

IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	)	Case No. 08-0367
	)	Second Appeal from the Public
Appellant,	)	Utilities Commission of Ohio
	)	Case Nos. 03-93-EL-ATA, 03-2079-
v.	)	EL-AAM, 03-2081-EL-AAM,
	)	03-2080-EL-ATA
The Public Utilities Commission)	
of Ohio,)	
)	
Appellee.)	

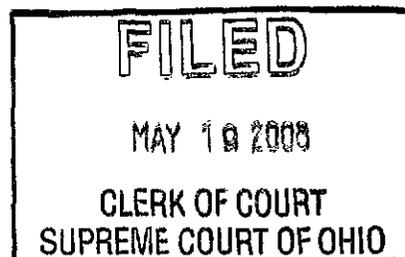
**MOTION TO SEAL CONTENTS OF MERIT BRIEF AND ASSOCIATED FILINGS
PENDING RESOLUTION OF CONFIDENTIALITY ISSUES ON APPEAL**

BY

APPELLANT,

THE OFFICE OF THE OHIO CONSUMERS' COUNSEL

(ATTACHMENT 4 OF 4)



IN THE SUPREME COURT OF OHIO

The Office of the Ohio Consumers' Counsel,	)	Case No. 08-0367
	)	Second Appeal from the Public
Appellant,	)	Utilities Commission of Ohio
	)	Case Nos. 03-93-EL-ATA, 03-2079-
v.	)	EL-AAM, 03-2081-EL-AAM,
	)	03-2080-EL-ATA
The Public Utilities Commission)	
of Ohio,)	
)	
Appellee.)	

**SUPPLEMENT
BY
APPELLANT (VOL. II),
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
(PUBLIC VERSION)**

Janine L. Migden-Ostrander
(Reg. No. 0002310)
Consumers' Counsel

Thomas R. Winters
(Reg. No. 0018055)
Acting Attorney General of Ohio

Jeffrey L. Small, Counsel of Record
(Reg. No. 0061488)
Ann M. Hotz
(Reg. No. 0053070)
Assistant Consumers' Counsel

Duane W. Luckey
(Reg. No. 0023557)
Section Chief
Thomas W. McNamee, Counsel of Record
Counsel of Record
(Reg. No. 0017352)
Sarah J. Parrot
(Reg. No. 0082197)
Assistant Attorneys General

10 West Broad Street, Suite 1800
Columbus, Ohio 43215-3485
(614) 466-8574 (T)
(614) 466-9475 (F)
small@occ.state.oh.us
hotz@occ.state.oh.us

180 East Broad Street
Columbus, Ohio 43215-3793
(614) 644-8698 (T)
(614) 644-8764 (F)
duane.luckey@puc.state.oh.us
thomas.mcnamee@puc.state.oh.us
sarah.parrot@puc.state.oh.us

*Attorneys for Appellant,
Office of the Ohio Consumers' Counsel*

*Attorneys for Appellee,
Public Utilities Commission of Ohio*

Paul A. Colbert, Counsel of Record
(Reg. No. 0058582)
Associate General Counsel
Duke Energy Ohio, Inc.
155 East Broad Street, 21st Floor
Columbus, Ohio 43215
(614) 221-7551 (T)
(614) 221-7556 (F)
paul.colbert@duke-energy.com

Rocco D'Ascenzo
(Reg. No. 0077651)
Counsel
139 East Fourth Street, 29 At. II
Cincinnati, Ohio 43215
(513) 419-1852 (T)
(513) 419-1846 (F)
rocco.d'ascenzo@duke-energy.com

*Attorneys for Intervening Appellee,
Duke Energy Ohio, Inc.*

Michael D. Dortch, Counsel of Record
(Reg. No. 0043897)
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, Ohio 43215
(614) 464-2000 (T)
(614) 464-2002 (F)
mdortch@kravitzllc.com

*Attorney for Intervening Appellee,
Duke Energy Retail Sales, LLC*

**SUPPLEMENT
TABLE OF CONTENTS**

Page

Volume I

Testimony of Beth E. Hixon, OCC Remand Ex. 2(A),
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,*
Case No. 03-93-EL-ATA, et al. (March 9, 2007).....000001

Volume II (cont.)

Testimony of Neil H. Talbot, OCC Remand Ex. 1,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,*
Case No. 03-93-EL-ATA, et al. (March 9, 2007).....000496

Summary of Switch Rates from EDUs to CRES Providers, OCC Remand Ex. 4,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,*
Case No. 03-93-EL-ATA, et al.
(March 31, June 30, September 30 and December 31, 2006).....000611

Interrogatory No. 03-RI55, OCC Remand Ex. 5,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,*
Case No. 03-93-EL-ATA, et al. (January 29, 2007).....000619

Settlement Agreement between CG&E and City of Cincinnati (“City Agreement”),
OCC Remand Ex. 6,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,*
Case No. 03-93-EL-ATA, et al. (June 14, 2004).....000626

TABLE OF CONTENTS – cont.

Page

Deposition Transcript of Denis George (14-15, 17-22, 24-26, 29-30, Dep. Ex. “A”),
OCC Remand Ex. 7,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,
Case No. 03-93-EL-ATA, et al. (February 21, 2007)*.....000629

Deposition Transcript of James E. Ziolkowski (7, 10, 24-36), OCC Remand Ex. 8,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,
Case No. 03-93-EL-ATA, et al. (February 13, 2007)*.....000668

Deposition Transcript of Gregory C. Ficke (9-12, 21-27, 34-41, 73-89),
OCC Remand Ex. 9,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,
Case No. 03-93-EL-ATA, et al. (February 20, 2007)*.....000684

Deposition Transcript of Charles R. Whitlock (18-21, 26-29, 30-33, 46-61),
OMG Remand Ex. 4,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,
Case No. 03-93-EL-ATA, et al. (January 9, 2007)*.....000720

Testimony of John P. Steffen (1, 25-26, 33), Second Supplemental, Company Remand Ex. 3,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,
Case No. 03-93-EL-ATA, et al. (February 28, 2007)*.....000728

TABLE OF CONTENTS – cont.

Page

Testimony of James E. Ziolkowski, Company Ex. 5,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,
Case No. 03-93-EL-ATA, et al. (April 15, 2004)*.....000732

Stipulation and Recommendation (“2004 Stipulation”), Joint Ex. 1,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,
Case No. 03-93-EL-ATA (May 19, 2004)*.....000748

Tr. Vol. I (114), Examination of Witness John P. Steffen,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,
Case No. 03-93-EL-ATA (March 19, 2007)*.....000781

Tr. Vol. II (7-8, 83-85), Examination of Witness Neil H. Talbot,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,
Case No. 03-93-EL-ATA (March 20, 2007)*.....000783

Tr. Vol. III (48-50), Examination of Witness Beth E. Hixon,
*In the Matter of the Application of The Cincinnati Gas & Electric
Company to Modify its Nonresidential Generation Rates to
Provide for Market-Based Standard Service Offer Pricing and
to Establish an Alternative Competitive-Bid Service Rate
Option Subsequent to the Market Development Period,
Case No. 03-93-EL-ATA (March 21, 2007)*.....000789

TABLE OF CONTENTS – cont.

Page

Entry,

*In the Matter of the Applications of: MxEnergy, Inc., et al., for Certification
as Retail Natural Gas Suppliers,*

Case Nos. 02-1173-GA-CRS, et al. (September 7, 2004)000794

Opinion and Order,

*In the Matter of the Complaint of the Ohio Cable Telecommunications
Association Against Ameritech,*

Case No. 97-654-TP-CSS (August 21, 1997).....000799

Opinion and Order,

*In the Matter of the Joint Application of The Ohio Bell Telephone Company
and Ameritech Mobile Service, Inc. for Approval of the Transfer of Certain Assets,*

Case No. 89-365-RC-ATR (October 18, 1990).....000807

Opinion and Order,

In the Matter of the Complaint of Suburban Fuel Gas Against Columbia Gas,

Case No. 86-1747-GA-CSS (August 4, 1987).....000823

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

PREPARED TESTIMONY

OF

**NEIL H. TALBOT
Synapse Energy Economics, Inc.**

**ON BEHALF OF
THE OFFICE OF THE OHIO CONSUMERS' COUNSEL
One Columbus, 10 West Broad St., Suite 1800
Columbus, OH 43215
(614) 466-8574**

DATE: MARCH 9, 2007

TABLE OF CONTENTS

I.	INTRODUCTION AND QUALIFICATIONS	1
II.	SUMMARY AND RECOMMENDATIONS.....	3
III.	THE REGULATORY FRAMEWORK.....	7
IV.	ANALYSIS AND CRITIQUE OF DUKE ENERGY OHIO'S STANDARD SERVICE OFFER PRICE COMPONENTS	19
A.	Overall Structure.....	19
B.	Little g.....	22
C.	Fuel and Economy Purchased Power	23
D.	Annually Adjusted Component.....	29
E.	Infrastructure Maintenance Fund	36
F.	System Reliability Tracker	44
G.	Rate Stabilization Charge.....	52
H.	Regulatory Transition Charge	59
V.	OVERALL ASSESSMENT OF DUKE ENERGY OHIO'S STANDARD SERVICE OFFER PRICING	60

ATTACHMENTS

NHT Attachment 1	DE-Ohio's Response to OCC-INT-06-RI148
NHT Attachment 2	DE-Ohio's Response to OCC-INT-04-RI78
NHT Attachment 3	DE-Ohio's Response to OCC-INT-04-RI61
NHT Attachment 4	DE-Ohio's Response to OCC-INT-04-RI140
NHT Attachment 5	DE-Ohio's Response to OCC-INT-04-RI67
NHT Attachment 6	DE-Ohio's Response to OCC-INT-06-RI142
NHT Attachment 7	DE-Ohio's Response to OCC-INT-06-RI149
NHT Attachment 8	DE-Ohio's Response to OCC-INT-06-RI150
NHT Attachment 9	DE-Ohio's Response to OCC-INT-04-RI68
NHT Attachment 10	DE-Ohio's Response to OCC-INT-04-RI73
NHT Attachment 11	DE-Ohio's Response to OCC-INT-04-RI77
NHT Attachment 12	DE-Ohio's Response to OCC-INT-04-RI62

TABLE OF CONTENTS CONT'D

NHT Attachment 13
NHT Attachment 14
NHT Attachment 15

DE-Ohio's Response to OCC-INT-06-RI134
DE-Ohio's Response to OCC-INT-04-RI63
DE-Ohio's Response to OCC-INT-04-RI64

1 **I. INTRODUCTION AND QUALIFICATIONS**

2 **Q1. PLEASE STATE YOUR NAME, OCCUPATION AND ADDRESS.**

3 **A1.** My name is Neil H. Talbot. I am an economic and financial consultant affiliated
4 with Synapse Energy Economics, Inc. My business address is 22 Pearl Street,
5 Cambridge MA 02139.

6

7 **Q2. ARE YOU THE SAME NEIL TALBOT WHO TESTIFIED PREVIOUSLY IN**
8 **THIS MATTER?**

9 **A2.** Yes, I submitted Prepared Testimony on May 6, 2004 and Supplemental
10 Testimony on May 26, 2004. In my Prepared Testimony, I outlined my
11 qualifications and included my professional resume as an attachment. In summary,
12 I have degrees in economics and finance from Cambridge University, England and
13 Boston College respectively, and have been an economic consultant for the past
14 38 years. Most of my consulting work has related to the electric utility industry.

15

16 **Q3. ON WHOSE BEHALF ARE YOU TESTIFYING IN THIS PROCEEDING?**

17 **A3.** I am testifying on behalf of the Office of the Ohio Consumers' Counsel (OCC).

18

19 **Q4. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS CASE?**

20 **A4.** In the context of the remand of the standard service offer for Duke Energy Ohio,
21 Inc. ("Duke Energy Ohio" or "the Company") by the Ohio Supreme Court to the
22 Commission for rehearing, my testimony relates to the pricing of Duke's current

1 standard service offer. I analyze the rate components of the standard service offer
2 and give my professional opinion as to whether, severally and in combination,
3 they provide reasonably priced service either in terms of accounting costs or
4 market pricing principles.

5
6 **Q5. WHAT WAS THE SCOPE OF YOUR EARLIER TESTIMONY?**

7 **A5.** In my earlier testimony I addressed the Market Based Standard Service Offer
8 ("MBSSO") submitted by Cincinnati Gas & Electric Company ("CG&E"), now
9 Duke Energy Ohio. This offer was first submitted by the Company in its January
10 10, 2003 Application, and was later referred to as the Competitive Market Option
11 MBSSO ("CMO MBSSO" or "CMO standard service offer"). I also addressed
12 briefly the modified MBSSO, which the Company submitted on January 26, 2004
13 as part of its Electric Reliability and Rate Stabilization Plan ("ERRSP"). This was
14 developed by the Company in response to the concern expressed by the
15 Commission that "the competitive retail market for electric generation has not
16 developed as rapidly as anticipated..." The Commission said: "(W)e encourage
17 electric utilities to consider the establishment of plans which will stabilize prices
18 following the termination of their (Market Development Periods), and will allow
19 additional time for competitive markets to grow." (Entry in Cases No. 03-93-EL-
20 ATA, et al., December 9, 2004 at page 5) This MBSSO -- as modified by a
21 stipulation, the Commission's subsequent order, the Company's application for
22 rehearing and the Commission's entries on rehearing -- has been in place for non-
23 residential customers since January 1, 2005 and for residential customers since

1 January 1, 2006. I will refer to it as "the RSP MBSSO" or simply "the standard
2 service offer."
3

4 **Q6. HOW IS YOUR TESTIMONY ORGANIZED?**

5 **A6.** The following section (Section II) presents a summary of the points made in my
6 testimony and my recommendations.

7 Section III contains an account of the regulatory framework of this case.

8 Section IV provides a detailed review of Duke Energy Ohio's standard service
9 offer pricing and includes descriptions and critiques of each of the specific rate
10 components separately. This section provides the detailed analyses and
11 assessments on which my general assessment of the Company's standard service
12 offer is based.

13 Section V explains my general assessment and discusses alternative directions for
14 the Commission to take.
15

16 **II. SUMMARY AND RECOMMENDATIONS**

17
18 **Q7. WHAT ARE YOUR SUMMARY POINTS AND RECOMMENDATIONS?**

19 **A7.** I have the following points and recommendations:

20 1. Duke Energy Ohio's current standard service offer is a combination of six
21 generation-related price components based on different and inconsistent pricing
22 methodologies. The tariff generation charge ("TGC") is based on old historical
23 costs; two are pure "estimates" that the Company finds it difficult to explain; and

1 three, including the Fuel and Economy Purchased Power component, are trackers
2 that recover and reconcile actual accounting costs incurred by the company

3 2. The six generation-related price components fall into two groups, those that are
4 part of the Price to Compare and are bypassable by customers who switch to a
5 competitive retail electric supplier ("CRES"), and those that are part of the
6 Company's Provider of Last Resort ("POLR") charges that are not fully
7 bypassable.

8 3. Of the six generation-related price components, no fewer than four are part of the
9 non-bypassable POLR charge. (Some of these components are bypassable by
10 certain percentages of customer loads.)

11 4. The effect of the POLR components, including those that are partially bypassable,
12 has been to almost eliminate CRES entry into the retail electricity market in
13 Duke's service territory. The outcome is inconsistent with the Commission's
14 stated objective of fostering competition.

15 5. The Supreme Court of Ohio remanded the standard service offer case to the
16 Commission for rehearing on modifications to the standard service offer that had
17 been introduced after the Commission's 2004 hearing.

18 6. In particular, the new System Reliability Tracker ("SRT") and Infrastructure
19 Maintenance Fund ("IMF") were lacking justification. According to the Company,
20 those charges are simply re-labeled components of the Reserve Margin charge. It
21 is clear, however, that the SRT -- which relates explicitly to the acquisition of
22 adequate generation reserves -- is the sole successor to the Reserve Margin charge.
23 In switching from an unreliable estimate of approximately \$53 million, based on

1 the cost of building new peaking units, to the actual or expected cost of acquiring
2 capacity in the regional electricity market, the Company's estimate for SRT was
3 reduced by 72 percent to under \$15 million. This new estimate, which was subject
4 to true-up, was all that remained of the Reserve Margin charge.

5 7. The IMF had no remaining basis, because it referred to existing capacity, not an
6 incremental reserve margin. The Company argues that the IMF is compensation
7 for the opportunity cost or risk of making its capacity available to standard service
8 offer consumers as opposed to being able to sell it, or electricity generated by it,
9 on the deregulated market. However, no risk analysis or opportunity cost analysis
10 was performed by the Company. Moreover, this argument is an incorrect use of
11 risk analysis. Risk results from having an open or exposed position in the market,
12 which would be the case if the Company had no assured outlet for its capacity.
13 Standard service offer, by giving the Company a relatively assured outlet, *reduced*
14 its exposure to market risk. No risk premium or other compensation such as the
15 IMF is therefore justified.

16 8. The RSC, which was split off from generation charges into a separate, non-
17 bypassable rate component, is also in need of a rationale. Like the IMF, it is
18 supposed to be compensation for risk related to the Company's existing
19 generation. This claim duplicates that of the IMF and likewise is a misuse of risk
20 analysis, since the sale of electricity to standard service offer customers *reduces*
21 the Company's risk. (Fluctuations in fuel and purchased power costs are flowed
22 through to customers, so there is no risk to the Company in this component.) Like
23 the IMF, the RSC is not based on verifiable market prices, nor is it based on

1 accounting costs. There is no basis for concluding that either of these charges
2 provides for reasonably priced service.

3 9. The current standard service offer is neither consistently cost-based, nor
4 consistently market-based, and its flaws are related to this problem.

5 If the Commission does not wish to let the market place itself determine market
6 prices for standard service offer, the next best proxy for market prices is a
7 consistently cost-based standard service offer. This is the direction in which the
8 Commission has been moving. Three of the six generation-related components --
9 the Fuel and Purchase Power ("FPP"), the Annually Adjusted Component
10 ("AAC") and the SRT -- are now based on current accounting costs. Following
11 this approach, the RSC and IMF, which have no cost basis, should be terminated.

12 The largest charge, TGC for tariff generation charge, is a historical charge. If the
13 Commission decides to rely more on a cost-based proxy for determining
14 reasonable prices for the priced standard service offer, it should consider updating
15 this cost component.

16 10. In either case, standard service offer generation charges should be fully bypassable
17 by customers who switch to competitive suppliers. CRESs already take on the
18 responsibility of lining up transmission and ancillary services such as spinning
19 reserves. If the Commission is concerned about reliability of supply, it can,
20 together with the Company, set financial and operational standards for CRESs to
21 meet, such that CRESs as Load Serving Entities and Midwest ISO Transition
22 Customers would take on the responsibility for generation capacity reserves to
23 cover their capacity responsibilities with an appropriate reserve margin. This

1 would relieve the Company of this responsibility and clear the way for market
2 entry by competitors who are currently blocked by POLR charges.

- 3 11. The quarterly tracking feature of the FPP is burdensome from a regulatory
4 standpoint and can lead to price volatility for customers. The Commission should
5 consider incorporating a smoothing mechanism in the FPP, or an annual
6 adjustment with interim adjustments triggered by increases or decreases in fuel
7 and economy purchased power costs over a certain level.

8
9 **III. THE REGULATORY FRAMEWORK**

10
11 ***Q8. WHAT WAS THE ORIGIN OF DUKE ENERGY OHIO'S CURRENT***
12 ***STANDARD SERVICE OFFER?***

- 13 ***A8.*** In hearings which commenced on May 19, 2004, the Commission considered the
14 Company's CMO MBSSO (originally filed on January 10, 2003) and its proposed
15 Rate Stabilization Plan (RSP, filed on January 26, 2004). The latter consisted of
16 its Market Based Standard Service Offer (RSP MBSSO) and Competitive Bid
17 Process (CBP). The testimony of a number of witnesses, including myself, was
18 taken. However, the hearings were adjourned because of settlement discussions,
19 and on May 19, 2004 a Stipulation and Recommendation was entered into by
20 several of the parties to the proceedings, but not by my client the OCC or certain
21 other parties. I will refer to the version of the RSP standard service offer contained
22 in the Stipulation as "the stipulated standard service offer." The hearings were then

1 concluded, and on September 29, 2004, the Commission issued its Opinion and
2 Order in the matter, approving the Stipulation with certain modifications. In an
3 Application for Rehearing dated October 29, 2004, the Company asked the
4 Commission to take one of the following three courses of action:

- 5 (1) Reinstatement of the Stipulation as filed;
- 6 (2) Adoption of an Alternative Proposal (which was described in
7 attachments); or,
- 8 (3) Allow the Company to implement its previously-filed
9 MBSSO, which I refer to as the CMO MBSSO).

10
11 ***Q9. WHICH COURSE DID THE COMMISSION TAKE?***

12 ***A9.*** The Commission, in its first Entry on Rehearing dated November 23, 2004, stated
13 that it had "reviewed CG&E's proposed modifications of the opinion and order
14 and believes that, with certain clarifications and provisions, the suggestions are
15 meritorious." (Entry on page 9) The Commission accordingly accepted the
16 Alternative Proposal (RSP MBSSO) with certain modifications. This modified
17 rate plan is the MBSSO that was put into effect by the Company for its non-
18 residential customers on January 1, 2005 and its residential customers on January
19 1, 2006, and which I refer to simply as "the standard service offer."

1 **Q10. TO CLARIFY, WHICH STANDARD SERVICE OFFERS WILL YOU**
2 **REFER TO IN YOUR TESTIMONY?**

3 **A10.** I will refer to three offers – the original CMO MBSSO, the Stipulated MBSSO
4 and the (current) standard service offer. This list is the same as that presented by
5 Mr. Steffen in his Second Supplemental Testimony in this matter, filed February
6 28, 2007 (at page 2), except that I do not include his third offer, the Alternative
7 Plan, which is one of the stepping stones between the Stipulated MBSSO and the
8 current standard service offer. As a result, I number the current standard service as
9 the third offer, while he numbers it as the fourth, which he calls "the Approved
10 MBSSO."

11
12 **Q11. IN ITS FIRST ENTRY ON REHEARING, WHICH ISSUES DID THE**
13 **COMMISSION INCLUDE FOR REHEARING?**

14 **A11.** The Commission first listed the issues that the Company had itemized in its
15 assignments of error related to the Commission modifications of the standard
16 service offer. These were (summarizing the Commission's listing of the items on
17 pages 8 to 9 of the Entry):

18 (a) The Company would retain five of the modifications required by the
19 Commission's Opinion and Order. These included "the calculation of a
20 market price for returning nonresidential consumers based upon only
21 CG&E's wholesale market costs," and "the calculation of actual AAC and
22 FPP, including both cost decreases and increases in each cost category."

- 1 (b) As part of the non-bypassable POLR charge, introduce an Infrastructure
2 Maintenance Fund (IMF) equal to 4 percent of "little g" during 2005 and
3 2006, and 6 percent of little g in 2007 and 2008.
- 4 (c) Recover the actual costs of power purchased to maintain system reliability
5 through a System Reliability Tracker (SRT), not as part of the AAC, as
6 previously requested.
- 7 (d) Make the remaining portion of the AAC avoidable by the first 50 percent
8 of non-residential and 25 percent of residential load to switch to
9 competitive retailers.
- 10 (e) Increase the avoidability of costs by moving the recovery of emission
11 allowances from the AAC to the FPP.
- 12 (f) Set increases in the AAC for non-residential customers at 4 percent of
13 little g in 2005, an additional 4 percent of little g in 2006, and allow
14 increases based on actual costs incurred in 2007 and 2008. For residential
15 customers, the increase would be 6 percent of little g in 2006, and
16 increases in 2007 and 2008 would be based on actual costs incurred.

17
18 ***Q12. FOR PURPOSES OF THIS PROCEEDING, ARE THERE CERTAIN ITEMS***
19 ***IN THIS LIST THAT SHOULD BE ADDRESSED?***

20 ***A12.*** Yes. I note two points in particular. One is that "actual AAC and FPP" should be
21 charged to consumers, as opposed to using estimates. The other is the introduction
22 of two new rate components -- the IMF rider and the SRT tracker.

1 **Q13. WHAT FURTHER COMMENTS DID THE COMMISSION MAKE**
2 **REGARDING THE COMPANY'S PROPOSALS?**

3 **A13.** As noted earlier, the Commission generally regarded these proposed modifications
4 as meritorious. It added certain clarifications and revisions, which were, in
5 summary, as follows:

6 (a) Regarding the SRT, AAC and FPP, the Commission made it clear that it
7 would not cede its review of costs incurred, but would "continue to
8 consider the reasonableness of expenditures."

9 (b) The baselines above which costs would be recoverable through the SRT,
10 AAC and FPP should be clarified. Regarding the SRT, "at the time of
11 CG&E's last rate case, the Commission staff determined that CG&E had
12 sufficient generation capacity to cover all of its peak load and provider of
13 last resort obligations...As a result, all amounts in the SRT are in excess
14 of the cost of capacity requirements which are a part of "little g." (Entry at
15 page 11) The baseline for AAC costs would be those incurred in 2000, and
16 for FPP costs would be the level authorized in the Company's last Electric
17 Fuel Component (EFC) proceeding.

18 (c) The SRT charge would be unavoidable in 2005, but the Commission
19 determined that introduction of the Midwest ISO's Day 2 might change the
20 situation, and stated that "the avoidability or unavailability of the SRT for
21 all subsequent years will be determined by the Commission." (Entry at
22 pages 11-12.)

1 **Q14. FOR PURPOSES OF YOUR ASSESSMENT, ARE THESE POINTS**
2 **SIGNIFICANT?**

3 **A14.** Yes. Of particular significance is the Commission's emphasis on reviewing the
4 reasonableness of expenditures claimed in the SRT, AAC and FPP components. I
5 read this consideration as referring to quantitatively measurable costs and
6 primarily to accounting costs as traditionally assessed in regulated utility rate
7 cases.

8
9 **Q15. DID THE COMMISSION PROVIDE FURTHER JUSTIFICATION FOR ITS**
10 **DECISIONS REGARDING THE COMPANY'S PROPOSALS AND THE**
11 **REHEARING?**

12 **A15.** The Commission referred to its three standards for rate stabilization plans, namely
13 that they "should provide rate certainty for consumers, provide financial stability
14 for utility companies, and encourage the development of competition." (November
15 23, 2004 Entry at page 13) Regarding the encouragement of competition, the
16 Commission argued that, "The opinion and order modified the stipulation in a
17 variety of aspects designed to encourage the development of competitive
18 markets." (Id.) Its specific views were as follows:

19 "First, the percentage of nonresidential consumers that can avoid
20 the RSC and the AAC was increased by the opinion and order
21 from 25 percent to 50 percent. Second, the opinion and order
22 decreased the total cost of service for residential consumers by
23 extending the residential discount until December 31, 2005; by

1 terminating the collection of Regulatory Transition Charges
2 (“RTCs”) as of December 31, 2008; and by charging only
3 nonresidential consumers for the cost of certain capital investments
4 in CG&E's distribution system. The revisions to the opinion and
5 order which are being made by this entry on rehearing would leave
6 all of these modifications in place and would also make two other
7 positive changes. First, the opinion and order will be modified to
8 increase the price to compare for all shoppers by moving the cost
9 of emission allowances (“EAs”) from the unavoidable portion of
10 the price to the avoidable portion of the price. Second, the opinion
11 and order will be modified to further increase the price to compare
12 by making the AAC permanently avoidable for a percentage of
13 each class of consumers.” (Id. at pages 13-14.)
14

15 ***Q16. DID THE COMMISSION GRANT REHEARING ON ANY OTHER ISSUES?***

16 ***A16.*** Yes. The Commission agreed to reconsider the issue of the appropriate pricing for
17 returning customers.
18

19 ***Q17. WHAT WAS THE RESULT AT THE SUPREME COURT OF OHIO AS IT***
20 ***RELATES TO YOUR TESTIMONY?***

21 ***A17.*** The OCC appealed the Commission's decision to the Supreme Court of Ohio
22 which, in a decision dated November 22, 2006, remanded the case to the

1 Commission for rehearing on issues related to generation price components
2 which, together with related issues, are the primary subject of my testimony.
3

4 **Q18. ON WHICH GENERAL ISSUES HAS THE SUPREME COURT OF OHIO**
5 **REMANDED THE MATTER TO THE PUCO?**

6 **A18.** The court "remand(ed) this matter to the commission for further clarification of all
7 modifications made in the first rehearing entry to the order approving the
8 stipulation." (Decision at Paragraph 36) The court found that the Commission
9 "made several modifications on rehearing without any reference to record
10 evidence and without thoroughly explaining its reasons." (Decision at Paragraph
11 35) It found that "(t)he portion of the commission's first rehearing entry approving
12 CG&E's alternative proposal is devoid of evidentiary support." (Decision at
13 Paragraph 28) It was not clear to the court that the modifications would meet the
14 three-part test that has guided the Commission: providing rate certainty for
15 consumers, ensuring financial stability for the Company and encouraging the
16 development of competitive markets. It is clear that the specific modifications
17 such as the infrastructure maintenance fund and the system reliability tracker are
18 in need of a sound rationale if they are to be retained.

19
20 **Q19. PLEASE PROVIDE SPECIFIC DETAILS.**

21 **A19.** The remand covers "the alternative proposal," and in particular those features of
22 the alternative proposal that differed from the commission's original order. The
23 court said:

1 Paragraph 24. Under the stipulation approved by the commission's
2 original order, CG&E's market-based standards service offer
3 consisted of two components: the price-to-compare and the
4 provider-of-last-resort ("POLR") component. The price-to-
5 compare component represents that portion of the market-based
6 standard service offer that consumers switching to a competitive
7 retail electric service provider may avoid paying to CG&E. The
8 POLR component, which the commission refers to as the
9 "unavoidable" or "nonbypassable" component, represents charges
10 incurred by CG&E for risks associated with its statutory
11 obligation...as default provider, or provider of last resort, for
12 customers who opt for another provider who then fails to provide
13 service....

14 Paragraph 25. These components are themselves made up of
15 separate components. The POLR component comprises a rate-
16 stabilization-charge component and an annually adjusted
17 component. The annually adjusted component was designed to
18 maintain adequate electric capacity reserves in excess of expected
19 demand and to recover costs associated with homeland security,
20 taxes, environmental compliance, and emissions allowances.
21 Neither CG&E nor the commission identified the purpose of the
22 rate-stabilization charge. Nevertheless, the charge is self-defining,
23 and the signatory parties agreed to it.

1 Paragraph 26. In its first application for rehearing, CG&E
2 proposed modifying the stipulation approved in the commission's
3 order. Under CG&E's proposal, the POLR component would
4 include four components. In addition to the rate-stabilization
5 charge and the annually adjusted component, the POLR
6 component would also include an "infrastructure maintenance
7 fund" component and a "system reliability tracker" component.
8 The infrastructure maintenance fund charge was intended "to
9 compensate CG&E for committing its generation assets to serve
10 market-based standard service offer consumers." The system
11 reliability-tracker was intended to permit CG&E "to recover its
12 annually committed capacity, purchased power, reserve capacity,
13 and other market costs necessary to serve market-based standard
14 service offer consumers." CG&E suggested other changes as well,
15 and after reviewing these suggestions, the commission found that
16 with certain clarifications and modifications of its own, CG&E's
17 proposed modifications were meritorious."

18 It is clear that all these specific modifications – the infrastructure maintenance
19 fund, system reliability tracker, and the other modifications – are in need of a
20 sound rationale if they are to be retained.

1 **Q20. FROM A TECHNICAL STANDPOINT, IS IT FEASIBLE TO CONSIDER**
2 **THESE ITEMS IN ISOLATION?**

3 **A20.** No. Since these specific items are parts of broader components, which in turn are
4 parts of rates paid by customers, I urge the Commission to consider on remand the
5 overall reasonableness of these broader items and the reasonableness of the rates
6 that they constitute. There should be no overlap or duplication of items and the
7 components should work together to achieve standard service offer rates that
8 provide for reasonably priced service and meet the three standards of rate stability
9 for customers, financial stability for the company, and encouragement of
10 competition.

11

12 **Q21. DID THE COURT POINT TO ANY OTHER SPECIFIC CONCERNS?**

13 **A21.** Yes.

14 (1) CG&E claimed that the infrastructure maintenance fund and system
15 reliability tracker represent the reserve capacity charge set forth in
16 the stipulation as part of the annually adjusted component. However,
17 the respective roles of these two charges in compensating the
18 Company for maintaining adequate reserve capacity requirements
19 was not clear to the court.

20 (2) The baseline for determining certain cost components, specifically
21 the system-reliability tracker, annually adjusted component, and the
22 fuel and economy purchased power component, was not supported
23 or explained.

1 (3) CG&E claimed that the alternative proposal merely resulted in an
2 increased price to compare and set the unavoidable POLR charges at
3 lower levels. However, the court found that it is not clear that the
4 POLR charges would be lower. Admittedly, moving the emission
5 allowance from the annually adjusted component to the price-to-
6 compare component, and increasing the percentage of customers
7 who could avoid paying the annually adjusted component, would
8 seemingly lower the POLR charge. However, other modifications --
9 such as the infrastructure maintenance charge, the system-reliability-
10 tracker charge, and presetting the annually adjusted component
11 charge -- might increase it. The net effect was uncertain.

12

13 **Q22. DO YOU CONSIDER THESE POINTS IN YOUR TESTIMONY?**

14 **A22.** Yes.

1 **IV. ANALYSIS AND CRITIQUE OF DUKE ENERGY OHIO'S STANDARD**
2 **SERVICE OFFER PRICE COMPONENTS**

3

4 **A. Overall Structure**

5

6 ***Q23. IN THE CURRENT STANDARD SERVICE OFFER, WHAT IS THE***
7 ***STRUCTURE OF THE COMPANY'S PRICING?***

8 ***A23.*** The Company's standard service offer pricing is built from various components,
9 riders and trackers. The traditional components of transmission and distribution
10 costs are relatively non-controversial, at least in principle, and I will not address
11 them here. (In Ohio, meter reading, billing and other customer services are still
12 within the scope of regulated distribution services and have not been opened up to
13 competition.) This leaves the components related to electricity generation and
14 related services, which are the areas most affected by restructuring and are now
15 actually or potentially bypassable by those retail customers who choose to switch
16 to competitive retail electric suppliers.

17

18 ***Q24. PLEASE CATEGORIZE THE VARIOUS COMPONENTS OF DUKE***
19 ***ENERGY OHIO'S CHARGES FOR GENERATION AND RELATED***
20 ***SERVICES.***

21 ***A24.*** Broadly, the charges fall into two categories – components of the Price to
22 Compare and charges that, according to the Company, are necessary in order to

1 fulfil its Provider of Last Resort (POLR) responsibilities and therefore should in
2 its opinion not be bypassable. The Price to Compare includes "little g," which is
3 historical generation costs less a stranded cost component, and Fuel and Economy
4 Purchased Power costs (FPP).

5
6 **Q25. WHAT COMPONENTS HAVE BEEN INCLUDED IN THE PROVIDER OF**
7 **LAST RESORT CHARGE?**

8 **A25.** As set out in item 3 of the Stipulation of May 19, 2004, POLR charges initially
9 included a Rate Stabilization Charge (RSC), and an Annually Adjusted
10 Component (AAC). In the Company's Application for Rehearing of October 29,
11 2004, (revised paragraph 3), the scope of the AAC was reduced and two new
12 components were added. These were an Infrastructure Maintenance Fund (IMF)
13 and a System Reliability Tracker (SRT). Thus, there are now four generation cost-
14 related POLR charges – the RSC, the AAC, the IMF and the SRT – as well as two
15 bypassable generation-related components – little g (actually 85 percent of little g)
16 and FPP – for a total of six generation-related charges.

17
18 **Q26. IS THE COMPANY STILL COLLECTING RESTRUCTURING**
19 **TRANSITION COSTS?**

20 **A26.** Yes. The Company's rates include a Regulatory Transition Charge (RTC). The
21 charge will be included in residential rates until December 31, 2008, and non-
22 residential rates until December 31, 2010.

1 **Q27. HOW SIGNIFICANT ARE THESE VARIOUS ITEMS, AND WHAT ARE**
 2 **THE RELATIVE MAGNITUDES OF THE POLR CHARGES AND PRICE**
 3 **TO COMPARE?**

4 **A27.** The magnitudes are illustrated by a breakdown of the Company's standard service
 5 offer revenue for 2006, the first year in which residential as well as non-residential
 6 customers were included:

7	<u>Rate Component</u>	<u>2006 Revenue</u>	<u>Percent of Total</u>
8	Tariff Gen. Charge (TGC)	\$654,280,074	62.7%
9	Fuel & Ec. Purchased Power	194,302,151	18.6%
10	Annually Adjusted Comp.	<u>55,008,125</u>	<u>5.3%</u>
11	Total Fully Bypassable	\$903,590,350	86.6%
12	Rate Stabilization Charge	\$114,747,660	11.0%
13	System Reliability Tracker	(6,031,653)	(0.6%)
14	Infrastr. Maintenance Fund	<u>31,549,495</u>	<u>3.0%</u>
15	Total Not Fully Bypassable	\$140,265,502	13.4%
16	Grand Total	\$1,043,855,852	100.0%

17 Source: Company Response to OCC-INT-06-RI148.¹

18 While the fully bypassable charges for generation, fuel, etc. predominate in the
 19 rate structure, the components that are not fully passable (*i.e.*, bypassable, if at all,
 20 by only a certain percentage of customers) are quantitatively very significant. A
 21 Competitive Retail Electricity Supplier (CRES) trying to match the Company's

¹ DE-Ohio's Response to OCC-INT-06-RI148, NHT Attachment 1.

1 prices *and* compensate customers for charges up to 13.4 percent of the Company's
2 standard service offer price would have to be a very smart or lucky competitor to
3 make any money. (A minor point is that the negative SRT rate is obviously
4 anomalous; in a normal year, it would be a positive number.)
5

6 **B. Little g**
7

8 ***Q28. WHAT IS "LITTLE G"?***

9 ***A28.*** Little g, a significant charge of about 40 mills per kilowatt-hour, is based on
10 historical generation costs that go back to the last general rate case. It is equal to
11 the historical generation rate, "g," less the Regulatory Transition Charge (RTC).
12 This rate component has a stabilizing effect by locking in some of the generation
13 costs associated with legacy coal-fired generation.
14

15 ***Q29. DO YOU HAVE ANY FURTHER OBSERVATIONS REGARDING LITTLE***
16 ***G?***

17 ***A29.*** I would note that little g is an avoidable component of the Price to Compare.
18 However, the avoidable component is more accurately described as 85 percent of
19 little g, since the remaining 15 percent of little g was moved into the Rate
20 Stabilization Charge (RSC) and made a component of the Company's Provider of

1 Last Resort (POLR) charge. (I sometimes loosely refer to the remaining 85 percent
2 of little g as "little g." The meaning should be clear from the context.)
3

4 ***Q30. IN YOUR OPINION, IS THIS REALLOCATION OF GENERATION COSTS***
5 ***TO A NON-BYPASSABLE RATE COMPONENT APPROPRIATE?***

6 ***A30.*** No, this is inappropriate. I will refer to this issue later in connection with the IMF
7 and RSC.
8

9 **C. Fuel and Economy Purchased Power**
10

11 ***Q31. WHAT IS THE FPP CHARGE?***

12 ***A31.*** A baseline cost per kilowatt-hour of fuel and purchased power was calculated in
13 the former Electric Fuel Component in Case No. 99-103-EL-EFC. Cost increases
14 for fuel and economy purchased power over and above that baseline are included
15 in the FPP charge. According to the Stipulation of May 19, 2004, "CG&E shall
16 calculate the bypassable fuel cost component of the price to compare by using the
17 average costs for fuel consumed at CG&E's plants, and economy purchased power
18 costs, for all sales in CG&E's Certified Service Territory." (Stipulation, page 17)
19

20 ***Q32. IS THE FPP RIDER A REASONABLY WELL-BASED CHARGE?***

21 ***A32.*** In principle, the FPP charge seems similar to other standard fuel adjustment
22 mechanisms, which allows the Company to flow changes in fuel and economy
23 purchased power costs through to customers. However, the devil is in the details,

1 and the FPP charge exemplifies the problems of a hybrid system of pricing that is
2 partly market-based and partly cost-based, and might include purchases from
3 affiliated companies.
4

5 **Q33. WAS THE COMMISSION SATISFIED WITH THE STIPULATION'S**
6 **PROPOSED PROCEDURES FOR INCREASING FPP COST RECOVERY?**

7 **A33.** No. In its Opinion and Order of September 29, 2004, the Commission modified
8 the Stipulation by requiring quarterly filings of FPP increases. The increases
9 should also be net of any offsetting reductions in FPP costs. The Commission also
10 ordered an annual review of the preceding four quarters' filings "to determine
11 whether they accurately reflect actual costs incurred by CG&E." (Order at page
12 17.)
13

14 **Q34. AS A RESULT OF THIS REQUIREMENT BY THE COMMISSION, THE**
15 **FPP HAS BEEN SUBJECTED TO AN AUDITOR'S REVIEW. DID THE**
16 **AUDITOR EXPRESS ANY CONCERNS ABOUT THE FPP?**

17 **A34.** Yes. In the second audit (dated October 12, 2006.), the auditor notes that "during
18 this transition period, CG&E operated as a deregulated entity." The auditor states:
19 "The re-entry into regulatory oversight with respect to the FPP created a host of
20 issues related to both the allocation of utility assets and CG&E's approach to fuel
21 procurement." (Auditor's Report, pages 1-3) According to the Auditor:

22 "DE-Ohio considers itself to be unregulated because native
23 customers are not obligated to purchase power from DE-Ohio.

1 (The auditor) considers DE-Ohio to be at least partly regulated
2 because the RSP and FPP provide for recovery of costs included in
3 the RSP such as fuel costs." (Auditor's Report, pages 1-6)

4
5 There is confusion between FPP costs and other costs, with "very significant
6 ratepayer impacts":

7 "CG&E was required to make a number of decisions in computing
8 the FPP. Because the order did not lay out the specifics, CG&E
9 believed that it had the license to evaluate and select which
10 approach to use. Not surprisingly, the range of alternative
11 approaches was large and CG&E's elections had very significant
12 ratepayer impacts. Compounding the auditing problems, CG&E
13 continuously modified its approach to many of these items."

14 (Auditor's Report, October 12, 2006, pages 1-3.)

15 I share the Auditor's evident concern that Duke Energy Ohio has too much
16 latitude in making decisions regarding the setting of its FPP charges in a semi-
17 deregulated situation.

18
19 **Q35. WERE ALLOCATION ISSUES IDENTIFIED IN THE PREVIOUS AUDIT,**
20 **DATED OCTOBER 7, 2005?**

21 **A35.** Yes. The auditor noted that in the previous audit, "many issues were raised
22 regarding the appropriateness of CG&E allocations." (Auditor's Report, October
23 12, 2006, page 1-3) A stipulation was entered into, in which, among other things:

1 "The parties agree to discuss criteria for the equitable assignment
2 of benefits and costs of CG&E's coal contract sales margins
3 regarding contracts executed on or after January 1, 2005. If the
4 parties are unable to agree upon such criteria, then the FPP auditor
5 shall review the criteria in the next FPP audit... In addition, the
6 FPP auditor shall review the application of such criteria and verify
7 the equitable assignment to FPP customers of the benefits and
8 costs of coal contract sales executed on or after January 1, 2005."

9 (Auditor's Report, October 12, 2006, pages 1-4.)

10 Regarding rising fuel costs, the auditor had the following to say:

11 "According to the FERC form 423 filings made by DE-Ohio,
12 average fuel costs increased by almost 10 percent on a cents per
13 MMBTU basis between the current and prior audit periods. The
14 increase is due to higher contract coal prices and a higher percent
15 of spot coal purchases. The reported delivered coal prices are
16 higher than they would have been if large quantities of older
17 below-market contract purchases had not been resold. The
18 increased cost was mitigated in part by the credits for the margins
19 on the re-sold contracts which were allocated to the FPP pursuant
20 to...the stipulation." (Auditor's Report, pages 1-6.)

21 During the audit period, "DE-Ohio did not pass through over \$35 million in
22 margins generated from the resale of coal covered by... the stipulation." (Auditor's
23 Report, pages 1-7.)

1 **Q36. DOES THE FPP DISTORT THE WAY IN WHICH THE COMPANY**
2 **PURCHASES FUEL AND EMISSION ALLOWANCES?**

3 **A36.** Yes, the Auditor finds that this is the case. "DE-Ohio continues to purchase fuel
4 and emission allowances in a manner that is inconsistent with best industry
5 practices among regulated utilities. Namely, DE-Ohio is not maintaining a
6 contract portfolio but, pursuant to directives by DE-Ohio management, DE-Ohio
7 actively looks to limit commitments beyond the end of the RSP period." (Auditor's
8 Report at page 8) As a result, prices could be significantly more volatile after the
9 end of the RSP period.

10

11 **Q37. STEPPING BACK, IS THE FPP A COST-BASED OR MARKET PRICE-**
12 **BASED CHARGE?**

13 **A37.** This question confuses anybody who tries to understand Duke's standard service
14 offer, as I will show in my discussions of other components of the Company's
15 standard service offer pricing. In the case of the FPP, I would say that the practical
16 answer is clear: it is a cost-based tracker that is adjusted to market quarterly. And
17 by costs here I mean first and foremost *accounting* costs. This is why an audit and
18 review can be performed annually. However, the Company regards it as primarily
19 a market price: "The FPP market price is calculated using accounting costs.... The
20 FPP is a market price, not a cost-based rate."²

² DE-Ohio's Response to OCC-INT-04-RI78 (d) and (e), NHT Attachment 2.

1 **Q38. THE FPP IS A QUARTERLY TRACKER. IS THIS A DESIRABLE**
2 **FEATURE?**

3 **A38.** It assures the Company quick recovery of its fuel and economy purchased power
4 costs, which are its largest out-of-pocket expenditures. However, this is not
5 desirable for the Commission and for consumers. For the Commission, there is the
6 problem of monitoring frequent adjustments. For consumers, there is the problem
7 of rate volatility. This latter problem could be addressed by changes in the
8 Company's fuel procurement and fuel price hedging strategies, but it could also be
9 addressed by changing the FPP.

10

11 **Q39. WOULD A SWITCH TO AN ANNUAL FPP ADJUSTMENT BE**
12 **DESIRABLE FOR THE COMMISSION AND CONSUMERS?**

13 **A39.** Since price stability is one of the Commission's objectives for standard service
14 offer, a switch to annual adjustments would have the advantage of greater
15 stability, as well as regulatory efficiency.

16

17 **Q40. COULD A SWITCH TO ANNUAL FPP ADJUSTMENTS JEOPARDIZE**
18 **THE COMPANY'S FINANCIAL STABILITY?**

19 **A40.** By means of forward pricing and hedging, the Company should be able to
20 significantly reduce the risk of exposure to fuel and purchased power price
21 volatility during the following year. However, we know that fuel and purchased
22 power prices can be unpredictable and volatile. It would seem desirable to
23 supplement any annual procedure with a trigger or some similar provision for

1 passing through to consumers at least part of any extreme price changes (up or
2 down) during the year.

3
4 ***Q41. COULD FLUCTUATIONS IN FUEL COSTS BE REDUCED WHILE***
5 ***RETAINING QUARTERLY ADJUSTMENTS?***

6 ***A41.*** Yes. A smoothing mechanism could be introduced into the quarterly adjustments
7 whereby there are limits on quarterly changes, with under- or over-recovery in the
8 case of large fluctuations being reconciled over several future quarters.

9
10 **D. Annually Adjusted Component**

11
12 ***Q42. TURNING FROM THE PRICE TO COMPARE TO THE PROVIDER OF***
13 ***LAST RESORT COMPONENTS, WHAT IS THE AAC?***

14 ***A42.*** The AAC is a charge that recovers from Duke's customers the costs of certain
15 specific items.

16
17 ***Q43. HOW DOES YOUR TESTIMONY RELATE TO THAT OF OCC WITNESS***
18 ***HAUGH IN THIS MATTER?***

19 ***A43.*** Mr. Haugh's testimony focuses on the Company's applications to increase the
20 AAC and adjust the SRT in 2007 according to previous Commission orders and
21 entries. My references to the AAC and the SRT are in the broader context of the
22 standard service offer.

1 **Q44. WHAT WAS THE ORIGIN OF THE AAC?**

2 **A44.** The AAC originated in the Stipulation of May 19, 2004, and was one of the two
3 components of the non-bypassable Provider of Last Resort charge. This charge
4 was "for maintaining adequate capacity reserves and to recover costs associated
5 with homeland security, taxes, environmental compliance, and emission
6 allowances." (Stipulation at pages 4-5.)

7
8 **Q45. HOW WAS THE AAC TO BE CALCULATED?**

9 **A45.** The language of the Stipulation did not make it clear what the base of this charge
10 would be. It did set out, however, alternative means of calculating increases in the
11 AAC, expressed as percentages of little g, or alternatively based on actual costs
12 incurred by the Company for the expenditure items covered. In 2005, this charge
13 applied only to non-residential customers, and from 2006 it applied to residential
14 customers as well. During 2005 and 2006, the rider was established as a fixed
15 percentage of little g. For those years, the Company apparently did not track the
16 costs that were covered.³ For 2007, the rider is recovering actual accounting costs
17 incurred.

18
19 **Q46. HAS THE COMPANY SHOWN HOW THE AAC WAS CALCULATED?**

20 **A46.** Yes. Originally, in Exhibit 1 of the Stipulation of May 19, 2004, the Company
21 provided details of what it labeled "The POLR Charge" for 2005. Of the total

³ DE-Ohio's Response to OCC-INT-04-RI61(b), NHT Attachment 3.

1 amount of \$107.5 million to be recovered, Reserve Margin accounted for 49
2 percent, Environmental Compliance 40 percent, Emission Allowances 10 percent
3 and Homeland Security 1 percent.
4

5 **Q47. DID THE CHARGES APPEAR TO BE REASONABLE?**

6 **A47.** No. In both the Reserve Margin and Environmental Compliance calculations,
7 which together accounted for nearly 90 percent of the total, there were features
8 that are not reasonable.
9

10 **Q48. WHAT WAS THE PROBLEM WITH THE RESERVE MARGIN**
11 **CALCULATION?**

12 **A48.** The Reserve Margin calculation covered the cost of the *margin*, not the capacity
13 for the expected load. Let me give an example. Say the customer load being
14 planned for was 100 megawatts, and the required reserve margin was 17 percent.⁴
15 Suppliers would need to line up (and pay for) 117 megawatts, not just 17
16 megawatts, and yet it is apparently only the 17 megawatts for which the Company
17 is claiming cost recovery. In this case it was claiming recovery for 826.54
18 megawatts of "reserve margin" capacity at an estimated \$64 per kw-year, not for
19 projected 2005 peak demand (switched and non-switch) of 4,862 megawatts. This
20 would only be the correct amount of the Company's shortfall in capacity costs
21 under the assumption that the Company's existing resources covered none of the

⁴ At the time, the Company was planning for a 17 percent reserve margin. Currently, the planned margin is 15 percent.

1 margin and accordingly the Company had to purchase the entire amount of 17
2 megawatts. As far as I am aware, the Company has not presented data to support
3 this requirement.
4

5 **Q49. DO YOU HAVE ANY OTHER CONCERNS WITH THE WAY IN WHICH**
6 **THE RESERVE MARGIN COMPONENT WAS CALCULATED AT THAT**
7 **TIME?**

8 **A49.** Yes, I have one other concern at this point. The cost of capacity of \$64 per kw-
9 year was estimated based upon "the annualized cost of a peaking unit using EPRI
10 TAG costs." (Footnote to Exhibit 1, Stipulation at page 6) This estimate, which
11 was supposed to be a market price estimate, did not bear any close relationship to
12 either then-current market prices for peaking capacity or to the Company's
13 historical embedded costs of peaking capacity. It was an overestimate, because at
14 that time there was considerable regional excess generation capacity. This is a
15 good example of my concern that estimation procedures for measuring what are
16 supposedly market prices may be way off the mark.
17

18 **Q50. WHAT IS YOUR CONCERN ABOUT THE COMPANY'S CLAIM FOR**
19 **ENVIRONMENTAL COST COMPLIANCE?**

20 **A50.** My concern relates to the manner in which this supposed "market" price
21 component is calculated as a "Revenue Requirement," which is a term that applies
22 to regulatory pricing, not market pricing. This ambiguity, which is discussed
23 further below, causes confusion about the way in which the calculation is done: it

1 includes a return on "Construction Work in Progress," which is most certainly a
2 regulatory term, without any justification for its inclusion in what is the equivalent
3 of rate base in this context. If CWIP is a rate base item, is it correctly included in
4 rate base without Commission approval? If it is an element of market-based
5 pricing, does the market typically charge customers for equipment not yet in
6 service? The answer to both questions is "no." General Motors does not recover
7 the costs of a new plant until it sells cars produced at that plant. The Company
8 does not throw any light on this situation, it merely says: "The AAC is not a
9 regulated rate. It is a market price and has no 'rate base.'" ⁵ The claimed pre-tax
10 return of 14.22 percent on the Company's June 30, 2004 environmental
11 investments CWIP of \$175.9 million is \$25 million, which appears to be an
12 overcharge.

13
14 ***Q51. DID THE COMMISSION ACCEPT THE AAC CHARGE AS PROPOSED IN***
15 ***THE STIPULATION?***

16 ***A51.*** No, in its order of September 29, 2004 the Commission modified the proposal by
17 making the AAC charge completely avoidable by shopping customers in 2005,
18 finding that "additional encouragement of this market is appropriate." (Order at
19 page 32) The Commission limited the amount of costs to be recovered under the
20 AAC, noting that "the Commission is convinced that CG&E may be recovering
21 some percentage of those costs through off-system sales..." It also said that it
22 would "determine whether any subsequent AAC increases or changes to the level

⁵ DE-Ohio's Response to OCC-INT-04-RI61(I), NHT Attachment 3.

1 of avoidability are reasonable, not anticompetitive, and not likely to create a
2 subsidy..." (Order at page 33.) In evaluating such changes, the Commission
3 would consider cost savings as well as increases.
4

5 **Q52. WAS THE AAC MODIFIED LATER IN 2004?**

6 **A52.** Yes, in the Company's Application for Rehearing of October 29, 2004, the scope
7 of the AAC was reduced by excluding the costs of "maintaining adequate capacity
8 reserves." These costs, or similar ones, were now to be included in two other
9 POLR charges – an Infrastructure Maintenance Fund (IMF) and a System
10 Reliability Tracker (SRT), which are described below.
11

12 **Q53. WERE ANY OTHER ITEMS REMOVED FROM THE AAC?**

13 **A53.** Yes, the cost of emission allowances was excluded from the AAC and included in
14 the FPP, where it would be subject to quarterly tracking and annual review and
15 would also be completely avoidable by shopping customers.
16

17 **Q54. HOW WAS THE AAC TO BE CALCULATED?**

18 **A54.** For non-residential consumers there were now to be increases of 4 percent of little
19 g in 2005 (an increase from zero, implicitly, not some unstated base level), and an
20 additional 4 percent in 2006. For residential customers, for whom the Market
21 Development Period would end on December 31, 2005, the 2006 charge would be
22 6 percent of little g. For 2007 and 2008, the charge would be "the revenue
23 requirement of (the Company's) actual net costs incurred for homeland security,

1 taxes, and environmental compliance during each year." (Application for
2 Rchearing, Attachment 1, page 2, revised item 3.)

3
4 **Q55. PLEASE EXPLORE THE QUESTION WHETHER THE AAC IS A COST-**
5 **BASED ITEM OR A COMPONENT OF MARKET-BASED PRICING?**

6 **A55.** The AAC is supposedly a component of market-based standard service offer
7 prices. "The AAC component is DE-Ohio's market price for generation service."⁶
8 However, the Company presents its AAC proposals as if the SRT were based on
9 costs. For example, in his direct testimony of September 1, 2006 in Case No. 06-
10 1085-EL-UNC, Mr. Wathen builds up what he calls the Rider AAC *Revenue*
11 *Requirement*, which is clearly a term from cost-based regulatory ratemaking. (See
12 Attachment WDW-2 to Mr. Wathen's testimony, for example.) In reviewing the
13 Company's case, Staff "approached this investigation as it would any cost based
14 rate proceeding." (Testimony of Mr. Tufts in that proceeding, dated November 28,
15 2006.) The Company's claim for 2007 was based on costs for the twelve months
16 ending May 31, 2006. Yet Mr. Tufts, who is in the Staff's Accounting and
17 Electricity Division, found that, "The Applicant filed a minimal amount of
18 information in its Application and the supporting documentation was not readily
19 available...Staff was unable to make some findings due to the lack of information
20 necessary to provide a recommendation." (Testimony at page 2) Likewise, Mr.
21 Tufts's colleague Ms. Smith testified that, "Staff had been unable to determine the

⁶ DE-Ohio's Response to OCC-INT-04-RI61, NHT Attachment 3.

1 appropriate rate of return." (Trisha J. Smith, Testimony Dated Nov. 28, 2006, at
2 page 2)

3
4 **Q56. CURRENTLY, TO WHAT DEGREE IS THE AAC CHARGE AVOIDABLE?**

5 **A56.** The first 25 percent of residential load and the first 50 percent of non-residential
6 load, by customer rate class, to switch to a certified supplier is exempted from
7 having to pay the AAC charge.

8
9 **E. Infrastructure Maintenance Fund**

10
11 **Q57. WHAT IS THE IMF?**

12 **A57.** The Infrastructure Maintenance Fund (IMF), which was introduced in the
13 Company's Application for Rehearing of October 29, 2004, was described as a
14 "charge to compensate CG&E for committing its generation assets to serve
15 market-based standard service offer customers." (Application, Attachment 1, page
16 1, revised item 3) Later in the application the IMF is related to generation
17 "capacity." (Application, page 7, item 4.1), and it is set at 4 percent of little g in
18 2005 (for non-residential customers) and 2006 (for all customers), and 6 percent
19 of little g in 2007 and 2008. The Company has also said, "The fixed percentage of
20 little g that DE-Ohio receives for the IMF as a component of its MBSSO is
21 compensation for its opportunity cost associated with committing its assets at first

1 call to MBSSO load."⁷ Mr. Steffen provides a somewhat longer account of the

2 IMF:

3 "DE-Ohio has the sole obligation to provide POLR service to
4 consumers within its service territory. Accordingly, it must be
5 compensated for the risks inherent in this obligation. The IMF is
6 part of the compensation for this service. It is compensation for the
7 first call dedication of its generation assets to native load
8 consumers and the foregone opportunity to sell that energy and
9 capacity and take advantage of pure retail market prices. The IMF
10 allows DE-Ohio to provide stable prices to its consumers *and*
11 *provides some level of revenue certainty to the Company.*

12 Similarly, the IMF provides consumers with a dedicated capacity
13 supply that DE-Ohio cannot contract to a third party, assuring
14 consumers of adequate capacity to maintain system reliability."

15 (Mr. Steffen's Second Supplemental Testimony at pages 25-26,
16 italics added)

17
18 **Q58. WHAT DO YOU MAKE OF THIS CLAIM?**

19 **A58.** The argument seems to be couched in terms of risk. The Company claims it is
20 taking the risk of guaranteeing a stable price to customers. In reviewing this claim
21 I note at the outset that the greatest risk facing an electric utility is the risk of fuel

⁷ DE-Ohio's Response to OCC-INT-04-R167(a) and (c), NHT Attachment 5 and DE-Ohio's Response to OCC-INT-04-R173, NHT Attachment 10.

1 and purchased power price fluctuations, and in Duke's case that risk is passed on
2 to customers dollar-for-dollar by means of the Fuel and Economy Purchased
3 Power tracker. And the risk of acquiring capacity in the market place is passed on
4 to customers dollar-for-dollar by means of the SRT tracker. Secondly, the basis for
5 the IMF charge seems to be similar, if not identical, to that of the RSC charge --
6 compensation for providing customers with stable prices over time. And both
7 apparently refer to costs related to existing capacity.

8

9 ***Q59. HAS THE COMPANY TAKEN A BALANCED VIEW OF THE ISSUE OF***
10 ***RISK AND RISK-AVOIDANCE?***

11 ***A59.*** No. It has taken a completely one-sided view. The sale of electricity at a stable
12 market price cuts both ways. For a utility like Duke Energy Ohio with generation
13 resources, there is a benefit to price stability, which is a hedge against volatility of
14 sales prices and profits. If the Company did not have captive consumers -- and I
15 use the word "captive" advisedly, considering how few customers are actually
16 shopping -- it would have an open or unhedged "long" position in the electricity
17 market. It would, simply stated, have no assured market for the output of its
18 generation assets, and it would be at the mercy of the market. Market prices can go
19 down as well as up, and with standard service offer customers the Company is
20 hedged against those fluctuations.

1 **Q60. MS. MEYER SAYS IN HER TESTIMONY THAT "UNDER THE RSP, DE-**
2 **OHIO ASSUMED THE RISK ASSOCIATED WITH MARKET**
3 **VOLATILITY...." (DIRECT TESTIMONY AT PAGE 9). DO YOU AGREE?**

4 **A60.** No, she is also looking at only one side of the picture.

5

6 **Q61. WITHOUT A BALANCED RISK ASSESSMENT, IS THERE ANY**
7 **JUSTIFICATION FOR THE IMF?**

8 **A61.** No. The Company cannot show what level of risk it is taking on. it cannot even
9 claim that it is taking on any net risk at all and on the face of it standard service
10 offer reduces risk. And the Company has not justified its claims in terms of any
11 quantitative risk analysis.

12

13 **Q62. WHAT DOES THE TERM "OPPORTUNITY COST" MEAN?**

14 **A62.** Opportunity cost is not an accounting cost term, it is a term of economics. It is
15 "the value of the forgone alternative action... (A)n accountant and economist may
16 well define the cost of an action quite differently." (MIT Dictionary of Economics)
17 It is, in effect, the market price at which some asset could have been sold or leased
18 out to provide services to the market as opposed to providing service to standard
19 service offer consumers.

1 **Q63. HAS THE COMPANY ESTIMATED THE OPPORTUNITY COST OF**
2 **MAKING THIS CAPACITY AVAILABLE TO STANDARD SERVICE**
3 **OFFER CONSUMERS?**

4 **A63.** No. The Company was asked the following question, "What is the 'opportunity
5 cost' (i.e., the cost foregone) and how has the opportunity cost been calculated?"

6 The reply was, "The opportunity cost is the market price of incremental capacity
7 and energy to non-MBSSO customers. The Company has not performed such a
8 calculation."⁸

9
10 **Q64. DID THE COMPANY PROVIDE ANY EXPLANATION REGARDING THE**
11 **LEVELS AT WHICH THE IMF HAS BEEN SET?**

12 **A64.** No. Mr. Steffen hardly even makes an attempt. "The IMF pricing methodology as
13 percentages of little g are simply the way DE-Ohio proposed to calculate an
14 *acceptable dollar figure* to compensate DE-Ohio for the first call dedication of
15 generating assets and the opportunity costs of not simply selling its generation into
16 the market at potentially higher prices." (Mr. Steffen's Second Supplemental
17 Testimony at page 26, italics added)

⁸ DE-Ohio's Response to OCC-INT-06-R1140, NHT Attachment 4.

1 **Q65. IS THE COMPANY ENTITLED TO COMPENSATION FOR ANY RISKS**
2 **THAT IT TAKES IN CONNECTION WITH COMMITTING ITS ASSETS TO**
3 **STANDARD OFFER SERVICE?**

4 **A65.** No. It is not appropriate to charge for taking risk, if any, without a thorough risk
5 analysis. I will return to the issue of risk when I discuss the RSC below. I will
6 show that arguably the Company should compensate consumers for providing an
7 assured market for their generation. The one-sided nature of the Company's view
8 of the risks involved is repeated in Mr. Steffen's testimony.

9 "All consumers in DE-Ohio's certified territory benefit by having a
10 first call on DE-Ohio's physical generating capacity at a price
11 certain. Otherwise, consumers would be subject to price volatility
12 in the energy and capacity markets and decreased reliability should
13 capacity be unavailable." Mr. Steffen's Second Supplemental
14 Testimony at page 27)

15 Again, Mr. Steffen does not provide a balanced assessment in which, absent the
16 assurance of sales to standard service offer consumers, the Company would also
17 be subject to "price volatility in the energy and capacity markets." And in bringing
18 the assurance of *reliability* into the equation, he is muddying the water by referring
19 to a cost element supposedly covered by the SRT, not the IMF.

20

21 **Q66. WAS THE IMF A COMPONENT OF LITTLE G?**

22 **A66.** No, it is *additional* to little g. It is not clear why it is expressed as a percentage of
23 little g.

1 **Q67. IS IT CLEAR WHICH GENERATION CAPACITY COSTS ARE ASSIGNED**
2 **TO THE IMF, LITTLE G, THE SRT AND THE RSC RESPECTIVELY?**

3 **A67.** No. In a recent response to a discovery question referring to the IMF, the
4 Company stated that the committed assets in question are electric generating
5 plants, all or part of which are owned by DE-Ohio. "(C)onsumers in DE-Ohio's
6 certified service territory have the right to receive generation capacity from these
7 units before it can be sold to anyone else." On the issue of the opportunity cost of
8 this capacity, the Company says, "The opportunity cost is the market price of
9 incremental capacity and energy to non-MBSSO customers." How was the
10 opportunity cost calculated? "The Company has not performed such calculation."⁹

11
12 **Q68. HAS THE COMPANY PROVIDED FURTHER ELUCIDATION OF THE**
13 **IMF CHARGE IN RESPONSES TO DISCOVERY QUESTIONS?**

14 **A68.** Yes. Noting that the SRT represents the direct costs for incremental capacity to
15 maintain a 15% reserve margin, the Company states that, "Little g and the IMF
16 represent compensation for the Company's *existing* capacity."¹⁰ Confusingly, it
17 does not mention the RSC, which is also a capacity charge, in this context. There
18 appears to be over-charging for existing capacity to the extent that little g and the
19 RSC and the IMF are all recovering the costs or risks of existing capacity. There is
20 no assurance that these charges are not duplicative.

⁹ DE-Ohio's Response to OCC-INT-06-RI140 (f) and (h), NHT Attachment 4.

¹⁰ DE-Ohio's Response to OCC-INT-06-RI142, NHT Attachment 6. (emphasis added).

1 **Q69. ARE THESE GENERATION UNITS OPERATED ENTIRELY FOR THE**
2 **BENEFIT OF STANDARD SERVICE OFFER CUSTOMERS?**

3 **A69.** No. "For 2006, the percentage of energy (from the committed generation assets)
4 not needed by DE-Ohio's FPP consumers was approximately 11%."¹¹

5
6 **Q70. IS THIS OR IS THIS NOT A COST-BASED RATE COMPONENT?**

7 **A70.** Here, as elsewhere, the Company avoids detailed scrutiny of the "costs" that are
8 the building blocks of its standard service offer rates. On the one hand it calls
9 them costs, but if these were accounting costs, some sharing would occur in the
10 case of assets that are only partly used for standard service offer customers. In
11 answer to the question whether the revenues of such sales are credited to MBSSO
12 customers, the Company replied: "None. DE-Ohio's market price does not include
13 a credit for revenue from the sale of power to non-MBSSO consumers."¹² And
14 again, even capacity costs of base and intermediate load generation plants should
15 be allocated in part to energy sales.

16
17 **Q71. IS THE IMF AVOIDABLE FOR CUSTOMERS WHO SWITCH TO**
18 **COMPETITIVE RETAILERS?**

19 **A71.** No, it is payable by all customers, whether they continue to take service from DE-
20 Ohio or switch to another provider.

¹¹ DE-Ohio's Response to OCC-INT-06-RI140(k), NHT Attachment 4.

¹² DE-Ohio's Response to OCC-INT-06-RI140(l), NHT Attachment 4.

1 **Q72. WHAT OTHER CLAIMS DOES THE COMPANY MAKE REGARDING THE**
2 **IMF COMPONENT?**

3 A72. The Company states: "The Company is willing to commit its generation at 1st call
4 to MBSSO consumers for an additional two years. In exchange for such
5 commitment, DE-Ohio's position is that the proposed increase in the IMF
6 component is appropriate."¹³ DE-Ohio also states: "Since 2004, various costs and
7 risks have increased. Additionally, opportunities and prices in the electric power
8 market have increased."¹⁴ Although the present cases do not involve the extension
9 for two additional years, I note these responses because they are purely qualitative;
10 there is no specific quantitative justification for this request either in terms of
11 accounting costs, or market costs of longer-term commitments or hedges, for
12 example. This is a failing of the Company for all time periods.

13
14 **F. System Reliability Tracker**

15
16 **Q73. WHAT IS THE SYSTEM RELIABILITY TRACKER?**

17 A73. The System Reliability Tracker (SRT), like the IMF, was introduced in the
18 Company's Application for Rehearing of October 29, 2004. It was described as a
19 "tracker to permit CG&E to recover its annually committed capacity, purchased
20 power, reserve capacity, and other market costs necessary to serve market-based
21 standard service offer consumers." (Application, Exhibit 1, pages 1-2, item 3.)

¹³ DE-Ohio's Response to OCC-INT-06-RI149(a), NHT Attachment 7.

¹⁴ DE-Ohio's Response to OCC-INT-06-RI150, NHT Attachment 8.

1 **Q74. DID THE APPLICATION FOR REHEARING PROVIDE ANY FURTHER**
2 **EXPLANATION FOR THE SRT?**

3 **A74.** The Company said the tracker was "to maintain the reliability of service to
4 consumers...(and would cover) purchases necessary to maintain a sufficient
5 reserve margin...purchased power costs, capacity costs, and other market costs
6 necessary to maintain a reliable generation supply and adequate reserve margin."
7 (Application, page 7, item 4.2) The Company also refers to recovering "these
8 *incremental* costs." (Application page 8, line 2. Emphasis added.) No explanation
9 was provided regarding any base level over which these charges would be an
10 increment. The Company has also said, "The SRT is DE-Ohio's market price for
11 the cost of purchasing capacity to maintain a 15% reserve margin under its
12 provider of last resort obligation...The Company calculates its market price for
13 Rider SRT based upon the price to purchase various capacity products in the
14 market. The products and their cost are included in the quarterly SRT update
15 filings."¹⁵

16
17 **Q75. DOES MR. STEFFEN THROW LIGHT ON THE COVERAGE OF THE SRT**
18 **IN HIS SECOND SUPPLEMENTAL TESTIMONY?**

19 **A75.** Mr. Steffen makes it clear that the SRT is supposed to cover only *incremental*
20 capacity costs. "(A)ll amounts in the SRT are in excess of the cost of capacity

¹⁵ DE-Ohio's Response to OCC-INT-04-RI68 (a) and (c), NHT Attachment 9.

1 requirements which are part of little g." (Second Supplemental Testimony at page
2 23.)

3
4 **Q76. IS THE SRT THE SUCCESSOR TO THE RESERVE MARGIN**
5 **COMPONENT OF THE AAC?**

6 **A76.** Yes. Apart from reducing the reserve margin from 17 percent to 15 percent, it is
7 an improvement on the AAC's reserve margin component in two respects. First, it
8 covers actual costs incurred by the Company, as opposed to estimating those costs
9 using the cost of a peaking unit as a proxy. Second, it is designed to recover costs
10 for the actual amount of capacity acquired. For example, where peak demand is
11 100 megawatts and the desired reserve margin is 15 megawatts, for a total
12 capacity requirement of 115 megawatts, the Company presumably would acquire
13 the exact amount of its capacity shortfall. If it already had 105 megawatts, it would
14 acquire 10 megawatts, not 15 megawatts.

15
16 **Q77. WHAT EFFECT DID THESE CHANGES HAVE ON THE DOLLAR**
17 **AMOUNT OF THE RESERVE MARGIN CHARGE?**

18 **A77.** The switch from the "reserve margin" component to the SRT shows the benefits
19 of basing such charges on actual costs rather than estimated costs. The claim for
20 actual costs for 2005 was only 28 percent of the amount "estimated" using the cost
21 of building new peaking capacity -- down from \$52,898,560 to \$14,898,00. (Mr.
22 Steffen's Second Supplemental Testimony at page 24)

1 **Q78. IS THIS CHARGE WELL-BASED?**

2 **A78.** To the extent the charge is based on actual costs incurred by the Company in
3 acquiring services in the market place, it is much better based than it was before,
4 and is better based than the remaining "estimated" components of Duke's standard
5 service offer. It meets the double standard of reflecting measurable accounting
6 costs and verifiable market costs. (I leave to one side the issue of purchases from
7 affiliates, which raises regulatory issues regarding the appropriate transfer prices.
8 The Commission has to approve any purchases from Duke Energy North
9 America.)

10

11 **Q79. MR. STEFFEN CLAIMS THAT "EVEN WITH THE ADDITION OF THE**
12 **COST-BASED SRT (\$14,898,000) FOR RESERVE CAPACITY, AND**
13 **TAKING THE IMF AT ITS FULLY IMPLEMENTED (I.E., RESIDENTIAL**
14 **AND NON-RESIDENTIAL) LEVEL, DE-OHIO IS CHARGING LESS THAN**
15 **THE \$52,898,560 ORIGINALLY PROPOSED AND SUPPORTED BY THE**
16 **COMPANY AS ITS MARKET PRICE FOR RESERVE MARGIN AND THE**
17 **DEDICATION OF ITS PHYSICAL CAPACITY." (MR. STEFFEN'S**
18 **SECOND SUPPLEMENTAL TESTIMONY AT PAGE 27) DO YOU AGREE?**

19 **A79.** No. Mr. Steffen's statement is misleading and, at best, only correct for the year
20 2006.

1 **Q80. IN WHAT WAY IS IT MISLEADING?**

2 **A80.** The SRT is the only true successor to the Reserve Margin charge, which was
3 calculated strictly in terms of reserve margin and did not relate to the dedication of
4 existing capacity. There is no justification for the IMF on the record. The apples to
5 apples comparison would be a reduction from an (estimated) Reserve Margin
6 charge of \$52,898,560 to a cost-based SRT of \$14,898,000, a 72 percent reduction
7 to only 28 percent (based on actual costs subject to true-up) of the earlier
8 "estimate." This would have reduced the Company's rates by about \$38 million. It
9 is incorrect to say that, between the Stipulation and the current standard service
10 offer, "these underlying costs were merely reduced, repositioned, made avoidable
11 or carved out into the IMF and SRT charges." (Mr. Steffen, Second Supplemental
12 Testimony at page 30) In fact, the IMF is a brand new charge.

13

14 **Q81. IF YOU ADD IN THE IMF, ISN'T THE COMBINED TOTAL STILL**
15 **UNDER THE EARLIER RESERVE MARGIN CHARGE?**

16 **A81.** No. The introduction of the IMF more than recovers the amount the Company lost
17 by switching from estimated to actual reserve margin costs. In his Attachment
18 JPS-SS1, Mr. Steffen combines the IMF with the SRT (\$30,080,000 and
19 \$15,000,000 respectively, to get a total of \$45,080,000, which is somewhat less
20 than the previous \$52,898,560. However, in 2007 the IMF increases from 4
21 percent of little g to 6 percent, or approximately \$45 million. The combined total,
22 other things being equal, will now be about \$60 million, a higher level than the
23 earlier reserve margin charge of approximately \$53 million.

1 **Q82. ATTACHMENT 2 TO THE COMPANY'S APPLICATION FOR**
2 **REHEARING OF OCTOBER 29, 2004 CONTAINED SRT GUIDELINES.**
3 **DID THESE CLARIFY THE RELATIONSHIP BETWEEN THE VARIOUS**
4 **CHARGES?**

5 **A82.** The Guidelines throw light on one important issue, namely the relationship
6 between the FPP, which is bypassable, and the SRT, which is not. In a nutshell,
7 the FPP is a charge for *energy*, and the SRT is a charge for *capacity*.

8
9 **Q83. DID THE FPP AUDIT, WHICH ALSO COVERED THE SRT, DEAL WITH**
10 **THESE CONCERNS?**

11 **A83.** The audit highlighted the problem of affiliate transactions, specifically the
12 purchase of capacity from Duke Energy North America (DENA).

13 "(The auditor) does not believe that DE-Ohio provided data or
14 evidence which would support the authorization for DE-Ohio to
15 purchase reserve capacity from DENA assets as part of the SRT.
16 (The auditor) believes that the market for reserve capacity is not
17 liquid and transparent enough for there to be an audit trail to assure
18 that affiliate purchases from DENA were at prices no greater than
19 market, and also believes that the purchase of reserve capacity
20 from DENA could discourage other suppliers from making
21 competitive offers to DE-Ohio. (Audit Report, at page 1-9).

22

1 These concerns led the auditor to recommend that "purchases of reserve capacity
2 from DENA assets should not be eligible for inclusion in the SRT, as is currently
3 the case." (Audit Report, pages 1-10)
4

5 **Q84. ARE THERE CONTINUING CONCERNS REGARDING THE NON-**
6 **AVOIDABILITY OF THE SRT?**

7 **A84.** Yes. The Company says that "in Case No. 06-986-EL-UNC, DE-Ohio has
8 proposed to make reserve capacity purchases, currently included in Rider SRT,
9 unavoidable. This proposal is consistent with DE-Ohio's past proposals. All
10 MBSSO consumers benefit from the reserve capacity purchases and should pay
11 the price."¹⁶ I repeat my concern that the charge, like the IMF, involves
12 overcharging customers who switch to competitive retailers.
13

14 **Q85. THE COMPANY HAS ARGUED THAT IT HAS A GREATER**
15 **COMMITMENT TO RELIABILITY THAN COMPETITIVE RETAILERS**
16 **DO. DO YOU AGREE?**

17 **A85.** Competitive retailers are designated "Load Serving Entities" ("LSEs") and
18 "Transmission Customers" by the Midwest ISO, and have *some* commitment to
19 their customers and to the ISO with regard to reliability. They are required to line
20 up transmission and take responsibility for providing ancillary services, including
21 spinning and other reserves that add up to about 4 percent of demand. To this

¹⁶ DE-Ohio's Response to OCC-INT-04-R177, NHT Attachment 11.

1 extent at least there is currently an overlap. Furthermore, to the extent that
2 retailers' current commitments fall short of those of utility LSEs, it is not clear
3 why they should not be enhanced. It would be preferable for the Commission to
4 create equal responsibilities for non-utility and utility LSEs, rather than having the
5 Company volunteer to take on this obligation at considerable cost to consumers. I
6 am concerned that this feature of the regional power market is being used as the
7 basis for making large portions of Duke's generation charges unavoidable, thereby
8 creating barriers to competitive entry into the market by CRESs.

9
10 ***Q86. ARE THE COST ELEMENTS BEING CLAIMED BY THE COMPANY***
11 ***UNDER THE SRT CONSISTENT WITH ITS JUSTIFICATION FOR***
12 ***MAKING THE TRACKER UNAVOIDABLE?***

13 ***A86.*** No. The specific details of DE-Ohio's request for SRT undermine the view that its
14 concern about reliability is totally different than that of competitive retailers. I say
15 this because, in the SRT, the Company is not asking only for recovery of the cost
16 of acquiring "real" resources like shares in generation plants. It is also requesting
17 compensation for the costs of such financial instruments as purchased power and
18 forward reliability contracts, options, etc. (See Application for Rehearing,
19 Attachment 2, page 2) These financial instruments do not directly add to reliability
20 in the regional power grid. And to the extent that contracts such as these are
21 actually entered into – or could feasibly be entered into -- by competitive retailers,
22 the scope of competitive services is reduced and there is a likelihood of
23 overlapping services and costs.

1 **Q87. IS THE SRT AVOIDABLE BY ANY RETAIL CUSTOMERS?**

2 **A87.** The SRT is unavoidable by residential customers. It is, however, avoidable to non-
3 residential customers that agree to stay with a competitive retailer until December
4 31, 2008. If these customers return to DE-Ohio prior to this date their generation
5 rates will consist of the MISO hourly locational marginal price.

6

7 **G. Rate Stabilization Charge**

8

9 **Q88. WHAT IS THE RSC?**

10 **A88.** In the Stipulation of May 19, 2004, the Rate Stabilization Charge was included as
11 one of the two components of the non-bypassable Provider of Last Resort charge.
12 This would apply to all customers – to non-residential customers effective January
13 1, 2006 and to residential customers effective January 1, 2006 – except that the
14 first 25 percent of load in any consumer class could avoid paying this charge,
15 subject to certain conditions relating to return to CG&E service, in the case of
16 non-residential customers. Residential customers could return to standard service
17 offer. There were, however, monetary limits on the Company's lost revenues
18 resulting from switching by residential customers. Subject to FERC and MISO
19 regulations, while load-serving entities would provide ancillary services and daily
20 operating reserves, they "may rely upon CG&E's reserve capacity to meet their
21 reserve capacity (but not energy) requirements for loads served within CG&E's
22 certified territory." (Stipulation, page 11) Thus, Competitive Retail Electric
23 Suppliers could apparently not compete to supply capacity as well as energy,

1 ancillary services and operating reserves, as the Company retained the sole right to
2 provide capacity.

3
4 ***Q89. WHAT IS THE RATIONALE OR BASIS FOR THE RSC?***

5 ***A89.*** The basis for the charge is quite unclear. "The RSC is the Company charge for
6 providing a stable market price over a prolonged period of time."¹⁷ Is this, then,
7 the provision of a hedge against market price changes? To what degree have
8 prices actually been hedged, and what was the cost or measure of any such
9 hedges? The Company's response and its testimony do not provide a clear basis
10 for the RSC.

11
12 ***Q90. DOES THE RSC APPARENTLY DUPLICATE COSTS ALSO RECOVERED***
13 ***BY THE IMF AND POSSIBLY LITTLE G?***

14 ***A90.*** Yes. I have discussed this issue in connection with the IMF.

15
16 ***Q91. AGAIN, HAS THE COMPANY TAKEN A BALANCED VIEW OF THE***
17 ***ISSUE OF RISK AND RISK-AVOIDANCE BY HEDGING?***

18 ***A91.*** No, as I said in connection with the IMF, it has taken a completely one-sided
19 view. A "stable market price over a prolonged period of time" cuts both ways. For
20 a utility like Duke Energy Ohio with generation resources, there is a benefit to
21 price stability, which is a hedge against volatility of sales prices and profits. An

¹⁷ DE-Ohio's Response to OCC-INT-04-RI62(a), NHT Attachment 12.

1 open or unhedged position would be a "long" position in which the Company has
2 the assets but no assured market for them. It would be at the mercy of market
3 fluctuations.

4
5 ***Q92. WITHOUT A BALANCED RISK ASSESSMENT, IS THERE ANY***
6 ***JUSTIFICATION FOR THE RSC?***

7 ***A92.*** No. There is no showing that the Company is taking on risk, let alone providing a
8 quantitative risk analysis to justify any specific risk charge.

9
10 ***Q93. IS THE RSC A NEW CHARGE?***

11 ***A93.*** Yes and no. It was a component of little g, and in that sense was not new. But it
12 was new in the sense that 15 percent of little g was now recovered through a
13 different rider. The significance of the new rider is that, unlike the remaining 85
14 percent of little g, it is non-bypassable by shopping customers. Why this
15 component should be set at the level it is set, and why it should not be bypassable,
16 is not clear. The Company has recently broadened the rationale for the charge and
17 in the process made it even less clear. "The Company determined that this level
18 for the RSC would be sufficient compensation to satisfy the Commission's Rate
19 Stabilization Plan goal of price certainty for consumers and revenue stability for
20 utilities. The 15% was determined to be a reasonable market price to help achieve
21 all three of the Commission's goals for the plan." ¹⁸

¹⁸ DE-Ohio's Response to OCC-INT-06-R1134, NHT Attachment 13.

1 **Q94. IS THERE A COST BASIS FOR THE RATE STABILIZATION CHARGE?**

2 **A94.** Yes and no. The tendency has been for other riders to become cost-based in terms
3 of current costs, but the RSC is resolutely founded on historical costs as reflected
4 in little g. "As with a number of the components of the MBSSO, the RSC is not
5 cost-based. The Company used its judgment to determine that 15% of little g
6 represented a reasonable market price for the RSC component of its MBSSO as
7 compensation for providing a stable price over a prolonged period of time."¹⁹

8
9 **Q95. IS THIS A SOUND BASIS FOR A RATE COMPONENT IN ORDER TO**
10 **PROVIDE REASONABLY PRICE SERVICE?**

11 **A95.** No. In this instance, as in others, there is confusion over whether the standard
12 service offer rate components are cost-based or market-based. This confusion
13 allows the Company's proposals to avoid thorough scrutiny. To the extent that
14 there is an accounting cost basis of rate components like the FPP, they can be
15 audited. But to the extent components like the RSC are merely there in order to
16 build up the total standard service offer price to a level that the Company regards
17 as a "market price," there is no sound basis for these charges, nor is it clear why
18 they should not be bypassable.

¹⁹ DE-Ohio's (Response to OCC-INT-04-RI62(c), NHT Attachment 12.

1 **Q96. HOW DID THE COMMISSION TREAT THE RSC IN ITS OPINION AND**
2 **ORDER OF SEPTEMBER 29, 2004?**

3 **A96.** In its Order, the Commission said that it was "very concerned about the impact
4 that the stipulation may have on competition." (Order at page 19) The initial
5 relatively high levels of switching by non-residential customers had subsided, and
6 the Commission realized that the avoidability of the RSC charge by only 25
7 percent of load in each customer class might be an inhibiting factor. The
8 Commission still accepted a limit for avoidability, but increased it to 50 percent of
9 non-residential load. For residential customers, who had switched in much smaller
10 numbers, there was still scope for substantial switching without bumping into the
11 25 percent ceiling, and the Commission left that ceiling in place.

12
13 **Q97. DO YOU AGREE WITH THE COMMISSION'S LOGIC REGARDING THE**
14 **LIMIT ON CUSTOMER SWITCHING BEYOND WHICH CUSTOMERS**
15 **WOULD BE CHARGED THE RSC CHARGE?**

16 **A97.** With respect, I disagree with the Commission. The RSC, when looked at from the
17 standpoint of a competitive retailer, is a penalty on switching, period. It has the
18 effect of inhibiting competitive entry, even if it only takes effect over and above a
19 certain level, whether that level is 25 percent of load or 50 percent. Before making
20 the necessary investment in marketing, administration, contracting, other
21 overhead, etc., competitive retailers would surely like to know that they have the
22 chance of being rewarded for their success in attracting large numbers of
23 customers, not penalized for doing so. It should be borne in mind that the

1 individual retailer is not looking at a potential market of 25 percent or 50 percent
2 of load, but at some smaller market share, since it will not be the only competitor
3 in the market. Of course, with a 25 percent limit on avoiding the RSC charge, the
4 deterrent effect is even greater.

5
6 ***Q98. WHAT WERE THE PROVISIONS REGARDING THE RATE***
7 ***STABILIZATION CHARGE IN THE COMPANY'S APPLICATION FOR***
8 ***REHEARING OF OCTOBER 29, 2004?***

9 **98.** Reflecting the Commission's order, the RSC was made effective January 1, 2005
10 for non-residential customers and January 1, 2006 for residential customers. Like
11 the AAC, it would be an unavoidable charge related to the Company's POLR
12 responsibilities, but it would be avoidable for the first 25 percent of residential
13 load to switch and the first 50 percent of non-residential load to switch. In order to
14 avoid paying this charge (and the AAC), non-residential customers must be within
15 the first 50 percent of load to switch, and they must have a contract for firm
16 generation service with a competitive retailer. Moreover, if they return to the
17 Company's generation service, they will have to pay the highest applicable
18 marginal rate for generation. Residential customers may avoid paying this charge
19 (and the AAC) if they are within the first 25 percent of load to switch and they
20 must comply with "any applicable tariffed minimum stay or exit fee provisions."
21 They may, however, return to standard service offer at standard rates if their
22 competitive supplier defaults.

1 **Q99. DID THE SUPREME COURT OF OHIO ADDRESS THE RSC IN ITS**
2 **ORDER OF NOVEMBER 26, 2006?**

3 **A99.** Yes. It did so, however, in passing and without going into it. "Neither CG&E nor
4 the commission identified the purpose of the rate stabilization charge.
5 Nevertheless, the charge is self-defining, and the signatory parties agreed to it."
6 (Decision at Paragraph 25, page 9) This is not exactly a thorough analysis of the
7 RSC, let alone a ringing endorsement of it. This cursory reference does not seem
8 to shut the door on a review of the RSC in the context of the reasonableness of
9 non-bypassable charges and their impact on competition. The combined
10 magnitude and complementary nature (or lack thereof) of the various rate
11 components in standard service offer -- including the RSC, little g, the SRT, the
12 IMF, the AAC and the FPP -- surely also remains a valid concern for the
13 Commission.

14
15 **Q100. IS THE COMPANY CURRENTLY PROPOSING CHANGES TO THE RSC?**

16 **A100.** Yes. "In Case No. 06-986-EL-UNC DE-Ohio is proposing to combine the AAC
17 and the RSC in order to simplify the MBSSO."²⁰ The Company is also seeking to
18 increase the level of the RSC to 16 percent of little g for 2009 and 17 percent of
19 little g for 2010. "In order to extend stable prices for two more years the Company
20 is willing to accept a slight increase to its RSC component of its MBSSO."²¹

²⁰ DE-Ohio's Response to OCC-INT-04-RI63, NHT Attachment 14.

²¹ DE-Ohio's (Response to OCC-INT-04-RI64, NHT Attachment 15.

1 **Q101. IF THE COMMISSION DECIDES TO RETAIN THE RSC, WOULD THIS**
2 **PROPOSAL PROVIDE AN OPPORTUNITY TO TIGHTEN UP THE BASIS**
3 **OF THE RSC?**

4 **A101.** Yes. I would note, firstly, that since the RSC is, or has been, a component of little
5 g, an increase in the RSC percentage of little g, if permitted by the Commission,
6 should presumably be matched by a reduction in the remaining little g charge.
7 Even if it is now completely detached from historical little g, however, the RSC
8 needs to be justified on its own terms. The increase would still have the
9 unfavorable effect of increasing the Company's unavoidable generation charges.
10 Bearing these considerations in mind, this could be a good opportunity for the
11 Commission to make the RSC completely bypassable and to clarify which parts of
12 generation resources and costs are covered by the RSC. A sound general position
13 would be that all generation-related services should be competitively provided and
14 all generation-related charges, including the RSC, should be avoidable by
15 shopping customers. If the RSC is retained for customers who do not shop, it
16 should be tightened up by basing it on verifiable and measurable generation costs.

17
18 **H. Regulatory Transition Charge**

19
20 **Q102. FOR COMPLETENESS, PLEASE DESCRIBE THE REGULATORY**
21 **TRANSITION CHARGE**

22 **A102.** The Regulatory Transition Charge (RTC) is a component of generation charges
23 ("g") that was separated out to reflect stranded costs and other transitional or

1 restructuring charges. It is also a reminder that customers are still paying for the
2 Company's costs of restructuring.

3
4 **V. OVERALL ASSESSMENT OF DUKE ENERGY OHIO'S STANDARD**
5 **SERVICE OFFER PRICING**

6
7 ***Q103. WHAT IS YOUR OVERALL ASSESSMENT OF THE COMPANY'S***
8 ***STANDARD SERVICE OFFER?***

9 ***A103.*** I assess Duke's standard service offer against the criteria established by the
10 Commission in its implementation of Senate Bill 3. These are "rate certainty,
11 financial stability for the electric distribution utilities and further competitive
12 market development."²² In the last several years, however, problems with
13 deregulation and competitive electricity markets have led to a partial return to
14 traditional thinking about rates. The Company's standard service offer is caught in
15 a kind of time warp. Within an apparent framework of market pricing created
16 three years ago, its riders and trackers increasingly look like traditional rate
17 components based on accounting costs. This issue needs to be addressed head-on
18 by the Commission, and in that spirit I also ask the fundamental question whether
19 Duke's standard service offer rates provide reasonably priced generation service. I
20 will deal in some detail with a number of specific problems of the standard service
21 offer rate components separately and with their consistency and complementary
22 nature (or lack thereof).

²² In FirstEnergy Case No. 03-1461-EL-UNC, Entry on Rehearing, October 22, 2003.

1 **Q104. DID THE STIPULATION OF MAY 19, 2004 OSTENSIBLY ESTABLISH A**
2 **REASONABLE PRICING SYSTEM?**

3 **A104.** The Stipulation of May 19, 2004 contains the following "finding of fact." "The
4 market-based standard service offer price, and individually the price to compare
5 and the Provider of Last Resort components, represent the price of competitive
6 retail electric generation service from a willing seller to willing buyers."
7 (Stipulation, page 21) One only has to look at the statistics on switching, or the
8 lack thereof, to see that this assertion cannot be correct. As of September 30,
9 2006, Duke Energy Ohio retained 96.76 percent of sales. This figure can be
10 compared to the data for December 31, 2004 in which Duke Energy Ohio retained
11 only 83.47 percent of total sales. Breaking down its market monopoly, as of
12 September 31, 2006, Duke Energy Ohio retained 98.25 percent of residential kWh
13 sales, 91.77% of commercial sales, and an amazing 99.65% of industrial sales.
14 (The data are from the Commission's website, Summary of Switch Rates from
15 EDUs to CRES Providers in Terms of Sales For the Months Ending December 31,
16 2004 and September 30, 2006 respectively.) It seems more accurate to conclude
17 that, as a result of a combination of several factors, standard service offer pricing
18 and the conditions placed on customer switching have created a playing field that
19 is far from level and strongly favors Duke Energy Ohio as an incumbent
20 monopolist.

1 **Q105. DOES THIS IMPLY THAT STANDARD OFFER SERVICE IS PRICED**
2 **BELOW COST?**

3 **A105.** No. The lack of switching does not suggest that the Company is pricing service
4 below the level of its accounting costs. Recall that the Company has a number of
5 legacy generating plants that burn coal that is relatively cheap when compared
6 with recent and current prices of natural gas, which tends to be the marginal fuel
7 during peak periods. (The Stipulation of May 19, 2004 contained a provision that
8 the Company would "have no obligation to transfer ownership of its generating
9 assets." (Stipulation, page 23)) Likewise, compared with potential retail
10 competitors, the Company has a long-established customer service network, and
11 this benefit of incumbency enables it to avoid the heavy marketing and
12 administrative costs that a new entrant would have to incur.

13
14 **Q106. ARE THERE BARRIERS TO ENTRY CONTAINED IN THE PRICING OF**
15 **STANDARD SERVICE OFFER?**

16 **A106.** Yes. The Company's standard service offer is made up of six generation-related
17 components – little g, FPP, AAC, IMF, SRT and RSC. A striking feature of the
18 offer is that no fewer than four of these six generation-related price components –
19 the AAC, IMF, SRT and RSC -- are not fully bypassable by consumers who
20 switch to competitive retailers. There are only two components that are fully
21 avoidable, namely the legacy generation rate known as "little g" and the fuel and
22 economy purchased power (FPP) tracker.

1 **Q107. ARE THERE NOT PROVISIONS UNDER WHICH CERTAIN**
2 **PERCENTAGES OF SWITCHING CUSTOMERS CAN AVOID PAYING**
3 **SOME OF THESE CHARGES?**

4 **A107.** Yes. However, these provisions do not remove the barriers to entry, they only
5 lower them. In regard to the previous CMO MBSSO, I objected to what was
6 called the "flex down" provision, which allowed the Company to reduce its
7 standard service offer rates if it began to encounter significant competition from
8 competitive retail electric suppliers. The partial bypassability provisions in the
9 current standard service offer have a similar effect. After the first 25 percent or 50
10 percent of each customer class's load has switched, other retail customers cannot
11 avoid paying these charges when they switch to competitive retailers. Like the
12 earlier flex-down provision, it is a warning to market entrants that if they are
13 successful, they or their customers will be penalized. It is important to understand
14 that unlike an incumbent monopolist such as a distribution utility, competitive
15 retailers have to incur significant marketing and other overhead and indirect costs
16 if they are to enter a market. They are unlikely to do this unless there is the chance
17 of establishing a large customer base in competition with not only the incumbent
18 utility but also other competitors who are likely to be pursuing the same limited
19 opportunity. These switching provisions are yellow lights for competitors and
20 constitute barriers to entry even when actual switching percentages are below the
21 limits.

1 **Q108. ARE THERE OTHER BARRIERS TO COMPETITIVE ENTRY?**

2 **A108.** I note as a barrier the Company's retention of the role of providing capacity to
3 back up energy provided by competitors, and charging all customers POLR
4 charges for this service, including customers who switch. As the incumbent
5 generation service provider, the Company is positioned (in the absence of tight
6 regulatory oversight) to use affiliates to discriminate in favor of customers whom
7 it fears are most likely to switch to competitive suppliers. The Company's current
8 service plan does not seem conducive to the development of the competitive
9 market. The Company has retained a 99.65 percent market share of industrial
10 sales, as of September 30, 2006, closer to a complete monopoly than it was on
11 December 31, 2004, when its market share was 91.04 percent.

12
13 **Q109. PLEASE TURN TO OTHER ASPECTS OF THE PRICING OF DUKE**
14 **ENERGY OHIO'S STANDARD SERVICE OFFER.**

15 **A109.** It is difficult to summarize all of the Company's rate components, which I
16 discussed in the previous section of my testimony. Here I will deal with major
17 concerns and general features. There are several themes that I would like to
18 develop, apart from the problem of unavoidable charges discussed above. These
19 include the difficulty of finding a reasonable basis for some of the charges; the
20 problem of differing and possibly conflicting pricing methodologies; and the
21 difficulty of figuring out how the various rate components fit together.

1 **Q110. HOW WOULD YOU COMPARE THE COMPANY'S STANDARD SERVICE**
2 **OFFER RATE REQUESTS WITH TRADITIONAL RATE CASES?**

3 **A110.** As noted earlier, the Company seems caught between what is supposedly a market
4 pricing framework and what in detail looks increasingly like accounting cost-
5 based justifications for specific rate components. Take for example the AAC,
6 which was initially expressed as a percentage of little g and was not based on the
7 recovery of actual costs incurred. The AAC now looks quite like a traditional rate
8 component, a tracker to recover actual costs incurred for certain items such as
9 environmental investments and costs of homeland security, including
10 reconciliation of past over- or under-recovery.

11
12 **Q111. DOES THIS MEAN THAT THERE IS NO PROBLEM WITH THESE COST-**
13 **BASED RATE COMPONENTS?**

14 **A111.** No. One difficulty is that, when pressed on the details of the accounting costs
15 underlying these supposedly cost-based items, the Company sometimes switches
16 to a broader justification, namely that they are part of market-based pricing.
17 According to the Company, cost-based items do not need to be specifically
18 justified in detail if the overall total price is reasonable.

19
20 **Q112. CAN YOU GIVE AN EXAMPLE?**

21 **A112.** Yes. The calculation of the accounting costs of environmental investments in the
22 AAC rate component is a good example of how the Company uses a "revenue
23 requirements" type calculation, but balks at implementing it in a precise manner

1 that accords with traditional rate-making standards. As noted earlier, in the
2 calculation of the accounting cost basis of AAC charges for environmental
3 investments, construction work in progress ("CWIP") is included in investment.
4 The Commission only permits CWIP in rate base in certain circumstances. Is its
5 inclusion here appropriate? The Company side steps this issue. Mr. Wathen says:
6 "The applicability of traditional ratemaking regulations, such as the limit on CWIP
7 at issue here, must be set aside because we are not dealing with traditional cost
8 based regulation – instead, we have a "new" formula to determine a market price,
9 just as the Commission wrote on page 19 of its Entry on Rehearing." (Wathen
10 Supplemental Testimony at page 5) This reference to what the Commission said
11 does not resolve the issue. In accepting or requiring the use of an accounting cost
12 procedure to build up the components of a market price, I doubt that the
13 Commission meant to say those procedures could be loosely applied. The only
14 argument for preferring a cost-based procedure for estimating a market price is
15 surely that it is hopefully more precise than unreliable guesses at what the market
16 price would be. It is not enough to say that the procedures are vaguely or
17 approximately reasonable, it would be better for them to be precisely applied and
18 precisely reasonable. Taking the Company's approach, the whole costing exercise
19 hardly seems to be relevant, so long as the net result is a reasonable market price.
20 But, apart from prices paid for goods and services like fuel and capacity in the
21 marketplace, there is no clear evidence as to what exactly the market price is,
22 which leaves an accounting cost basis as a proxy, and a precisely estimated proxy
23 is better than an approximate one.

1 ***Q113. HOW WERE YOU CONCERNED ABOUT THE REASONABLENESS OF***
2 ***THE COMPANY'S EARLIER PROPOSALS?***

3 *A113.* In my previous testimony in 2004 in this matter, I critiqued the Company's
4 attempt to build up a market price for generation services. The Company tried to
5 justify its MBSSO pricing structure as an attempt to replicate the kind of price that
6 a Competitive Retail Electric Supplier (CRES) would build up from a number of
7 cost and risk components. To the base component, which was a market price
8 index, the Company added several components reflecting the kinds of costs and
9 risks that it argued a CRES would seek to recover in its retail prices. The problem
10 was that the components were based upon estimates by the Company's very
11 imprecise measures of the costs and risks faced by CRES providers (let alone
12 those actually faced by the Company itself as the MBSSO provider). Some of the
13 cost or risk items appeared to be over-estimated, and there also appeared to be
14 double-counting of costs. Company witness Rose acknowledged that the pricing
15 methodology was novel, untested, and based upon a large number of judgments
16 and estimates for which there was no firm basis. When I testified in 2004, my
17 concern was that the prices constructed according to the CMO MBSSO
18 methodology were unlikely to correctly measure the actual costs and risks of
19 providing competitive retail service. The prices seemed likely to be higher than
20 justified by either the Company's underlying cost of providing the service, or
21 prices likely to be determined in the competitive market. In my testimony, I
22 addressed this concern in relation to various specific price components. The
23 general problem with the way the Company developed its proposed MBSSO rates

1 was that it was complex, artificial and imprecise. I argued that it was next to
2 impossible to accurately simulate prices that would prevail in the competitive
3 retail market, as opposed to letting the market itself determine what those prices
4 would be. Perhaps also fearing that the estimated price was too high, or at least
5 being uncertain about the accuracy of its methods, the Company also included a
6 flex-down provision under which it could lower its price if it started to lose market
7 share to competitors.

8
9 **Q114. DID SUBSEQUENT DEVELOPMENTS VALIDATE YOUR CONCERNS?**

10 **A114.** Yes. The essentially subjective nature of the CMO MBSSO pricing methodology
11 was dramatically borne out by a subsequent development. When the Company
12 filed its Alternate Plan, pursuant to the Stipulation of May 19, 2004, it was
13 concerned that its new proposed rates might be *lower than* its costs and might
14 therefore constitute predatory pricing. It therefore filed testimony by Mr. Rose in
15 which much lower revised "market prices" were developed by simply changing a
16 few input assumptions of the pricing methodology. Probably, the lower estimates
17 were more reasonable than the earlier ones, and the Company's proposed prices
18 were therefore higher than market prices.

19
20 **Q115. WHY DO YOU RAISE THESE ISSUES AGAIN?**

21 **A115.** It is not my intention to try to settle this old argument. I provide this example of
22 the difficulty inherent in trying to artificially construct market prices using risk

1 models, etc. The range of Mr. Rose's "market" prices was so large that the pricing
2 exercise lost all credibility.

3
4 **Q116. HAS MR. ROSE RETURNED TO THIS ISSUE IN HIS SECOND**
5 **SUPPLEMENTAL TESTIMONY?**

6 **A116.** Yes. He has the following to say.

7 "Attachment JLR-37-Supplemental to my first supplemental
8 testimony shows CMO MBSSO prices based on four hypothetical
9 adjustments: (1) lower power prices (*i.e.*, at 2003 levels instead of
10 2004), (2) with greater load shape information and non-block
11 pricing, (3) lower margins *i.e.*, 7% operating risk versus 13.4%),
12 and (4) lower supply management fees (*i.e.*, 4% instead of 7%).
13 Lower costs, lower risks or greater competition could also lower
14 margins and fees... The results showed that depending on market
15 conditions, the CMO MBSSO might either be above, below, or
16 close to the RSP MBSSO price to compare." (Second
17 Supplemental Testimony at page 9.)

18 This boils down to saying that market prices depend on a variety of factors and
19 when a risk model is used in an attempt to estimate market prices, it all depends
20 on how you assess those factors in the particular circumstances. This was not a
21 sound basis for determining electricity market prices in 2004 and it is not a sound
22 basis today.

1 **Q117. SHOULD THE COMMISSION SWITCH TO MARKET PRICES AS**
2 **DETERMINED BY THE MARKET ITSELF?**

3 **A117.** The market itself is in principle the best source of market prices. I would like to
4 express two reservations about observed market prices. One is that, after several
5 years of electricity market pricing around the country, we now know that market
6 prices can be volatile in the short-run. Price volatility can make short-run prices
7 depart significantly from long-run equilibrium prices. Complete reliance on short-
8 term pricing can have adverse effects on consumers, and can give consumers the
9 wrong price signals. The other potential problem with pricing in newly
10 restructured markets is that incumbent utilities or their affiliates may have large
11 shares of the regional generation market and may be able to exercise market
12 power.

13
14 **Q118. IS THERE AN ALTERNATE METHOD FOR DETERMINING MARKET**
15 **PRICES, OR A PROXY FOR MARKET PRICES, IN THE NEAR TERM?**

16 **A118.** Yes. Greater reliance on actual accounting costs -- rather than costs estimated
17 from pricing theories and models -- can provide a relatively stable proxy for
18 market prices. As I look at the trend or tendency of the Commission's regulation
19 of Duke's standard service offer during the past two or three years, it seems that
20 this is the direction in which the Commission has been heading.

1 **Q119. CAN YOU PROVIDE EXAMPLES OF THIS TREND?**

2 **A119.** Of the six generation-related rate components, three are now (either in principle or
3 in practice) based primarily on accounting cost – the FPP, the AAC and the SRT.

4 The FPP, which is one of the bypassable rate components, is functioning for the
5 most part as a traditional fuel adjustment clause tracker. And the AAC and SRT –
6 two of the four non-bypassable components– are also based on accounting costs.

7 While not agreeing with all the features of these charges, I believe that, if correctly
8 designed, they can be components of reasonably priced service that meet the
9 Commission's objectives of rate stability for consumers and financial stability for
10 the Company. The third objective – the fostering of competition – is turning out to
11 be less easily attainable than had been previously hoped. What is clear at this
12 point is that competition will be enhanced to the extent the Commission transfers
13 cost recovery from non-bypassable POLR charges to bypassable Price to Compare
14 charges. For example, the SRT should be completely bypassable.

15

16 **Q120. DO YOU HAVE ANY COMMENTS ON THE BASIS OF THE OTHER**
17 **THREE RATE COMPONENTS?**

18 **A120.** Little g and the RSC, which is a component of little g, are currently neither
19 market-based nor based on recently-audited costs. The fact is that little g, and by
20 extension the RSC which is a component of little g, are legacy items that go back
21 many years. It should be possible, however, to update the cost basis of legacy
22 generation.

1 **Q121. THE COMPANY REGARDS THE ASSETS COVERED BY LITTLE G AS**
2 **DEREGULATED. CAN THE COMMISSION CONTINUE TO MAINTAIN**
3 **REGULATORY PRICING OF THESE ASSETS?**

4 **A121.** I don't know the answer to this question from a legal standpoint. However, I note
5 that the Company has resisted attempts to be required to transfer its generation
6 assets to a separate deregulated affiliate and is still committing these assets ("at 1st
7 call") to standard service offer customers. It is also currently recovering
8 transitional charges under the Regulatory Transition Cost (RTC) rider, and will
9 continue to do so through 2008 or 2010. It seems appropriate for customers who
10 are paying for the transition costs of restructuring to get the benefit of reasonably-
11 priced electricity from partially restructured assets.

12

13 **Q122. WHAT ABOUT THE BASIS OF THE IMF?**

14 **A122.** From a consistent cost basis, this is an anomalous charge that should be dropped.
15 Again, if generation charges are to be cost based, the cost of generating capacity
16 should be recovered by means of some combination of an updated little g and the
17 SRT, which is already based on current costs incurred.

18

19 **Q123. IS CONTINUATION OF THE MOVEMENT TOWARD COST-BASED**
20 **PRICING THE PREFERABLE WAY FOR THE COMMISSION TO GO?**

21 **A123.** I am not stating a preference for cost-based pricing over market-based pricing.
22 What I am saying is that tightening up the cost basis of the Company's charges is a

1 reasonable response to the challenge of developing a consistent and reasonable
2 framework for standard service offer pricing that provides reasonable prices.

3
4 ***Q124. WOULD A CONTINUATION OF THE STATUS QUO, WITH THE***
5 ***COMMISSION SIMPLY AFFIRMING THE PRESENT STRUCTURE, BE***
6 ***DESIRABLE?***

7 ***A124.*** No. I have presented a number of criticisms of the Company's current standard
8 service offer. In my opinion, it is impossible to find a reasonable and consistent
9 basis for all of its pricing components, separately or in combination, as they are
10 currently designed.

11
12 ***Q125. THE COMPANY HAS, AMONG OTHER ALTERNATIVES, GIVEN THE***
13 ***COMMISSION THE CHOICE OF RETURNING TO THE STIPULATED***
14 ***MBSSO OF MAY 19, 2004 OR THE ORIGINAL CMO MBSSO. IN YOUR***
15 ***OPINION, ARE THESE GOOD ALTERNATIVES?***

16 ***A125.*** No. A return to the Stipulated RSP MBSSO would reverse a number of beneficial
17 changes that the Commission has made, for example the increase in avoidability
18 of some of the rate components. Regarding the CMO MBSSO, I refer to my
19 testimony of May 6, 2004, which contained a number of very sharp criticisms of
20 that proposal. I referred earlier to the issue of using a risk model to estimate
21 market prices, and showed that the estimates depend on so many assumptions that
22 they are too approximate and unreliable to be used for rate-making purposes.

1 **Q126. WHAT THEN IS YOUR OVERALL CONCLUSION?**

2 **A126.** Taken together, the components of the current standard service offer pricing are
3 poorly defined and do not have a reasonable basis. Generation charges should be
4 completely bypassable by shopping customers. Unless the Company's standard
5 service offer rates are based on either market prices actually determined in the
6 market place, or on the proxy of consistently-calculated embedded and current
7 costs, the service will not be reasonably priced for consumers.

8

9 **Q127. DOES THAT CONCLUDE YOUR TESTIMONY?**

10 **A127.** Yes it does. However, I reserve the right to incorporate new information that may
11 subsequently become available.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Testimony of Neil Talbot was served electronically on the persons listed on the electronic service list shown below (as supplemented for this pleading), provided by the Attorney Examiner, this 9th day of March 2007.



Jeffrey W. Small
Assistant Consumers' Counsel

paul.colbert@duke-energy.com
rocco.d'ascenzo@duke-energy.com
anita.schafer@duke-energy.com

michael.pahutski@duke-energy.com
ariane.johnson@duke-energy.com
mdortch@kravitzllc.com

cmooney2@columbus.rr.com
dboehm@bkllawfirm.com
mkurtz@bkllawfirm.com
sam@mwnemh.com
dneilsen@mwnemh.com
lmcAlister@mwnemh.com
jbrowse@mwnemh.com
drinebolt@aol.com
WTPMLC@aol.com
schwartz@evainc.com
rsmithla@aol.com
harthroyer@aol.com
sbloomfield@bricker.com

TOBrien@Bricker.com
dane.stinson@baileycavalieri.com
korkosza@firstenergycorp.com
JKubacki@strategicenergy.com
mehristensen@columbuslaw.org
tschneider@mgsqglaw.com
shawn.leyden@pseg.com
ricks@ohanet.org
cgoodman@energymarketers.com
nmorgan@lascinti.org
eagleenergy@fuse.net
Stephen.Reilly@puc.state.oh.us
mhpetricoff@vssp.com

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

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

NHT Attachment 1

**Ohio Consumers' Counsel
Sixth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: February 15, 2007
Response Due: February 26, 2007**

OCC-INT-06-RI148

REQUEST:

Regarding the Companies' meeting of the standard service offer peak loads and capabilities, what was a breakdown of the amounts and cost recovery of that megawatt generating capacity and capacity products covered by each standard service offer component or rider (e.g. Little g, IMF, RSC, and SRT) as of Summer 2006 and Winter 2006/2007?

RESPONSE:

The only components of the MBSSO that are market prices based upon direct "cost recovery" are the Riders FPP and SRT. For 2006, the billed revenue for each component of the Company's MBSSO are shown in the table below:

MBSSO Revenue for 2006	
Components of MBSSO	Amount
Generation (G)	\$654,280,074
RSC	114,747,660
Little g (G + RSC)	\$769,027,734
FPP	\$194,302,151
AAC	55,008,125
SRT	(6,031,653)
IMF	31,549,495
Total MBSSO Revenue	\$1,043,855,852

WITNESS RESPONSIBLE: N/A

000575

NHT Attachment 2

**Ohio Consumers' Counsel
Fourth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: January 26, 2007
Response Due: February 5, 2007**

OCC-INT-04-RI78

REQUEST:

In regards to DE-Ohio's FPP for 2005, 2006, and as proposed for 2007:

- a. What is the rationale for this component?
- b. What are its sub-components?
- c. What are the underlying costs associated with each sub-component?
- d. Which of the sub-components are accounting cost based and which are market-based, and what were the actual costs for those sub-components that are based upon costs?
- e. Of the cost based sub-components in response to Interrogatory No. 78d, what are the actual costs for 2005 and 2006?
- f. How is the FPP calculated and allocated to the residential class (including an explanation of the use of actual per kWh costs and estimated amounts)?
- g. How is each sub-component of the FPP calculated and allocated to the residential class (including an explanation of the use of actual per kWh costs and estimated amounts)?
- h. What risks are covered by the FPP in the current standard service offer?
- i. How does DE-Ohio allocate the type of costs upon which the FPP is based between customers who receive the Company's standard service offer and those customers who do not receive the Company's standard service offer?

RESPONSE:

000577

- a. Rider FPP is a component of the Company's formula-based MBSSO. Rider FPP allows the Company to recover incremental fuel, purchased power, and emission allowance costs (EAs).
- b. The Rider FPP market price includes the incremental costs of fuel, economy purchased power, and EAs over the amount of the EFC rate frozen as of October 1999. It also includes a reconciliation adjustment for prior period over- or under-collections. As of the first quarterly filing for 2007, Rider FPP also includes MISO charges for congestion and losses.
- c. The fuel component includes the costs of fossil fuel used in the generation of power and the cost of economy purchases of power from the MISO. The congestion and losses are also included in the fuel component.

Since the average cost for fuel and purchased power used in the calculation is at the busbar, there is also an adjustment (the System Loss Adjustment or "SLA") to convert the market price to an "at the meter" price.

The EA component includes the incremental cost of emission allowances.

The reconciliation adjustment includes all prior period differences between revenue and costs that will be recovered from or returned to consumers.

- d. The FPP market price is calculated using accounting costs.
- e. The FPP is a market price, not a cost-based rate. See Attachment OCC-INT-04-RI78.
- f. All costs are allocated to the consumer classes based on kWh usage. For documentation of the FPP calculation, please see the company's quarterly filings.
- g. See response to OCC-INT-04-RI78f.
- h. The Rider FPP covers the price risk for fuel, economy purchased power, and EAs.
- i. DE-Ohio allocates on a per/ kWh basis.

WITNESS RESPONSIBLE: N/A

NHT Attachment 3

**Ohio Consumers' Counsel
Fourth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: January 26, 2007
Response Due: February 5, 2007**

OCC-INT-04-R161

REQUEST:

In regards to DE-Ohio's AAC for the years 2005, 2006, and as proposed for 2007 in Case No. 06-1085-EL-UNC:

- a. What were the actual revenues received by DE-Ohio from the AAC in years 2005 and 2006?
- b. What were the actual accounting costs incurred by the Company for each of the components of the AAC, e.g., environmental costs, Homeland Security costs and costs (or credits) for tax changes?
- c. Will the Company be trueing up any over- or under-recovery of AAC costs in 2005 and 2006 (as proposed by the Company for 2007)?
- d. If the response to Interrogatory No. 61c is negative, why will there be no true-up?
- e. If the response to Interrogatory No. 61c is positive, when will the true-up occur?
- f. Of the costs listed in response to Interrogatory No. 61b what amount was classified as generation expenses?
- g. Of the costs listed in response to Interrogatory No. 61b what amount was classified as distribution expenses?
- h. Of the costs listed in response to Interrogatory No. 61b what amount was classified as transmission expenses?
- i. How did the Company allocate the AAC costs between SSO customers and other retail and wholesale customers?

000530

- j. In proposing a larger increase in the 2007 AAC charges for residential customers than for other customer classes does the Company apparently believe that the Commission should no longer be concerned about the rate impact on residential customers?
- k. If the response to Interrogatory No.61j is negative, why is the Company requesting a larger increase for residential customers?
- l. Why did the Company include CWIP in rate base for the purpose of calculating the AAC in 2007?
- m. Does the Company agree that in a competitive market, costs incurred, including the return of and on generating facilities, generally can only be recovered from sales after the facilities are completed?
- n. If the response to Interrogatory No. 61m is negative, explain how a generating facility could recover costs prior to completion of construction of the facility?

RESPONSE:

Please see the general objection.

- a. For 2005, \$15.8 million. For 2006, \$55.0 million.
- b. For 2005 and 2006, the Rider AAC was established at a fixed percentage of "little g." For those years, the Company did not track the costs referred to in the question. For 2007, the Rider AAC proposed in Case No. 06-1085-EL-UNC, is based on actual data for the twelve month period ending May 31, 2006. (One component of the Rider AAC revenue requirement, environmental reagents, is based on forecasted data for 2007 per a Stipulation Agreement approved by the Commission in Case No. 05-806-EL-UNC).
- c. No.
- d. The agreed upon price was a fixed percentage of little g with no true-up required.
- e. Not applicable.
- f. All costs eligible for recovery in Rider AAC are classified as generation.
- g. None.
- h. None.

- i. Costs eligible for recovery in the Rider AAC are allocated to all MBSSO load.
- j. The AAC component is DE-Ohio's market price for generation service. The factors the Commission uses to review and any market price application is set forth by statute.
- k. De-Ohio is to treat all consumers at the same level and to have no cross-subsidization.
- l. The AAC is not a regulated rate. It is a market price and has no "rate base." CWIP has been a component of DE-Ohio's AAC market price since its approval in Case No. 03-93-EL-ATA.
- m. No.
- n. In a truly competitive market any type of arrangement can be made between a willing buyer and a willing seller. ee response to OCC-INT-04-RI61(n).

WITNESS RESPONSIBLE: N/A

NHT Attachment 4

000533

**Ohio Consumers' Counsel
Sixth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: February 15, 2007
Response Due: February 26, 2007**

OCC-INT-06-RI140

REQUEST:

In its response to OCC-INT-04-RI67(c), the Company states that "[t]he fixed percentage of little g that DE-Ohio receives for the IMF as a component of its MBSSO is compensation for its opportunity cost associated with committing its assets at first call to MBSSO load."

- a. What are the assets to which the Company refers (i.e. identify the assets)?
- b. What kind of assets are they?
- c. Who owns these assets (i.e. identify the owner(s))?
- d. To the extent these assets are generation plants, what are their megawatt capacities?
- e. Which of these assets were previously included in little g?
- f. What does "committing (such) assets at first call to MBSSO load" entail?
- g. In what way(s) is the commitment referred to legally binding?
- h. What is the "opportunity cost" (i.e. the cost foregone) and how has the opportunity cost been calculated?
- i. What amount of the committed generation assets are committed to MBSSO load?
- j. What amount of the committed generation assets are committed to other retail load?
- k. What percentage of the generation from the committed generation assets is sold in the market to non-MBSSO customers?
- l. How are the revenues from sales inquired into by RI141(k) passed on to MBSSO customers?

000534

RESPONSE:

- a. See Attachment OCC-INT-06-RI140(a).
- b. Electric generating plants.
- c. DE-Ohio owns all or parts of all of the assets in question.
- d. See response to OCC-INT-06-RI140(a).
- e. All generating assets identified in response to OCC-INT-06-RI140(a).
- f. It means that consumers in DE-Ohio's certified service territory have the right to receive generation capacity from these units before it can be sold to anyone else.
- g. To the same extent the Commission's Orders in this case are legally binding.
- h. The opportunity cost is the market price of incremental capacity and energy to non-MBSSO customers. The Company has not performed such calculation..
- i. All.
- j. None.
- k. The percentage varies from hour to hour. For 2006, the percentage of the energy not needed by DE-Ohio's FPP consumers was approximately 11%.
- l. Assuming the question is referring to OCC-INT-06-RI140(k): None. DE-Ohio's market price does not include a credit for revenue from the sale of power to non-MBSSO consumers.

WITNESS RESPONSIBLE: N/A

000535

NHT Attachment 5

000536

**Ohio Consumers' Counsel
Fourth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: January 26, 2007
Response Due: February 5, 2007**

OCC-INT-04-RI67

REQUEST:

In regards to DE-Ohio's IMF for 2005, 2006, and as proposed for 2007:

- a. What is the rationale for this component?
- b. What are the actual revenues received by DE-Ohio from the IMF for 2005 and 2006?
- c. What are the underlying costs associated with each of the sub-components?
- d. Of the sub-components, which are based upon accounting costs and which are market-based?
- e. What is the rationale for using 4 percent of little g in 2005 and 2006 and 6 percent of little g in 2007 and 2008 as the estimate for the IMF?
- f. How is each sub-component calculated and allocated to the residential class (including an explanation of the use of actual per kWh costs and estimated amounts)?

RESPONSE:

- a. The Infrastructure Maintenance Fund (IMF) was created to compensate DE-Ohio for committing its generating assets to its retail consumers on a first call basis.
- b. \$19.8 million for 2005. \$31.5 million for 2006.
- c. The fixed percentage of little g that DE-Ohio receives for the IMF as a component of its MBSSO is compensation for its opportunity cost associated with committing its assets at first call to MBSSO load.

000537

- d. Rider IMF is a market price component of the formula for calculating the Market-Base Standard Service Offer. There are no sub-components of the IMF.
- e. See the response to OCC-INT—04-RI67(d).
- f. Rider IMF is calculated as a fixed percentage of “little g” for each rate class.

WITNESS RESPONSIBLE: N/A

000538

NHT Attachment 6

**Ohio Consumers' Counsel
Sixth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: February 15, 2007
Response Due: February 26, 2007**

OCC-INT-06-RI142

REQUEST:

In its response to OCC-INT-04-RI68(a), the Company states that, "[t]he SRT is DE-Ohio's market price for the cost of purchasing capacity to maintain a 15% reserve margin under its provider of last resort obligation." How is the capacity covered by this rider different from other capacity owned or acquired by the Company for which compensation is covered by other riders or components of the MBSSO, such as little g and the IMF?

RESPONSE:

The SRT represents the direct costs for incremental capacity to maintain a 15% reserve margin.

Little g and the IMF represent compensation for the Company's existing capacity.

WITNESS RESPONSIBLE: N/A

000500

NHT Attachment 7

**Ohio Consumers' Counsel
Sixth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: February 15, 2007
Response Due: February 26, 2007**

OCC-INT-06-RI149

REQUEST:

Regarding the Company's response to OCC-INT-04-RI70:

- a. Why is the Company requesting an increase in its IMF component of its standard service offer "in order to commit its generation at 1st call to MBSSO consumers"?
- b. What is the definition of "a slight increase" as used in response to OCC-INT-04-RI70?

RESPONSE:

Objection. Irrelevant. Assumes facts not in evidence in the consolidated remand cases as ordered by the Commission on or about December 14, 2006. However, without waiving said objection:

- a. The Company is willing to commit its generation at 1st call to MBSSO consumers for an additional two years. In exchange for such commitment, the Company believes the proposed increase in the IMF component is appropriate.
- b. The American Heritage College dictionary defines "slight" as, 1. small in size, degree, or amount.

WITNESS RESPONSIBLE: N/A

000592

NHT Attachment 8

**Ohio Consumers' Counsel
Sixth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: February 15, 2007
Response Due: February 26, 2007**

OCC-INT-06-RI150

REQUEST:

If costs or risks covered by the IMF component have increased:

- a. In what way have they increased?
- b. Why have they increased?

RESPONSE:

Since 2004, various costs and risks have increased. Additionally, opportunities and prices in the electric power market have increased.

WITNESS RESPONSIBLE: N/A

000504

NHT Attachment 9

**Ohio Consumers' Counsel
Fourth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: January 26, 2007
Response Due: February 5, 2007**

OCC-INT-04-R168

REQUEST:

In regards to DE-Ohio's SRT for 2005, 2006, and as proposed for 2007:

- a. What is the rationale for this component?
- b. What are the actual revenues received by DE-Ohio in SRT charges for 2005 and 2006?
- c. Which of the sub-components are based upon accounting costs and which are market-based, and what were the actual costs for those sub-components that are based upon costs?
- d. How is the SRT calculated and allocated to the residential class (including an explanation of the use of actual per kWh costs and estimated amounts)?
- e. How is each component calculated and allocated to the residential class (including an explanation of the use of actual per kWh costs and estimated amounts)?

RESPONSE:

- a. The SRT is DE-Ohio's market price for the cost of purchasing capacity to maintain a 15% reserve margin under it's provider of last resort obligation.
- b. 2005: \$14.8 million 2006: (\$6.0 million)
- c. The Company calculates its market price for Rider SRT based upon the price to purchase various capacity products in the market. The products and their cost are included in the quarterly SRT update filings.
- d. The calculation of the SRT and the allocation among classes and to demand and energy charges is included in the quarterly SRT filing.

000506

- e. The SRT cost is allocated 42.382% to the residential class as provided in the Stipulation and Agreement approved by the Commission in Case No. 05-724-EL-UNC and signed by OCC. The cost is allocated per kWh using estimated and/or actual kWh volumes. The final annual cost is reconciled and any over-collection is returned to customers and any under-collection is recovered from customers.

WITNESS RESPONSIBLE: N/A

NHT Attachment 10

000508

**Ohio Consumers' Counsel
Fourth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: January 26, 2007
Response Due: February 5, 2007**

OCC-INT-04-RI73

REQUEST:

Which risks are covered by the IMF under the current standard service offer?

RESPONSE:

The IMF is a DE-Ohio market price component of the Company's provider of last resort charge. See the response to OCC-INT-04-RI67(a).

WITNESS RESPONSIBLE: N/A

000509

NHT Attachment 11

**Ohio Consumers' Counsel
Fourth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: January 26, 2007
Response Due: February 5, 2007**

OCC-INT-04-RI77

REQUEST:

Why does DE-Ohio propose the SRT to be unavoidable starting in 2009?

RESPONSE:

Objection. Irrelevant. Assumes facts not in evidence in the consolidated remand cases as ordered by the Commission on or about December 14, 2006. Without waiving said objection:

Case No. 03-93-EL-ATA, *et al.*, does not include such a proposal. However, in Case No. 06-986-EL-UNC, DE-Ohio has proposed to make reserve capacity purchases, currently included in Rider SRT, unavoidable. This proposal is consistent with DE-Ohio's past proposals. All MBSSO consumers benefit from the reserve capacity purchases and should pay the price.

WITNESS RESPONSIBLE: N/A

000601

NHT Attachment 12

**Ohio Consumers' Counsel
Fourth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: January 26, 2007
Response Due: February 5, 2007**

OCC-INT-04-RI62

REQUEST:

In regards to DE-Ohio's RSC for 2005, 2006, and as tariffed for 2007:

- a. What is the rationale for this component?
- b. What are its sub-components?
- c. What are the underlying costs associated with each sub-component?
- d. Which of the sub-components are based upon accounting costs and which are market-based?
- e. Why did DE-Ohio use 15 percent of little g to project the estimated cost of the RSC?
- f. How is the RSC calculated and allocated to the residential class (including an explanation of the use of actual per kWh costs and estimated amounts)?
- g. How is each component or sub-component of the RSC calculated and allocated to the residential class (including an explanation of the use of actual per kWh costs and estimated amounts)?
- h. What risks are covered by the RSC in the current standard service offer?

RESPONSE:

- a. The RSC is the Company charge for providing a stable market price over a prolonged period of time.
- b. There are no sub-components for the Rider RSC.
- c. See response to OCC-INT-04-RI62(b)

000603

- d. See response to OCC-INT-04-RI62(b).
- e. As with a number of the components of the MBSSO, the RSC is not cost-based. The Company used its judgment to determine that 15% of Little g represented a reasonable market price for the RSC component of its MBSSO as compensation for providing a stable price over a prolonged period of time.
- f. Rider RSC was set at the same fixed percentage of Little g for all consumers. Thus, Rider RSC is allocated on exactly the same basis that Little g was allocated in the unbundling case, Case No. 99-1658-EL-ETP. Actual cost/kWh and estimated cost are irrelevant to the Rider RSC calculation.
- g. See OCC-INT-04-RI62(a) and (e).
- h. See OCC-INT-04-RI62(e).

WITNESS RESPONSIBLE: N/A

000004

NHT Attachment 13

**Ohio Consumers' Counsel
Sixth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: February 15, 2007
Response Due: February 26, 2007**

OCC-INT-06-RI134

REQUEST:

Regarding the Company's response to OCC-INT-04-RI62(e), what considerations were taken into account by the Company when it "use[d] its judgment to determine that 15% of Little g represented a reasonable market price for the RSC component of its MBSSO as compensation for providing a stable price over a prolonged period of time"?

RESPONSE:

The Company determined that this level for the RSC would be sufficient compensation to satisfy the Commission's Rate Stabilization Plan goal of price certainty for consumers and revenue stability for utilities. The 15% was determined to be a reasonable market price to help achieve all three of the Commission's goals for the plan.

WITNESS RESPONSIBLE: N/A

000006

NHT Attachment 14

**Ohio Consumers' Counsel
Fourth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: January 26, 2007
Response Due: February 5, 2007**

OCC-INT-04-RI63

REQUEST:

Why does DE-Ohio propose to combine the AAC and RSC?

RESPONSE:

See the general objection.

Objection. Irrelevant. Assumes facts not in evidence in the consolidated remand cases as ordered by the Commission on or about December 14, 2006. Without waiving said objection:

Case No. 03-93-EL-ATA, *et al.*, does not include such a proposal. However, in Case No. 06-986-EL-UNC DE-Ohio is proposing to combine the AAC and the RSC in order to simplify the MBSSO.

WITNESS RESPONSIBLE: N/A

000608

NHT Attachment 15

**Ohio Consumers' Counsel
Fourth Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: January 26, 2007
Response Due: February 5, 2007**

OCC-INT-04-RI64

REQUEST:

What is the rationale for increasing the RSC to 16 of little g for 2009 and 17 percent of little g for 2010?

RESPONSE:

See the general objection.

Objection. Irrelevant. Assumes facts not in evidence in the consolidated remand cases as ordered by the Commission on or about December 14, 2006. However, without waiving said objection:

Case No. 03-93-EL-ATA, *et al.*, does not include such a proposal. In order to extend stable prices for two more years the Company is willing to accept a slight increase to its RSC component of its MBSSO.

WITNESS RESPONSIBLE: N/A

000610

**Summary of Switch Rates from EDUs to CRES Providers in Terms of Sales
For the Month Ending March 31, 2006
(MWh)**

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Cleveland Electric Illuminating Company	CEI	31-Mar	2006	403581	335223	641388	1399750
CRES Providers	CEI	31-Mar	2006	43640	85428	78458	205726
Total Sales	CEI	31-Mar	2006	447401	420649	717857	1605475
EDU Share	CEI	31-Mar	2006	90.20%	78.89%	88.35%	87.18%
Electric Choice Sales Switch Rates	CEI	31-Mar	2006	9.80%	20.31%	10.85%	12.81%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
The Cincinnati Gas and Electric Company	CGE	31-Mar	2006	566104	439493	498047	1823796
CRES Providers	CGE	31-Mar	2006	13349	46022	5067	64428
Total Sales	CGE	31-Mar	2006	579453	485515	501104	1888223
EDU Share	CGE	31-Mar	2006	97.70%	90.52%	98.99%	98.18%
Electric Choice Sales Switch Rates	CGE	31-Mar	2006	2.30%	9.48%	1.01%	3.82%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Columbus Southern Power Company	CSP	31-Mar	2006	587185	629786	317991	1536777
CRES Providers	CSP	31-Mar	2006	0	30436	0	30436
Total Sales	CSP	31-Mar	2006	587185	660222	317991	1568213
EDU Share	CSP	31-Mar	2006	100.000%	95.390%	100.000%	98.050%
Electric Choice Sales Switch Rates	CSP	31-Mar	2006	0.000%	4.610%	0.000%	1.940%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
The Dayton Power and Light Company	DPL	31-Mar	2006	466181	255392	134208	961545
CRES Providers	DPL	31-Mar	2006	0	40737	221948	268610
Total Sales	DPL	31-Mar	2006	466181	296129	356164	1228255
EDU Share	DPL	31-Mar	2006	100.00%	86.24%	37.58%	78.28%
Electric Choice Sales Switch Rates	DPL	31-Mar	2006	0.00%	13.76%	62.32%	21.71%

Source: PUCO, Division of Market Monitoring & Assessment.

Note1: Total sales includes residential, commercial, industrial and other sales.

Note2: The switch rate calculation is intended to present the broadest possible picture of the state of retail electric competition in Ohio.

Appropriate calculations made for other purposes may be based on different data, and may yield different results.

**Summary of Switch Rates from EDUs to CRES Providers in Terms of Sales
For the Month Ending March 31, 2006
(MWh)**

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Monongahela Power Company	MON	31-Mar	2006	0	0	0	0
CRES Providers	MON	31-Mar	2006	0	0	0	0
Total Sales	MON	31-Mar	2006	0	0	0	0
EDU Share	MON	31-Mar	2006	0%	0%	0%	0%
Electric Choice Sales Switch Rates	MON	31-Mar	2006	0%	0%	0%	0%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Ohio Edison Company	OEC	31-Mar	2006	684343	415717	605145	1700649
CRES Providers	OEC	31-Mar	2006	136340	171978	135028	443344
Total Sales	OEC	31-Mar	2006	800683	587695	740171	2143983
EDU Share	OEC	31-Mar	2006	82.97%	70.74%	81.78%	76.32%
Electric Choice Sales Switch Rates	OEC	31-Mar	2006	17.03%	29.25%	18.24%	23.68%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Ohio Power Company	OP	31-Mar	2006	607289	466986	1082575	2144127
CRES Providers	OP	31-Mar	2006	0	0	0	0
Total Sales	OP	31-Mar	2006	607289	466986	1082575	2144127
EDU Share	OP	31-Mar	2006	100.00%	100.00%	100.00%	100.00%
Electric Choice Sales Switch Rates	OP	31-Mar	2006	0.00%	0.00%	0.00%	0.00%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Toledo Edison Company	TE	31-Mar	2006	178655	146276	406606	736411
CRES Providers	TE	31-Mar	2006	22445	93618	6694	124757
Total Sales	TE	31-Mar	2006	201100	239894	413602	861188
EDU Share	TE	31-Mar	2006	66.84%	60.98%	97.91%	66.51%
Electric Choice Sales Switch Rates	TE	31-Mar	2006	11.16%	38.82%	2.09%	14.48%

Source: PUCO, Division of Market Monitoring & Assessment.

Note1: Total sales includes residential, commercial, industrial and other sales.

Note2: The switch rate calculation is intended to present the broadest possible picture of the state of retail electric competition in Ohio. Appropriate calculations made for other purposes may be based on different data, and may yield different results.

Note3: American Electric Power, through its Columbus Southern Power subsidiary, purchased Monongahela Power Company's Ohio transmission and distribution operations in January 2006. Monongahela Power is no longer an electric distribution utility in Ohio. Previously reported Monongahela sales and customers are now being reported by CSP.

000612

**Summary of Switch Rates from EDUs to CRES Providers in Terms of Sales
For the Month Ending June 30, 2006
(MWh)**

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Cleveland Electric Illuminating Company	CEI	30-Jun	2006	345827	308895	681446	1355820
CRES Providers	CEI	30-Jun	2006	38587	73900	85513	196000
Total Sales	CEI	30-Jun	2006	382214	382795	766959	1551820
EDU Share	CEI	30-Jun	2006	90.43%	80.69%	88.86%	87.37%
Electric Choice Sales Switch Rates	CEI	30-Jun	2006	9.57%	19.31%	11.15%	12.63%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Duke Energy Ohio	CGE	30-Jun	2006	517862	502188	630891	1686032
CRES Providers	CGE	30-Jun	2006	14047	40477	3502	58026
Total Sales	CGE	30-Jun	2006	531899	542675	634493	1744058
EDU Share	CGE	30-Jun	2006	97.36%	92.54%	99.34%	96.67%
Electric Choice Sales Switch Rates	CGE	30-Jun	2006	2.64%	7.46%	0.66%	3.33%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Columbus Southern Power Company	CSP	30-Jun	2006	506367	704541	347520	1562850
CRES Providers	CSP	30-Jun	2006	0	14589	0	14589
Total Sales	CSP	30-Jun	2006	506367	719130	347520	1577439
EDU Share	CSP	30-Jun	2006	100.000%	97.971%	100.000%	99.975%
Electric Choice Sales Switch Rates	CSP	30-Jun	2006	0.000%	2.029%	0.000%	0.025%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
The Dayton Power and Light Company	DPL	30-Jun	2006	385588	284042	141732	926428
CRES Providers	DPL	30-Jun	2006	0	44239	241038	289918
Total Sales	DPL	30-Jun	2006	385588	328281	382770	1216348
EDU Share	DPL	30-Jun	2006	100.00%	86.52%	37.03%	76.18%
Electric Choice Sales Switch Rates	DPL	30-Jun	2006	0.00%	13.48%	62.97%	23.84%

Source: PUCO, Division of Market Monitoring & Assessment.

Note1: Total sales includes residential, commercial, industrial and other sales.

Note2: The switch rate calculation is intended to present the broadest possible picture of the state of retail electric competition in Ohio.

Appropriate calculations made for other purposes may be based on different data, and may yield different results.

Note4: Duke Energy Ohio (formerly CG&E)

000613

**Summary of Switch Rates from EDUs to CRES Providers in Terms of Sales
For the Month Ending June 30, 2006
(MWh)**

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Monongahela Power Company	MON	30-Jun	2006	0	0	0	0
CRES Providers	MON	30-Jun	2006	0	0	0	0
Total Sales	MON	30-Jun	2006	0	0	0	0
EDU Share	MON	30-Jun	2006	0%	0%	0%	0%
Electric Choice Sales Switch Rates	MON	30-Jun	2006	0%	0%	0%	0%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Ohio Edison Company	OEC	30-Jun	2006	536624	432137	656349	1640204
CRES Providers	OEC	30-Jun	2006	126177	164991	148256	439424
Total Sales	OEC	30-Jun	2006	662801	597128	804605	2079628
EDU Share	OEC	30-Jun	2006	80.98%	72.37%	81.57%	78.67%
Electric Choice Sales Switch Rates	OEC	30-Jun	2006	19.04%	27.63%	18.43%	21.13%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Ohio Power Company	OP	30-Jun	2006	482085	477863	1036619	2001743
CRES Providers	OP	30-Jun	2006	0	0	0	0
Total Sales	OP	30-Jun	2006	482085	477863	1036619	2001743
EDU Share	OP	30-Jun	2006	100.00%	100.00%	100.00%	100.00%
Electric Choice Sales Switch Rates	OP	30-Jun	2006	0.00%	0.00%	0.00%	0.00%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Toledo Edison Company	TE	30-Jun	2006	154694	144039	446617	749871
CRES Providers	TE	30-Jun	2006	21969	96316	9602	130067
Total Sales	TE	30-Jun	2006	176663	242355	456419	879658
EDU Share	TE	30-Jun	2006	87.56%	58.43%	97.85%	85.22%
Electric Choice Sales Switch Rates	TE	30-Jun	2006	12.44%	41.57%	2.15%	14.78%

Source: PUCO, Division of Market Monitoring & Assessment.

Note1: Total sales includes residential, commercial, industrial and other sales.

Note2: The switch rate calculation is intended to present the broadest possible picture of the state of retail electric competition in Ohio.

Appropriate calculations made for other purposes may be based on different data, and may yield different results.

Note3: American Electric Power, through its Columbus Southern Power subsidiary, purchased Monongahela Power Company's

Ohio transmission and distribution operations in January 2006. Monongahela Power is no longer an electric distribution utility in Ohio.

Previously reported Monongahela sales and customers are now being reported by CSP.

Note4: Duke Energy Ohio (formerly CG&E)

000614

**Summary of Switch Rates from EDUs to CRES Providers in Terms of Sales
For the Month Ending September 30, 2006
(MWh)**

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Cleveland Electric Illuminating Company	CEI	30-Sep	2006	397894	328598	682784	1429324
CRES Providers	CEI	30-Sep	2006	33121	68534	84748	186403
Total Sales	CEI	30-Sep	2006	431006	397132	767532	1615727
EDU Share	CEI	30-Sep	2006	92.32%	82.74%	88.98%	88.46%
Electric Choice Sales Switch Rates	CEI	30-Sep	2006	7.68%	17.26%	11.04%	11.54%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Duke Energy Ohio	CGE	30-Sep	2006	632985	544480	541148	1851356
CRES Providers	CGE	30-Sep	2006	11253	48813	1889	61955
Total Sales	CGE	30-Sep	2006	644238	593293	543037	1813311
EDU Share	CGE	30-Sep	2006	98.25%	91.77%	99.85%	98.76%
Electric Choice Sales Switch Rates	CGE	30-Sep	2006	1.75%	8.23%	0.35%	3.24%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Columbus Southern Power Company	CSP	30-Sep	2006	819588	761662	329595	1715326
CRES Providers	CSP	30-Sep	2006	0	16277	0	16277
Total Sales	CSP	30-Sep	2006	819588	777939	329595	1731603
EDU Share	CSP	30-Sep	2006	100.000%	97.808%	100.000%	99.080%
Electric Choice Sales Switch Rates	CSP	30-Sep	2006	0.000%	2.092%	0.000%	0.940%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
The Dayton Power and Light Company	DPL	30-Sep	2006	445872	327019	152877	1053893
CRES Providers	DPL	30-Sep	2006	0	46278	243523	294442
Total Sales	DPL	30-Sep	2006	445872	372297	398200	1349075
EDU Share	DPL	30-Sep	2006	100.00%	87.84%	38.54%	78.18%
Electric Choice Sales Switch Rates	DPL	30-Sep	2006	0.00%	12.16%	61.46%	21.84%

Source: PUCO, Division of Market Monitoring & Assessment.

Note1: Total sales includes residential, commercial, industrial and other sales.

Note2: The switch rate calculation is intended to present the broadest possible picture of the state of retail electric competition in Ohio.

Appropriate calculations made for other purposes may be based on different data, and may yield different results.

Note4: Duke Energy Ohio (formerly CG&E)

000615

**Summary of Switch Rates from EDUs to CRES Providers in Terms of Sales
For the Month Ending September 30, 2006**

(MWh)

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Monongahela Power Company	MON	30-Sep	2006	0	0	0	0
CRES Providers	MON	30-Sep	2006	0	0	0	0
Total Sales	MON	30-Sep	2006	0	0	0	0
EDU Share	MON	30-Sep	2006	0%	0%	0%	0%
Electric Choice Sales Switch Rates	MON	30-Sep	2006	0%	0%	0%	0%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Ohio Edison Company	OEC	30-Sep	2006	614552	468291	676241	1774289
CRES Providers	OEC	30-Sep	2006	134519	173542	152501	460562
Total Sales	OEC	30-Sep	2006	749071	641833	828742	2234851
EDU Share	OEC	30-Sep	2006	82.04%	72.99%	81.90%	79.39%
Electric Choice Sales Switch Rates	OEC	30-Sep	2006	17.96%	27.04%	18.40%	20.61%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Ohio Power Company	OP	30-Sep	2006	570350	523971	1043843	2144359
CRES Providers	OP	30-Sep	2006	0	0	0	0
Total Sales	OP	30-Sep	2006	570350	523971	1043843	2144359
EDU Share	OP	30-Sep	2006	100.00%	100.00%	100.00%	100.00%
Electric Choice Sales Switch Rates	OP	30-Sep	2006	0.00%	0.00%	0.00%	0.00%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Toledo Edison Company	TE	30-Sep	2006	167158	152491	458311	782453
CRES Providers	TE	30-Sep	2006	22043	86373	8908	119324
Total Sales	TE	30-Sep	2006	189201	240864	467219	901777
EDU Share	TE	30-Sep	2006	88.35%	63.31%	98.09%	86.77%
Electric Choice Sales Switch Rates	TE	30-Sep	2006	11.65%	36.69%	1.91%	13.23%

Source: PUCD, Division of Market Monitoring & Assessment.

Note1: Total sales includes residential, commercial, industrial and other sales.

Note2: The switch rate calculation is intended to present the broadest possible picture of the state of retail electric competition in Ohio.

Appropriate calculations made for other purposes may be based on different data, and may yield different results.

Note3: American Electric Power, through its Columbus Southern Power subsidiary, purchased Monongahela Power Company's Ohio transmission and distribution operations in January 2006. Monongahela Power is no longer an electric distribution utility in Ohio. Previously reported Monongahela sales and customers are now being reported by CSP.

Note4: Duke Energy Ohio (formerly CG&E)

000616

**Summary of Switch Rates from EDUs to CRES Providers in Terms of Sales
For the Month Ending December 31, 2006
(MWh)**

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Cleveland Electric Illuminating Company	CEI	31-Dec	2006	408958	318731	824854	1389728
CRES Providers	CEI	31-Dec	2006	36268	65682	76158	177088
Total Sales	CEI	31-Dec	2006	442236	384389	701012	1548918
EDU Share	CEI	31-Dec	2006	92.03%	82.92%	89.14%	88.55%
Electric Choice Sales Switch Rates	CEI	31-Dec	2006	7.97%	17.08%	10.86%	11.45%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Duke Energy Ohio	CGE	31-Dec	2006	590170	468325	488072	1699664
CRES Providers	CGE	31-Dec	2006	14008	44764	1805	60577
Total Sales	CGE	31-Dec	2006	604178	533089	499877	1760241
EDU Share	CGE	31-Dec	2006	97.68%	91.90%	99.64%	96.50%
Electric Choice Sales Switch Rates	CGE	31-Dec	2006	2.32%	8.40%	0.36%	3.44%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Columbus Southern Power Company	CSP	31-Dec	2006	628388	697089	317752	1647722
CRES Providers	CSP	31-Dec	2006	0	15881	0	15881
Total Sales	CSP	31-Dec	2006	628388	712960	317752	1663683
EDU Share	CSP	31-Dec	2006	100.000%	97.775%	100.000%	99.047%
Electric Choice Sales Switch Rates	CSP	31-Dec	2006	0.000%	2.225%	0.000%	0.953%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
The Dayton Power and Light Company	DPL	31-Dec	2006	442413	259300	136624	945588
CRES Providers	DPL	31-Dec	2006	0	45474	263507	259038
Total Sales	DPL	31-Dec	2006	442413	304774	340031	1198623
EDU Share	DPL	31-Dec	2006	100.00%	85.08%	40.15%	78.89%
Electric Choice Sales Switch Rates	DPL	31-Dec	2006	0.00%	14.92%	59.85%	21.11%

Source: PUCO, Division of Market Monitoring & Assessment.

Note1: Total sales includes residential, commercial, industrial and other sales.

Note2: The switch rate calculation is intended to present the broadest possible picture of the state of retail electric competition in Ohio.

Appropriate calculations made for other purposes may be based on different data, and may yield different results.

Note4: Duke Energy Ohio (formerly CG&E)

000617

**Summary of Switch Rates from EDUs to CRES Providers in Terms of Sales
For the Month Ending December 31, 2006
(MWh)**

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Monongahela Power Company	MON	31-Dec	2006	0	0	0	0
CRES Providers	MON	31-Dec	2006	0	0	0	0
Total Sales	MON	31-Dec	2006	0	0	0	0
EDU Share	MON	31-Dec	2006	0%	0%	0%	0%
Electric Choice Sales Switch Rates	MON	31-Dec	2006	0%	0%	0%	0%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Ohio Edison Company	OEC	31-Dec	2006	866528	428195	606887	1716211
CRES Providers	OEC	31-Dec	2006	125918	148250	128568	400756
Total Sales	OEC	31-Dec	2006	792446	572445	735455	2115987
EDU Share	OEC	31-Dec	2006	84.11%	74.45%	82.52%	81.06%
Electric Choice Sales Switch Rates	OEC	31-Dec	2006	15.89%	25.55%	17.48%	18.94%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Ohio Power Company	OP	31-Dec	2006	650322	490598	998193	2147879
CRES Providers	OP	31-Dec	2006	0	0	0	0
Total Sales	OP	31-Dec	2006	650322	490598	998193	2147879
EDU Share	OP	31-Dec	2006	100.00%	100.00%	100.00%	100.00%
Electric Choice Sales Switch Rates	OP	31-Dec	2006	0.00%	0.00%	0.00%	0.00%

Provider Name	EDU Service Area	Quarter Ending	Year	Residential Sales	Commercial Sales	Industrial Sales	Total Sales
Toledo Edison Company	TE	31-Dec	2006	180657	137878	388488	709167
CRES Providers	TE	31-Dec	2006	20416	77800	9009	107225
Total Sales	TE	31-Dec	2006	201073	215478	395505	816392
EDU Share	TE	31-Dec	2006	89.85%	63.89%	97.72%	86.87%
Electric Choice Sales Switch Rates	TE	31-Dec	2006	10.15%	36.11%	2.28%	13.13%

Source: PUCO, Division of Market Monitoring & Assessment.

Note1: Total sales includes residential, commercial, industrial and other sales.

Note2: The switch rate calculation is intended to present the broadest possible picture of the state of retail electric competition in Ohio.

Appropriate calculations made for other purposes may be based on different data, and may yield different results.

Note3: American Electric Power, through its Columbus Southern Power subsidiary, purchased Monongahela Power Company's

Ohio transmission and distribution operations in January 2006. Monongahela Power is no longer an electric distribution utility in Ohio.

Previously reported Monongahela sales and customers are now being reported by CSP.

Note4: Duke Energy Ohio (formerly CG&E)

000618

Ohio Consumers' Counsel
Third Set Interrogatories
Duke Energy Ohio, Inc.
Case No. 03-93-EL-ATA
Following Remand
Date Received: January 19, 2007
Response Due: January 29, 2007

OCC-INT-03-RI55 (Revised)

REQUEST:

How many megawatt-hours were served by a CRES provider in the second quarter of 2004 for:

- a. Customers on Customer List 1?
- b. Customers on Customer List 2?

RESPONSE:

CONFIDENTIAL PROPRIETARY TRADE SECRET

Objection: This question (and its subparts a-b) is not calculated to lead to discovery of relevant evidence to these cases. However, without waiving said objection:

a-b. DE-Ohio has not performed this calculation. However, in the spirit of cooperation, DE-Ohio has prepared a spreadsheet to summarize the requested information. Please note that the attached spreadsheet contains confidential customer information.

WITNESS RESPONSIBLE: N/A

000619

**CONFIDENTIAL PROPRIETARY
TRADE SECRET**

Billed KWH

NAME	ACCOUNT	REVCLASS	REVPER			Grand Total
			04-01-2004	05-01-2004	06-01-2004	
		74			0	0
		94	25,853,710	25,188,257	26,924,875	77,966,842
			25,853,710	25,188,257	26,924,875	77,966,842
		92	888,879	1,111,972	1,355,345	3,356,196
			888,879	1,111,972	1,355,345	3,356,196
		96	1,156,899	1,340,980	1,499,420	3,997,299
			1,156,899	1,340,980	1,499,420	3,997,299
		94	11,251,397			11,251,397
		94	14,458,275			14,458,275
			25,709,672			25,709,672
		94	586,709	554,595	594,905	1,736,209
		94	79,640	81,083	83,508	244,231
		94	87,257	93,833	101,429	282,519
		94	243,544	266,863	338,129	848,336
		94	226,524	232,729	257,806	717,059
		94	785,888	826,356	830,514	2,442,758
			2,089,560	2,055,259	2,206,291	6,271,110
		92	242,418	240,193	286,860	769,471
		72	1,484	1,422	1,518	4,434
		72	1,300	1,130	1,000	3,430
		92	297,611	291,762	314,807	904,180
		92	250,258	282,232	290,135	822,625
		72	1,138	1,055	1,127	3,318
		72	0	0	0	0
		92	363,938	372,315	415,391	1,151,644
		74	323	289	396	998
		92	176,165	182,050	211,235	579,450
		72	657	333	265	1,255
		72	4,490	4,530	4,520	13,540
		92	249,039	286,268	298,348	813,655

000620

CONFIDENTIAL PROPRIETARY
TRADE SECRET

[REDACTED]	92	268,027	270,664	346,201	884,892
[REDACTED]	92	272,464	301,021	317,910	891,395
[REDACTED]	92	233,308	241,325	285,107	759,740
[REDACTED]	72	4,088	4,266	3,600	11,952
[REDACTED]	92	308,439	295,172	332,051	935,662
[REDACTED]	72	568	607	677	1,852
[REDACTED]	92	411,710	428,619	515,924	1,356,253
[REDACTED]	92	314,890	354,482	382,222	1,051,594
[REDACTED]	92	200,187	183,745	203,262	587,194
[REDACTED]	72	7,776	8,316	8,748	24,840
[REDACTED]	72	2,400	2,400	2,400	7,200
[REDACTED]	72	490	500	370	1,360
[REDACTED]	92	298,529	300,157	349,189	945,875
[REDACTED]	94	843,855	903,869	962,379	2,710,203
[REDACTED]	92	239,227	284,250	301,391	824,868
[REDACTED]	72	7,400	6,279	6,904	20,583
[REDACTED]	72	4,212	2,664	5,922	12,798
[REDACTED]	72	372	324	324	1,020
[REDACTED]	92	71,823	68,004	75,468	213,093
[REDACTED]	92	243,820	258,577	309,815	813,012
[REDACTED]	92	272,289	272,996	298,430	843,715
[REDACTED]	92	230,789	264,983	308,545	804,297
[REDACTED]	92	326,592	334,628	406,148	1,067,368
[REDACTED]	72		600	12,300	12,900
[REDACTED]	92	1,629			1,629
[REDACTED]	72	13,560	14,040	15,840	43,440
[REDACTED]	72	367	313	321	1,001
[REDACTED]	92	270,481	306,360	336,581	913,422
[REDACTED]	92	291,062	317,935	387,115	976,112
[REDACTED]	92	276,893	285,269	347,415	909,377
[REDACTED]	92	254,000	269,644	305,195	828,839
[REDACTED]	72	3,850	3,470	4,000	11,420
[REDACTED]	72	4,580	4,240	4,420	13,240
[REDACTED]	92	210,030	208,937	233,133	652,100
[REDACTED]	72	22,580	25,920	33,120	81,600
[REDACTED]	92	271,423	264,484	298,422	834,329
[REDACTED]	72	269	231	234	734
[REDACTED]	92	212,801	230,888	266,276	710,165
[REDACTED]	92	234,981	289,684	283,388	768,011

000621

**CONFIDENTIAL PROPRIETARY
TRADE SECRET**

[REDACTED]	92	392,995	366,577	386,155	1,145,727
[REDACTED]	92	249,471	285,892	309,001	844,164
[REDACTED]	92	246,651	288,513	351,046	866,210
[REDACTED]	92	92,700	93,662	115,847	302,009
[REDACTED]	92	254,710	269,454	324,036	848,200
[REDACTED]	72	821	850	800	2,571
[REDACTED]	72		(764)		(764)
[REDACTED]	92	287,471	302,610	319,213	889,294
[REDACTED]	92	206,454	210,789	280,802	678,045
[REDACTED]	92	180,334	194,610	228,692	601,636
[REDACTED]	92	612,216	683,481	896,758	2,192,455
[REDACTED]	92	270,553	313,650	337,290	921,493
[REDACTED]	72	3,320	2,790	3,520	9,630
[REDACTED]	92	176,614	177,719	218,075	572,408
[REDACTED]	72	7,746	6,953	6,596	21,297
[REDACTED]	92	262,698	261,196	291,612	815,506
[REDACTED]	92	274,729	265,785	295,032	835,546
[REDACTED]	72	5,252	4,900	5,113	15,265
[REDACTED]	92	260,502	249,759	279,547	789,808
[REDACTED]	72	6,037	5,823	6,409	18,269
[REDACTED]	92	41,438	43,791	51,115	136,344
[REDACTED]	94	251,681	245,682	278,877	776,220
[REDACTED]	92	255,633	277,235	324,778	857,646
[REDACTED]	92	243,935	277,374	282,745	804,054
[REDACTED]	92	259,294	267,862	318,114	845,270
[REDACTED]	72	12,480	11,280	16,440	40,200
[REDACTED]	92	161,779	181,904	180,661	524,344
[REDACTED]	92	245,398	284,625	292,681	822,685
[REDACTED]	92	224,059	237,520	278,553	741,132
[REDACTED]	92	243,600	260,132	304,384	808,116
[REDACTED]	92	160,510	169,724	194,249	524,483
[REDACTED]	92	59,415	68,620	90,626	218,661
[REDACTED]		14,149,726	14,932,300	16,933,984	46,063,010
[REDACTED]	72	10,160	6,400	5,280	21,840
[REDACTED]	94	88,468	52,099	53,111	193,678
[REDACTED]	94	685,813	708,657	638,685	2,032,165
[REDACTED]	94	108,246	105,290	118,133	331,669
[REDACTED]		892,687	873,446	812,219	2,579,352

000622

CONFIDENTIAL PROPRIETARY
TRADE SECRET

[REDACTED]	72	30,000	32,720	34,000	96,720
[REDACTED]	72	15,280	14,200	16,520	46,000
[REDACTED]	72	27,120	26,080	28,440	81,640
[REDACTED]	72	20,160	18,480	21,600	60,240
[REDACTED]	72	30,120	32,760	31,440	94,320
[REDACTED]	72	14,160	13,440	14,820	42,420
[REDACTED]	72	21,840	21,480	23,640	66,960
[REDACTED]	72	8,409	8,553	10,230	27,192
[REDACTED]	72	15,540	14,100	17,880	47,520
[REDACTED]	72	29,920	28,640	29,800	88,160
[REDACTED]	72	16,360	17,280	17,000	50,640
[REDACTED]	72	27,360	25,560	26,700	79,620
[REDACTED]	92	22,982	24,668	28,000	75,650
[REDACTED]	72	15,480	17,024	19,627	52,141
[REDACTED]	72	17,180	18,030	20,370	55,580
[REDACTED]	72	22,920	21,840	28,800	73,560
[REDACTED]	72	31,440	31,200	31,260	83,900
[REDACTED]	72	30,800	31,040	36,720	98,560
[REDACTED]	72	31,580	34,560	38,840	102,960
[REDACTED]	72	31,500	28,560	30,600	90,660
[REDACTED]	72	12,980	16,020	15,480	44,480
[REDACTED]	72	27,840	18,240	30,720	76,800
[REDACTED]	72	22,320	23,920	26,920	73,160
[REDACTED]	72	0	24,480	28,200	52,680
[REDACTED]	72	27,300	27,360	30,660	85,320
[REDACTED]	72	24,840	24,000	25,080	73,920
[REDACTED]	72	9,720	10,240	11,960	31,920
[REDACTED]	72	5,200	4,040	3,800	13,040
[REDACTED]	72	30,240	27,240	31,560	89,040
[REDACTED]	72	27,040	24,000	26,080	77,120
[REDACTED]	72	26,560	26,880	28,640	82,080
[REDACTED]	72	30,720	32,160	33,360	96,240
[REDACTED]	72	29,440	29,820	35,360	94,720
[REDACTED]	72	31,440	33,720	36,480	101,640
[REDACTED]	72	24,840	25,280	30,480	80,400
[REDACTED]	72	20,520	22,920	23,040	66,480
[REDACTED]	72	33,720	30,720	32,760	97,200
[REDACTED]	72	11,920	12,400	15,520	39,840

000623

**CONFIDENTIAL PROPRIETARY
TRADE SECRET**

[REDACTED]	[REDACTED]	72	19,980	22,500	26,280	68,760
	[REDACTED]	72	14,820	14,940	16,200	45,960
	[REDACTED]	72	24,120	21,000	23,520	68,640
	[REDACTED]	72	25,440	24,400	27,360	77,200
	[REDACTED]	72	29,600	33,840	34,880	98,320
	[REDACTED]	72	7,047	7,793	7,349	22,189
	[REDACTED]	72	8,240	7,440	7,920	23,600
	[REDACTED]	72	22,600	21,280	23,000	66,880
	[REDACTED]	72	33,120	30,720	33,920	97,760
	[REDACTED]	72	37,320	23,280	25,920	86,520
[REDACTED]	[REDACTED]	72	31,728	29,592	33,552	94,872
[REDACTED]	[REDACTED]		1,110,575	1,110,540	1,230,088	3,451,204
[REDACTED]	[REDACTED]	92	323,226	363,913	416,561	1,103,700
[REDACTED]	[REDACTED]		323,226	363,913	416,561	1,103,700
[REDACTED]	[REDACTED]	92	880,137	1,049,103	1,189,912	3,119,152
[REDACTED]	[REDACTED]		880,137	1,049,103	1,189,912	3,119,152
[REDACTED]	[REDACTED]	92	990,242	1,118,791	1,373,353	3,482,386
[REDACTED]	[REDACTED]		990,242	1,118,791	1,373,353	3,482,386
[REDACTED]	[REDACTED]	92	607,268	666,199	724,504	1,997,971
[REDACTED]	[REDACTED]		607,268	666,199	724,504	1,997,971
[REDACTED]	[REDACTED]	92	30,411	22,649	21,920	74,980
[REDACTED]	[REDACTED]	92	1,063,777	1,165,380	1,304,800	3,533,757
[REDACTED]	[REDACTED]		1,094,188	1,188,029	1,325,520	3,608,737
[REDACTED]	[REDACTED]	72	2,532	2,148	1,982	6,672
[REDACTED]	[REDACTED]	92	83,891	67,366	65,725	216,782
[REDACTED]	[REDACTED]	74	18,200	12,480	12,000	43,680
[REDACTED]	[REDACTED]	84	47	34	25	106
[REDACTED]	[REDACTED]	94	497,868	546,868	631,722	1,676,556
[REDACTED]	[REDACTED]	74	3,580	1,861	533	5,974
[REDACTED]	[REDACTED]	94	1,934,974	2,132,708	2,380,873	6,448,555
[REDACTED]	[REDACTED]	92	1,160,138	1,277,804	1,384,068	3,822,010
[REDACTED]	[REDACTED]	94	13,841	14,984	13,927	42,862
[REDACTED]	[REDACTED]	72	1,360	1,162	1,188	3,710

000624

**CONFIDENTIAL PROPRIETARY
TRADE SECRET**

		72	12,360	14,860	21,660	48,880
		94	319,431	301,825	371,143	992,399
		74	938	1,676	2,826	5,440
		74	600	300	150	1,050
		72	5,392	4,694	4,770	14,856
		92	64,693	66,662	78,663	210,018
		92	8,529	5,586	4,496	18,621
		92	115,908	135,559	154,899	406,366
		92	78,628	82,282	97,990	258,910
		72	4,680	4,170	4,350	13,200
		92	875,684	1,093,685	1,217,277	3,186,646
		94	42,310	42,154	54,489	138,953
		74	1,871	1,886	3,181	6,938
		94	86,838	101,984	121,266	310,068
			5,535,291	5,914,748	6,629,223	17,079,262
		92	1,134,365	1,248,117	1,428,858	3,811,340
		92	146,442	149,968	174,362	470,772
		92	1,446,400	1,630,935	1,715,523	4,792,858
		92	2,540,970	3,015,304	3,170,514	8,726,788
			5,268,177	6,044,324	6,489,257	17,801,756
Grand Total			86,269,238	62,948,861	69,162,552	218,380,651

000625

**CONFIDENTIAL PROPRIETARY
TRADE SECRET**

Settlement Agreement

This Settlement Agreement is between The Cincinnati Gas & Electric Company ("CG&E"), and the City of Cincinnati ("City") (collectively the "Parties"), effective this 14th day of June 2004. It is the intent of this Settlement Agreement to bind the Parties to the terms and conditions set forth herein.

1. The Parties, for good consideration, agree to amend the three existing Electricity Agreements dated February 5, 2004 by and between CG&E on the one hand, and the City for City Facilities, and the City on behalf of the Metropolitan Sewer District of Greater Cincinnati, Hamilton County, Ohio, and the City on behalf of the Greater Cincinnati Water Works, on the other hand (collectively "Electricity Agreements"), by including in such Electricity Agreements the following:

The "aggregate generation rate" referenced in Paragraph 1.1 and in Exhibit 1 shall be amended in Exhibit 1 to define the term as "the avoidable generation charge available to shopping customers, as specified in CG&E tariffs, as such tariffs may be amended and approved from time to time by the Public Utilities Commission of Ohio."

2. CG&E will provide the City one million dollars (\$1,000,000.00) in total consideration for the above amendments to the Electricity Agreements. The City shall determine, and provide notice to CG&E, in advance of payment, the proportion of the total consideration to be paid under each Electricity Agreement, and the terms and timing of payment. No payment of consideration shall occur before January 1, 2005.
3. This Settlement Agreement does not affect the rates or terms and conditions of public utility service provided by CG&E to the City, any division of the City, or any utility account managed by the City.
4. This Settlement Agreement is expressly conditioned upon City Council's approval of the amendments to the Electricity Agreements, and any other approval if required, by June 30, 2004, and the City's withdrawal from PUCO Case No. 03-93-EL-ATA within three business days of the approval by City Council and any other required approval of any of the amendments to the Electricity Agreements.
5. The Parties recognize that in a settlement, both Parties have granted concessions to the other and that if the Parties were to litigate the issues that they have now settled, their positions would be different. In the spirit of compromise and to ensure a complete resolution, it is important that the Parties uphold this Settlement Agreement. Therefore, this Settlement Agreement is expressly conditioned upon CG&E and the City not formally advocating a position in any forum in opposition to the issues resolved in the Stipulation and

**CONFIDENTIAL PROPRIETARY
TRADE SECRET**

Recommendation filed in Case No. 03-93-EL-ATA, as that Stipulation and Recommendation is adopted and approved by the Public Utilities Commission of Ohio. The Parties also agree that the City will have the same rights as signatories to the Stipulation and Recommendation.

6. This Settlement Agreement terminates at the end of the day, December 31, 2008, or as follows:
 - i. The Commission, in Case No. 03-93-EL-ATA or a related case necessary to carry out the terms and conditions of the Stipulation and Recommendation filed in that case, issues an order unacceptable to CG&E.
 - ii. A court or administrative agency of competent jurisdiction issues an order depriving the Parties of the benefits of this Settlement Agreement or otherwise voiding this Settlement Agreement.
 - iii. The failure of the City to satisfy the conditions set forth in paragraphs 4 and 5 above.
7. Before termination of the Settlement Agreement as provided in paragraphs 6 (i), (ii) and (iii) above, the Parties agree to use best efforts to fulfill the intent of this Settlement Agreement, by negotiating amendments to the Settlement Agreement that provide the Parties with substantially the same economic benefit for substantially the same consideration as contained in the original Settlement Agreement.
8. All notices, demands, and statements to be given hereunder shall be given in writing to the Parties at the addresses appearing herein below and will be effective upon actual receipt:

To the City:

Julia Larita McNeil Esq.
City Solicitor
City of Cincinnati
Room 214
801 Plum Street, Room 122
Cincinnati, OH 45202

and

Daniel J. Schlueter Esq.
Legal Affairs Administrator
Greater Cincinnati Water Works
4747 Spring Grove Avenue
Cincinnati, OH 45232

To CG&E:

CONFIDENTIAL PROPRIETARY
TRADE SECRET

James B. Gainer
Vice President, Regulatory and Legislative Strategy
Cinergy Services, Inc.
139 East Fourth Street
Cincinnati, OH 45202

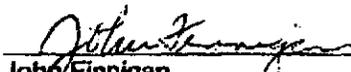
or such other address as is provided in writing by the recipient from time to time.

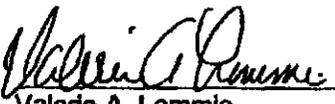
9. The City agrees that this Settlement Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with its terms, subject to any equitable or sovereign or other immunity defenses. CG&E agrees this Settlement Agreement constitutes a legal, valid and binding obligation enforceable against it in accordance with its terms, subject to any equitable defenses. This Settlement Agreement is for the exclusive benefit of the Parties and may not be assigned without the written consent of the non-assigning party.
10. This Settlement Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.
11. Except as provided in Paragraph 1 above, this Settlement Agreement does not modify any other terms of the Electricity Agreements and all other terms of the Electricity Agreements shall remain in full force and effect.

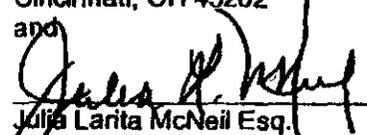
Entered into on this 14th day of June:

On Behalf of
The Cincinnati Gas & Electric Company

On Behalf of the
City of Cincinnati


John Finnigan,
Senior Counsel
The Cincinnati Gas & Electric Company
139 East Fourth Street
Cincinnati, Ohio 43202


Valerie A. Lemmie
City Manager
City of Cincinnati
801 Plum Street, Room 122
Cincinnati, OH 45202
and


Julia Larita McNeil Esq.
City Solicitor
City of Cincinnati
Room 214
801 Plum Street, Room 122
Cincinnati, OH 45202

CONFIDENTIAL

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

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

FUCO

2007 MAR 15 PM 3:53

RECEIVED-DOCKETING DIV.

**JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL**

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

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

1 accounts, there may be an amendment?

2 A. There have been several amendments
3 over the years on this as we add and delete
4 accounts to the base agreement. So, I think we
5 are up to about 9 or 10 through this week
6 because [REDACTED]

7 Q. Amendments to the schedule?

8 A. Yes. There is a schedule A to this
9 agreement that lists accounts that are covered.
10 And it's only that schedule that usually gets
11 amended when we are adding and deleting
12 accounts.

13 Q. But there aren't any other
14 provisions in that, just a change in the
15 exhibit?

16 A. To my knowledge there are no other
17 provisions except that. But I would have to
18 check on that for you.

19 Q. Okay. All right. I just wanted to
20 be clear about what agreements [REDACTED] has. All
21 right. I would like to direct your attention to
22 Exhibit B. And that is an agreement dated in
23 the back, the last page, there are Bates stamps
24 on this document 1173 through 1179. And if you

000630

1 could turn to Bates stamp 1179 you will see a
2 date of [REDACTED] and earlier in the document on
3 1174 it says [REDACTED]. So, [REDACTED]

4 A. Yes.

5 Q. Bates stamp 1179 that shows [REDACTED]
6 [REDACTED] signature. Was this agreement ever
7 executed by [REDACTED]?

8 A. I believe it was, yes.

9 Q. Okay. Remaining within that
10 document, turning to page Bates stamp 1174, and
11 the first paragraph after the whereas. It's
12 about midway through the page. That paragraph
13 basically identifies the parties and has the
14 date of [REDACTED] Who is Cinergy Retail
15 Sales LLC that is mentioned in the first
16 sentence of that paragraph?

17 A. Who are they?

18 Q. Yes.

19 A. To my knowledge it is an operating
20 subsidiary of the large electric holding company
21 that I know as Cinergy that is responsible for
22 transactions such as this. I don't know much
23 more about them than that.

24 Q. Do you know what the status is of

000631

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

3 A. Okay.

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

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

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

10 A. No.

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

15 A. Yes. My answer would be the same.

16 Q. All right. Turning to these
17 previous agreements for a second. I am on
18 Exhibit A. And we had a little bit of an
19 exchange concerning who the parties were to the
20 first agreement executed [REDACTED] very
21 first one, agreement on Exhibit A. And you
22 noted Cinergy Operating Companies. Do you see
23 that?

24 A. Yes.

000632

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

3 A. That is what it says there, yes.

4 Q. Okay. And agreement 2, I call it
5 agreement 2, it's the second one in this packet,
6 again [REDACTED], and again it says Cinergy
7 Operating Company and refers to CG&E and PSI
8 again. Do you agree?

9 A. Yes. I see that.

10 Q. Okay. And an agreement in the
11 packet a little bit, we looked at this earlier,
12 it's [REDACTED] again it's that confirmation
13 letter that says 2 of 11 at the top.

14 A. Yes.

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

18 A. Yes.

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

24 A. I see that.

000632-8

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

4 A. Yes. That is in the first
5 paragraph.

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

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

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

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

24 A. I was part of the process, but I

000633

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

3 Q. When you are mentioning counsel are
4 you referring to [REDACTED]

5 A. [REDACTED] would have been our
6 counsel, yes.

7 Q. And do you know who the counsel
8 would have been for the other side of
9 the transaction? Would it be [REDACTED] who
10 executed the agreement?

11 A. I don't believe [REDACTED] executed
12 the Performance Assurance Agreement.

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

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

16 Q. I was directing your attention to
17 the earlier agreements just because they said
18 Cinergy Operating Companies. But now I am on
19 Exhibit B. This is [REDACTED]. And as you
20 stated it was executed by [REDACTED]. It was
21 executed by [REDACTED] at some point?

22 A. Yes.

23 Q. And by [REDACTED]

24 A. Yes.

000634

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Q. And so I suggested was [redacted] involved in this?

A. Yes, he was.

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

A. I believe [redacted] was involved. [redacted]

Q. Anyone else?

[redacted] Excuse me. Just for the record I believe that is E-R, not O-R.

[redacted] Off the record.

(DISCUSSION OFF THE RECORD)

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

Q. Was [redacted] involved? President of Cincinnati Gas & Electric?

A. [redacted]

Q. Yes.

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

000635

1 was involved in. But I remember him being at
2 meetings.

3 Q. When you are speaking about these
4 agreements are you mentioning the agreements
5 with the Cinergy Operating Companies or the
6 agreements with Cinergy Retail Sales?

7 A. I am referring to the agreements
8 that we have marked as Exhibit B, C and D.

9 Q. Do you remember a [REDACTED] who
10 worked for [REDACTED]

11 A. Yes. I remember [REDACTED] and I
12 remember him being involved.

13 Q. In the --

14 A. Now that you refreshed my
15 recollection.

16 Q. In the Exhibits B, C and D?

17 A. Yes.

18 Q. Do you recall a [REDACTED]?

19 A. I do not recall [REDACTED].

20 Q. And do you recall a [REDACTED]

21 [REDACTED]

22 A. I do not recall [REDACTED]

23 Q. Now, you have been mentioning who
24 you remember being involved in the process.

000636

1 stabilization proposal.

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

4 A. No.

5 Q. Between January and July?

6 A. Yes.

7 Q. Now, this agreement, for present
8 purposes I am remaining on Exhibit B, Bates
9 stamp 1177, refers to, in paragraph 8, refers
10 to -- states "[REDACTED] shall support the [REDACTED]
11 [REDACTED] stipulation and recommendation" and so
12 forth. Do you see that?

13 A. Yes.

14 Q. Did [REDACTED] sign that stipulation?

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

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

19 A. Yes.

20 Q. Okay. Do you consider this an
21 agreement for service by Cinergy Retail Services
22 to the [REDACTED]?

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

000637

1 to the sale and provision of electricity that [REDACTED]

2 [REDACTED] So, I have to say yes.

3 Q. Is the provision of that energy
4 though from Cinergy Resale Services?

5 A. Cinergy Resale Services in this case
6 is the wholesale supplier of the electricity
7 that is purchased by [REDACTED] and in turn [REDACTED]
8 [REDACTED] is the retail supplier of the electricity
9 to [REDACTED].

10 Q. All right. I would like to go
11 through the major provisions of this. And I am
12 at page Bates stamp 1175. You are already
13 there. Paragraph 1. Paragraph 1, am I correct
14 that this is basically organized as paragraph 1
15 is for [REDACTED] paragraph 2 is for [REDACTED], so
16 forth and so on? The paragraphs have to do with
17 different time periods?

18 A. At least the first three paragraphs
19 have to do with different time periods.

20 Q. Okay. Let's start with paragraph 1,
21 and that is for the period [REDACTED]; correct?

22 A. Yes.

23 Q. All right. Now, it provides for --
24 well, there is a statement here that "[REDACTED]"

000638

1 [REDACTED]

2 [REDACTED] Do you

3 see that? About midway in the paragraph?

4 A. I see that.

5 Q. [REDACTED]

6 A. [REDACTED]

7 [REDACTED]

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

11 A. Yes.

12 Q. Okay.

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

17 Q. All right. [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED] that is something that was part of the
21 Duke Energy? It's awkward because of the names
22 as you mentioned. I am going to refer to the
23 company, the company that provides distribution
24 service and so forth as Duke Energy Ohio, but

000639

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

A. At the time [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

And based on the fact we were in a

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Given the contractual situation
between the parties, all the parties involved,
and given the fact that we had a strained
relationship with [REDACTED]

[REDACTED]
[REDACTED] So, this is the way that
the parties worked out the arrangement to

000640

1 satisfy our concerns, [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 Q. I want to make sure that I
5 understood the word that you used. Did you use
6 the word strained?

7 A. Yes.

8 Q. I wanted to distinguish it from
9 strange. It was strained?

10 A. Strained. S-T-R-A-I-N-E-D.

11 Q. Okay.

12 A. We already established my ability to
13 spell.

14 Q. I wanted to find out a little bit
15 more about that. Since [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]?

19 A. They are currently known as

20 [REDACTED] And for the State of
21 Ohio and this system the answer is yes.

22 Q. So they started [REDACTED]

23 [REDACTED]

24 [REDACTED]?

000641

No. of Pages 4	Date: [REDACTED]	Audit #:
Name: [REDACTED]	Name: [REDACTED]	
Customer: [REDACTED]	Company: [REDACTED]	
Fax: [REDACTED]	Fax: [REDACTED]	
Phone: [REDACTED]	Phone: [REDACTED]	

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

SERVICE SCHEDULE A: MARKET-BASED POWER

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

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

Seller:	Cinergy Services, Inc., as agent for and on behalf of The Cincinnati Gas & Electric Company ("CG&E") and PSI Energy, Inc. (collectively, "Cinergy Operating Companies").																
Buyer:	[REDACTED]																
Product:	Firm Energy with Liquidated Damages for each of the 24 hours for each day provided during the term of this agreement. The Product is further defined by hourly load shape limitations described below in the Load Shape Provision.																
Quantity:	<p>The Maximum Hourly Quantity in any hour during each year of the term will be as follows:</p> <table border="1"> <thead> <tr> <th>Year</th> <th>Maximum Hourly Quantity</th> </tr> </thead> <tbody> <tr> <td>2001</td> <td>27 MW</td> </tr> <tr> <td>2002</td> <td>28 MW</td> </tr> <tr> <td>2003</td> <td>29 MW</td> </tr> <tr> <td>2004</td> <td>30 MW</td> </tr> <tr> <td>2005</td> <td>31 MW</td> </tr> <tr> <td>2006</td> <td>32 MW [REDACTED]</td> </tr> <tr> <td>2007</td> <td>33 MW [REDACTED]</td> </tr> </tbody> </table> <p>***Buyer is currently confirming its forecasted retail load obligation. As such, [REDACTED]</p>	Year	Maximum Hourly Quantity	2001	27 MW	2002	28 MW	2003	29 MW	2004	30 MW	2005	31 MW	2006	32 MW [REDACTED]	2007	33 MW [REDACTED]
Year	Maximum Hourly Quantity																
2001	27 MW																
2002	28 MW																
2003	29 MW																
2004	30 MW																
2005	31 MW																
2006	32 MW [REDACTED]																
2007	33 MW [REDACTED]																

000642



	[REDACTED]
Delivery Point:	Into Cnergy, Seller's Daily Choice. (See Attachment A for further definition).
Term:	[REDACTED]
	[REDACTED]
Price:	[REDACTED]
Scheduling:	[REDACTED]

	[REDACTED]
Transmission:	[REDACTED]
Load Shape Provision:	<p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED] As such, [REDACTED] agrees to receive the wholesale power delivered by Cinergy pursuant to this Agreement in a manner consistent with the mutual understanding expressed above.</p> <p>[REDACTED]</p> <p>[REDACTED] shall permit Cinergy to audit the meter data for [REDACTED] and other applicable records as necessary to ensure compliance with this provision. Such meter data and applicable records shall be preserved and retained by [REDACTED] for the duration of the contract term.</p>
Conditions Precedent	This agreement shall be [REDACTED]

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

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

[REDACTED]
[REDACTED]
By [REDACTED]
[REDACTED]
[REDACTED]

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

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

[REDACTED]
[REDACTED]

ATTACHMENT A

"Into Cinergy" Product and Delivery Mechanism

"Into Cinergy" is a bilateral transaction for the sale or purchase of electrical energy. Energy is traded in the form of physical Megawatt-hours scheduled between counterparties according to specific demand periods¹. Performance in Into Cinergy transactions is secured by liquidated damages.

I. Delivery

- a. Delivery is made into the receiving control area's transmission system. Seller's daily option of interface; or by procuring energy generated from a source within the receiving control area.
- b. The receiving control area in Into Cinergy deliveries is defined as the high voltage transmission system operated by Cinergy Corp., which otherwise can be referred to as the Cinergy Transmission System.
- c. The Cinergy Transmission System contains eleven (11) border interfaces. These interfaces include: CIN/AEP, CIN/NIPS, CIN/OVEC, CIN/EXPC, CIN/KU, CIN/SIG, CIN/CIPS, CIN/P&L, CIN/G&E, CIN/DPL, CIN/HE.
- d. In the case of interfaces internal to the Cinergy Transmission System, there are several entities that own or control generation inside the receiving control area, which can be used in fulfillment of Seller's "Into Cinergy" delivery obligations. A partial list of these entities includes Cinergy, Indiana Municipal Power Agency (IMPA), Wabash Valley Power Association (WVPA), City of Hamilton (OH), City of Logansport (IN) and Purdue University.

II. Seller's Obligations:

- a. The Seller is required to deliver financially firm energy into the receiving control area's transmission system at any interface designated by the Seller. Seller's designation of interface can change daily.
- b. The availability to the Buyer of transmission service on the receiving control area's transmission system at a particular interface shall serve as a precondition of Seller's designation of delivery point. The Seller places no restrictions on the Buyer regarding the quality of transmission service to be used in the transaction².
- c. The determination of transmission service availability for the Buyer is made through Buyer's confirmed transmission request recorded on the receiving control area's Open Access Same Time Information System (OASIS), or by the regional transmission group/Independent System Operator (hereafter referred to as an ISO). Buyer's transmission request for day ahead scheduling of energy must be submitted to the responsible transmission agency at the earliest time for the receipt of such schedules after the 12:00 P.M. Eastern Prevailing Time declaration of schedules.
- d. The Seller is not released from his delivery obligation to the Buyer, if the Buyer is unable to obtain transmission service on the receiving control area's transmission system. Should transmission service

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

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

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

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

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

g. Seller is responsible for any additional transmission purchases incurred by the Buyer in connection with Seller's failure to deliver energy at Seller's previous interface designation(s). Should this circumstance occur, Seller is obligated to compensate for Buyer's incremental transmission costs, and/or associated congestion charges as a result of Seller's change in Buyer's point of receipt¹. In the case of same-day curtailments, Seller is responsible for the lesser of, (1), Buyer's hourly non-firm transmission system purchases over the duration of the curtailment or (2), Seller's hourly transmission costs incurred from the delivery of energy to Buyer's point of delivery, which by mutual agreement can include any transmission purchases outside of the receiving control area. For day-ahead transactions, Seller is responsible for all additional receiving control area transmission purchases, attributed to Seller's change in Buyer's interface designation(s).

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

III. Buyer's Obligations:

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

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

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

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

Buyer's decision to purchase and utilize non-firm transmission service can carry singular consequential risk for the Buyer⁴.

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

IV. Performance

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

V. Seller's Non-Performance

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

VI. Buyer's Non-Performance

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

VII. Scheduling of Energy

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

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

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

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

PERFORMANCE ASSURANCE AGREEMENT

This Performance Assurance Agreement dated as of [REDACTED] (the "Agreement") is made by and between [REDACTED]

[REDACTED] and Cinergy Services, Inc., a Delaware corporation, acting on behalf of and as agent for The Cincinnati Gas & Electric Company ("CG&E"), an Ohio corporation and PSI Energy, Inc., an Indiana corporation, (each a "Cinergy Operating Company") and collectively, ("Cinergy").

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

WHEREAS, [REDACTED] has approached Cinergy regarding [REDACTED] desire to procure wholesale energy from Cinergy in order to meet [REDACTED] retail load obligations to [REDACTED] pursuant to CG&E's Customer Choice Program; and

WHEREAS, [REDACTED] and Cinergy desire to enter into a certain Confirmation Letter Agreement of even date herewith whereby the Cinergy Operating Companies [REDACTED]

[REDACTED], as more fully described in the Confirmation Letter Agreement, pursuant to the "Cinergy Operating Companies Market Based Power Sales Tariff FERC Electric Tariff Original Volume 7" (the "Confirmation Letter Agreement"), under the terms and conditions of the Confirmation Letter Agreement; and

WHEREAS, Cinergy's willingness to enter into the Confirmation Letter Agreement with [REDACTED] and assume the associated commodity risk is predicated upon the fact that [REDACTED]

[REDACTED] and

WHEREAS, Cinergy's willingness to offer [REDACTED] the price specified in the Confirmation Letter Agreement is predicated, in part, [REDACTED]

WHEREAS, Cinergy is unwilling to enter into the Confirmation Letter Agreement unless [REDACTED]

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

000649

1. Performance Assurances.

- (a) [REDACTED] agree with Cinergy (i) to fully and timely perform and comply with all of the provisions of the retail supply agreement between [REDACTED] with respect to energy purchased by [REDACTED] under the Confirmation Letter Agreement (and for which performance is not excused in accordance with the terms thereof), (ii) not to amend or modify the [REDACTED] retail agreement in a manner that will modify in any way either the amount of energy that [REDACTED] is required to purchase from [REDACTED] with respect to the Confirmation Letter Agreement or the terms and conditions thereof, and (iii) not to terminate or repudiate the [REDACTED] Retail Agreement in breach or default thereof (including without limitation, through any rejection or similar termination of that agreement in a bankruptcy proceeding involving [REDACTED]).
- (b) To the extent that [REDACTED] relinquishes or otherwise forfeits its right to supply retail electric service generally, as referenced above, and specifically to [REDACTED] becomes bankrupt or insolvent, or otherwise terminates its business operations such that it is unable to continue performance under the Confirmation Letter Agreement, or otherwise fails to perform any of its obligations under the Confirmation Letter Agreement so as to trigger an Event of Default, [REDACTED] agrees to guarantee payment of all monies owed by [REDACTED] to Cinergy under the Confirmation Letter Agreement as evidenced by that certain Guaranty of even date herewith made by [REDACTED] for the benefit of Cinergy Services, Inc., as agent for and on behalf of The Cincinnati Gas & Electric Company and PSI Energy, Inc.; provided, however, that [REDACTED] will not owe such monies to the extent a Replacement Retail Provider assumes [REDACTED] rights and obligations under the Confirmation Letter Agreement. The Guaranty shall survive any succession of retail provider.
- (c) [REDACTED] agree to provide Cinergy with access to all [REDACTED] energy meter data during the term of the Confirmation Letter Agreement.
- (d) Notwithstanding any of the provisions contained in this Agreement, none of the parties hereto shall be liable to the other for any indirect, special, incidental or consequential damages with respect to any claim arising hereunder or under the obligations pursuant to the Confirmation Letter Agreement.

[REDACTED]

47

(e) For purposes of this Agreement and the Confirmation Letter Agreement, [REDACTED]

[REDACTED]

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

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

If to Cinergy, to:

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

[REDACTED]

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

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

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

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

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

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

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

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

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

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

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

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

By: [REDACTED]
Name: [REDACTED]
Title: [REDACTED]

By: [REDACTED]
Name: [REDACTED]
Title: [REDACTED]

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

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

[Handwritten initials]

[REDACTED]

**FIRST AMENDMENT TO
PERFORMANCE ASSURANCE AGREEMENT**

[REDACTED]

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

WHEREAS, Energy, [REDACTED] are parties to the Performance Assurance Agreement, dated as of [REDACTED] (the "Agreement") wherein [REDACTED] agreed to assume certain obligations (as described more fully in the Attachment B exhibits) to Energy's willingness to provide wholesale energy to [REDACTED] Inc., pursuant to the Confirmation Letter Agreement, issued as of [REDACTED] and [REDACTED]

WHEREAS, [REDACTED] and Energy desire to enter into that certain Confirmation Letter Agreement, dated as of [REDACTED] pursuant to which Energy [REDACTED]

WHEREAS, as a material portion of the consideration to Energy in exchange for Energy's willingness to enter into the [REDACTED] Confirmation Letter and offer the rates specified therein, [REDACTED]

NOW THEREFORE, in consideration of, and as an inducement for, the Energy entering into the [REDACTED] Confirmation Letter, Energy, [REDACTED] hereby covenants and agrees as follows:

1. Each of the provisions set forth in the Agreement shall apply with respect to the [REDACTED] Confirmation Letter, except as set forth below.
2. For purposes of the [REDACTED] Confirmation Letter, [REDACTED]
3. This Amendment shall be effective as of [REDACTED]

003/008

006

[Redacted]

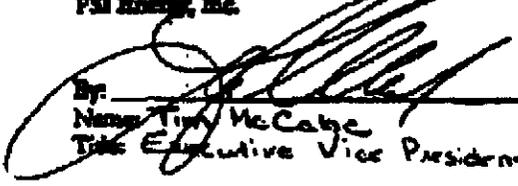
[Redacted]

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

[Redacted]
By: [Redacted]
Name: [Redacted]
Title: [Redacted]

[Redacted]
By: [Redacted]
Name: [Redacted]
Title: [Redacted]

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

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

000656

[Redacted]

No. of Pages: 1	Date: [REDACTED]	Audit #:
Name: [REDACTED]	Name: [REDACTED]	
Customer: [REDACTED]	Company: [REDACTED]	
Fax: [REDACTED]	Fax: [REDACTED]	
Phone: [REDACTED]	Phone: [REDACTED]	

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

SERVICE SCHEDULE A: MARKET-BASED POWER

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

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

Seller:	Cinergy Services, Inc., as agent for and on behalf of The Cincinnati Gas & Electric Company ("CG&E") and PSI Energy, Inc. (collectively, "Cinergy Operating Companies").
Buyer:	[REDACTED]
Product:	Firm Energy with Liquidated Damages for each of the 24 hours for each day provided during the term of this agreement. The Product is further defined by hourly load shape limitations described below in the Load Shape Provision.
Quantity:	The Maximum Hourly Quantity in any hour during the Term of the contract will be [REDACTED]. If the Buyer's megawatt hour consumption exceeds the Maximum Hourly Quantity stated above in any hour, [REDACTED]

	[REDACTED]
Delivery Point:	Into Cinergy, Seller's Daily Choice. (See Attachment A for further definition).
Term:	[REDACTED]
Price:	[REDACTED]
Scheduling:	[REDACTED]
Transmission:	[REDACTED]
Load Shape Provision:	[REDACTED]

[REDACTED]

[REDACTED] s such [REDACTED] agrees to receive wholesale power delivered by Cinergy pursuant to this Agreement in a manner consistent with the mutual understanding expressed above.

[REDACTED]

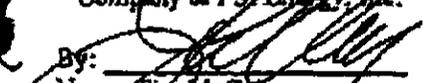
[REDACTED] shall permit Cinergy to audit the meter data for [REDACTED] and other applicable records as necessary to ensure compliance with this provision. Such meter data and applicable records shall be preserved and retained by [REDACTED] for the duration of the contract Term plus an additional two months after the termination of the Term.

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

Customer: [REDACTED]

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

By: [REDACTED]
 Name: [REDACTED]
 Title: [REDACTED]

By: 
 Name: Tim McCabe
 Title: Executive Vice President

Date Signed: [REDACTED]

Date Signed: [REDACTED]

ENERGY SERVICE AGREEMENT

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

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

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

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

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

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

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

000660

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

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

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

By: [redacted]
[redacted]
[redacted]

By: [redacted]
[redacted]
[redacted]

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

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

Number: [redacted]

Account Manager: _____

Agreement is Not Valid
Unless Executed by
[redacted]

[redacted]

[REDACTED]

[REDACTED]

DEFINITIONS AND GENERAL TERMS AND CONDITIONS

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

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

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

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

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

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

"Party(ies)" means [REDACTED] individually or collectively.

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

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

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

T1.3 Energy Profile and Minimum/Maximum Use Limitations. The Parties agree that [REDACTED]

[REDACTED]

[REDACTED]

000662

[REDACTED]

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

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

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

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

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

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

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

[REDACTED]

000663

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

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

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

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

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

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

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

000664

Schedule A to
Energy Service Agreement
Expiration Date:

	Account No.	Meter No.	Switch Date	Account Type
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				
11				
12				
13				
14				
15				
16				
17				
18				
19				
20		None		
21				
22				
23				
24				
25				
26				
27				
28				
29				
30				
31				
32				
33				
34				
35				
36				
37				
38				
39				
40				
41				
42		None		
43				

000666

Account has been resubmitted. Switch Date is Approximate.

Account No.	Master No.	Switch Date	Account Type
44			
45			
46			
47			
48			
49			
50			
51			
52			
53			
54			
55			
56			
57			
58			
59			
60			
61			
62			
63			
64			
65			
66			
67			
68			
69			
70			
71			
72			
73			
74			
75			
76			
77			
78			
79			
80			
81			
82			
83			
84			
85			
86			
87			



[REDACTED]
Maximum MW Demand The initial MW Demand for this agreement shall be [REDACTED]

Price Capacity and Energy is to be billed at [REDACTED] for the term of the agreement.

Term The term of this Agreement is [REDACTED] Consistent with [REDACTED] supply agreement. [REDACTED]

Transmission Charges [REDACTED] will add to the above stated Capacity and Energy prices an amount for Firm Network Transmission consistent with the then applicable EDC Energy Network Transmission charge as stated in the EDC's FERC approved OATT.

Ancillary Services Charges [REDACTED] will add to the above stated Capacity and Energy prices an amount for Ancillary Services (excluding Energy Imbalance Service), consistent with the then current applicable EDC Ancillary Services charges as stated in EDC's FERC approved OATT.

Losses [REDACTED] will inflate the above stated Capacity and Energy prices by a percentage consistent with the then applicable EDC Loss factor as stated in EDC's FERC approved OATT.

- This Schedule A is subject to and conditioned upon the terms of the [REDACTED] Energy Service Agreement ("Agreement") containing the [REDACTED] Reference Number listed below and is not valid beyond 2:00 p.m. EPT on the Expiration Date.
- Any alteration, addition, or modification of the preprinted terms upon this Schedule A shall be void and without any effect.
- [REDACTED] will provide a [REDACTED] Contract Number upon receipt of the following by 2:00 p.m. EPT on the Expiration Date via facsimile to [REDACTED] (1) the completed Agreement containing the [REDACTED] Reference Number and executed by [REDACTED] and (2) [REDACTED] signature on this Schedule A.

I request [REDACTED] to provide service for the Account(s) stated on this Schedule A under the Terms and Conditions specified in the Agreement corresponding to the [REDACTED] Reference Number identified below:

By: [REDACTED]
By: [REDACTED]

Date: [REDACTED]

Reference Number:
Contract Number:

000667

CONFIDENTIAL

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

**CONFIDENTIAL PORTION OF DEPOSITION TRANSCRIPT AND
CONFIDENTIAL EXHIBITS OF
JAMES E. ZIOLKOWSKI TAKEN FEBRUARY 13, 2007**

RECEIVED-DECKETTING DIV
 MAR 15 3:54 PM
 P U C C

**JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL**

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

OHIO CONSUMERS' COUNSEL

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

000668

1 A. I believe that I was deposed in
2 early-2004 in this case prior to the hearing.

3 Q. And who took the deposition? What party?
4 Not what person, what party?

5 A. I don't recall exactly, but it might have
6 been you. Possibly.

7 Q. Were you a witness in the case?

8 A. Yes, I was.

9 Q. What did you testify about? What was the
10 subject matter of your testimony?

11 A. I testified about CG&E's competitive
12 market option.

13 Q. Under those circumstances you might have
14 been deposed by another counsel in my office, but
15 you'll pardon me if I've just misplaced the thing, it
16 was a couple years ago. Prior to that had you
17 testified before the Public Utilities Commission?

18 A. Yes.

19 Q. What was that case?

20 A. I testified in a complaint case, it was
21 *Surf Cincinnati versus CG&E.*

22 Q. What was the name, Surf?

23 A. Surf Cincinnati.

24 Q. S-u-r-f?

000669

1 management programs.

2 Q. And those are programs for CG&E?

3 A. Yes.

4 Q. And what was your next position with a
5 Cinergy-affiliated company? The year.

6 A. In 1996 I became an account engineer.

7 Q. And who was your employer?

8 A. I believe it was CG&E.

9 Q. And what were your duties?

10 A. I was an account representative and met
11 with various large industrial and commercial
12 accounts, resolved various billing and operational
13 issues with those accounts.

14 Q. Who was your supervisor in that position?

15 A. Jim Brewer, B-r-e-w-e-r.

16 Q. All right. The date of your next
17 position?

18 A. In January of 1998 I became a rate
19 coordinator in the Rate department.

20 Q. And Rate department working for what
21 corporation?

22 A. I believe it was Cinergy Shared Services.

23 Q. Is that Cinergy Services, Inc., or
24 Cinergy Shared Services? I have Shared Services as

000670

1 for a moment, we will come back to it in a little
2 bit. I'm going to mark another exhibit, Exhibit 3.

3 MR. SMALL: Paul, this is not from your
4 material.

5 [REDACTED]: Right.

6 MR. SERIO: You've seen it before,
7 though.

8 [REDACTED]: Yeah.

9 MR. SMALL: If you would mark that as
10 Exhibit 3.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 Q. (By Mr. Small) All right. Exhibit 3 has
13 a number of agreements on it. What I'd like to
14 concentrate on the lines that say "Option Agreement,"
15 and let me explain this chart to you a little bit.
16 If you see the third agreement down, the first three
17 are all labeled under Party 2, they're all labeled --

18 [REDACTED] The third one down says
19 "Option Agreement"; do you see that?

20 A. Yes.

21 Q. That would be -- that means option
22 agreement for [REDACTED] And then you look three lines down
23 below that, it says "Option Agreement," and under
24 Party 2 it says [REDACTED]; do you see that?

000671

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

A. Yes.

Q. And down the chart it has a similar structure where there are option agreements under the title Document and then a party's name next to it under "Party 2." Do you see that?

A. Yes.

Q. Now, you refer to [REDACTED] is that correct?

A. Yes.

Q. When you refer to [REDACTED]

[REDACTED] are you referring to the parties listed under the column Party 2 that are listed under Document as having [REDACTED] Do these look like the customers that you are referring to?

A. Yes.

Q. Does this look like a complete list of

[REDACTED]
[REDACTED]

A. It looks complete.

Q. At the bottom you'll see three lines that are devoted to [REDACTED] as the -- [REDACTED] is listed under Party 2. [REDACTED]

[REDACTED] You'll

000672

1 notice it's [REDACTED]

2 A. No.

3 Q. [REDACTED]

4 [REDACTED]

5 A. No.

6 Q. Okay. There's another agreement that
7 we've seen in this case dealing with [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 A. Yes, it is.

11 Q. Okay. [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 A. Yes.

15 Q. I believe you can set that aside.

16 I'm going to go back to Exhibit 2. I see
17 you still have it in front of you. That's it, yes.

18 And I'm going to be asking a series of questions

19 concerning an e-mail that starts at the bottom of

20 page Bates stamped 645 and extends over to 646. That

21 e-mail was from you to [REDACTED] and [REDACTED] May

22 11th, 2006, with a copy to [REDACTED] Topic is

23 [REDACTED] Is this an e-mail that you sent at

24 least partially in response to [REDACTED] inquiries?

000673

1 A. Yes.

2 Q. And the inquiries we just looked at a
3 moment ago.

4 A. Yes.

5 Q. There are many little features in it so
6 I'd like to go over it a little bit at a time.
7 There's a reference to Customer Choice, I'm at the
8 very bottom of 645, "Customer Choice in January 2001"
9 is what it says. You are familiar with electric
10 restructuring legislation that was passed in the
11 state of Ohio?

12 A. Yes.

13 Q. Are you familiar with the terminology
14 "SB3"?

15 A. Yes.

16 Q. And that was a designation for the
17 electric restructuring legislation; is that correct?

18 A. Yes.

19 Q. And you are familiar that that electric
20 restructuring legislation permitted customers to
21 choose their supplier of generation service beginning
22 January 1st, 2001?

23 A. Yes.

24 Q. Now, again at the bottom of 645 there's a

000674

1 reference to market development period. Do you see
2 that?

3 A. Yes.

4 Q. What is your understanding of the term
5 "market development period"?

6 A. Market development period was a period
7 covering -- starting in January 2001 and ending no
8 later than December 31st, 2005, during which CG&E's
9 electric rates were frozen and customers could switch
10 to CRESs, and those that switched would receive a
11 shopping credit.

12 Q. That's one of those instances where it
13 would be best if you used the CRES because we're
14 going to get into -- it may get a little messy. Your
15 reference was to competitive retail electric
16 suppliers, CRES?

17 A. Yes.

18 Q. Thank you.

19 Are you familiar with a CG&E filing
20 around January 3rd, 2003, concerning generation
21 rates to be charged after the market development
22 period?

23 A. Yes.

24 Q. And that was the -- that original filing

000675

1 is what you referred to earlier as the competitive
2 market option; is that correct?

3 A. Yes.

4 Q. And what happened to that filing, that
5 first initial filing in 2003?

6 A. As far as I'm aware, no action was taken
7 during 2003 on that filing.

8 Q. All right. And I believe that's the
9 topic of your first full paragraph on page 646 which
10 starts out "By 2003." What is your understanding of
11 the treatment of the company's proposal in 2003?

12 A. Could you restate that?

13 Q. Well, what's your understanding of the
14 PUCO's treatment of the company's filing, and in
15 particular you make several statements in this first
16 full paragraph on 646 about the PUCO's treatment of
17 the competitive electric retail market in Ohio?

18 A. My understanding was that the PUCO took
19 no action on our filing, and I believe that the PUCO
20 did not like that particular filing.

21 Q. And are you familiar with them actually
22 asking the company to file some alternative to the
23 competitive market option?

24 A. Yes.

000676

1 Q. And that took place in early-2004,
2 correct?

3 A. Yes.

4 Q. And that's the nature of the comment that
5 you make at the top of the second full paragraph that
6 starts "CG&E filed its RSP" and so forth.

7 A. Yes.

8 Q. In that same paragraph there's a
9 reference to large customers and the term that you
10 use is "The intervenors represented a roadblock"; do
11 you see that?

12 A. Yes.

13 Q. And in making that statement -- and I'm
14 sorry, we're not quite done with Exhibit 3, would you
15 refer to Exhibit 3? Thank you. -- the large
16 customers that you're referring to in that paragraph,
17 is that a reference to the customers that we see on
18 Exhibit 3?

19 A. Yes.

20 Q. And that's including, for instance, I'm
21 referring to all the customers here, not just the

22

23

24 A. Yes.

000677

1 Q. Okay. And that's what you're referring
2 to in the second full paragraph on page 646?

3 A. Yes.

4 Q. All right. I believe you can put Exhibit
5 3 aside, we're going to stay with Exhibit 2. I'm
6 going to mark a few more exhibits, three exhibits.
7 We'll do this one at a time.

8 MR. SMALL: Let's go off the record for a
9 second.

10 (EXHIBITS MARKED FOR IDENTIFICATION.)

11 (Recess taken.)

12 MR. SMALL: Let's go back on the record.

13 Q. All right. We're going to be going back
14 and forth between your e-mail and the Exhibits 4, 5,
15 and 6. In your e-mail you mention, and this is the
16 third full -- I'm still over on your e-mail, the
17 third full paragraph of your e-mail, there's a
18 reference to "generation service for the intervenors
19 at prespecified, contractual rates." Do you see
20 that?

21 A. Yes.

22 Q. And I've got Exhibit 4 which shows an
23 agreement between Cinergy Corp. and [REDACTED]
24 [REDACTED], that's in the first sentence at the

000678

1 very top.

2 A. Yes.

3 Q. [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 A. Possibly. When I wrote this memo, I
7 didn't have any contracts or anything in front of me.

8 Q. Understood. [REDACTED]

9 [REDACTED]

10 A. Yes. I -- yes.

11 Q. [REDACTED]

12 [REDACTED]

13 A. Yes.

14 Q. And Exhibit 5 is another agreement dated
15 at approximately the same period of time. I'm wrong
16 about that. For the company's system here, Exhibit 4
17 is Bates stamped 334 through 340.

18 Let's try to do this with the exhibits.

19 I've made a small error here in mixing dates.

20 Exhibit 4 is dated around [REDACTED] The

21 agreement in Exhibit 5 is dated around [REDACTED] [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 Some, with earlier dates and some with later dates?

000679

1 A. I understood that particularly because
2 the [REDACTED] agreements said that they superseded [REDACTED]
3 agreements --

4 Q. Right.

5 A. -- which meant that [REDACTED] agreements must
6 have existed.

7 Q. Okay. I know you said you didn't have
8 the contracts in front of you when you wrote this,
9 but had you ever seen these agreements?

10 A. I was somewhat familiar with the [REDACTED]
11 agreements.

12 Q. And the [REDACTED] agreements would be like
13 the one that's shown on Exhibit 4.

14 A. Yes.

15 Q. And then Exhibit 5 I'm showing a [REDACTED]
16 agreement. Is your understanding there would also be
17 a [REDACTED] agreement with the same customers?

18 A. Well, Exhibit 4 is the [REDACTED] agreement
19 that's associated with Exhibit 5.

20 Q. Ah, you're correct. You're correct.
21 They both have to do with [REDACTED] so Exhibit 4 is the
22 [REDACTED] agreement, and I think you've said it
23 superseded the [REDACTED] 2004 agreement for [REDACTED] is that
24 correct?

000680

1 A. Yes.

2 Q. Your understanding of the relationship;
3 okay.

4 Exhibit 6 dated close to [REDACTED] it's
5 [REDACTED] and Exhibit 6 is Bates stamped
6 353 through 357. And that's with, well, it refers to
7 [REDACTED] do you see that?

8 A. Yes.

9 Q. And is that another one of these
10 [REDACTED] agreements that you were referring to in
11 your e-mail? [REDACTED]

12 [REDACTED]
13 A. I believe I was referring to this
14 agreement also.

15 Q. You can set those aside.

16 A little bit further down in your e-mail,
17 the same paragraph, third full paragraph, and this is
18 sort of in the middle of that paragraph, it says,
19 "The CRES settlement was too risky." Do you see
20 that?

21 A. Yes.

22 Q. By "CRES settlement" you are referring to
23 the entering into agreements of the nature of
24 Exhibits 4, 5, and 6; is that correct? 000681

1 A. Yes.

2 Q. What do you understand about the
3 riskiness of the settlements? What did you mean by
4 the settlement was too risky?

5 A. I recall when I wrote this memo my
6 understanding was that the contracts were risky [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 Q. Would you turn back to Exhibit 4 -- I
10 apologize for asking you to turn that back in -- 334,
11 starts with Bates stamp 334? And that's an agreement
12 involving Cinergy Corp. and [REDACTED] and mentions [REDACTED]

13 [REDACTED]. Is there something in
14 this agreement which is a [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 A. I don't know.

18 Q. You haven't analyzed the agreement that I
19 put in front of you, Exhibit 4?

20 A. No.

21 Q. Did you ever do any analysis on this?

22 A. No.

23 Q. Did you, and specifically with respect to
24 the risk that you referred to in your e-mail, did you

000682

1 discuss that feature of the CRES settlements with
2 anyone else in the company?

3 A. No. I just at the time I wrote this
4 quick memo I recalled someone mentioning, and I don't
5 even remember who, saying that someone had decided
6 that the contracts were too risky.

7 Q. Was that somebody in the Rate department?
8 Somebody in close proximity to your work?

9 A. Possibly, yes.

10 Q. Do you recall any analysis that was
11 performed by your group or any others regarding the
12 likely outcomes of moving forward with the CRES
13 settlements? Some kind of risk analysis or anything
14 of that nature?

15 A. No, I don't.

16 Q. All right. A little further down in your
17 memo, same paragraph, you stated that -- it states
18 that "Cinergy entered into negotiations with each of
19 the parties." Do you see that?

20 A. Yes.

21 Q. What's your understanding about an
22 additional round of negotiations?

23 A. Well, I recall that the [REDACTED]
24 contracts contain a clause that required Cinergy

000683

CONFIDENTIAL

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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

In the Matter of the Application of)	
Duke Energy Ohio To Modify Its	)	Case No. 06-986-EL-UNC
Market-Based Standard Service Offer.)	

**CONFIDENTIAL PORTION OF DEPOSITION TRANSCRIPT AND
CONFIDENTIAL EXHIBITS OF
GREGORY C. FICKE TAKEN FEBRUARY 20, 2007**

PUC

2007 MAR 13 11:35 AM

RECEIVED-DEPOSITING DIV

**JANINE L. MIGDEN-OSTRANDER
CONSUMERS' COUNSEL**

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

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

1 that.

2 MR. COLBERT: Okay.

3 THE WITNESS: But, you know, in broadest
4 terms I'm a consultant to Duke Energy, not an
5 employee in any way, and actually am not representing
6 Duke Energy without, you know, without their
7 authorization.

8 Q. (By Mr. Small) All right. Please respond
9 to my questions unless your counsel, and I understand
10 your counsel is directly to your right, unless your
11 counsel instructs you otherwise. Do you have any
12 questions?

13 A. No.

14 Q. I have somewhat of your background from
15 other materials that you've submitted. You joined
16 the Cincinnati Gas & Electric Company in 1977; is
17 that correct?

18 A. Correct.

19 Q. And you were General Manager -
20 Environmental Services at one point?

21 A. At one point. Not in 1977.

22 Q. I'm not going to be making reference to
23 particular years at this particular point.

24 Was the General Manager - Environmental

000685

1 Services for Cincinnati Gas & Electric?

2 A. For Cincinnati Gas & Electric and also
3 for Cinergy Corp. after the merger of Cincinnati
4 Gas & Electric and PSI Energy.

5 Q. Okay. Who are you employed by as General
6 Manager - Environmental Services?

7 A. Initially by Cincinnati Gas & Electric
8 and then after the merger I was employed by Cinergy
9 Services. The merger took place in 1994.

10 Q. Okay. And later you were Vice
11 President - Gas Operations; is that correct?

12 A. That's correct.

13 Q. And who was your employer in that
14 capacity?

15 A. I believe it was Cinergy Services.

16 Q. And that was after you were a general
17 manager of Environmental Services?

18 A. Yes.

19 Q. And Vice President and Chief Information
20 Officer - Regulated Business unit, you had that
21 capacity as well?

22 A. Yes.

23 Q. Was that after you were Vice President of
24 Gas Operations?

000686

1 A. Yes.

2 Q. And who were you employed by?

3 A. I believe it was Cinergy Services.

4 Q. And following that you were the president
5 of the Cincinnati Gas & Electric Company?

6 A. That's correct.

7 Q. And who were you employed by in that
8 capacity?

9 A. Cinergy Services. And I might just add,
10 at that time I was President of CG&E and also
11 President of Union Light, Heat & Power, President of
12 KO Transmission, and also President of Tri-State
13 Improvement Company employed by Cinergy Services.

14 Q. And all of these corporations that you
15 just mentioned are affiliates of or were affiliates
16 of the Cincinnati Gas & Electric Company.

17 A. Yes.

18 Q. What position did you hold in -- we went
19 over a number of positions. What position did you
20 hold in 2000?

21 A. I became President of CG&E in 2001, in
22 October of 2001, so my position prior to that was
23 Regulated Business unit - Chief Information Officer.

24 Q. This Regulated Business unit, what

000687

1 corporation is the Regulated Business unit part of,
2 or was it part of?

3 A. The Regulated Business unit had pieces of
4 a number of different operating companies in it. A
5 good example would be the Regulated Business unit is
6 involved with Public Service Indiana as well as
7 Cincinnati Gas & Electric and as well as Union Light,
8 Heat & Power. So it cuts across operating companies.

9 Q. And what position did you hold in January
10 2003?

11 A. President of CG&E and Vice President of
12 Cinergy Services. Or, I mean Cinergy Corp.; I'm
13 sorry.

14 Q. When did you become Vice President of
15 Cinergy Corp.?

16 A. I know it was when I became President of
17 CG&E. I may have been a vice president of Cinergy
18 Corp. prior to that, prior to the time that I was
19 president of CG&E, but I don't know that.

20 Q. So you would have had that title October
21 2001 or before that.

22 A. Yeah. Or before.

23 Q. Did you hold those same positions in
24 January 2004?

000688

1 None of those names surprise me. I don't believe
2 I've read every agreement with every company, but
3 none of the names on there surprise me.

4 Q. You were aware that agreements with these
5 companies had taken place.

6 A. Sure.

7 Q. In this time frame.

8 A. Sure.

9 Q. Okay. You can set that aside. We'll
10 mark Exhibit 4.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 Q. Now, Exhibit 4 is an e-mail, actually two
13 e-mails, and it shows on a [REDACTED] at the
14 very top, an e-mail from [REDACTED]
15 [REDACTED] Do you see that?

16 A. Uh-huh.

17 Q. And it shows you as being copied on that
18 e-mail.

19 A. Uh-huh.

20 Q. And this, you're certainly welcome to
21 read it over, but this deals with the [REDACTED] or [REDACTED]
22 [REDACTED] and it says, subject line:
23 [REDACTED] Do you
24 see that?

000689

1 A. Yes.

2 Q. Were you informed about a process of
3 reaching agreement with the [REDACTED]
4 in this time frame?

5 A. Can you say that again? Informed about
6 what?

7 MR. SMALL: Let's have it reread.

8 (Question read.)

9 A. What confused me, about a process of
10 reaching agreement.

11 Q. All right.

12 A. No, I didn't -- I was not informed of
13 what process was going to be used to reach agreement
14 if that's what you're asking.

15 Q. Were you aware that there were settlement
16 talks that were being conducted with the [REDACTED]
17 [REDACTED]?

18 A. Actually, there were settlement talks
19 being conducted with a lot of parties including Ohio
20 Consumers' Counsel, [REDACTED]
21 [REDACTED] and these were public meetings that we called in
22 Columbus. We brought all the parties together and
23 inquired as to whether any parties were interested in
24 settlement, and as a result, you know, that process

000690

1 proceeded and we ultimately did enter into a
2 settlement agreement with a lot of the parties.

3 But it was done in the Commission offices
4 with all parties' awareness and, for the most part,
5 all parties' attendance.

6 Q. Do you know what the reference is in both
7 of these e-mails to the new item 5?

8 A. No.

9 Q. Down in the second e-mail, the one
10 from -- by the way, do you know who [REDACTED]
11 is?

12 A. I know the name.

13 Q. Is he with the [REDACTED]?

14 A. I don't know that he's with the [REDACTED]
15 [REDACTED], but I do recognize the name.

16 Q. Where do you recognize the name from?

17 A. I probably heard it before.

18 Q. Do you know [REDACTED]?

19 A. I recognize the name. Don't think I've
20 met either one of the two, although I may have been
21 in large meetings with them.

22 Q. Do you recognize him as associated with
23 the [REDACTED]

24 A. I wouldn't -- I couldn't -- without this

000691

1 I couldn't have told you that. If you would have
2 mentioned the name and asked me who they worked for,
3 I couldn't have told you, but seeing this in context
4 it doesn't surprise me that they're with the [REDACTED] but
5 I would have had to have something to jog my memory.

6 Q. In your previous response, and I go back
7 to the second portion of this, it's actually a second
8 e-mail, the [REDACTED], it states "Note that
9 number 5 was added this afternoon at the behest of
10 one of our members, but it will not be a deal
11 breaker." Do you see that?

12 A. Yes.

13 Q. Do you believe this was part of the --
14 that appears to be a statement between the [REDACTED] and
15 CG&E. Is this part of the public process of
16 negotiating?

17 A. I have no idea what they're talking about
18 here. I can't characterize it.

19 Q. It is part of the settlement discussions
20 that you mentioned, though. Wouldn't you agree?
21 Even without knowing what No. 5 was.

22 A. I don't recall this whole No. 5 issue
23 coming up. I don't recall what it was. I don't
24 recall how it was resolved. I just don't remember

000692

1 the substance of it. It doesn't look to be very
2 important.

3 Q. All right. I'm going to mark Exhibit 5.
4 (EXHIBIT MARKED FOR IDENTIFICATION.)

5 Q. Exhibit 5 is [REDACTED]
6 [REDACTED] it's an agreement between Cinergy Retail Sales,
7 oftentimes abbreviated CRS, and, as it states, [REDACTED]
8 [REDACTED], dated around [REDACTED] Have you
9 seen this document before?

10 A. I'm sure that I've seen it.

11 Q. Now turning to what's marked as Bates
12 stamp 349. Throughout this deposition I will tend to
13 use these numbers rather than the numbers on the
14 documents, 349 is at the bottom right.

15 A. That's fine.

16 Q. [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 [REDACTED] Do you see that?

20 A. Yes.

21 Q. Were you aware of this agreement of the
22 [REDACTED]
23 [REDACTED]

24 A. Yes.

000693

1 Q. When did you become aware of that?

2 A. Would have been in the time frame of this
3 agreement, so it would be in [REDACTED]

4 Q. And how did that come to your attention?

5 A. By reading the document I suppose.

6 Q. And how did you come by the document?

7 A. I don't recall the delivery method.

8 Q. Were agreements of this type that dealt
9 with support of the stipulation in 03-93 routinely
10 brought to your attention? Would you have seen those
11 types of documents in this time frame?

12 A. In this time frame, sure.

13 Q. So there were other agreements that you
14 saw, not just this [REDACTED]
15 agreement.

16 A. Much like those that you showed me in
17 your Exhibit No. 3.

18 Q. Did you see what's marked as Exhibit 5 or
19 drafts of it before this agreement was executed?

20 A. I may have.

21 Q. [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 A. Yes.

000694

1 Q. And were those negotiations that resulted
2 in the agreements such as that shown on Exhibit 5,
3 were those part of a public process that involved all
4 the parties to the 03-93 case?

5 A. No.

6 Q. I'm going to mark Exhibit 6.

7 (EXHIBIT MARKED FOR IDENTIFICATION.)

8 Q. Let's set Exhibit 6 aside for a second.
9 If you could pick up Exhibit 2. Do you have that?

10 A. Uh-huh.

11 Q. Okay. You may want to find a more
12 comfortable position, I'm going to ask a few
13 questions about Exhibit 2 again.

14 I'd like to direct your attention to what
15 is numbered as Bates stamped 330, section 5 which
16 states that [REDACTED]

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 A. Yes.

000695

1 affiliates.

2 Q. So if the same people were informed --
3 were involved, CRS would just know that fact; is that
4 correct?

5 MR. DORTCH: Objection. Go ahead and
6 answer if you can.

7 A. I don't know. I mean, I believe what
8 you're saying, but just because one person knows it
9 I'm not sure that I can say with certainty that
10 somebody else does.

11 Q. Now, that paragraph refers to, and I'm
12 over here on Bates stamp 331. ". . . [REDACTED]

13 [REDACTED]
14 [REDACTED] Do you see that?

15 A. Right.

16 Q. Are you aware of a process of -- and I
17 get the word [REDACTED] in this instance, it says a --
18 [REDACTED] are the last three
19 words of that paragraph. [REDACTED]

20 [REDACTED]
21 [REDACTED]

22 A. No.

23 Q. Is your response meant to state that you
24 were unaware of any negotiations with the members of

000696

1 the [REDACTED] after [REDACTED]?

2 A. No.

3 Q. Okay. All right. If I understand that
4 response, you are aware that there were additional
5 negotiations with the members of the -- [REDACTED]

6 [REDACTED]

7 A. Yeah. Back to your Exhibit 3, those
8 agreements are after this time frame, and I was aware
9 of those agreements.

10 Q. Okay. And are you saying that those
11 were -- the agreements that were after the May time
12 frame and that are shown on Exhibit 3 did not result
13 from the provision on paragraph 10?

14 A. I don't believe that they did.

15 Q. You stated that you were not aware of --

16 MR. SMALL: Let's go off the record.

17 (Discussion held off the record.)

18 MR. SMALL: Let's go back on the record.

19 Q. A little while ago you mentioned who were
20 several individuals that were involved in negotiating
21 agreements between CRS and other parties in the May
22 time frame. Was there a CG&E representative involved
23 in that process considering all the provisions in
24 this, for instance, Exhibit 5 that relate to

000697

1 Cincinnati Gas & Electric Company?

2 A. I was involved in it.

3 Q. Okay. Anybody else besides you? You
4 were involved in the negotiations of these
5 agreements; is that correct?

6 A. I was involved in preparations of
7 information, reviewing information, those sorts of
8 things in my role as a vice president of Cinergy
9 Corp. I guess if you're asking for someone involved
10 in the negotiations who is exclusively a CG&E
11 employee, you know like maybe some of the workers on
12 the coal pile at some of the stations, they're CG&E
13 employees, they only work for a CG&E plant, I don't
14 think there was anybody involved in the negotiations
15 that was like that.

16 Q. So the only people who would be in some
17 way connected with CG&E would be you as President and
18 also legal counsel that represented more than one
19 corporation.

20 A. Yeah, and there were a number of Cinergy
21 Services folks that did work for a number of the
22 affiliates. And Legal is a good example of that,
23 being Cinergy Services and doing work for a number of
24 different affiliates.

000698

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

Q. [REDACTED]

A. I don't know what their classification is, but I would not be surprised if they were Cinergy Services employees.

Q. Were you referring to anybody besides that group of Cinergy Services, Inc. employees that would have been involved in the process of negotiating those agreements?

A. I'm sorry, was I referring to?

MR. SMALL: Let's have it reread.

(Record read.)

A. No, although I just -- I don't mean for that to be an exhaustive list. I didn't want you to think that I had exhausted the list of people that would have been involved from time to time.

Q. Those are the people you could think of.

A. Off the top of my head, yeah.

Q. Okay. I want to mark 6.

MR. DORTCH: You marked Exhibit 6.

Q. Okay, then I'll return to Exhibit 6.

A. Done with Exhibit 2?

Q. Yes.

000699

1 Now, Exhibit 6 I may have mentioned is
2 Bates stamped 320 to 326 and, again, involves Cinergy
3 Retail Sales and a group of corporations that I think
4 we just recently saw, the same corporations as shown
5 on the top of [REDACTED] This agreement is in the
6 [REDACTED] Have you seen this
7 document before?

8 A. I believe that I've probably seen it,
9 yes.

10 Q. And when did you first see this document?

11 A. Around the time frame that is referenced
12 in the first paragraph; [REDACTED]

13 Q. Okay. Would you turn to Exhibit 3 again,
14 that was the list of agreements? And you'll note the
15 pattern that I mentioned earlier, there are
16 agreements in the [REDACTED] and then below them
17 oftentimes there is something listed in the [REDACTED]
18 [REDACTED]. Do you see the [REDACTED] agreements, for
19 instance the second line --

20 A. Yes.

21 Q. -- and the fifth line? Did you see other
22 agreements in the [REDACTED] similar to that
23 which is shown on Exhibit 6?

24 A. Yes.

000700

1 Q. And are the ones that are shown on
2 Exhibit 3 for the [REDACTED] time frame, have you seen
3 those documents?

4 A. I can't say that I've seen every one of
5 them.

6 Q. Are you generally familiar with those
7 documents?

8 A. Generally familiar, yeah.

9 Q. And you're generally familiar in the same
10 way that you're generally familiar with Exhibit 6?

11 A. Yes.

12 Q. I mentioned that Exhibit 2 and Exhibit 6
13 have the same parties. [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 MR. DORTCH: Objection. There's about
19 three questions there, Jeff.

20 MR. SMALL: Let's have it read back.

21 MR. DORTCH: Okay.

22 (Question read.)

23 Q. I think that's one question. Forget
24 about the superseded part, but the real question is

000701

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

did the [REDACTED]
[REDACTED]
[REDACTED]

A. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

I didn't connect it to that specific term that you were referring to. I guess I was involved at a higher level. I didn't connect it to that term.

Q. So at a high level the, as you mentioned, [REDACTED] is that --

A. Yes.

Q. Okay. Who was involved in negotiating those agreements in the [REDACTED]
[REDACTED]

A. I would say it was primarily -- these organizations were represented by counsel. We had a number of attorneys that were involved in dealing

000701-B

1 with those. And as I mentioned before, there were a
2 lot of folks internally that had their eyes on the
3 pros, cons, and other impacts associated with
4 entering into these agreements.

5 Q. Would they generally be the same
6 individuals that you identified earlier [REDACTED]

7 [REDACTED]
8 A. Sure.

9 Q. Are you familiar with a [REDACTED]?

10 A. Yeah.

11 Q. Was he involved in this process?

12 A. [REDACTED] helped --

13 Q. That's [REDACTED]

14 A. [REDACTED] To the
15 extent that [REDACTED] was involved, [REDACTED] was on
16 his staff and was involved, sure.

17 Q. And you mentioned that you were, at least
18 in background terms, were involved in the [REDACTED]
19 agreements; was that also your involvement in the
20 [REDACTED] agreements? I think you --

21 A. I would say it was similar, yeah.

22 Q. Okay. I'm going to mark Exhibit 7.

23 (EXHIBIT MARKED FOR IDENTIFICATION.)

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

000702

1 Exhibit 16. This also is with [REDACTED]
2 (EXHIBIT MARKED FOR IDENTIFICATION.)

3 Q. I believe if you turn to paragraph 2 --
4 pardon me, I got a little bit confused by two
5 paragraph 2s in Exhibit 15 again. I'm looking at the
6 first paragraph 2 on Exhibit 15 which is also page 2
7 of the exhibit, and paragraph 2 of Exhibit 16. Do
8 you see the reference to [REDACTED]

9 A. Yes.

10 Q. Have you seen these two [REDACTED]
11 agreements, Exhibit 15 and Exhibit 16?

12 A. I believe that I have, yes.

13 Q. And is that your -- you saw them in the
14 time frame which they were executed?

15 A. That's correct.

16 Q. Now, these documents, why were these
17 documents entered into, 15 and 16?

18 A. Well, I think from our standpoint the
19 company [REDACTED] agreed to [REDACTED] n

20 [REDACTED]
21 Q. Okay. And when you mentioned [REDACTED]
22 [REDACTED] you're referring to the
23 agreement that's shown on Exhibit 15? [REDACTED] --

24 A. Both, actually, 15 and 16.

000703

1 Q. Okay. The reason why I ask about 15 is
2 that on paragraph 5, page 2, it refers [REDACTED]

3 [REDACTED]

4 A. Right.

5 Q. [REDACTED]

6 [REDACTED]

7 A. Correct.

8 Q. All right. [REDACTED]

9 [REDACTED]

10 So wasn't Exhibit 16 executed in connection with

11 [REDACTED]

12 A. I think that's what I said, but if that's
13 not what I said, that's what I meant to say.

14 Q. Is there any other purpose for these
15 agreements, Exhibits 15 and 16?

16 MR. DORTCH: Objection. Go ahead and
17 answer if you can.

18 A. Other than not addressed on the face of
19 the agreement, I do recall that during this time

20 [REDACTED] was
21 undergoing a bargaining unit activity which was

22 impacting their operations. [REDACTED]

23 [REDACTED] which was placing a number of
24 constraints upon their continued operation, and as a

000704

1 corporation I don't think we wanted to see such a
2 prominent employer impacted negatively, and I do
3 recall -- the only reason I bring it up is I do
4 recall those circumstances being brought to my
5 attention by [REDACTED] and their rather precarious
6 situation in terms of being able to continue to
7 operate.

8 Cinergy Corp. had an interest, may even
9 have a continuing interest, in providing energy to
10 companies in the general vicinity of [REDACTED] in terms
11 of constructing and operating cogeneration plants
12 and, in a sense, had a continuing interest in the
13 vibrancy of that area, and I guess finally just, you
14 know, as a corporate citizen had an interest in our
15 customers continuing profitable operations.

16 Q. You just mentioned Cinergy Corporation
17 which is the entity that entered into this agreement
18 with [REDACTED] What are the operations of Cinergy
19 Corp. -- let's go back a second.

20 Cinergy Corporation is a corporation
21 without any employees; is that correct?

22 A. I don't know that.

23 Q. Okay. What was its business operations
24 at the time of the [REDACTED] agreement with

000705

1 [REDACTED] that's Exhibit 16?

2 A. As far as I know it was a holding
3 company.

4 Q. Did I misunderstand? I thought you said
5 something about a cogeneration plant. Development of
6 cogeneration plants.

7 A. Yeah, I was -- [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED] I did mention that.

11 Q. Okay. And what is that corporation that
12 you're referring to?

13 A. I don't know what it's called now. It
14 had many different names over the years such as
15 [REDACTED] are two that I can
16 remember.

17 Q. [REDACTED] as one of those corporations
18 that you mentioned you were -- had a title connected
19 with?

20 A. No. No, that was [REDACTED]
21 Company.

22 Q. Sorry. This agreement is a little bit
23 different than the others entered into that we've
24 looked at earlier today in the [REDACTED]

000706

1 [REDACTED] period. Do you know why the agreement
2 involved Cinergy Corp. without any reference to
3 Cinergy Retail Sales?

4 A. Well, there's not a option payment or an
5 agreement to serve them, which was Cinergy Retail
6 Sales' interest in those other agreements.

7 Q. And what made [REDACTED]
8 [REDACTED]
9 [REDACTED]

10 A. I don't know. I don't know.

11 Q. Do you know of any other agreements such
12 as the [REDACTED] agreement that didn't involve any
13 mention of a CRES, competitive retail electric
14 service, supply?

15 A. No. Now, as far as I know there are
16 none.

17 Q. What was your involvement, either
18 directly or in the background, with the [REDACTED]
19 agreements, [REDACTED]

20 A. I reviewed drafts of the documents,
21 probably provided comments, explained at a high level
22 what the contents of the agreements were. So
23 generally involved in the negotiations with the
24 support of a number of the people we've talked

000707

1 about --

2 Q. And those --

3 A. -- in the past.

4 Q. And those negotiations, then, directly
5 were between some of the people that you mentioned
6 previously in this deposition and [REDACTED]

7 A. Sure.

8 Q. Okay. Do you know who was on the other
9 end as far as the negotiation for [REDACTED]

10 A. I know one individual was [REDACTED]
11 There was another individual that was involved that I
12 have been trying to remember his name and I can't.

13 Q. And what position does [REDACTED]

14 A. I don't know by title, [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 Q. And are you familiar with [REDACTED]

18 [REDACTED]

19 A. Yes.

20 Q. And he is [REDACTED]

21 A. Yes.

22 Q. And was he involved in these
23 negotiations?

24 A. Sure.

000708

1 Q. Anybody else that you can think of on
2 behalf of [REDACTED]

3 A. No.

4 Q. Do you know whether -- well, referring to
5 Exhibit 16 and, again, paragraph 2 on page 2, [REDACTED]
6 [REDACTED]. Do you know
7 whether there were payments made to [REDACTED] under this
8 agreement?

9 A. [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]

14 Q. Okay. On page 3 and it's paragraph B --

15 A. Sixteen?

16 Q. [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 [REDACTED] Do you see that
21 paragraph?

22 A. Yes.

23 Q. Now this is the paragraph that we saw
24 earlier in another agreement in this time frame, and

000709

1 if I understood your question -- your response to
2 that question, it was that the [REDACTED]
3 [REDACTED] I don't
4 want to mischaracterize you, but really the question
5 is if paragraph B on page 3, [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 A. Well, not remembering the conversations
9 explicitly, but just based on the end result I think
10 we looked at the agreement that Cinergy Corp. had
11 with [REDACTED] and, [REDACTED]
12 [REDACTED], elected to
13 honor the terms of this agreement. Because I don't
14 believe that there was a subsequent agreement. I
15 don't believe that there was a subsequent agreement,
16 and I --

17 Q. [REDACTED]
18 [REDACTED]

19 A. I don't recall there being a subsequent
20 agreement. You'd have to ask the attorneys what the
21 legal standing of this agreement is based on the
22 Commission's order and how it was we could have
23 continued to honor this agreement [REDACTED]

24 [REDACTED] But based on what we did, we did

000710

1 honor the terms of this agreement, I believe, [REDACTED]

2 [REDACTED]

3 Q. Okay. You can set that aside. We're on
4 Exhibit 17.

5 (EXHIBIT MARKED FOR IDENTIFICATION.)

6 Q. Exhibit 17, Bates stamped 1173 through
7 1179. This agreement has a lot of whereases, but
8 it's dated the [REDACTED] I believe that's [REDACTED]
9 Yes, it's on 1174, [REDACTED] between [REDACTED]
10 and Cinergy Retail Sales. Have you seen this
11 agreement before?

12 A. I probably have seen it.

13 Q. All right. [REDACTED]

14 [REDACTED] Do you see
15 that?

16 A. Yes.

17 Q. Was this entered into as a settlement
18 agreement in 03-93?

19 A. I'm not sure I understand your question.
20 I believe [REDACTED] did support the stipulation in that
21 case.

22 Q. Okay. Were you part of the -- what was
23 your part in connection with Exhibit 17? Did you
24 negotiate it? Did you --

000711

1 A. No; probably less involved with this one
2 than the other ones because of [REDACTED] situation
3 with other providers and really Cinergy Retail Sales
4 was in this business and really understood the
5 details of the more complicated [REDACTED] situation than
6 I would have been able to.

7 So less familiar with the content and the
8 ongoing very detailed issues that surrounded [REDACTED]
9 That was mainly between Cinergy Retail Sales and
10 [REDACTED]

11 Q. You mentioned CRS personnel. Do you know
12 who those -- who are the personnel that you're
13 referring to? Is that the same --

14 A. The same people that we talked about
15 before.

16 Q. [REDACTED]

17 A. Sure. [REDACTED] that group.

18 Q. That group that you mentioned earlier.

19 And do you know who would have -- who
20 negotiated or who dealt with this matter for [REDACTED]

21 Are you familiar with [REDACTED]

22 A. Sure. [REDACTED] and he was represented by
23 either [REDACTED]

24 Q. With regard to these agreements?

000712

1 A. I get them confused. One of them usually
2 represents [REDACTED] and the other one usually
3 represents the rest, and they're interchangeable in
4 my mind.

5 Q. Just for your information, 1179 does
6 mention [REDACTED] so that's probably -- did you see
7 any communications with [REDACTED] regarding [REDACTED]
8 or [REDACTED]

9 A. I probably saw some correspondence, sure.

10 Q. Okay. I'm going to mark Exhibit 18.

11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 Q. Now, Exhibit 18 Bates stamped 1180 to
13 1187 has on its last p [REDACTED] and on
14 page Bates stamped 1181 that's a reference to
15 [REDACTED] between the Cinergy operating
16 companies -- I'm sorry, between Cinergy Retail Sales
17 and [REDACTED], it's on page 1181. Have you seen
18 this document before?

19 A. I'm sure I saw it.

20 Q. Now, referring back to -- do you know why
21 a second agreement with [REDACTED] was entered into, that
22 is Exhibit 18, a second agreement to the Exhibit 17
23 which I'm referring to as the first agreement?

24 A. I believe it was the same reason that

000713

1 there were May and November agreements between
2 Cinergy Retail Sales and the other companies that
3 we've previously discussed.

4 Q. And your reason for that was, I believe,
5 in your words, a high level of -- [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 A. Correct.

9 Q. -- without alteration by the Commission?

10 A. Correct.

11 Q. And, again, did you become familiar with
12 this document around the time it was executed in
13 late-2004?

14 A. Yes.

15 Q. [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 A. Not personally familiar.

19 Q. Have you seen [REDACTED]

20 [REDACTED]

21 A. I don't believe I -- I don't believe I
22 have.

23 Q. Okay. Have you seen spreadsheets which
24 payments under the option agreements were shown?

000714

1 That's the option agreements, I'm referring to the
2 agreements with largely the [REDACTED]
3 [REDACTED] and so forth. [REDACTED]

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

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

14 A. I recall there being spreadsheets, you
15 know, [REDACTED]
16 [REDACTED]

17 Q. By "moving pieces" do you mean the
18 components such [REDACTED]
19 [REDACTED]

20 A. Sure.

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

000715

1 and so forth. Have you seen spreadsheets of that
2 nature?

3 A. I have seen spreadsheets that have those
4 companies listed on it, yes.

5 Q. And have you ever seen [REDACTED] listed on
6 those spreadsheets?

7 A. I believe that [REDACTED] would have been
8 listed. I don't see why they would not have been
9 listed.

10 Q. Okay. I'm going to mark Exhibit 19.
11 (EXHIBIT MARKED FOR IDENTIFICATION.)

12 Q. Excuse me, I'm going to go back to
13 Exhibit 18 for a second here. Do you have that in
14 front of you?

15 A. Uh-huh.

16 Q. I think we're over here, 18.

17 A. Right.

18 Q. Okay. There are a number of whereas
19 clauses in this agreement, for instance a

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 A. No.

24 Q. [REDACTED]

000716

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

[REDACTED]

[REDACTED] have you seen that agreement?

A. No.

Q. [REDACTED]

[REDACTED]

[REDACTED]

A. No.

Q. Are you familiar at all with any of those agreements even if you haven't seen them?

A. No.

Q. In your work for the Cinergy-affiliated companies have you ever heard of those three -- any of those three agreements mentioned?

A. I might have heard the terms mentioned. I don't really ever remember hearing or seeing those terms before, but I wouldn't say that I had never heard them.

Q. Okay.

A. I certainly don't know what they are.

Q. What is your understanding of [REDACTED]

[REDACTED]

[REDACTED] do you know who they were taking service from, generation service from?

A. You know, I was not involved in that. I

000717

1 can't say that I haven't heard names like [REDACTED]
2 and -- if I were still an employee and someone asked
3 me to go find out what those arrangements were, I
4 could, but, you know, just sitting here I can't tell
5 you that I recall the contractual arrangement under
6 which [REDACTED] was being served.

7 I do remember that it was different. It
8 was different than some of the other [REDACTED]
9 [REDACTED]. They had gone a different route once they
10 were presented with the SB3 structure. And I recall
11 discussions about it having to do with the fact that

12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 So in general, I mean, I was aware of
17 discussions, but if you asked me to tell you what
18 their contractual relationship was, I couldn't do it.

19 Q. Okay. When you said different than the
20 normal, the normal you're referring to was service by
21 Cincinnati Gas & Electric Company?

22 A. Service by Cincinnati Gas & Electric
23 Company or a certified supplier.

24 Q. Okay. I guess I'm a little bit confused.

000718

1 A. Let me just try to correct -- it was very
2 complicated. That's what I'm remembering is that it
3 was different because it was very complicated. I
4 just remember feeling that the way that ██████████ had
5 gone about getting its electric supply once SB3 was
6 put in place was, number one, different, and it was
7 different because it was complex. It wasn't like
8 they went out and took a certified supplier as many
9 of our customers had and entered into a contract. It
10 just seemed -- seemed like it was more complicated is
11 what I'm referring to.

12 Q. Okay. And you don't know how it was more
13 complicated?

14 A. No, because I never really -- I never
15 really had the need to get involved with it. And let
16 me say my recollection might be -- my understanding
17 might not be correct, but that was, in fact, my
18 understanding.

19 MR. SMALL: Okay. Did we mark Exhibit
20 19?

21 THE REPORTER: Yes.

22 Q. Exhibit 19 Bates stamped 1188 to 1195
23 ██████████ have you seen this
24 agreement before?

000719

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

In the Matter of the :
 Application of Duke Energy:
 Ohio to Modify its : Case No. 06-986-EL-UNC
 Market-Based Standard :
 Service Offer. :

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

- - -

DEPOSITION

of Charles R. Whitlock, taken before me, Maria
 DiPaolo Jones, a Notary Public in and for the State
 of Ohio, at the Offices of the Ohio Consumers'
 Counsel, Ten West Broad Street, 18th Floor, Columbus,
 Ohio, on Tuesday, January 9, 2007, at 1:20 p.m.

- - -

ARMSTRONG & OKEY, INC.
 185 South Fifth Street, Suite 101
 Columbus, Ohio 43215-5201
 (614) 224-9481 - (800) 223-9481
 Fax - (614) 224-5724

000720

- - -

1 Q. Yes.
 2 MR. PAHUTSKI: Can we go off the record
 3 once more?
 4 MR. SMALL: Sure.
 5 (Discussion held off the record.)
 6 MR. SMALL: Let's go back on the record.
 7 Q. Any more clarifications?
 8 A. No.
 9 Q. Okay. Who is Duke Energy Americas?
 10 What's their relationship to other corporations? For
 11 instance, are they owned by another Duke corporation?
 12 A. I don't know.
 13 Q. What does Duke Energy Americas do?
 14 A. It holds Duke Energy's unregulated
 15 businesses.
 16 Q. How many employees does Duke Energy
 17 Americas have?
 18 A. I don't know.
 19 Q. Do you have an approximate number? Is it
 20 a thousand? A hundred? Ten?
 21 A. I want to say north of 2,000.
 22 Q. Two thousand plus?
 23 A. I believe so.
 24 Q. And are you counting just the Duke Energy

1 Q. And Cinergy Capital and Trading,
 2 Incorporated is owned by Cinergy Investment,
 3 Incorporated; is that correct?
 4 A. Yes.
 5 Q. Cinergy Investment, Incorporated is owned
 6 by Cinergy Corporation; is that correct?
 7 A. I believe so.
 8 Q. Cinergy Corporation is owned by Duke
 9 Energy Corporation; is that correct?
 10 A. Yes.
 11 Q. That, of course, I've taken from your
 12 certificate case at the Public Utilities Commission.
 13 Where does Duke Energy Americas fit into that?
 14 A. I don't know.
 15 Q. Do you have any position or title with
 16 any of the entities that I just named?
 17 A. Yes.
 18 Q. Which corporation, and what is the title?
 19 A. I'm the president of DERS.
 20 Q. All right.
 21 A. I'm a vice president of Cinergy Capital
 22 and Trading.
 23 Q. All right. Is that it?
 24 A. Yes.

1 Americas or all of the unregulated affiliates that it
 2 owns?
 3 A. Your question was Duke Energy Americas.
 4 Q. Yes, it was.
 5 A. That's how I answered it.
 6 Q. What's the relationship between Duke
 7 Energy Americas and DERS?
 8 A. I don't know.
 9 Q. Well, you stated that it holds Duke's
 10 unregulated businesses. Is DERS an unregulated
 11 business?
 12 A. DERS is an unregulated business.
 13 Q. Should I conclude from that, then, that
 14 it is owned by -- either directly or indirectly by
 15 Duke Energy Americas, or you don't know?
 16 A. I don't know the relationship of Duke
 17 Energy Americas. I can tell you how DERS is related
 18 to Cinergy Capital and Trading, LLC and Cinergy
 19 Investments, but I don't know how those three
 20 entities are related to Duke Energy Americas.
 21 Q. Let's go through that. DERS is owned by
 22 Cinergy Capital and Trading, Incorporated; is that
 23 correct?
 24 A. Yes.

1 Q. So in the Duke-affiliated companies you
 2 hold three positions, one with DERS, one with Cinergy
 3 Capital and Trading, and one with Duke Energy
 4 Americas; is that correct?
 5 A. Yes.
 6 Q. Who issues your paycheck?
 7 A. Duke Energy Shared Services.
 8 Q. That's a different corporation than the
 9 three names that you just gave me, isn't it?
 10 A. Yes.
 11 Q. Then you must have a position with a
 12 fourth entity, Duke Energy Shared Services, don't
 13 you?
 14 A. Yes.
 15 Q. And what position is that?
 16 A. With Duke Energy Shared Services?
 17 Q. Yes.
 18 A. Senior Vice President and Commercial
 19 Asset Management.
 20 MR. PAHUTSKI: Could we go off the record
 21 for a minute?
 22 MR. SMALL: Okay, let's go off the
 23 record.
 24 (Discussion held off the record.)

1 Q. And you've studied business management?
2 You've studied business management as well, at
3 Harvard?

4 A. Yeah, I took like five classes at Harvard
5 when I lived in Boston.

6 Q. No degree came from that.

7 A. No, sir.

8 Q. Are there any other --

9 A. Unfortunately.

10 Q. Any other educational experiences that
11 led to degrees?

12 A. I attended a Bible college for two years
13 and I got a, some kind of -- I don't think it's a
14 degree, but I went for two years and I got some kind
15 of diploma from there, or a certificate of
16 graduation.

17 Q. Do you hold any licenses?

18 A. Driver's license.

19 Q. Nothing like a CPA or anything like that.

20 A. No.

21 Q. And you started with Cinergy in May 2000;
22 is that correct?

23 A. Yes.

24 Q. And what positions did you have

1 those all Shared Services positions?

2 MR. PAHUTSKI: Objection. We're, again,
3 heading down this path of really deviating quite far
4 from the confines of the subpoena. Mr. Whitlock,
5 again, is here as a Duke Energy Retail Sales
6 representative to answer questions regarding these
7 proceedings as well as questions on contracts that
8 may or may not have been entered into.

9 We want to limit this to the matters that
10 were noted in the subpoena as well as limited by the
11 Attorney-Examiner's entry in this proceeding as well.

12 I'm going to ask Mr. Whitlock not to
13 answer any further questions regarding any companies
14 other than Duke Energy Retail Sales at this point.

15 MR. SMALL: Well, I consider these to be
16 foundation questions to find out what his capacity
17 is. DERS has represented that he has certain
18 knowledge, I think I'm entitled to find out what his
19 background is.

20 MR. PAHUTSKI: We're not representing
21 that he is an expert witness. He's simply here to
22 represent DERS and DERS's knowledge regarding the
23 matters mentioned in the subpoena, and that's what
24 he's here for today.

1 chronologically for that six-year period?

2 A. I was a manager of Realtime Price Risk; I
3 managed Day-Ahead Power book; then I began
4 supervising the short-term traders; then I had a
5 responsibility for managing all of the proprietary
6 trading business.

7 Q. What does "proprietary trading business"
8 mean?

9 A. Speculative trading business.

10 Q. What period of time are we up to at this
11 point?

12 A. January 2004ish.

13 Q. Okay. And after that?

14 A. Then I had responsibility for managing --
15 I was a vice president of Portfolio Optimization,
16 which is a precursor to the Commercial Asset
17 Management Group, and that was in February of 2004.

18 At the merger with Duke I became the
19 president of Commercial Asset Management.

20 Q. That was 2006?

21 A. Yes, sir.

22 I became president of Duke Energy Retail
23 Sales June 14th of 2006. Or June.

24 Q. Okay. That's a bunch of groups, but are

1 MR. SMALL: All right. Well, I'll put on
2 the record that I can't fully explore my -- the
3 agreements that we're here to discuss unless I get
4 foundation of who it is that I'm deposing here today,
5 so we may have to just disagree about those
6 foundation questions and we may have to reconvene
7 regarding that.

8 I will do my best to make the questions
9 that I have consistent, but I do have other
10 additional questions having to do with Mr. Whitlock's
11 background.

12 Q. (By Mr. Small) In your capacity as
13 president of DERS who do you report to?

14 A. Tom O'Connor.

15 Q. And what is Mr. O'Connor's position?

16 A. Actually, could I clarify that? I mean,
17 in my capacity at DERS I report to the CEO who is
18 Paul Barry right now, but he's now -- he's been move
19 out of that position and Tom O'Connor has taken his
20 position, and I don't think we've made officer
21 appointments to make Tom O'Connor my boss, right?
22 Does that help?

23 Q. All right. Let me see if I can get that.

24 A. Okay.

1 Q. I think maybe, as I understood your
2 answer, the official stated CEO was Paul Barry. Can
3 you spell that last name? B-e-r-r-y?
4 A. I believe it's B-a-r-r-y.
5 Q. Okay. Functionally he's been replaced.
6 Tom O'Connor --
7 A. Yes.
8 Q. -- is serving in that capacity as CEO?
9 A. Yes.
10 Q. Likely to be named in that position in
11 the near future?
12 A. Yes.
13 Q. And that's CEO of DERS; is that correct?
14 A. Yes.
15 Q. Is there any other chain of command that
16 goes above that? Does he report to anybody?
17 A. I don't know.
18 Q. Who reports to you at DERS?
19 A. I don't have any employees.
20 Q. You mean to say that DERS has no
21 employees?
22 A. Right.
23 Q. How does DERS get its work done without
24 any employees? Who does the work for DERS?

1 A. Again, it relies on Duke Energy Shared
2 Services.
3 MR. SMALL: I'm going to mark an exhibit.
4 This is a letter dated April 19th, 2005, received
5 by the Commission April 25th, 2005. It's a
6 submission, again, in 04-1323-EL-CRS. It's the
7 certification case, again.
8 (EXHIBIT MARKED FOR IDENTIFICATION.)
9 Q. Are you ready?
10 A. Yeah.
11 Q. Mr. Whitlock, the document that I gave
12 you appears to be a notice of current officers as of
13 the date of the filing. First of all, as a matter of
14 clarification, can you explain the redactions in the
15 document?
16 A. I can't.
17 Q. I want to be clear. Do you know why
18 portions of this document were redacted?
19 A. I don't.
20 Q. Do you know the information that has been
21 redacted from this document?
22 MR. PAHUTSKI: Just to note that if --
23 Mr. Whitlock's answer may very well be designated
24 confidential. If he knows the answers, knows what

1 was redacted, we'll have to hold that in confidence.
2 MR. SMALL: I'm very confused by this
3 document because I can't figure out why titles of
4 officers are redacted.
5 Let's go off the record.
6 (Discussion held off the record.)
7 MR. SMALL: Let's go back on the record.
8 Q. Do you --
9 A. Could you repeat your question?
10 Q. Let's start again.
11 A. Okay.
12 Q. Do you understand why materials, why a
13 title for a person would be redacted in the document?
14 It does not appear to be explained by the document.
15 A. I do not.
16 Q. Okay. Is this list up to date? In other
17 words, have there been any changes since this
18 document was filed?
19 A. Yes.
20 Q. Okay. What are those changes?
21 A. I'm an officer. I'm currently President
22 of DERS.
23 Q. Okay. Did you replace Ms. -- I'm not
24 sure -- Mr. Good?

1 MR. PAHUTSKI: Object; there's no
2 evidence that Ms. or Mr. Good had been president on
3 this sheet here. Object to the form of the question.
4 Q. All right. Who did you replace in your
5 position as President of DERS?
6 A. I don't know.
7 Q. There's always a possibility this wasn't
8 redacted, it just looks that way on the Commission
9 website. Or it could be shaded, not redacted, which
10 sort of would eliminate the objection for
11 confidentiality.
12 MR. SMALL: What was our last question?
13 (Question read.)
14 Q. Can we have a response to that question?
15 A. I don't know.
16 Q. Which of these individuals continues to
17 have a capacity with DERS?
18 A. None of these people, I believe, are
19 currently officers of DERS.
20 Q. Has there been some filing that states
21 who the officers of DERS are?
22 A. I don't know.
23 MR. SMALL: Let's go off the record here.
24 (Discussion held off the record.)

1 provides electric service to residential, commercial,
2 and industrial and not other customers, we'll skip
3 the characterization of what functions they serve.

4 MR. PAHUTSKI: Okay. I think
5 Mr. Whitlock is still somewhat confused. Can you
6 restate that?

7 Q. (By Mr. Small) DE-Ohio owns the power
8 plants; is that correct?

9 A. Yes.

10 MR. PAHUTSKI: So for clarity, Mr. Small,
11 when you refer to "DE-Ohio," you'll be referring to
12 the legal entity that provides generation,
13 transmission, and distribution services to retail
14 residential --

15 MR. SMALL: Customers.

16 MR. PAHUTSKI: -- yeah, commercial,
17 industrial customers.

18 MR. SMALL: Correct.

19 Q. That's clear?

20 A. Yes. For now it's clear. I'm sure it
21 will get fuzzy again.

22 Q. All right. Are there people at DE-Ohio
23 that you deal with regarding generation since you
24 seem to be on the generation side of things?

1 A. We're peers.

2 Q. Peers? And you're providing shared
3 services to DE-Ohio in that capacity.

4 A. I don't understand the question.

5 Q. You're kind of a technical expert for
6 them; is that the gist of your job?

7 A. Yes. Technical expert.

8 Q. Do you know who Mr. Davis reports to?

9 A. He reports to Tom O'Connor.

10 Q. Mr. O'Connor reports to Mr. Rogers.

11 A. Yes.

12 Q. Do you know who the president of DE-Ohio
13 is? I ask because I don't see a president in the
14 link -- in the chain that you just gave me.

15 A. Yeah, I think the president of DE-Ohio is
16 Sandra Meyer.

17 Q. Yes. Where does she fit into that chain?

18 A. She's not in that chain.

19 Q. Doesn't Mr. Curtis Davis, is he an
20 employee of DE-Ohio?

21 A. I don't believe so.

22 Q. Are all the people that you named Shared
23 Services people?

24 A. I believe so. I've got to be candid with

1 A. Yes.

2 Q. And who are those individuals?

3 A. Curtis Davis. The power plant managers.

4 Q. He's one of them?

5 A. He --

6 Q. Or is he over all of them?

7 A. Over all of them, and then they have
8 power plant managers that I deal with.

9 Q. And you deal with them because you're
10 doing -- your function is to provide logistics and
11 also purchasing of inputs for those plants; is that
12 correct?

13 A. Yeah, and then I monetize the outputs
14 and -- yeah.

15 Q. Could you describe "monetize the
16 outputs"?

17 A. Sell power, excess power.

18 Q. Excess power generated that isn't needed
19 by DE-Ohio's customers. I'm just trying to define
20 what "excess power" is.

21 A. Yeah, power that's not committed under
22 the MBSSO.

23 Q. Okay. And, I'm sorry, what's your
24 relationship with Mr. Davis?

1 you, man, I barely know who I work for. I care who
2 pays my paycheck and I don't know, you know, I really
3 don't know, but I believe he is an employee of Duke
4 Energy Shared Services.

5 Q. Would you move back to Exhibit 2, it's in
6 your packet? It's a thick one.

7 A. Is this it?

8 Q. Yeah. Could you verify, is the
9 information on page 1 of -- you're looking at the
10 letter and I'm going to move to the application
11 itself, the form, which is also labeled page 1.
12 Could you verify the information on page 1? Is the
13 information correct there?

14 A. It is.

15 Q. Okay. Do you see the website address
16 there, cres.duke-energy.com?

17 A. Yes.

18 Q. When I go to that address, I reach an
19 invitation to contact DERS to buy five megawatts of
20 load individually or in aggregate accounts. Have you
21 been to that web address?

22 A. I have not.

23 Q. Do you know what happens if a user
24 provides a name, company, and e-mail address that's

1 requested on that form?
 2 A. I don't.
 3 Q. Do you have something on the order of
 4 customer contact representatives -- and when I say
 5 "you," I mean DERS, I realize that you have no
 6 employees. But in the capacity of taking shared
 7 employees from Duke Energy Shared Services is there
 8 something like a customer contact that provides
 9 services to DERS?
 10 A. No. Not right now.
 11 Q. Okay. Was there ever a person in that
 12 capacity? The website invites a customer to contact
 13 them. Was there ever anybody on the other side to
 14 respond to that inquiry?
 15 A. There are contacts for the company. I
 16 mean, we fill out our annual report, Uma Nanjundan is
 17 the contact person that's referenced on our -- and
 18 you can call her and contact her at that number.
 19 Q. And there's a telephone number listed on
 20 the website; 800-920-5039. What happens if I call
 21 that number?
 22 MR. PAHUTSKI: Object; the question
 23 assumes facts not established. We don't have the
 24 website in front of us.

1 Q. What happens if I call the telephone
 2 number that's on the website?
 3 A. I don't know. I've never called it.
 4 Q. DERS doesn't have an 800 number?
 5 A. I've never called -- I've never called
 6 the 800 number listed here, so I don't know what
 7 happens.
 8 Q. Do I understand -- do I understand your
 9 answer that the only way to get ahold of DERS is to
 10 contact the people listed on your certification
 11 application? You mentioned Ms. -- this is a woman,
 12 right? -- Nanjundan. That's a woman, right? That's
 13 a woman.
 14 A. Yes, it is a woman.
 15 Q. Is she the contact person for DERS with
 16 customers?
 17 A. She's the contact person for Commission
 18 Staff use.
 19 Q. I know. That wasn't the question.
 20 A. What was the question?
 21 Q. Is she the contact person for customers?
 22 A. Customers could contact her, but . . .
 23 Q. Is there anybody else?
 24 A. I don't know.

1 Q. Let's take this back in time a little
 2 bit. Do you know whether there's ever been a person
 3 that contacted a customer -- in a customer contact
 4 capacity at DERS or its predecessor, CRS?
 5 A. Yes.
 6 Q. And who would that person be?
 7 A. Jason Barker.
 8 Q. When was he serving in that capacity?
 9 A. I don't know.
 10 Q. How do you know that Mr. Barker filled
 11 that role?
 12 A. How do I know he filled that role?
 13 Q. Well, I mean, you came up with a name.
 14 You just didn't come up with that --
 15 A. I'm trying to --
 16 Q. You must know Mr. Barker.
 17 A. I do know Mr. Barker. I'm trying to
 18 figure out how I knew that he was the contact. I
 19 don't know how I knew that.
 20 Q. And when did he stop being the contact?
 21 A. I don't remember when he stopped being --
 22 I presume when he left the company.
 23 Q. When was that?
 24 A. I don't know.

1 Q. Was it part of the merger situation?
 2 A. I don't know. I believe it was before
 3 the merger.
 4 Q. And Mr. Barker worked with Shared
 5 Services, again?
 6 MR. PAHUTSKI: Could I ask you to repeat
 7 that question? I'm sorry.
 8 Q. Did Mr. Barker work for Shared Services?
 9 And really what I mean is his paycheck was issued by
 10 Shared Services.
 11 A. I don't know who paid Jason.
 12 Q. And are you saying that he filled that
 13 capacity, but nobody replaced him when he left?
 14 MR. PAHUTSKI: Objection; that
 15 mischaracterizes the witness's testimony. He didn't
 16 say --
 17 MR. SMALL: It's a question.
 18 A. I said I didn't know, I believe, and I'll
 19 tell you the same thing, I don't know.
 20 Q. Do you know who Kim Twele, T-w-e-l-e, is
 21 A. Kim Twele, yes, I do.
 22 Q. And who is that?
 23 A. She's a contract administrator.
 24 Q. Is she still a contract administrator for

1 DERS?
 2 A. Again, I believe she works for Duke
 3 Energy Shared Services, but I'm not sure.
 4 Q. She is providing services to DERS?
 5 A. She or other contract administrators
 6 would provide services to DERS --
 7 Q. And what is --
 8 A. -- if they need it.
 9 Q. What does a contract administrator do?
 10 A. Administers contracts.
 11 Q. What does that mean?
 12 A. I mean, we have enabling agreements with
 13 counterparties, we have forms that need to be filled
 14 out, and they will maintain those forms and submit
 15 those forms, they'll -- I mean, that's basically what
 16 they do.
 17 Q. What is an enabling agreement?
 18 A. An ISDA is an enabling agreement.
 19 Q. I'm sorry, I didn't --
 20 A. An ISDA.
 21 Q. ISDA. What is an ISDA --
 22 A. I believe it's the International Swap
 23 Dealers Agreement.
 24 Q. That's a trading agreement.

1 A. Right now she buys all of the natural gas
 2 for our gas assets.
 3 Q. And is that purchasing natural gas to be
 4 burned by DE-Ohio's power plants?
 5 A. Yes. She also in her capacity for DERS
 6 did most of the work on the financial statements,
 7 most of the heavy lifting on the financial
 8 statements. She did structuring for various
 9 transactions that the CRS has looked at in the past
 10 and will likely do that kind of structuring for deals
 11 that we'll look at in the future.
 12 Q. What past deals are you referring to?
 13 A. I'm sorry?
 14 Q. I think you were referring to past deals
 15 that then would be done again in the future.
 16 A. Well, for example, I mean the DERS has
 17 looked at participating in retail auctions in states
 18 outside of Ohio. She did a lot of the heavy lifting
 19 around the analysis. She probably -- she did a lot
 20 of the historic pricing analysis to figure out what
 21 our offer was going to be in those auctions.
 22 She did analysis in the Illinois auction.
 23 She, I believe, has done some analysis on other
 24 utilities in Ohio about whether or not there was an

1 A. Yes. EEI is on --
 2 Q. Are these agreements with DERS or some
 3 other entity?
 4 A. They could be for any of those entities.
 5 You were asking me what a contract administrator did,
 6 so I was trying to answer that. In the capacity --
 7 again, I thought their capacity was a Duke Energy
 8 Shared Service employee.
 9 Q. Does DERS have any ISDA, I-S-D-A,
 10 agreements?
 11 A. Not to my knowledge.
 12 Q. So those services would be provided to
 13 one of the other companies.
 14 A. Yeah.
 15 Q. Okay. What does Miss Twele do for DERS?
 16 I notice she's listed on Exhibit 2 --
 17 A. Right.
 18 Q. -- as the person who submitted this.
 19 What capacity was she filling when she submitted
 20 that? Is this one of the forms?
 21 A. Yeah. This would be a form, sure.
 22 Q. Okay. Who is -- you kind of jumped the
 23 gun here. Who is Uma Nanjundan, or what are her
 24 duties?

1 opportunity for us to use the CRS or DERS to
 2 aggregate load in those jurisdictions.
 3 Q. Has DERS participated in any auctions?
 4 A. Have we participated or won any auctions?
 5 Q. First, participation.
 6 A. I believe so.
 7 Q. Which ones?
 8 A. I believe the New Jersey auction.
 9 Q. The BGS auction?
 10 A. Yeah. And I'm not sure if they did the
 11 Illinois auction or not.
 12 Q. And did the DERS, did it gain any
 13 customers or any load through those auctions?
 14 A. Not to -- no.
 15 Q. Let's go on to Exhibit 4.
 16 (EXHIBIT MARKED FOR IDENTIFICATION.)
 17 Q. Now, Exhibit 4 is a letter filed at the
 18 Commission in the certificate case 04-1323, it's
 19 dated August 8th, 2005, received by the Commission
 20 August 9th, 2005. I see Mr. Barker listed there,
 21 was he -- did he have Ms. Nanjundan's position before
 22 her position?
 23 A. No. Again, I mean, you had asked earlier
 24 about the contact person for the --

1 Q. Yes.
 2 A. -- for the CRS or for DERS, and I stated
 3 that it was Jason Barker and, indeed, from this
 4 document it appears to me that he indeed was that
 5 person, and this person -- and he's -- effective
 6 August 9th, 2005, says that Mr. John Deeds will
 7 assume responsibility as the contact person for
 8 Cinergy Retail Sales.
 9 Q. Wasn't the contact person we just spoke
 10 about, wasn't that Uma Nanjundan?
 11 A. We talked about her being the contact
 12 person for the Commission requests.
 13 Q. I see.
 14 A. I think there are various points of
 15 contact, right? I mean, they could contact me as the
 16 president, or they could contact the CEO, Tom
 17 O'Connor.
 18 Q. Let's go back to Exhibit 2.
 19 MR. PAHUTSKI: Excuse me, exhibit which
 20 number, Mr. Small?
 21 Q. Exhibit 2.
 22 A. That's the thick one?
 23 Q. Yes. I'm looking at what's labeled page
 24 2 of the form, it's the third page on your

1 Q. Yes. Which is maybe the reason why we
 2 should stick with DERS --
 3 A. Okay.
 4 Q. -- because it's easily distinguished from
 5 that word that starts with a C. The world of
 6 acronyms.
 7 A. I didn't invent them.
 8 Q. Has DERS provided any services to a
 9 residential customer?
 10 A. We have not.
 11 Q. At any point in time?
 12 A. No. I would say no, not to the best of
 13 my knowledge.
 14 Q. On the form it refers to Exhibit B-1 of
 15 the form, not to be confused with our Exhibit 2 which
 16 is what I've labeled it, Jurisdiction of Operations,
 17 it's labeled as page 15 of the form. Are you there?
 18 A. I believe so. Page 15?
 19 Q. Yes.
 20 A. Yep.
 21 Q. And it references "... qualified to do
 22 business in Ohio, Delaware, Illinois, and New
 23 Jersey." I just want to make sure, are the
 24 operations in those states, did you previously state

1 attachment. Do you know why the Residential box is
 2 marked on this form, and Commercial, Mercantile,
 3 Industrial are not marked?
 4 A. Yes.
 5 Q. Why is that?
 6 A. This is a change, right? And,
 7 previously, we had selected the other boxes,
 8 Commercial, Mercantile, and Industrial, and we didn't
 9 select Residential, and this is a change to say that
 10 we're going to include -- in the text of the letter
 11 it says "This Application also includes the addition
 12 of the Residential class under Section A-10." So
 13 it's basically simply the CRS wants to do business
 14 with residential customers.
 15 Q. And the CRES we're referring to is DERS?
 16 A. Yeah. I'm going to use those
 17 interchangeably as you do.
 18 Q. I've never used the term "CRES."
 19 A. Whatever. Cinergy Retail Sales, right?
 20 Q. Oh, I'm sorry. "CRES" means competitive
 21 retail electric supplier.
 22 A. Fair enough.
 23 Q. So that's a little bit confusing.
 24 A. Okay. Our CRS.

1 what those operations are, which is -- I believe you
 2 said participation, but no customers in New Jersey,
 3 and you didn't know whether there was participation
 4 in the Illinois auction. Does that summarize the
 5 operations in those jurisdictions?
 6 A. Yeah. I mean, this exhibit says that we
 7 are qualified to do business in Ohio, Delaware,
 8 Illinois, and New Jersey.
 9 Q. Right, and I'm asking what business you
 10 actually do in those states.
 11 A. We have no current business in those
 12 states.
 13 Q. No current customers?
 14 A. No, sir.
 15 Q. And no current revenues.
 16 A. No, sir.
 17 Q. Have you ever had customers -- ever had
 18 any revenues? And when I say "you," I mean DERS, its
 19 predecessor CRS.
 20 A. I don't know.
 21 Q. Could you, to the best of your knowledge,
 22 could you give a history of DERS, that is landmarks
 23 in its development and so forth? For instance, its
 24 formation, when did that take place?

FILE

COMPANY EX. 3

42

RECEIVED-DOCKETING DIV

2007 FEB 28 PM 2:47

DE-Ohio Exhibit 3

BEFORE

PUCO

THE PUBLIC UTILITIES COMMISSION OF OHIO

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

SECOND SUPPLEMENTAL TESTIMONY OF

JOHN P. STEFFEN

ON BEHALF OF

DUKE ENERGY OHIO

- Management policies, practices, and organization
- Operating income
- Rate base
- Allocations
- Rate of return
- Rates and tariffs
- Other - Second Supplemental Testimony

202554

February 28, 2007

This is to certify that the images appearing are an accurate reproduction of a case file document in the regular course of business.
 Technician KW Date Processed 2-28-07

000728

1 **INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 A. My name is John P. Steffen. My business address is 139 East Fourth Street,
4 Cincinnati, Ohio 45202.

5 **Q. ARE YOU THE SAME JOHN P. STEFFEN WHO PREVIOUSLY FILED**
6 **TESTIMONY IN THIS PROCEEDING?**

7 A. Yes.

8 **Q. WHAT IS YOUR CURRENT POSITION?**

9 A. Currently, I am an outside consultant hired by Duke Energy Corporation to
10 support various regulatory initiatives. Previously, in these proceedings, I was
11 Vice President, Rates, for Cinergy Services, Inc. (Cinergy Services). Prior to the
12 merger between Cinergy Corp. and Duke Energy Corporation, Cinergy Services
13 provided various administrative services to Cinergy companies. Following the
14 merger between Cinergy Corp. and Duke Energy Corporation in April 2006,
15 Cinergy Services became Duke Energy Shared Services, Inc. I retired from Duke
16 Energy Corporation on May 1, 2006.

17 **Q. WHAT IS THE PURPOSE OF YOUR SECOND SUPPLEMENTAL**
18 **TESTIMONY IN THIS PROCEEDING?**

19 A. The purpose of my Second Supplemental Testimony is to: (1) summarize the
20 procedural history of cases involving Duke Energy Ohio's (DE-Ohio) market
21 based standard service offer (MBSSO) as approved by the Commission in Case
22 No. 03-93-EL-ATA, Case No. 03-2079-EL-AAM, Case No. 03-2080-EL-ATA,
23 and Case No. 03-2081-EL-AAM (Initial MBSSO Cases); (2) summarize my

1 subject to an annual review and hearing in which the Commission performs an
2 audit of expenditures and allows any party to comment regarding the costs
3 charged to consumers.

4 **Q. IS THE IMF A COST-BASED PRICE?**

5 **A.** The IMF is not tied directly to a specific out of pocket expense and it is not a pass
6 through of actual tracked costs. It is a component of the formula for calculating
7 the total market price DE-Ohio is offering and is willing to accept in order to
8 supply consumers and to support its POLR risks and obligations.

9 In the deregulated electric generation environment, market prices are not
10 set using cost-based recovery in the traditional regulatory sense. There is no
11 longer an opportunity to file a rate case for electric generation and receive cost
12 recovery, including a reasonable rate of return. As a supplier of deregulated
13 generation, DE-Ohio is not in the business of simply recovering its costs. A
14 market price offered in any market, whether it is new cars or groceries, inherently
15 includes margin over costs. The same is true with respect to retail electric service.

16 DE-Ohio has the sole obligation to provide POLR service to consumers
17 within its service territory. Accordingly, it must be compensated for the risks
18 inherent in this obligation. The IMF is part of the compensation for this service.
19 It is compensation for the first call dedication of its generation assets to native
20 load consumers and the foregone opportunity to sell that energy and capacity and
21 take advantage of pure retail market prices. The IMF allows DE-Ohio to provide
22 stable prices to its consumers and provides some level of revenue certainty to the
23 Company. Similarly, the IMF provides consumers with a dedicated capacity

1 supply that DE-Ohio cannot contract to a third party, assuring consumers of
2 adequate capacity to maintain system reliability.

3 **Q. PLEASE EXPLAIN THE IMF CHARGE AND ITS DEVELOPMENT.**

4 A. The IMF was previously embedded in the reserve margin component of the
5 Stipulated AAC price of \$52,898,560.

6 The IMF is a non-bypassable component of DE-Ohio's POLR component
7 of its MBSSO. The IMF charge is equal to 4% of little g during 2005 and 2006,
8 and equal to 6% of little g during 2007 and 2008.²⁰ The IMF pricing methodology
9 as percentages of little g are simply the way DE-Ohio proposed to calculate an
10 acceptable dollar figure to compensate DE-Ohio for the first call dedication of
11 generating assets and the opportunity costs of not simply selling its generation into
12 the market at potentially higher prices.

13 **Q. DO YOU BELIEVE THE IMF IS A REASONABLE CHARGE?**

14 A. Yes. The IMF pricing mechanism approved is reasonable and supportable in a
15 number of ways. First, DE-Ohio's proposed IMF is consistent with the
16 Commission's previously stated goals for Rate Stabilization Plans in that the IMF
17 provides revenue stability for DE-Ohio and price certainty for consumers.²¹

18 The IMF was also supported by the evidentiary record in this case. The
19 IMF charge, as included in the Company's Alternative Proposal, would result in
20 projected revenues of approximately \$19.7 million in 2005, and \$30.1 million in

²⁰ *In re. DE-Ohio's MBSSO*, Case no. 03-93-EL-ATA *et al.*, (November 23, 2004) (Entry Rehearing at 8),
citing *In re DP&L's RSP and First Energy's RSP*.

²¹ *In re DE-Ohio's MBSSO*, Case No. 03-93-EL-ATA, *et al.*, (September 29, 2004) Opinion and Order at
15).

1 agreements" is irrelevant to the second and third parts of the three-part
2 reasonableness test., it is, however, relevant to the first part, whether the
3 stipulation was the product of serious bargaining. The Court remanded the matter
4 to the Commission to compel disclosure of the requested information. The Court
5 also stated that upon disclosure, the Commission may, if necessary, decide any
6 issues pertaining to admissibility of that information.

7 **Q. DID DE-OHIO HAVE ANY AGREEMENTS WITH PARTIES TO THE**
8 **MBSO PROCEEDING WHICH WERE RESPONSIVE TO THE OCC'S**
9 **REQUEST?**

10 A. Yes, as I previously explained there was one such agreement and it has been
11 produced.

12 **Q. PLEASE EXPLAIN THE AGREEMENT.**

13 A. DE-Ohio has an agreement with the City of Cincinnati. The agreement amended
14 previous agreements DE-Ohio had with the City of Cincinnati and consisted of a
15 payment of \$1,000,000 as consideration for the amendments. In return, the City
16 agreed to withdraw from the MBSO proceeding. DE-Ohio provided OCC with a
17 copy of this agreement. This agreement was actually available to the parties at all
18 times because Cincinnati City Council had to approve the agreement by vote,
19 which is a matter of public record.

20 **Q. DID DE-OHIO ENTER INTO ANY OTHER AGREEMENTS WITH ANY**
21 **OTHER PARTY TO THE MBSO PROCEEDINGS?**

22 A. No.

FILE

RECEIVED-DOCKETING DIV.

2004 APR 15 PM 3: 15

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

PUCO

In the Matter of the Application)
of the Cincinnati Gas & Electric)
Company to Modify its Non-)
Residential Generation Rates to)
Provide for Market-Based) Case No. 03-93-EL-ATA
Standard Service Offer Pricing)
and to Establish a Pilot)
Alternative Competitively-Bid)
Service Rate Option Subsequent)
to Market Development Period)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Certain Costs Associated) Case No. 03-2079-EL-AAM
With The Midwest Independent)
Transmission System Operator)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Capital Investment in its) Case No. 03-2081-EL-AAM
Electric Transmission And Distribution) Case No. 03-2080-EL-ATA
System And to Establish a Capital)
Investment Reliability Rider to be)
Effective After the Market Development)
Period)

DIRECT TESTIMONY OF

JAMES E. ZIOLKOWSKI

ON BEHALF OF

THE CINCINNATI GAS & ELECTRIC COMPANY

This is to certify that the images appearing are an
accurate and complete reproduction of a case file
document delivered in the regular course of business.
Technician JZ Date Processed 4-15-04

123668

April 15, 2004

000732

- Management policies, practices, and organization
- Operating income
- Rate base
- Allocations
- Rate of return
- Rates and tariffs
- Other

JAMES E. ZIOLKOWSKI DIRECT

-1-

123668

000733

TABLE OF CONTENTS

<u>DESCRIPTION OF TESTIMONY</u>	<u>TESTIMONY PAGES</u>
Introduction.....	1 - 3
Modifications to CG&B'S Electric Tariff.....	3 - 8
Changes to CG&E'S Certified Supplier Tariff.....	8 - 9
Conclusion	9 - 10
Appendix:	
Attachment JEZ-1	
Attachment JEZ-2	

JAMES E. ZIOLKOWSKI DIRECT

- iii -

123668

000735

1 **I. INTRODUCTION**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 **A.** My name is James E. Ziolkowski. My business address is 139 East Fourth Street,
4 Cincinnati, Ohio 45202.

5 **Q. WHAT IS YOUR CURRENT POSITION?**

6 **A.** I am a Rate Coordinator in Cinergy Services, Inc.'s Rate Department. Cinergy
7 Services, Inc. is a service company formed under the Public Utility Holding
8 Company Act of 1935, as amended (PUHCA) to provide centralized services to
9 the Cinergy Corp. family of companies, including The Cincinnati Gas & Electric
10 Company (CG&E).

11 **Q. WILL YOU PLEASE SUMMARIZE YOUR EDUCATION AND**
12 **PROFESSIONAL QUALIFICATIONS?**

13 **A.** I received a Bachelor of Science degree in Mechanical Engineering from the U.S.
14 Naval Academy in 1979, and a Master of Business Administration degree from
15 Miami University in 1988. I am also a licensed Professional Engineer in the State
16 of Ohio.

17 After graduating from the Naval Academy, I attended the Naval Nuclear
18 Power School and other follow-on schools. I served as a nuclear-trained officer
19 on various ships in the U.S. Navy through 1986. From 1988 through 1990, I
20 worked for Mobil Oil Corporation as a Marine Marketing Representative in the
21 New York City area.

JAMES E. ZIOLKOWSKI DIRECT

-1-

000736

1 I joined CG&E in 1990 as a Product Applications Engineer, in which
2 capacity I designed and managed some of CG&E's demand side management
3 programs including Energy Audits and Interruptible Rates. From 1996 until 1998,
4 I was an Account Engineer, and worked with large consumers to resolve various
5 service-related issues, particularly in the areas of billing, metering, and demand
6 management. In 1998 I joined Cinergy Services, Inc.'s Rate Department, where I
7 focus on rate design and tariff administration. I was significantly involved with
8 the unbundling and design of CG&E's current retail electric rates.

9 **Q. PLEASE SUMMARIZE YOUR DUTIES AS RATE COORDINATOR.**

10 **A.** As a member of the Rate Department, I address primarily rate design, tariff,
11 billing, and revenue reporting issues. I also prepare filings to modify charges and
12 terms in CG&E's retail electric tariff, and develop rates for new services. During
13 major rate cases, I help with the design of the new base rates. I frequently work
14 with CG&E's consumer contact and billing personnel to answer rate-related
15 questions, and to apply the retail electric tariff to specific situations.
16 Occasionally, I meet with consumers and Company representatives to explain
17 rates or provide rate training. I also prepare reports that are required by
18 regulatory authorities.

19 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY IN THIS**
20 **PROCEEDING?**

21 **A.** The purpose of my testimony is to describe the changes to CG&E's filed tariffs
22 resulting from the implementation of its proposed Competitive Market Option

JAMES E. ZIOLKOWSKI DIRECT

-2-

123668

000737

1 Market-Based Standard Service Offer (CMO MBSSO). Specifically, I will
2 discuss: (1) how CG&E's proposed CMO MBSSO is represented in, and
3 otherwise affects, CG&E's retail electric tariff, P.U.C.O. Electric No. 19 (Retail
4 Electric Tariff); and (2) changes to CG&E's Certified Supplier Tariff, P.U.C.O.
5 Electric No. 20.

6 **II. MODIFICATIONS TO CG&E'S ELECTRIC TARIFF**

7 **Q. PLEASE SUMMARIZE THE CHANGES CG&E'S PROPOSED CMO**
8 **MBSSO WILL HAVE ON CG&E'S RETAIL ELECTRIC TARIFF.**

9 A. First, implementation of CG&E's proposed CMO MBSSO affects Section III,
10 Customer Choice Enrollment and Participation Guidelines, Sheet No. 22.2.
11 Second, implementation of CG&E's proposed CMO MBSSO affects existing rate
12 schedules, as listed in Attachment JEZ-1, attached. Third, implementation of
13 CG&E's proposed CMO MBSSO requires the development of new riders, as
14 listed in Attachment JEZ-2, attached.

15 **Q. PLEASE DESCRIBE THE CHANGES IN THE RETAIL ELECTRIC**
16 **TARIFF, SECTION III, CUSTOMER CHOICE ENROLLMENT AND**
17 **PARTICIPATION GUIDELINES, SHEET NO. 22.2.**

18 A. CG&E has proposed changes to Section III, Customer Choice Enrollment and
19 Participation Guidelines in recognition of the fact that, with approval of its
20 Application, CG&E may choose to end the market development period (MDP) for
21 one or more classes. Thus, there may be some consumers for whom the MDP has
22 not yet ended, and some for whom the MDP has ended. Section III required

JAMES E. ZIOLKOWSKI DIRECT

-3-

123668

000738

1 clarification in several paragraphs to recognize this situation. For example,
2 CG&E's minimum stay rules would no longer apply to consumers whose MDP
3 has ended, since these consumers will be subject to the Market True-up provision
4 of CG&E's CMO MBSSO.

5 CG&E also clarified its requirements, in Section III, associated with
6 dedicated phone lines for interval meters.

7 **Q. PLEASE BRIEFLY DESCRIBE THE CHANGES TO THE EXISTING**
8 **RATE SCHEDULES.**

9 **A.** Generally, the changes to CG&E's existing rate schedules require the inclusion of
10 new riders to effect CMO MBSSO pricing. Additionally, several of the rate
11 schedules contain additional metering requirements. Further, CG&E has included
12 a provision in its existing rate schedules providing for recovery of additional costs
13 imposed by FERC's proposed Standard Market Design regulations in the event
14 that FERC promulgates such regulations.

15 **Q. PLEASE BRIEFLY DESCRIBE EACH OF THE NEW RIDERS**
16 **PROPOSED BY CG&E TO IMPLEMENT THE CMO MBSSO.**

17 **A.** CG&E has proposed four Standard Offer Electricity Pricing riders. Rider SEP-
18 FPY - Standard Offer Electricity Pricing, Fixed Annual Price Option (Rider SEP-
19 FPY) offers consumers a single price per kWh for the term of a one year contract.
20 This option will likely be chosen by most small commercial and industrial
21 consumers, and will be the default option for those consumers served under a rate

JAMES E. ZIOLKOWSKI DIRECT

-4-

123668

000739

1 schedule other than CG&E's Rate TS rate schedule who do not positively select a
2 standard offer electricity pricing option at the end of the MDP.

3 Rider SEP-FPV – Standard Offer Electricity Pricing, Variable Term, Fixed
4 Price Option (Rider SEP-FPV) offers consumers a single price per kWh for a
5 mutually agreed upon term. This option is targeted to those consumers who want
6 to lock in an energy price for other than a one year period.

7 Rider SEP-HP – Standard Offer Electricity Pricing, Hourly Price Option
8 (Rider SEP-HP) offers consumers a price per kWh that varies with each hour that
9 energy is taken. CG&E will provide internet-based access to day-ahead hourly
10 price quotes such that consumers can determine the retail price of each hour of the
11 next day. This option is targeted to those consumers who have the ability to shift
12 large portions of their load to off-peak hours to gain the benefits of lower off-peak
13 pricing, and will be the default CMO MBSSO option for those consumers served
14 under CG&E's Rate TS rate schedule who do not positively select a Standard
15 Offer Electricity Pricing option.

16 Rider SEP-HPF – Standard Offer Electricity Pricing, Hourly Price and
17 Forward Option (Rider SEP-HPF), provides consumers a fixed price per kWh for
18 a portion of their load, while providing hourly prices for the remainder. This
19 option, which is similar to CG&E's existing Rate RTP – Real Time Pricing, is
20 targeted to consumers who can shift a portion of their load to off-peak hours to
21 take advantage of lower off-peak pricing but who desire a fixed price for the
22 remainder of their load.

JAMES E. ZIOLKOWSKI DIRECT

-5-

123668

000740

1 Each of these Standard Offer Electricity Pricing riders apply all or some of
2 the retail pricing components described in the Direct Testimony of Dr. Richard G.
3 Stevie.

4 In addition to these Standard Offer Electricity Pricing riders, CG&E has
5 proposed Rider POLR - Provider of Last Resort Tracker, designed to recover
6 CG&E's costs associated with standing ready to serve all load in its service
7 territory at all times during a fully competitive market, and Rider SSO - Standard
8 Service Offer Market Price Tracker, which is designed as a hedge against super-
9 peak wholesale market prices. Finally, CG&E has proposed Rider CB -
10 Competitively Bid Generation Option, which represents CG&E's proposed pilot
11 competitive bid process (Pilot CBP) discussed in the Direct Testimony of Dr.
12 Richard G. Stevie, and the Direct Testimony of Judah L. Rose.

13 **Q. PLEASE DESCRIBE THE PRICING COMPONENTS APPLICABLE TO**
14 **EACH OF THE STANDARD OFFER ELECTRICITY PRICING RIDERS.**

15 **A. CG&E's Rider SEP-FPY and Rider SEP-FPV apply all of the pricing components**
16 **described by Dr. Stevie. That is, these riders compute the retail market price by**
17 **beginning with the load-weighted wholesale market indices, adjusted for the super**
18 **peaks as described by Dr. Stevie, and apply the appropriate Covariance Factor, the**
19 **Ask Adder (4%), the Loss Adjustment Factor (7%), the Supply Management Fee**
20 **(10%), the Operating Risk Adjustment (13.4%) and the Adjustment for**
21 **Uncollectibles (1.5%).**

1 CG&E's Rider SEP-HP applies all of the pricing components described by
2 Dr. Stevie except the Supply Management Fee. This is because consumers
3 assuming the risk of hourly pricing remove this risk from CG&E, so CG&E does
4 not require compensation for this risk element from these consumers. Incidentally,
5 Rider SEP-HP also assesses a Program Fee to compensate CG&E for maintaining
6 the internet-based hourly price reporting service.

7 CG&E's Rider SEP-HPF combines elements of both Rider SEP-FPY and
8 SEP-HP. That is, for the portion of the consumer's load that is priced at a fixed
9 amount per kWh, all of the pricing components applied to Rider SEP-FPY are
10 applied. For the portion of the consumer's load that is priced hourly, the same
11 pricing components used in computing the Rider SEP-HP price are used. Thus,
12 computation of fixed prices is performed consistently across riders, and
13 computation of hourly prices is performed consistently across riders.

14 Additionally, Rider SEP-FPY, Rider SEP-FPV and Rider SEP-HPF also
15 contain the Market Price True-up component described by Dr. Stevie. However,
16 Rider SEP-HPF only applies the Market Price True-up to the portion of the
17 consumer's load subject to fixed pricing since that is the amount of load that
18 CG&E would hedge and must be reconciled when a consumer terminates his
19 CMO MBSSO contract early. The Market Price True-up does not apply to Rider
20 SEP-HP since consumers electing this option are taking power on a pay-as-you-go
21 hourly basis, and thus have not required CG&E to hedge their loads.

JAMES E. ZIOLKOWSKI DIRECT

-7-

123668

000742

1 Q. PLEASE DESCRIBE FURTHER THE CHANGES TO CG&E'S
2 METERING REQUIREMENTS.

3 A. CG&E currently requires consumers with monthly demand of 500 kW or greater
4 to install interval meters. With this Application, CG&E seeks to require that
5 consumers having new interval meters installed also install dedicated landline
6 telephone lines. CG&E has experienced difficulty in the past with wireless
7 connections and the timely collection of interval meter data when collected
8 manually, and thus seeks to mitigate these difficulties with future installations.

9 Additionally, consumers with monthly demand less than 500 kW who
10 choose one of CG&E's hourly priced CMO MBSSO options will be required to
11 have interval meters installed. These consumers will be charged for such
12 installation if they do not already have an interval meter in place. An interval
13 meter is necessary for the hourly price options so that CG&E can measure the
14 consumer's energy utilization on an hourly basis. CG&E will also require these
15 consumers to install dedicated landline telephone lines for the reasons discussed
16 above.

17 III. CHANGES TO CG&E'S CERTIFIED SUPPLIER TARIFF

18 Q. PLEASE BRIEFLY DESCRIBE THE CHANGES TO CG&E'S
19 CERTIFIED SUPPLIER TARIFF.

20 A. With the implementation of CG&E's CMO MBSSO, CG&E has proposed
21 changes to its Certified Supplier Tariff to address generally two issues. First,
22 CG&E has added some language to accommodate CG&E's proposed Pilot CBP.

1 Second, CG&E has added some language in recognition of the dual state of affairs
2 that will likely occur, as I described earlier, with some consumers on CMO
3 MBSSO pricing and some on unbundled generation pricing, depending on when
4 CG&E ends their respective MDPs.

5 If the Commission approves CG&E's ERRSP rather than its CMO
6 MBSSO, CG&E proposes to extend the minimum stay rules, as described by
7 CG&E witness William L. Greene, resulting in a change in CG&E's Certified
8 Supplier Tariff.

9 IV. CONCLUSION

10 Q. WHAT CHANGES WILL CONSUMERS OBSERVE ON THEIR BILLS AS
11 A RESULT OF CG&E'S CMO MBSSO PRICING?

12 A. CG&E's CMO MBSSO pricing will only affect consumers in those classes for
13 which CG&E has ended the MDP, and will depend on whether and when a
14 consumer has switched to a Competitive Retail Electric Service (CRES) provider.
15 CG&E's Stipulation and Recommendation in its Electric Transition Plan (ETP)
16 proceeding addressed various consumer switching scenarios and how charges
17 would be assessed under these scenarios, as follows. First, consumers who have
18 not switched to a CRES provider at the end of the MDP will begin to be assessed
19 the applicable CMO MBSSO price for their generation service provided by
20 CG&E rather than CG&E's frozen unbundled generation charge. These
21 consumers will also begin to be assessed a charge under CG&E's Rider RTC.
22 Rider RTC is designed to recover CG&E's regulatory transition costs, those costs

JAMES E. ZIOLKOWSKI DIRECT

-9-

123668

000744

1 associated with transitioning to the new competitive retail electric environment in
2 Ohio, and was approved in CG&E's ETP proceeding.

3 Second, those consumers who have not switched to a CRES provider at
4 the end of the MDP, but later switch to a CRES provider, will not be assessed any
5 generation charge from CG&E, but will rather see this charge assessed solely by
6 their CRES provider. These consumers will continue to be assessed charges under
7 Rider RTC.

8 Finally, those consumers who have already switched to a CRES provider
9 before the end of their MDP will see no changes to how they are charged through
10 December 31, 2005. That is, these consumers will be assessed CG&E's frozen
11 unbundled generation charge, and receive the applicable shopping credit under
12 CG&E's Rider SC. Beginning January 1, 2006, these consumers will no longer
13 receive a generation charge or a shopping credit from CG&E, and will begin to be
14 assessed the charges under Rider RTC.

15 **Q. DID YOU PROVIDE ANY RATE INFORMATION TO OTHER CG&E**
16 **WITNESSES IN THIS PROCEEDING?**

17 **A.** Yes, I provided Mr. Rose with CG&E's average generation rate per kWh,
18 assuming various load characteristics, as well as "little g," for a number of CG&E
19 rate schedules. I also provided Mr. Rose with "little g" for each of Ohio's other
20 investor-owned utilities for similar rate schedules.

21 **Q. DOES THIS COMPLETE YOUR DIRECT TESTIMONY?**

22 **A.** Yes.
23

Attachment JEZ-1

The following are the unbundled competitive retail electric generation rates that CG&E seeks to change in its Retail Electric Tariff, P.U.C.O. Electric No. 19:

- Rate DS, Service At Secondary Distribution Voltage, Sheet No. 40.4
- Rate GS-FL, Optional Unmetered General Service Rate For Small Fixed Loads, Sheet No. 41.4
- Rate EH, Optional Rate For Electric Space Heating, Sheet No. 42.4
- Rate DM, Secondary Distribution Service - Small, Sheet No. 43.4
- Rate DP, Service At Primary Distribution Voltage, Sheet No. 44.4
- Rate TS, Service At Transmission Voltage, Sheet No. 50.4
- Rate SL, Street Lighting Service, Sheet No. 60.4
- Rate TL, Traffic Lighting Service, Sheet No. 61.4
- Rate OL, Outdoor Lighting Service, Sheet No. 62.4
- Rate NSU, Street Lighting Service For Non-Standard Units, Sheet No. 63.4
- Rate NSP, Private Outdoor Lighting For Non-Standard Units, Sheet No. 64.4
- Rate SC, Street Lighting Service – Consumer Owned, Sheet No. 65.4
- Rate SE, Street Lighting Service – Overhead Equivalent, Sheet No. 66.4
- Rate UOLS, Unmetered Outdoor Lighting Electric Service, Sheet No. 67.4.
- Rate MSC, Meter Service Charges, Sheet No. 96

000746

Attachment JEZ-2

The following are the new tariff schedules CG&E proposes to add to its Retail Electric Tariff, P.U.C.O Tariff No. 19:

- Rider SEP-FPY, Standard Offer Electricity Pricing – Fixed Annual Price Option, Sheet No. XX
- Rider SEP-FPV, Standard Offer Electricity Pricing – Variable Term Fixed Price Option, Sheet No. XX
- Rider SEP-HP, Standard Offer Electricity Pricing – Hourly Price Option, Sheet No. XX
- Rider SEP-HPF, Standard Offer Electricity Pricing – Hourly Price and Forward Option, Sheet No. XX
- Rider POLR, Provider Of Last Resort Tracker, Sheet No. XX
- Rider SSO, Standard Service Offer Market Price Tracker, Sheet No. XX
- Rider CB, Competitively Bid Generation Option, Sheet No. XX.

000747

FILE

CONFIDENTIAL SETTLEMENT DOCUMENT

RECEIVED-DOCKETING DIV

2004 MAY 19 PM 5:12

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

PUCO

In the Matter of the Application)
of The Cincinnati Gas & Electric)
Company to Modify its Non-)
Residential Generation Rates to)
Provide for Market-Based) Case No. 03-93-EL-ATA
Standard Service Offer Pricing)
and to Establish a Pilot)
Alternative Competitively-Bid)
Service Rate Option Subsequent)
to Market Development Period)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Certain Costs Associated) Case No. 03-2079-EL-AAM
With The Midwest Independent)
Transmission System Operator)

In the Matter of the Application of The)
Cincinnati Gas & Electric Company for)
Authority to Modify Current Accounting)
Procedures for Capital Investment in its) Case No. 03-2081-EL-AAM
Electric Transmission And Distribution) Case No. 03-2080-EL-ATA
System And to Establish a Capital)
Investment Reliability Rider to be)
Effective After the Market Development)
Period)

STIPULATION AND RECOMMENDATION

Rule 4901-1-30, Ohio Administrative Code (O. A. C.) provides that any two or more parties to a proceeding may enter into a written stipulation covering the issues presented in such a proceeding. The purpose of this document is to set forth the understanding and

000748

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business Technician And Date Processed 5/20/04

agreement of the Parties who have signed below (Parties)¹ and to recommend that the Public Utilities Commission of Ohio (Commission) approve and adopt this Stipulation and Recommendation (Stipulation), which resolves all of the issues raised by The Cincinnati Gas & Electric Company's applications in these cases.

This Stipulation is supported by adequate data and information; represents a just and reasonable resolution of the issues raised in these proceedings; violates no regulatory principle or precedent; and is the product of lengthy, serious bargaining among knowledgeable and capable Parties in a cooperative process, encouraged by this Commission and undertaken by the Parties representing a wide range of interests, including the Commission's Staff,² to resolve the aforementioned issues. While this Stipulation is not binding on the Commission, it is entitled to careful consideration by the Commission. For purposes of resolving certain issues raised by these proceedings, the Parties stipulate, agree and recommend as set forth below.

Except for dispute resolution purposes, neither this Stipulation, nor the information and data contained therein or attached, shall be

¹ The support of the signatories to this Stipulation, does not affect, and is not binding upon, their position in any other case. The signatories retain all legal rights to participate and litigate in other proceedings. Further, the support of the Industrial Energy Users-Ohio (IEU-Ohio) as a signatory to this Stipulation, does not affect, and is not binding upon, its position in any other case. IEU-Ohio's support is, practically speaking, guided by the relatively small size of the individual member accounts affected by the settlement and shall not be construed or applied to indicate IEU-Ohio's views on settlement packages or litigation positions in other cases involving larger and more energy intensive manufacturing operations.

² Staff will be considered a party for the purpose of entering into this Stipulation by virtue of O.A.C. Rule 4901-1-10(c).

cited as precedent in any future proceeding for or against any Party, or the Commission itself. This Stipulation and Recommendation is a reasonable compromise involving a balancing of competing positions, and it does not necessarily reflect the position which one or more of the Parties would have taken if these issues had been fully litigated.

This Stipulation is expressly conditioned upon its adoption by the Commission, in its entirety and without modification. Should the Commission reject or modify all or any part of this Stipulation or impose additional conditions or requirements upon the Parties, the Parties shall have the right, within 30 days of issuance of the Commission's order, to either file an application for rehearing. Upon the Commission's issuance of an Entry on Rehearing that does not adopt the Stipulation in its entirety without modification, any Party may terminate and withdraw from the Stipulation by filing a notice with the Commission within 30 days of the Commission's order on rehearing. Upon such notice of termination or withdrawal by any Party, pursuant to the above provisions, the Stipulation shall immediately become null and void.

All the Signatory Parties fully support this Stipulation and urge the Commission to accept and approve the terms hereof.

WHEREAS, all of the related issues and concerns raised by the Parties have been addressed in the substantive provisions of this Stipulation, and reflect, as a result of such discussions and compromises by the Parties, an overall reasonable resolution of all such issues. This

Stipulation is the product of the discussions and negotiations of the Parties, and is not intended to reflect the views or proposals which any individual party may have advanced acting unilaterally. Accordingly, this Stipulation represents an accommodation of the diverse interests represented by the Parties, and is entitled to careful consideration by the Commission;

WHEREAS, this Stipulation represents a serious compromise of complex issues and involves substantial benefits that would not otherwise have been achievable; and

WHEREAS, the Parties believe that the agreements herein represent a fair and reasonable solution to the issues raised in these proceedings designed to set the market-based standard service offer price for competitive retail electric service after the end of the market development period through December 31, 2008;

NOW, THEREFORE, the Parties stipulate, agree and recommend that the Commission make the following findings and issue its Opinion and Order in these proceedings in accordance with the following:

1. The Parties agree that the market development period ends for non-residential consumers on December 31, 2004.
2. The Parties agree that the market development period ends for residential consumers on December 31, 2005.
3. The Parties agree upon a non-by-passable Provider of Last Resort charge made up of two components: (1) the rate stabilization

charge, as described in paragraph four (4) of this Stipulation; and (2) an annually adjusted component for maintaining adequate capacity reserves and to recover costs associated with homeland security, taxes, environmental compliance, and emission allowances. The Provider of Last Resort charge shall be effective for non-residential consumers beginning January 1, 2005, and residential consumers beginning January 1, 2006. CG&E shall implement the annually adjusted component of the Provider of Last Resort charge for all consumers beginning January 1, 2005, at its annual option through: (1) an automatic annual increase of 6% of little g; or (2) an increase of 8% of little g that CG&E must demonstrate by documenting actual costs for homeland security, taxes, environmental compliance, and emission allowances. Increases to the annually adjusted component of the Provider of Last Resort charge are cumulative. CG&E shall, however, waive collection of the annually adjusted component of the Provider of Last Resort charge for residential consumers in 2005, and calculate the charge effective January 1, 2006, as if CG&E had instituted an increase of 5% of little g in 2005. Further, CG&E shall limit the incremental annual increase for residential consumers to 6% effective January 1, 2006, to no more than 7% effective January 1, 2007, and to no more than 8% effective January 1, 2008. If, in any year, CG&E elects option two (2), it

shall demonstrate annual and cumulative costs above the baseline of costs included in CG&E's unbundled rates approved by the Commission in Case No. 99-1658-EL-ETP for the calendar year 2000 and the calculation of such charges and costs shall be subject to Staff audit and verification. Cost recovery for reserve capacity shall be subject to the limits described in this paragraph three (3) and recovered at the formula rate set forth at page 6 of the attached Stipulation Exhibit 1. CG&E hereby elects option two (2) for 2005. The Parties agree that the schedules attached as Stipulation Exhibit 1 demonstrate that CG&E has actual costs in excess of 8% of little g and therefore, may recover 8% of little g as the annually adjusted component of the Provider of Last Resort charge from non-residential consumers beginning January 1, 2005.

4. The Parties agree upon a non-by-passable rate stabilization charge (RSC) as set forth in Stipulation Exhibit 3, effective January 1, 2005, for all non-residential consumers, and effective January 1, 2006, for all residential consumers, as a component of the Provider of Last Resort charge, except that such charge will be an avoidable component of the price to compare for the first 25% of load in each consumer class to switch to a competitive retail electric service provider or governmental aggregator subject to the following conditions:

- A. The ability to bypass the Rate Stabilization Charge component of the Provider of Last Resort Charge is effective January 1, 2005, for all non-residential consumers (except shopping consumers defined in paragraph 11, who retain their shopping credit through December 31, 2005, and pay their applicable unbundled generation rate approved by the Commission in Case No. 99-1658-EL-ETP, which includes the Regulatory Transition Charge and Rate Stabilization Charge component of the Provider of Last Resort Charge, and is effective January 1, 2006, for all residential consumers; and
- B. The first 25% of eligible load, by consumer rate class, to switch to a competitive retail electric service provider shall not pay the rate stabilization charge. All consumers in the remaining 75% of load, by consumer rate class, shall pay the rate stabilization charge. CG&E shall calculate 25% of the load by consumer class in the same manner as it calculates switched load pursuant to its transition plan stipulation approved by the Commission in Case No 99-1658-EL-ETP; and
- C. CG&E shall establish and maintain a queue of switched consumers by load, effective January 1, 2005, such that as the load of one consumer returns to CG&E's market-based

standard service offer rate the applicable load of the next consumer in the queue shall move into the first 25% of switched load in the applicable consumer class, in order, until 25% has been achieved; and

- D. To qualify to by-pass the rate stabilization charge, a non-residential consumer must enter a contract with a credit worthy CRES provider to provide firm generation service through December 31, 2008, or a non-residential consumer may provide CG&E an assurance that it will purchase competitive retail electric generation service from a competitive retail electric service provider by signing an agreement with CG&E to return to CG&E only at (1) the highest purchase power costs incurred by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month; or (2) the highest cost generation dispatched by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month. If a non-residential consumer provides a contract, such contract must satisfy the full capacity, energy, and transmission requirements associated with the consumer. The applicable non-residential consumer must provide a minimum of 90-days notice to CG&E of the effective date of the contract, and may provide notice to CG&E beginning

October 1, 2004. The applicable non-residential consumer must provide CG&E evidence of the required contract containing all of the terms specified above, at the time of notice. All loads of consumers seeking to avoid the rate stabilization charge must be in the first 25% of the load of the applicable consumer class at the time that contract notice is given to CG&E. All consumers, including those already switched, may give such notice and shall be placed in the queue for avoidance of the rate stabilization charge at the time notice is given. To calculate 25% of the load by consumer class CG&E shall count all switched consumers receiving shopping credits and consumers having given the required notice and with the required contract. Consumers that present CG&E with an acceptable contract as described above, must sign a contract with CG&E agreeing that if their contracting CRES provider defaults the consumer may only return to service from CG&E at the market rate, or, if no generation is available, be subject to disconnection. Such consumers waive their statutory right to Provider of Last Resort service. No human needs or public welfare consumer, as that term is defined by the Commission in Case No. 85-800-GA-COI, shall be subject to the disconnection requirements contained herein. Human needs and public

welfare consumers include, but are not limited to, hospitals and schools. The market rate shall vary monthly and be the higher of: (1) the highest purchase power costs incurred by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month; or (2) the highest cost generation dispatched by CG&E or by any affiliate to serve any of CG&E's consumers during the applicable calendar month. Each month CG&E shall determine the applicable market rate for each consumer who shall pay that rate until they switch to a competitive retail electric service provider or December 31, 2008, whichever is sooner.

- E. None of the restrictions or requirements set forth in Paragraph 4(D) of this Stipulation shall apply to residential consumers, other than any applicable tariffed minimum stay or exit fee provisions. Residential consumers may bypass the Rate Stabilization Charge if they are in the first 25% of residential load as determined by order and receipt by CG&E of a proper Direct Access Service Request (DASR). DASRs for residential consumers served under existing contracts with a competitive retail electric service provider as of January 1, 2006 shall be considered received as of their original receipt date. Residential consumers returning to CG&E due to the default of their contracting competitive retail electric service

provider or upon expiration of their contract shall be served at CG&E's market-based standard service offer rate.

5. Subject to Federal Energy Regulatory Commission (FERC) approval of the proposed Midwest Independent Transmission System Operator (MISO) Day 2 tariffs, and on-going FERC regulation, load-serving entities may rely upon CG&E's reserve capacity to meet their reserve capacity (but not energy) requirements for loads served within CG&E's Certified Service Territory.³ If the FERC approves the proposed MISO tariffs with substantial modification relevant to this provision, the parties agree to work in good faith to implement this provision. This Stipulation shall not constitute a state requirement for reserve capacity as defined by the proposed MISO day two tariffs at proposed Sheet No. 816, FERC Electric Tariff, Third Revised Volume No. 1. Each load-serving entity shall remain responsible for its energy purchases, procurement of ancillary services, and East Central Area Reliability Coordination Agreement reserve requirements.⁴
6. The Parties agree that CG&E may establish accounting deferrals representing the difference between CG&E's current revenue

³ It is the parties intent that this provision of the stipulation shall constitute a contract through which market participants may rely upon CG&E's reserve capacity to ensure compliance with an RTO's or state's reliability obligations, as defined by the proposed MISO day 2 tariffs at FERC Docket No. ER04-691, proposed Sheet No. 813, FERC Electric Tariff, Third Revised Volume No. 1.

⁴ Original Sheet 810, Section 68 (Compliance with Existing State and Reliability Resource Organization Requirements), Module E (Resource Adequacy) of the MISO's filed Energy Markets Tariff (EMT). The East Central Area Reliability Coordination Agreement Document No. 2, Daily Operating Reserve.

requirement on the net capital investment related to CG&E's distribution business less the revenue requirement on its capital investment related to CG&E's electric distribution business approved by the Commission in Case No. 92-1464-EL-AIR, from July 1, 2004, through December 31, 2005. CG&E shall implement a rider for recovery of the accounting deferrals, effective January 1, 2006, and amortized over five (5) years. The accounting deferrals are set forth in the attached Stipulation Exhibit 2, and will be supported by the Company's filings in Case No. 04-680-EL-AIR. Stipulation Exhibit 2 shall set the amount of deferrals for the period of July 1, 2004 through December 31, 2004. CG&E shall update the amount of deferrals on Stipulation Exhibit 2 to be established and recovered for the period of January 1, 2005 through December 31, 2005 pursuant to the distribution rate case to be filed in 2005. The Parties hereby recommend that the Commission approve the accounting deferrals in this case. The Parties further recommend that the Commission approve a rate design for the recovery of the deferrals in CG&E's next electric distribution base rate case.

7. The Parties agree that CG&E will withdraw its pending distribution base rate case, Case No. 04-680-EL-AIR; will file a distribution base rate case with rates to be effective January 1, 2006; and that

increased distribution rates shall not be effective before January 1, 2006.

8. The Parties agree that CG&E's market-based standard service offer shall consist of two components, a price to compare component and a Provider of Last Resort component. The price to compare represents that portion of the market-based standard service offer that consumers switching to a competitive retail electric service provider may avoid paying to CG&E. CG&E shall set the price to compare component of its market-based standard service offer, as set forth in Column E of the attached Stipulation Exhibit 3, plus fuel and economy power purchases. The rate stabilization charge shall be part of the price to compare for the first 25% of switched load by consumer class, as set forth in paragraph 4 above, and a component of the Provider of Last Resort charge for the remaining 75% of switched load by consumer class. The Transmission cost riders described below shall be charged only to CG&E's market-based standard service offer consumers and are therefore, part of the price to compare.
9. Before December 31, 2004, CG&E shall establish a tariff applicable to first 25% of residential load to purchase competitive retail electric generation service from a competitive retail electric service provider and to residential consumers served by competitive retail electric service providers not affiliated with CG&E, such that the

applicable residential consumers receive a bill credit per kwh. The bill credits shall be limited to a total of no more than \$ 7,000,000.00 for the period of January 1, 2006, through December 31, 2008, and no more than \$3,000,000 in any calendar year. ⁵

10. The Parties agree that CG&E shall establish transmission cost riders for non-residential consumers beginning January 1, 2005, and residential consumers beginning January 1, 2006, to recover as a pass-through charge, all Midwest Independent Transmission System Operator and Federal Energy Regulatory Commission approved transmission and ancillary service rates and charges. The first rider shall recover transmission and ancillary service costs including, but not limited to, all tariffed charges incurred by CG&E on behalf of its retail consumers under the applicable Open Access Transmission Tariff. These Open Access Transmission Tariff charges currently include the Midwest Independent Transmission System Operator's Schedule 9 - Network Integration Service, Schedule 10 - Administrative Adder, Schedule 10 - FERC, and Schedule 18 - Sub-Regional Rate Adjustment, as well as Cinergy's Open Access Transmission Tariff ancillary service charges. When the Midwest Independent Transmission System Operator's Day 2 markets become effective, it will implement Schedule 16 - Financial Transmission Rights Administrative

⁵ CG&E agrees to work in good faith with the parties to draft and implement tariff language establishing the credit mechanism in Stipulation paragraph nine (9) prior to December 31, 2004.

Service Cost Recovery Adder, and Schedule 17 – Energy Market Support Administrative Service Cost Recovery Adder. All Midwest Independent Transmission System Operator's tariffed charges will be included in these riders. The second rider will recover, through a tracking mechanism, all direct and indirect transmission congestion costs, other wholesale energy market costs and congestion-related charges that CG&E pays to a third party, including the Midwest Independent Transmission System Operator, for CG&E to provide transmission service for standard service offer consumers, including energy costs, congestion costs, losses, and financial transmission rights (FTR) costs (while crediting back FTR revenues). The tracker will also recover MISO costs not covered by a schedule, such as uplift costs. These costs, which are not currently known or measurable, will be assessed to CG&E by the applicable RTO, or otherwise approved by FERC. When such costs are first incurred, CG&E will defer them until it can file for recovery of these costs with the Commission through a tracker. The transmission cost riders shall only be charged to consumers taking generation service from CG&E.

11. The Parties agree that shopping credits for all non-residential consumers shall end on December 31, 2004, and for residential consumers on December 31, 2005, except non-residential consumers that are switched on December 31, 2004, shall receive

the applicable shopping credit set forth in CG&E's transition plan stipulation approved by the Commission in Case No. 99-1658-EL-ETP and percentage of income payment plan consumers shall be eligible to receive shopping credits as set forth in paragraph 18 herein. Beginning on January 1, 2005, switched non-residential consumers shall pay the applicable Provider of Last Resort charge, and beginning January 1, 2006, residential consumers shall pay the cumulative year-two Provider of Last Resort charge, as set forth in paragraph three (3) above.

12. The Parties agree that the regulatory transition charge, as set forth in Stipulation Exhibit 4, remains a non-by-passable charge. The regulatory transition charge shall remain effective for all consumers, including residential consumers, through December 31, 2010.
13. The Parties agree that the Commission may determine and implement a competitive bidding process to test CG&E's price to compare, defined as the price to compare for the first 25% of load of each consumer class to switch to a CRES provider, against the market price. If the price to compare is significantly different than the bid price, either the Commission or CG&E may begin discussions with all Parties to continue, amend, or terminate this Stipulation.

14. The Parties agree that CG&E does not have an obligation to transfer generating assets to an Electric Wholesale Generator by December 31, 2004. CG&E has no plans to transfer generating assets to any party, other than those plans already announced. If CG&E has any plans to transfer generating assets it shall provide the Commission with written notice 60-days before the transfer of any such asset to any entity. Approval of this Stipulation shall constitute approval of an amendment to CG&E's Corporate Separation Plan with respect to the transfer of its electric generating assets in accordance with R. C. 4928.17(D).
15. The Parties agree that CG&E shall calculate the by-passable fuel cost component of the price to compare by using the average costs for fuel consumed at CG&E's plants, and economy purchase power costs, for all sales in CG&E's Certified Service Territory. CG&E shall adjust its fuel costs quarterly and shall calculate the fuel costs to be part of the price to compare by using a baseline of the fuel costs approved by the Commission in Case No. 99-103-EL-EFC. Beginning January 1, 2006, CG&E shall also calculate its fuel cost to account for voltage differentials among consumers on different rate schedules. In no instance shall fuel costs amending the price to compare be less than \$ 0.00. Fuel used by CG&E's plants, and economy purchased power obtained, to serve The Union Light, Heat and Power Company load shall remain part of

the calculation of average fuel and purchase power costs until CG&E's Power Sales Agreement, Rate Schedule FERC No. 56, is terminated.

16. The Parties agree that CG&E shall extend its existing contracts for weatherization and energy assistance, pursuant to contract changes made in conjunction with the Cinergy Community Energy Partnership board, through December 31, 2008.
17. The Parties agree that CG&E shall implement a residential Demand Side Management tracker, set initially at \$ 0.00. Program content shall be determined by CG&E working with Cinergy Community Energy Partnership, and Staff. CG&E shall apply for Commission approval of any proposed demand side management program and rider level.
18. CG&E shall enter into good faith discussions with the Ohio Department of Development to establish an annual arrearage crediting program for percentage of income payment program consumers. The Parties intend that the initial arrearage credit will be for the entirety of existing arrearages already recovered by CG&E, without condition, and to occur on or about December 31, 2004. Thereafter, an agreed upon arrearage crediting program shall credit arrearages already recovered by CG&E, shall retain applicable arrearages necessary to enforce current and future disconnection rules in an effort to limit the amount of arrearages,

and shall require percentage of income payment program consumers to timely pay their required percentage of income payment before they may receive a credit. If this program is approved CG&E will develop, in concert with Cinergy Community Energy Partnership, a demand side management education and energy efficiency program to educate percentage of income payment plan consumers of the opportunities available pursuant to an approved arrearage crediting program. CG&E shall also permit percentage of income payment plan consumers to receive the residential shopping credit approved by the Commission in Case No. 99-1658-EL-ETP through December 31, 2005, for the first 25% of residential load to switch to a competitive retail electric service provider conditioned upon the inclusion of such consumers toward the first 25% of residential load to switch. Implementation of these programs is conditioned upon the agreement of the Ohio Department of Development and cost recovery of the arrearages by CG&E.

19. The Parties agree that CG&E shall maintain the 5% generation rate decrease for residential consumers on CG&E's market-based standard service unless CG&E's collection of regulatory transition charges from residential consumers is not extended through December 31, 2010, in which case the residential 5% generation

decrease shall end effective immediately or January 1, 2005, whichever is later.

20. CG&E will file a Motion to Dismiss Ohio Supreme Court Case Nos. 03-1207, 03-2034, and 04-563, will cease prosecution before the Commission of any case based on its assertion that the requirements imposed on competitive retail electric service providers with respect to collateral requirements and supplier agreements apply to governmental aggregators, and will not assert this same argument in the future in any proceeding or in any dealings with governmental aggregators.

21. This Stipulation does not amend or supersede any provision of the Stipulation approved by the Commission in Case No. 99-1658-EL-ETP, except as expressly stated herein.

The Signatory Parties recommend and request that the Commission make the following findings of fact and conclusions of law in its Opinion and Order approving this Stipulation as fully described above:

Findings of fact:

1. The market-based standard service offer proposed herein, and the individual components thereof, are set at a rate such that it is not free service or service provided for less than actual cost for the purpose of destroying competition.

2. The market-based standard service offer proposed by CG&E does not give an undue or unreasonable advantage or preference to any consumer or subject any consumer to undue or unreasonable prejudice or disadvantage.
3. That portion of the market-based standard service offer proposed by CG&E to be charged to all consumers as the Provider of Last Resort charge is just and reasonable and consists of those components necessary for CG&E to provide a reliable generation supply to consumers such that it may fulfill its statutory obligation to serve.
4. CG&E has achieved twenty percent (20%) switching or effective competition in each non-residential consumer class.
5. The market-based standard service offer price, and individually the price to compare and the Provider of Last Resort components, represent the price of competitive retail electric generation service from a willing seller to willing buyers.
6. Effective competition exists for all consumer classes, as of the end of the Market Development Period for each respective consumer class, if CG&E adheres to the terms and conditions of this Stipulation.
7. Pursuant to the findings of fact set forth in paragraphs four, five, and six above, the market development period ends for all non-

- residential consumer classes on December 31, 2004, and the residential consumer class on December 31, 2005.
8. The Electric Reliability and Rate Stabilization Plan stipulated to herein accomplishes generally the same market option for customers as the competitive bid process required by R. C. 4928.14(B) and no competitive bid option other than contained herein is therefore required.
 9. It is just and reasonable that CG&E establish, and recover through a rider amortized over five years beginning January 1, 2006, accounting deferrals equal to the revenue requirement from July 1, 2004, through December 31, 2005, on net capital investment related to CG&E's distribution business.
 10. It is just and reasonable that CG&E establish mechanisms to recover costs as follows: (1) Transmission Cost Riders to recover, in an annual proceeding as described in the application, changes in transmission costs assessed to CG&E by the applicable regional transmission organization or otherwise approved by the Federal Energy Regulatory Commission; and (2) a Demand-Side Management Cost Rider to recover the development and implementation costs for energy efficiency and load management programs agreed upon by the Cinergy Community Energy Partnership board and approved by the Commission, in an annual proceeding as described in the application.

11. It is just and reasonable for CG&E to continue to fund and recover in base rates energy efficiency programs, as approved in Case No. 99-1658-EL-ETP through December 31, 2008, or as approved by the Commission in CG&E's next distribution base rate case.
12. It is just and reasonable for CG&E to have no obligation to transfer ownership of its generation assets.
13. CG&E's collection of regulatory transition revenues from residential consumers for the period of January 1, 2009, through December 31, 2010, does not represent an increase of the charge recovering revenue requirements associated with the recovery of previously approved regulatory assets.
14. This Stipulation is supported by adequate data and information; violates no regulatory principle or precedent; and is the product of lengthy, serious bargaining among knowledgeable and capable parties representing a wide range of interests, including the Commission's Staff.

Conclusions of Law:

1. CG&E's market-based standard service offer and competitive bid process, as set forth herein, comply with R. C. Title 49, including but not limited to, R. C. Sections 4928.02, 4928.03, 4928.05, and 4928.14.
2. CG&E's market-based standard service offer, including the price to compare and Provider of Last Resort charge, is consistent with R.

C. Title 49, including but not limited to, Division B of R. C. 4905.33 and R. C. 4905.35.

3. The deferral and recovery of accounting deferrals equal to the revenue requirement from July 1, 2004, through December 31, 2005, on net capital investment related to CG&E's distribution business, is consistent with the frozen rates during the market development period required generally by R. C. Chapter 4928 and specifically by R. C. 4928.34(A)(6).
4. The approval and implementation of: (1) Transmission Cost Riders to recover, as described in the application, changes in transmission costs approved by FERC including those costs assessed to CG&E by the applicable regional transmission organization; and (2) a Demand-Side Management Cost Rider to recover the development and implementation costs for energy efficiency and load management programs agreed upon by the Cinergy Community Energy Partnership board and approved by the Commission, as described in the application, is consistent with the Commission's ratemaking authority set forth in R. C. Title 49, including, but not limited to, R. C. 4909.15, 4909.17, 4909.18, and 4909.19.
5. The end of the market development period for each consumer class, pursuant to the factual findings set forth in this Opinion and

Order, is in compliance with R. C. Title 49, including but not limited to, R. C. 4928.40.

6. The approval that CG&E may maintain ownership of its generation assets is in compliance with R. C. Chapter 4928 generally, including, but not limited to, R. C. 4928.17, 4928.18, 4928.31, and 4928.34.
7. CG&E's collection of regulatory transition revenues from residential consumers for the period of January 1, 2009, through December 31, 2010, is in compliance with R. C. 4928.40.

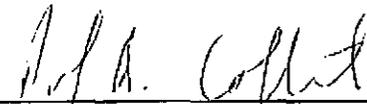
The undersigned hereby stipulate and agree and each represents that it is authorized to enter into this Stipulation and Recommendation this 19th day of May, 2004.

Respectfully submitted,



Paul A. Colbert, Senior Counsel
John J. Finnigan, Jr., Senior Counsel
THE CINCINNATI GAS & ELECTRIC
COMPANY
139 East Fourth Street, 2500 Atrium II
Cincinnati, OH 45202
(513) 287-3601

THE CINCINNATI GAS & ELECTRIC COMPANY

By: 

Paul A. Colbert, Senior Counsel
John J. Finnigan, Senior Counsel
Its Attorney

STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Thomas McNamee / [Signature]
Thomas McNamee, Assistant Attorney General
Its Attorney

OHIO CONSUMERS' COUNSEL

By: _____
Larry S. Sauer, Esq.
Jeffrey L. Small, Esq.
Ann M. Holtz, Esq.
Kimberly Bojko, Esq.
Its Attorney

INDUSTRIAL ENERGY USERS-OHIO

By: Samuel C. Randazzo / [Signature]
Samuel C. Randazzo, Esq.
Lisa Gatchell, Esq.
McNees, Wallace & Nurick
Its Attorney

OHIO HOSPITAL ASSOCIATION

By: [Signature]
Richard L. Sites, Esq.
Its Attorney

DOMINION RETAIL, INC.

By: 
Barth E. Royer
Judith B. Sanders
Bell, Royer & Sanders Co., LPA
Its Attorney

OHIO MANUFACTURERS' ASSOCIATION

By: _____
Sally W. Bloomfield, Esq.
Thomas J. O'Brien
Brickler & Eckler, LLP
Its Attorney

CITY OF CINCINNATI

By: _____
Sally W. Bloomfield, Esq.
Thomas J. O'Brien
Brickler & Eckler, LLP
Its Attorney

MIDAMERICAN ENERGY COMPANY

By: _____
M. Howard Petricoff
Vorys, Sater, Seymour & Pease
Its Attorneys

STRATEGIC ENERGY, LLC

By: _____
M. Howard Petricoff
Vorys, Sater, Seymour & Pease
Its Attorneys

DUKE REALTY CORPORATION

By: _____
M. Howard Petricoff
Vorys, Sater, Seymour & Pease
Its Attorney

CONSTELLATION POWER SOURCE, INC.

By: _____
M. Howard Petricoff
Vorys, Sater, Seymour & Pease
Its Attorney

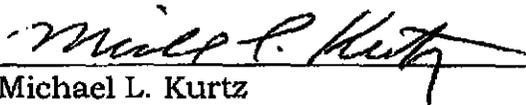
WPS ENERGY SERVICES, INC.

By: _____
M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour & Pease

THE OHIO ENERGY GROUP, INC.

By: 
Michael L. Kurtz
David Boehm
Boehm, Kurtz & Lowry
Its Attorney

THE KROGER COMPANY

By: 
Michael L. Kurtz
Boehm, Kurtz & Lowry
Its Attorney

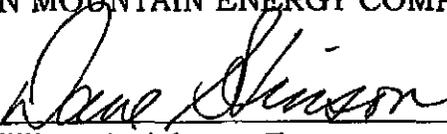
AK STEEL CORPORATION

By: 
David F. Boehm, Esq.
Boehm, Kurtz & Lowry
Its Attorney

CONSTELLATION NEWENERGY, INC.

By: _____
Jonathan W. Airey, Esq.
Vorys, Sater, Seymour & Pease
Its Attorney

GREEN MOUNTAIN ENERGY COMPANY

By: 
William A. Adams, Esq.
Dane Stinson, Esq.
BAILEY CAVALIERI LLC
Its Attorneys

PEOPLE WORKING COOPERATIVELY, INC.

By:  by 
Mary W. Christensen
Christensen, Christensen & Devillers
Its Attorney

NATIONAL ENERGY MARKETERS ASSOCIATION

By: _____
Craig G. Goodman, Esq., President
National Energy Marketers Association
Its Attorney

OHIO PARTNERS FOR AFFORDABLE ENERGY

By: _____
David C. Rinebolt, Esq.
Its Attorney

PSEG ENERGY RESOURCES & TRADE, LLC

By: _____
Shawn P. Leyden
Vice President & General Counsel
Its Attorney

FIRSTENERGY SOLUTIONS CORP.

By: Arthur E. Korkosz by phone authority, P.C.
Arthur E. Korkosz, Senior Counsel
FirstEnergy Solutions
Its Attorney

COMMUNITIES UNITED FOR ACTION

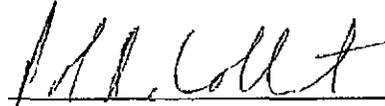
By: Noel M. Morgan by phone authority, P.C.
Noel M. Morgan, Esq.
Legal Aid Society of Greater Cincinnati
Its Attorney

COGNIS CORPORATION

By: Theodore J. Schneider by phone authority, P.C.
Theodore J. Schneider, Esq.
Murdock Goldenberg Schneider & Groh, LPA
Its Attorney

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Stipulation and Recommendation was sent by electronic mail to all parties of record and listed below this 19th day of May, 2004.



Paul A. Colbert

Samuel C. Randazzo, Esq.
Lisa Gatchell, Esq.
McNees, Wallace & Nurick
*Counsel for Industrial Energy
Users-Ohio*
21 East State Street, 17th Floor
Columbus, Ohio 43215
(614) 469-8000
srandazzo@mwncmh.com
lgatchell@mwncmh.com

Richard L. Sites, Esq.
Ohio Hospital Association
155 East Broad Street, 15th
Floor
Columbus, Ohio 43215-3620
(614) 221-7614
ricks@ohanet.org

Barth E. Royer
Judith B. Sanders
Counsel for Dominion Retail, Inc.
Bell, Royer & Sanders Co., LPA
33 South Grant Avenue
Columbus, Ohio 43215-3900
(614) 228-0704
BarthRoyer@aol.com

Sally W. Bloomfield, Esq.
Thomas J. O'Brien
*Counsel for Ohio Manufacturers'
Association and City of
Cincinnati*
Brickler & Eckler, LLP
100 South Third Street
Columbus, Ohio 43215
(614) 227-2368
sbloomfield@bricker.com

M. Howard Petricoff
Stephen M. Howard
Vorys, Sater, Seymour & Pease
*Counsel for MidAmerica Energy
Co., Strategic Energy, LLC, Duke
Realty, Constellation Power
Source, Inc., and
WPS Energy Services, Inc.*
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 466-5414
mhpetricoff@vssp.com

Michael L. Kurtz
Boehm, Kurtz & Lowry
Attorneys for The Kroger Co.
and The Ohio Energy Group
2110 CBLD Center
36 East Seventh Street
Cincinnati, Ohio 45202
(513) 421-2255
mkurtzlaw@aol.com

000778

Larry S. Sauer, Esq.
Jeffrey L. Small, Esq.
Ann M. Holtz, Esq.
Kimberly Bojko, Esq.
Office of Consumers' Counsel
10 West Broad Street, Suite
1800
Columbus, Ohio 43215
(614) 466-8674
sauer@occ.state.oh.us;
hotz@occ.state.oh.us
small@occ.state.oh.us

W. Jonathan Airey, Esq.
*Counsel for Constellation
NewEnergy, Inc.*
Vorys, Sater, Seymour & Pease
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6346
wjairey@vssp.com

David F. Boehm, Esq.
Counsel for AK Steel Corp.
Boehm, Kurtz & Lowry
36 East Seventh Street, Suite
2110
Cincinnati, Ohio 45202
(513) 421-2255
dboehmlaw@aol.com

William A. Adams, Esq.
Dane Stinson, Esq.
BAILEY CAVALIERI LLC
*Counsel for Green Mountain
Energy Co.*
10 West Broad Street, Suite
2100
Columbus, Ohio 43215
(614) 221-3155
William.Adams@BaileyCavalieri.com
Dane.Stinson@BaileyCavalieri.com

Mary W. Christensen
Christensen, Christensen &
Devillers
*Counsel for People Working
Cooperatively*
401 N. Front Street, Suite 350,
Columbus, Ohio 43215-2249
(614) 262-3969
Mchristensen@Columbuslaw.org

Craig G. Goodman, Esq.,
President
National Energy Marketers
Association.
3333 K Street, N.W., Suite 110
Washington, DC 20007
cgoodman@energymarketers.com

David C. Rinebolt
Ohio Partners for Affordable
Energy
337 S. Main Street, 4th Floor,
Suite 5
P.O. Box 1793
Findlay, Ohio 45839-1793
(419) 425-8860
drinebolt@aol.com

Shawn P. Leyden
VP and General Counsel
PSEG Energy Resources &
Trade LLC
80 Park Plaza, 19th Floor
Newark, NJ 07102
Shawn.Leyden@pseg.com

Arthur E. Korkosz
First Energy Solutions Counsel
76 South Main Street
Legal Dept. 18th Floor
Akron, Ohio 44308-1890
(330) 384-5849
KorkoszA@FirstEnergyCorp.com

000779

Noel M. Morgan, Esq.
*Counsel for Communities United
for Action*
Legal Aid Society of Greater Cincinnati
215 East Ninth Street
Cincinnati, Ohio 45202
(513) 241-9400
nmorgan@lascinti.org

Theodore J. Schneider, Esq.
Counsel for Cognis Corporation
Murdock Goldenberg Schneider
& Groh
700 Walnut Street, Suite 400
Cincinnati, Ohio 45202-2011
(513) 345-8291
tschneider@mgsqglaw.com

Benita A. Kahn, Esq.
Vorys, Sater, Seymour & Pease
*Counsel for General Electric
Company*
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6487
bakahn@vssp.com

000780

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

3	Consolidated Duke Energy	:	Case Nos.	03-93-EL-ATA
4	Ohio, Inc. Rate	:		03-2079-EL-AAM
4	Stabilization Plan	:		03-2081-EL-AAM
5	Remand, and Rider	:		03-2080-EL-ATA
5	Adjustment Cases.	:		05-724-EL-UNC
6		:		05-725-EL-UNC
6		:		06-1068-EL-UNC
7		:		06-1069-EL-UNC
7		:		06-1085-EL-UNC

PROCEEDINGS

before Ms. Jeanne Kingery and Mr. Scott Farkas, Hearing Examiners, at the Public Utilities Commission of Ohio, 180 East Broad Street, Room 11-C, Columbus, Ohio, called at 10:00 a.m. on Monday, March 19, 2007.

VOLUME I

This is to certify that the imags. appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business Technician SB Date Processed 4-3-07

RECEIVED-DOCKETING DIV
2007 APR -3 PM 1:25
PUCO

ARMSTRONG & OKEY, INC.
185 South Fifth Street, Suite 101
Columbus, Ohio 43215-5201
(614) 224-9481 - (800) 223-9481
Fax - (614) 224-5724

000781

ORIGINAL

TRANSCRIPT VOLUME I

PAGE 114

REDACTED

000782

1 Q. By whom are you employed?

2 A. Synapse Energy Economics.

3 Q. For whom are you testifying in the case?

4 A. The Office of the Ohio Consumers'
5 Counsel.

6 MR. FINNIGAN: Your Honor, OCC would like
7 to mark Mr. Talbot's prepared testimony as OCC remand
8 Exhibit 1, please.

9 (EXHIBIT MARKED FOR IDENTIFICATION.)

10 EXAMINER FARKAS: So marked.

11 Q. Mr. Talbot, do you have before you what
12 has been marked as OCC Exhibit 1?

13 A. I do.

14 Q. Do you have any changes or corrections
15 you would like to make to that document?

16 A. Yes. There's one change to a table,
17 which is on page 21. The line No. 11 that's part of
18 that table which has a Rate Component, Total Fully
19 Bypassable should be moved up above the previous
20 line, which is Annually Adjusted Component, which
21 then would become line 11, and the percentage that's
22 now on line 11 of 86.6 percent would now become
23 81.3 percent Total Fully Bypassable, and the dollar
24 number for Total Fully Bypassable is 848,582,225.

1 Then going down to line 15, the Total Not
2 Fully Bypassable would increase from 13.4 percent to
3 18.7 percent, and the dollar amount would be
4 195,273,627.

5 And then on the next page, first line
6 that's page 22, the first line is 13.4 percent would
7 increase to 18.7 percent. That's the change.

8 Q. Mr. Talbot, does that change any of your
9 conclusions or recommendations?

10 A. No.

11 Q. If you were asked the same questions
12 today that you were asked in this testimony, would
13 you have the same answers?

14 A. Yes, I would.

15 MS. HOTZ: Mr. Talbot is available for
16 cross-examination.

17 EXAMINER FARKAS: Thank you.

18 MR. FINNIGAN: Thank you, your Honor.

19

20

 CROSS-EXAMINATION

21 By Mr. Finnigan:

22 Q. Good morning, Mr. Talbot.

23 A. Good morning, Mr. Finnigan.

24 Q. Mr. Talbot, could we stay on that table,

1 with you, Mr. Talbot, is the amount to which the
2 company's generation charge is nonbypassable.

3 A. Very well.

4 Q. And could you go back to page 21 of your
5 prefiled testimony where you discuss that?

6 A. Yes.

7 Q. And please take a look at tab 13. Do you
8 see the document that's at tab 13?

9 A. Yes.

10 Q. And it's been marked as Duke Energy Ohio
11 Remand Exhibit 16.

12 A. Yes.

13 Q. And do you recognize that as something we
14 discussed in your deposition?

15 A. I do.

16 Q. Do you believe that calculation to be
17 accurate?

18 A. I do.

19 Q. Subject to the fact it uses the same
20 revenue numbers that the company supplied in response
21 to a data request as you used on page 21 of your
22 prefiled testimony.

23 A. Yes. There's only one point that I'd
24 like to make, and that is, if I look at the system

1 reliability tracker, which is not bypassable by
2 residential customers, that is negative item of
3 \$6 million or .6 percent because of an accounting, if
4 you will, of overcollection in a previous period. So
5 that this is a negative or repayment to customers,
6 credit to customers in the current period, which is
7 2006.

8 I believe that that number would be
9 something in the range of up to one percent positive
10 for 2007 and '08, so in other words, there are
11 expenses in that item, which changes the figures by
12 in effect normalizing them. So I would point out
13 this is not normalized.

14 Q. That would just be a minor change,
15 wouldn't it?

16 A. Well, not so minor. So if you go from
17 negative .6 to positive one percent or .8 percent
18 something in that range, you do end up with more like
19 4 percent total nonbypassable, which is not an
20 insignificant item when you consider it in relation
21 to potential margins of competitors. It might, in
22 effect, eliminate their margin, their profit margin
23 so that I would say that it's actually a significant
24 item.

1 Q. Have you studied suppliers' margins and
2 the margins that they plan to obtain when they enter
3 a retail market?

4 A. Yes. This came up in 2004 in the
5 previous proceeding, and it was pretty clear that
6 those margins are not easy to identify, and it all
7 depends on a variety of factors. But if you look
8 at -- I think what we looked at then was retail
9 margins for retail businesses generally, and they
10 were not a large number. It was a relatively single
11 digit margin, as I recall. So if you're talking
12 about a single digit return, knocking three or four
13 percent off that is a big -- is a big reduction in
14 margin.

15 Q. Now, with respect to the document that
16 you have before you, it says residential consumers
17 but wouldn't that apply to residential and
18 nonresidential consumers for the most part?

19 A. Yes.

20 Q. And the only difference would be that the
21 system reliability tracker is avoidable by
22 nonresidential consumers under certain circumstances
23 if they sign a contract and agree to remain off the
24 company's system through 2008.

FILE

184 ~~199~~

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

- - -

3	Consolidated Duke Energy	:	Case Nos.	03-93-EL-ATA
4	Ohio, Inc. Rate	:		03-2079-EL-AAM
4	Stabilization Plan	:		03-2081-EL-AAM
5	Remand, and Rider	:		03-2080-EL-ATA
5	Adjustment Cases.	:		05-724-EL-UNC
6		:		05-725-EL-UNC
6		:		06-1068-EL-UNC
7		:		06-1069-EL-UNC
7		:		06-1085-EL-UNC

- - -

PROCEEDINGS

10 before Ms. Jeanne Kingery and Mr. Scott Farkas,
 11 Hearing Examiners, at the Public Utilities Commission
 12 of Ohio, 180 East Broad Street, Room 11-C, Columbus,
 13 Ohio, called at 9:00 a.m. on Wednesday, March 21,
 14 2007.

- - -

VOLUME III

- - -

RECEIVED-DOCKETING DIV
 2007 APR -4 AM 10:49

PUCO

19 This is to certify that the images appearing are an
 accurate and complete reproduction of a case file
 document delivered in the regular course of business

20 Technician OB Date Processed 4-4-07
 ARMSTRONG & OKEY, INC.

21 185 South Fifth Street, Suite 101
 22 Columbus, Ohio 43215-5201
 (614) 224-9481 - (800) 223-9481
 23 Fax - (614) 224-5724

ORIGINAL

TRANSCRIPT VOLUME III

PAGE 48

REDACTED

000750

TRANSCRIPT VOLUME III

PAGE 49

REDACTED

000791

TRANSCRIPT VOLUME III

PAGE 50

REDACTED

000792

TRANSCRIPT VOLUME III

PAGE 50

REDACTED

000793

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Applications of:)
)
 MxEnergy, Inc.,) Case No. 02-1773-GA-CRS
 ACN Energy, Inc., and) Case No. 02-1828-GA-CRS
 Direct Energy Services, LLC) Case No. 02-1829-GA-CRS
)
 for Certification as Retail Natural)
 Gas Suppliers in the State of Ohio.)

ENTRY

The attorney examiner, pursuant to the authority granted by Rules 4901-1-14 and 4901-1-24, Ohio Administrative Code (O.A.C.), finds:

- (1) On August 9, 2004, MxEnergy, Inc. (MxEnergy), a previously certified competitive retail natural gas supplier pursuant to Section 4929.20 *et seq.*, Revised Code, filed its renewal application to retain its certified status. As part of that filing, MxEnergy requested a protective order under Rule 4901-1-24(D), O.A.C., for its summary of experience ("Exhibit B-3"); financial statements ("Exhibit C-3"); financial arrangements ("Exhibit C-4"); and forecasted financial statements ("Exhibit C-5").
- (2) Similarly, on August 10, 2004 and August 16, 2004, respectively, Direct Energy Services, LLC (Direct Energy) and ACN Energy, Inc. (ACN Energy), previously certified competitive retail natural gas suppliers pursuant to Section 4929.20 *et seq.*, Revised Code, filed their renewal applications to retain their certified status. As part of its filing, Direct Energy requested a protective order under Rule 4901-1-24(D), O.A.C., for its Supplemental Exhibit C-6. ACN Energy sought similar protection for its Exhibits C-3, C-4 and C-5. Also, on August 9, 10 and 16, 2004, MxEnergy, Direct Energy and ACN Energy respectively filed under seal with the Docketing Division of the Commission the exhibits for which they each sought a protective order, and filed their motions for protective order. No memoranda contra were filed regarding any of the motions for protective order.
- (3) The Commission has emphasized, in *In the Matter of the Application of The Ohio Bell Telephone Company for Approval of an Alternative Form of Regulation*, Case No. 93-487-TP-ALT, Entry issued November 23, 2003, that:

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business
 Technician CH Date Processed 9/7/04

[a]ll proceedings at the Commission and all documents and records in its possession are public records, except as provided in Ohio's public records law (Section 149.43, Revised Code) and as consistent with the purposes of Title 49 of the Revised Code. Ohio public records law is intended to be liberally construed to "ensure that governmental records be open and made available to the public...subject to only a few very limited exceptions." *State ex rel. Williams v. Cleveland* (1992), 64 Ohio St. 3d 544, 549, [other citations omitted].

- (4) In determining whether to issue a protective order in these instances, it is necessary to assess whether the materials for which such an order is sought:
- (a) are prohibited to be released by state or federal law under Section 149.43(A)(1)(v), Revised Code;
 - (b) are maintained as confidential by the company seeking the order (see, *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, 524-525, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App. 3d 131); and
 - (c) the non-disclosure of which will not be inconsistent with the purposes of Title 49, Revised Code, as required by Rule 4901-1-24(D), O.A.C.
- (5) Section 4929.23(A), Revised Code, requires that, "the Commission take such measures as it considers necessary to protect the confidentiality of any such [competitive retail natural gas service] information." However, the mere filing of materials required by the Commission pursuant to this statute does not satisfy the requirements for non-disclosure of what is otherwise a public document. An *in camera* inspection is necessary to determine whether the materials are entitled to protection from disclosure. *State ex rel. Allright Parking of Cleveland Inc. v. Cleveland* (1992), 63 Ohio St. 3d 772. During that inspection, the question is whether the materials have actual or potential independent economic value from not being

generally known. See, *State ex rel. Besser v. Ohio State Univ.* (2000), 89 Ohio St. 3d 396.

- (6) Upon review, the attorney examiner finds that each company has made an effort to preserve the confidential nature of the materials related to its motion and each of the exhibits for which protection is sought contains sensitive information which would be of competitive value if publicly disclosed. Consistent with Rule 4901-1-24(D)(1), O.A.C., where such confidential material can be reasonably redacted from a document without rendering the remaining document incomprehensible or of little meaning, redaction should be ordered rather than wholesale removal of the document from public scrutiny. Based upon review of the documents, the examiner concludes:
- (a) All of Exhibit B-3 should not be kept under seal, as MxEnergy proposes. MxEnergy should redact the numbers related to customers and volumes delivered from Exhibit B-3, and the redacted document should be filed in the public record. However, removal of consolidated financial information from its Exhibit C-3 would leave only auditor's notes that have little meaning in the absence of the underlying numerical values. Similarly, Exhibits C-4 and C-5 cannot be reasonably redacted to protect the confidential materials contained therein. Accordingly, Exhibits B-3, C-3, C-4 and C-5, currently under seal, should remain under seal for the 18-month period after the date of this entry.
 - (b) Direct Energy's Supplemental Exhibit C-6, although characterized as a "credit rating," is actually a financial arrangement that can be easily redacted by removing the names and addresses of entities, the names of persons executing the agreement, specific financing dollar amounts, and interest rates. Accordingly, Direct Energy should redact the names and addresses of entities, the names of persons executing the agreement, specific financing dollar amounts, and interest rates from Supplemental Exhibit C-6, and the redacted document should be filed in the

public record. Unredacted Supplemental Exhibit C-6, currently under seal, should remain under seal for the 18-month period after the date of this entry.

- (c) ACN Energy's Exhibits C-3 and C-5 cannot be reasonably redacted to protect the confidential materials contained therein. However, Exhibit C-4, a lengthy financing agreement, can be reasonably redacted by removing the names and addresses of entities, the names of persons executing the agreement, specific financing dollar amounts, and interest rates. Accordingly, ACN Energy should redact the names and addresses of entities, the names of persons executing the agreement, specific financing dollar amounts, and interest rates from Exhibit C-4, and the redacted document should be filed in the public record. It is also noted that the agreement as submitted to the Commission is not an executed copy. Further, Exhibits C-3, C-4 and C-5, currently under seal, should remain under seal for the 18-month period after the date of this entry.

Therefore, there is good cause to grant in part and deny in part the motions for protective orders as described above.

- (7) The motions by MxEnergy and Direct Energy each request a waiver from Rule 4901-1-24(F), O.A.C., the provision that protective orders under Rule 4901-1-24(D), O.A.C., automatically expire after 18 months. However, that same rule provides that, "[a] party wishing to extend a protective order beyond eighteen months shall file an appropriate motion at least forty-five days in advance of the expiration date." The examiner is unwilling to accept that the information being protected today will continue in its entirety to require such protection 18 months from now. The requests for waiver of the initial 18-month limitation should be denied.

It is, therefore,

ORDERED, That the motion of MxEnergy for a protective order is granted in part and denied in part. Within seven days of the date of this entry, MxEnergy shall file Exhibit B-3 as a public document, redacted as required by this entry. Exhibits C-3, C-4 and C-5,

and the unredacted version of Exhibit B-3 will remain under seal for the 18-month period from the date of this entry. It is, further,

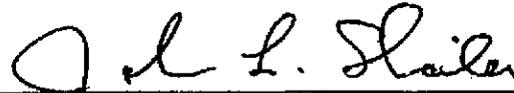
ORDERED, That the motion of Direct Energy for a protective order is granted in part and denied in part. Within seven days of the date of this entry, Direct Energy shall file Supplemental Exhibit C-6 as a public document, redacted as required by this entry. The unredacted version of Supplemental Exhibit C-6 will remain under seal for the 18-month period from the date of this entry. It is, further,

ORDERED, That the motion of ACN Energy for a protective order is granted in part and denied in part. Within seven days of the date of this entry, ACN Energy shall file Exhibit C-4 as a public document, redacted as required by this entry. Exhibits C-3, C-5 and the unredacted version of Exhibit C-4 will remain under seal for the 18-month period from the date of this entry. It is, further,

ORDERED, That the requests of MxEnergy and Direct Energy for a waiver of the 18-month time period contained in Rule 4901-1-24(F), O.A.C., are denied. It is, further,

ORDERED, That a copy of this entry be served upon MxEnergy, Direct Energy, ACN Energy, their counsel and all other interested parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



By: John L. Shailer
Attorney Examiner

1ct

Entered in the Journal

SEP 7 2004



Renee J. Jenkins
Secretary

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of the Ohio)	
Cable Telecommunications Association,)	
)	
Complainant,)	
)	
v.	)	Case No. 97-654-TP-CSS
)	
Ameritech Ohio,)	
)	
Respondent.)	

OPINION AND ORDER

The Commission, having considered the various legal briefs and pleadings submitted in this case, and based on the stipulated facts agreed to by the parties, hereby issues its opinion and order.

INTRODUCTION AND SUMMARY OF THE PROCEEDING

On June 19, 1997, the Ohio Cable Telecommunications Association (OCTA) filed a complaint (or, in the alternative, a request for a Commission investigation) against Ameritech Ohio (Ameritech) alleging anticompetitive marketing behavior by Ameritech with respect to the "AmeriCheck" marketing program. OCTA alleges that Ameritech, through its cable television affiliate Ameritech New Media (New Media), is offering rebates (that may be used for any Ameritech service) to customers who sign up for its cable service¹. OCTA contends that the AmeriCheck rebate program violates Ameritech's alternative regulation plan by offering monopoly telephone service at rates below long run service incremental cost (LRSIC), thereby subsidizing competitive and unregulated services. OCTA argues that the AmeriChecks rebates violate Sections 4905.33 and 4905.35, Revised Code (which prohibit offering rebates, special rates, free service, or unreasonable preferences). OCTA also alleges that the AmeriChecks program violates the Federal Telecommunications Act of 1996 (47 USC Section 254[k]) by using revenues from noncompetitive services to subsidize competitive services. OCTA seeks emergency relief pursuant to Section 4909.16, Revised Code, and requests that the Commission: direct Ameritech to immediately cease and desist from offering local exchange service below LRSIC; direct Ameritech to immediately terminate the

¹ Copies of the marketing literature are attached to OCTA's complaint. Under this marketing program, customers who sign up for "americast" cable television service receive \$60 to \$120 in AmeriChecks (depending on whether a customer agreement is signed by the customer). The AmeriChecks may be used like cash to pay for other Ameritech services including the customer's home phone bill, Ameritech cellular telephone bill, Ameritech paging service bill, or americast cable bill. Ameritech does not dispute OCTA's allegations with respect to the ability of New Media/americast subscribers to use the AmeriChecks for other Ameritech services, including home telephone services (See Ameritech's June 26, 1997 Memorandum Contra, at 4-5).

This is to certify that the images appearing are an accurate and complete reproduction of a case file document delivered in the regular course of business.
Technician SW Date Processed 7/21/97

000799

AmeriChecks marketing program and refrain from engaging in any similar promotions; initiate an investigation of whether the AmeriChecks program has resulted in subsidization of competitive services by monopoly customers; and issue appropriate corrective orders to remedy unlawful cross-subsidization.

Ameritech filed a memorandum contra on June 26, 1997. Ameritech states that OCTA has failed to support its burden of proving that emergency relief is warranted pursuant to the Section 4909.16, Revised Code. Ameritech argues that OCTA incorrectly assumes, without any supporting affidavits or verification, that Ameritech is providing reduced rates to telephone customers in connection with the AmeriChecks promotion. Ameritech claims that its telephone customers will continue to pay the full tariffed rates and that Ameritech will be paid in full by Huntington National Bank, from New Media funds, for any AmeriChecks used by customers for payment of Ameritech local telephone bills. Accordingly, Ameritech requests that the Commission deny OCTA's request for emergency relief.

On June 30, 1997, the attorney examiner initiated a teleconference with the parties to discuss the issues raised in this case. The examiner indicated that it was appropriate to address the threshold issue of whether Ameritech's customers are being offered special rates, rebates, or undue preferences, pursuant to Sections 4905.33 and 4905.35, Revised Code, before proceeding on the other issues raised in OCTA's complaint. The parties agreed that it was not necessary to hold a hearing on the limited issue identified by the examiner, based on certain stipulated facts concerning the operation of the AmeriChecks program.² The parties agreed to submit legal briefs on the issue of compliance with Sections 4905.33 and 4905.35, Revised Code. Initial briefs were filed on July 9, 1997 and reply briefs were filed July 11, 1997.

SUMMARY OF APPLICABLE LAW AND LEGAL ARGUMENTS

Section 4905.33, Revised Code, provides in relevant part:

No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge,

² The stipulated facts, solely for purposes of addressing the threshold issue identified by the attorney examiner, are as follows: (1) New Media customers may use AmeriChecks to help pay their Americast Cable TV, Ameritech Cellular, Ameritech Paging and/or Ameritech Ohio home telephone bills; (2) The AmeriChecks are issued and funded by Ameritech New Media through a Huntington National Bank account on which the AmeriChecks are drawn; (3) If an Ameritech New Media customer elects to use one of the AmeriChecks for a home telephone bill, Ameritech Ohio deposits the AmeriChecks and receives payment from Huntington National Bank from funds drawn on Ameritech New Media in an amount equivalent to the amount of the AmeriChecks; and (4) Ameritech New Media and Ameritech Ohio are each wholly-owned subsidiaries of Ameritech Corporation (See Exhibit A attached to Ameritech's initial brief filed July 9, 1997).

000800

demand, collect or receive from any person, firm, or corporation a greater or lesser compensation for any services rendered, or to be rendered, ... than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions. No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition.

Section 4905.35, Revised Code, provides:

No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

In its legal briefs, OCTA contends that the AmeriChecks marketing program is discriminatory and anticompetitive because it results in the opportunity for some customers to pay below-tariff rates for telephone service, thus unfairly influencing choices between competing providers. OCTA argues that the AmeriChecks program violates Section 4905.33, Revised Code, because a New Media subscriber may pay less than a non-subscriber for identical telephone service. OCTA claims that Section 4905.35, Revised Code, is also violated by the AmeriChecks program because Ameritech has, in effect, created two classes of basic monopoly telephone customers (i.e., those customers who can and do choose New Media cable service and those who cannot or do not choose New Media).

Ameritech responds that it is collecting the full tariff rate from each of its customers, either directly or indirectly, and Ameritech's sole conduct at issue is accepting and cashing of AmeriChecks like any other bank check. Ameritech claims that OCTA's focus on the affiliate relationship between itself and New Media is misplaced because it ignores New Media's fundamental right to be in the cable television business without regard to its corporate affiliation. Ameritech argues that the AmeriChecks marketing program is no different than if New Media chose to provide its subscribers with \$10 bills or \$10 checks payable directly to the customer. In either situation, Ameritech contends that the customer could use the money to pay for cable service, telephone service, or any other bills. Ameritech states that any economic benefits that accrue to New Media subscribers, who may also be Ameritech customers, are provided by New Media and not by Ameritech. According to Ameritech, it cannot influence the marketing decisions of any cable television provider, including New Media. However, Ameritech claims that it would be willing to accept bank checks issued by other cable providers if presented by a customer as partial payment for a home telephone bill.

CONCLUSION

The issue to be determined in this case is relatively straightforward: Whether Ameritech Ohio's acceptance of AmeriChecks issued by its affiliate New Media, for payment of home telephone service, constitutes a violation of Sections 4905.33 or 4905.35, Revised Code. The relevant facts are undisputed. Ameritech Ohio telephone customers who subscribe to cable television service from Ameritech New Media may use AmeriChecks issued by New Media to lower their home telephone bills by up to \$120.

Based on the relevant facts and the applicable law, we find that Ameritech Ohio's practice of accepting AmeriChecks issued by New Media constitutes a violation of Sections 4905.33 and 4905.35, Revised Code. Clearly, in today's environment, Ameritech Ohio, as a monopoly provider of residential local exchange service, could not directly offer rebates for home telephone service to its customers who also subscribe to cable television from Ameritech New Media, without triggering a review under Section 4905.33, Revised Code. Similarly, Ameritech may not accomplish indirectly (by accepting checks issued by its cable affiliate) what it cannot do directly. Section 4905.33, Revised Code, prohibits public utilities from "directly or indirectly" charging or receiving greater or lesser compensation for services rendered under substantially the same circumstances. Thus, the AmeriChecks program violates Section 4905.33, Revised Code, because it allows New Media subscribers to pay less for their local telephone service than Ameritech Ohio customers that do not subscribe to New Media, even though the telephone service received by both customers is identical. Ameritech's receipt of New Media AmeriChecks also violates Section 4905.35, Revised Code, which prohibits public utilities from giving "any undue or unreasonable preference or advantage". As indicated above, Ameritech Ohio's participation in this program essentially separates its customers into two discrete classes, those who can and do subscribe to New Media cable television and those who cannot or do not choose to do so. Ameritech Ohio has extended a preference to customers of its affiliate by relieving those customers of the requirement of full cash payment, while customers who do not subscribe to Ameritech's affiliate are still required to satisfy the totality of their bills by full payment in cash or by check (or else risk disconnection). Such a classification of customers bears no rational relationship to current rate justifications or any other nondiscriminatory segmentation of customers of a monopoly service and, as a result, must be considered the granting of an undue preference or advantage by Ameritech Ohio to customers of its affiliate, New Media.³

We disagree with Ameritech's argument that it is in compliance with Sections 4905.33 and 4905.35, Revised Code, because it receives full tariff charges through the combination of customer payments and New Media AmeriChecks. The fact that Ameritech Ohio is ultimately "made whole" by cashing the New Media AmeriChecks is

³ We note that our decision is based on the current lack of competitive options for residential local telephone service. We need not, at this time, reach the question of how this type of program may be treated in a fully competitive environment.

irrelevant for purposes of determining compliance with the applicable statutes. As pointed out by OCTA, even if New Media pays the difference between the customer's reduced bill and the otherwise applicable tariff rates, Section 4905.33, Revised Code, prohibits a public utility from receiving less compensation from one customer than it receives from another customer for comparable telephone service. The statute references the amount received from the customer, and not from all other sources (subject to Commission approval), because it is the amount paid by customers that measures the potentially discriminatory impact on customers and that affects competition. Indeed, if Ameritech's arguments were followed to their logical conclusion, nothing in the Ohio statutes would preclude a public utility from setting up corporate affiliates to underwrite the utility bills of selected customers, thereby offering below-tariff rates that would be insulated from regulatory oversight. For all of the reasons set forth above, we conclude that Ameritech's acceptance of AmeriChecks issued by New Media, for the purpose of reducing home telephone bills, violates Sections 4905.33 and 4905.35, Revised Code.

Having determined that Ameritech's current participation in the New Media AmeriChecks program is unlawful, we must next fashion a remedy. Under the circumstances presented by the ongoing marketing program, we believe it is appropriate for Ameritech Ohio to develop a notice to be included in customer telephone bills (in areas served or being marketed to by New Media), as well as a newspaper notice, to explain that AmeriChecks issued by New Media will no longer be honored for payment of home telephone service bills. The proposed notices should be submitted to the staff and OCTA no later than July 21, 1997. In order to further expedite this notice process, the attorney examiner assigned to this case will convene a conference with the parties and staff on Wednesday, July 23, 1997, at 10:00 a.m., at the offices of the Commission, to discuss the best means of notifying affected customers. Following this conference, the attorney examiner will issue an entry finalizing approval of the notice and the effective date for compliance with our directive in this order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

- (1) The parties stipulated to various facts, including the fact that customers may use AmeriChecks issued by New Media to help pay their Ameritech Ohio home telephone bills.
- (2) Based on the stipulated facts agreed to by the parties, Ameritech Ohio's participation in the New Media AmeriChecks program, by accepting AmeriChecks for payment of home telephone service, violates Sections 4905.33 and 4905.35, Revised Code.
- (3) Subject to appropriate notice to affected customers, Ameritech Ohio must discontinue acceptance of AmeriChecks issued by New Media for payment of Ameritech Ohio home telephone service.

000803

ORDER:

It is, therefore,

ORDERED, That, subject to appropriate notice to affected customers, Ameritech Ohio's acceptance of AmeriChecks issued by Ameritech New Media, for payment of home telephone service bills, is found to violate Sections 4905.33 and 4905.35, Revised Code, and Ameritech Ohio is directed to discontinue the acceptance of New Media AmeriChecks in accordance with this order and the directives of the attorney examiner. It is, further,

ORDERED, That Ameritech Ohio submit proposed customer notices to the staff and OCTA no later than July 21, 1997, in accordance with this order. It is, further,

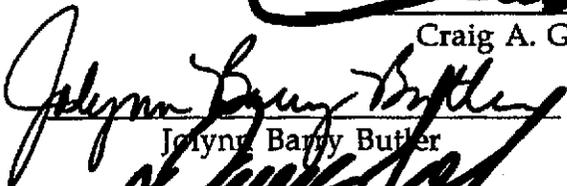
ORDERED, That a conference be scheduled for July 23, 1997, at 10:00 a.m., at the offices of the Commission, in accordance with this order. It is, further,

ORDERED, That a copy of this entry be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



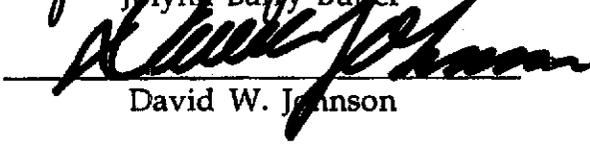
Craig A. Glazer, Chairman



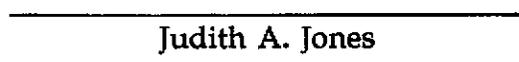
Jolynn Barry Butler



Ronda Hartman Fergus



David W. Johnson



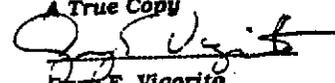
Judith A. Jones

DDN;geb

Entered in the Journal

JUL 17 1997

A True Copy



Gary E. Vigorito
Secretary

000804

CASE NUMBER 97-654-TP-CSS
CASE DESCRIPTION OHIO CABLE TEL/AMERITECH OHIO
DOCUMENT SIGNED ON July 17, 1997
DATE OF SERVICE 2/12/97

PERSONS SERVED

PARTIES OF RECORD

ATTORNEYS

INTERVENOR

OFFICE OF CONSUMERS' COUNSEL
77 S. HIGH ST
15TH FLOOR
COLUMBUS, OH 43266-0550

TERRY L. ETTER
OHIO CONSUMERS' COUNSEL
77 SOUTH HIGH STREET
15TH FLOOR
COLUMBUS, OH 43266-0550

COMPLAINANT

OHIO CABLE TELECOMMUNICATIONS

STEPHEN M. HOWARD
VORYS, SATER, SEYMOUR AND PEASE
52 EAST GAY STREET
P.O. BOX 1008
COLUMBUS, OH 43216-1008

WILLIAM S. NEWCOMB, JR.
VORYS, SATER, SEYMOUR & PEASE
52 EAST GAY STREET P.O. BOX 1008
COLUMBUS, OH 43216-1008

RESPONDENT

AMERITECH OHIO
JON F. KELLY
150 E. GAY STREET ROOM 4-C
COLUMBUS, OH 43215

NONE

MICHAEL T. MULCAHY
ATTORNEY AT LAW
OHIO BELL TELEPHONE COMPANY
45 ERIEVIEW PLAZA, SUITE 1400
CLEVELAND, OH 441147

000805

MARK S. STEMM
PORTER WRIGHT MORRIS & ARTHUR
41 SOUTH HIGH STREET
COLUMBUS, OH 43215

000806

THIS IS TO CERTIFY THAT THE MICROPHOTOGRAPH APPEARING ON THIS FILM
IS AN ACCURATE AND COMPLETE REPRODUCTION OF A CASE FILE DOCUMENT
DELIVERED IN THE REGULAR COURSE OF BUSINESS FOR PHOTOGRAPHING.
CAMERA OPERATOR _____ DATE PROCESSED _____

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Joint Appli-)
cation of The Ohio Bell Telephone)
Company and Ameritech Mobile Ser-) Case No. 89-365-RC-ATR
vices, Inc. for Approval of the)
Transfer of Certain Assets.)

OPINION AND ORDER

The Commission, considering the application filed March 2, 1989, the public hearing held June 11, 1990, as well as the briefs and reply briefs filed June 25 and July 6, 1990, and having determined that this matter should proceed directly to opinion and order without the issuance of an attorney examiner's report, issues its opinion and order.

APPEARANCES:

Mr. Charles S. Rawlings, 45 Erieview Plaza, Cleveland, Ohio 44114, on behalf of The Ohio Bell Telephone Company.

Mr. Dennis L. Meyers, 1515 Woodfield Road, Suite 1400, Schaumburg, Illinois 60173, and Mr. J. Raymond Prohaska, 150 East Broad Street, Suite 220, Columbus, Ohio 43215, on behalf of Ameritech Mobile Services, Inc.

Mr. William A. Spratley, Consumers' Counsel, by Ms. Colleen L. Mooney, Associate Consumers' Counsel, 77 South High Street, Columbus, Ohio 43266-0550, on behalf of the residential ratepayers of The Ohio Bell Telephone Company.

Mr. Anthony J. Celebrezze, Jr., Attorney General of Ohio, by Mr. Robert S. Tongren, Section Chief, and Ms. Ann E. Henkener, Assistant Attorney General, 180 East Broad Street, Columbus, Ohio 43266-0573, on behalf of the staff of the Public Utilities Commission of Ohio.

Bricker & Eckler, by Ms. Sally W. Bloomfield and Ms. Mary R. Brandt, 100 South Third Street, Columbus, Ohio 43215, on behalf of U.S.A. Mobile Communications, Inc., II.

OPINION:

On March 2, 1989, The Ohio Bell Telephone Company (Ohio Bell) and Ameritech Mobile Services, Inc. (AMSI; collectively, the joint applicants) filed a joint application in Case No. 89-365-RC-ATR for approval, pursuant to Section 4905.48, Revised Code, of the

000807

89-365-RC-ATR

-2-

purchase by AMSI of certain services and assets of Ohio Bell associated with the provision of General Improved Mobile Telephone Service (IMTS) and Signaling Service (Bellboy), as set forth in Ohio Bell's Telephone Service Tariff, P.U.C.O. No. 3. Ohio Bell and AMSI are subsidiaries of Ameritech Corporation. AMSI proposes to use the assets which are the subject of the transfer application to provide two-way interconnected mobile telephone service in Butler, Clark, Cuyahoga, Franklin, Lucas, Mahoning, Montgomery, Stark, and Summit counties, Ohio; and tone and voice, and display paging service in Belmont, Butler, Clark, Columbiana, Coshocton, Cuyahoga, Erie, Fairfield, Franklin, Greene, Hancock, Jefferson, Lake, Lucas, Mahoning, Portage, Sandusky, Seneca, Stark, Summit, Trumbull, Washington, and Wood counties, Ohio.

Legal notice of this proceeding was timely published in newspapers of general circulation in the above counties on or before May 15, 1989. USA Mobile Communications, Inc., II (USA Mobile) and the Office of the Consumers' Counsel (OCC) timely filed motions to intervene in this matter on May 26 and July 31, 1989, respectively. Several memoranda were thereafter filed concerning the Commission's jurisdiction in this proceeding and the appropriate treatment of alleged proprietary information submitted by the joint applicants.

By entry issued March 1, 1990, the attorney examiner granted the motions to intervene filed by USA Mobile and OCC, and scheduled a prehearing conference for April 17, 1990. Subsequent to the prehearing conference, the parties entered into a protective agreement concerning the alleged proprietary information submitted by the joint applicants and, by entry issued April 20, 1990, this matter was scheduled for hearing to commence on June 11, 1990. The hearing was held as scheduled, and briefs and reply briefs were filed on June 25 and July 6, 1990, respectively.

One outstanding procedural matter warrants resolution prior to proceeding to the merits of the application. The joint applicants assert that a limited amount of testimony and evidence, which was examined in camera at the hearing held in this matter, should continue to be afforded proprietary status and remain on file with the Commission under seal. This information includes net revenue figures and paging units in service contained in a valuation analysis performed by Coopers & Lybrand (USA Mobile Ex. 1, at 2 and 4; Kukla Affidavit, at 2; Schmidt Affidavit, at 2), a business enterprise cash flow analysis performed by Coopers & Lybrand (USA Mobile Ex. 2, at 2-4; Tr. 89-98), and portions of the testimony of USA Mobile witness Andrew R. Gefen (USA Mobile Ex. 4, at 5, 7, 8, 11, 12, 13, 15, and exhibits; Tr. 224-229).

At the conclusion of the hearing, the examiner instructed the parties that, if they intended to assert that certain of the testimony or exhibits reviewed in camera should continue to receive

000808

89-365-RC-ATR

-3-

confidential treatment, the party requesting such treatment would bear the burden on brief to establish the proprietary nature of each specific item (Tr. 266-268). On brief, the joint applicants have generalized that all of the information for which they seek confidential treatment is proprietary, arguing that they have not made this information available to the public and that, if disclosed, it would give USA Mobile, and any other competitor, an unfair business advantage (Jt. Apps. Initial Br., at 28).

USA Mobile asserts that the joint applicants, by making only conclusive statements about the trade secret nature of this information, have failed to meet their burden of showing why it should be protected (USA Mobile Reply Br., at 5-6). OCC generally agrees with USA Mobile and, further, states that much of the information which the joint applicants contend is confidential is either contained in the open record or is easily ascertainable from information already on the public record and, therefore, should not be protected (OCC Reply Br., at 19-21).

The public record statutes specifically applicable to the Commission (Section 4901.12 and 4905.07, Revised Code) provide a strong presumption in favor of disclosure, which the party claiming protective status must overcome. In this regard, the joint applicants have failed by not raising specific arguments as to how public disclosure of the specific items could cause them harm, or how disclosure of the information would permit the companies' competitors to use the information to their advantage.

In addition, OCC is correct that much of this information is already on the public record, or readily ascertainable through information on the public record, e.g., the number of official paging units, the total number of paging units, and the per pager purchase price. Further, certain of the exhibits, most notably the business enterprise analysis (USA Mobile Ex. 2) and the analysis prepared by Mr. Gefen (USA Mobile Ex. 4), contain information (such as revenue and expense figures) which the Commission customarily requires to be filed in companies' annual reports, certification cases, rate cases, and transfer cases. The joint applicants have offered no distinguishing circumstances to warrant protection of this information, nor have they attempted to segregate this information in the analyses. In addition, certain of the data contained in Mr. Gefen's analysis is the product of his independent efforts.

Finally, we find that any interest which the joint applicants might have in maintaining confidentiality of this information is outweighed by the public's interest in full disclosure. We find this particularly true of the conclusion of the Coopers & Lybrand business enterprise analysis (USA Mobile Ex. 2), which was conducted as a reasonableness test of the proposed fair market value

000809

89-365-RC-ATR

-5-

or otherwise, signed and verified by the president and the secretary of the respective companies, clearly setting forth the object and purposes desired, and stating whether or not it is for the purchase, sale, lease, or making of contracts, or for any other purpose provided in this section, and also the terms and conditions of the same, shall be filed with the commission. If the commission deems it necessary, it shall, upon the filing of such petition, fix a time and place for a hearing.

If, after such hearing or in case no hearing is required, the commission is satisfied that the prayer of such petition should be granted and the public will thereby be furnished adequate service for a reasonable and just rate, rental, toll, or charge, it shall make such order as it deems proper and the circumstances require, and thereupon the things provided for in such order may be done.

On brief, the joint applicants argue that Section 4905.48 restricts the Commission's review in this proceeding merely to whether the public will be furnished adequate service for a reasonable and just rate. They argue that, since staff and the intervenors do not contest AMSI's ability to provide adequate service or the reasonableness of the rates to be charged (by adopting Ohio Bell's tariff, P.U.C.O. No. 3), the statute requires that the transfer be approved, without further inquiry (Jt. Apps. Initial Br., at 5-6, 18-19).

The joint applicants' argument is without merit. Section 4905.48, Revised Code, grants the Commission wide discretion in considering transfer applications by providing that the Commission must be satisfied that the "petition should be granted and the public will thereby be furnished adequate service for a reasonable and just rate..." (emphasis added). This language makes clear that, while the Commission's consideration of whether to grant the application includes a review of the adequacy of service and reasonableness of rates resulting from the transfer, the Commission is not restricted in its deliberations to those issues, but must also consider other matters, including the overall reasonableness of the transfer and its effect upon the public interest. That the statute contemplates such thorough review is evidenced by the requirement that the applicant file the terms and conditions of the transaction with the Commission. Under this provision, the Commission has traditionally required that the applicant file, for our review, the purchase agreement, including the purchase price, for the assets being transferred. Thus, the price at which the

000811

89-365-RC-ATR

-6-

transaction is to be consummated plays an integral part in our determination. Furthermore, the Commission has the authority under the general supervisory powers contained in Sections 4905.04 - 4905.06, Revised Code, to consider whether the proposed transaction is in the public interest.

In considering the reasonableness of the proposed transfer, the parties and staff have focused on the proper valuation to be given the assets involved. For guidance, they have relied upon the Uniform System of Accounts (U.S.O.A.), as adopted by the Commission in Case No. 86-2074-TP-ORD, In the Matter of the Amendment of Chapter 4901:1-3, Ohio Administrative Code, Concerning the Uniform System of Accounts for Telephone Companies (September 29, 1987), and codified in Chapter 4901:1-3, Ohio Administrative Code. The parties and staff cite two sections of the U.S.O.A. which deal with the valuation of transferred property: Section 32.2000(b) (2), which requires that property transferred between two regulated affiliates be accounted for at original cost, and Section 32.27(c), which requires that property transferred from a regulated utility to its nonregulated affiliate be accounted for at the higher of net book cost or estimated fair market value.

Although the joint applicants have recognized the applicability of Section 32.27(c) to this proceeding in their pleadings and have performed a valuation analysis in accordance therewith, they point out, on brief, the apparent inconsistency of applying that section to the transaction before us, when we have found this transaction to be between two public utilities under Section 4905.48, Revised Code. As set forth above, Ohio Bell and AMSI are regulated public utilities subject to the Commission's jurisdiction by reason of Sections 4905.02 and 4905.63, Revised Code, respectively. However, only Ohio Bell, which is subject to traditional rate base regulation, is required to keep its books in accordance with the U.S.O.A. AMSI is not. Thus, while AMSI is considered to be a regulated utility under state law, under the U.S.O.A. it is considered to be unregulated. Indeed, Ohio Bell's own witness, Theodore W. Kukla, division manager of corporate regulatory accounting and support, recognized this distinction and testified that, for regulatory accounting purposes, AMSI is unregulated, and that this transaction is subject to the provisions of Section 32.27(c), U.S.O.A. (Tr. 141, 146-147).

Thus, we conclude that Section 32.27(c), U.S.O.A., provides the standard for the appropriate valuation of this transaction. Section 32.27 provides, in part:

§ 32.27 Transactions with affiliates.

(a) Unless otherwise approved by the Chief, Common Carrier Bureau, transactions with affiliates involving asset transfers into or out

000812

89-365-RC-ATR

-7-

of the regulated accounts shall be recorded by the carrier in its regulated accounts as provided in paragraphs (b) through (f) of this section.

...

(c) Assets sold or transferred from the regulated accounts to affiliates shall be recorded as operating revenues, incidental revenues or asset retirements according to the nature of the transaction involved. If such sales are reflected in tariffs on file with a regulatory commission or in a prevailing price held out to the general public, the associated revenues shall be recorded at the prices contained therein in the appropriate revenue accounts. If no tariff or prevailing price is applicable, the proceeds from such sales shall be determined at the higher of cost less all applicable valuation reserves, or estimated fair market value of the asset. (Emphasis added).

Since there is no tariff or price list applicable to the property to be transferred, the joint applicants caused to be performed the valuation analysis set forth in the last sentence of Section 32.27(c). Mr. Kukla presented testimony that the estimated net book amount for Ohio Bell's IMTS service was \$1,054,953 and that the net book cost for Bellboy was \$1,153,364 (Ohio Bell Ex. D, at 4). Mr. Kukla further testified that the net book cost of FCC licenses was not included in these amounts because they were obtained at minimal or no cost and were charged to expense when acquired, and not to an investment account (Ohio Bell Ex. D, at 6). Mr. Kukla also expressed his opinion that, even if a value were placed on the licenses and other intangibles which exceeded net book value, the amount which exceeded net book would be recorded below the line in a non-income operating account and would accrue to the benefit of Ohio Bell's shareholders, and not to the general body of ratepayers (Tr. 145). Neither staff nor the intervenors challenged the net book figures presented by Mr. Kukla.

The accounting firm of Coopers & Lybrand was retained by Ohio Bell to perform a fair market valuation of the property subject to transfer. Mr. Robert Svoboda, manager of valuation service at Coopers & Lybrand, testified that the fair market value for the tangible assets equaled \$250,000 for IMTS and \$1,575,000 for Bellboy (Ohio Bell Ex. C, at 10). At the instruction of Ohio Bell, Mr. Svoboda did not attempt to value the intangibles associated with the property (Ohio Bell Ex. C, at 20; Tr. 64-65, 129).

000813

89-365-RC-ATR

-8-

Mr. Svoboda utilized a market approach to value IMTS and a cost approach for Bellboy. For purposes of the valuation, Bellboy was considered to be a continuing viable service, while IMTS was considered as if it were being liquidated (Ohio Bell Ex. C, at 15-17).

In valuing IMTS, Mr. Svoboda used a variation of the market approach called the percent of cost technique ("cents-on-the-dollar"), which expresses market data in relationship to an asset's current cost new. Based upon his experience that the types of assets involved in providing IMTS sell for 10-25 percent of their original cost excluding installation, Mr. Svoboda deducted 25 percent from the original cost of the assets and further deducted an amount required to sell them to arrive at a net liquidation value (Ohio Bell Ex. C, at 18-19).

In valuing the Bellboy assets, Mr. Svoboda used a cost approach, which entailed determining the current cost new of all of the equipment, by applying an inflation adjustment factor to the equipment's original cost and deducting an amount for depreciation (Ohio Bell Ex. C, at 16-17). Since he was instructed to place a value only on the tangible assets associated with the services, Mr. Svoboda did not use a third alternative appraisal approach, the income approach, because a separate identifiable income stream cannot be attributed solely to fixed assets (Ohio Bell Ex. C, at 15; Tr. 49, 77). Nor did he use the market approach with respect to his appraisal of the Bellboy service, since he was unable to find market data regarding the sale of only fixed assets (Tr. 54). Although Mr. Svoboda did not use the income approach to determine fair market value of the Bellboy assets, he did consider the income from the Bellboy assets in a business enterprise analysis, which he conducted as a reasonableness check to test whether there are adequate earnings from the Bellboy service to support the investment equal to the calculated fair market value of \$1.575 million. The business enterprise analysis, which considered both tangible and intangible assets, showed a value of \$5.2 million for the Bellboy service alone (USA Mobile Ex. 2; Tr. 112, 129). On cross examination, Mr. Svoboda stated that the difference between the \$1.575 million fair market value calculated using the cost approach and the \$5.2 million value derived from the business enterprise analysis was the value of the intangible assets (Tr. 96).

Because Ohio Bell's analysis showed that the net book value of the assets is greater than the fair market value, the joint applicants propose to transfer the property at net book value, or approximately \$2,208,000.

The staff and the intervenors argue that the proposed transfer of assets is unreasonable and should not be granted on two

000814

89-365-RC-ATR

-9-

grounds, namely, that, in determining the fair market value of the property being transferred, the joint applicants improperly placed no value on the intangible assets, and that they unreasonably undervalued the tangible assets.

Value of Intangible Assets

It is undisputed in this proceeding that Ohio Bell is transferring to AMSI all of the assets, tangible and intangible, associated with Ohio Bell's Bellboy and IMTS services (Tr. 70). Indeed, the Asset Transfer Agreement entered into between the parties provides for the transfer of all Federal Communication Commission (FCC) and other licenses related to Ohio Bell's radio services, as well as the customer lists related to the property being transferred (Jt. Apps. Ex. B, at 3). It is also undisputed that Mr. Svoboda, at the direction of Ohio Bell, assigned no value to these intangible assets in determining the fair market value of the property to be transferred (Ohio Bell Ex. C, at 20; Tr. 64-65, 109, 129), even though the value of these intangible assets is "significant" (Tr. 96) and, if included in fair market value, would exceed net book value. Thus, the determination of the reasonableness of the proposed asset transfer in this proceeding centers upon whether the joint applicants properly excluded the value of the intangible assets from their calculation of fair market price performed pursuant to Section 32.27(c), U.S.O.A.

In support of their position as to the appropriate fair market value of the assets being transferred, the joint applicants rely upon their interpretation of applicable portions of FCC Docket 86-111, In the Matter of Separation of Costs of Regulated Telephone Services from Cost of Nonregulated Activities, etc., 2 FCC Rcd 1298 (1987), which adopted Section 32.27(c), effective March 4, 1987. Paragraph 295 of Docket 86-111 reads:

4. Valuation of assets transferred between affiliates.

295. There is widespread support in the comments for our proposal to use fair market value as the criterion for valuing assets which are transferred from a regulated entity to an unregulated affiliate, or vice-versa. The controversy arises when 'fair market value' can not be determined in the manner which we proposed in the Notice: by reference to prevailing price lists held out to the general public in the normal course of business or to filed tariffs. We believe that this approach remains the preferred method of valuation, and that other methods do not provide us with the assurance that asset

000815

89-365-RC-ATR

-10-

transfers protect the ratepayers from bearing unreasonable charges. AT&T suggests that fair market value is best determined from actual market transactions rather than from price lists held out to the general public.⁴⁶⁷ This approach affords the carrier a degree of subjectivity in selecting the 'actual market transaction' for the asset transfer, and as such detracts from our ability to monitor the carrier's asset transfers. We also find unpersuasive the argument that the valuation should, in the absence of a tariff or price list, always be 'cost, which includes a reasonable profit.' (Centel Comments at 15.) The cost may bear little resemblance to the asset's actual value, such as land and buildings in downtown locations.⁴⁶⁸ Moreover, the failure to recognize fair market value in transfers out of regulation in absence of tariff or price lists would not comply with the principles of Democratic Central Committee. See para. 301, infra.⁴⁶⁹

466 The term 'asset' encompasses any item that would be recorded in an investment account of the regulated carrier.

467 AT&T Comments at 56.

468 See e.g., CBEMA Reply at 5-6.

469 We reject Centel's position that cost must be used in the absence of price lists or tariffs because 'establishing a fair market price is speculative.' (Centel Comments at 15.) Although establishing fair market value requires some degree of subjectivity, there are methods of valuation which are readily available to the carriers, such as competitive bids, appraisals, market surveys, etc.

The joint applicants point to Mr. Kukla's testimony that the intangibles in question are not recorded on Ohio Bell's books and rely on footnote 466 of FCC Docket 86-111 to support their contention that, since such intangibles are not so recorded, they are not "assets" within the meaning of 86-111 or Section 32.27(c), U.S.O.A, and thus should not be a part of the fair market valuation (Jt. Apps. Initial Br., at 20-25; Jt. Apps. Reply Br., at 10-12). In support of this position, the joint applicants also cite the FCC's Memorandum Opinion and Order In the Matter of

000816

89-365-RC-ATR

-11-

Ameritech Operating Companies Permanent Cost Allocation Manual for the Separation of Regulated and Non-Regulated Costs, Docket No. AAD 7-1668, 3 FCC Rcd 433 (adopted December 28, 1987 and released January 29, 1988). In this order, which concerned the implementation of 86-111 by the Ameritech companies, the FCC stated, citing 86-111 (See paragraph 41), that intangible benefits, and the allocation of those benefits, were beyond the scope of this proceeding, since the intangibles (there, the Bell name and employee training costs) were not costs that are recorded on the company's books (Jt. Apps. Initial Br., at 23; Reply Br., at 12).

OCC presented no witnesses in this proceeding, but argues on brief that the joint applicants read too much into footnote 466, and contend that a full reading of paragraph 295 and all of its footnotes makes clear that the FCC intended that the fair market value of the assets on the company's books be determined in reference to prices paid by the general public in the normal course of business, which would include a valuation of the intangible assets being sold. OCC points out that the competitive bids and market surveys explicitly referenced by the FCC would produce a fair market value that includes the value of intangibles, and that the "assets" defined in footnote 466 would have intangible value attached to them (OCC Initial Br., at 33-38; Reply Br., at 11-15).

Staff argues that paragraph 295 discusses only the proper method of valuing the assets in question and not whether the FCC intended to include or exclude intangible assets in this definition of "asset". Staff also points out that goodwill and other intangibles meet the definition of "asset" contained in footnote 466 since Part 32 provides accounts for these intangibles in Sections 32.2007 and 32.2690, respectively. Finally, staff states that, even if the definition of "asset" were determined to include only tangible assets, the Commission is not bound to accept that definition for intrastate accounting purposes. In this regard, staff cites Section 4905.48, Revised Code, which requires the Commission's consent and approval for the purchase or lease of "property, plant, or business" between public utilities. Staff contends that the legislature, by referring both to "plant" and "business" in the statute, intended that value be placed on both the tangible and intangible assets when an entire business is being transferred (Staff Initial Br., at 5-6; Reply Br., at 6).

In support of its position, staff presented Deborah Hensel, continuing regulation officer in the Commission's Utilities Department Accounts and Audits Division, as a witness. She testified that Part 32 of the U.S.O.A. places no restrictions on the sale or recording of the sale of either tangible or intangible assets (Tr. 240, 247), and that Ohio Bell's book treatment of the involved tangible and intangible assets, either before or after the transfer, is not relevant to the threshold issue in this

000817

89-365-RC-ATR

-12-

proceeding of whether the intangible assets should be included in the fair market value to determine the transfer price (Tr. 253).

It is USA Mobile's position that the purpose of the FCC orders pertaining to interaffiliate transfers is to simulate the market in which such a transfer would take place between unaffiliated parties in an arm's length transaction. USA Mobile states that the fair market value referenced in Section 32.27(c), U.S.O.A., means the amount that a willing buyer would pay a willing seller in an arm's length transaction with neither under any compulsion to complete the transaction (USA Mobile Ex. 4, at 5). The joint applicants' witness Svoboda agreed with this definition upon cross-examination by USA Mobile and testified that the transaction between the joint applicants conformed therewith, with respect to the tangible assets he considered. He offered no conclusion on this point when considering that both tangible and intangible assets are sought to be transferred by this proceeding (Tr 68-73). USA Mobile contends that, because Ohio Bell is willing to transfer valuable intangible assets to AMSI for no consideration, the terms of the transfer are clearly disadvantageous to Ohio Bell. It reasons that, in an arms length transaction, Ohio Bell would attempt to maximize its revenues and that its failure to do so here, in a transaction involving an affiliate entity, shows that the transaction is not at arm's length, and not at fair market value (USA Mobile Initial Br., at 13-17).

USA Mobile presented one witness to support its position, Andrew R. Gefen, vice president of financial services and director of broadcast appraisals for Malarkey-Taylor Associates, Inc. Mr. Gefen criticized the Coopers & Lybrand analysis of fair market value, finding that it used an incorrect valuation approach for this type of transfer, that it did not include valuable intangible assets, and that it did not use knowledge of the paging industry or valuation techniques used in arm's length transactions. Specifically, Mr. Gefen testified that the cost approach used by Coopers & Lybrand is not applicable to the valuation of intangible assets and asset-light services such as the paging business. He stated that the usual method of valuing communication properties is the income approach, using a discounted cash flow model, which accounts for the projected cash flow of the system's tangible and intangible assets (USA Mobile Ex. 4, at 6-7). Mr. Gefen also testified that a comparison of comparable sales or an examination of competitive bids would also be methods of determining fair market value (USA Mobile Ex. 4, at 15-17). Using data from the Coopers & Lybrand analysis and current industry norms, Mr. Gefen concluded that the transfer price for the assets being transferred should fall in a range between \$10,314,000 and \$19,965,000, dependent upon various transfer scenarios (USA Mobile Ex. 4, at 4). Mr. Gefen did not offer any point within this range as an alternative transfer price, but merely used it for illustrative purposes as to the unreasonableness of the transfer price proposed.

000818

89-365-RC-ATR

-13-

The appropriate starting point in our analysis is with Section 4905.48, Revised Code, which, as stated above, controls the merit determination of whether the proposed transfer of assets should be granted. We agree with staff that the Commission must give weight to each of the terms listed in this statute, and that we must initially determine whether the instant transaction involves the transfer of "property, plant, or business". In this regard, it is undisputed that both the tangible and intangible assets associated with IMTS and Bellboy are being transferred from Ohio Bell to AMSI and, thus, that the entire "business" is the subject of the proposed transaction. We find that the joint applicants' valuation of only the tangible assets ("plant") contravenes the requirement of Section 4905.48 that we consider the reasonableness of the transfer of the entire business and particularly, under the facts of this case, the reasonableness of the business' purchase price. Under Section 4905.48, we find it inherently unreasonable for this transfer to be made at a price which does not consider the entirety of the business and which, thus, significantly understates the business' value.

Section 32.27(c), U.S.O.A., and the FCC orders which implemented it support our determination. Considering the entirety of paragraph 295 of Docket 86-111, its footnotes, and the intent of the FCC to simulate the open market in transfers between regulated and nonregulated affiliates, it becomes clear that the joint applicants' interpretation of "asset" in the cited provisions as including only tangible assets is erroneous. This error is made evident in this proceeding because such interpretation has effectively precluded the use of valuation approaches embraced by the FCC in determining fair market value, and has resulted in the use of the one approach (cost) which the FCC explicitly rejected. Specifically, by limiting Mr. Svoboda's valuation to tangibles, the joint applicants precluded him from conducting appraisals based upon market and income approaches, and from performing valuations based upon competitive bids and market surveys endorsed by 86-111 (Tr. 54, 77-78). Valuations of physical assets performed consistent with these methodologies would necessarily include the value of the associated intangibles. Thus, we find, under the facts of this proceeding, that the fair market valuation required by Section 32.27(c) must include the value of the intangible assets being transferred, and that the joint applicants' fair market valuation is deficient for its omission of these assets.

We reject the joint applicants' argument that this determination is inconsistent with the FCC's finding that intangibles are outside of the scope of 86-111 and its progeny. Just because the FCC limited its consideration in 86-111 to items recorded in the company's investment accounts does not mean that such items do not have intangible value associated with them, as we have found here. Similarly, we find that the FCC has merely deferred its decision on the appropriate accounting treatment (under Part 64) for such

000819

89-365-RC-ATR

-14-

intangibles, which precludes neither them, nor us from issuing accounting orders which address how the gain associated with the sale of these assets should be handled once the sales are consummated. Thus, while well aware that we have adopted only the U.S.O.A. and that the FCC decisions interpreting it are not controlling in our deliberations, we believe that our findings here are consistent with and supported by the decisions of the FCC.

Because the joint applicants have failed to establish the reasonableness of their fair market valuation and, thus, the reasonableness of the purchase price for the business being transferred, we must deny their application for transfer. For us to hold otherwise would adversely affect the interests of Ohio Bell's general body of ratepayers. In this regard, the joint applicants contend that their ratepayers would suffer no harm by the omission of the value of intangibles from the purchase price because any gain that Ohio Bell would have realized over net book would be recorded in a non-operating income account ("below the line" for ratemaking purposes) and would accrue only to the benefit of its shareholders. We disagree. The investments in IMTS and Bellboy have been supported by the general body of Ohio Bell's ratepayers and the revenues derived from those services have been recorded above the line, contributing to Ohio Bell's overall revenue requirement. Were we to approve this transaction at the proposed transfer price, we would be authorizing the erosion of the company's revenue requirement to the detriment of the general body of ratepayers. We, therefore, believe that any gain on the sale of assets involved in proceedings should benefit the general body of ratepayers. Our holding on this issue is consistent with 86-111, which recognized, in accordance with Democratic Central Committee v. Washington Metropolitan Area Transit Commission, 485 F.2d 776 (D.C. Cir. 1973), that since ratepayers bear the economic burden on most utility assets, they are entitled to the gains resulting from their sale (86-111, Order on Reconsideration, 2 FCC Rcd Vol. 21, at 6295 [October 16, 1987]).

It would be necessary for the Commission to issue an accounting order for this gain to be realized by the ratepayers. However, the issuance of such an order, in the context of this proceeding, would be premature since the Commission has determined that the joint application should be denied. In any future cases involving this issue, the parties are invited to address the various available accounting treatments which could be employed.

Value of Tangible Assets

Staff and the intervenors also contend that the joint applicants have improperly valued the tangible assets involved in this proceeding. The joint applicants used the Marshall & Swift Index to compute the fair market value of the physical assets associated with the Bellboy system, and an "orderly liquidation valuation" for IMTS. Staff performed a reasonableness test of the joint

000820

89-365-RC-ATR

-15-

applicants' fair market valuation for all tangible assets of both services, using the Handy Whitman Index. Such indices measure price movement over time for a number of various assets or accounts. Staff contends that the Handy Whitman Index is more appropriate than the Marshall & Swift Index, since the former is more closely aligned with utility accounts and is broken down by regional areas. Staff's reasonableness check revealed that the joint applicant's understated the proposed valuation of physical assets by at least \$2,000,000 (Staff Ex. A, at 4).

Although the joint applicants' witness Svoboda agreed with staff on cross-examination that the Handy Whitman Index is more closely aligned with utility accounts and is more sensitive to regional differences in the country than the Marshall & Swift Index, he also testified that, under his analysis of equipment located in two locations in Ohio, the valuations ascertained under the Handy Whitman Index were approximately 5 percent less than those obtained using the Marshall & Swift Index (Tr. 117, 126). On brief, the joint applicants criticize staff's reasonableness test, asserting that staff has not shown the Marshall & Swift Index to be unreasonable, and that the test lacked supporting data.

We do not find the joint applicants' criticisms to be persuasive. First, it is the joint applicants' burden to show the reasonableness of the proposed transfer, the associated price, and the methodologies employed, and not the staff's or intervenors' burden to show otherwise. It being undisputed that the Handy Whitman Index is more closely aligned with utility accounts, the Commission is inclined to rely on it and accept staff's reasonableness test, in the absence of evidence to the contrary. In this regard, we do not find Mr. Svoboda's analysis of only two locations sufficient to reject staff's analysis. We, therefore, find that the joint applicants have also failed to establish the reasonableness of their fair market valuation of the tangible assets involved in the proposed transfer, and that the application should also be denied for this reason.

It is, therefore,

ORDERED, That the joint applicants' motion for protective order is denied in its entirety. The Commission's Docketing Division shall be instructed, once this opinion and order has been rendered final, to file in the open record the information for which protective status was claimed. It is, further,

ORDERED, That the joint application for the transfer of assets from The Ohio Bell Telephone Company to Ameritech Mobile Services, Inc. is denied. It is, further,

000821

89-365-RC-ATR

-16-

ORDERED, That a copy of this opinion and order be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Jolynn Barry Butler
Jolynn Barry Butler, Chair

J. Michael Eddison
J. Michael Eddison

Ashley G. Brown
Ashley G. Brown

Richard M. Fanelli
Richard M. Fanelli

Lenworth Smith, Jr.
Lenworth Smith, Jr.

DS;geb

Entered in the Journal

OCT 18 1990

A True Copy

Gary E. Vigorito
Gary E. Vigorito
Secretary

000822

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Complaint of)
The Suburban Fuel Gas, Inc.,)
Complainant,)
v.) Case No. 86-1747-GA-CSS
Columbia Gas of Ohio, Inc.,)
Respondent,)
Relative to various alleged viola-)
tions of the Ohio Revised Code.)

OPINION AND ORDER

The Commission, coming now to consider the complaint filed August 29, 1986, the testimony presented at the public hearing held on May 7, 1987, the briefs filed June 12, 1987, July 7, 1987, July 17, 1987, and July 22, 1987, and waiving the attorney examiner's report pursuant to Rule 4901-1-33, Administrative Code, hereby issues its Opinion and Order.

APPEARANCES:

Messrs. Muldoon, Pemberton & Ferris, by Mr. David L. Pemberton, 2733 West Dublin-Granville Road, Worthington, Ohio 43085, on behalf of the complainant.

Messrs. Thomas E. Morgan, Roger C. Post, and Kenneth W. Christman, 200 Civic Center Drive, P.O. Box 117, Columbus, Ohio 43216-0117, on behalf of the respondent.

Mr. William A. Spratley, Consumers' Counsel, by Ms. Margaret Ann Samuels and Ms. Evelyn Robinson, Associate Consumers' Counsel, 137 East State Street, Columbus, Ohio 43266-0550, on behalf of the residential customers of Suburban Fuel Gas, Inc., and Columbia Gas of Ohio, Inc.

HISTORY OF THE PROCEEDINGS:

The Suburban Fuel Gas, Inc. (Suburban, complainant) filed this complaint against Columbia Gas of Ohio, Inc. (Columbia) on August 29, 1986. On September 23, 1986, Columbia filed a motion to dismiss the complaint because Columbia believed that Suburban did not have standing to bring the complaint and that Suburban had not stated reasonable grounds for complaint. On October 9, 1986, the attorney examiner ordered Suburban to file a more definite statement alleging the facts which were the basis of Suburban's complaint.

000823

On October 22, 1986, Suburban filed an amended complaint. The amended complaint stated that Columbia and Suburban are competitors, particularly in Wood County, Ohio. Suburban alleged that Columbia was offering general service customers within Wood County lower rates than Columbia's general service rates on file with the Commission. Suburban alleged that the lower rates were being charged on a discriminatory basis without regard to the requirements of customers similarly situated and for the purpose of destroying competition. In addition, Suburban alleged that Columbia was violating its tariffs on file with the Commission by providing customers with service lines free of charge. Suburban alleged that the free service lines were offered on a discriminatory basis and for the purpose of destroying competition. Another allegation by Suburban was that Columbia was violating its tariffs by providing distribution main line extensions for commercial or industrial customers without requiring a deposit from those customers. Suburban alleged that the waiving of deposits was done on a discriminatory basis and for the purpose of destroying competition. Suburban alleged that Columbia's actions in these matters were violations of Sections 4905.30, 4905.32, 4905.33, and 4905.34, Revised Code.

On November 12, 1986, Columbia filed a motion to dismiss the amended complaint and argued again that Suburban had no standing to bring the complaint and that Suburban had not stated reasonable grounds for complaint. By Entry dated January 6, 1987, the Commission denied the motion of Columbia to dismiss the complaint and ordered Columbia to answer the complaint. The Commission found that Suburban had standing to bring this complaint under Section 4905.26, Revised Code. However, in the January 6, 1987 Entry the Commission reiterated its position that the Commission's function is not to administer anti-trust laws but rather to protect utility consumers from unjustly discriminatory rates and charges. The Commission's primary interest is in securing the best possible service for the public under just and reasonable rates and not in refereeing a contest between competitors. The Commission stated that the Commission is interested in this matter only to the extent that Suburban's allegations against Columbia affect service to the public.

On January 27, 1987, Columbia answered the complaint. Columbia denied that Columbia had provided service in a manner which violated its tariffs and contracts or state statutes, that Columbia had charged unlawfully discriminatory rates, and that Columbia had charged rates or performed services for the purpose of destroying competition. Columbia denied all the substantive allegations of the complaint.

On February 2, 1987, the attorney examiner scheduled this matter for hearing and ordered notice of the hearing to be published in accordance with Section 4905.26, Revised Code. On April 1, 1987, the legal director granted a continuance and

000824

rescheduled the hearing to May 7, 1987. On April 16, 1987, the Office of Consumers' Counsel, State of Ohio (OCC), moved to intervene in this proceeding. OCC stated that if the allegations of the complaint were true, the result might be an increase in costs to residential ratepayers. On April 22, 1987, the examiner asked OCC to inform the Commission as to its specific grounds for intervention. On May 1, 1987, OCC responded that competition between gas distribution companies could have an adverse impact on residential customers and that discriminatory rates are unfair to customers who pay full rates. OCC also asserted that residential customers have an interest to ensure that utilities do not engage in predatory practices. On May 14, 1987, the examiner found that although OCC's grounds for intervention remained vague, the motion of OCC to intervene should be granted.

The hearing in this matter was held on May 7, 1987. Notice of the hearing was published in the Daily Sentinel-Tribune, a newspaper of general circulation in Wood County, Ohio. At the hearing, the complainant called Mr. Ronald G. Parshall, Columbia's area manager for several communities in Wood County, Ohio, and Mr. Michael Law, an industrial marketing engineer employed by Columbia at its Findlay, Ohio office. Columbia called Mr. Thomas F. Devers, vice president of rates and depreciation at Columbia, and Mr. A. Scott Rotney, executive vice president of Suburban. At the close of the hearing a briefing schedule was arranged. Subsequently, continuances to the briefing schedule were granted. Suburban filed its initial brief on June 12, 1987, Columbia and OCC filed briefs on July 7, 1987, Suburban and Columbia filed reply briefs on July 17, 1987, and OCC filed its reply brief on July 22, 1987.

SUMMARY OF THE EVIDENCE:

Suburban has presented various examples of Columbia's alleged unfair competitive practices. To summarize the evidence, the facts regarding each of these examples will be discussed.

A plant of Equity Group-Ohio Division (Equity) is located on Grant Road in the unincorporated area of Wood County. In mid-1985, at the time that a part of Equity's plant was served by Columbia LNG, Suburban offered and began service to Equity (Tr. 208). Apparently, another part of the plant continued to be served by Columbia, and at some point Suburban offered to serve the entire plant and take this service from Columbia. This solicitation by Suburban of the portion of the plant served by Columbia was, according to Columbia, the event that gave rise to Columbia's "flex" rate program. In July 1986, Equity entered into an agreement for gas service with Columbia in which Equity stated that Equity had received a bona fide offer from Suburban which was lower than Columbia's general service rate, which was applicable to the Equity plant (Complainant's Ex. 12). Columbia agreed to provide gas to Equity at \$5.05 per mcf plus a \$4.20

customer service charge. The rate would fluctuate quarterly with Columbia's gas cost recovery (GCR) rate and the base rate of Suburban, but the rate would not be lower than Columbia's GCR rate plus the applicable customer charge and excise taxes. If Equity received a bona fide offer from a competing utility at a total rate less than Columbia's total "flex" rate, Columbia could, at its option, match the offer of the competing utility. Equity would submit an affidavit regarding the offer, and Columbia reserved the right to determine if the offer was bona fide. Gas service under the agreement was to begin on May 21, 1986, and either party could terminate the agreement after one year. This agreement was submitted to the Commission for approval on July 25, 1986 in In the matter of the application of Columbia Gas of Ohio, Inc. for filing a contract with Equity Group-Ohio Division involving the sale of gas pursuant to Section 4905.31, Revised Code, Case No. 86-1491-GA-AEC, but the application was withdrawn by Columbia, and the arrangement was never approved. The rates set forth in the agreement in Case No. 86-1491-GA-AEC were the same as Suburban's rates (Tr. 103).

On August 18, 1986, a vice president of Equity signed a Columbia customer affidavit in which he swore that Equity had received a bona fide offer from Suburban to provide natural gas at \$5.0168 per mcf plus a \$4.00 customer service charge per month (Complainant's Ex. 14). On the same day, Equity entered into a general service agency purchase and transportation agreement with Columbia in which Columbia agreed to purchase and deliver gas to Equity at \$4.6194 per mcf and a monthly service charge of \$5.25. The rates charged under the contract could, at Columbia's option, be decreased in accordance with fluctuations in the cost of alternate energy resources available from competing utilities or suppliers provided that the rate would not exceed Columbia's applicable general service rate. In the Equity agreement, Columbia could only decrease the rate to Equity. Mr. Law believed that Columbia agreed not to increase the rate offered to Equity because of Columbia's policy to beat the competition posed by Suburban (Tr. 105). Equity could terminate the agreement within fifteen days if Columbia declined to meet a bona fide offer of a competing utility or supplier, after Equity signed an affidavit regarding the competing offer, and after Columbia determined the validity of the competing offer. The agreement was to take effect August 20, 1986 and continue for one year. Columbia filed this agreement with the Commission on September 5, 1986 in In the matter of the application of Columbia Gas of Ohio, Inc. for approval of an arrangement with Equity Group-Ohio Division involving the purchase and transportation of natural gas, Case No. 86-1781-GA-AEC, which was approved by the Commission on September 30, 1986.

The Woodland Mall is a new shopping center north of Bowling Green in Wood County, Ohio. Suburban and Columbia were in competition to serve the mall. At some point, Suburban submitted

000826

a proposal to Brisa Builders, Inc., the developers of the Woodland Mall to provide gas service to the mall tenants (Tr. 42). On August 19, 1986, Columbia's Mr. Law wrote a letter to Mr. Larry Jarrett, owner of Brisa Builders, Inc., and made an offer to serve the Woodland Mall that Mr. Jarrett could not refuse (Complainant's Ex. 6). Columbia offered:

1. To pay for the service lines to the base of the two end stores and core area.
2. To pay 100 percent of the house piping, engineering, and difference in equipment cost between gas and electric for the Elder-Beerman store.
3. To provide gas to all customers at \$4.62 per mcf for a primary term of twelve months.

The letter assured Mr. Jarrett that "Columbia Gas has the ability to be competitive with any energy supplier with new programs." (Complainant's Ex. 6). On October 22, 1986, Mr. Jarrett wrote to Mr. Parshall of Columbia to accept the August 19, 1986 offer. In addition, Mr. Jarrett respectfully requested that Columbia immediately proceed with the installation of the necessary transmission lines (Complainant's Ex. 7).

Mr. Law testified that he believed it was necessary for Columbia to make the August 19, 1986 offer in order to beat out the competition from Suburban and from the electric energy supplier (Tr. 139). According to Mr. Law, Columbia had to offer the customer service lines in order to compete with electricity. Under P.U.C.O. No. 1, Original Sheet No. 6, Section 22(b) of Columbia's tariffs, the customer shall install and maintain at his own expense customer service lines. In addition, Columbia provided free house piping to the Elder-Beerman store and paid the difference in equipment cost between gas and electric appliances in order to induce Elder-Beerman to switch from electric to natural gas, but Columbia did not make a similar offer to the other large store, J.C. Penney, which paid for its own house piping because J.C. Penney had designated natural gas heat from the beginning (Tr. 39). Under Columbia's tariff, P.U.C.O. No. 1, Second Replacement Sheet No. 7, Section 28, the customer shall install and maintain all appliances at the customer's expense. The offer of \$4.62 per mcf for twelve months was made because Columbia figured that Suburban would match the first two items of Columbia's offer, and Columbia knew that the rate would beat Suburban's rate (Tr. 138). In addition to the August 19, 1986 offer, Columbia agreed to extend its main distribution lines to the meters and the stores of the two principal mall tenants (Tr. 43). Columbia also agreed to install the customer service lines for the smaller stores of the mall (Tr. 43). Apparently, no other mall in the area has been offered

000827

a fixed rate by Columbia nor has any other mall received similar free lines or piping. In addition, there have been no similar offers by Columbia to reimburse a customer the difference between gas and electric appliances (Tr. 43-44).

C & C Fabrication, Inc. (C & C) was a new customer for whose business Columbia and Suburban were competing (Tr. 46). C & C had requested natural gas service from both Columbia and Suburban. At approximately 750 mcf per year, C & C's annual natural gas usage would not warrant a special contract rate with Columbia (Tr. 47). However, Columbia beat the competition posed by Suburban by offering C & C a general service agency purchase and transportation agreement. On November 13, 1986, a representative of C & C completed a customer affidavit in which he swore that C & C had received a bona fide offer from Suburban for natural gas at \$5.0457 per mcf plus a \$4.00 customer service charge (Complainant's Ex. 9). Thereupon, on the same day, November 13, 1986, C & C signed a general service agency purchase and transportation agreement with Columbia by which Columbia would provide natural gas service to C & C at \$4.6494 per mcf plus a customer charge of \$5.25 per month for twelve months. The rate charged could be increased or decreased in accordance with fluctuations in the cost of alternative energy resources available from competing utilities or suppliers but the rate could not exceed Columbia's applicable general service rate. The customer could terminate the agreement within fifteen days if Columbia declined to match a bona fide offer from a competing utility or supplier. Columbia had the right to determine whether the competing offer stated in the customer affidavit was valid. The agreement was to take effect on November 14, 1986 (Complainant's Ex. 8). Columbia's vice president did not sign the agreement until January 9, 1987 because the contract was lost by Columbia (Tr. 117). Columbia did not file an application with the Commission for approval of the contract with C & C until March 26, 1987 because of an oversight (Tr. 154). Mr. Devers testified that Columbia began billing C & C under the agreement in January 1987 (Tr. 154).

The general service agency purchase and transportation agreement was not the only inducement that Columbia used to win C & C as a customer. Columbia agreed to provide a main line extension of approximately 800 feet to C & C without requiring a deposit from C & C for the line extension. The cost of the line extension would be about \$5 per foot. Under Columbia's tariff P.U.C.O. No. 1, Original Sheet No. 8, Section 34, where a main extension is requested for service for commercial purposes and the main extension is determined by the company to be economically feasible, the applicant for an extension may enter into a line extension agreement and shall deposit with the company the estimated cost of the extension. Mr. Law testified that he had performed a maximum allowable investment calculation for Columbia that determined that the extension was economically justified

(Tr. 204). Finally, in addition to the decision to waive the line extension deposit, Columbia also provided C & C with material in the form of a pipe and riser for the customer service line (Tr. 107).

The Bowling Green Church of God (BGCG) is located on Mercer Road in the unincorporated area of Wood County. BGCG uses about 100 mcf of natural gas annually (Tr. 25). Prior to March 1986, BGCG was a customer of neither Suburban nor Columbia, and there was competition between Suburban and Columbia for this service. BGCG was to be served directly off a tap from the transmission line of Columbia Gas Transmission Corporation (TCO). Suburban had initially tapped into TCO's line in order to serve BGCG. On February 10, 1986, Columbia filed an application with TCO to obtain a tap off the transmission line to serve BGCG. At about that time, Columbia was aware that Suburban had already obtained a tap from TCO (Tr. 27). Columbia began to serve BGCG as a general service commercial customer in March 1986. Columbia called Suburban and told Suburban to remove its regulators and meter settings which were already in place (Tr. 79).

In order to serve BGCG, a suitable regulator for reducing pressure off the transmission line was required. Although Suburban was offering to serve BGCG at a rate \$0.83 per mcf lower than Columbia's general service rate plus Suburban's \$4.00 customer charge per month, BGCG chose Columbia. According to Suburban, Columbia provided BGCG with a free regulator in order to beat out Suburban (Tr. 23). Under P.U.C.O. No. 1, Section 23, Original Sheet No. 6, of Columbia's tariffs, the customer shall install and maintain at his expense a suitable regulator or regulators for reducing pressure from a high pressure transmission line.

The Dayspring Assembly of God Church (DAGC) is located on North Dixie Highway in the unincorporated area of Wood County and uses about 800 mcf of natural gas annually. Prior to March 1987, neither Columbia nor Suburban served DAGC, and both were in competition to serve DAGC. Columbia knew that Suburban had a line across the road from DAGC (Tr. 32-33). However, it was Columbia that began service to DAGC in March 1987. Because of DAGC's usage pattern, DAGC would normally be classified under Columbia's tariffs as a general service customer for rate purposes, and DAGC would not qualify for a special contract with Columbia. On March 11, 1987, a general service agency and transportation agreement between DAGC and Columbia was signed (Complainant's Ex. 10). The customer affidavit stated that DAGC had received a bona fide offer from Suburban to provide natural gas at \$5.1128 per mcf plus a \$4.00 customer charge per month. The customer affidavit was signed by the pastor of DAGC. The agreement between Columbia and DAGC was that Columbia would purchase gas as an agent for DAGC and deliver the gas to DAGC for \$4.6494 per mcf plus a \$5.25 per month customer charge. The rate

000829

charged under the agreement could, at Columbia's option, be increased or decreased in accordance with fluctuations in the cost of alternate energy resources available from competing utilities or suppliers, provided however that the rate would not exceed Columbia's applicable general service rate and that the customer could terminate the agreement within fifteen days notice if Columbia declined to match the delivery price of a bona fide offer from a competing utility or supplier. The customer was to submit an affidavit regarding the competing offer, and Columbia reserved the right to determine the validity of the competing offer. Although the agreement was signed March 11, 1987, it was to take effect on February 19, 1987 and continue in effect for one year. On April 2, 1987, the contract was filed with the Commission pursuant to In the matter of the application of Columbia Gas of Ohio, Inc. and Madison County Hospital, Inc. for approval by the Public Utilities Commission of Ohio for a reasonable arrangement for transporting gas pursuant to Revised Code Section 4905.31, Case No. 87-159-GA-AEC, Finding and Order, March 17, 1987.

In Case No. 87-159-GA-AEC, Columbia received what Columbia refers to as "blanket approval" for its CTAPA agreements, an acronym for Competitive Transportation and Agency Purchase Agreement. Under the CTAPA agreements, Columbia sells and delivers gas to end users from a pool of incremental purchases not needed for system supply. The rates to be charged are flexible in order to prevent the loss of load. According to the Finding and Order in Case No. 87-159-GA-AEC, Columbia anticipated that there would be a series of requests by customers other than Madison County Hospital for CTAPA agreements, and Columbia believed that maximum benefits from the program would be derived if CTAPA volumes were permitted to flow on the basis of pre-granted approval from the Commission. Columbia stated that similar CTAPA agreements would be filed with summary reference to the Madison County Hospital application in Case No. 87-159-GA-AEC. The Commission ordered in the March 17, 1987 Finding and Order that all future similar contracts would be considered approved by the Commission upon filing by Columbia subject to future Commission rulings within thirty days of the filing. Columbia filed the CTAPA contract between Columbia and DAGC on April 2, 1987, and the contract was considered approved by the Commission on that date subject to Commission action within thirty days.

Columbia provides service to DAGC on the CTAPA program at a lower rate than Columbia's general service tariff rate and at a lower rate than Suburban's rate. Columbia offered DAGC the CTAPA rate because Columbia was in direct competition with Suburban for DAGC's service (Tr. 32). Of course, Columbia had also been in direct competition with Suburban for service to BGCG, but BGCG received only a free regulator from Columbia and remains a general service tariff customer of Columbia. BGCG has not been

offered the lower CTAPA rate (Tr. 147, 158). According to Mr. Devers, "If the competitive situation would have warranted utilizing a transportation arrangement, I'm sure that Columbia would have approached the customer (EGCG) with that. In this particular instance for the Bowling Green Church of God apparently the Columbia tariff rate was enough for the customer to take service from our company instead of Suburban" (Tr. 157-158). At this point, DAGC is the only church in the area on the CTAPA rate, but Mr. Law stated that Columbia would offer the CTAPA rate to any church in the area "if necessary" to beat out the competition (Tr. 97, 137).

In addition, not only did DAGC receive the CTAPA rate from Columbia, but also DAGC received a free customer service line (Tr. 35). The DAGC customer service line ran approximately 100 to 150 feet at approximately \$5 a foot (Tr. 35-36). Under Columbia's tariff, P.U.C.O. No. 1, Original Sheet No. 6, Section 22(b), the installation and maintenance associated with customer service lines are to be at the customer's expense.

The Wood County Children's Resource Center (WCCRC), a day care center, is located within the corporate limits of Bowling Green and would be subject to Columbia's ordinance contract with the city of Bowling Green. WCCRC's estimated annual consumption is approximately 400 mcf annually. Suburban offered service to WCCRC and offered to extend its main distribution line to the property line of WCCRC, an extension of more than one hundred feet (Tr. 212). Suburban did not ask WCCRC for a deposit to extend the line although Suburban's tariffs require such a deposit (Tr. 212). Columbia offered to install WCCRC's customer service line. For Columbia, this was an extension of 415 feet at \$5 per foot. Although it would take Columbia approximately four years to recover the cost of the customer service line under its base rates, Columbia extended the line because of the competitive situation (Tr. 58).

Columbia and Suburban are also in competition to serve Norbalt Rubber Company (Norbalt) of North Baltimore, Ohio and to make Norbalt a consumer of natural gas instead of fuel oil. On June 23, 1986, Mr. Law wrote to Norbalt to offer a firm burner-tip price of \$2.48 per mcf for a term comparable to any other supplier's offer (Complainant's Ex. 15). Mr. Law stated to Norbalt officials that Columbia intended to keep Suburban out of North Baltimore (Tr. 121). Mr. Law also recalled Columbia's representatives stating at a North Baltimore village council meeting that "Columbia would do whatever it had to do to keep Suburban Gas out of North Baltimore, Ohio" (Tr. 121-123). On July 11, 1986, Mr. Harold Rowe, Columbia's division manager at the Findlay office, wrote to D.S. Brown Company of North Baltimore and offered D.S. Brown a firm natural gas price to match D.S. Brown's current fuel oil cost. The offer was good for twenty-four months (Complainant's Ex. 16). In addition, Columbia

000831

told D.S. Brown that, due to changes in federal transportation policies, Columbia was able to match any bona fide offer from any competing natural gas supplier. However, Suburban began service to D.S. Brown in January 1987 in spite of the fact that Columbia already had a meter at the site (Tr. 208).

Residential consumers may also begin to become a focus of the competition between Columbia and Suburban. According to Mr. Devers, Columbia is considering offering Mr. Vincent Messenger, a residential customer, the CTAPA rate, because Columbia finds itself in a competitive situation with Suburban to serve this residential customer (Tr. 161). Mr. Messenger's home is near the Woodland Mall (Tr. 197). Mr. Devers testified that this residential consumer is the only residential consumer in the Woodland Mall area and the only residential consumer to whom Columbia is considering offering the CTAPA rate (Tr. 198). In addition, Columbia installed the customer service line for Mr. Messenger (Tr. 133). Columbia has also waived deposits on main line extensions for residential customers in the Findlay area (Tr. 76, 134).

Columbia's witness Mr. Devers testified that while Columbia is aggressively competing with Suburban, Columbia would not do anything unlawful to meet competition from Suburban (Tr. 153). Mr. Devers also testified that Columbia would not violate sound business judgment (Tr. 153). Mr. Devers acknowledged that the CTAPA rate is not available to all of Columbia's customers but only to those in competitive situations where the load would not otherwise be served by Columbia. He argued that the CTAPA rate allows Columbia to retain existing load and to compete vigorously, but fairly, for new markets (Columbia Ex. 1, at 5). According to Mr. Devers, there is no adverse impact upon gas costs under the CTAPA program because the gas supplies for CTAPA customers are obtained through incremental purchases which are not needed for Columbia's system supply. In addition, according to Mr. Devers, the non-excise tax portion of the agency fee and supplemental charge is credited to Columbia's GCR rate and lowers the cost of gas to GCR customers. Mr. Devers also testified that CTAPA customers contribute to fixed costs (Columbia Ex. 1, at 5).

Mr. Devers stated that Equity was the first customer to be offered the "flex" rate because Equity informed Columbia that it would purchase its gas requirements from Suburban (Columbia Ex. 1, at 5). Subsequently, Columbia determined that it would be preferable to meet competition with transportation arrangements rather than sales arrangements, and the CTAPA program was developed. The "flex" rate sales contracts were withdrawn, and customers were offered CTAPA agreements. Mr. Devers stated that CTAPA rates are designed to recover the cost of providing service and that CTAPA customers are not served at less than cost. Mr. Devers stated that both the "flex" rate of 1986 and the present CTAPA rates allow Columbia to recover its incremental costs

000832

(Columbia Ex. 1, at 6). The purchase price of the pool of gas used for the CTAPA program was about \$2.21 per mcf (Tr. 182).

Mr. Devers further testified that Columbia does not believe that Columbia's tariff is violated when Columbia extends its distribution mains to serve new customers without requiring the customer to deposit the full cost of the extension. He testified that if Columbia determines that the investment is economically justified, Columbia will extend the main without requiring a deposit. If the extension cannot be justified economically, Columbia may still extend the main because of competition from other suppliers (Columbia Ex. 1, at 6). According to Mr. Devers, requiring a deposit equal to the full cost of a main extension would adversely affect Columbia's ability to attract new business into Columbia's service territory.

Mr. Devers also testified that Columbia had installed on certain occasions customer service lines in order to meet competition. Mr. Devers stated that the cost of customer service lines would not be passed on to Columbia's customers through Columbia's base rates but would be charged to a marketing account (Columbia Ex. 1, at 7). Mr. Parshall testified that the costs associated with the provision of customer service lines, line extensions, regulators, and the waivers of deposits and the reimbursement of cost differentials of appliances were not being recovered by the company through base rates but rather were absorbed by the stockholders (Tr. 61). However, Mr. Law testified that none of these incentives were offered before Columbia's present general service rates became effective on July 2, 1985 (Tr. 130-131).

Mr. Devers testified that there have been instances in which Columbia has begun to bill customers under the CTAPA rate prior to Commission approval (Tr. 154). He stated that Columbia did this because of commitments made to customers in light of the competitive situation (Tr. 154).

Finally, Mr. Rothery testified that Suburban is a gas distribution company subject to Commission regulation but has no general service rates established by the Commission and no GCR rate. In addition, Suburban has only two special contracts on file with the Commission (Tr. 210). However, Suburban does have tariffs for the provision of service on file with the Commission. Suburban's tariffs are modeled after Columbia's tariffs. Suburban is serving some 200 to 250 customers inside the corporate limits of Bowling Green but does not have a franchise to serve Bowling Green. The rates charged these customers are established by ordinances of villages which own the lines. Mr. Rothery stated that he was advised by the mayor of Bowling Green that he did not need a franchise to operate in the city, apparently because Suburban was serving these areas when they were annexed to the city of Bowling Green (Tr. 218).

000833

DISCUSSION:

Suburban argues that Columbia's actions have violated Sections 4905.30, 4905.32, 4905.33, and 4905.35, Revised Code. Section 4905.30, Revised Code, provides in pertinent part:

Every public utility shall print and file with the public utilities commission schedules showing all rates, joint rates, rentals, tolls, classifications, and charges for service of every kind furnished by it, and all rules and regulations affecting them. Such schedules shall be plainly printed and kept open to public inspection.

Section 4905.32, Revised Code, provides:

No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the public utilities commission which is in effect at the time.

No public utility shall refund or remit directly or indirectly, any rate, rental, toll, or charge so specified, or any part thereof, or extend to any person, firm, or corporation, any rule, regulation, privilege, or facility except such as are specified in such schedule and regularly and uniformly extended to all persons, firms, and corporations under like circumstances for like, or substantially similar, service.

Section 4905.33, Revised Code, provides:

No public utility shall directly or indirectly, or by any special rate, rebate, drawback, or other device or method, charge, demand, collect, or receive from any person, firm, or corporation a greater or lesser compensation for any service rendered, or to be rendered, except as provided in Chapters 4901., 4903., 4905., 4907., 4909., 4921., 4923., and 4925. of the Revised Code, than it charges, demands, collects, or receives from any other person, firm, or corporation for doing a like and contemporaneous service under substantially the same circumstances and conditions. No public utility shall furnish free service or service for less than actual cost for the purpose of destroying competition.

000834

Section 4905.35, Revised Code, provides:

No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or reasonable prejudice or disadvantage.

Suburban charges that Columbia provided free customer service lines to DAGC, the Woodland Mall's two major tenants, and WCCRC in violation of Columbia's tariffs and Sections 4905.30 and 4905.32, Revised Code; that Columbia provided C & C with the pipe and riser for its customer service line in violation of Columbia's tariffs and Sections 4905.30 and 4905.32, Revised Code; that Columbia's provision of a free regulator to BGCG violated Columbia's tariffs and Sections 4905.30 and 4905.32, Revised Code; that Columbia violated its tariffs and Sections 4905.30 and 4905.32, Revised Code, by providing the Elder-Beerman store with house piping and the reimbursement for the difference between the cost of electric and the cost of gas appliances; and that Columbia violated its tariffs and Sections 4905.30 and 4905.32, Revised Code, by failing to require deposits from C & C, the Woodland Mall, and other customers for the cost of main line extensions. Suburban points out that all the general service agency purchase and transportation agreements discussed in this proceeding incorporated Columbia's tariffs on file with the Commission into the agreements and that Columbia therefore bound itself to adhere to its tariffs in regard to these customers. In addition, the ordinance of the city of Bowling Green incorporates Columbia's tariffs on file with the Commission. Suburban also charges that Columbia violated Sections 4905.30 and 4905.32, Revised Code, by charging DAGC and C & C the general service agency purchase and transportation rates prior to Commission approval. In addition, Suburban charges that Columbia violated Section 4905.33, Revised Code, by offering to some but not to all of its customers free customer service lines, free regulators, and similar incentives. Suburban charges that Columbia violated Sections 4905.32, 4905.33, and 4905.35 Revised Code, by offering some of its general service customers the general service agency purchase and transportation rates and not offering the same rates to other similarly situated general service customers. Suburban also charges that Columbia violated Section 4905.35, Revised Code, by making DAGC the only church in Columbia's service area on the CTAPA rate, by agreeing that the Woodland Mall would have the only arrangement with a fixed rate for twelve months, by making the Woodland Mall the only mall in Columbia's service area on the general service agency purchase and transportation program, by giving Equity the only agreement in which rates can only be decreased, by offering D.S. Brown a firm burner-tip price for two years, and by offering Norbalt an indeterminate agreement period. Finally, Suburban believes that the CTAPA rate violates Section 4905.35, Revised Code, in that a rate designed to flex

000835

downward to meet a competitor's cost inherently is designed to permit the provision of service at less than its actual cost for the purpose of destroying competition.

Suburban argues that Columbia's failure to follow its tariffs and the Ohio Revised Code are particularly damaging given the competitive environment. According to Suburban, competition should require more disclosure of the terms and conditions of utility rates and services and stricter compliance with the tariffs and statutes. Suburban argues that customers need to know what rates and services are available to them and points to the disparate treatment of J.C. Penney and Elder-Beerman and BGCC and DAGC as examples. Suburban argues that it is unfair that everyone in Columbia's service territory does not know that if competition from Suburban exists that lower rates, free customer service lines, free house piping, free regulators, waivers of main line extension deposits, reimbursement of the differential of the cost of gas appliances, and other such incentives from Columbia could be available. Without such knowledge, according to Suburban, there will be discrimination among similarly-situated customers of Columbia.

In addition to these specific charges, Suburban argues that Columbia has transformed the general service agency purchase and transportation agreements from a defensive program that was designed to help Columbia maintain its existing load to an offensive weapon that is being used by Columbia to destroy competitors such as Suburban. Suburban states that DAGC, C & C, and the Woodland Mall were all new customers, none of whom were previously served by either Suburban or Columbia. At the time Suburban offered to serve these customers, none of them were customers of Columbia. In addition, D.S. Brown and Norbalt were using fuel oil at the time Suburban offered them service. Suburban argues that these customers were subject to open competition between Suburban and Columbia and that Suburban was not raiding established customers of Columbia.

Suburban argues that Columbia's use of the CTAPA program will be detrimental to customers. Suburban believes that similarly-situated public utility customers are entitled to the same rates and privileges and are subject to the same rules and regulations. Suburban believes that because Columbia's actions will effectively destroy competition, such activities will ultimately mean higher rates. Suburban states that Suburban did not succeed in obtaining a single general service account in circumstances where Suburban was in competition with Columbia even though Suburban's general service rates are lower than Columbia's. Suburban argues that Columbia has totally lost sight of its legal and regulatory responsibilities as a public utility in its "over-aggressiveness" toward Suburban. Suburban argues that Columbia cannot rely upon the new competitive environment to justify the specific statutory violations alleged in this case.

000836

OCC agrees with Suburban that the record in this proceeding shows numerous instances in which Columbia has violated Section 4905.32, Revised Code, by offering service at a rate different from the rate provided for in Columbia's tariffs. OCC also agrees with Suburban that Columbia's failure to adhere to the terms of Columbia's tariffs is a violation of Section 4905.33, Revised Code, which prohibits discriminatory rates. OCC asserts that the charging of discriminatory rates causes general service customers and especially residential customers to bear the burden of Columbia's generosity. OCC asserts that the charging of discriminatory rates is unfair to customers who pay full rates.

OCC points to the record that indicates that Columbia began charging C & C the general service agency purchase and transportation rate with December 1986 usage, although the agreement between Columbia and C & C was not finally made until January 9, 1987 and Columbia did not file the agreement with the Commission for approval until March 26, 1987 (Tr. 65-66). OCC states that Columbia began charging DAGC the CTAPA rate on February 19, 1987 but did not file the agreement with the Commission until April 2, 1987. In addition, OCC argues that the CTAPA agreements are discriminatory because they have not been extended to all customers in a similar manner as required by Section 4905.33, Revised Code. OCC also argues that because customers on CTAPA rates are not billed for any excise tax charges on the gas cost portion of their gas bills, either the company or other remaining customers must bear the excise tax charges associated with these customers.

OCC also argues that the record shows that Columbia has violated P.U.C.O. No. 1, Original Sheet No. 6, Section 22(b) of Columbia's tariffs which states that the customer is to bear the expense of installing and maintaining customer service lines because Columbia provided free customer service lines to DAGC, Elder-Beerman, J.C. Penney's and WCCRC and free equipment to C & C. OCC argues that Columbia also violated its tariff which requires the customer to install and maintain appliances at the customer's own expense when Columbia reimbursed Elder-Beerman for the difference in cost between electric and gas appliances. OCC argues that the provision of a free regulator to BGCG violated P.U.C.O. No. 1, Original Sheet No. 6, Section 23 of Columbia's tariffs which provides that the customer must install and maintain a regulator. OCC believes that competition from Suburban or other fuel sources does not justify Columbia's tariff violations.

OCC recommends that the Commission reconsider Columbia's CTAPA program and that the Commission find the CTAPA program to be discriminatory. OCC further recommends that the Commission order Columbia to cease its application of the general service purchase agency and transportation rate or the CTAPA rate to C & C, DAGC, Equity, and any other customers on such rates. In the

000837

alternative, OCC argues that the Commission should require Columbia to present evidence that all costs associated with the general service purchase agency and transportation agreements or the CTAPA agreements as well as the provision of free services are borne by Columbia's shareholders and not ratepayers.

Columbia argues that Columbia has violated neither its tariffs nor the statutes and that Columbia's rates, charges, and practices have been fully consistent with its obligations as a public utility. First, Columbia argues that this case must be viewed within the broader context of the sweeping changes in the natural gas industry. According to Columbia, as a result of regulatory changes and market forces, local gas distribution companies face intense competition from alternate fuels, unregulated gas producers, and other regulated gas distribution companies. The Federal Energy Regulatory Commission has authorized selective discounting of interstate transportation rates in competitive situations, and the Public Utilities Commission of Ohio has approved a number of innovative arrangements including sales and transportation rates based upon the price of competing alternate fuels. Columbia believes that only such innovative arrangements will allow Ohio's gas utilities to cope with the demands of the changing marketplace.

Columbia argues that Columbia is aggressively pursuing new markets but is not duplicating the facilities of other utilities which are already in place. Columbia argues that Suburban attempted to raid from Columbia a part of the Equity plant that Columbia was serving. Columbia claims that Columbia maintained that portion of the Equity load by offering Equity a "flex" rate. Columbia also states that Columbia was prepared to serve D.S. Brown when Suburban offered D.S. Brown service. Columbia argues that Columbia was providing natural gas service to North Baltimore when Suburban sought an ordinance to serve portions of the village. In short, Columbia charges that Suburban was attempting to raid its established markets.

Columbia admits that Columbia entered into agreements with Equity, C & C, DAGC, and the tenants of the Woodland Mall in order to meet competition posed by Suburban. Columbia states that such agreements have already been approved by the Commission. Columbia argues that because the Commission granted "blanket approval" in Madison County Hospital, Case No. 87-159-GA-AEC, the need for further applications has been eliminated.

Columbia admits that customers with general service agency purchase and transportation agreements are billed under those rates pending formal approval by the Commission but argues that rapid response is essential given the competitive situation. Columbia argues that if Columbia had been required to wait for formal Commission approval, the customer would have been lost.

000838

Columbia argues that where an arrangement is consistent with the Commission's transportation guidelines, there is nothing to prohibit Columbia from temporarily offering the service pending Commission approval. Columbia further argues that the only penalty for failure to file contracts with the Commission is that the contracts are not lawful, and the only consequence is that the contracts are not enforceable in a court of law. In any event, according to Columbia, because the agreements at issue in this proceeding have now been approved by the Commission, this issue is moot.

Columbia further argues that the CTAPA program does not violate Sections 4905.30 and 4905.32, Revised Code, which require utilities to adhere to rates and charges set forth in their tariffs, because CTAPA customers are not served under a tariff but under special arrangements filed and approved under Section 4905.31, Revised Code. According to Columbia, special arrangements are permissible under Section 4905.31(D), Revised Code, if a classification of service based upon any reasonable consideration is established. Under the CTAPA or general service agency purchase and transportation arrangement programs, the classification is based upon the existence of competition for a customer's service. Columbia argues that a classification based upon competitive conditions is reasonable. According to Columbia, a utility should be able to charge different rates in specific areas to particular customers without being guilty of undue discrimination if such rates are necessary to meet competition. Columbia argues that the Commission has authorized "downwardly flexible" intrastate transportation rates in Investigation of Gas Transportation, Case No. 85-800-GA-COI, August 13, 1986. According to Columbia, the Commission's approval of "downwardly flexible" intrastate transportation rates constituted an implicit finding that such rates are not unduly discriminatory. Columbia states that Columbia offers the CTAPA rate to customers who have received an offer from a competitor and which offer the customer was prepared to accept. Without the CTAPA rate, Columbia would not have the load. Columbia argues that the Commission did not mean to allow the use of the CTAPA program only in a situation where existing load would be "lost", because new load, as well as existing load, can be "lost" to competing suppliers. As for the variations in the CTAPA agreements offered by Columbia, Columbia states that the variations were necessary in the competitive situation. According to Columbia, the need for variation is one of the reasons that CTAPA customers are served under special arrangements rather than a tariff.

Columbia also argues that the CTAPA program does not constitute unlawful or undue discrimination. According to Columbia the statutory prohibitions against discrimination do not apply to special contracts. In addition, Columbia argues that Section 4905.35, Revised Code, forbids only "undue" or "unreasonable"

preferences or advantages, while Section 4905.33, Revised Code, prohibits only the receipt of different compensation for "like and contemporaneous service under substantially the same circumstances and conditions". Section 4905.32, Revised Code, bars utilities from granting refunds, privileges, or facilities unless they are extended to all customers under like circumstances for like or substantially similar service. In other words, according to Columbia, Ohio law requires similar treatment only where the customers are similarly situated, and Columbia believes that because of the competitive offers received by its customers with general service agency purchase and transportation agreements, these customers were not similarly situated to Columbia's other customers not on such agreements.

Columbia further argues that the CTAPA agreements do not violate the Section 4905.33, Revised Code, prohibition against furnishing service for less than actual cost for the purpose of destroying competition because the CTAPA rates are based upon the full cost of service. Columbia argues that nothing in the record supports the contention that the CTAPA program involves service at less than actual cost. Columbia states that the state excise tax on the cost of gas is always excluded from transportation volumes because the excise tax does not apply to transportation volumes. In addition, the CTAPA agreements require the customer to reimburse Columbia for any tax liability that Columbia may have on the volumes. Columbia admits that under the CTAPA program Columbia may flex the CTAPA rates downward so that there is a potential that service may occur at less than cost in order for Columbia to retain the load. Columbia argues that if this situation were to occur, the pricing at less than cost would not be for the purpose of destroying competition but rather to meet competition from alternate suppliers. However, according to Mr. Devers, under the CTAPA program, Columbia would not charge less than a floor rate which would include the cost of gas, the agency fee, and an amount sufficient to cover the variable costs of providing the service.

As for the question of Columbia's failure to follow its tariff by waiving deposits for main extensions for its tariff customers, Columbia believes that the tariff gives Columbia discretion to require deposits, and Columbia argues that Columbia's level of investment in new facilities is a management decision subject to review in rate proceedings. In addition, Columbia argues that while Columbia and Suburban have identical tariffs on main extensions, Suburban offered to extend its main to WCCRC without asking for a deposit. According to Columbia, it would be detrimental to business in Ohio to collect a deposit equal to the full cost of every main extension needed to serve a new industrial or commercial customer.

In addition, Columbia argues that the incentives offered such as free customer service lines and regulators, the

000840

reimbursement of certain equipment costs, and the waiver of deposits are used only in situations where Columbia believes that the load would not otherwise be served by Columbia. Columbia argues that new loads increase contributions to fixed costs which benefit all customers. Furthermore, according to Columbia, the cost of these incentives are fully absorbed by Columbia's shareholders. Columbia also argues that these incentives do not violate Sections 4905.32, 4905.33, and 4905.35, Revised Code, because marketing incentives are not public utility services. Columbia argues that customer service lines and reimbursements for appliances, like telephone directories, fall outside the scope of regulation. At the same time, Columbia argues that the tariffs serve only to absolve Columbia from the obligation to provide customer service lines and regulators but do not prohibit Columbia from furnishing additional assistance above and beyond Columbia's obligations. Columbia argues that variations in incentives offered were the result of the competitive situation. In addition, if incentives were offered at less than cost, the incentives were offered to meet, and not to destroy, competition.

The Commission believes that Columbia's general service agency purchase and transportation arrangements are proper under Section 4905.31(D), Revised Code, for Columbia to retain existing load and to obtain new load. The Commission finds that a reasonable classification of customers under Section 4905.31(D), Revised Code, would be a classification of customers who would not otherwise be served by Columbia in the absence of the special arrangement. In The Cleveland Electric Illuminating Company, Case No. 83-1342-EL-ATA and Case No. 83-1343-HT-ATA, Opinion and Order, May 8, 1984, the Commission suggested that the "reasonable arrangements" mechanism of Section 4905.31, Revised Code, would be the appropriate way to modify rates in order to meet competition to retain existing load and to obtain new load. The Commission sees no basis for a distinction between the retention of presently existing customers and the acquisition of new customers in regard to whether a reasonable classification exists to meet competition under Section 4905.31(D), Revised Code. Under both circumstances the utility is attempting to meet competition to serve a customer who would not otherwise be served if the rate were not offered. The Commission finds that Suburban has not met its burden of proving that the general service agency purchase and transportation agreements are unreasonable arrangements to allow Columbia to serve load that Columbia would not otherwise serve in the absence of such arrangements.

The Commission approved Columbia's general service agency purchase and transportation agreement with Equity in Case No. 86-1781-GA-AEC, September 5, 1986. The record indicates that Columbia offered the "flex" rate to Equity in order to retain Columbia's load that Suburban had offered to serve. The Commission believes that Equity was a proper customer to enter into a general service agency purchase and transportation

agreement with Columbia. As for the Equity agreement feature that the Equity rate could only be decreased, the Commission does not find that feature to violate Section 4905.33, Revised Code, which prohibits special rates offered one customer and not another and prohibits free service or service at less than cost for the purpose of destroying competition. First, there is nothing in the record to indicate that the rate was offered at less than cost, and in fact the record indicates that the rate adequately covers Columbia's costs. The problem that the rate could eventually flex so far downward so as not to cover Columbia's costs has not presented itself here. Second, as for Suburban's argument that the general service agency purchase and transportation rate offered to Equity was not offered to others, the Commission finds that under Section 4905.31, Revised Code, the arrangement between Equity and Columbia as presented in Case No. 86-1781-GA-AEC is a reasonable arrangement. The classification of customer represented by Equity is a general service customer of Columbia that Columbia would not have served had the arrangement not been available. Having determined that Equity was a proper customer to make a general service agency purchase and transportation agreement with Columbia, the Commission will not interfere with the bargain made between the two contracting parties once it appears to the Commission that the arrangement was reasonable and lawful. There is no requirement that all general service agency purchase and transportation agreements be alike.

In addition, the Commission approved C & C's general service agency purchase and transportation agreement with Columbia in Case No. 87-504-GA-AEC, on April 21, 1987. The application stated that the arrangement would benefit Columbia's customers because of increased fixed-cost contributions from a load that would otherwise be lost. The Commission approved this arrangement under Section 4905.31, Revised Code, as a reasonable arrangement, and Suburban has presented no evidence that would convince the Commission that the general service agency purchase and transportation agreement between Columbia and C & C was unreasonable.

Of the agreements discussed in this proceeding, only the general service agency purchase and transportation agreement between Columbia and DAGC was filed pursuant to the blanket approval granted in the Commission's Finding and Order in Madison County Hospital, Inc., Case No. 87-159-GA-AEC, March 17, 1987. The Commission found in Madison County Hospital that under Section 4905.31, Revised Code, reasonable arrangements between gas utilities and their customers may be authorized upon approval by the Commission. In the Finding and Order in Case No. 87-159-GA-AEC, the Commission found that "the rates to be charged under this arrangement provide for flexibility in order to prevent the loss of load." When Columbia filed on April 2, 1987 its agreement with DAGC, Columbia stated that the filing was

pursuant to Case No. 87-159-GA-AEC in which the Commission approved an identical general service agency purchase and transportation agreement and ordered that all future similar agreements be approved by the Commission upon filing by Columbia unless and subject to future rulings by the Commission within thirty days of the filing of such agreement (Columbia Ex. 3). The Commission did not make any subsequent findings within thirty days, and the arrangement remains approved. Suburban has presented no evidence to convince the Commission that the arrangement between Columbia and DAGC is unreasonable and should not be approved.

However, the Commission is concerned about the fact that the agreement between Columbia and Equity was to take effect on August 20, 1986 according to the agreement, but the agreement was not filed with the Commission until September 5, 1986, and was not approved by the Commission until September 30, 1986. Under Section 4905.31, Revised Code, the Commission is to approve such arrangements, and no arrangement is lawful unless it is filed with and approved by the Commission. Regardless of whether Columbia argues that the only consequence of unapproved arrangements is that the contracts are unenforceable, the Commission has long had the policy that any arrangements under Section 4905.31, Revised Code, must be reviewed and approved by the Commission before they become effective so as to ensure that they are just and reasonable and to ensure that they will not adversely affect the balance of the company's customers. Cleveland Electric Illuminating, supra, at 7. The Commission agrees with Suburban that it is improper for Columbia to allow gas to flow at a special contract rate prior to Commission approval of the special contract arrangement.

The delay in filing the special arrangements exists in the other cases under discussion here as well. The case of the C & C contract is especially disturbing as it appears that the agreement was to take effect on November 14, 1986 but was not filed with the Commission until March 26, 1987, and not approved until April 21, 1987. The Commission finds that Columbia's failure to file the contract in a timely fashion was improper as was the decision to allow gas to flow under the contract rate prior to Commission approval.

As for the DAGC arrangement, the Commission notes that it was to become effective as of February 19, 1987, but was not filed with the Commission until April 2, 1987. Given the fact that the Commission has taken the extraordinary step of allowing approval of these contracts upon their filing subject to Commission action within thirty days, the Commission can see no reason why these contracts would take effect prior to their filing. The Commission does not believe that the competitive threat justifies placing the rate in effect prior to Commission approval. The Commission finds it unreasonable for the general

000843

service agency purchase and transportation rates to go into effect prior to their filing with the Commission.

The Commission also notes that Columbia has already reached an agreement with the Woodland Mall to charge the Woodland Mall at a particular special rate without filing such agreement with the Commission for approval. Apparently, no gas has flowed under this arrangement at this time; however, the Commission can see no reason why Columbia has not filed this arrangement under the Case No. 87-159-GA-AEC blanket approval provisions. The Commission would not foreclose the approval of the general service agency purchase and transportation arrangement between the mall and its tenants and Columbia simply because these are new customers of Columbia. However, prior to the arrangements being filed, the Commission can make no determination in this matter.

With regard to the provision of free customer service lines, regulators, and various equipment and the waiver of deposits on main line extension, the Commission notes that all the general service agency purchase and transportation agreements that have been approved by the Commission have all incorporated Columbia's tariffs on file with the Commission as part of the arrangements. The Commission finds that Columbia's tariffs on file with the Commission apply to the general service agency purchase and transportation agreements. In addition, to argue, as Columbia does, that customer service lines, main line extensions, and regulators are not subject to Columbia's tariffs is directly contrary to the fact that Columbia's tariffs expressly cover these items and expressly state the customers' responsibilities. To waive tariff provisions for customers with regard to these services would render Columbia's tariffs on these services completely unreliable as a source of information on Columbia's charges and would violate Sections 4905.30 and 4905.32, Revised Code. The Commission finds that the waivers of tariff provisions for customers are violations of Columbia's tariffs and Sections 4905.30, 4905.32, 4905.33, and 4905.35, Revised Code. Under Section 4905.30, Revised Code, the tariffs are to contain all charges for service of every kind furnished by Columbia. Under Section 4905.32, Columbia may not collect a different charge for any service rendered than that contained in its tariffs, and Columbia may not remit any charge or extend to any person any privilege except as specified in its tariffs and as extended uniformly to all persons under similar conditions. Under Section 4905.33, Revised Code, Columbia may not charge any person a greater or lesser amount for any service rendered than it charges any other person under the same circumstances. Under Section 4905.35, Revised Code, Columbia may not give any unreasonable advantage to any person or subject any person to any undue disadvantage. Under Columbia's tariffs, the customer is responsible to provide customer service lines, house piping, and appliances, and there are no exceptions in Columbia's tariffs to

000844

these requirements. Columbia may not apply its tariffs to one customer and not to another.

Therefore, Columbia's tariffs on file with the Commission apply to C & C as the tariffs apply to any other general service customer of Columbia. C & C should have been required to deposit the cost of the main line extension with Columbia as required by Columbia's tariffs. The tariff does not make the deposit subject to Columbia's discretion. Once Columbia determines that the main extension should be done, it is mandatory under the tariffs that the customer deposit with Columbia the cost of the extension. In addition, the free equipment to C & C violated Columbia's tariffs. However because Columbia has already provided this free service to C & C and has already waived the deposit, the Commission will not require any payment for these services by C & C. The Commission understands that the cost of this equipment was not borne and will not be borne by Columbia's ratepayers.

In addition, Columbia violated its tariffs and Sections 4905.30, 4905.32, 4905.33, and 4905.35, Revised Code by providing DAGC with a free customer service line. Under Columbia's tariffs, the customer is responsible for the expense of new customer service lines. Columbia may not waive this tariff provision for one or any of its customers. Columbia's tariffs on file with the Commission apply to DAGC as they apply to all Columbia's general service customers. However, because Columbia has already provided the free customer service line to DAGC, the Commission does not believe that DAGC should now have to pay for the line. The Commission notes that the cost of the line was not borne and will not be borne by Columbia's ratepayers.

Finally, the Commission finds that the only rules and regulations for service from Columbia that should apply to the mall are Columbia's tariffs for gas service on file with the Commission. The August 19, 1986 offer by Columbia to Brisa Builders to pay for the customer service lines to J.C. Penney and Elder-Beerman and to pay for Elder-Beerman's house piping and the differential between gas and electric appliances violated Sections 4905.32, 4905.33, and 4905.35, Revised Code, and Columbia's tariffs on file with the Commission. The competition posed by Suburban does not justify Columbia's attempt to waive tariffs in regard to the mall and to some of the mall tenants in order to beat out Suburban to serve the mall. The Commission will not now insist that Columbia collect the improperly waived charges from the mall's tenants. Although the failure to follow Columbia's tariffs was unlawful, Columbia's general service customers were not harmed to the extent that the cost of the provision of these services was not paid and will not be paid by Columbia's ratepayers.

The provision of a free regulator to BGCG and of a free customer service line to WCCRC violated Columbia's tariffs and Sections 4905.30, 4905.32, 4905.33, and 4905.35, Revised Code.

000845

BGGC is a general service customer of Columbia subject to Columbia's rates and tariffs on file with the Commission. Under Columbia's tariff, P.U.C.O. No. 1, Section 23, Original Sheet No. 6, the customer shall at his expense provide, install, and maintain the regulator. WCCRC is a general service customer subject to Columbia's tariffs, and under Columbia's tariff P.U.C.O. No. 1, Original Sheet No. 6, Section 22 (b) a customer is to install and maintain customer service lines at his own expense. Although WCCRC is located in the corporation limits of Bowling Green, the ordinance contract between Columbia and Bowling Green incorporates Columbia's tariffs on file with the Commission.

The Commission finds that Suburban has met its burden of proving the allegations of its complaint to the extent discussed above. The Commission agrees that the provision of free services and the waiving of deposits for customers were in violation of Columbia's tariffs and the Revised Code. The Commission has not ordered Columbia to demand payment from small customers, C & C, DAGC, BGGC, or WCCRC for the provision of various services in violation of Columbia's tariffs and the Revised Code; however, the Commission expects Columbia to cease such practices immediately. The Commission does not agree with Suburban that CTAPA rates should not be offered to customers facing competition from other natural gas distribution companies. The Commission believes that it is reasonable for Columbia to offer a CTAPA rate to retain load that would otherwise be lost to any competing supplier or to attract new load. In addition, the Commission sees no distinction between new and existing customers in regard to which customers may be offered such arrangements. It should be clear, however, that the Commission does not condone the actions of Columbia in offering facilities free or below cost in violation of Columbia's tariffs. The Commission is also considering the possibility that there may be certain classes of customers who may not be appropriate for general service agency purchase and transportation agreements. Finally, the Commission does not foreclose the possibility that Suburban will be able to establish its own general service agency purchase and transportation arrangements with customers whose load might otherwise be lost to competitors.

FINDINGS OF FACT:

- 1) This complaint was filed by Suburban on August 29, 1986 against Columbia. On October 22, 1986, Suburban filed an amended complaint. Suburban alleged that Columbia's practices were violations of Sections 4905.30, 4905.32, 4905.33, and 4905.35, Revised Code.

000846

- 2) On January 27, 1987, Columbia answered the complaint. Columbia denied all the substantive allegations of the complaint.
- 3) On May 14, 1987, the motion of OCC to intervene in this proceeding was granted.
- 4) The hearing in this matter was held on May 7, 1987. Notice of the hearing was published in the Daily Sentinel-Tribune, a newspaper of general circulation in Wood County, Ohio.
- 5) Equity was a customer of Columbia in July 1986 when Columbia offered Equity a general service agency purchase and transportation agreement. Equity had been approached by Suburban and would have switched from Columbia to Suburban had the transportation arrangement not been offered.
- 6) The "flex" rate offered Equity may only be decreased by Columbia.
- 7) Columbia offered the new stores at the Woodland Mall general service agency purchase and transportation agreements along with free customer service lines to two of the stores and house piping and the differential between the cost of gas and electric appliances to one of the stores.
- 8) Columbia offered C & C a general service agency purchase and transportation agreement, provided C & C with a main line extension without requiring a deposit, and provided a pipe and riser for the line of C & C.
- 9) On March 11, 1987, Columbia entered into a general service agency purchase and transportation agreement with DAGC.
- 10) Columbia filed the CTAPA agreement with DAGC on April 2, 1987, pursuant to Madison County Hospital, Case No. 87-159-GA-AEC.
- 11) DAGC received a free customer service line from Columbia.
- 12) Columbia provided its new general service tariff customer BCGG with a regulator needed to provide service from a high pressure transmission line.

- 13) Columbia provided a free customer service line to WCCRC, a customer subject to Columbia's ordinance rates with the city of Bowling Green.
- 14) Columbia filed its general service agency purchase and transportation arrangements with the Commission in several instances after the agreements went into effect.

CONCLUSIONS OF LAW:

- 1) This complaint was brought under Section 4905.26, Revised Code. Notice of the hearing was published in accordance with the requirements of that section.
- 2) Equity was a proper customer to receive a general service agency purchase and transportation agreement from Columbia. The arrangement has been approved by the Commission pursuant to Section 4905.31, Revised Code.
- 3) Because Equity was a proper customer to enter into a general service agency purchase and transportation agreement with Columbia and because the Commission considers the arrangement between Columbia and Equity to be lawful and reasonable, the Commission will not inquire further into the question whether Columbia made a good bargain as long as the Commission has no reason to doubt that Columbia is not offering the service below cost for the purpose of destroying competition.
- 4) It is appropriate for Columbia to offer existing and new customers general service agency purchase and transportation agreements because these agreements are reasonable to allow Columbia to maintain its existing load and to attract new load.
- 5) C & C was a proper customer to be offered the general service agency purchase and transportation agreement. The arrangement has been approved by the Commission pursuant to Section 4905.31, Revised Code.
- 6) DAGC was an appropriate customer to be offered a CTAPA rate. The arrangement has

000848

been approved by the Commission pursuant to Section 4905.31, Revised Code.

- 7) The general service agency purchase and transportation rates should not take effect prior to Commission approval, which under Case No. 87-159-GA-AEC is granted upon filing of the arrangement with the Commission.
- 8) The general service agency purchase and transportation agreements discussed in this case incorporate Columbia's tariffs by reference, and customers of Columbia under the agreements are subject to Columbia's tariffs on file with the Commission.
- 9) The provision of customer service lines, regulators, and line extensions are subject to Columbia's tariffs on file with the Commission and to Sections 4905.30 and 4905.32, 4905.33, and 4905.35, Revised Code.
- 10) The provision by Columbia of free customer service lines, regulators, and house piping, the waiver of deposits for main line extensions, and the provision of the cost differential between gas and electric appliances to customers subject to Columbia's general service tariffs are violations of Columbia's tariffs and Sections 4905.30, 4905.32, 4905.33, and 4905.35, Revised Code.
- 11) Columbia may not waive its tariff requirements for some customers and not others regardless of whether the cost is not borne by ratepayers because Sections 4905.32, 4905.33, and 4905.35, Revised Code, require that the tariffs be uniformly applied to similarly-situated customers.
- 12) The existence of competition for customers in Columbia's service territory does not justify the disregard for Columbia's tariffs on file with the Commission.
- 13) The provision of a main line extension to C & C without requiring a deposit is not in conformity with Columbia's tariffs P.U.C.O. No. 1, Original Sheet No. 8, Section 34 which should have applied to C & C. The provision of material to C & C in the form of a pipe

000849

and riser for the service line is also not in conformity with Columbia's tariffs.

- 14) The provision of a free customer service line to DAGC was inappropriate for a customer who should have been subject to Columbia's tariffs.
- 15) Under Columbia's tariffs, P.U.C.O. No. 1, Original Sheet No. 6, Section 22 (b), installation and maintenance of customer service lines is to be at the customer's expense.
- 16) The provision of a free regulator to BCCG, a general service customer subject to Columbia's tariffs, is contrary to Columbia's tariffs and Ohio statutory law.
- 17) The provision by Columbia of a free regulator to a customer subject to Columbia's general service rate is not in conformity with P.U.C.O. No. 1, Original Sheet No. 6, Section 23, of Columbia's tariffs which states that the customer shall install and maintain, at his expense, a suitable regulator for reducing pressure where service is provided from a high pressure transmission line.
- 18) A free customer service line should not have been provided to WCCRC under P.U.C.O. No. 1, Original Sheet No. 6, Section 22 (b) of Columbia's tariffs.
- 19) Under Ordinance No. 4209 of the city of Bowling Green, Section 3, the terms and conditions of service to be rendered shall conform with the rules and regulations for furnishing gas service of Columbia on file with the Commission.
- 20) The provision of free service lines, house piping, and the differential in the cost of gas and electric appliances given to some but not all stores at the Woodland Mall by Columbia was not appropriate under Columbia's tariffs for customers who should have been subject to Columbia's tariffs.
- 21) The complainant has met its burden of proving that Columbia has violated its tariffs and Sections 4905.30, 4905.32, 4905.33, and 4905.35, Revised Code, by providing free

000850

86-1747-GA-CSS

-29-

customer service lines to Elder-Beerman and J.C. Penney at the Woodland Mall, DAGC, and WCCRC, free house piping and the differential between gas and electric appliances to Elder-Beerman at the Woodland Mall, a free regulator to BGCG, and a waiver of the deposit required for a main line extension to C & C.

- 22) The complainant did not meet its burden of proving that the general service agency purchase and transportation agreements between Columbia and its customers Equity, the Woodland Mall, C & C, and DAGC are unreasonable.

ORDER:

It is, therefore,

ORDERED, That Columbia may enter into general service agency purchase and transportation agreements to retain existing load and to attract new load. It is, also,

ORDERED, That general service agency purchase and transportation agreements take effect only upon their filing with the Commission under Case No. 87-159-GA-AEC. It is, further,

ORDERED, That Columbia apply uniformly its tariffs on file with the Commission to all Columbia's general service customers to whom these tariffs apply and to all customers subject to ordinance rates which ordinances incorporate such tariffs and to all customers subject to agreements which agreements incorporate such tariffs. It is, further,

ORDERED, That a copy of this Opinion and Order be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas V. Chema, Chairman

William H. Brooks
William H. Brooks

Ashley C. Brown
Ashley C. Brown

Gloria L. Gaylord
Gloria L. Gaylord

Alan R. Schriber
Alan R. Schriber

CLM/vrt

Entered in the Journal

04 AUG 1987

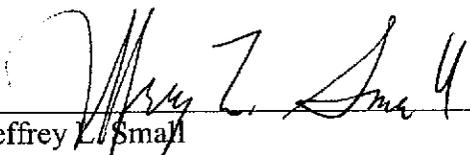
A True Copy

Nancy L. Wolpe
Nancy L. Wolpe
Secretary

000851

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Supplement of Appellant, the Office of the Ohio Consumers' Counsel (Public Version) was served upon the below-listed counsel by regular U.S. Mail, prepaid, this 19th day of May 2008.



Jeffrey L. Small
Counsel for Appellant,
Office of the Ohio Consumers' Counsel

PARTIES OF RECORD

Thomas W. McNamee
Duane W. Luckey
Sarah J. Parrot
Assistant Attorneys General
Public Utilities Section
180 East Broad Street, 9th Floor
Columbus, OH 43215

*Attorneys for Appellee
Public Utilities Commission of Ohio*

Michael D. Dortch
Kravitz, Brown & Dortch, LLC
65 East State Street, Suite 200
Columbus, Ohio 43215

*Attorney for Intervening Appellee,
Duke Energy Retail Sales, LLC*

Paul Colbert
Rocco D'Ascenzo
Duke Energy Ohio, Inc.
155 East Broad Street, 21st Floor
Columbus, Ohio 43215

*Attorneys for Intervening Appellee
Duke Energy Ohio, Inc.*