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 Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated With Reconciliation Mechanisms and Phase In, and Tariffs for Generation Service	))))))))	Case No. 07-796-EL-ATA Case No. 07-797-EL-AAM

INITIAL COMMENTS OF

CONSTELLATION NEWENERGY, INC. AND CONSTELLATION ENERGY COMMODITIES GROUP, INC.

DATED: SEPTEMBER 5, 2007

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Initial Comments of Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc.

In the instant proceeding, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy" or "FE") filed an application (the "Application") with the Public Utilities Commission of Ohio ("PUCO" or "Commission") seeking approval for a competitive bidding process to procure electric power and energy for the provision of Standard Service Offer electric generation service to FirstEnergy's retail electric customers who do not choose to purchase electric generation service from a competitive retail electric supplier ("CRES") beginning January 1, 2009 ("CBP").[1] Pursuant to the schedule adopted in the proceeding[2], Constellation NewEnergy, Inc. and Constellation Energy Commodities Group, Inc. (collectively "Constellation") offer Initial Comments regarding FirstEnergy's CBP.

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[1] July 17, 2007 Application at p.1 Case Nos. 07-796-EL-ATA and 07-797-EL-AAM.

[2] August 16, 2007 Entry Finding no 3.

I.

EXECUTIVE SUMMARY:

FE'S CBP IS A DETAILED AND WELL-BALANCED PLAN TO MEET THE NEEDS OF FE'S CUSTOMERS IN THE POST-RSP PERIOD

In considering the myriad issues in designing the post rate stabilization period ("RSP") for FirstEnergy, there are at least four critical market participants to consider. First and foremost are the customers who must continue to receive safe, reliable, and reasonably priced electricity[3]. Second is FirstEnergy, who will serve as the provider of the standard offer service, using a price based on the wholesale bid results plus all other costs associated with the procurement of the power and costs incurred to serve its customers. Third are the wholesale suppliers, who will competitively bid to supply wholesale electricity to FirstEnergy. Fourth are the CRES, who will compete to serve customers based on, among other factors, the retail price charged by FirstEnergy in its role as default supplier.

Constellation has extensive experience across the country with the use of competitive processes for the procurement of electric power and energy. As will be discussed in greater detail below, in Constellation's view, FirstEnergy's proposed CBP is a well-balanced, detailed plan that will send accurate price signals to all classes of consumers, promote the continued development of the competitive retail and wholesale markets in Ohio, will lead to the promotion of renewable resources, energy efficiency, and demand response programs, and includes a number of consumer protections and other safeguards. This proceeding is the logical next step for the Commission to promote the public policies espoused in Senate Bill 3[4] and the legal requirements for market based pricing contained in Section 4928.14, Revised Code. Therefore,

[3] See Section 4928.02, Revised Code

[4] Chapter 4928, Revised Code

this proceeding is extremely important for consumers, utilities, and other market participants as it will prepare everyone for the post-rate stabilization period ("RSP") and continue the movement toward appropriate reliance upon competitive markets to provide safe, reliable, and reasonably-priced electric services.

Background on the Constellation Companies

Constellation NewEnergy, Inc. ("CNE") provides electricity and energy-related services to retail customers in Ohio as well as in 15 other states, the District of Columbia and two Canadian provinces and serves over 15,000 megawatts of load and over 10,000 customers. CNE holds a certificate as a CRES from the Commission to engage in the competitive sale of electric service to retail customers in Ohio. CNE currently provides service to retail electric customers in Ohio.

Constellation Energy Commodities Group, Inc. ("CCG") provides wholesale power and risk management services to wholesale customers (distribution utilities, co-ops, municipalities, power marketers, utilities and other large load serving entities), throughout the United States and Canada, in both regulated and deregulated energy markets. CCG is active in the PJM Interconnection, L.L.C. and Midwest Independent System Operator ("MISO") wholesale power markets and has sold power for wholesale delivery in Ohio. CNE and CCG are subsidiaries of Constellation Energy Group, Inc.

Constellation's Interest In This Proceeding

As a potential bidder in the competitive procurement process, CCG has an interest in participating in the instant proceeding as the Commission assesses the bidding alternatives

proposed by FirstEnergy, establishes the terms and conditions that appropriately reflect bidders' risks, and makes other decisions that will affect the viability of the competitive retail market in which CCG provides electric power and other products and services to retail electric suppliers. CNE also has an interest in participating in the instant proceeding as a supplier of electric power and energy to retail customers in the State, based on its status as a CRES.

Due to its unique expertise and participation in the competitive retail and wholesale markets in Ohio and across the country, Constellation will be able to assist in the development of a full and complete record to assist the Commission in its consideration of the Application.

II.

COMMENTS ON SPECIFIC ISSUES

In short, Constellation respectfully requests that the Commission adopt the basic form and substance of FirstEnergy's CBP. By providing guidance on these significant issues, the Commission can assist in realizing an important goal: bringing a degree of certainty to the post-RSP Ohio retail electric market. In these Initial Comments, Constellation will address the following issues:[5]

- Overall, the competitive procurement method proposed by FE is similar to the procurement processes that have been tried and tested in New Jersey, Pennsylvania, Delaware, D.C., Connecticut and elsewhere; and that experience generally suggests that FirstEnergy (and Ohio) should adopt a competitive procurement methodology tailored to meet the needs of consumers in the Ohio electric market;

- Constellation supports the portions of FirstEnergy's CBP that outline the:
  - Provision of Data and Information;
  - Communication Protocols;
  - Contingency Plans; and
  - Proposed Timeline.

[5] The failure of Constellation to address any other portions of FirstEnergy's CBP should not be construed as support for such other provisions and Constellation expressly reserves the right to respond to issues raised in the Initial Comments of other parties.

- The Competitive Bidding Process By Load Class Is The Preferred Alternative – While either alternative is workable, this alternative would eliminate any potential cross-subsidies, would obviate any need for the imposition of non-bypassable generation-related charges, and better align costs with cost causers;

- How the CBP Supports the Continuing Development of the Competitive Retail Electric Market;

- Proposed Changes to The Master SSO Supply Agreements; and

- Necessary clarifications regarding the proposed Load Response Programs.

Each of these items will be discussed below.

A. FirstEnergy's CBP Appears To Be Consistent With Successful Competitive Procurement Mechanisms That Have Been Utilized In Other Markets

FirstEnergy has proposed use of a competitive procurement process that is consistent with procurement mechanisms utilized in numerous other restructured electric markets, especially those in which regulated electric utilities no longer own generating assets, including, but not limited to Pennsylvania, Maryland, D.C., Delaware, and Illinois. FirstEnergy's proposed CBP has a number of specific characteristics that make it a reasonable approach for adoption by the Commission at this time. First, by use of a full requirements tranche structure, the CBP serves to mitigate the potential effects of concentration of ownership of certain types of generation. The proposed procurement structure, along with the various consumer protections, is highly transparent and should serve to mitigate any concerns regarding market power or affiliate abuse.

Second, the design of the CBP should be expected to attract generation owners as well as financial firms, thus expanding the number of competing wholesale participants. In short, the CBP is expected to produce wholesale energy prices reflective of market conditions at the time

the procurements are conducted and should also help to keep the costs of FirstEnergy's operation of the delivery network free of commodity-related risks and costs.

Third, since the resulting CBP price would represent the costs of utility generation supply, there should be little question about the inclusion of these costs as a component of the new standard service option ("SSO") bundled rates. The CBP would merely be the method of acquiring necessary supplies to meet the needs of bundled service customers and the translation of those results into retail rates would remain subject to Commission review and approval.

Fourth, the CBP should simplify the Commission's evaluation of utility cost of capital in FirstEnergy's pending distribution rate case because a variety of risks will be borne by the competing participants in the competitive procurement process instead of utility ratepayers.

It is clear that as a matter of law and sound public policy, there is a need for the Commission to approve FirstEnergy's post-RSP procurement methodology. If the Commission were to leave FirstEnergy without the ability to satisfy the energy needs of its customers, it likely would result in the Commission having less control over FirstEnergy's wholesale electricity procurement process, potentially yielding significant authority to the Federal Energy Regulatory Commission ("FERC").

Currently, FirstEnergy's proposal includes Commission pre-approval and oversight of the process and final Commission approval before the wholesale prices resulting from the auction are translated into retail rates. Since the FirstEnergy electric utilities no longer own generating assets, without a state-approved acquisition methodology, FirstEnergy likely would enter into FERC-approved bilateral wholesale contracts (with their affiliates or otherwise). Under the Federal Power Act, wholesale contract transactions generally are considered to be subject to FERC's regulatory authority. (*See New York v. FERC*, 535 U.S. 1, 18-19, 122 S. Ct. 1012, 1023

(2002) ("the FPA gives FERC jurisdiction over the transmission of electric energy in interstate commerce and . . . the sale of such energy at wholesale") (*quoting* 16 U.S.C. § 824(b)). *See also Mississippi Power & Light Co. v. Miss*. ex rel. Moore, 487 U.S. 354, 371, 108 S. Ct. 2428, 2438-39 (1988).)

FirstEnergy's proposed procurement process appropriately provides assurance to the Commission that it will have oversight of the procurement process. The Commission's involvement will further ensure that the resulting wholesale rates that are produced through the competitive bid process are just and reasonable.

Thus, FirstEnergy's competitive procurement proposal appropriately incorporates the competitive goals of the General Assembly and provides for Commission pre-approval, oversight and evaluation of the wholesale prices which emanate from the competitive bid process prior to those prices becoming the retail rates that are paid by FirstEnergy's customers.

B. FirstEnergy's CBP Has Numerous Features That Should Lead To A Successful Procurement Process

As discussed above, FirstEnergy's CBP seems to have been the product of a great deal of research and analysis of the various forms of competitive procurement that have occurred in the recent past by the several restructured markets[6] in the United States. One of the hallmarks is the provision of data and information for interested parties. Under the CBP, FirstEnergy will create a website that is dedicated to the competitive procurement process. On the website, interested parties will be able to find valuable information about the competitive bid process, updates, and have access to data that will better assist participants in the formulation of bids. For example, such information and data will likely include:

- Historical Customer hourly usage data by rate schedule;

[6] States or utility service areas which utilize market pricing in lieu of a cost of service paradigm.

- Number of Customers by rate schedule by month for defined periods of time;
- Capacity peak load contribution figures by rate schedule;
- Historical monthly switching numbers by rate schedule;
- The specific formula to translate the winning supplier price into retail rates;
- Access to certain key MISO information on Market Participant requirements;
- Updated data at the time of procurements.

All data and information should be provided in a consistent format. This type of information has been provided with other competitive procurement processes in other states.

In addition, FirstEnergy has outlined a communication protocol that is well-balanced and properly recognizes the commercial sensitive and confidential nature of certain information that is essential to a successful competitive bidding process. Under the communications protocol, FirstEnergy's CBP outlines the specific type of information available to the CBP Manager, the FirstEnergy distribution utilities, and the Commission; and other types of information and data that is only made available to bidders in the process. These communication protocols appear to be reasonable and consistent with other similar competitive procurement processes.

Further, FirstEnergy has outlined a timeline leading up to the first procurement (March 2008) that is both comprehensive and consistent with other similar types of staggered procurement processes.

Finally, in the event that the proposed CBP is not successful, FirstEnergy has been responsible and has outlined two (2) potential types of scenarios where there may be a need for a contingency plan: (i) process is not fully subscribed or a bidder defaults; or (ii) an insufficient number of bids are received. These situations are practical realities of a competitive bidding process and the general contingency plans proposed appear to be reasonable.

C. The Commission Should Utilize the Class Load Alternative Proposed by FirstEnergy

FirstEnergy divides its retail electric service into three classes (residential, commercial and industrial) and believes that there is a noted difference in the cost of providing generation to these three classes. To address this difference, FirstEnergy in the Application proposed two alternative methods of cost allocation. The "Load Class" approach calls for holding separate auctions for the three classes, with the weighted average of the auction prices including both the price of generation and the generation avoided cost. The alternative "Slice of System" approach takes the weighted average price obtained from the auctions and applies a fixed allocation factor for assignment to the three classes.

Use of the Load Class alternative under the CBP will properly promote retail competition by providing appropriate price signals to all customer classes and preserving customer choice. Use of this alternative should provide enhanced price signals to all customer classes, an important factor for promoting conservation as well a equitable pricing. This is partially due to the fact that it will reflect the full price of the utility providing the service. The full retail price of the standard offer service consists of the wholesale price paid to winning bidders and any costs associated with providing retail customers standard offer service. To the extent that retail prices do not fully reflect *all* costs of providing the service, customers will not be able to choose their electricity supplier based on a true price comparison because certain costs of providing service will not be properly allocated. Use of the Load Class alternative (as opposed to Slice of System) better reflects FirstEnergy's costs to supply standard offer service and will not force shopping customers to pay twice for some services – once to FirstEnergy and once to the CRES. Promoting retail competition depends to a large degree on providing appropriate price signals to customers. In sum, by adopting use of the Load Class alternative, the Commission will remove

artificial barriers that have prevented customers from seeing and therefore responding to the appropriate price signals.

D. Retail Market Issues

Many facets of the CBP, such as elimination of cross-subsidies and the appropriate allocation of costs, affirmatively support the continuing development of the competitive retail electric market. In order to gain greater clarity regarding its proposal, Constellation recommends that FirstEnergy confirm that it is not proposing any changes to the existing switching rules or imposition of new enrollment windows that would restrict the ability of customers to exercise choice.

1. Cross-Subsidies

The Commission should resist any approach that results in cross-subsidies, and should instead actively take steps to eliminate any such existing cross-subsidies. FirstEnergy's filing attempts to do just that, albeit through a phased-in approach of rates for some customers. Forcing certain customers to subsidize others does not lower total service costs by a single penny, but serves only to distort the evaluations customers must make in considering their choices of supply and products – ultimately leading to inefficiency and higher total costs of service. The cross-subsidy question is one that has plagued the retail electric market because cross-subsidies convey distorted price signals that then inevitably lead to inefficiency and less-than-optimal investment in the electric infrastructure, further complicating policy decisions. The opportunity exists in this proceeding to eliminate, as much as possible, the problem of cross-subsidies and the harm they create.

2. Allocation Of Costs

FirstEnergy's proper allocation of costs to cost-causers can only improve the market, and customer behavior. The failure to properly allocate costs inevitably leads to inaccurate pricing. Inaccurate pricing leads to inefficient choices on the part of both consumers and those who must make decisions about energy usage. To the extent that the actual cost of any particular function, such as power supply procurement, is attributed instead to another function, such as delivery, then the prices of those two quite different functions will be out of kilter. Supply from the utility, a competitive product, will be priced below its real cost while delivery, a traditional monopoly function, will be priced above its actual cost.

3. Enrollment Windows and Switching Restrictions

Based on FirstEnergy's CBP filing and its representatives' statements at the recent technical conference, it appears that FirstEnergy is not proposing any special enrollment windows or switching restrictions relating to a customer's election to take service from a CRES (or the SSO Generation Service option). FirstEnergy should confirm this understanding, as these operational matters can serve as significant barriers to customers fully realizing the savings opportunities that may exist in the competitive marketplace.

E. Proposed Changes to the Master SSO Supply Agreement

Constellation herein proposes only two important changes to FirstEnergy's proposed Master SSO Supply Agreement ("MSA") which, if implemented, will promote increased competition in the CBP.

1. Accelerated Payments In The Event FirstEnergy's Credit Rating Falls Below Investment Grade

First, Constellation proposes that the MSA, under Section 9.1, should accelerate payments on a weekly basis from the Companies if one of the Companies falls below investment

grade because this will give additional protection to SSO Suppliers against nonpayment by the Companies, a situation which becomes more likely if the Companies face financial difficulties. While accelerated weekly payments do not alleviate the credit risks that Suppliers face (only fully bilateral credit provisions would best protect Suppliers), such provisions would provide greater assurance to Suppliers that they will receive prompt payment in the event that the Companies' credit standing is downgraded – a circumstance which may reflect financial conditions which would make payment by the Companies less certain. In addition, modifying the MSA to accelerate payments on a weekly basis has little additional cost to the Companies, but will serve to give potential Suppliers more certainty with regard to the risk of nonpayment by the Companies. Specifically, Constellation proposes that FE add the following new subsection 9.1(j) in order to implement such accelerated payments under the MSA:

> "(j) If at any time during the delivery period a Company Downgrade Event occurs, (i) the billing period applicable to the Companies shall be shortened to a Weekly Billing Period; (ii) a Statement will be prepared and sent to the SSO Supplier on the first Business Day after the end of each Weekly Billing Period; (iii) the Statements for each Weekly Billing Period will be based upon estimated data and will be adjusted for actual data through a Statement sent to the SSO Supplier within six (6) Business Days after the end of the calendar month; and (iv) payment will be made on the third Business Day after the end of each Weekly Billing Period. Alternatively, the Companies and the SSO Supplier may agree upon a schedule. The Weekly Billing Period shall be in effect only for so long as a Company is experiencing a Company Downgrade Event. The Companies' failure to make payments in accordance with this Section 9.1 shall be deemed an Event of Default under Section 5.1 (Events of Default) of the Agreement if the Companies fail to remedy such failure within two (2) Business Days of receipt of written notice from the SSO Supplier. For the purposes of this Section 9.1: a "Company Downgrade Event" means that at least one Company's Credit Rating is less than BBB- from S&P, Baa3 from Moody's or BBB- from Fitch; and a "Weekly Billing Period" means a period of seven (7) calendar days commencing on Tuesday and ending on Monday."

2. SSO Supplier Option To Use The Notional Quantity Language

Constellation next proposes that the last sentence in MSA Section 5.4(a) (the "Notional Quantity Language") be made optional, at the discretion of the SSO Supplier, due to the specific accounting consequences to a SSO Supplier from net settling a DS contract subject to such language. This language creates a "notional quantity" and transforms the MSA into a derivative instrument as defined under Rule 133 of the Statement of Financial Accounting Standards ("SFAS"), in order to meet the accounting practices of certain wholesale suppliers. In other words, with the inclusion of the Notional Quantity Language, the MSA is considered to have a notional quantity and thus results in the MSA being considered a derivative under SFAS 133, such that certain wholesale suppliers are able to elect "mark-to-market" (derivative) accounting.

Due to the inclusion of the Notional Quantity Language and the MSA's resulting status as a derivative, in order for a SSO Supplier to account for this contract on an accrual basis (*i.e.*, not on a 'mark-to-market' basis) it must designate it as a "normal purchase and sale" for accounting purposes. One of the requirements for electing the "normal" designation is that such contracts must be taken to physical delivery throughout their entire term. Because of this requirement, the future assignability of the contract is compromised. If a MSA designated as normal were to be net settled, as might occur if such MSA were ever assigned, it would call into question the SSO Supplier's initial designation as normal and could require, under current accounting rules, that the MSA be rebooked as a mark-to-market contract unless the assignment was caused by exogenous circumstances (e.g., bankruptcy), potentially causing significant negative financial and accounting consequences for the SSO Supplier. More specifically, "net settlement" of a contract designated as "normal" under SFAS 133 paragraph 10(b), as would occur if the contract were ever to be assigned, would be considered an accounting "error," not just for that particular

MSA, but also for any other similar contracts to which the SSO Supplier is a party. Such an error, if material, would cause the SSO Supplier to restate its financial results using mark-to-market (derivative) accounting for such contract(s) for all affected periods. Such a restatement of several years of financial results would be unduly burdensome and viewed as a very adverse event in financial markets, to the point that assignment, under such circumstances, is not a viable option.

In this way, this feature essentially makes the MSA unassignable for any SSO Supplier that has designated the MSA as a normal purchase and sale. An ability to assign the MSA provides reassurance to SSO Suppliers that they will be able to appropriately manage their obligations. Moreover, an ability to assign the MSA promotes the interests of consumers in that a SSO Supplier that unexpectedly finds itself unable to meet its obligations under the MSA due to financial or other reasons will be able to transfer its supply obligations to a Supplier that is more readily able to meet the MSA's requirements.

As a solution, Constellation proposes that MSA subsection 5.4(a) be revised such that the Notional Quantity Language is explicitly optional, at the discretion of the SSO Supplier, due to potential accounting consequences to a Supplier arising from such language. This can be achieved using one of two approaches. The MSA could first be revised simply by identifying the Notional Quantity Language as new subsection 5.4(a)(i) and including the following prior to the Notional Quantity Language:

> "☐ SSO Supplier may, in its sole discretion, add the following subsection 5.4(a)(i) by checking this box. If SSO Supplier does not check this box, subsection 5.4(a)(i) will not be deemed to be included as part of the Parties' Agreement."

In the alternative, the MSA could be revised by moving the Notional Quantity Language to a new Appendix [X] to the MSA, as subsection 5.4(a)(i), and adding after the first part of subsection 5.4(a) the following language:

> "☐ SSO Supplier may, in its sole discretion, add subsection 5.4(a)(i) included in Appendix [X] by checking this box. If Supplier does not check this box, subsection 5.4(a)(i) will not be deemed to be included as part of the Parties' Agreement."

Without such a revision to the MSA, certain wholesale suppliers likely will account for their inability to appropriately manage their obligations (*i.e.*, their inability to assign the MSA without incurring potentially significant financial consequences as a result of accounting practices) by limiting their participation in the CBP and/or including in their bids an additional risk premium. Thus, by making optional the Notional Quantity Language as explained herein, the Commission may reduce the likelihood of additional risk premiums and increase the robustness of the bidding process by attracting more wholesale suppliers to the procurement, resulting in a more competitive procurement process and more competitive prices for consumers. Making such language optional will allow for an *equal* ability to assign the MSA for all potential SSO Suppliers (rather than only by those SSO Suppliers who utilize mark-to-market accounting). However, making such a revision will do nothing to either undermine the requirements that a SSO Supplier must meet its supply and other obligations under the MSA or limit the Companies' ability under the MSA to reject any proposed assignment by a Supplier.

Constellation notes that, when language such as the Notional Quantity Language is included in a contract, it is included only in order to meet the requirements of FAS 133 and qualify as a derivative contract for accounting purposes. In fact, with respect to a default by a SSO Supplier (*i.e.*, *not* FE) the MSA lays out clearly under Section 5.4 that FE (the Non-Defaulting Party, in this scenario): "will calculate, in a commercially reasonable manner, a

Settlement Amount with respect to the obligations under [the MSA]."[7] More specifically, to assist in calculating Damages in a "commercially reasonable manner" the MSA provides that:

> Damages resulting from . . . [a Supplier default] . . . will include all costs incurred by any of the Companies, acting in a commercially reasonable manner . . . in obtaining replacement services or in obtaining a replacement supplier, which costs exceed the amounts that would have been payable to the defaulting SSO Supplier under this Agreement.[8]

The costs of obtaining replacement energy or a replacement supplier are not dependent on the language in the Notional Quantity Language, but rather are dependent on the actual costs that the Companies incur in replacing the energy that the defaulting SSO Supplier did not provide. These actual costs are verifiable actual replacement supplies that the Companies procure to serve their load, as stated in the damages provisions of the MSA, and are not dependent upon a calculation of what "those quantities . . . would have been," as stated in the Notional Quantity Language. To be specific, the *estimated* Settlement Amount is not the final determinant of Damages because the MSA in Section 5.3 points out that:

> [t]he Parties recognize [that] the final calculation of Damages hereunder may not be known for some time since the level of such Damages may be dependent upon the arrangements made by [FE] to obtain replacement services or a replacement [SSO Supplier]. [FE] and each SSO Supplier agree that, until the calculation of Damages under this provision is completed, the amount and payment to [FE] of the [*estimated* Settlement Amount] in Section 5.4 . . . will be immediately due and owing as an estimate of [Damages]. After Damages have been finally determined under this Section 5.3, the amounts of Damages due and owing will be reconciled with payments already made by SSO Supplier under Section 5.4 hereof.[9]

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[7] Note also that a "Settlement Amount" is defined as "the net amount of the Losses or Gains, and Costs, expressed in U.S. Dollars, which [a Non-Defaulting Party] incurs as a result of Early Termination . . . ." "Losses," "Gains," and "Costs" are each defined terms under the MSA which go into an estimated Settlement Amount.

[8] MSA Section 5.3(a).

[9] MSA Section 5.3(a) (*emph.* added).

In this way, the MSA clearly lays out that Damages must inevitably be calculated as *actual* Damages, and that the estimate of Damages under Section 5.4 should be calculated by the Non-Defaulting Party in a "commercially reasonable manner." The Notional Quantity Language therefore has no effect on calculating the final *actual* Damages due to a default. In short, pursuant to the terms of the MSA, calculations of damages will not be affected by not including the Notional Quantity Language.

Other jurisdictions have made changes similar to those proposed herein by Constellation with respect to the Notional Quantity Language. Last year, Delaware, Maryland, and the District of Columbia all revised their agreements equivalent to the MSA in order to make their respective versions of the Notional Quantity Language optional, at the wholesale supplier's discretion, as Constellation has proposed.

In approving the revision to make the Notional Quantity Language optional, at the supplier's discretion, the Maryland Public Service Commission ("Maryland Commission") stated that:

> [i]t has always been the intent of the [Maryland] Commission that language in the [contract] should provide for the optionality discussed in [Constellation's] "notional quantity" proposal. [Making the Notional Quantity Language optional] broadens the pool of potential bidders.

The Public Service Commission of the District of Columbia ("DC Commission"), in deciding to make the Notional Quantity Language optional at the supplier's discretion, stated that the DC Commission:

> recalls that [the Notional Quantity Language] was included in the contract [in order] to allow more diverse parties such as investment banks to participate in the SOS process. The [DC Commission] does not believe that [making the Notional Quantity Language optional] will detract from the clause's intended purpose and therefore accepts . . . [the] revision to [the contract].

The Delaware Public Service Commission ("Delaware Commission") similarly approved the proposal to make the Notional Quantity Language optional at the discretion of the supplier.

In summary, having such an option will only increase flexibility in the types of accounting treatment that Suppliers may elect for the MSA. Making the Notional Quantity Language optional in this way may lead to increased willingness of certain companies to participate in the CBP, to the benefit of the competitiveness of the procurement and, ultimately, to the benefit of FirstEnergy's consumers.

F. Load Response

Under FirstEnergy's proposal, certain option load response programs would be made available to Standard Service Offer Generation customers being served at 69kV or higher, that have at least 1 MW of Realizable Curtailable Load (RCL). Specifically, eligible customers could enroll in programs that could subject them to an Emergency Curtailment Event, in which customers must drop their usage at or below firm load within 10 minutes, as well as an Economic Buy Through Event (EBT Event), which could apply for up to 1,000 hours per year, and be invoked anytime MISO Day Ahead LMP prices are greater than 125% Blended Competitive Bid price for 3 consecutive hours. It is not clear from the filing what the program credit would actually be, however, or that the proposed calculation is appropriate. We look forward to FirstEnergy providing some clarification on these issues.

III.

CONCLUSION

The Commission has an opportunity to be a steadying force in the continued evolution of the competitive electric market in Ohio. The Commission is faced with the task of setting the ground rules for the next phase of the evolution of the FirstEnergy service territory. As a general

matter, FirstEnergy's CBP proposal, with the modifications discussed herein, is the best means for the procurement of standard service supply that will be product delivered by FirstEnergy in its role as default provider. FirstEnergy's proposal will bring the benefits of wholesale competition to customers that do not choose a competitive alternative to FirstEnergy's standard offer service and should help foster the continued evolution of the competitive retail electric market.

Constellation respectfully requests that the Commission enter an Order that:

(1) Adopts First Energy's Class-Based Alternative under its proposed Competitive Bid Plan; and

(2) Revises the Master SSO Supply Agreement such that: (a) the MSA, under Section 9.1, will accelerate payments on a weekly basis from the Companies if one of the Companies falls below investment grade; and (b) the last sentence in MSA Section 5.4(a) be made optional, at the discretion of the SSO Supplier.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing documents was served this 5th day of September, 2007 by regular U.S. mail, postage prepaid, or by electronic mail, upon the persons listed below.

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