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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

Enron Energy Services, Inc., *et al.*, **Complainants,** **v.** **FirstEnergy Corp., *et al.*,** **Respondents.**	**Case No. 01-393-EL-CSS** 01-393-EL

BRIEF OF FIRSTENERGY CORP.

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ATTORNEYS FOR RESPONDENTS

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BRIEF OF FIRSTENERGY CORP.

Pursuant to the agreement of the parties, FirstEnergy Corp. and its Ohio operating companies Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy"), file this Brief in response to the Initial Brief filed by Enron Energy Services, Inc., Exelon Energy Company, Strategic Energy, LLC, AES Power Direct, LLC and MidAmerican Energy Company (collectively, "Enron").

I. INTRODUCTION

The real purpose of Enron's complaint is to have the Commission force FirstEnergy to take market support generation ("MSG") away from Industrial Energy Users-Ohio ("IEU") so that Enron can get more of it. But in order to try to hide the fact that this is simply another MSG case brought by marketers that failed to get in line early enough to get all the MSG they want,[1] Enron tries to convince the Commission that it can accomplish more lofty purposes in this case. Enron begins its Brief this way: "This proceeding presents the Commission with a chance to ensure that the statutory goals for electric deregulation in Ohio are met . . . ." (Enron Br., p. 1.)

[1] Two other such cases are pending before the Commission: Case No. 01-174-EL-CSS, filed by the City of Cleveland and WPS, Inc., and Case No. 01-1331-EL-CSS, filed by Advantage Energy, Inc.

That is a tall order for a case that is simply about the allocation of MSG under the Protocol for First-Come-First-Served Claims for Market Support and Non-Market Support Generation (the "Protocol") (Dinie Depo., Exh. 15, Bates No. 60), which was drafted by FirstEnergy in order to administer the MSG program. How MSG is allocated has nothing to do with the statutory goals for electric deregulation in Ohio. MSG is not a creation of Amended Substitute Senate Bill No. 3 ("S.B. 3"); MSG is not mentioned in, or even contemplated by, S.B. 3. As the Commission has already recognized, FirstEnergy has no statutory obligation to provide MSG, much less to provide it in any particular way.[2] How, then, could the way FirstEnergy has allocated MSG under the Protocol have anything to do with the statutory goals for electric deregulation in Ohio? It doesn't.

MSG was a creation of the parties to the Stipulation and Recommendation filed with the Commission in FirstEnergy's transition plan case, Case No. 99-1212-EL-ETP, and the Stipulation required only that MSG be allocated on a first-come, first-served basis for committed capacity sales. As discussed below, IEU's claim met those requirements.

Enron also suggests that this case gives the Commission the opportunity "to confirm that settlement agreements will remain a viable means to resolve contested cases." (Enron Br., p. 1.) Enron may have raised the issue of whether FirstEnergy complied with a settlement agreement, but the case is not about whether settlements are a viable means of resolving contested cases. Of course they are, and what the Commission does in this case won't affect that in the least.

In any event, the evidence shows that FirstEnergy complied with the Stipulation. FirstEnergy agreed, in the Stipulation, to make system level generation, at a specific price,

[2] The Commission recognized, in its September 13, 2000 Entry on Rehearing in Case No. 99-1212-EL-ETP, that "FirstEnergy was under no legal obligation to make this offer [of MSG], but agreed to do so as part of the settlement process" and that the provision of MSG "is not a requirement of S.B. 3 or the Commission's rules." (Entry on Rehearing, pp. 8, 11.)

available to entities that had a commitment from end-use customers to purchase that generation. That is exactly what FirstEnergy has done. The MSG was made available as a way to jump-start the competitive marketplace, and, as is evident from the information filed by FirstEnergy in Case No. 01-2736-EL-UNC, the MSG has had its intended effect. Reaching that goal was not dependent on who got the MSG, just that the MSG was available and that some customers were getting competitive retail electric service from alternative suppliers. Enron contends that rather than jump-start the market, FirstEnergy, by allocating MSG to IEU, has "short-circuited" the competitive market. (Enron Br., p. 3.) That may be cute wordplay, but it's the wrong conclusion.

Enron's argument is premised on the proposition that it was really FirstEnergy Services ("FES") that got the MSG. But there was no "indirect reservation" of MSG by FES, as Enron contends. FES has not reserved MSG for itself, either directly or indirectly, and it is not receiving MSG, either directly or indirectly. The reservation of MSG was by IEU, an entity certified by the Commission to provide aggregation services, with members that had committed to purchasing generation through IEU. The fact that IEU hired FES to administer the aggregation program does not mean that the MSG has been allocated to FES. The MSG is provided to end-use customers not, as Enron suggests, by FES, but rather through IEU.

Enron stretches its argument to the point of claiming that FirstEnergy has violated its transition plan and, consequently, R.C. Sections 4928.33 and 4928.02. It bases that claim on its argument that FirstEnergy has allocated MSG to FES and that FirstEnergy has failed to require FES to relinquish the MSG as required by the Supplemental Settlement Materials. Enron argues that the Stipulation and the Supplemental Settlement Materials (together, the "Stipulation") filed in Case No. 99-1212-EL-ETP "were incorporated as part of the approved Transition Plans for

FirstEnergy" and thus that by violating the Stipulation, FirstEnergy has violated its transition plan. (Enron Br., p. 15.) It is not correct that the Stipulation was made a part of the transition plan. The Commission accepted the Stipulation, but it approved FirstEnergy's transition plan separately. (*See* July 19, 2000 Opinion and Order, p. 71, first ordering paragraph.)[3] FirstEnergy is not making the MSG available as a result of the Commission's approval of the transition plan, but rather as a result of the commitment it made in order to settle the transition plan case. This case is not about FirstEnergy's compliance with its transition plan or with S.B. 3.

This case is simply another MSG case, filed, like the other MSG cases, by marketers that did not reserve their place in the MSG queue early enough to get all of the MSG they wanted. It is simply an attempt by those marketers to make the Commission reallocate the MSG so that they can get more of it. The only issue in this case is whether FirstEnergy fairly applied the Protocol and allocated the MSG on a first-come first-served basis for committed capacity sales. The evidence shows it did. The Commission should find that Complainants have not met their burden of proof, and should decide this case in favor of Respondents.

II. FACTS

Most of the facts set out in the Statement of Facts in Enron's Brief are correct. Some, however, are wrong, and some, irrelevant. Rather than address the factual allegations in a separate section of this Brief, FirstEnergy incorporates in the Argument below its responses to the incorrect and irrelevant factual allegations in the "Statement of Facts" section of Enron's brief.

[3] In any event, FirstEnergy did not violate the Stipulation, and thus, even if the MSG had somehow been "incorporated as part of the approved Transition Plans," FirstEnergy would not have violated the transition plan.

III. ARGUMENT

A. The MSG Claim Was Filed By IEU and Approved For IEU

Enron incorrectly claims that "[u]nlike other marketers, brokers and non-municipal aggregators who applied for MSG, IEU-OH was excused from a number of significant requirements" under the Stipulation and the Protocol. (Enron Br., p. 11.) Enron posits that IEU was not held to the requirements of the Stipulation and the Protocol because it didn't have to meet those requirements, given that FES satisfied them all. Enron's ultimate conclusion -- equally incorrect -- is that it was actually FES that reserved the MSG. There are two major flaws in that argument.

1. IEU was not excused from any requirements under the Protocol applicable to non-municipal aggregators.

The first flaw in Enron's argument is that there is nothing in the record that supports the statement that IEU was excused from any requirement in the Protocol that was imposed on other non-municipal aggregators. In fact, the requirements applied to IEU were the same as those applied to any other certified supplier similarly situated to IEU -- that is, other non-municipal aggregators. Enron points to no situation in which that was not the case. It is true that IEU was not required to comply with the requirements of FirstEnergy's Electric Generation Supplier Coordination Tariffs, but neither was any other non-municipal aggregator.

Notably, Enron did not -- because it could not -- actually name any other non-municipal aggregator that was held to requirements different from those applied to IEU, even though it was aware that there were other non-municipal aggregators that had filed MSG claims. In response to a question at his deposition, Mr. Burnell identified by name another non-municipal aggregator that had applied to be an Eligible Supplier under the Protocol. (Burnell Depo., p. 12.) Interestingly, Mr. Burnell was never asked what requirements were applied to that other non-

municipal aggregator, perhaps because Enron did not want to hear the truth, which is that the requirements were the same as those applied to IEU. The fact that IEU had a contract with FES to administer the aggregation program made absolutely no difference in the steps it had to follow to file a valid claim and properly reserve a place in the MSG queue.

Mr. Burnell made it clear that the only registration requirement applied to an aggregator -- any aggregator -- was the filing of the aggregator's application to the Commission for certification as a Certified Retail Electric Supplier ("CRES"). (Burnell Depo., p. 35.) Both Mr. Burnell and Mr. Blank made it quite clear that the registration to be an Eligible Supplier was different for aggregators and marketers. (Burnell Depo., p. 32; Blank Depo., p. 42.) Despite Enron's claim that there was only one registration requirement, registration under the Protocol to become an eligible supplier in order to file a claim and establish a place in the MSG queue was different from registration under the Supplier Coordination Tariff. (Blank Depo., pp. 40, 56-57.) Because IEU was not a supplier, and because its relationship with FirstEnergy was not going to be governed by the Supplier Coordination Tariff, IEU did not have to comply with the requirements of that tariff.[4]

In its Brief, Enron emphasizes two of those requirements: EDI ("electronic data interchange") testing and the provision of credit information. Enron claims that IEU could not reserve MSG because it never conducted EDI testing, as required by the Supplier Coordination Tariff. The purpose of EDI testing, as is evident from Section 2.g. of the Protocol, was to ensure that customer enrollments could be made electronically. The only way to enroll customers is through a Direct Access Service Request ("DASR"). (Burnell Depo., pp. 98-99.) Therefore, the

[4] Enron apparently sees something sinister in Mr. Blank's failure to verify personally IEU's registration under the Protocol. (Enron Br., p. 22.) There was nothing sinister about it; it was simply a function of whose job it was to handle registration under the Protocol. That was Mr. Burnell's job. (Blank Depo., p. 41.) Mr. Burnell advised Mr. Blank that the registration requirements had been met (Blank Depo., p. 55), and Mr. Blank relied on Mr. Burnell without making his own independent investigation. (*Id.*, pp. 37, 38.)

fact that FES had conducted EDI testing was sufficient, given that FES has the administrative function of submitting DASRS on IEU's behalf. (*See* discussion, *infra*, p. 10.) Consequently, IEU itself did not have to conduct EDI testing. EDI testing "only had to happen when there has to be EDI testing to make the program work to begin with or else it becomes a moot point." (Blank Depo., p. 66.)

Enron also tries to make something out of the fact that IEU did not submit credit information in connection with its MSG application. Enron claims that this is another indication that IEU was not the entity that actually reserved the MSG. (Enron Br., p. 14.) In support of its position, Enron cites Mr. Murray's testimony that IEU has no financial arrangements in place to conduct CRES as a business activity. (*Id.*) But because of the particular activity that IEU was conducting in connection with the MSG -- because it was an aggregator -- that was irrelevant. As Mr. Blank testified numerous times during his deposition, credit information was not required from IEU because FirstEnergy would never incur any financial risk with respect to IEU. IEU would never owe the utilities money, and thus the credit information was unnecessary. (Blank Depo., pp. 59, 60, 61, 176.) The same was true for any aggregator that would not owe FirstEnergy money. (Blank Depo., pp. 57-58.) There was no point in requiring a useless act.

IEU's relationship with FES had no bearing on what it was required to do in order to become an Eligible Supplier. IEU did all of the things it had to do, as an aggregator, to file an MSG claim under the Protocol and to establish a place in the MSG queue. FirstEnergy fairly applied the Protocol and the MSG was rightfully allocated to IEU.

2. As an aggregator, IEU was entitled to claim MSG for the IEU members that had made a commitment to purchase generation through IEU.

The second flaw in Enron's argument that FES was actually the MSG claimant is that it fails to acknowledge the existence of aggregators, separate from marketers and brokers, and fails

to give meaning to the definition in the Protocol of "Generation Service Agreement" as the commitment of a customer to purchase generation "from or through" an Eligible Supplier (emphasis supplied). There is clearly a difference between aggregators, on the one hand, and marketers and brokers, on the other. S.B. 3 recognizes the difference, the Commission's rules recognize the difference, the Stipulation recognizes the difference, and the Protocol recognizes the difference. Enron, however, by insisting that it was actually FES that was the claimant for MSG, ignores the difference.

S.B. 3 defines "retail electric service" as "any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state . . ." R.C. Section 4928.01(A)(27) (emphasis supplied). The definition goes on to provide that "retail electric service" includes "one or more of the following service components," and includes aggregation service as one of those components. Clearly, S.B. 3 contemplates the existence of aggregators as distinct from marketers or brokers and recognizes aggregation service as something other than supplying electricity.

So do the Commission's CRES rules, which establish requirements for aggregators that are different from those applicable to other CRES providers. (*See, e.g.*, Ohio Administrative Code Rule 4901:1-24-04(B)). IEU filed its application to be an aggregator (Case Nos. 00-1518-EL-UNC, 00-1711-EL-AGG), and the Commission certified IEU to provide aggregation services. IEU's application set out the manner in which it was going to provide aggregation service, including the fact that IEU was "likely to employ the services of a contractor(s)." (IEU CRES Application, p. 8.) The Commission clearly recognizes the difference between aggregators and other types of retail electric suppliers and the difference in the services they provide.

The Stipulation provides that FirstEnergy will make available 1120 MW of MSG to marketers, brokers, and aggregators for sales to retail customers. The parties to the Stipulation, and the Commission, in approving the Stipulation, understood that there was a difference between aggregators, on the one hand, and marketers and brokers, on the other, since they were independently identified in that document. That concept was carried over to the Protocol. Section 4.a of the Protocol provides that any marketer, broker, or aggregator that fulfills the eligibility requirements can be an Eligible Supplier.

Enron tries to diminish IEU's role in its aggregation program: "IEU-OH will not be buying and selling the electricity, but will merely 'facilitate member access to FirstEnergy's MSG.'" (Enron Br., p. 6 (emphasis supplied).) But facilitating access to electric generation for the members of the aggregation group is exactly what aggregators do. If the spin put on the IEU arrangement by Enron were adopted by the Commission -- that IEU "merely fronted" FES's reservation of MSG (Enron Br., p. 22) -- the provision in the Stipulation that MSG can be made available to aggregators would have no meaning. It would make the concept of aggregators a nullity, in contravention of S.B. 3, the CRES rules, and the Stipulation. It would likewise negate the existence of aggregators as legitimate CRES suppliers, a view not in accord with the Commission's rules.

In support of its position that it was FES that reserved the MSG, Enron also relies on language from the Master Service Agreement ("MSA") between IEU and FES (Murray Depo., Exh. 2). As if it helped its argument, Enron points out that the MSA provides that "FES, on IEU-OH's behalf, shall pay for the Market Support Generation associated with the 200MW Layer . . . as though FES had obtained such Market Support Generation and was functioning as a supplier to the Pooled Customers Accounts." (Enron Br., p. 13.) The mere existence of that language

shows that FES did not, in fact, obtain the MSG for itself. If it had, that contract language would not have been necessary.

Enron claims that under the MSA, "all aspects of the IEU-OH MSG aggregation program are made the exclusive province of FES." (Enron Br., p. 12.) That is not true. The MSA clearly states that IEU established the aggregation program, obtained commitments from its members to be a part of the aggregation group and purchase MSG through IEU, and obtained the MSG. (Murray Depo., Exh. 2.) In short, IEU arranged for the supply of electricity to its members -- it provided aggregation service. The functions left to FES are administrative, and all of those administrative functions are performed on IEU's behalf: the MSA states that FES will "assist IEU-OH, in its capacity as an aggregator, [to] administer the Aggregation Program . . . ." (*Id.*) What the MSA in fact shows is that IEU was in the driver's seat with respect to the MSG claim.

Enron points to the fact that submitting Direct Access Service Requests, in order to enroll a customer in the aggregation group, is one of the things FES does under the MSA. (Enron Br., p. 13.) But what does that prove? Only that FES is handling the administrative functions of the aggregation program, which is exactly what the MSA says FES will do. Another fact used by Enron to try to support its argument is that "rate information about IEU-OH's members is transmitted by FES to the applicable FirstEnergy electric distribution utility . . . ." (*Id.* (emphasis in original)). But, contrary to the impression Enron tries to give, FES does not actually generate the rate information. IEU generates the rate information and then gives it to FES simply to transmit to the electric distribution utility. (Murray Depo., p. 112.) FES's role with respect to the rate information is simply another part of the administrative function it agreed to perform.

Enron goes so far as to claim that based on the facts laid out by Enron in its Brief, "it cannot have escaped Mr. Blank's surmise that some entity other than IEU-OH was reserving the

MSG on behalf of IEU-OH's members . . . ." (Enron Br., p. 22.) But that is not the logical conclusion to be drawn from those facts. IEU did not have to register under the Supplier Coordination Agreement because it is not a supplier.[5] The requirements imposed on IEU were strictly a function of its role as an aggregator, and IEU met all of those requirements. Enron's argument that FES was the entity reserving MSG misses the mark by a mile.

B. The Allocation of MSG to IEU Did Not Violate the Stipulation's Requirement That There Be a Committed Capacity Sale.

Enron begins its discussion of the committed capacity sale requirement of the Stipulation by misstating the facts. It claims that the Stipulation and the Protocol require a "supplier-customer commitment" to establish and hold a place in the MSG queue. (Enron Br., p. 16.) That is not what the Stipulation and Protocol require, and, despite Enron's citation to the transcript of his deposition in support of that contention, Mr. Blank never said that they do. Rather, Mr. Blank explained that "there had to be a commitment of a customer to purchase generation from or through an eligible supplier . . . From or through was the critical determination, not necessarily a buyer and a seller per se." (Blank Depo., p. 12.)

The Protocol incorporated the "committed capacity sale" requirement from the Stipulation. The Protocol (Section 5.d.(i), incorporated by reference in Section 5.e.) requires that every claim contain the name of each customer with whom the claimant has a Generation Service Agreement; "Generation Service Agreement" is defined in Section 2.f. of the Protocol as

[5] Enron tries to make something of the fact that Mr. Blank was unable to explain the processing error that caused letters to be sent to IEU members identifying FES as the supplier (and that also caused the power not to be characterized as MSG in the first place), implying that Mr. Blank's inability to explain casts doubt on the veracity of the claim that there was a processing error. (Enron Br., p. 14.) The fact is, it was Mr. Burnell, who does not work for or report to Mr. Blank, who identified the problem and had it corrected. (Blank Depo, pp. 103, 104-105.) (Mr. Blank is Manager of FirstEnergy's Rate Department; Mr. Burnell works in the Customer Choice Services Department (Blank Depo., p. 5; Burnell Depo., p. 22.)) Enron never asked Mr. Burnell about the processing error.

"the commitment of a customer to purchase generation from or through an Eligible Supplier." (Emphasis supplied.) Obviously, an MSG claimant did not have to have a sales agreement with the customer, if the customer had committed to purchasing generation through the claimant. That is exactly the situation with IEU and its members. Each of the IEU members that wanted to be part of the IEU aggregation group had signed an IEU-OH Member Contingent Participation Agreement before IEU's claim was filed on October 19, 2000. (Murray Depo., p. 76.)

Enron suggests that there were deficiencies and contingencies in the Contingent Participation Agreement between IEU and its members, the agreement reviewed by Ms. Dinie (Murray Depo., p. 76), that precluded a finding that IEU had a "committed capacity sale." But, as the following analysis demonstrates, FirstEnergy's finding that IEU had a commitment from certain of its members to purchase generation through IEU is consistent with the record.

1. Execution by IEU members of the Contingent Participation Agreement was evidence of a commitment to purchase MSG through IEU.

Enron's primary argument is that the Contingent Participation Agreement was not sufficient proof of a "committed capacity sale." It bases its argument on two points: first, that the Contingent Participation Agreement was contingent on the execution of the MSA, which, it claims, neither Ms. Dinie nor Mr. Blank confirmed, and second, that the IEU members could get out of the agreement if they were not satisfied as to the savings they would see as a result of the arrangement. But Enron doesn't get it right on either point.

In fact, the Contingent Participation Agreement was not contingent on the execution of the MSA, but rather on the execution of the MSA in substantially the same form as that of the

(continued...)

Enron also apparently thinks it is significant that Mr. Blank did not know who the supplier is. (Enron Br., p. 14.) But that is irrelevant to the issue of whether IEU's MSG claim met the requirements of the Protocol. (*See* Blank Depo., p. 13.)

MSA attached as Appendix A to the Contingent Participation Agreement. (Murray Depo., Exh. 4, p. 1.) Mr. Blank made a point of asking Ms. Dinie to verify which it was. (Dinie Depo., p. 85.) She verified that "[t]he wording [of the Contingent Participation Agreement] was that it had to be executed in substantially the same form." (*Id.*, p. 86).

Given that the terms of the MSA had already been negotiated, that it had been reduced to an executable document, and that the condition was simply that the MSA be executed in substantially the same form as that supplied to the IEU members in conjunction with the Contingent Participation Agreement, it was reasonable for Mr. Blank to conclude that there was a committed capacity sale. Mr. Blank understood from Ms. Dinie that she was satisfied that there was a committed capacity sale. (Blank Depo., pp. 35, 168, 170, 171, 173.) Based on her report and his discussions with FirstEnergy lawyers, Mr. Blank made the final determination that there was a committed capacity sale. (*Id.*, pp. 35, 171.) Enron suggests that Ms. Dinie "flatly denie[d]" that she was satisfied that there was a "committed capacity sales contract." (Enron Br., p. 18.) But a careful examination of the transcript pages Enron cites in support of that contention show that Ms. Dinie was not asked whether she was satisfied that there was a committed capacity sale; she was asked what her involvement was on this matter, and who determined whether or not there was a contract. She said that she raised items with Mr. Blank, but that he made the final determination: "I would have been involved in discussing with FirstEnergy if there was a concern as to whether or not a contract existed" at the time of IEU's claim, but FirstEnergy made the final determination as to whether or not there was a contract and hence a "committed capacity sale." (Dinie Depo., pp. 64 - 67.) Her testimony is entirely consistent with Mr. Blank's. Contrary to Enron's assertion (Enron Br., p. 18), Ms. Dinie never said that she suspected that there was no committed capacity sale as of October 19, 2000. Enron is

completely wrong on that point, as its failure to cite any portion of the record in support of that statement indicates.[6]

The second prong of Enron's argument is that "IEU-OH members were assured that the Contingent [Participation] Agreement would include contingencies that would allow them to 'walk' if a member deemed an unacceptable outcome existed." (Enron Br., p. 18.) Enron has a copy of that Agreement; its failure to cite any portion of the agreement in support of this argument is telling. It relies only on e-mails from Mr. Randazzo and Mr. Murray, certainly not the best evidence on this point.

In Mr. Blank's view, a committed capacity sale does not necessarily require that there be a binding contract between the Eligible Supplier and the customers on whose behalf a claim is filed. (Blank Depo., p. 164.) He wanted to know about any such contingencies (*Id.*, pp. 16-17), but the mere existence of a contingency was not automatically cause for rejecting the Eligible Supplier's claim: "we didn't want to over-prescribe what a supplier or claimant for MSG could or couldn't do other than what we needed for administration of the program and for meeting the terms of the stipulation." (*Id.*, p. 17.)

There was certainly no expectation on FirstEnergy's part that the members of an aggregation group would be forced to remain in the group. Whenever an aggregation group

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[6] Even where Enron cites the record in support of its arguments, those citations must be examined very carefully. The record frequently does not say what Enron says it says. For example, citing pages from Mr. Blank's deposition, Enron states that Mr. Blank "consult[ed] with FirstEnergy's lawyers, and then made the determination that IEU-OH's MSG application, made indirectly by FES, should be granted." (Enron Br., p. 17.) Obviously, Mr. Blank made no determination that IEU's MSG application was made indirectly by FES.

Enron also misrepresents the record when it claims that Mr. Blank made inquiries of FirstEnergy's legal department about FES's relationship with IEU because he was "aware . . . that discussions took place between FES and IEU-OH about the manner in which MSG would flow to IEU-OH members" and "that FES's affiliation with FirstEnergy would disqualify FES from being the supplier of MSG to IEU-OH's members." (Enron Br., p. 21.) Mr. Blank was hardly that definite about the FES/IEU discussions; he testified that he was aware that there was "some sort of discussion" between IEU and FES, and he wanted to know if he should be concerned about having to reallocate MSG "if there were alternate claimants." (Blank Depo., pp. 116, 117.) We fail to see why that should be at all "troubling" to Enron.

member leaves the group, the MSG attributable to that customer goes back into the MSG pool and is allocated to the next eligible claimant. The fact that there might have been conditions under which the IEU members could leave the group did not mean that there was not a committed capacity sale, as that term is used in the Stipulation and the Protocol.

In Mr. Blank's view, there is a committed capacity sale if "there is in fact a known destination in the form of a retail customer for that market support generation power." (Blank Depo., p. 185.) Each of the IEU members for which IEU filed a claim had signed an "IEU-OH Member Contingent Participation Agreement" before IEU submitted its claim on October 19, 2000. (Murray Depo., pp. 76, 136-137.) Thus, there was a "known destination" for IEU's MSG, and the committed capacity sale requirement of the Stipulation and the Protocol was met.

2. The absence of a price term in the Contingent Participation Agreement did not affect the existence of a committed capacity sale.

Enron also has focused on the fact that the Contingent Participation Agreement did not have a price term, arguing that there cannot be a "commitment to purchase," as required by the Protocol, without the identification of a price. In support of its argument, Enron gives us a definition of "purchase" -- "to obtain in exchange for money or its equivalent." (Enron Br., p. 17, footnote 8.) That definition does not require the identification of the amount of the consideration, only that there be some. There was certainly no doubt that the IEU members were going to pay something for the MSG, and that was all that was necessary. As Mr. Blank explained, "[t]he details of the consideration . . . could certainly be determined subsequent to the establishment of a commitment to purchase." (Blank Depo., p. 26.) Mr. Blank was very clear on that point -- once he had identified that there was a commitment to purchase, he was satisfied: "[t]he price arrangement was not [FirstEnergy's] business." (*Id.*, p. 15.) He simply was not

concerned about the price. (*Id.*, pp. 13, 15, 24, 169.) Enron has failed in its attempt to make a mountain out of a mole hill.

The "committed capacity sale" concept does not exist independent of the Stipulation. The point of that requirement was to prevent a claimant from claiming the MSG with the intent to use it to serve customers outside FirstEnergy's service territory. Given that FirstEnergy was responsible for administering the MSG program, it was up to FirstEnergy to determine what would satisfy the requirement. The execution by IEU members of the Contingent Participation Agreement was sufficient proof of a committed capacity sale. Given the ability of FirstEnergy to determine for whom IEU was claiming MSG, the determination that there was a committed capacity sale was reasonable.

C. The Settlement Agreements Between FirstEnergy and IEU Did Not Have to be Filed

Based simply on e-mails from Mr. Murray and Mr. Randazzo to IEU members, Enron contends that there were settlement agreements between FirstEnergy and IEU that should have been, but were not, filed with the Commission for its approval. Enron argues that the failure to file those agreements constitutes a violation of Sections 4905.31, .32, .33, and .35. (Enron Br., p. 19.)

The question of whether such agreements must be filed has already been decided. In FirstEnergy's transition plan case, a request was made for the "separate agreements" that FirstEnergy entered into with various intervenors. In its Opinion and Order, the Commission denied the request, pointing out that, other than the requirement in Section 4905.31 that special contracts be filed, no such separate agreements have to be filed: "Even if separate agreements exist, they are not relevant or necessary for the resolution of this proceeding under the dictates of S.B. 3." (Case No. 99-1212-EL-ETP, Opinion and Order, p. 16.)

In support of its claim that the agreements should have been filed under Section 4905.31 as special arrangements, Enron points to an e-mail to IEU members from IEU's counsel stating that "IEU also secured some additional settlement benefits that should improve the economics for eligible IEU members." (Murray Depo., Exh. 8, p. 2.) There is nothing in that language even suggesting that what the e-mail refers to are special contracts between a utility and its customers with respect to a regulated service, which, of course, is the only type of contract that must be filed under Section 4905.31. This argument is simply a make-weight argument, which has no merit.

D. FirstEnergy Has Not Abused Its Market Power

Enron's argument that FirstEnergy has abused its market power simply derives from the other arguments in Enron's Brief. Enron argues that "[t]hrough its approval of the FES reservation of MSG, FirstEnergy has prevented marketers and brokers who are not affiliated with FirstEnergy from acquiring electric generation at a price that would allow them to compete in the market." (Enron Br., p. 20.) That one sentence summarizes everything that is wrong with Enron's argument.

In addition to being wrong about who reserved the MSG, Enron is also off the mark when it criticizes FirstEnergy for somehow "prevent[ing] marketers and brokers who are not affiliated with FirstEnergy from acquiring electric generation at a price that would allow them to compete in the market." (Enron Br., p. 20.) The point of the MSG provision of the Stipulation was to jump-start electric competition in the FirstEnergy service territory in order to ensure that end-use customers would have competitive alternatives. Fulfilling that purpose does not depend on whether a particular CRES or even particular customers get the available MSG, only that some do. There is a fixed amount of MSG, and it was always understood that some would get it and others wouldn't. It should be irrelevant to the Commission whose claims were approved under

the Protocol, so long as FirstEnergy applied the Protocol in accordance with the Stipulation and in a non-discriminatory manner. The evidence shows that it did.

IV. CONCLUSION

FirstEnergy did not excuse IEU from any requirements of the Stipulation or the Protocol applicable to non-municipal aggregators. With the assistance of Ms. Dinie, who verified the factual matters necessary for FirstEnergy to determine the validity of MSG claims, FirstEnergy reasonably made the determination that IEU's claims met the requirements of the Protocol.

FES did not reserve the MSG for itself, either directly or indirectly. IEU could have contracted with anyone to administer its MSG aggregation program. It simply didn't matter who was performing that function for purposes of determining compliance with the Protocol. The fact that many of the administrative tasks in connection with the provision of MSG to IEU members were undertaken by FES, in accordance with the Master Service Agreement, is irrelevant to the issue of whether IEU's claims met the requirements of the Protocol.

Enron is mistaken when it claims that "[a]fter January 1, 2001, very little has changed" with respect to the supply of electric service to large industrial customers in FirstEnergy's service territory. (Enron Br., p. 3.) Enron is correct that FirstEnergy supplied bundled electric service to those customers before January 1, 2001, but it is not true, as Enron claims, that FirstEnergy is still supplying those customers "through its affiliated marketer, FES." (*Id.*) While FirstEnergy continues to provide all customers electric distribution service, it does not supply electric generation service to IEU's customers. Those customers are being supplied MSG through IEU, a certified CRES and an Eligible Supplier under the Protocol. FirstEnergy's allocation of MSG to IEU did not violate its Stipulation, its transition plan, or any provision of S.B. 3 or any other section of Title 49.

The aim of S.B. 3 was to provide competitive alternatives for end-users. It was not to enhance the business opportunities of marketers, brokers, or aggregators, and certainly not any particular marketer, broker, or aggregator. The purpose of the MSG was to stimulate the retail market by providing a supply of competitively priced electricity for sale to consumers, and that is what IEU's members are receiving. It was not the purpose of the MSG to enrich specific marketers, brokers, or aggregators.

Complainants have the burden of proof in this matter. *Grossman v. Pub. Util. Comm.*, 5 Ohio St.2d 189 (1966). They have not met that burden. For that reason, the Commission should find in favor of Respondents on all counts.

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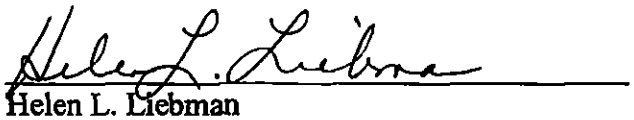
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of FirstEnergy Corp. was delivered to the following parties via hand delivery or regular U.S. Mail this 16th day of November, 2001.



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