

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 Tuesday, March 15, 2016.

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VOLUME II

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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

- - -

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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1 Tuesday Morning Session,
2 March 15, 2016.

3 - - -

4 EXAMINER WALSTRA: We'll go on the record.
5 The Public Utilities Commission of Ohio has called
6 for hearing at this time and place, Case Nos.
7 14-457-EL-RDR and 15-534-EL-RDR, both being In the
8 Matter of the Application of Duke Energy Ohio for
9 Recovery of Program Costs, Lost Distribution Revenue
10 and Performance Incentives Related to its Energy
11 Efficiency and Demand Response Programs. We are
12 reconvening here. And I believe, Ms. Mooney, your
13 witness.

14 MS. MOONEY: Yes, your Honor. OP&E would
15 call Dave Rinebolt.

16 EXAMINER WALSTRA: Will you raise your
17 right hand.

18 (Witness sworn.)

19 EXAMINER WALSTRA: You may be seated.

20 - - -

21 DAVID C. RINEBOLT
22 being first duly sworn, as prescribed by law, was
23 examined and testified as follows:

24 DIRECT EXAMINATION

25 By Ms. Mooney:

1 Q. Mr. Rinebolt, do you have before you what
2 we would mark as OP&E Exhibit 3, which is the Direct
3 Testimony of David Rinebolt?

4 A. I do.

5 MS. MOONEY: Your Honor, I distributed
6 this to the court reporter already.

7 EXAMINER WALSTRA: Thank you.

8 (EXHIBIT MARKED FOR IDENTIFICATION.)

9 MS. MOONEY: Were you going to swear him
10 in?

11 EXAMINER WALSTRA: I already did.

12 MS. MOONEY: Oh, you already did.

13 Q. And if I were to ask you the same
14 questions today as -- well, wait a minute. Let me
15 ask, do you have any additions or corrections to your
16 testimony?

17 A. No.

18 Q. And if I were to ask you the same
19 questions today, would your answers be the same?

20 A. They would.

21 MS. MOONEY: Okay. Thank you.

22 Your Honor, Mr. Rinebolt is available for
23 cross-examination.

24 EXAMINER WALSTRA: Thank you.

25 Ms. Watts, go ahead.

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CROSS-EXAMINATION

By Ms. Watts:

Q. Mr. Rinebolt, I would like to cross-examine you on your trip, but we will save that for another day.

(Laughter.)

Q. So welcome back.

A. Thank you.

Q. Would you tell me, please, what you reviewed in preparation for your testimony today.

A. Yes. I reviewed the stipulation in Case No. 08-920-EL-SSO and testimony related to the description of the Save-a-Watt approach proffered by Duke Witness Schultz.

I reviewed Case No. 09-1999 and relevant testimony to that case. I reviewed Case No. 11-4393 that I would refer to as the 2011 rider case and related filings there.

I've reviewed Case Nos. 11-5568-EL-POR and 11-5569-EL-POR which are the AEP DSM portfolio cases that include the shared savings mechanism that was adopted in this approach.

Let me see. I have reviewed, obviously, the documents in 14-457 and the 15-534 cases. And

1 there are two or three other cases of Duke's that
2 relate to this, I think it's 13 -- it's in here
3 somewhere. There's so many cases in this.

4 Oh. Case No. 12-2190-EL-POR. That's the
5 FirstEnergy portfolio case.

6 And Case No. 14-1580-EL-RDR. There was
7 also a '12 case in this, but it's not referenced in
8 my testimony; I did, however, look at it.

9 Oh. I looked at Case No. 13-431-EL-POR as
10 well.

11 I think that's it for the purposes of the
12 testimony. As you know, I've been involved in
13 virtually every case -- in every case that's involved
14 your portfolio since 2008.

15 Q. Thank you.

16 And, Mr. Rinebolt, you are urging the
17 Commission to follow existing precedent, as you
18 characterize it, and deny Duke Energy Ohio the
19 ability to collect shared savings for 2013, '14, and
20 '15, correct?

21 A. Yes. Based on your use of energy savings
22 achieved in prior years.

23 Q. And you're aware, are you not, that the
24 stipulation provides that the Company will not
25 recover shared savings up through 2016 and possibly

1 longer than that, correct?

2 A. It might not. My reading of the
3 stipulation is that it might not achieve what you
4 just described. There are a number of holes in the
5 language in the stipulation that would still permit
6 you to do exactly what we're arguing about in this
7 case.

8 MS. WATTS: I would move to strike
9 beginning with "there are a number of holes." And,
10 your Honor, if we're going to have this all day long,
11 it's going to take us forever. Mr. Rinebolt's not
12 really answering my -- he's answering the question
13 and then going on forever.

14 EXAMINER WALSTRA: I'm going to overrule
15 for now.

16 Q. Mr. Rinebolt, would you turn to page 3 of
17 your testimony, please. On line 13 you refer to a
18 case as "Case No. 14-453." In looking at that case,
19 it's an application for a renewable energy
20 certificate. Do you know what actual case number you
21 intended there?

22 A. Oh, my apologies. That would be
23 14-457-EL-RDR.

24 Q. Okay. Did you want to then make some
25 corrections to your testimony, because I think that

1 appears pretty much throughout the testimony.

2 A. Did I use -- consistently use that number?

3 Q. You did.

4 A. Then let's consistently replace that
5 number.

6 Q. And, sir, you indicated that you reviewed
7 Case No. 08-920 which was Duke Energy Ohio's first
8 ESP proceeding, correct?

9 A. Correct.

10 Q. So you reviewed that for your testimony
11 today. Would you agree with me that that was where
12 the Save-a-Watt cost recovery mechanism was first
13 approved?

14 A. Yes. In Ohio. It was also approved in
15 other states.

16 Q. But we're only concerned with Ohio right
17 now; isn't that correct?

18 A. That's correct.

19 Q. Okay. And you, on page 5 of your
20 testimony, at lines 16 and 17, you mention that
21 Save-a-Watt expired in 2011. Can you explain why it
22 expired then?

23 A. I believe it was from the operation of
24 time. The Commission also ruled in Case 09-1999 that
25 the rider SAW, as defined in Case 08-920, violated

Chapter 4901:1-39 and -- because it included generation as a part of the recovery which was prohibited by the regulations. And so, the decision established an end date for rider SAW. And then you were directed -- Duke was directed to file an alternative that would take effect after that date. Duke was also required to refund the generation-related portion recovered under Save-a-Watt.

Q. And the Commission's rules provide that when a portfolio is filed it's good for three years, correct?

A. Yes, that's absolutely true. And there was a case that brought your portfolio into that three-year alignment with the rules.

Q. So, essentially, the Save-a-Watt mechanism would have expired either way, correct?

A. Well, it expired by force of the decision in 09-1999.

Q. On pages 5, 6, and 7 of your testimony, you provide your view of the history of the Company's incentive mechanism through its development, correct?

A. I do.

Q. And you understand that Duke Energy's view of that history differs?

1 A. Well, it became apparent, after we signed
2 the stipulations, that you had a different
3 interpretation than the other parties.

4 Q. Okay. When you say "after we signed the
5 stipulations," which stipulations are you referring
6 to?

7 A. Let me see. I believe 11-4393 and it's
8 been an issue in subsequent rider cases that we have
9 stipulated. We've had discussions over the extension
10 of the incentive mechanism and over, you know, the
11 incentive mechanism generally has been an issue in a
12 number of cases that we've successfully resolved.

13 Q. And would you agree with me that your view
14 that it was successfully resolved may actually only
15 be your view of that?

16 A. Well, I find the language to be very
17 clear. I don't think there's any vagueness in those
18 stipulations. I think that you have -- that Duke
19 has, for whatever reason, decided to reinterpret
20 those stipulations in manners inconsistent with the
21 intent of parties.

22 Q. Mr. Rinebolt, I understand your view of
23 those stipulations, but you're certainly not
24 testifying today on behalf of Duke Energy Ohio, are
25 you?

1 A. I am not.

2 Q. Thank you.

3 I'd like to call your attention to OMA
4 Exhibit 11, and I will provide you a copy. It's
5 already been marked.

6 A. Uh-huh.

7 Q. You don't have a set of exhibits up there,
8 do you?

9 A. I do not. I didn't know what the list
10 was.

11 Q. And, sir, do you recognize that document?

12 A. I do.

13 Q. Can you tell me what your recollection of
14 that document is?

15 MS. BOJKO: I'm sorry. Could you identify
16 the document just since it's been a couple days?

17 MS. WATTS: Sure. It's the comments of
18 OCEA in the 11-4393 case.

19 MS. BOJKO: Thank you.

20 A. The comments involve a decoupling and
21 incentives provision, program cost recovery
22 mechanism, and removing the throughput incentive, a
23 shared savings incentive, a low-income program, your
24 M and V plan, and then several proposed programs and
25 pilots.

1 Q. So you did actually review that in
2 preparation for today, I gather?

3 A. I read it a couple weeks ago.

4 Q. Okay. You didn't take it on your trip
5 with you?

6 A. No, I didn't. I had limited space to be
7 able to carry things.

8 Q. I'd ask you to turn to page 8 of that
9 document, please. The page numbers are not -- the
10 pages are not line numbered, but in Section B.,
11 entitled "Shared Savings Incentive," about halfway
12 down, 1, 2, 3, 4, 5, 6, 7 sentences down, there's a
13 line that begins "The Company states that its banked
14 savings would be used for compliance and for
15 determining the percentage of net benefit it
16 retains." Do you see that?

17 A. I do see that line.

18 Q. Can you tell me how you understand -- what
19 you understand that to mean?

20 A. It means to me that the savings that
21 occurred during that year would be used for
22 compliance with the statutory benchmarks, and if the
23 savings during that year exceeded the percentages
24 justifying the incentive that they would be able to
25 receive a shared savings incentive on those excess

1 energy savings.

2 Q. And then what is your understanding of the
3 term "banked savings"?

4 A. "Banked savings" is a statutory term and a
5 regulatory -- a term in the regulations, itself, and
6 it allows an entity, a utility that over-performs in
7 a particular year, as Duke did in, I believe, 2011,
8 to take those savings over the benchmark, put them in
9 a bank, and then use them for compliance with the
10 benchmarks in future years.

11 Q. Okay. So notwithstanding your comment,
12 the fact that the Company called out that it would be
13 using banked savings explicitly in that sentence,
14 you're arguing or contending that you did not
15 understand that to mean it would use banked savings
16 from previous years?

17 MS. BOJKO: Objection. Your Honor, the
18 question mischaracterizes the comments put forth by
19 the parties. It is implying that this was OCEA's
20 position when it clearly states it's "The Company
21 states...."

22 MS. WATTS: Your Honor, I'm asking
23 Mr. Rinebolt to explain what his understanding of the
24 Company's position was in this case.

25 MS. BOJKO: That wasn't the question.

1 That question I don't object to, your Honor.

2 MS. WATTS: I can rephrase then.

3 MS. BOJKO: Thank you.

4 EXAMINER WALSTRA: Please do.

5 MS. WATTS: Thank you.

6 Q. (By Ms. Watts) So, Mr. Rinebolt, as you
7 see in that sentence, it states -- and again, just so
8 we're clear, this is the Company's view that's stated
9 here, correct?

10 A. (Witness nods.)

11 THE COURT REPORTER: Is that a "yes"?

12 THE WITNESS: Oh, no, no, no. I'm just
13 nodding as I'm listening to her.

14 Q. Well, then, let's back up so that you can
15 answer the question. This paragraph characterizes
16 the Company's proposal, correct?

17 A. That's what the language says, yes.

18 Q. And is it your testimony that based on
19 what the Company proposed, it was not your
20 understanding that the Company would use banked
21 savings from previous years for any purpose?

22 A. It was our understanding that the Company
23 would not use banked savings -- or, would use banked
24 savings for compliance with the statutory
25 requirements in future years. There is no compliance

1 with shared savings because at that point it wasn't
2 part of the statute.

3 Q. And so, when the sentence says "The
4 Company states that its banked savings would be used
5 for compliance and for determining the percentage of
6 net benefit it retains," what was your understanding
7 of the second half of that sentence?

8 A. Well, let me restate. The banked savings
9 would be used for statutory compliance purposes, and
10 the overall savings would determine which level of
11 shared savings would be triggered as a result of
12 performance during that year.

13 Q. So it was your understanding that banked
14 savings could be used to determine the level of
15 compliance in order to trigger the incentive
16 mechanism?

17 A. No. That was not my understanding. My
18 understanding related to, let me doublecheck, this is
19 Case 11-4393 and this is the case where we stipulated
20 to a shared savings mechanism that, in the words of
21 your witness, was identical to American Electric
22 Power.

23 And so, the sentence that you're pulling
24 out here, "The Company states that its banked savings
25 would be used for compliance...." You will use them

1 for statutory compliance purposes. It does not say
2 that you would use them to determine -- use banked
3 savings to determine a level of shared savings. It
4 said, in my mind, that you can determine the
5 percentage of net benefits that you retain, but
6 not -- you have to exceed the statutory level.

7 Q. Okay. So the one thing we can agree upon
8 is that's sort of the heart of the dispute between
9 the parties and the Company, correct?

10 A. I think it is a one-sentence description
11 of -- of what is a very complex issue at least in the
12 minds of, excuse me, certain parties. I don't think
13 the sentence actually captures all the aspects of
14 this, so I wouldn't say that a small number of words
15 like this, given all the paper that's been filed in
16 these cases over time, is the only issue.

17 Q. Sir, OPAC was part of the OCEA group that
18 made comments in the 4393 case, correct?

19 A. No, we were not.

20 Q. OPAC was not a member?

21 A. I don't believe so. No, we were not.

22 Q. Did OPAC sign the stipulation in that
23 proceeding?

24 A. Yes, we did.

25 Q. Did OPAC agree with the comments of OCEA

1 at the time?

2 A. OPAE supported the language in the
3 stipulation.

4 Q. Is it your understanding that the
5 Commission -- wait a minute. Strike that.

6 Is it your understanding that the
7 stipulation made -- more or less set out a
8 recommendation for how the shared savings mechanism
9 should appear to the Commission?

10 A. I don't have the stipulation in front of
11 me, but the stipulation defined the shared savings
12 mechanism. I don't recall the details of the
13 Commission's discussion of that in the Opinion and
14 Order. I did review it, and I'd be happy to look at
15 it again, but . . .

16 Q. Is it your recollection that the
17 Commission adopted and approved the OCEA
18 recommendation?

19 MS. MOONEY: I object. Your Honor, I do
20 believe that stipulation is one of the OMA exhibits.
21 If someone could hand Mr. Rinebolt a copy of it
22 before he answers questions about the stipulation.

23 MS. WATTS: Counsel, I just want to
24 understand what his recollection is right now.

25 MS. MOONEY: Well, I would prefer that he

1 be given a copy of that stipulation. I think it's
2 OMA Exhibit 10.

3 MS. WATTS: If you would like to give him
4 one --

5 MS. MOONEY: I don't have one. I'm not
6 asking him questions about it.

7 MS. BOJKO: Your Honor, I could be
8 helpful. I have one.

9 EXAMINER WALSTRA: I appreciate that.
10 Thank you.

11 MS. BOJKO: May I approach?

12 EXAMINER WALSTRA: You may. I gave you
13 guys a path today.

14 Q. (By Ms. Watts) So, Mr. Rinebolt, were you
15 just handed the Stipulation and Recommendation?

16 A. I was just handed the Stipulation and
17 Recommendation.

18 Q. I believe my question went to the
19 Commission's Opinion and Order in that proceeding.

20 A. Yes.

21 MS. BOJKO: Oh, I'm sorry.

22 MS. MOONEY: That's another exhibit.

23 A. Sorry. I thought your question was about
24 the Opinion and Order as well.

25 MS. MOONEY: The Opinion and Order is OMA

1 Exhibit 12.

2 MS. WATTS: Your Honor, the witness
3 indicated he reviewed these documents in preparation
4 for his testimony today. I'm only asking for his
5 recollection, so I really don't need him to refer to
6 the document.

7 EXAMINER WALSTRA: Do you have a
8 recollection of these, Mr. Rinebolt?

9 THE WITNESS: I have a recollection, your
10 Honor, but it's difficult, after we've just parsed a
11 single second -- sentence to remember every single
12 sentence in the Commission's decision.

13 Q. (By Ms. Watts) I'm not asking for any
14 specific review of any sentence. The only question I
15 have put before you, Mr. Rinebolt, is do you recall
16 whether or not the Commission adopted and approved
17 OCEA's recommendation in that case?

18 A. I recall that the Commission referenced
19 the OCEA recommendation as part of its decision of
20 the shared savings provision of the stipulation.

21 Q. Okay. So now that you have the
22 stipulation in front of you, let's go ahead and refer
23 to that because that will make this next series of
24 questions easier. Do you want to take a moment to
25 review it?

1 A. All right.

2 Q. Sir, do you see anywhere in that document
3 where it specifically states that the Company will
4 not be eligible for incentive unless it fully meets
5 the mandates in a given year?

6 A. Yes.

7 Q. Would you point that out, please?

8 A. At the top of page 5 in the chart that
9 says "Incentive Structure." If you're equal to or
10 less than 100 percent of the annual target, the
11 after-tax shared savings is zero.

12 Q. Nowhere in that chart that you've just
13 referred us to does it indicate that the Company may
14 not count banked savings to calculate its
15 achievement, correct?

16 A. No. Well, it says "Achievement of Annual
17 Target." The annual target is the target established
18 by statute. If you don't produce enough savings
19 during the year to trigger -- to hit those
20 percentages, then you don't qualify for shared
21 savings.

22 Q. And I appreciate that's your view of that
23 chart. Thank you very much.

24 MS. BOJKO: Objection, your Honor.
25 Counsel is providing commentary instead of questions.

1 EXAMINER WALSTRA: I think she
2 understands. Go ahead.

3 Q. Sir, in preparation for today, did you
4 read Mr. Duff's Supplemental Direct Testimony in this
5 proceeding?

6 A. I did.

7 Q. Was there anything in his testimony that
8 you did not understand?

9 A. From an English standpoint, I read his
10 testimony and I understand the sentences; I just
11 don't agree with it.

12 Q. Understood.

13 Are you, sir, generally opposed to the
14 concept of a shared savings mechanism?

15 A. It was the policy of Ohio Partners for
16 Affordable Energy, at the time that the statute was
17 passed and in subsequent proceedings, that a shared
18 savings incentive or, frankly, any kind of incentive
19 mechanism was not warranted because there was a
20 statutory mandate.

21 However, we did sign the stipulation with
22 Duke in 08-920 which had Save-a-Watt which was an
23 incentive mechanism of a different type. Now, that
24 was in the context of a very, very large case and, as
25 you know, when you stipulate you don't always get

1 everything you want.

2 But in subsequent proceedings and
3 negotiations we did oppose incentives. But
4 ultimately in the cases, the 11 cases, portfolio
5 cases with AEP, after much discussion with all the
6 parties, we agreed to go along with the shared
7 savings mechanism which is consistent with the one
8 that I've described in my testimony.

9 Q. So just as you've said with respect to the
10 Save-a-Watt mechanism, there are shared savings
11 mechanisms of different flavors or types, correct?

12 A. Yes, there have been.

13 Q. And the Commission's rules explicitly
14 provide that a Company may request a shared savings
15 mechanism, correct?

16 A. They do indeed.

17 Q. On page 9 of your testimony you have a
18 cite there to Case No. 12-2190-EL-POR. Do you see
19 that?

20 A. I do.

21 Q. Applications for rehearing were filed in
22 that case, correct?

23 A. In -- we're referring to the FirstEnergy
24 2012 portfolio case?

25 Q. It's your cite, so I --

1 A. Right.

2 Q. Yes.

3 A. There were a number of applications for
4 rehearing filed in that case because it was the first
5 fully-litigated DSM portfolio case.

6 Q. And is it possible that the Commission
7 could grant rehearing in that case?

8 A. I can't recall whether any of the
9 applications for hearing are outstanding. I don't
10 believe that they are. We've been operating with
11 FirstEnergy under the shared savings provisions
12 approved by the Commission in that case for some
13 time.

14 You know, once the Commission approves and
15 creates a precedent, you know, that perhaps only
16 shared savings can only be counted -- or, energy
17 savings can only be counted in the year that they
18 accrue for the purposes of determining shared
19 savings, you know, that's a precedent, you follow it,
20 and that's what we've been doing right now. As you
21 know, the Commission's decisions are presumed to be
22 correct and tariffs filed are presumed to be correct.

23 Q. Sir, you also indicated that you reviewed
24 the 14-1580 case, correct?

25 A. Yes, I did.

1 Q. And the Commission has not ruled on that
2 case, correct?

3 A. We do not have a ruling on that case.
4 That's one of the cases this stipulation does not
5 resolve.

6 Q. You did not identify in your testimony
7 anywhere, you didn't identify a Commission rule or
8 statute that compels the inclusion of all parties in
9 a stipulation, did you?

10 A. No.

11 Q. And you did not identify any Supreme Court
12 decision that mandates the inclusion of all parties
13 in every stipulation, correct?

14 A. No. My testimony simply states that only
15 two parties agreed, agreed to the stipulation, and
16 none of them pay.

17 Q. And you're aware that partial settlements,
18 even those signed by less than all the parties, have
19 been filed with the Commission previously, correct?

20 A. I believe they have been filed with the
21 Commission.

22 Q. And even approved by the Commission in
23 some instances, correct?

24 A. Yes.

25 Q. And OPAC has, in fact, recently

1 participated in a settlement that involved less than
2 all the parties, correct?

3 A. Yes.

4 Q. On pages 12 and 13 of your testimony you
5 refer to a provision in the stipulation wherein the
6 Company agreed that, beginning in 2017, the Company
7 will not file for recovery of shared savings,
8 correct?

9 A. I see it. I see that language.

10 Q. Are you presently aware, as you sit here
11 today, of any specific proposed law or regulation
12 that would change anything committed to in the
13 stipulation?

14 A. I know that there are currently
15 negotiations going on between the Senate, the House,
16 and the Governor's office about what to do with
17 Senate Bill 310. I know that the Governor has
18 recently made public utterances that a permanent
19 freeze is not acceptable. So I would clearly say
20 there are discussions going on. And because Senate
21 Bill 310 does reference shared savings, that is one
22 of the provisions that could become -- that could be
23 more defined than it is under current law.

24 Q. And, in fact, if such a law is passed, it
25 could be defined in any number of ways, correct?

1 A. That's quite possible; though, the General
2 Assembly has evinced great concern over the cost of
3 DSM portfolios. So my assessment would be that they
4 would seek to restrict costs, and shared savings
5 would be one of the costs that would be the simplest
6 to restrict.

7 Q. And would OP&E view that as a positive
8 step?

9 A. Frankly, it depends on what else is in the
10 bill.

11 MS. WATTS: I have no further questions.
12 Thank you.

13 EXAMINER WALSTRA: Thank you.

14 Mr. Jones.

15 MR. JONES: Thank you, your Honor.

16 - - -

17 CROSS-EXAMINATION

18 By Mr. Jones:

19 Q. Good morning, Mr. Rinebolt.

20 A. Good morning, Mr. Jones.

21 Q. Mr. Rinebolt, you would agree with me that
22 the May 19, 2015 order by the Commission in the
23 14-457 case, that is not a final order, is it?

24 A. It is current Commission precedent.

25 Q. No. My question is, is it a final order?

1 A. There are two applications for rehearing
2 pending: One, ours, deals with a cap on shared
3 savings; and the Duke one, and correct me if I
4 mischaracterize this, but they essentially are
5 arguing what we're arguing in this case, is can
6 energy efficiency attributes from prior years be used
7 to trigger shared savings in a future year.

8 Q. Okay. Well, let's get back to my
9 question. The order by the Commission on May 19th,
10 2015, in the 14-457 case, that is not a final order;
11 it's subject to review by the Commission, correct?

12 A. It's subject to two applications for
13 rehearing and, yes, review by the Commission.

14 Q. So that order is subject to review,
15 reconsideration on those apps for rehearing that you
16 just described, and the outcome could be they could
17 affirm that order, they could reverse that order, or
18 they could modify that order; is that correct?

19 A. I can't imagine them completely reversing
20 the order because part of it's just an operation of a
21 recovery mechanism, a rider. The two policy issues
22 that were raised in the applications for rehearing
23 could affect what the final entry on rehearing is.

24 Q. So it could be modified, right?

25 A. Yes, it could.

1 Q. So, as I said, that's not a final order,
2 the May 19th, 2015 order is not a final order.

3 A. No, it's not, it's not. The other
4 Commission precedent I cite is the FirstEnergy
5 portfolio case and the ruling there.

6 Q. Mr. Rinebolt, what I want to make clear
7 for the record, are you an attorney?

8 A. I am trained as an attorney and I have
9 practiced in front of this Commission and I have
10 practiced on behalf of Ohio Partners for Affordable
11 Energy.

12 Q. In fact, you've practiced before the
13 Commission for many years, haven't you?

14 A. Twenty years, April 1st.

15 Q. Okay. Also, you make reference to the
16 14-1580 case, is that correct, in your testimony?

17 A. That's correct.

18 Q. Did you participate in that proceeding?

19 A. Yes.

20 Q. In what capacity?

21 A. I believe I'm counsel of record.

22 Q. Okay. So you understand the application
23 in that proceeding, what the application is about?

24 A. I think I have a fairly decent
25 understanding of it, yes.

1 Q. And you would agree with me that the
2 central issue in that case concerns whether or not
3 the incentive mechanism in Duke's portfolio plan
4 should be extended into 2016; that is the central
5 issue, is it not?

6 A. Yes, yes. It's been an issue in two prior
7 cases and now it's an issue in this one, in 14-1580.

8 Q. Okay. And so, that issue is not an issue
9 in this case before us, the 14-457 case, or the
10 15-534 case, is it, that very issue?

11 A. The issue of the extension of the --

12 Q. Yes.

13 A. -- recovery?

14 Q. Yes.

15 A. It is an issue in this case only to the
16 extent that what is being extended into '16 is in
17 question; what is the shared savings mechanism that
18 will be extended.

19 Q. I'm talking about the incentive mechanism
20 that's currently --

21 A. Yes.

22 Q. -- that was part of Duke's portfolio plan
23 through 2015 and its review for extension into 2016.
24 That issue, itself, is not in this case, these cases;
25 isn't that correct?

1 A. No, I'd have to disagree with you.

2 Q. And how -- and explain yourself.

3 A. I'd be happy to. We are discussing
4 whether a shared savings -- 1580 discusses whether a
5 shared savings mechanism should be extended into
6 2016. However, we have disagreements over what the
7 current shared savings mechanism is. So our position
8 on the case, in 1580, on that extension could
9 radically change and we would willingly enter into
10 settlement negotiations if the structure of the
11 incentive is defined in the way we believe previous
12 stipulations have defined it. Am I making myself
13 clear?

14 Q. I've got another question. So you
15 reviewed the stipulation that was filed in this case
16 by Staff and Duke, correct?

17 A. Yes, I have.

18 Q. And the stipulation states, in paragraph
19 3.a., that "The parties agree that for the remaining
20 years of the Company's approved energy efficiency and
21 peak demand reduction portfolio" and then in parens
22 "(i.e., 2015 and 2016), the Company will not recover
23 a shared savings incentive." That's the way it reads
24 in the stipulation, isn't that correct, Mr. Rinebolt?

25 A. Yes. In fact, I cite it in my testimony

1 on page 12, lines 12 through 15.

2 Q. So regardless of what the outcome is in
3 14-1580, the proceeding on the central issue of
4 whether or not the incentive mechanism itself is
5 extended or not, the stipulation makes clear that
6 Duke will not be able to collect shared savings in
7 the stipulation, isn't that correct, as I just read?

8 A. No, that's not correct. Because the
9 stipulation goes on to say that Duke Energy Ohio,
10 this is quoted in my testimony as well, at the bottom
11 of page 12 through 13, "the Parties expressly agree
12 that Duke Energy Ohio is permitted to seek a shared
13 savings incentive consistent with such change in law,
14 regulation, or order."

15 So, if, dependent upon what the Commission
16 issues in another case, this might not block the use
17 of a collection of shared savings in '15 and '16.
18 We've seen the legislature reach back three years and
19 allow companies to count prior efficiency for the
20 purpose of compliance -- efficiency prior to the
21 passage of Senate Bill 221.

22 And, as you pointed out earlier, the
23 Commission -- or, was pointed out earlier, the
24 Commission on rehearing in the case, in the 1457
25 case, might change the shared savings mechanism.

1 That would be an order. And so, the Company's
2 commitment would no longer be a commitment. It would
3 be superceded by a future decision of the Commission.

4 Q. Mr. Rinebolt, what amount of shared
5 savings is Duke seeking recovery of in the 14-1580
6 case?

7 A. 14-1580 only addresses what they could
8 recover in '16, because currently they are not
9 authorized to recover any shared savings in 2016.

10 Q. So they're not seeking any recovery in
11 that case; isn't that correct?

12 A. In and of itself, no, but I would presume
13 that if they were allowed to recover shared savings
14 in '16 as a result of the decision in that case, they
15 would file a rider case to collect shared savings.
16 They will file a rider case to recover their costs of
17 operation anyway.

18 And, traditionally, if you've got a shared
19 savings incentive in play, you go for recovery of
20 that in those cases as well. The way recovery works
21 in Ohio, it's projected. So if the Company projects
22 they're going to meet the shared savings goal, they
23 can correct that and then true it up later through a
24 rider filing.

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

1 strike everything after "no" as nonresponsive to my
2 question.

3 MS. MOONEY: Your Honor, I think it was
4 responsive to the question. The question was what
5 would come out of the 1580 case, and Mr. Rinebolt was
6 describing what could happen as a result of the
7 decision in the 1580 case.

8 EXAMINER WALSTRA: Overruled.

9 MR. JONES: That's all I have. Thank you.

10 EXAMINER WALSTRA: Any redirect?

11 MS. MOONEY: Could I have a second just to
12 ask?

13 EXAMINER WALSTRA: Of course.

14 (Off the record.)

15 MS. MOONEY: Your Honor, we have no
16 redirect. Thank you.

17 EXAMINER WALSTRA: Thank you. You may
18 step down.

19 THE WITNESS: Thank you.

20 MS. MOONEY: And OPAC would call for the
21 admission of OPAC Exhibit 3 which is the Direct
22 Testimony of David Rinebolt.

23 EXAMINER WALSTRA: Any objection?

24 MR. JONES: No objection.

25 EXAMINER WALSTRA: It will be admitted.

1 MS. MOONEY: Thank you.

2 (EXHIBIT ADMITTED INTO EVIDENCE.)

3 EXAMINER WALSTRA: Who's next? OCC, are
4 you going next, Ms. Bojko?

5 MS. BOJKO: Thank you, your Honor. At
6 this time the Ohio Manufacturers' Association would
7 like to call John Seryak to the stand.

8 EXAMINER WALSTRA: Raise your right hand.
9 (Witness sworn.)

10 EXAMINER WALSTRA: Whenever you're ready.

11 MS. BOJKO: Thank you, your Honor.

12 - - -

13 JOHN A. SERYAK

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

16 DIRECT EXAMINATION

17 By Ms. Bojko:

18 Q. Could you, please, state your name and
19 address for the record.

20 A. John A. Seryak. The address is 3709 North
21 High Street, Columbus, Ohio 43214.

22 Q. Did you file or cause to be filed
23 testimony opposing the stipulation that was filed in
24 this case?

25 A. Yes.

1 MS. BOJKO: Your Honor, at this time, I
2 would like to mark as OMA Exhibit 1, a document
3 titled Direct Testimony of John Seryak on Behalf of
4 the Ohio Manufacturers' Association, filed March 4th,
5 2016, in this proceeding.

6 EXAMINER WALSTRA: So marked.

7 (EXHIBIT MARKED FOR IDENTIFICATION.)

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

9 EXAMINER WALSTRA: You may.

10 Q. Sir, do you have in front of you what's
11 been marked as OMA Exhibit 1?

12 A. I do.

13 Q. Do you recognize this document as your
14 testimony filed in this proceeding?

15 A. Yes.

16 Q. Was this testimony prepared by you or
17 under your direction?

18 A. Yes.

19 Q. And on whose behalf are you testifying
20 today?

21 A. The OMA.

22 Q. Since the filing of your testimony do you
23 have any changes?

24 A. Not at this time.

25 Q. If I were to ask you the same questions

1 today as they appear in your testimony, would your
2 answers be the same?

3 A. Yes.

4 MS. BOJKO: Your Honor, at this time, I
5 would like to move the admission of OMA Exhibit 1,
6 subject to cross-examination, and I tender the
7 witness for cross.

8 EXAMINER WALSTRA: Thank you.

9 Whenever you're ready, Ms. Watts.

10 MS. WATTS: Yes, I am. Thank you, your
11 Honor.

12 - - -

13 CROSS-EXAMINATION

14 By Ms. Watts:

15 Q. Good morning, Mr. Seryak.

16 A. Good morning.

17 Q. You haven't been sailing, have you?

18 A. I have not been sailing, no.

19 (Laughter.)

20 Q. Good. And you just stated that you're
21 testifying today on behalf of OMA, correct?

22 A. That's correct.

23 Q. And are you familiar with an entity known
24 as "OMAEG"?

25 A. I am.

1 Q. And what is that entity in your
2 understanding?

3 A. It's a subsidiary of the OMA that follows
4 energy issues.

5 Q. And are you sometimes retained to work on
6 behalf of OMAEG as well?

7 A. Yes.

8 Q. What is the distinction between the two
9 entities?

10 A. Well, OMAEG is a subsidiary, it has
11 members that are part of the OMA, but not all OMA
12 members are members of the OMAEG.

13 Q. Thank you.

14 Can you tell me what you reviewed in
15 preparation for your testimony today?

16 A. Yes. The Stipulation and Recommendation
17 in this case; the Direct Testimony of Timothy Duff
18 and Patrick Donlon; and the Finding and Order in
19 Case 14-457.

20 Q. Have you reviewed any other Duke Energy
21 energy efficiency matters?

22 A. In preparation for this case I didn't find
23 any new evidence or facts submitted in the
24 stipulation or the other supporting witness
25 testimony, so I didn't review any other cases. I

1 have over time, but not in preparation for this case.

2 Q. And, sir, you've testified that you -- let
3 me refer you to the cite, just one second. I believe
4 it's on page 1, line 21, you testify that you've
5 participated extensively in the electric distribution
6 utilities' energy efficiency collaboratives. Do you
7 see that?

8 A. Of my testimony you're talking about?

9 Q. Yes.

10 A. Yes.

11 Q. But you have not, in fact, ever
12 participated in a Duke Energy Ohio collaborative,
13 correct?

14 A. No. They denied our request.

15 Q. And you testified previously on behalf of
16 OMA in Case No. 14-1580, correct?

17 A. Yes, that's correct.

18 Q. Are there any other Duke Energy Ohio rider
19 proceedings that you've been involved in on behalf of
20 OMA?

21 A. The two cases that are part of this
22 stipulation and 14-1580; that's it.

23 Q. Okay. Thank you.

24 But you've participated in other Ohio
25 electric distribution utility energy efficiency

1 proceedings on behalf of OMA?

2 A. I have participated in other utilities'
3 proceedings.

4 Q. And you've taken care to ensure that all
5 of the opinions you're offering for purposes of this
6 hearing are in your direct testimony, correct?

7 A. Could you rephrase that?

8 Q. Sure. The opinions you're offering with
9 respect to this case are contained within your direct
10 testimony, correct?

11 A. I mean, my testimony is my testimony. If
12 I get asked a question here today on my expert
13 opinion, I may respond, respond to that to the best
14 of my ability.

15 Q. Sure.

16 A. So that may include an opinion that wasn't
17 in my testimony. It depends on what I'm asked today.

18 Q. Okay. But you stated on page 2 of your
19 testimony that the purpose of your testimony is to
20 address whether the stipulation satisfies the
21 Commission's three-prong test, correct?

22 A. That is the purpose, yes.

23 Q. And that test is one employed by the
24 Commission in deciding whether to approve the
25 stipulation, correct?

1 A. That's my understanding.

2 Q. And all of the opinions you have in this
3 case are, therefore, then in your direct testimony.

4 MS. BOJKO: Objection, your Honor. Asked
5 and answered. He gave his answer actually quite
6 thoroughly. He said his direct testimony is his
7 direct testimony. If he's asked his expert opinion,
8 he'll try to answer that today.

9 EXAMINER WALSTRA: Is there something more
10 you're looking for, Ms. Watts?

11 MS. WATTS: Just clarity, your Honor.

12 A. That means I'm supposed to answer?

13 Q. Yes.

14 A. In this case, that's pretty broad, so I'd
15 say no, my testimony is in reference to the
16 stipulation, and then the other expert witness
17 testimony, which is pretty narrow, it doesn't bring
18 up any new information or data that would negate the
19 Finding and Order.

20 And so, looking at the stipulation and the
21 witness testimony, I didn't really see much, as an
22 expert witness, to look into. There doesn't seem
23 like there's been any change in Duke's performance or
24 reason why shared savings would be allowed.

25 So, do I have other opinions on this case,

1 yes, but my testimony is on the stipulation which,
2 frankly, doesn't bring in any new information.

3 Q. In your direct testimony you do not
4 dispute that the stipulation was the product of
5 serious bargaining between capable and knowledgeable
6 parties, do you?

7 A. I wasn't privy to the bargaining, so I
8 don't testify on whether it was or wasn't.

9 Q. Okay. And you did not identify in your
10 testimony any Commission rule or statute that compels
11 the inclusion of all parties in every settlement
12 before the Commission, did you?

13 A. I'm not an expert in those matters, so I
14 didn't weigh in, one way or the other, on that.

15 Q. All right. And, likewise, you didn't
16 identify any Supreme Court decision that mandates the
17 inclusion of all parties in a settlement, did you?

18 A. Similarly, that's not my area of
19 expertise, so I didn't say one way or another on
20 that.

21 Q. Are you aware of partial settlements that
22 have been proposed to the Commission previously?

23 A. No, I don't follow those. I don't follow
24 that.

25 Q. And the second part of the three-part test

1 concerns whether the stipulation violates an
2 important regulatory principle or practice; isn't
3 that correct?

4 A. I'm sorry. Say that again.

5 Q. The second part of the three-part test
6 concerns whether the stipulation violates an
7 important regulatory principle or practice, correct?

8 A. My understanding is that's one of the
9 prongs, yes.

10 Q. Okay. But the only one of those three
11 prongs that your testimony addresses is the second
12 part that appears on page 3 of your testimony,
13 beginning on line 12?

14 MS. BOJKO: Objection. Mischaracterizes
15 his testimony.

16 EXAMINER WALSTRA: The witness can
17 clarify.

18 A. I'm sorry. Can you rephrase?

19 Q. The part of your testimony that addresses
20 the second prong is that which appears on page 3,
21 beginning on line 12, and carrying over to page 4,
22 ending at line 12, correct?

23 A. Sorry. Can you -- instead of saying
24 "first" or "second" or "third prong," can you
25 describe, like, which prong?

1 Q. Okay.

2 A. Not in numbers, but what that prong is
3 actually supposed to test. Could you clarify which
4 prong you're referring to?

5 Q. Yes. I understand what you're asking.
6 Just give me a moment.

7 So turning in your testimony to page 2.

8 A. Yes.

9 Q. You start off by saying that the purpose
10 of your testimony is to address the -- whether the
11 stipulation satisfies the three-part test, correct?

12 A. Yes.

13 Q. And then going on it says you conclude
14 that the stipulation is in conflict with the
15 three-part test, correct?

16 A. Yes.

17 Q. And specifically the part of that
18 three-part test that deals with whether the
19 benefit -- whether the stipulation benefits customers
20 and the public interest.

21 A. Yes.

22 Q. So that's the one prong of the three
23 prongs that you're addressing in your testimony,
24 correct?

25 MS. BOJKO: Objection. Mischaracterizes

1 his testimony.

2 EXAMINER WALSTRA: Overruled.

3 A. Yeah, I'm addressing the prong that
4 specifically addresses the public interest; benefits
5 the customers and the public interest.

6 Q. And the part of your testimony that
7 addresses that prong appears on page 3, beginning on
8 line 12, and carries over to page 4, ending at
9 line 12, correct?

10 MS. BOJKO: Your Honor, I object. This
11 mischaracterizes his testimony. I don't know if
12 there's an incorrect page reference or there's a
13 confusion of what prong numbers we're talking about,
14 but it clearly mischaracterizes his testimony.

15 EXAMINER WALSTRA: The witness can clarify
16 if that's not the case.

17 A. I believe my whole testimony addresses
18 this; whether this is in the customer interest or
19 not.

20 Q. Looking at your testimony on page 4,
21 lines 1 through 12.

22 A. Yes.

23 Q. That refers to a different Commission
24 proceeding, correct?

25 MS. BOJKO: Objection. Mischaracterizes

1 his testimony.

2 EXAMINER WALSTRA: The witness can
3 clarify.

4 A. I've referenced Case 14-1580 in these
5 lines.

6 Q. Yes.

7 A. Which I acknowledge is not a case that's
8 part of the stipulation.

9 Q. Okay. And you reviewed 14-1580 in
10 preparation for your testimony today, correct?

11 A. I'm -- I answered that. So I looked at
12 the stipulation and the other witnesses' testimonies;
13 I didn't see anything new.

14 14-1580 is another case. This feels a
15 little bit like déjà vu. A lot of these same
16 questions were discussed in 14-1580. In fact, I
17 believe we litigated in that case and it hasn't been
18 resolved. So, yeah, I'm generally aware or pretty
19 well aware of that case.

20 Q. Okay. And, in fact, you were a witness on
21 behalf of OMA in that case, correct?

22 A. Yes, that's right.

23 Q. And the single issue involved in that case
24 was the continuation of the Company's shared savings
25 mechanism through 2016, correct?

1 A. I don't recall if that's the single issue.
2 I recall that that is one of the issues. I'm not
3 sure if there were others or not.

4 Q. And so, you've reviewed the stipulation
5 that's the subject of this proceeding, correct?

6 A. Yes.

7 Q. And is it your understanding then that if
8 the Commission approves the Stipulation, Duke Energy
9 Ohio will not be permitted to request shared savings
10 for 2016?

11 A. That's my understanding of the
12 stipulation.

13 Q. And in this proceeding, this proceeding
14 right now in which you are testifying just to be
15 clear --

16 A. Yes.

17 Q. -- you understand that there were two
18 parties that filed applications for rehearing,
19 correct?

20 A. I -- subject to check, sure.

21 Q. Okay. And you understand that the
22 Commission granted rehearing to those two parties?

23 A. Subject to check. I'll take your word on
24 it.

25 Q. And when the Commission grants rehearing,

1 based on your experience thus far with proceedings
2 before the Commission, the Commission can alter its
3 previous determination, correct?

4 MS. BOJKO: Objection. Clarification that
5 you're not asking this witness as an attorney.

6 Q. With the understanding you are not an
7 attorney, sir.

8 A. Can you ask that again?

9 Q. Sure. You've had some now -- you've
10 testified that you've had some experience in
11 testifying before the Commission and in practicing on
12 matters related to energy, both at the Commission and
13 the General Assembly, correct?

14 A. Yes.

15 Q. So when the Commission grants rehearing in
16 a case, isn't it correct that the Commission can
17 reconsider its previous decision?

18 A. In my experience, just my limited
19 experience, they haven't, but my understanding is
20 that they could.

21 Q. If the Commission were to have -- this is
22 hypothetically speaking, if the Commission in this
23 case had permitted the use of banked savings to
24 calculate a shared savings incentive, do you know how
25 much money the Company would have been entitled to

1 for 2013?

2 A. I could go check documents and figure that
3 out. I don't know the exact number off the top of my
4 head.

5 Q. And do you know that number for 2014?

6 A. Similar response. I could check and find
7 that number. I don't know the exact number off the
8 top of my head.

9 Q. So to the extent -- so you don't know
10 then, as you sit here today, what trade-off the
11 Company might have made in respect of what it
12 viewed -- strike that.

13 So you understand that there was a
14 negotiated stipulation in this case, correct?

15 A. Between Duke and Staff, yes.

16 Q. Would you expect, hypothetically, in the
17 process, that both parties gave up something in order
18 to arrive at that stipulation?

19 MS. BOJKO: Objection. Calls for
20 speculation.

21 EXAMINER WALSTRA: Overruled.

22 A. No. I mean, my understanding is for the
23 Commission to -- on rehearing, to change its finding
24 and order substantively, there would need to be some
25 sort of new information or fact that wasn't here

1 before. I haven't seen anything like that. I mean,
2 there's no performance change from Duke, there's
3 no -- there's no argument in the stipulation or in
4 the witness testimony that gives a reason on why Duke
5 should be incented when it didn't perform.

6 Q. Okay. I'm going to go back and ask the
7 question again because I don't believe you answered
8 the question.

9 When parties negotiate a stipulation
10 generally, parties each need to give something up to
11 arrive at an agreement, correct?

12 MS. BOJKO: Objection. It calls for
13 speculation.

14 EXAMINER WALSTRA: Overruled.

15 A. You don't have to give something up; I
16 think a lot of times parties do.

17 Q. Do you know when Duke Energy first began
18 offering energy efficiency and peak demand reduction
19 programs?

20 A. I don't know the exact date. I believe it
21 was prior to -- prior to the law requiring them to do
22 so.

23 Q. Do you know how long Dayton Power and
24 Light has been offering programs for energy
25 efficiency and peak demand reduction?

1 A. Again, I don't know the exact day, but
2 they started offering programs when Senate Bill 221
3 came into effect after a reasonable period of time.

4 Q. How about AEP, do you know when they first
5 began offering EE/PDR programs, energy efficiency and
6 peak demand reduction?

7 A. Yes. It was several months after the
8 enactment of Senate Bill 221.

9 Q. Putting aside the shared savings question
10 for a moment. Would you agree with me that the law
11 permits a utility to achieve compliance with the
12 mandates by using banked energy savings?

13 MS. BOJKO: Objection. Calls for a legal
14 conclusion.

15 EXAMINER WALSTRA: Overruled.

16 A. Yes, I'd agree with that.

17 Q. Would you look at page 5 of your
18 testimony, please, line 12.

19 EXAMINER WALSTRA: What page was that?

20 MS. WATTS: Page 5, line 12, your Honor.

21 EXAMINER WALSTRA: Thank you.

22 A. Yeah, I'm there.

23 Q. Do you see where it says that the
24 Company's "plan to use banked savings to claim an
25 incentive did not come to light until 2014"?

1 A. Yes.

2 Q. When you say it "did not come to light,"
3 are you referring to your understanding of it, or
4 what exactly did you mean by that phrase?

5 A. Yeah, let me clarify. I don't think it
6 was transparent to other parties that Duke was
7 intending to use banked savings to set the shared
8 savings incentive tier until 2014 when they filed
9 workpapers that showed that.

10 Q. Now, you're not testifying on behalf of
11 any party but OMA today, correct?

12 A. That's correct.

13 Q. So you can't say definitively when this
14 information came to light for anyone other than
15 perhaps OMA, correct?

16 A. No. Well -- so I'm under oath here, but
17 people do talk a lot about the shared savings
18 incentive structure, and I think pretty much around
19 the entire community there's an understanding, a
20 pretty deep understanding that banked savings aren't
21 to be used to set the shared savings incentive tier.
22 So that's the discussions with Staff and other
23 parties during collaboratives and even the utilities.

24 And the other utilities, you know, until
25 this filing I don't think I had ever come across in

1 working with any other party, you know, anyone even
2 thinking of using banked savings to set the shared
3 savings incentive tier.

4 MS. WATTS: And, your Honor, I would move
5 to strike that entire answer because I believe the
6 entire answer is based upon hearsay.

7 MS. BOJKO: Your Honor, she opened the
8 door by asking what the basis of his knowledge was
9 and whether he knew about the other parties and their
10 positions, and he stated that he had firsthand
11 knowledge of why he drafted this sentence.

12 EXAMINER WALSTRA: I understand it is
13 clearly hearsay. I think it kind of goes to what his
14 understanding was. The Commission will give it the
15 weight it deserves.

16 MS. WATTS: Okay. Thank you, your Honor.

17 Q. (By Ms. Watts) Sir, have you ever reviewed
18 any of Duke Energy Ohio's annual energy efficiency
19 status filings?

20 A. I would say I've seen them and done a
21 cursory review. I have not done an in-depth review
22 or compiled an analysis, an in-depth analysis of
23 them.

24 Q. And is it your testimony, as you sit here
25 today, that you -- that there is no reference in any

1 of those status filings to the use of banked savings
2 to calculate incentive?

3 A. Can you ask that again?

4 Q. Sure. You claim that you've reviewed some
5 of those filings in a cursory fashion, correct?

6 A. Yeah. To be clear, we're talking about
7 the -- if I can use a different term to make sure
8 we're talking about the same thing -- the evaluation
9 reports of the programs? Or are you speaking of
10 something different?

11 Q. I'm speaking of the annual EEC filings
12 that the Company makes in order to demonstrate
13 compliance with the S.B. 221 mandates.

14 A. Is that different than the Evaluation,
15 Measurement, and Verification reports? You'd
16 probably have to show me one.

17 Q. Okay. In any case, you're not aware of --
18 you're not testifying today that the Company has not
19 ever demonstrated use of banked savings to calculate
20 incentive in previous filings, correct?

21 MS. BOJKO: Objection, your Honor. He
22 said he doesn't understand which filing she's talking
23 about. She couldn't explain it and he asked to see
24 one and she hasn't given him one, and now she's still
25 asking the same question but changing the terminology

1 to "filings" instead of "EEC filings." He clearly
2 asked to see what she was referencing before
3 committing to testimony regarding such.

4 EXAMINER WALSTRA: The witness may answer
5 if he knows.

6 A. Yeah, I mean, so I provided a written
7 testimony. I have an oral testimony here today
8 that's responsive to questions. So, I mean, your
9 question is confusing to me. I'm not going to -- my
10 understanding of an oral testimony is I am not
11 allowed to bring, like, bring up new information that
12 I didn't have in my written testimony. So you're
13 asking me a question about something that wasn't in
14 my written testimony, but it's --

15 MS. WATTS: I will withdraw the question,
16 your Honor.

17 EXAMINER WALSTRA: Thank you.

18 Q. Sir, since you testified in the 14-1580
19 case, have you gained a better understanding of how
20 the Company calculates its shared savings incentive?

21 A. I'd say my understanding is very similar
22 to when I testified in the 14-15 -- 14-1580 case.

23 Q. And what was that understanding?

24 MS. BOJKO: Objection. I'm sorry. Are we
25 asking what his understanding was in the 14-1580 or a

1 general understanding of the shared savings?

2 MS. WATTS: Well, Mr. Seryak testified
3 that his understanding today is the same as it was
4 then, so either one is fine with me.

5 MS. BOJKO: But regarding what?

6 MS. WATTS: How the Company calculates its
7 shared savings incentive.

8 MS. BOJKO: Thank you.

9 A. Can you be more specific? Like, you're
10 talking about the shared savings pool or how you
11 achieve the shared savings incentive? There's a lot
12 to this. That's a very, very broad question.

13 Q. Sure. I just wonder if you can state the
14 mathematical formula the Company uses to calculate
15 its shared savings incentive.

16 A. Well, there's a very complicated series of
17 nested formulas that aren't -- actually it's -- so
18 there's a formula to determine how to set the shared
19 savings incentive tier and then there's another
20 formula to calculate the shared savings pool, this is
21 system benefits, the Company hasn't made that formula
22 public. And then there's formulas on how to apply
23 the two together to arrive at the Company's eventual
24 shared savings. So there's a lot of math in there.
25 So I can try to answer your question if you're more

1 specific.

2 Q. Well, the best question I can put to you
3 is, are you able to state a mathematical formula that
4 explains how the calculation is made?

5 MS. BOJKO: Objection, your Honor. Asked
6 and answered. He just said there's numerous formulas
7 that make up the one, and one is secret that the
8 Company won't share, so I think the question is
9 impossible.

10 EXAMINER WALSTRA: If the witness knows,
11 he can answer.

12 A. I mean, my hunch is Duke uses a software
13 program to calculate system benefits. This is a
14 whole lot of formulas that would probably take hours
15 to recite. And, you know, whether Duke uses -- like,
16 we're still not sure if Duke is subtracting from the
17 shared savings pool to account for that they're not
18 bidding in all efficiency resources into PJM. So
19 there's a lot of questions into the formulas Duke
20 uses.

21 I can't give you a single equation. I
22 mean, you're asking something very general. If
23 you're more specific, I may be able to tell you
24 generally the equation that's used. But you're
25 asking for, you know, a very broad bucket of

1 equations that even if you listed it out, it would
2 probably be multiple pages of programming code.

3 Q. Okay. So the answer to my question is no,
4 you do not have a mathematical formula; is that
5 correct?

6 MS. BOJKO: Objection, your Honor. Asked
7 and answered three times now.

8 EXAMINER WALSTRA: I'm going to sustain.

9 MS. WATTS: Okay. I have nothing further,
10 your Honor.

11 EXAMINER WALSTRA: Thank you.

12 Mr. Jones

13 MR. JONES: Thank you, your Honor.

14 - - -

15 CROSS-EXAMINATION

16 By Mr. Jones:

17 Q. Hello, Mr. Seryak.

18 A. Good morning.

19 Q. My name is John Jones. I represent the
20 Staff in this proceeding.

21 MS. BOJKO: I'm sorry. Could you use your
22 mic, please, sir.

23 MR. JONES: Yes.

24 MS. BOJKO: Thank you.

25 Q. Mr. Seryak, I want to refer you to your

1 testimony on page 5, lines 11 and 12, where you refer
2 to "Duke's intentions or plan." Do you see that
3 language there in your testimony?

4 A. Yes.

5 Q. Okay. And you said that the "plan to use
6 banked savings to claim an incentive did not come to
7 light until 2014." Now, when you say "did not come
8 to light," it came to light how, in your description?

9 A. Came to light within the workpaper filings
10 that showed Duke, in Duke's filing, you know,
11 essentially requesting or using banked savings to set
12 the shared savings tier.

13 Q. So are you familiar with all of Duke's
14 filings underneath the portfolio plan from the
15 beginning of the plan until now?

16 A. Which plan?

17 Q. Their portfolio plan.

18 A. Can you give me a case number? Like,
19 Duke's had -- received permission for a couple of
20 different plans.

21 Q. Well, are you familiar with the
22 stipulation in Case No. 11-4393-EL-RDR? Did you
23 review that at any time?

24 A. I have reviewed it in the past.

25 Q. Okay. So you have then reviewed some

1 documents. Can you give a description of what you
2 have reviewed as far as the portfolio plan to date?

3 MS. BOJKO: Objection. Asked and
4 answered. Ms. Watts went through this quite
5 extensively.

6 MR. JONES: He didn't answer that
7 question, your Honor.

8 EXAMINER WALSTRA: Overruled.

9 A. These are documents I've -- was familiar
10 with for other cases and reviewed in the past. Last
11 year when we litigated some of these same issues, I
12 reviewed them at that time.

13 Q. So would you agree with me then, sir, that
14 Duke's approach from the beginning of its portfolio
15 plan has been consistent as to its methodology in
16 using banked savings to claim an incentive?

17 A. No.

18 Q. All right. Do you want to explain that?

19 A. Yes. My understanding of the approved
20 shared savings mechanism in the portfolio case for
21 Duke, which is consistent with what other utilities
22 follow, is that use of banked savings to set the
23 shared savings tier is ineligible. The Commission
24 reaffirmed that in their Finding and Order in this
25 case.

1 So when -- when there's a consistent view
2 of how banked savings should be used in Commission
3 orders, and Duke does something counter to that and
4 the Commission says that was not allowed, I would
5 say, you know, the approach is inconsistent, right?
6 If you're not allowed to use banked savings and then
7 Duke tries to do that, I would say that's an
8 inconsistent approach.

9 Q. I'm talking specifically about Duke's
10 filings as to what they filed.

11 A. Yes.

12 Q. And their methodology and their filings as
13 to that methodology. It's been consistent, right?

14 A. In years prior, I don't think they were
15 using -- in order to judge their approach and their
16 consistency, you need to look at other years in which
17 they would have tried to use banked savings to set
18 the shared savings tier. From documents I've
19 reviewed, 2013 is the first year in which that
20 happened that I'm aware of, but that is -- I mean,
21 Duke's approach should be consistent with Commission
22 orders, and that wasn't consistent, for Duke, with
23 Commission orders.

24 Q. When you say "came to light" in your
25 testimony, it means this is a plan that they've been

1 following themselves as a Company; is that correct?

2 A. I can't tell you if it's their plan, but I
3 can tell you they tried to use banked savings to set
4 their shared savings tiering. I mean, I think what's
5 relevant is the Commission orders on the matter.

6 Q. When you refer then in the next sentence
7 in your testimony on the same page, page 5, beginning
8 at line 13, "Therefore," continuing over to 14 and
9 15, you say "Duke has since had ample time to
10 increase the energy savings achieved by its
11 programs....," are you referring to since it came to
12 light in 2014?

13 A. Yes.

14 Q. And are you familiar with Senate Bill -- I
15 know you're not an attorney, but are you familiar
16 with Senate Bill 310?

17 A. I am.

18 Q. And Senate Bill 310 became effective in
19 2014, correct?

20 A. It was passed in 2014. It became
21 effective -- well, changes to programs or nonchanges
22 to programs became effective January 1st, 2015.

23 Q. But the law, itself, became effective
24 September 12th, 2014, correct?

25 A. Yes.

1 Q. And under that law, if an EDU, electric
2 distribution utility, like Duke, if they didn't
3 modify their portfolio plan, then that plan had to
4 stay in place until the duration of the plan, is that
5 correct, existing plan?

6 A. That's my understanding.

7 Q. That's your understanding?

8 A. Yes.

9 MS. BOJKO: Your Honor, I apologize. May
10 I have that question and answer reread?

11 EXAMINER WALSTRA: Sure.

12 (Record read.)

13 Q. And, sir, Duke did not modify that plan,
14 did they?

15 A. Yeah, that's my understanding is they did
16 not modify their plan.

17 MR. JONES: No further questions. Thank
18 you.

19 MS. BOJKO: May we have a few minutes,
20 your Honor?

21 EXAMINER WALSTRA: Sure. We'll take a
22 5-minute break.

23 (Recess taken.)

24 EXAMINER WALSTRA: Ready to go back on the
25 record?

1 MS. BOJKO: Thank you, your Honor. Yes,
2 we have a few redirect questions.

3 - - -

4 REDIRECT EXAMINATION

5 By Ms. Bojko:

6 Q. Mr. Seryak, do you recall questions from
7 Ms. Watts about the three-prong test?

8 A. Yes.

9 Q. And you are aware that there -- you talk
10 specifically about the first prong, but you're aware
11 that the other two prongs are "Does not violate any
12 important regulatory principle or practice," and "As
13 a package, benefits ratepayers and the public
14 interest"?

15 A. Yes.

16 Q. Can you turn to page 3 and 4 of your
17 testimony. You were asked a few questions about
18 pages 3 and 4, but then I think Ms. Watts focused her
19 question to the top of page 4 and asked you if this
20 whole section was concerning Case 14-1580. Do you
21 recall that?

22 A. I recall.

23 Q. Okay. After rereading this section, do
24 you now understand that this talks about another case
25 as well?

1 A. Yes. I also cite to the Commission order
2 in Case 14-457.

3 Q. And in discussing the Commission order in
4 that case and the other case, did you make a
5 recommendation, on page 4, regarding what violates an
6 important regulatory principle or practice?

7 A. Yes. Insofar that the stipulation
8 violates a Commission order.

9 Q. Okay. So I think there was some confusion
10 about whether that was the second or third prong, but
11 you do believe you addressed that second prong in
12 your testimony?

13 A. Yes.

14 Q. Okay. And, sir, did you then address
15 another prong of the testimony regarding whether, as
16 a package, the stipulation benefits ratepayers and
17 the public interest?

18 A. Yes, I did.

19 Q. Okay. Is that later in your testimony?

20 A. Yes, I explain much of that in the
21 remainder of my testimony.

22 Q. When you say "remainder," you're saying
23 after the section we just discussed on page 4?

24 A. Yes.

25 Q. And so, what was your conclusion whether

1 the stipulation violates an important regulatory
2 principle or practice which is the second prong?

3 A. Oh. My conclusion is that it does,
4 insofar that it violates a Commission order.

5 Q. And which Commission order were you
6 referring to?

7 A. The Commission order that Duke was using
8 banked savings improperly to set the shared savings
9 tier.

10 Q. Okay. And was that the order that was
11 issued in this case -- I know there are a lot of case
12 numbers in this case -- but this case, 14-457?

13 A. Yes, it was issued in 14-457.

14 Q. Okay. And what was your conclusion
15 regarding whether, as a package, the stipulation
16 benefits ratepayers and is in the public interest?

17 A. My conclusion is that the stipulation only
18 created costs with no commensurate benefits for
19 customers, so I don't think it is in the public
20 interest.

21 MS. BOJKO: Okay. I have no further
22 questions, your Honor.

23 EXAMINER WALSTRA: Thank you.

24 Ms. Watts.

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RECROSS-EXAMINATION

By Ms. Watts:

Q. Sir, when you came back from the break did you bring some written documentation with you?

A. I took a piece of paper, yeah.

Q. And what does the paper contain?

MS. BOJKO: Objection, your Honor. I mean, if there's any client-attorney communications, it's improper to disclose those.

MS. WATTS: I'm not asking for attorney-client communication. I understand that the witness has additional material on the stand with him, and I'm entitled to understand what he's looking at in order to testify.

MS. BOJKO: Well, not if he's talking about the contents of notes that he may or may not have taken in conversations with the attorney.

EXAMINER WALSTRA: Can you state, without going into the contents, what the document is?

THE WITNESS: It's a document that I already had up here with just a couple notes that I handwrote.

EXAMINER WALSTRA: Okay. And is it your own notes?

THE WITNESS: Yeah, they're my own notes.

1 EXAMINER WALSTRA: Okay.

2 THE WITNESS: In my barely legible
3 handwriting.

4 MS. BOJKO: As a result of conversations
5 with Counsel, your Honor, he jotted down a note or
6 two.

7 EXAMINER WALSTRA: Are they from the
8 conversations with your attorney?

9 THE WITNESS: Yes.

10 MS. WATTS: Okay. Thank you.

11 Q. (By Ms. Watts) Sir, without reference to
12 those notes, are you able to state what the three
13 prongs are that the Commission reviews in determining
14 whether a stipulation should be approved?

15 A. So I have reference material I keep, so I
16 don't -- at my desk, in my office, so I don't get
17 confused about which order the prongs are. I don't
18 refer to them as "prongs." And so, I'm just -- this
19 is difficult for me to answer because I don't call
20 them a "prong." "Prong" is not very descriptive.

21 But if I can clarify, I do understand that
22 violating a Commission order is part of the second
23 prong, insofar as it goes against typical regulatory
24 practice. And I understand very well the third
25 prong, if I'm matching the prongs up right, that the

1 stipulation should benefit the good of the public.

2 MS. WATTS: I have no further questions.

3 EXAMINER WALSTRA: Thank you.

4 Mr. Jones.

5 MR. JONES: One second, your Honor.

6 No questions, your Honor.

7 EXAMINER WALSTRA: Thank you.

8 Thank you, Mr. Seryak.

9 MS. BOJKO: Your Honor, at this time, OMA
10 would like to move the admission of OMA Exhibit 1,
11 Mr. Seryak's testimony.

12 EXAMINER WALSTRA: Any objection?

13 MS. WATTS: No objection.

14 MR. JONES: No objection.

15 EXAMINER WALSTRA: It will be admitted.

16 (EXHIBIT ADMITTED INTO EVIDENCE.)

17 MS. BOJKO: Thank you.

18 EXAMINER WALSTRA: Thank you.

19 Mr. Stinson.

20 MR. STINSON: Your Honor, OCC will call
21 its witness, Wilson Gonzalez.

22 And if I could approach, your Honor.

23 EXAMINER WALSTRA: You may.

24 Raise your right hand.

25 (Witness sworn.)

1 EXAMINER WALSTRA: You may be seated.

2 MS. WATTS: Your Honor, may we go off the
3 record for a moment?

4 EXAMINER WALSTRA: Sure.

5 (Discussion off the record.)

6 (EXHIBITS MARKED FOR IDENTIFICATION.)

7 EXAMINER WALSTRA: We'll go back on the
8 record. Whenever you're ready, Mr. Stinson.

9 - - -

10 WILSON GONZALEZ

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

13 DIRECT EXAMINATION

14 By Mr. Stinson:

15 Q. Good morning, Mr. Gonzalez. Will you,
16 please, state your full name and business address for
17 the record.

18 A. Wilson Gonzalez. 4150 Whitney Avenue,
19 Worthington, Ohio 43 -- 43085.

20 Q. Thank you.

21 I have placed before you what's been
22 marked for identification purposes as OCC
23 Exhibit No. 3. Can you identify that for me, please?

24 A. Yeah. That's the direct testimony. My
25 direct testimony.

1 Q. And was that prepared by you or under your
2 direct supervision?

3 A. Yes, it was.

4 Q. I've also placed before you what's been
5 marked for identification purposes as OCC
6 Exhibit No. 4. Can you identify that for me, please?

7 A. Yes. That's my errata testimony.

8 Q. Your errata to OCC Exhibit No. 3?

9 A. Correct.

10 Q. If I were to ask you the same questions in
11 your direct testimony, OCC Exhibit No. 3, as modified
12 by the errata, OCC Exhibit 4, would your responses be
13 the same today?

14 A. Yes, they would.

15 Q. And are those responses true and accurate
16 to the best of your recollection?

17 A. Yes, they are.

18 MR. STINSON: At this time, I move the
19 admission of OCC Exhibits No. 3 and 4, subject to
20 cross-examination, and tender the witness for cross.

21 EXAMINER WALSTRA: Thank you.

22 Ms. Watts.

23 - - -

24 CROSS-EXAMINATION

25 By Ms. Watts:

1 Q. Good morning, Mr. Gonzalez.

2 A. Good morning, Ms. Watts.

3 Q. Sir, would you tell me what you reviewed
4 in preparation for your testimony today?

5 A. I'll direct you to page 5 of my testimony
6 where I did list some of the items that I reviewed.
7 I also reviewed the e-mail streams that have been
8 discussed prior, the e-mails from the Staff to OCC
9 and the other parties. And I also -- so the list is
10 in response to my Question 6.

11 I would add that, like Mr. Rinebolt, I've
12 been involved in every energy efficiency portfolio in
13 the state, so, you know, there's a lot of documents
14 that I've reviewed over time.

15 Q. Okay. Thank you.

16 Sir, have you reviewed any of Duke Energy
17 Ohio's annual status reports that are filed in
18 compliance with S.B. 221?

19 A. Usually when the, you know, when the
20 Company files their annual report, I have, you know,
21 taken a look at the reports. I must say they're one
22 of the hardest reports to get information from, but,
23 I have tried to, you know, yeah, I have reviewed
24 them.

25 Q. Sure. And at least, in part, they're

1 difficult because they're huge, correct, they're like
2 five-, six-hundred pages-ish?

3 A. No. I would say more because of the way
4 the reports are formatted and the information the way
5 it's presented, it's unlike the other utilities. I
6 think the other utilities are much more
7 straightforward with their results and so on.

8 Q. The Commission's rules dictate what is
9 contained in those reports, correct?

10 A. I believe there was, early on, the
11 Commission tried to set a template for those types of
12 reports and I think they were probably never
13 finalized, but there are certain things in the rules
14 and so on that state, you know, generally what
15 the, you know, what the reports should contain.

16 Q. But it's not your testimony here today
17 that Duke Energy's compliance filings are not in any
18 way noncompliant with the Commission's rules?

19 A. No.

20 MR. STINSON: Could I have the --

21 A. I'm sorry. No, from a compliance
22 perspective, no.

23 Q. And, sir, you refer to an evaluator's
24 report on page 19 of your testimony.

25 A. Correct.

1 Q. And that's a report that was filed in a
2 case, on behalf of the Staff, that was done by
3 Evergreen Economics, correct?

4 A. Yes.

5 Q. And did you review the Commission's
6 response to that evaluator's report?

7 A. I want to say I probably left before that
8 report came out, so perhaps I have not.

9 Q. Sir, when were you first asked to testify
10 on behalf of OCC in this proceeding?

11 A. I'm sorry, when I was asked to testify?

12 Q. Yes.

13 A. I would say when the -- sometime when the
14 entry came out for -- when the entry came out, that
15 specified a date when testimony was due. I think
16 that's when I was formally asked, but I was aware of
17 the, like I said, the e-mails, I was aware of the
18 document the Staff and Company had made available to
19 the parties on I believe it was December 30th.

20 Q. Okay. So it's your testimony that you --
21 did you file testimony earlier in the docket?

22 A. No, I did not.

23 Q. Okay. So, in fact, there was no testimony
24 filed earlier in the docket, correct?

25 A. In 14 --

1 Q. 14-457, on behalf of OCC.

2 A. Oh, on behalf of OCC. With that
3 clarification, no.

4 Q. Okay. And the Commission issued an order
5 in early 2015 in this case, correct, the first order?

6 A. That's my understanding, yes.

7 Q. Okay. And then there were two
8 applications for rehearing filed, correct?

9 A. Yes, that's correct.

10 Q. And one was filed on behalf of the Company
11 and one was filed on behalf of Ohio Partners for
12 Affordable Energy, correct?

13 A. That's correct.

14 Q. Okay. And during that time period were
15 you engaged with OCC in the docket?

16 A. I would say I was more engaged in the
17 14-1580 case.

18 Q. Okay. So it's your --

19 A. But I was aware of the docket and, you
20 know, we've had conversations about that particular
21 ruling and so on.

22 Q. Okay. So it's your understanding that on
23 December 30th, the Staff sent OCC a draft stipulation
24 for its review, correct?

25 A. I didn't find out about it on the 30th. I

1 think I found out about it shortly thereafter, I
2 think maybe on the 4th. I think there was some
3 holidays in there and so on and so forth.

4 I disagree with the way you phrased that,
5 because when I read the particular e-mail it
6 basically said do you want to sign on to it. There
7 was no mention of any negotiations. There was no --
8 which is -- which is, you know, one of the reasons in
9 my testimony I state I thought it was a "fait
10 accompli."

11 Q. I understand your view of that, sir. I'm
12 trying to understand the timeline here first, and
13 you'll have plenty of opportunity to share that view
14 with us.

15 So it's your understanding, at least
16 initially, I believe I just asked you this but I want
17 to be clear, that the Staff sent OCC a stipulation
18 for review on December 30th, correct?

19 A. They sent OCC a stipulation on that date.

20 Q. And you became aware of that stipulation,
21 regardless of how you want to characterize it, you
22 became aware of it on approximately the 4th.

23 A. I believe I received an e-mail on the 4th.

24 Q. And was that when you were asked to
25 provide testimony in this case?

1 A. No.

2 Q. Okay. So when were you asked to provide
3 testimony in this case?

4 A. When it became clear that testimony --
5 when there was going to be a procedural hearing on
6 the stipulation, and testimony was going to be filed
7 within a certain date, and so on and so forth.

8 Specifically, I mean, there's always,
9 whenever there's a case like that, and I'm talking
10 with OCC, you know, there's always, you know, if the
11 case gets litigated, you know, testimony is always
12 something that --

13 Q. I understand --

14 A. -- it's understood that I'll probably be
15 asked to provide testimony.

16 Q. Right. I understand your OCC's go-to
17 witness for EE; is that correct? Is that what you're
18 telling us, essentially?

19 A. No, no. I'm just stating when there's a
20 case that has a stipulation and it's dealing with
21 energy efficiency, then testimony is always -- I'm
22 always thinking about, you know, if testimony is
23 required in the case, you know, I start thinking
24 about that.

25 Q. Sure. Okay.

1 Now, any of the meetings or negotiations
2 that are described in your testimony, you did not
3 attend, correct?

4 A. You're talking about the selective
5 meetings between the Company and Duke?

6 Q. Any --

7 A. I mean, between Staff and Duke?

8 Q. Is it your understanding that those are
9 the only meetings that were held?

10 MR. STINSON: Well, I object to the form
11 of the question, your Honor. It's vague as to what
12 meetings she's speaking of.

13 EXAMINER WALSTRA: Could you be more
14 specific?

15 MS. WATTS: We'll get specific.

16 EXAMINER WALSTRA: Thank you.

17 Q. Sir, in your errata sheet there are some
18 discovery responses attached. Do you see that?

19 A. Yes.

20 Q. And if you turn to the very last page,
21 there's a response that is characterized as
22 OCC-INT-02-11 Supplemental. Do you see that?

23 A. Yes.

24 Q. And is it your understanding that that's a
25 supplemental discovery response that was provided to

1 OCC?

2 A. Yes.

3 Q. And in that discovery response there are
4 several meetings described.

5 A. Yes. If you're referring to those, I
6 didn't attend them.

7 Q. Okay. And in addition to those meetings,
8 do you know whether there were any other meetings
9 held to discuss the stipulation?

10 A. Yes. I believe there was another meeting
11 held after the stipulation was filed, sometime I
12 think late January.

13 Q. And did you attend that meeting?

14 A. I did not attend. I had a conflict, so I
15 was not able to attend.

16 Q. And do you know on what date the
17 stipulation was docketed?

18 A. Yes, the 6th, I believe, of January.

19 Q. And are you aware of whether OCC requested
20 any meetings to discuss the stipulation?

21 A. I believe in some of the e-mails I've read
22 where OCC requested to get together and discuss some
23 of the terms and understand some of the information
24 and some of the numbers in the stipulation.

25 Q. Is it your understanding then that that

1 meeting held later in January was in response to
2 OCC's request?

3 MS. BOJKO: Excuse me. May I have that
4 question reread, please.

5 EXAMINER WALSTRA: Sure.

6 (Record read.)

7 MS. BOJKO: Thank you.

8 A. I don't know specifically. That was
9 something the Staff -- I don't know specifically.

10 Q. Okay. I'd like you to turn to page 8 of
11 your testimony, please. Do you have that?

12 A. Yes, I do.

13 Q. On line 3 your sentence begins "No. My
14 understanding is that...." And my question to you
15 is, with reference to your phrase "My understanding,"
16 from what did you gain that understanding?

17 A. I got that understanding from the
18 discovery responses I looked at before in filing my
19 testimony, where you said -- where the Company
20 indicated that there were two meetings, but only
21 Staff and Company personally had attended.

22 Q. Okay. And on line 13 you make a statement
23 there that "This was not 'lengthy' negotiations as
24 claimed in the Stipulation." Do you see that?

25 A. That's correct.

1 Q. So you were not present at those meetings,
2 correct?

3 A. No, I was not.

4 Q. Do you have any direct knowledge of how
5 long each meeting was?

6 A. No.

7 Q. And, sir, in your testimony you claim that
8 the stipulation is not the product of serious
9 bargaining between capable, knowledgeable parties,
10 correct?

11 A. If you read my sentence it says "The first
12 prong of the PUCO's standard of review for
13 considering the reasonableness of a stipulation is
14 whether the settlement is a product of serious
15 bargaining among capable, knowledgeable parties
16 representing diverse interests." So I'm saying it's
17 not -- it's not capable and knowledgeable parties
18 representing diverse interests.

19 Q. Sir, you did not identify in your
20 testimony any Commission rule or Ohio statute that
21 requires the inclusion of all parties in every
22 settlement meeting, correct?

23 A. I did cite to, I believe it was a Supreme
24 Court case, the Time Warner case, where the
25 Commission -- where the Supreme Court was very

1 concerned that the partial stipulation had excluded
2 an important party in the case. So I would think --
3 this one excluded every party in the case, so I would
4 think that would follow pretty straightforward.

5 Q. Okay. We'll get to that, but I need an
6 answer to my question first. You did not cite a rule
7 or statute that compels inclusion of all parties in
8 settlement discussions, correct?

9 MR. STINSON: Objection. The testimony
10 speaks for itself, your Honor.

11 EXAMINER WALSTRA: Overruled.

12 THE WITNESS: Can you reread the question,
13 please?

14 (Record read.)

15 A. That's correct.

16 Q. And are you aware that partial
17 settlements, meaning settlements signed by less than
18 all parties, are sometimes filed with the Commission?

19 A. I'm aware that partial stipulations have
20 been, I guess, filed and approved by the Commission,
21 but in my history I've never heard of one that had
22 no -- none of the intervening parties sign on.

23 Q. Sir, have you ever seen a stipulation be
24 amended?

25 A. You're talking about after it's been

1 filed?

2 Q. Yes.

3 A. I've seen supplemental things added to
4 settlements. So you have your original settlement
5 then you have the supplemental settlement which might
6 add more things, more items.

7 Q. Would you turn to page 14 of your
8 testimony, please. On lines 13 and 14 there's a
9 sentence there that says "First of all, the risk to
10 customers is closer to \$40 million, not \$55 million."
11 Do you see that?

12 A. Correct, yes.

13 Q. Could you tell me how you arrive at the
14 \$40 million calculation?

15 A. I was responding there to the
16 stipulation's \$55 million figure that appears in the
17 stipulation, and my reasoning there was that the
18 14-1580 case had not been -- there was no order in
19 that case; however, I participated in that case, and
20 given the testimony, given the prior Commission
21 order, I felt that the risk there was very slight,
22 was slight -- I think the risk is slight for the
23 whole -- for the whole stipulation, the risk to
24 consumers.

25 However, I felt that that one I could take

1 out right away because we were talking about a new --
2 a new incentive mechanism, and we had the Commission
3 precedent in the FirstEnergy case, and we had the
4 Commission order in this particular case, in the
5 14-457 case.

6 Q. So then is your \$40 million number
7 calculation of shared savings for the years excluding
8 2016; is that a fair statement?

9 A. I would say I'm responding more to the --
10 I'm responding more to the number that was in the
11 settlement. I don't accept any of the numbers, you
12 know, a priori.

13 Q. Well, I'm just trying to understand where
14 you calculated 40 million.

15 A. Oh. I didn't calculate 40 million. The
16 stipulation contains 55 million. The Company
17 calculated some number and -- to get that, to get the
18 55.

19 Q. So the number is based on -- so tell me
20 what number you started with.

21 A. I'm providing testimony against the
22 settlement and the stipulation. The stipulation had
23 a number of 55 million. That was my starting point.
24 You presented me with a number.

25 Q. Okay. And your testimony is that the risk

1 to customers is closer to 40 million. My question to
2 you is, did you arrive at that 40 million by omitting
3 possible shared savings for 2016?

4 A. Yes.

5 Q. Sir, Duke Energy Ohio does not have an
6 approved portfolio for after 2016, correct?

7 A. That's correct.

8 Q. Nor does it have a shared savings
9 mechanism approved for after 2016, correct?

10 A. I would say 2015.

11 Q. Okay. So the 14-1580 case dealt with
12 whether or not the Company should have a shared
13 savings mechanism in 2016, correct?

14 A. I would say it was to define what type
15 of -- whether and what type of incentive mechanism.

16 Q. Okay. And you're familiar with the
17 Commission's rules with respect to energy efficiency
18 compliance, correct?

19 A. I have a general understanding of them,
20 yes.

21 Q. And the rules require that the Company
22 file a new portfolio and a new cost recovery
23 mechanism every three years, correct?

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

25 Q. On page 17 of your testimony, on line 7,

1 you see your reference to a "loop-hole" there?

2 A. What line? I'm sorry.

3 Q. Seven. Page 17, line 7.

4 A. Yes, I see that.

5 Q. Now, the provision you're referring to
6 there is a provision that's laid out in the
7 stipulation, correct?

8 A. Yes, I believe that's true.

9 Q. And you're not saying that the Commission
10 is not capable of understanding that provision,
11 correct?

12 MR. STINSON: Could I have the question
13 reread, please?

14 (Record read.)

15 A. Based on, I would say, Thursday's
16 discussion of this particular provision, it is a --
17 there is a lot -- there is some ambiguity to this
18 particular provision.

19 Q. And, certainly, the Commission can accept
20 or reject the stipulation, correct?

21 A. Yes.

22 Q. Turning again to your comments on page 19
23 about the Evergreen Economics report.

24 A. Yes.

25 Q. Do you recall what years that report was

1 examining?

2 A. I believe it was examining the Company's
3 first portfolio filing.

4 Q. So that was '09 and '10, correct?

5 A. Correct.

6 Q. Do you recall what specific finding you
7 were referring to in your testimony?

8 A. This was an example of a report that -- a
9 report that challenged some of the savings estimates
10 that the Company provided. I'm just using it for
11 illustrative purposes in terms of that could have
12 come up -- the Commission, by law, has to provide a
13 report, an EM&V report every year, and to the extent
14 that a report comes out from an independent EM&V
15 evaluator that questions the savings estimates of
16 Duke, of Duke's programs, this particular provision,
17 the provision where you're not going to change the
18 19.75 million, really wavier, almost waiver, in my
19 understanding, the Commission's right to, if they
20 have a finding where the savings are overestimated,
21 to adjust the savings and the amount of this award
22 that's -- that is part of this stipulation.

23 Q. So, but this evaluator's report was with
24 regard to years '09 and '10, correct?

25 A. Yes. Like I said, it's for illustrative

1 purposes. It happens every year. It could happen
2 again. I just thought it wasn't in the customer
3 interest for us to waive going back and taking
4 account of any findings in future EM&V reports.

5 Q. And again, you don't recall what the
6 Commission's response to that evaluator's report was
7 with respect to '09 and '10, correct?

8 A. No. Again, I was using it for
9 illustrative purposes.

10 Q. And you didn't include any of the
11 Commission's response in your testimony, did you?

12 A. I have one sentence. One sentence in the
13 study. Again, it was just to show that EM&V is
14 vibrant, it happens every year, and the Commission or
15 an independent evaluator can challenge certain of the
16 findings.

17 Q. And, sir, what is a Technical Reference
18 Manual?

19 A. It's a manual that has been established in
20 Ohio, I think it was the 09-512 case, and it sets
21 some of the parameters for savings estimates. So it
22 has -- it's a very -- I think it's a four-,
23 five-hundred page document with engineering
24 algorithms and savings and so on.

25 Q. And how is that manual to be used in Ohio?

1 A. As guidance.

2 Q. So is it correct to say that it's sort of
3 referred to as a "safe harbor"?

4 A. I would say that's correct.

5 Q. So to the extent a Company's measurement
6 and verification values don't line up with the
7 Technical Reference Manual, then what?

8 A. It depends. If it's very -- if it's a
9 very egregious difference, a major difference, I
10 think the Commission still has the option of
11 challenging the utility.

12 Q. And, likewise, it has the option of
13 accepting something different from what's in the
14 Technical Reference Manual, correct?

15 A. If the utility has sufficient
16 documentation supporting it, it could.

17 Q. Okay. Would you turn to page 22, please.
18 Are you there?

19 A. Yes, I am.

20 Q. Okay. Again, you referenced earlier the
21 Time Warner case, correct?

22 A. That's correct.

23 Q. Can you tell me what was in contention in
24 that case?

25 A. I've read it. It's a long case. It's the

1 telecom industry which I'm not an expert in the
2 telecom industry, but I believe it had to do with a
3 rate increase for Ameritech using an alternative
4 ratemaking methodology generally.

5 Q. Do you recall what the judgment of the
6 Court was in that case?

7 A. I've read it, but for the purposes of my
8 testimony I cite to a footnote where the Court had
9 very serious concern about the exclusion of a certain
10 party. So, for the purposes of my testimony, that
11 was, you know, my interest in that particular case.

12 Q. But you do not recall what the ultimate
13 judgment of the Court was?

14 A. No, I don't remember.

15 Q. Sir, what exactly is the "partial
16 settlement standard" that you refer to?

17 A. I think, generally speaking, it's a
18 standard when not all parties sign on to a
19 stipulation.

20 Q. Is it your understanding that the phrase
21 "partial settlement standard" is a phrase that came
22 out of that case that you cite?

23 A. I'm not an attorney, so in that sense,
24 I . . .

25 Q. So you don't recall if the case actually

1 used that phrase?

2 A. Well, I believe that the "partial
3 settlement" is used in the case I read.

4 Q. So can you describe what the Court's view
5 of a partial settlement standard was in that case?

6 A. Again, I would go back to the footnote
7 where the Court was very concerned that an important
8 party in that case was not involved in the
9 settlement, was excluded from the settlement.

10 Q. So it was in a footnote of the case?

11 MR. STINSON: Objection. Asked and
12 answered.

13 EXAMINER WALSTRA: Overruled.

14 A. Yes, and I have cited that footnote. I've
15 read that footnote and I'm aware of what the footnote
16 said.

17 Q. Okay. Thank you.

18 Sir, on page 22, lines 12 through 14, you
19 state that the Commission has granted -- I'm
20 paraphrasing slightly here -- the Commission has
21 granted rehearing only for the purpose of giving the
22 applications further consideration. Do you see that?

23 A. Yes.

24 Q. Is the word "only" in the Commission's
25 order?

1 MR. STINSON: Objection. The document
2 speaks for itself.

3 EXAMINER WALSTRA: Overruled. He can
4 answer if he knows.

5 A. That's my understanding of rehearings is
6 to give the Commission time to give the applications
7 further consideration.

8 Q. And after giving that further
9 consideration, the Commission can either affirm its
10 previous decision or change its decision, correct?

11 A. Those are two possible outcomes.

12 MS. WATTS: That's all I have. Thank you
13 very much.

14 EXAMINER WALSTRA: Thank you.

15 Mr. Jones.

16 MR. JONES: Thank you, your Honor.

17 - - -

18 CROSS-EXAMINATION

19 By Mr. Jones:

20 Q. Good morning, Mr. Gonzalez.

21 A. Hello, Mr. Jones.

22 Q. I want to direct your attention to page 9
23 of your testimony, lines 8 to 11. Let me know when
24 you get there.

25 A. Yes.

1 Q. Okay. Now, the testimony you give on
2 page 9, lines 8 through 11, this is information that
3 you do not have personal knowledge of or firsthand
4 information of; is that correct?

5 A. By "firsthand" you mean that I didn't
6 attend the --

7 Q. You did not attend, you were not present
8 at that meeting.

9 A. I was not present, but I've seen the
10 e-mails. I have seen the e-mail that --

11 Q. So --

12 A. -- you know, the results of that meeting,
13 I thought.

14 Q. So you're here today for this piece of
15 testimony, lines 8 through 11, you're asserting the
16 truth of what someone else told you; is that correct?

17 MR. STINSON: Objection. Asked and
18 answered.

19 EXAMINER WALSTRA: Overruled.

20 A. It's based on my reading of the string of
21 e-mails. I would say there was an e-mail sent after
22 the 27th meeting where it was fairly clear to me
23 there was certain provisions of the settlement, of
24 the stipulation, that were, whatever the term was,
25 not to be, you know, was a non-starter or --

1 Q. Well, Mr. Gonzalez, you were not copied on
2 any of those e-mails, were you?

3 A. No. OCC attorneys were.

4 Q. And so, then, someone else showed you or
5 provided those e-mails to you?

6 A. I think in any case I want to see what the
7 full record is, so I ask for whatever e-mails or
8 documents or anything have been -- have been produced
9 so that I could review them before I, you know, write
10 my testimony.

11 MR. JONES: Your Honor, I would move to
12 strike the testimony on page 9, lines 8 through 11.
13 The fact that he has testified he doesn't have
14 personal knowledge, he wasn't present at the meeting
15 on the 27th, he doesn't know what was said, and yet
16 he's asserting for the truth of the matter asserted
17 what someone else told him was said at the meeting on
18 the 27th, and that's classic hearsay, and I ask for
19 it to be stricken from his testimony.

20 MR. STINSON: Your Honor, Mr. Gonzalez, as
21 an expert witness, is testifying based on information
22 provided to him by his client, OCC. With respect to
23 Mr. Seryak, as well, the Bench permitted information
24 to be admitted into the record; that it be given the
25 applicable weight which it was due.

1 MR. JONES: Your Honor, no other witness
2 has been given the liberty to say what was said at
3 some meeting they didn't attend.

4 MR. STINSON: Mr. Seryak was.

5 MS. WATTS: And, your Honor, I might note
6 that a significant portion of Mr. Gonzalez's
7 testimony is, in fact, based on hearsay. And I had
8 an inclination to move to strike it and I did not do
9 so, but I think this particular section, between
10 lines 8 and 12, on page 9, are particularly egregious
11 in that clearly Mr. Gonzalez has no personal
12 knowledge of that meeting.

13 MR. STINSON: Motions to strike should be
14 made before the witness begins testifying, as well,
15 your Honor, in accordance with Commission practice.

16 MS. BOJKO: Your Honor, OMA opposes the
17 motions to strike. I think they're
18 mischaracterizing, misrepresenting Mr. Gonzalez's
19 testimony here this morning. He specifically stated
20 that this statement is from his personal knowledge of
21 reading e-mails. He did not say it was from hearsay
22 provided by other attorneys. It's after the review
23 of the record in this case and that's where he's
24 getting his knowledge from. So I think there's an
25 underlying representation, mischaracterizing of his

1 testimony this morning.

2 MR. STINSON: And that goes to the point,
3 your Honor, that he's testifying as an expert witness
4 here.

5 MR. JONES: Your Honor, the content of
6 this passage or this piece in his testimony makes it
7 sound like he's sitting in the meeting, itself, and
8 he's saying what was said at the meeting. I mean,
9 that's pretty substantive as to what the content of
10 this piece of testimony is.

11 EXAMINER WALSTRA: Understood. It is
12 hearsay. I think, you know, obviously at this moment
13 we do have testimony saying he was not at that
14 meeting, and where he did get the information from.
15 So I'm inclined to -- I'm going to let it remain in,
16 but, as was stated before, the Commission will give
17 it the weight it deserves, understanding of your
18 cross-examination here.

19 MR. JONES: Thank you, your Honor.

20 Q. (By Mr. Jones) Mr. Gonzalez, would you now
21 turn to page 14 of your testimony, lines 16 through
22 19.

23 A. Yes, I'm there.

24 Q. Okay. And there in your testimony you're
25 giving an opinion that based on your review of the

1 testimony and briefs presented in the case, that the
2 shared savings mechanism would not be extended into
3 2016. That's your opinion, right?

4 A. I was -- my reference here is really to
5 the dollars that might accrue from that type of --
6 what will happen in 2016.

7 Q. Well, you reference the 14-1580 case,
8 correct?

9 A. Yes.

10 Q. And you're saying that based on your
11 review of testimony and briefs in that case, that the
12 mechanism wouldn't be extended into 2016?

13 A. I don't limit it to testimony and briefs.
14 I talk about the Commission order in 14-457. I would
15 also add it's clear in this case that there's also
16 precedent from the FirstEnergy case, 12-2190-EL-POR,
17 where the Commission has come out against banked
18 savings for incentive purposes.

19 Q. You're giving a legal opinion there,
20 aren't you?

21 A. I'm not an attorney, but I've been in
22 regulatory circles for 30 years, I've been involved
23 in rulemaking governing both legislation and
24 hearings. I've testified before the Senate on
25 various Senate bills on energy efficiency. So, you

1 know, I'm not an attorney, but I believe I have a
2 large regulatory history and expertise.

3 Q. But it's the job of the Commission to
4 review testimony and briefs and weigh evidence;
5 that's the job of the Commission, correct?

6 A. I think that's the job of every party in
7 preparing for testimony. I think the decision, the
8 Commission is also -- it's the charge of the
9 Commission to review the record and make a decision;
10 that part is correct, yes.

11 Q. But you're attempting to act like the
12 Commission here in making this opinion, right?

13 MR. STINSON: Objection. Argumentative.

14 MR. JONES: I'm asking as to what he's
15 reviewing here. He's described everything that the
16 Commission review in making its decision, your Honor.

17 EXAMINER WALSTRA: Can you rephrase,
18 Mr. Jones?

19 Q. You use the word "unlikely." What's
20 unlikely?

21 A. When I say "unlikely," it's unlikely, in
22 my expert opinion, based on the record, based on the
23 cases that we've talked about, the Commission order,
24 the FirstEnergy order, Senate Bill 310 where the
25 Company is bound by the old Senate Bill 221 rules, so

1 this whole thing about there's some uncertainty about
2 whether the FirstEnergy 4.2 cumulative opens the door
3 for Duke to secure shared savings even if they
4 don't hit the -- even if they didn't hit the annual
5 benchmarks, I think that all that, to me, is strong
6 precedent and information that would -- that leads me
7 to think that it was unlikely they would prevail.

8 Also, I heard the Staff --

9 Q. Prevail?

10 A. In terms of had the cases -- so, to
11 prevail in a Commission order.

12 Q. You would agree with me, Mr. Gonzalez,
13 that you don't know how the Commission will decide
14 this case, or do you know?

15 A. No, no. I'm just -- my expert opinion is
16 based on the information that I've seen, and the
17 precedent that the Commission has ruled in the past
18 that it, you know, it's unlikely. Of course, I don't
19 know what the Commission is going to decide.

20 Q. So you're speculating, right?

21 MR. STINSON: Objection. Asked and
22 answered, your Honor, and argumentative.

23 MR. JONES: I just want to know the
24 context in which he says "unlikely," your Honor. I'm
25 asking if it's speculative. He's speculating.

1 MR. STINSON: We've been over it before,
2 your Honor. It's been asked and answered before.

3 EXAMINER WALSTRA: Overruled.

4 A. I wouldn't use the word "speculating,"
5 because "speculating" is -- you know, I would say
6 it's more of a reasoned response based upon the
7 information in my testimony and based upon Commission
8 precedent in other hearings, language contained in
9 other settlements, you know, with other utilities
10 around energy efficiency and portfolio and shared
11 savings.

12 Q. Mr. Gonzalez, not knowing how the
13 Commission might rule, there remains a risk that the
14 intervenors could lose; isn't that correct?

15 MR. STINSON: Objection. Once again,
16 asked and answered.

17 MR. JONES: It's not been asked and
18 answered.

19 EXAMINER WALSTRA: Overruled.

20 A. If you read my testimony --

21 Q. That's not my question.

22 MR. STINSON: Let him answer, please.

23 EXAMINER WALSTRA: You may answer.

24 A. If you read my testimony, I'm stating that
25 the risk is very small, and not commensurate with the

1 type of dollars that customers are going to be
2 saddled with.

3 Q. So you do acknowledge there's a risk,
4 right? Right?

5 A. I acknowledge that there's --

6 Q. Risk.

7 A. -- a little risk.

8 MR. JONES: All right. That's all I have,
9 Mr. Gonzalez.

10 EXAMINER WALSTRA: Thank you.

11 Do you need a minute?

12 MR. STINSON: If we could have a few
13 moments, your Honor.

14 EXAMINER WALSTRA: Of course. We'll go
15 off the record.

16 (Off the record.)

17 EXAMINER WALSTRA: Go back on the record.
18 Whenever you're ready.

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

21 EXAMINER WALSTRA: Thank you.

22 Thank you, Mr. Gonzalez. You may step
23 down.

24 MR. STINSON: At this time, your Honor, I
25 move the admission of OCC Exhibits No. 3 and 4.

1 EXAMINER WALSTRA: Any objections?

2 MS. WATTS: No objection.

3 MR. JONES: No objection.

4 EXAMINER WALSTRA: They will be admitted.

5 (EXHIBITS ADMITTED INTO EVIDENCE.)

6 EXAMINER WALSTRA: Before we get to a
7 briefing schedule, anything else to come before the
8 Commission?

9 MS. WATTS: Nothing further from us, your
10 Honor.

11 MR. JONES: Nothing from Staff.

12 EXAMINER WALSTRA: Off the record.

13 (Discussion off the record.)

14 EXAMINER WALSTRA: We'll go back on the
15 record. We'll set April 28th as the date for initial
16 briefs to be filed, and May 13th for reply briefs to
17 be filed. Anything else?

18 Hearing nothing, we are adjourned.

19 (Thereupon, the proceedings concluded at
20 12:55 p.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Tuesday, March 15, 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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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 03/15/16 - Volume II electronically filed by Mr. Ken Spencer on behalf of Armstrong & Okey, Inc. and Burke, Carolyn