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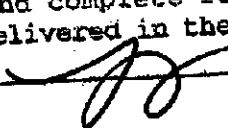
BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Ohio :  
Edison Company, the Cleveland Electric :  
Illuminating Company, and the Toledo :  
Edison Company for Approval of a : Case No. 07-796-EL-ATA  
Competitive Bidding Process for Standard : Case No. 07-797-EL-ATA  
Service Offer Electric Generation Supply, :  
Accounting Modifications Associated with :  
Reconciliation Mechanism and Phase In, :  
and Tariffs for Generation Service. :

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STAFF COMMENTS ON THE FIRSTENERGY COMPANIES'  
PROPOSED COMPETITIVE BID PROCESS

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The Commission needs to focus on whether or not the prices resulting from the Competitive Bid Process (CBP) proposed by the FirstEnergy companies (the Companies) can be relied upon to be just and reasonable given the state of electricity markets. There are large uncertainties as to whether sufficient or fair competition exists to discipline price and service quality. The restructuring of Ohio's electric generation business has thus far failed to produce an efficient, competitive retail market that can meet the needs of the state's economy in an affordable, reliable and sustainable manner. Likewise, staff questions the fairness and efficiency of the wholesale market that should support and enable retail competition and customer choice. Staff's concerns regarding FirstEnergy's proposal for a CBP derive from this lack of market development. We conclude that it is

still premature to release the prices for the Companies' standard service offer customers to market forces as they exist today.

### **Retail Markets**

Ohio's electric restructuring law, which was enacted in 1999, clearly envisioned the development of a fully competitive retail electric market where consumers would be able to choose from among a large number of Competitive Retail Electric Service (CRES) providers to supply their electricity. The law set a benchmark of 20% customer switching by the end of 2005.

The amount of electricity sold in Ohio by CRES providers has declined from a high of 20.5% of Ohio's total electricity requirements in 2005 to 9.0% in 2007. Of the 9.0% sold by CRES providers in Ohio 7.6% of total requirements are being served by utility affiliate marketers. Thus, non-affiliated CRES providers sold 1.3% of the total electric energy served in Ohio in the second quarter of 2007.

The amount of electricity sold by CRES providers in FirstEnergy service territories has declined from a high of 36.7% of total requirements in 2005 to 15.3% in 2007. Of the 15.3% sold by CRES suppliers in the FirstEnergy service territories 13.8% are being served by FirstEnergy Solutions, an affiliate of the Companies. Thus, non-affiliated CRES providers sold 1.6 % of the total electric energy consumed by customers in the FirstEnergy service territories in the second quarter of 2007.

Figures 1 through 6 demonstrate that a vibrant retail market has not developed even for those customers who use large amounts of electricity.

Figure 1.

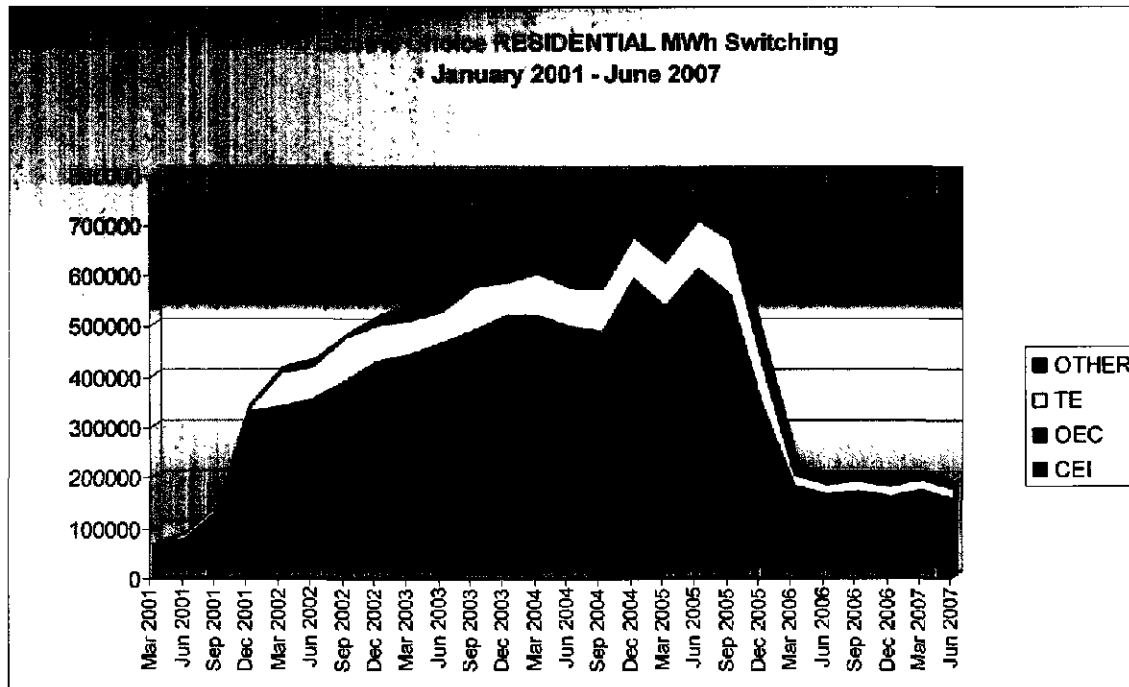


Figure 2.

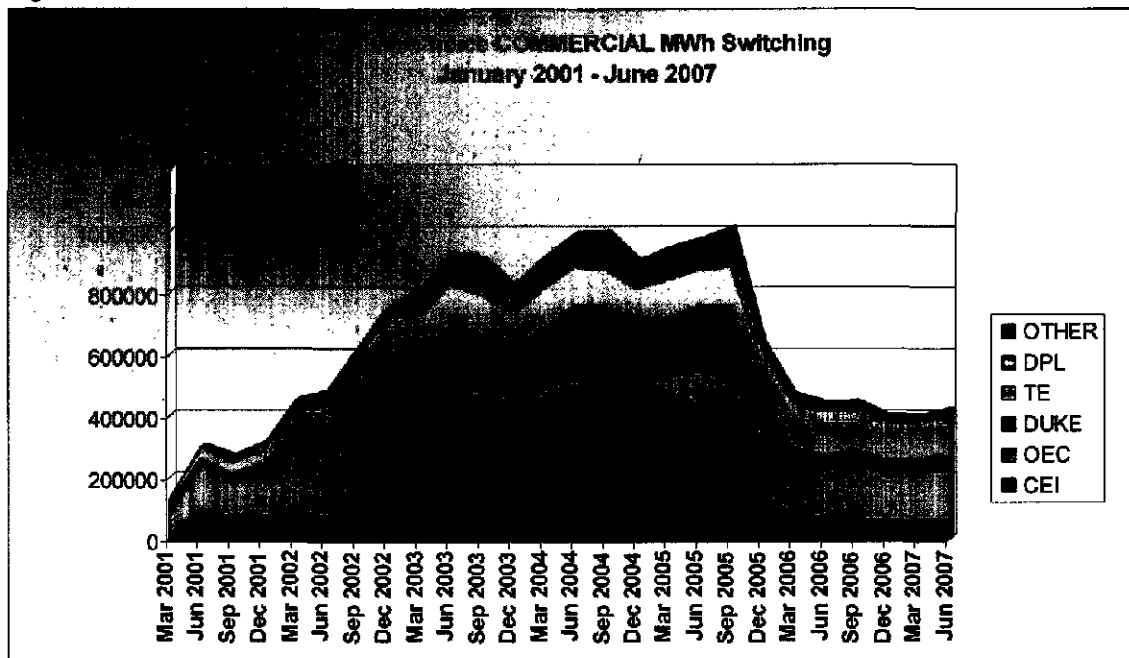


Figure 3.

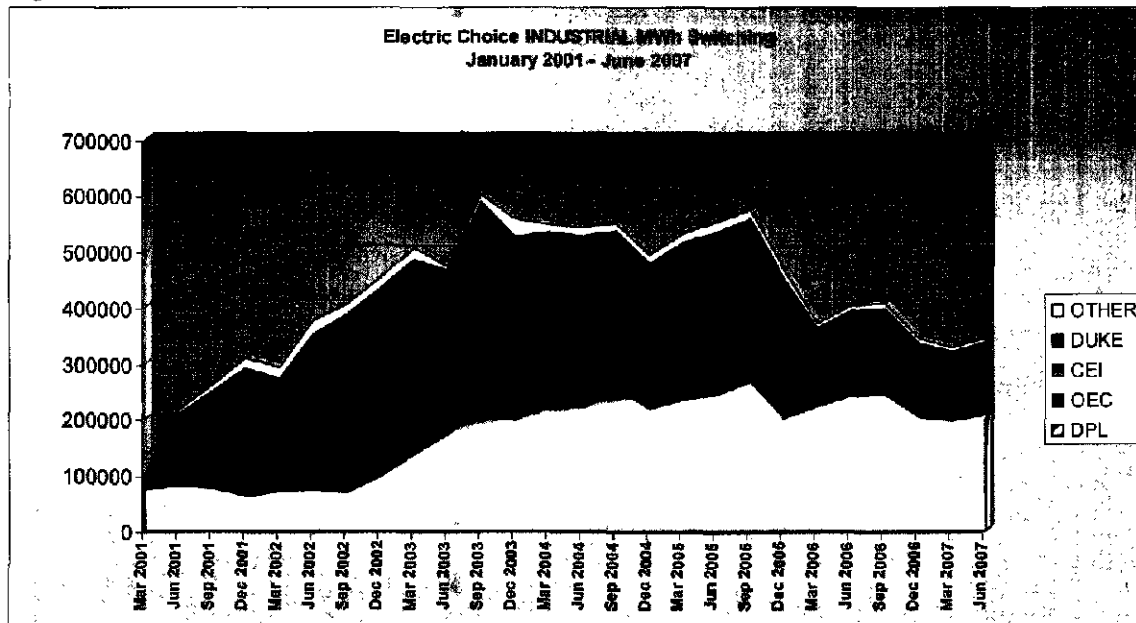


Figure 4

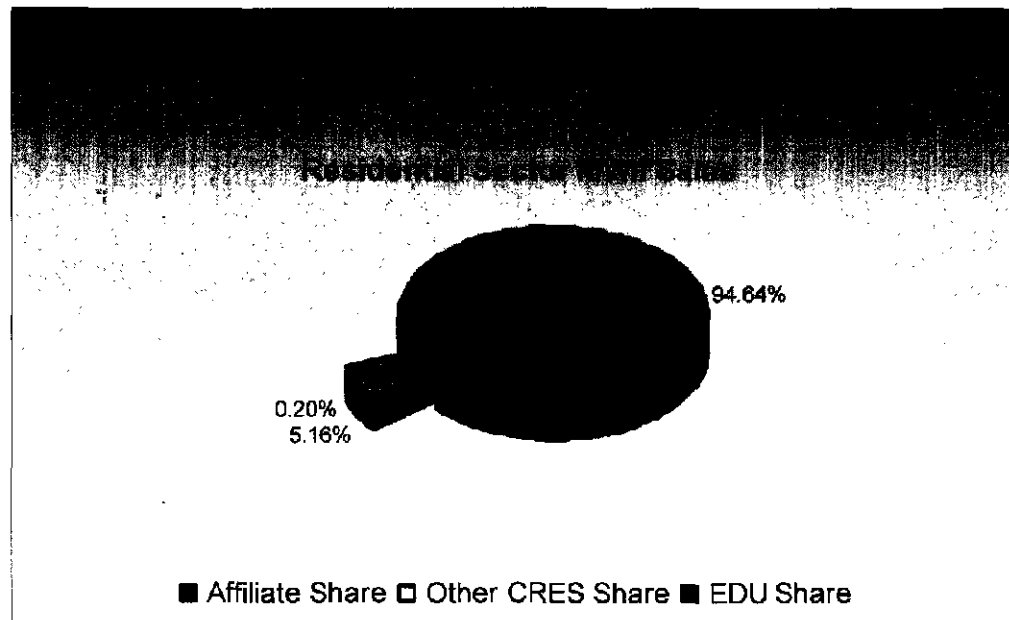


Figure 5.

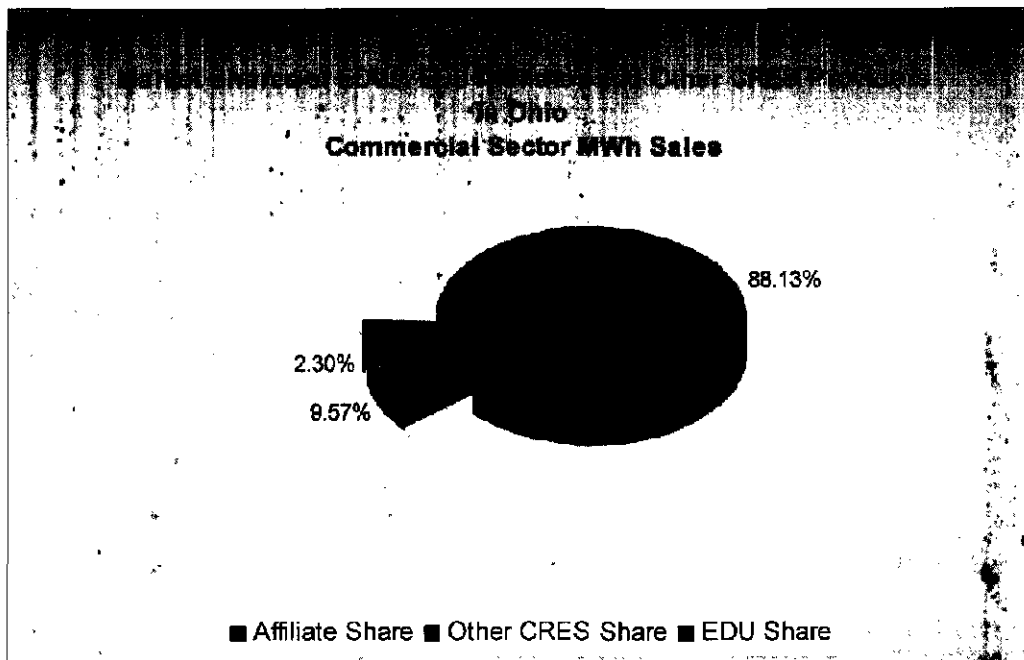
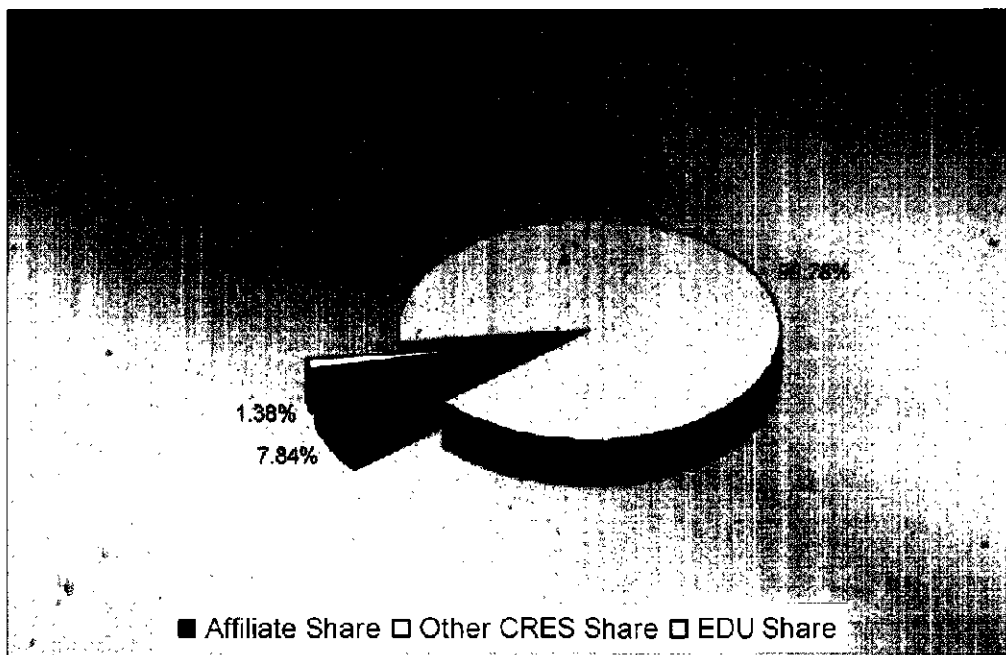


Figure 6.



Given the lack of customer choice in retail markets, Staff is concerned that FirstEnergy's CBP proposal would not establish a "fall-back" option for consumers who were in the

process of finding a CRES provider or switching from one CRES provider to another.

Rather, it would establish the only price available to the vast majority of customers. Such a state of affairs might be characterized as deregulated monopoly. Staff is concerned that the lack of choice in the retail market would tend to influence the wholesale bidding to the disadvantage of consumers.

### **Wholesale Markets**

The failure of retail markets in Ohio reflects the failure of wholesale markets to discipline prices to reasonable levels. Prices offered in rate plans by Ohio utilities have proved to be more reasonable than those offered by entities operating under the discipline of market forces. As the end of the original market development period drew near at the end of 2005, the Commission observed that the level of competition in both the wholesale and retail electric markets had not developed to the point where it was willing to allow generation rates to be based on the working of these imperfect institutions.

The rate stabilization plans approved by the Commission for all of Ohio's electric utilities established a mechanism for controlling retail rates to avoid rate shock, and to provide additional time for the development of energy markets. These rate stabilization plans are due to end for all of the EDUs except Dayton Power and Light, on December 31, 2008.

FirstEnergy's CBP proposal is being advanced as a means for establishing market-based retail rates. In recent months there have been numerous criticisms and concerns regarding the competitiveness of wholesale electricity markets, not only in terms of the



day ahead and balancing markets, but also with respect to the difficulty experienced by large, sophisticated power customers in procuring longer-term supply arrangements.

FirstEnergy customers have been paying the highest rates in the state for more than 20 years. Staff is convinced that if the Commission were to approve the CBP as proposed, those same customers will be plagued by dramatic price increases such as those that have resulted in states where competitive procurements relying on wholesale markets have been used. Market-based rates in Maryland produced increases of as much as 72% while some customers in Illinois experienced 50% increases. A recent review of U.S. Department of Energy data<sup>1</sup> indicated that in the 16 states (plus the District of Columbia), where generation has been deregulated, residential consumers paid an average of 30% more for power in 2006 than their counterparts in regulated states. That gap was 24% in 2000, prior to deregulation. Thus, prices have risen faster in deregulated states than they have in regulated states.

### **Uncertainty About Wholesale Markets' Ability to Support Large Procurement Processes**

Staff is not the only one concerned about the ability of wholesale markets to support large scale procurements. Requests by the New Jersey Board of Public Utilities and the Maryland Public Service Commission to PJM Market Monitoring Unit to conduct

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1 "Electric Deregulation Fails to Live Up to Promises as Bills Soar" USA Today, April 21, 2007. It as an Associated Press piece written by Ryan Keith. The article explained that the "analysis was based on the average electric rate that residential consumers paid each year from 1990 to 2006 according to numbers provided by the U.S. Department of Energy. Numerical and percentage changes in utility rates of both deregulated and regulated states were compared."

analyses of auction / RFP processes to set prices for Standard Service Offers in those states demonstrates widespread skepticism.<sup>2</sup> These requests reveal those state commissions' reservations about wholesale markets.

The New Jersey Board has had to repeatedly request the PJM MMU to perform such a study. PJM management, only after the third request from the New Jersey Board, and after the additional request by the Maryland Commission, allowed the MMU to commit to such a study. Such reticence adds fuel to the fire of doubt that market monitors are independent.

### **Market Conditions**

Confidence in the ability of the proposed CBP to result in a fair and reasonable price for generation does not derive solely from the number of suppliers willing and able to bid into the auction market. Rather what is required for a competitive process is that there is a number of suppliers able to bid at the margin of supply, since price is determined at the margin in an auction.

In a region in which a significant amount of generation is committed to specific load because of regulation or other commitments, there are reasonable questions about the amount of supply that can compete with the Companies' affiliated generation in a competitive process. Bidders in the auction can procure the power after they have won the tranches – and much of it would likely be procured from FirstEnergy generating

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<sup>2</sup> "PJM monitor to help 2 states scrutinize auctions," Platt's Energy Trader, September 4, 2007, p.

facilities. It seems unlikely that FirstEnergy would supply power to others at a lower price than it could get itself in the auction.

Competitive conditions were sufficient in the case of the procurement to serve the customers in the former Monongahela power service territory. However, in that instance, the amount of power to be procured was fairly small and the load shape was relatively more favorable.

This is not the case for the proposed CBP. Staff believes, given the large load that must be served in FirstEnergy's service territory, that the Commission should direct the Company to demonstrate that the wholesale market on which it will rely for electricity is sufficiently competitive to ensure that prices from the auction will be just and reasonable.

### **The Structure of Spot Markets and Single Clearing Price Auctions**

Electric restructuring was sold on the basis that competition would drive prices toward the utilities' variable cost of production. No such thing has happened. Prices resulting from single clearing price auctions such as the spot market administered by Regional Transmission Organizations, and such as the proposed CBP process are constrained by design from falling to such competitive levels. Only prices offered by suppliers at the margin feel such pressure. Remaining generators, whose costs may be far less than the cost of the marginal unit that sets price, receive the clearing price regardless of their cost.

This single price structure, and the resulting producer surplus due to the positive difference between the higher marginal price and the lower average price, is supposed to provide the incentive necessary to assure sufficient investment in generating capacity to serve load now and in the future. A problem is that most of the investment thus far has been in gas fired capacity mostly of the type that sets a high clearing price in spot markets, thus providing extra profits for owners of baseload facilities that have been significantly or fully depreciated under rate of return regulation, transition plans, and rate stabilization and rate certainty plans. Over the last seven years staff has observed a lack of investment in baseload capacity in Ohio and elsewhere.

Worse, there appears to actually be a disincentive for investing in baseload capacity. The work done by Argonne National Laboratory in its agent-based EMCASS modeling demonstrates that this is the case, and why it is the case – owners of existing depreciated baseload generators would diminish their own revenues by building coal or nuclear baseload facilities and bidding them into single clearing price auctions.<sup>3</sup> Staff believes that situation to be a market failure.

Single price auction mechanisms do not produce equitable results because the clearing price is paid to all successful bidders without regard to their cost structures or the value of their assets' operating characteristics such as flexibility of dispatch. The shift from rates based upon some form of average costs to prices based on the bid of the marginal supplier assures that consumers will pay more, even with the same asset base and

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<sup>3</sup> Staff communications with Guenter Conzelmann, Director, Center for Energy, Environmental, and Economic Systems Analysis (CEEESA), Decision and Information Sciences Division, Argonne National Laboratory, 9700 S. Cass Ave, DIS/900, Argonne, IL 60439.

constant fuel costs. In a time of rising costs, prices to consumers will rise faster than they would under average cost pricing.

Consider that the prices for all wholesale sales are disciplined by the hourly balancing market<sup>4</sup>. If suppliers could get more in the hourly market than in the day-ahead market, they would reduce quantities offered in the daily market in favor of the hourly market. If bilateral markets for longer term products, including those in the proposed auction, could get more in the daily or hourly markets, suppliers would defer sales to those procurements. Thus, the prices in the current auction are actually disciplined by the balancing market, a single clearing price mechanism.

The balancing market is some scant percentage of wholesale transactions and volumes transacted. Price formation for very large numbers of transactions and volumes is therefore heavily reliant on a very small number of transactions for very small quantities of power. Anomalies and/or inefficiencies in the balancing market can ripple through the entirety of wholesale transactions because the balancing markets are the tail that wags the dog. Thus small perturbations that may occur and may go unnoticed or unmitigated in those markets have disproportionately large and unseen impacts on longer term prices.

Staff is very wary of markets in which a very small percentage of transactions and volumes transacted serve to influence the entire market. The danger in relying on a small

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<sup>4</sup>

2006 STATE OF THE MARKET REPORT - THE MIDWEST ISO, Prepared by: INDEPENDENT MARKET MONITOR FOR THE MIDWEST ISO, July 2007, p. vi. "The real-time market is the primary driver for the day-ahead market and all other forward electricity markets. It is straightforward that higher real-time prices will lead to higher day-ahead and other forward market prices. If day-ahead prices were regularly lower than real-time prices, buyers would tend to increase purchases day-ahead and sellers would decrease their day-ahead sales. In addition, increased volatility in the real-time market will also generally lead to higher day-ahead and forward market prices because forward purchases are a primary means to manage the risks associated with real-time price volatility."

number of transactions to “set the pace” for other transactions many hundreds or thousands of times the size of the pace-setting transactions can be seen in recent events in the natural gas industry<sup>5</sup>. Amaranth has allegedly manipulated natural gas prices for hundreds of Tcf of natural gas physical and financial transactions by its actions in the last half hour of trading for the prompt month futures contract. That gas is on the margin in MISO markets for a significant percentage of hours during the year does not provide any reassurance that wholesale electricity markets are fair or efficient.

### **Repetitive Procurement Processes**

Procurement processes that repeat over and over again invite gaming. Suppliers can gain significant knowledge about one another’s bidding strategies, inviting tacit collusion.

### **Lack of Demand Response.**

A positive outcome of the development of markets has been the time differentiation of prices. Yet retail rate structures have not yet been implemented to encourage customers to recognize that differentiation. The demand curve is tilted too far towards vertical. Demand is inelastic. Consumers, having faced a single per-kilowatt hour price for their entire lives, have not developed a sense of the time differentiated value of electricity.

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5 “How Well are the Gas Markets Working in 2007?” Presentation to Mid American Regulatory Council. Steve Harvey, Director, Energy Market Oversight, Federal Energy Regulatory Commission, June 18, 2007. [http://www.puc.state.mn.us/news\\_events/events/marc\\_07/speakers/harvey.pdf](http://www.puc.state.mn.us/news_events/events/marc_07/speakers/harvey.pdf).

The development of broad based demand response capability depends heavily on the activities in Case No. 07-646-EL-UNC. Without metering technology that involves customers and enables the measurement and billing of electricity usage on a time differentiated basis, consumers will be held captive to an imperfect market. Staff notes that Ohio utilities, including the FirstEnergy Companies, have not yet complied with the Commission's Finding and Order of March 28, 2007 in Case No. 05-1500-EL-COI, to file tariffs offering time differentiated rates and meters to enable customers to respond to market prices.

Unless and until consumers are equipped with the means to manage energy costs in concert with the workings of the wholesale markets, it is premature to rely on market forces to be the sole basis of utility standard service offers.

### **Questionable Liquidity in Electricity Markets.**

Barron's defines liquidity in the context of equity markets:

Liquidity: Characteristic of a security or commodity with enough units outstanding to allow large transactions without a substantial drop in price. A stock, bond, or commodity that has a great many shares outstanding therefore has liquidity. Institutional investors are inclined to seek out liquid investments so that their trading activity will not influence the market price.<sup>6</sup>

The ability to reasonably measure liquidity may depend in part on the identification of an acceptable definition as it applies to these markets. Staff calls for assistance by interested parties to help craft a workable definition of liquidity in electricity markets.

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<sup>6</sup> Downes, John and Jordan Elliot Goodman, Dictionary of Finance and Investment Terms, Third Edition; Barron's Educational Series, Inc., Hauppauge, New York, 1985.

Meanwhile, given that wholesale market differentiates electricity by both time and location, it is not clear to staff that there are, or can be, enough trading entities and transactions, to prevent single entities from influencing prices.

### **Newly Proposed MISO Ancillary Services Markets**

MISO has recently proposed to implement markets for certain ancillary services including regulation service<sup>7</sup>. In his affidavit to the Federal Energy Regulatory Commission, the Independent Market Monitor has conducted a study of market power in the relevant geographic markets within MISO for the ancillary services.<sup>8</sup> Dr. Patton concludes in that affidavit that Zone 1, which includes FirstEnergy, would face a pivotal supplier<sup>9</sup> 34.4% of hours<sup>10</sup>. That number of hours is clearly indicative of a non-competitive market, however, other zones in MISO would face a pivotal supplier for greater percentages of hours up to 100%. Because the zones are subject to redefinition each quarter, Staff fears that the number of hours in which there exists a pivotal supplier may exceed even that level in future. We believe this illustrates the evolving and premature nature of wholesale markets.

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<sup>7</sup> Midwest Independent Transmission Operator, Inc., FERC Case Number ER07-1372-000, MISO filing of September 14, 2007.

<sup>8</sup> Docket No. ER07-1372-000, Affidavit of David B. Patton, PH.D.

<sup>9</sup> 2006 STATE OF THE MARKET REPORT THE MIDWEST ISO, Prepared by: INDEPENDENT MARKET MONITOR FOR THE MIDWEST ISO, July 2007, p. vi: A pivotal supplier has the ability to unilaterally raise the spot market prices to arbitrarily high levels by offering its energy and/or operating reserves at a very high price level. The market may be subject to substantial market power abuse when one or more suppliers are pivotal and the suppliers have the incentive to take advantage of their position to raise prices.

<sup>10</sup> Docket No. ER07-1372-000, Affidavit of David B. Patton, PH.D, Attachment A, p. 18.



### **Uncertainty About the Market Monitoring Paradigm.**

The principal remedy for behavioral and structural imperfections in wholesale markets administered by RTOs, the very markets that are intended to discipline wholesale bilateral markets such as the one embodied in the Companies' proposed CBP, is the presence and effectiveness of independent market monitors. With little or no ability to correct for observed misbehaviors or structural deficiencies, the market monitors must rely on FERC to act upon their observations. It is not apparent that FERC effectively responds to the market monitors' reports of market failures.

Even if the market monitors worked hand and glove with FERC enforcement, the system depends on the independence of market monitors and their free access to data and information. The Commission is a co-complainant in FERC Docket No. EL07-58-000. At issue in that case is the independence of the PJM Market Monitoring Unit. The allegations brought by Mr. Bowring, which include censorship, robbing the MMU of personnel resources to do its job effectively, and limiting the MMU's access to data and information, triggered Ohio and other states to act on their long standing but latent concerns by filing a formal complaint at FERC. The subsequent resignations of senior PJM managers in the midst of the swirl of controversy that was unleashed, and the unresolved questions surrounding that case give staff pause in believing that the market monitoring construct, as FERC has approved it, is effective in mitigating market power and/or manipulation of wholesale power markets.

It is little consolation that the Companies are members of MISO, not PJM. FERC is re-examining the entire structure of market monitoring in its Advanced Notice of Pro-

posed Rulemaking in Docket No. RM07-19-000, *et. al.* The breadth and scope of that proceeding reveals that FERC itself is uncertain whether the market monitoring function is adequately mitigating market power, manipulation and structural deficiencies in wholesale electricity markets. That uncertainty applies to MISO as well as to PJM.

### **Joint and Common Market**

Many potential suppliers in the proposed CBP auction are likely to be PJM members. To a certain extent, PJM and MISO have made efforts to craft a joint and common market. If that joint and common market were working well, staff would observe that locational marginal prices in PJM would track LMPs in MISO, and vice versa. Staff has observed that prices within each RTO track very closely from hour to hour. We have also observed significantly uncorrelated hourly price movements for nodes that are electrogeographically adjacent, but separated by the boundary between MISO and PJM.

It is unclear to Staff the degree to which this may impede PJM suppliers from participating in the proposed auction. Staff's conclusion from these observations is that a coordinated market does not exist between the RTOs, thus the market is flawed.

## **Conclusion**

Neither retail nor wholesale electricity market have developed sufficiently to warrant confidence in a CBP process that relies on the fairness and efficiency of those markets. Staff therefore recommends the Commission reject the CBP as a means of establishing the price of a standard service offer for its customers.

Respectfully Submitted,




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**Thomas W. McNamee**  
Assistant Attorney General  
Public Utilities Section  
180 East Broad Street, 9<sup>th</sup> floor  
Columbus, OH 43215-3793  
(614) 466-4397  
FAX: (614) 644-8764  
E-mail: [thomas.mcnamee@puc.state.oh.us](mailto:thomas.mcnamee@puc.state.oh.us)

## **Proof of Service**

I hereby certify that a true copy of the foregoing **Comments** submitted on behalf of the Staff of the Public Utilities Commission of Ohio was served by regular U.S. mail, postage prepaid, or hand-delivered, upon the following parties of record, this 21<sup>st</sup> day of September, 2007.



---

Thomas W. McNamee  
Assistant Attorney General

### Parties of Record:

Jeffrey L. Small  
Ann M. Hotz  
Office of the Ohio Consumers' Counsel  
10 West Broad Street, Suite 1800  
Columbus, OH 43215-3485  
[small@occ.state.oh.us](mailto:small@occ.state.oh.us)  
[hotz@occ.state.oh.us](mailto:hotz@occ.state.oh.us)

David F. Boehm  
Michael L. Kurtz  
Boehm, Kurtz & Lowry  
36 East Seventh Street, Suite 1510  
Cincinnati, OH 45202  
[dboehm@bkllawfirm.com](mailto:dboehm@bkllawfirm.com)  
[mkurtz@bkllawfirm.com](mailto:mkurtz@bkllawfirm.com)

David C. Rinebolt  
Colleen L. Mooney  
Ohio Partners for Affordable Energy  
231 West Lima Street  
P.O. Box 1793  
Findlay, OH 45839-1793  
[drinebolt@aol.com](mailto:drinebolt@aol.com)  
[cmooney2@columbus.rr.com](mailto:cmooney2@columbus.rr.com)

James Burk  
Mark A. Hayden  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 44308  
[burk@firstenergycorp.com](mailto:burk@firstenergycorp.com)  
[hayden@firstenergycorp.com](mailto:hayden@firstenergycorp.com)

Rick C. Giannantonio  
FirstEnergy Service Company  
76 South Main Street  
Akron, OH 443089  
[giannantonior@firstenergycorp.com](mailto:giannantonior@firstenergycorp.com)

Richard Sites  
Ohio Hospital Association  
155 East Broad Street, 15<sup>th</sup> Floor  
Columbus, OH 43215  
[ricks@ohanet.org](mailto:ricks@ohanet.org)

M. Howard Petricoff  
Stephen M. Howard  
Vorys, Sater, Seymour & Pease  
52 East Gay Street  
P.O. Box 1008  
Columbus, OH 43216-1008  
[mhpetricoff@vssp.com](mailto:mhpetricoff@vssp.com)  
[smhoward@vssp.com](mailto:smhoward@vssp.com)

Paul S. Goldberg  
Phillip D. Wurster  
5330 Seaman Road  
Oregon, OH 43616  
[pgoldberg@ci.oregon.oh.us](mailto:pgoldberg@ci.oregon.oh.us)

Peter D. Gwyn  
300 Walnut Street  
Perrysburg, OH 43551  
[pgwyn@toledolink.com](mailto:pgwyn@toledolink.com)

Thomas R. Hays  
3315 Centennial Road, Suite A-2  
Sylvania, OH 43560  
[hayslaw@buckeye-express.com](mailto:hayslaw@buckeye-express.com)

Glenn S. Krassen  
Bricker & Eckler  
1375 East Ninth Street, Suite 1500  
Cleveland, OH 44115  
[gkrassen@bricker.com](mailto:gkrassen@bricker.com)

Richard T. Stuebi  
The Cleveland Foundation  
1422 Euclid Avenue, Suite 1300  
Cleveland, OH 44115  
[rsteubi@clevefdn.org](mailto:rsteubi@clevefdn.org)

Robert N. Fronek  
4205 Chester Avenue  
Cleveland, OH 44103  
[rmf270@yahoo.com](mailto:rmf270@yahoo.com)

Samuel C. Randazzo  
Lisa G. McAlister  
Daniel J. Neilsen  
Joseph M. Clark  
McNees, Wallace & Nurick  
21 East State Street, 17<sup>th</sup> Floor  
Columbus, OH 43215-4228  
[sam@mwncmh.com](mailto:sam@mwncmh.com)  
Sheila H. McAdams  
Marsh & McAdams  
204 West Wayne Street  
Maumee, OH 43537  
[sheilahmca@aol.com](mailto:sheilahmca@aol.com)

Brian J. Ballenger  
Ballenger & Moore  
3401 Woodville Road, Suite C  
Toledo, OH 43619  
[ballengerlawbjb@sbcglobal.net](mailto:ballengerlawbjb@sbcglobal.net)

James E. Moan  
4930 Holland-Sylvania Road  
Sylvania, OH 43560  
[jimmoan@hotmail.com](mailto:jimmoan@hotmail.com)

Paul Skaff  
Leatherman, Witzler, Dombrey & Hart  
353 Elm Street  
Perrysburg, OH 43551  
[paulskaff@justice.com](mailto:paulskaff@justice.com)

Leslie A. Kovacik  
Kerry Bruce  
420 Madison Avenue, Suite 100  
Toledo, OH 43604-1219  
[leslie.kovacik@toledo.oh.gov](mailto:leslie.kovacik@toledo.oh.gov)  
[kerry.bruce@toledo.oh.gov](mailto:kerry.bruce@toledo.oh.gov)

William M. Ondrey-Gruber  
2714 Leighton Road  
Shaker Heights, OH 44120  
[gruberwl@aol.com](mailto:gruberwl@aol.com)

Terry S. Harvill  
Constellation Energy Resources  
111 Market Street  
Baltimore, MD 21202  
[terry.harvill@constellation.com](mailto:terry.harvill@constellation.com)

Joseph P. Meissner  
The Legal Aid Society of Cleveland  
1223 West 6<sup>th</sup> Street  
Cleveland, OH 44113  
[jpmeyssn@lasclev.org](mailto:jpmeyssn@lasclev.org)

Stephen L. Huntoon  
FPL Energy Power Marketing, Inc.  
801 Pennsylvania Avenue, N.W.  
Suite 220  
Washington, DC 20004  
[stephen\\_huntoon@fpl.com](mailto:stephen_huntoon@fpl.com)

Stephen N. Hadick  
76 South Main Street, 8<sup>th</sup> Floor  
Akron, OH 44308

David Applebaum  
FPL Energy Power Marketing, Inc.  
21 Pardee Place  
Ewing, NJ 08628  
[david\\_applebaum@fpl.com](mailto:david_applebaum@fpl.com)

Sean Boyle  
FPL Energy Power Marketing, Inc.  
700 Universe Boulevard  
Juno Beach, FL 33408  
[sean\\_boyle@fpl.com](mailto:sean_boyle@fpl.com)

Barth E. Royer  
Bell, Royer & Sanders  
33 South Grant Avenue  
Columbus, OH 43215-3927  
[barthroyer@aol.com](mailto:barthroyer@aol.com)

David I. Fein  
Cynthia A. Fonner  
Constellation Energy Group, Inc.  
550 West Washington Blvd., Suite 300  
Chicago, IL 60661  
[david.fein@constelation.com](mailto:david.fein@constelation.com)  
[cynthia.a.fonner@constellation.com](mailto:cynthia.a.fonner@constellation.com)

Divesh Gupta  
Constellation Energy Group, Inc.  
111 Market Place  
Baltimore, MD 21202  
[divesh.gupta@constellation.com](mailto:divesh.gupta@constellation.com)

Trent A. Dougherty  
Nolan M. Moser  
The Ohio Environmental Council  
1207 Grandview Avenue, Suite 201  
Columbus, OH 43212  
[trent@theoec.org](mailto:trent@theoec.org)

Sally W. Bloomfield  
Thomas J. O'Brien  
Bricker & Eckler  
100 South Third Street  
Columbus, OH 43215-4291  
[sbloomfield@bricker.com](mailto:sbloomfield@bricker.com)  
[tobrien@bricker.com](mailto:tobrien@bricker.com)

John W. Bentine  
Mark S. Yurick  
Chester, Willcox & Saxbe  
65 East State Street, Suite 1000  
Columbus, OH 43215-4213  
[jbentine@cwslaw.com](mailto:jbentine@cwslaw.com)  
[mvurick@cwslaw.com](mailto:mvurick@cwslaw.com)

Dane Stinson  
Bailey Cavalieri  
10 West Broad Street, Suite 2100  
Columbus, OH 43215  
[dane.stinson@baileycavalieri.com](mailto:dane.stinson@baileycavalieri.com)

Robert Heydron  
Hoover, Heydron & Herrnstein  
527 Portage Trail  
Cuyahoga Falls, OH 44221

Freddi Greenberg  
1603 Orrington Avenue  
Suite 1050  
Evanston, IL 60201

Joseph Allotta  
Allotta and Fraley Co.  
2222 Centennial Road  
Toledo, OH 43617

Judith Sanders  
Bell, Royer & Sanders  
33 South Grant Avenue  
Columbus, OH 43215  
[jsanders@bricker.com](mailto:jsanders@bricker.com)

Bobby Singh  
Chester, Willcox & Saxbe  
65 East State Street, Suite 1000  
Columbus, OH 43215  
[bsing@cwslaw.com](mailto:bsing@cwslaw.com)

Helen Liebman  
Jones Day  
P.O. Box 165017  
Columbus, OH 43216-5017

John Gibbon  
City of Cleveland Heights  
Tower at Erieview  
1301 East 9<sup>th</sup> Street, Suite 350  
Cleveland, OH 44114-1821

Garrett A. Stone  
Michael K. Lavanga  
Brickfield, Burchette, Ritts & Stone  
1025 Thomas Jefferson Street, N.W.  
8<sup>th</sup> Floor, West Tower  
Washington, DC 20007  
[gas@bbrslaw.com](mailto:gas@bbrslaw.com)  
[mkl@bbrslaw.com](mailto:mkl@bbrslaw.com)

Kathy Kolich  
FirstEnergy Corp.  
76 South Main Street  
Akron, OH 44308  
[kolichk@firstenergycorp.com](mailto:kolichk@firstenergycorp.com)  
Franklin Lewis  
Robert J. Triozzi  
William Zigli  
City of Cleveland  
601 Lakeside Avenue, Room 106  
Cleveland, OH 44114

Stephen Field  
FirstEnergy Corp.  
76 South Main Street  
Akron, OH 44308

Joseph Haefner  
Dano L. Koehler  
City of Stow  
3760 Darrow Road  
Stow, OH 44224

Gary A. Jeffries  
Dominion Retail, Inc.  
501 Martindale Street, Suite 400  
Pittsburgh, PA 15202-5817

Kevin Corcoran  
Bob Schmitt Homes, Inc.  
8501 Woodbridge Court  
North Ridgeville, OH 44039

David Hughes  
Citizen Power  
4037 Ludwick  
Pittsburgh, PA 15217

Steven T. Nourse  
American Electric Power  
Regulatory Services  
Legal Department  
1 Riverside Plaza  
Columbus, OH 43215  
[stnourse@aep.com](mailto:stnourse@aep.com)

Joseph Condo  
Calpine Corporation  
250 Parkway Drive  
Lincolnshire, IL 60069

Patrick J. Kealy  
Calpine Corporation  
717 Texas Street  
Houston, TX 77002-2761

Craig Smith  
2824 Coventry Road  
Cleveland, OH 44120