able to use  
8 banked savings to satisfy energy efficiency mandates,  
9 not to achieve additional recovery under the shared  
10 savings mechanism. Staff notes that it made this  
11 same recommendation in Staff's Policy Proposal for  
12 Incentivizing Utility Energy Efficiency Performance  
13 in First Energy's EE Portfolio Case in 2011."

14 Is that Staff's position as contained in  
15 the reply comments in 14-1580?

16 A. Yes. And Staff's litigation point in this  
17 case, as well, was zero for shared savings, the  
18 Company's was 55, and we negotiated to a number.

19 MR. STINSON: I move to strike everything  
20 after "yes," your Honor.

21 EXAMINER WALSTRA: Overruled.

22 Q. Did you state that same litigation  
23 position in this proceeding, either 14-457 or 15-534?

24 A. I think we established that Staff did not  
25 file comments in this one, if my recollection serves

1 me from an hour ago.

2 MR. STINSON: Thank you.

3 I have no further questions, your Honor.

4 EXAMINER WALSTRA: Thank you.

5 MR. JONES: Your Honor, could Staff have  
6 five minutes to consult?

7 EXAMINER WALSTRA: Yes.

8 MR. JONES: Thank you.

9 (Off the record.)

10 EXAMINER WALSTRA: Back on the record.

11 MR. JONES: Your Honor, Staff has no  
12 redirect.

13 EXAMINER WALSTRA: Thank you.

14 We'll adjourn until Tuesday at 10:00 a.m.

15 MS. BOJKO: You want to wait to do  
16 exhibits until Tuesday?

17 EXAMINER WALSTRA: Nope.

18 MS. WATTS: Your Honor, are we for sure  
19 going on Tuesday even if Mr. Rinebolt is not  
20 available on Tuesday?

21 EXAMINER WALSTRA: Let's do the exhibits  
22 and then --

23 MS. WATTS: Okay.

24 MR. JONES: Your Honor, Staff would move  
25 for admission of Staff Exhibit 1 and Joint Exhibit 1.

1 EXAMINER WALSTRA: Any objections?

2 MS. WATTS: No objection.

3 EXAMINER WALSTRA: They will be admitted.

4 MR. JONES: Thank you.

5 (EXHIBITS ADMITTED INTO EVIDENCE.)

6 EXAMINER WALSTRA: Ms. Bojko.

7 MS. BOJKO: Thank you, your Honor. OMA

8 moves for the admission of OMA Exhibit 21.

9 EXAMINER WALSTRA: Any objections?

10 MS. BOJKO: No.

11 (Laughter.)

12 MR. JONES: Is this the first one?

13 EXAMINER WALSTRA: This is the first one.

14 MS. BOJKO: Mine is just the one e-mail.

15 MS. WATTS: Your Honor, I object on the  
16 basis that it was never authenticated by this witness  
17 and he wasn't the author of the document, and I don't  
18 understand how it could be put into evidence under  
19 those circumstances.

20 MR. JONES: I would object --

21 MS. BOJKO: Your Honor, he did -- I'm  
22 sorry.

23 MR. JONES: I would object. It's hearsay.

24 MS. BOJKO: Actually, he received the  
25 e-mail. He agreed that he spoke to issues in the

1 e-mail. He also recollected the status of OMA and  
2 what the OMA had said about the stipulation and even  
3 the timing of the stipulation. He testified to all  
4 of those.

5 MS. WATTS: His testimony can stand  
6 without the document.

7 EXAMINER WALSTRA: I will admit that. He  
8 does have personal knowledge of those, so that will  
9 be admitted.

10 MS. BOJKO: Thank you.

11 (EXHIBIT ADMITTED INTO EVIDENCE.)

12 EXAMINER WALSTRA: Mr. Stinson.

13 MR. STINSON: I move the admission of OCC  
14 Exhibits No. 1 and 2.

15 EXAMINER WALSTRA: As to OCC Exhibit 2,  
16 any objections?

17 MR. JONES: Wait. What was the first OCC  
18 exhibit?

19 EXAMINER WALSTRA: We'll do that one  
20 second. The first one, OCC Exhibit 2 is what I'm  
21 talking about now, is the Staff reply comments in  
22 1580.

23 MS. WATTS: No objection.

24 MR. JONES: No objection to that.

25 (EXHIBIT ADMITTED INTO EVIDENCE.)

1 EXAMINER WALSTRA: And as to the e-mail  
2 chain?

3 MS. WATTS: Definite objection.

4 MR. JONES: Objection.

5 MS. WATTS: As previously stated.

6 MR. JONES: I thought we already got a  
7 ruling on it.

8 MS. WATTS: I thought we did too.

9 EXAMINER WALSTRA: Right. And I'll  
10 maintain my previous ruling.

11 MR. STINSON: Note my proffer for the  
12 record.

13 EXAMINER WALSTRA: Noted.

14 I believe that is all.

15 MR. ETTER: Excuse me, your Honor. Was  
16 Joint Exhibit 1, the stipulation, admitted?

17 EXAMINER WALSTRA: Yeah, they moved that,  
18 and that's admitted.

19 MR. ETTER: Okay. Thank you.

20 EXAMINER WALSTRA: Thank you. We will  
21 reconvene at this point. We'll aim for Tuesday at  
22 10:00 a.m. We're off the record.

23 (Thereupon, the proceedings concluded at  
24 7:39 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 Thursday, March 10, 2016, and carefully compared with my original stenographic notes.

---

Carolyn M. Burke, Registered  
Professional Reporter, and  
Notary Public in and for the  
State of Ohio.

My commission expires July 17, 2018.

- - -

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**3/21/2016 10:42:07 AM**

**in**

**Case No(s). 14-0457-EL-RDR, 15-0534-EL-RDR**

Summary: Transcript in the matter of Duke Energy of Ohio, Inc. hearing held on 03/10/016 - Volume I electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Burke, Carolyn