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Excelon Energy Co., Strategic Energy, LLC, AES Power Direct, LLC and

Midamerican Energy Co.

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November 28, 2001

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Mrs. Daisy Crockron
Chief, Docketing Division
Public Utilities Commission of Ohio
180 East Broad Street, 10th Floor
Columbus, Ohio 43215-3793

Re: Case Case No. 01-393-EL-CSS
Enron Energy Services, Inc., et al v. First Energy Corp., et al

Dear Mrs. Crockron:

Pursuant to Rule 4901-1-24(D) of the Ohio Administrative Code, I am submitting to you under this cover letter three (3) unredacted copies of the Complainants' Reply Brief in this matter. We ask that the unredacted brief of the Complainants be considered as confidential and afforded protective treatment.

Consistent with the requirements of the rule, a Motion for Protective Order has been filed today as well as redacted copies of the Complainants' Reply Brief.

Thank you in advance for your cooperation.

Sincerely yours,

Benita Kahn

/jam
Enclosure

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CONFIDENTIAL

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

01-393-EL-CSS

In the Matter of the Complaint of Enron Energy Services, Inc., *et al.*,	)	
Complainants,	)	
vs.	)	Case No. 01-393-EL-CSS
FirstEnergy Corp., the Cleveland Electric Illuminating Company, The Toledo Edison Company and the Ohio Edison Company	)	
Respondents.	)	

REPLY BRIEF OF COMPLAINANTS, ENRON ENERGY SERVICES, INC., EXELON ENERGY COMPANY, STRATEGIC ENERGY, LLC, AES POWER DIRECT, LLC AND MIDAMERICAN ENERGY COMPANY

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Pursuant to the Attorney Examiner's October 23, 2001 Entry in this proceeding, Enron Energy Services, Inc., Exelon Energy Company, Strategic Energy, LLC, AES Power Direct, LLC and MidAmerican Energy Company (collectively, "Complainants")[1] file this Reply Brief in response to the brief filed by FirstEnergy Corp. and its Ohio operating companies Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively, "FirstEnergy").

I. INTRODUCTION:

FirstEnergy concedes that its obligation to provide system level generation at below-market rates ("MSG") was designed to jump-start the competitive marketplace. See FirstEnergy Brief at 3; see also, Opinion and Order, PUCO Case No. 99-1212-EL-ETP, *et al.*, summary (July 19, 2000) and Entry on Rehearing, PUCO Case No. 99-1212-EL-ETP, *et al.*, at 11 (September 13, 2001). Yet, FirstEnergy suggests that "[r]eaching 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 alternate suppliers." FirstEnergy Brief at 3. Contrary to FirstEnergy's assertion, however, the actual claimants of the MSG, and compliance with the legal requirements for making allotments to those claimants, is critical.

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[1] It is worth emphasizing that while FirstEnergy defined and referred to the Complainants collectively as "Enron" throughout FirstEnergy's Brief, Complainants are actually comprised of multiple companies -- Exelon Energy Company, Strategic Energy, LLC, AES Power Direct, LLC, MidAmerican Energy Company and Enron Energy Services, Inc. This complaint proceeding is not, as FirstEnergy suggests, a mere attempt by one company to take away MSG from another entity so that it can get more of it. See FirstEnergy Brief at 1. Nor is it about marketers "failing to get in line early," as reservations exceeded the "Other Retail" MSG on the first day such reservations were allowed. Instead, this proceeding was initiated by numerous market participants to make sure that FirstEnergy complies with the obligations that it willingly accepted as part of its transition plan.

If, as FirstEnergy suggests, who got the MSG was unimportant, there would have been no need for the requirement in the May 9, 2000 Supplemental Settlement Materials[2] that if any MSG was reserved, directly or indirectly, by a FirstEnergy affiliate and the MSG was otherwise fully subscribed, FirstEnergy's affiliate's MSG must be released and made available to other, unaffiliated marketers. To the contrary, the Commission deemed this requirement to be important, as it would "allow more generating capacity to be made available to nonaffiliated companies and create greater activity in the marketplace." See Opinion and Order, PUCO Case No. 99-1212-EL-ETP, *et al.*, p. 68 (July 19, 2000). As such, the true recipient of the MSG is of great significance where, as here, the MSG reservation was made directly or indirectly by a FirstEnergy affiliate.

FirstEnergy did not deny or refute the vast majority of the factual assertions made by Complainants. When taken together, these admitted and uncontested facts illustrate that FirstEnergy Services ("FES") is the true supplier and the entity that reserved the MSG allocated to Industrial Energy Users ("IEU") for its members, and that FirstEnergy has failed to relinquish that MSG in violation of its obligations under the Supplemental Settlement.

FirstEnergy seeks to explain its failure to comply with its transition plan obligations by (1) incorrectly casting FES' role in the IEU MSG claim as merely administrative; (2) implying that FirstEnergy's Protocol somehow replaces or supercedes the law; (3) attempting to create after-the-fact differences between the registration

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[2] On April 17, 2000, a Stipulation and Recommendation was filed with the Commission on behalf of FirstEnergy, CEI, TE, OE and various parties to the transition case ("Stipulation"). On May 9, 2000 a second agreement, the Supplemental Settlement Materials ("Supplemental Settlement") was filed. On July 19, 2000, the Commission issued an Opinion and Order approving the electric restructuring transition plans submitted by FirstEnergy, as modified by the Stipulation and the Supplemental Settlement. See Opinion and Order, PUCO Case No. 99-1212-EL-ETP, *et al.*, p. 71 (July 19, 2000).

requirements for aggregators vs. marketers and brokers; and (4) fabricating a "committed capacity sale." The Commission should reject each of these attempts, and find that FirstEnergy knowingly failed to comply with its transition plan by breaching its obligations thereunder.

The Commission issued an Opinion and Order approving the transition plan, as modified, by the Stipulation and the Supplemental Settlement. FirstEnergy argues that the Stipulation and Supplemental Settlement are not part of its transition plan. See FirstEnergy Brief at 4 ("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."). However, the Commission's Opinion and Order approving the transition plan specifically provided: "The transition plans filed by the operating companies on December 22, 1999, as supplemented and corrected, are to be approved except as specifically modified under the stipulation." Opinion and Order, PUCO Case No. 99-1212-EL-ETP, *et al.*, at 8, ¶ 10 (July 19, 2000) (emphasis added).

The MSG was, in fact, the means by which FirstEnergy addressed the policy and goals of O.R.C. 4928.02. In addition, the Opinion and Order specifically includes requirements provided for in the Stipulation. See, e.g., id. at 9, 16, and 35-36. The MSG elements of the Stipulation and Supplemental Settlement were critical parts of the findings the Commission had to make in order to approve the transition plan under O.R.C. 4928.34(A). See Opinion and Order, PUCO Case No. 99-1212-EL-ETP, *et al.*, at 71 (July 19, 2000). FirstEnergy is required by O.R.C. 4928.33(C) to comply with the approved transition plan, as modified by the Stipulation and Supplemental Settlement,

and the Commission must ensure that the transition plan requirements, including all of FirstEnergy's MSG obligations, are met.[3]

The Commission must not be fooled by FirstEnergy's attempts to divert attention from the legal requirements imposed on FirstEnergy by its continued mischaracterization of this complaint proceeding as simply a Protocol case. See, e.g., FirstEnergy Brief at 4.[4] FirstEnergy cannot escape its obligation to comply with relevant statutes, Commission rules and orders, its transition plan and its Commission-approved tariffs, simply by adopting and creatively interpreting a management protocol for MSG allocation.

II. DISCUSSION:

A. FES played much more than a "merely administrative role" in the IEU MSG claim – FES is the true supplier of MSG to the IEU members.

Most of FirstEnergy's Brief is dedicated to attempting to convince the Commission that it should ignore the role that FES played in IEU's MSG claim, as that role was limited to merely "administrative functions." See, e.g., FirstEnergy's Brief at 10. However, FES played a much larger role in the IEU MSG claim than FirstEnergy would like to acknowledge. While FirstEnergy disputes the claim that all aspects of the

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[3] FirstEnergy challenges Complainants' assertion that this proceeding presents the Commission with an opportunity to confirm that settlement agreements will remain a viable means to resolve contested cases, stating that what the Commission does in this case will have no effect on settlements. See FirstEnergy Brief at 2 (citing Complainants Brief at 1). This proceeding is based on FirstEnergy's failure to comply with its obligations arising under settlement agreements that modified its transition plan. If the Commission does not enforce these obligations when they are violated, there will be no incentive for parties to use such agreements as a resolution to contested cases in the future. This proceeding does indeed present the Commission with a chance to confirm that settlement agreements will remain a viable means to resolve contested cases.

[4] FirstEnergy admits that the Protocol "was drafted by FirstEnergy." See FirstEnergy Brief at 2. This is even greater reason why the Protocol cannot, as FirstEnergy suggests, relieve FirstEnergy from complying with its statutory obligations, as well as those obligations arising under Commission-approved rules, orders, transition plans and tariffs.

IEU MSG aggregation program were made the exclusive province of FES, FirstEnergy did not, and could not, challenge the fact that under the executed Master Service Agreement ("MSA"), FES was responsible for all of the following:

i) procurement of all generation to meet all purchased electric requirements of the IEU members (which includes MSG);

ii) fulfilling the requirements of FirstEnergy's registration process;

iii) billing and collecting for the MSG supplied to IEU members;

iv) pricing the MSG sold to the IEU members by FES;

v) reduction of transition cost payments otherwise applicable to IEU members;

vi) providing working capital to address lags between expenses and revenues;

vii) identification of electricity capacity release opportunities;

viii) ultimate financial liability for the MSG;

ix) the right to reject an IEU member's Pooled Participation Agreement; and

x) in the event of breach, it is FES, not IEU, that must make IEU members whole in an amount equal to the difference between the price the IEU member would receive as a result of the MSA as compared to the member's replacement cost.

See MSA (Murray Deposition, Exhibit 2). In addition, FirstEnergy admitted that:

1. FES, not IEU, conducted the requisite electronic data interchange ("EDI") testing for IEU's MSG claim. See FirstEnergy's Brief at 6-7.

2. FES, not IEU, submitted the requisite Direct Access Service Request ("DASR") for IEU's MSG claim. See id. at 7

3. Since the submission of a DASR is the only method available to enroll customers, FES, not IEU, enrolled the IEU members as customers. See id. at 6.

4. Credit information was not required from IEU because FirstEnergy would never incur any financial risk with respect to IEU. See id. at 7.

Taken together, these activities do not equate to merely "administrative functions of the aggregation program." See, e.g., FirstEnergy Brief at 10. While FirstEnergy cites to a few self-serving quotations from the MSA in an attempt to argue that FES was merely playing an administrative role in the IEU MSG claim,[5] a review of the entire record clearly demonstrates what roles FES and IEU played, and that the role assumed by FES far exceeded "mere administration."

This is best demonstrated in the Contingent Participation Agreement, the very agreement relied upon by IEU and FirstEnergy to claim and confirm the existence of a committed capacity sale. The Contingent Participation Agreement detailed IEU's obligations to the IEU members, and provides that the "inclusion in its [IEU's] MSG claim shall be IEU-OH's sole obligation under this Agreement." See Murray Deposition, Ex. 4, § 2. Everything else was the responsibility of FES, as it was the true supplier of the MSG it indirectly reserved through IEU.[6]

B. MSG cannot legally be obtained "by or through" IEU where FES is the supplier.

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[5] It is interesting to note that the MSA quote relied upon most heavily by FirstEnergy, "FES will 'assist IEU-OH, in its capacity as an aggregator, [to] administer the Aggregation Program...'", does not appear in the "Whereas" clauses in the draft MSA that was attached to the Contingent Participation Agreement e-mailed to the IEU members by Mr. Randazzo on October 10, 2000. See Murray Deposition, Ex. 8B. Instead, this language appears in the MSA that was executed sometime in 2001 (the date is not filled in on the executed MSA) See Murray Deposition, Ex. 2. This self-serving language was added after-the-fact; i.e. after IEU's deficient claim for MSG was submitted on October 19, 2000.

[6] Moreover, the separate settlement agreements between IEU and FirstEnergy, as described in Mr. Randazzo's September 27, 2000 e-mail (Murray Deposition, Ex. 8), clearly indicate that FES was in the picture long before IEU submitted its MSG claim. While FirstEnergy challenges Complainants' assertions that these separate settlement agreements should have been filed with the Commission, FirstEnergy never denies the existence of these separate settlement agreements. See FirstEnergy Brief at 16-17. It is evident that IEU and FirstEnergy knew that FES would be the supplier well before October 19, 2000.

FirstEnergy argues that the identity of the supplier is irrelevant to the issue of whether IEU's MSG claim met the requirements of the Protocol. See id. at 12. The Commission, however, cannot accept FirstEnergy's reliance on its Protocol to supercede the obligations imposed on FirstEnergy by law and Commission-approved transition plans, settlements and tariffs.

Under FirstEnergy's tariff, which was approved by the Commission and, as such, sets forth requirements that FirstEnergy is obligated to follow (O.R.C. 4905.32), customers may be aggregated for the purpose of negotiating for the purchase of generation from a Certified Supplier. FirstEnergy's tariff requires that in order to become a Certified Supplier, an entity must be certified by the Commission and "have otherwise complied with the requirements set forth in the Company's Supplier Tariff." See P.U.C.O. No. 11 at § XIII, Original Sheet No. 4, p. 18. IEU never submitted an application to be a Certified Supplier under the tariff. See Burnell Deposition, Supplemental Answers (dated April 18, 2001). As such, IEU cannot be the supplier of the electricity to the IEU members. The MSA, however, requires FES to fulfill the requirements of FirstEnergy's registration process. It is FES who is the supplier of MSG to IEU members and FES who indirectly reserved the MSG for the IEU members.

In addition, under the Ohio Revised Code, an entity cannot provide a competitive retail electric service to a consumer without first being certified by the Commission to provide that service. O.R.C. 4928.08(B). This requires providing a financial guarantee sufficient to protect customers and EDUs from default. See id. IEU, as an aggregator, cannot "supply" the IEU members with electricity. See O.A.C. Rule 4901:1-24-01. Instead, an aggregator can only serve as an agent for the purposes of negotiating for the

purchase of electricity from a Certified Supplier. See P.U.C.O. No. 11 at § XVI, Original Sheet No. 4, p. 25. There still must be a supplier – and that is where FES came in. The MSA establishes that FES is responsible for all aspects of being the Certified Supplier, including fulfilling the requirements of FirstEnergy's registration process, satisfying the credit requirements, making the sale to the IEU members and assuming the payment obligation to the EDU. See MSA (Murray Deposition, Exhibit 2).

FirstEnergy argues that Complainants' assertions fail to recognize the existence of aggregators, separate from marketers and brokers, and fails to recognize the Protocol's provision that a customer may purchase generation "from or through" an eligible supplier. See FirstEnergy Brief at 7-8. However, in making this argument, FirstEnergy is attempting, yet again, to have its Protocol trump the relevant statutes, rules and Commission Orders. An aggregator can only be an agent for the aggregated customers; it cannot be a "supplier." See, e.g., P.U.C.O. No. 11, at § XVI, Original Sheet No. 4, p. 25. Complainants' arguments do not nullify the concept of aggregation. There are plenty of unaffiliated marketers that an aggregation group such as IEU could rely on to be their supplier. What an affiliated marketer such as FES cannot do, however, is be the supplier of MSG, which is otherwise fully subscribed, to end-users joined together in an aggregation group. The fact that the end-users may acquire the MSG "through" an aggregator is quite beside the point.

Pursuant to the terms of the Supplemental Settlement, any MSG that was reserved, directly or indirectly, by a FirstEnergy affiliate must be relinquished to marketers or brokers not affiliated with FirstEnergy if, as here, the MSG allotment is otherwise fully subscribed. The only acquisition of MSG "through IEU" that occurred,

was the indirect reservation by FES through IEU. FirstEnergy's failure to comply with the requirement to relinquish MSG reserved indirectly by its affiliate, FES, is a knowing breach of its transition plan and violates FirstEnergy's statutory obligations under O.R.C. 4928.33(C).

C. The Commission should reject FirstEnergy's after-the-fact attempts to differentiate between the registration requirements for aggregators vs. marketers and brokers.

FirstEnergy's attempts to explain the practical reasons why IEU was not required to satisfy the EDI testing and DASR requirements are not only circular,[7] they are also irrelevant. See FirstEnergy Brief at 6-7. FirstEnergy completely ignores that IEU had to meet these requirements at the point in time it submitted its MSG claim. See Protocol at 7, § 6.b.(ii). In order to submit an MSG claim into the queue under the Protocol, an entity must have first been an "eligible supplier." See Burnell Deposition at 15, lns. 21-25; see also, Protocol, at 3, § 4. "Eligible Suppliers" includes "non-affiliated eligible suppliers"; i.e., marketers, brokers or aggregators not affiliated with any Ohio investor-owned utility that have (1) submitted an application to the Commission to be certified as a CRES **and** (2) an application to FirstEnergy for registration. See id. at 3, § 4.a. "Registration", as specified by FirstEnergy in its October 2, 2000 technical meeting, meant registration under FirstEnergy's Electric Generation Supplier Coordination Tariffs ("supplier tariff"). See Dinie Deposition, Exhibit 15, Bates numbers 000015, 000018 and 000044.

Under the FirstEnergy supplier tariff, submission of DASRs (and thus enrollment of customers) can only be done by entities that have completed the registration process of

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[7] With regard to EDI testing, FirstEnergy "explains" its position by noting, "EDI testing only had to happen when there has to be EDI testing..." FirstEnergy Brief at 7.

the supplier tariff. Successful registration under the supplier tariff includes completion of the credit requirements[8] and EDI testing. IEU did not satisfy these requirements. In fact, FirstEnergy admits that "[i]t is true that IEU was not required to comply with the requirements of FirstEnergy's Electric Generation Supplier Coordination Tariffs." FirstEnergy's Brief at 5.[9] FirstEnergy explained that, in practice, it is FES and not IEU who submits customer information electronically. See id. at 7. This admission demonstrates that FirstEnergy recognizes that FES is the supplier of the MSG. In fact, Mr. Blank was aware of an FES and IEU relationship. When Mr. Blank was asked what led him to make an inquiry with FirstEnergy's legal department with respect to FES and IEU, Mr. Blank responded:

> Answer: First, the knowledge of what was in the stipulation. Second, that I became aware that there were discussions between IEU and FirstEnergy Services, so I thought I should find out because I thought it might have an effect on allocation of market support generation.
>
> Question: What was it about the discussion that you heard about between FirstEnergy Services and IEU that led you to believe that there would be an issue about market support allocation?
>
> The Witness: Could you repeat the question, please.
>
> (Record read.)
>
> Answer: Knowing what's in the stipulation about the -- really the supplemental materials to the stipulation, I believe where FirstEnergy Services is required to be moved to the end of the line in the event of

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[8] These credit requirements are intended to protect the EDU against the risk of non-payment and default. See Electric Generation Supplier Coordination Tariff. Mr. Blank admitted that IEU would never owe the FirstEnergy utilities any money. Blank Deposition at 59. This is because under the MSA it was FES that met these credit requirements. As demonstrated in Complainants' Brief, IEU could not and cannot meet these credit requirements. FirstEnergy waived the credit requirements for IEU because it knew there was a supplier who would purchase and sell the MSG. That supplier is FES. See Complainants Brief at 14.

[9] See also, e.g., Burnell Deposition, Supplemental Answers (dated April 18, 2001) ("IEU did not submit an application to be a certified supplier within the meaning of that term as defined in the Supplier Coordination Tariff").

> alternative claimants, knowing that there's a limited amount of MSG, knowing that there's a lot of interest in MSG and knowing that or at least hearing there has been some discussions, I thought it was incumbent upon me to know the facts about that situation as it related to was there going to be any MSG going to FirstEnergy Services, because if there was, I was going to have to do something about it in terms of displacement potentially if there were enough claimants.[10]

Blank Deposition at 121, lns. 10; 25 through 122, ln. 18. Ms. Dinie advised Mr. Blank of the existence of the MSA between FES and IEU. See e.g., Dinie Deposition at 117, ln. 21-118, ln. 2. Yet, Mr. Blank never requested an opportunity to review the MSA which would have clarified the reality of FES as the supplier. This highlights FirstEnergy's willingness to look the other way while FES reserved the MSG using IEU's name.

FirstEnergy tries to explain this failure in IEU's application by contending that there were different registration processes for aggregators than for marketers and brokers. See id. at 6. In an attempt to support this explanation, FirstEnergy cites to testimony provided by Mr. Blank. See id. However, Mr. Blank is on record numerous times stating that he is unfamiliar with the registration process, and that the registration process was Mr. Burnell's responsibility. See Blank Deposition at 39-42.[11] Regardless, Mr. Blank conceded that there is nothing in the FirstEnergy Protocol which distinguishes between a marketer and an aggregator for purposes of registering to be considered for approval of an MSG application. See id. at 45.

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[10] In its Brief, FirstEnergy suggests that Complainants misrepresent the record when they claim that Mr. Blank made inquiries of FirstEnergy's legal department about FES's relationship with IEU because he was "aware... that discussion 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." See FirstEnergy Brief at 14, fn. 6, citing Complainants Brief at 21. FirstEnergy argues that "Mr. Blank was hardly that definite about the FES/IEU discussions." FirstEnergy Brief at 14, fn. 6. However, as this quoted portion of Mr. Blank's deposition transcript illustrates, FirstEnergy's allegation of misrepresentation is off the mark.

[11] For example, when asked about the Protocol's registration requirement, Mr. Blank stated, "I think that's Mr. Burnell's area. I am not familiar with that detail." Blank Deposition. at 40, lns. 15-17.

Moreover, Mr. Burnell, the person identified by Mr. Blank as responsible for the registration process, testified that in order to submit a claim into the queue under the Protocol, an entity had to be an "eligible supplier." See Burnell Deposition at 15, lns. 21-25. Specifically, Mr. Burnell testified that before a marketer could submit a claim into the MSG queue, marketers were required to apply for registration under the FirstEnergy supplier tariff. See id. at 30, lns. 9-17; p. 43, lns. 6-15. This was not required of aggregators. Yet, when asked about the registration process, Mr. Burnell could not explain why the registration process was different for aggregators vs. marketers. See id. at 32, lns. 15-25. In addition, Mr. Burnell could not recall whether this difference was ever discussed in the technical meetings held by FirstEnergy to discuss the Protocol. See id. at 111, lns. 2-15.

Neither the MSG Protocol nor any of the materials presented or available describing the Protocol even hint at multiple registration processes. In fact, all of the materials used in the technical conference explaining the Protocol indicated that "registration" with FirstEnergy meant registration under the supplier tariff. More importantly, FirstEnergy's creative, after-the-fact interpretation of its own Protocol does not have the force of law. No matter how IEU's reservation of MSG is viewed under the Protocol, there is no question that it runs afoul of the law. See supra at 6-8.

D. FirstEnergy violated the transition plan by approving claims for MSG for which there was no committed capacity sale. FirstEnergy's arguments to the contrary lack both support and logic.

As noted in Complainants' Brief, if, at the time of application, a supplier did not have a contract with a retail customer of the required duration, the supplier was to forfeit its place in the queue for that claim. See Protocol, § 6.b(vii).[12] FirstEnergy challenges the assertion that it violated the Stipulation in approving claims for which there was no committed capacity sale by arguing that (1) the sole purpose of the "committed capacity sale" concept was to prevent a claimant from claiming MSG with the intent to use it to serve customers outside FirstEnergy's service territory, see FirstEnergy's Brief at 16; and (2) IEU members' execution of the Contingent Participation Agreement was sufficient evidence of a commitment to purchase MSG through IEU. See FirstEnergy Brief at 12. However, the record does not support either of these contentions.

First, FirstEnergy cannot in good faith argue that the committed capacity sale requirement only serves to prevent claimants from attempting to use the MSG to service customers outside the FirstEnergy service area. In two separate portions of the Stipulation it is emphasized that MSG is only for sales to customers of FirstEnergy. Specifically, the stipulation provides that (1) the MSG was to be made available for sales to retail customers of the FirstEnergy operating companies, and (2) that this availability was to be made "on a first-come-first served basis for committed capacity sales to a Company's [FirstEnergy's] customers." See Stipulation at 6 (emphasis added). As such, the committed capacity sales requirement must have meant something other than just

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[12] A claim could be submitted for multiple customers of the supplier, provided it did not exceed 10,000 customers. Because of the urgency of getting into the queue, most claimants submitted claims that

where the customers were located; the Stipulation already required the customers to be within the FirstEnergy service area.

Second, FirstEnergy could not have reasonably concluded that the IEU members' execution of the Contingent Participation Agreement was sufficient evidence of a committed capacity sales contract. In response to Ms. Dinie's request that IEU provide proof of a committed capacity sales contract with its members, IEU only provided an agreement that was contingent upon the execution of an additional agreement (the MSA), which, at the time, was in draft form. FirstEnergy argues that the agreement's requirement that the MSA be executed in substantially the same form as that of the MSA attached as Appendix A to the Contingent Participation Agreement was somehow sufficient evidence of a committed capacity sale. See FirstEnergy's Brief at 13. In support of this argument, FirstEnergy alleges that Mr. Blank understood from Ms. Dinie that she was satisfied that there was a committed capacity sale. See id.

Ms. Dinie testified that she never reviewed an executed copy of the MSA, but rather only reviewed the draft that was attached to the Contingent Agreement. See Dinie Deposition at 82. In fact, Ms. Dinie was unable to confirm that a final MSA had been executed at all, much less that the agreement was ever executed "in substantially the same form." See id. Even at the time of Ms. Dinie's review of the second round of MSG claims, which occurred on January 8, 2001, the MSA had still not been executed. See id. at 137, lns. 10-19 and Dinie Deposition Exhibit 20. Despite this, FirstEnergy suggests that Mr. Blank believed that Ms. Dinie was satisfied that there was a committed capacity sale. See FirstEnergy Brief at 13.

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included multiple customers. If, however, the supplier did not have a contract for the duration of the claim for 1% of the claimed load, the entire claim was rejected.

Even if Mr. Blank believed this, however, his belief would be unreasonable. Mr. Blank negotiated and executed the engagement letter between Arthur Andersen and FirstEnergy regarding the agreed upon procedures to be performed by Arthur Andersen. See Dinie Deposition at 10, ln. 2-16. The engagement letter is specific; the procedures and findings of the review performed by Ms. Dinie "will not constitute a legal determination of the suppliers' compliance with the requirements of the Protocol." See Dinie Deposition, Exhibit 1, at 1. The engagement letter further provided that Arthur Andersen was making "no representations regarding questions of legal interpretation of the provisions contained within the Customer Contracts ..." See id.[13] Arthur Andersen was to be alert for provisions within the Customer Contracts that may indicate such contracts were a letter of intent or option. See id. Ms. Dinie alerted FirstEnergy of her concerns regarding the contingency within the Contingent Agreement, the fact that to the best of her knowledge there was no final, executed MSA and that the MSA "was still with FirstEnergy Services." See Dinie Deposition at 83, lns. 9-15 and 84, lns. 8-19 (emphasis added). Despite this alert, Mr. Blank, without ever seeing the MSA in any form, made the decision that a committed capacity sale existed. This "blind" approval cannot be considered a reasonable finding of a "committed capacity sale."

Moreover, the Member Pool Participation Agreement, which was signed after the MSG was allocated, provides that a member may terminate the Agreement by providing a written termination notice twelve months prior to the specified termination date. See Member Pool Participation Agreement (Murray Ex. 3) at § 4.1(iv). IEU's "committed capacity" claim was for five years of MSG. Yet, each IEU member is only obligated to

[13] The description of work provided that Arthur Andersen would identify provisions in the Customer Contracts that may bear upon the determination that the supplier had a contract with the retail customer as

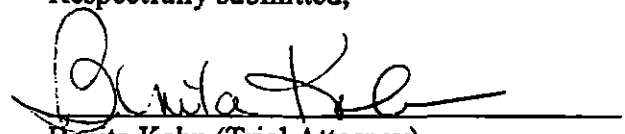
participate for, at most, 12 months. Even after the MSG was allocated, IEU members were provided an "out." If the Contingent Agreement was, as asserted by FirstEnergy, a committed capacity sale, then it should not be possible to terminate that commitment "at will" in a subsequent agreement. The Member Pool Participation Agreement confirms that the Contingent Agreement was not a committed capacity sale.[14]

III. CONCLUSION:

FirstEnergy's breach of its obligations under its Stipulation, its Supplemental Settlement, its transition plan, as modified by these settlement obligations, the Commission Order approving FirstEnergy's transition plan as modified, and Commission rules and orders is a violation of the Ohio Revised Code and has interfered with competition for retail electric service. The Ohio Revised Code requires the Commission to correct this breach through the appropriate and statutorily-authorized remedies addressed in Complainants' Initial Brief.

Dated: November 28, 2001

Respectfully submitted,



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of the date of the supplier's claim. See id.

[14] FirstEnergy's attempts to argue that aggregation groups allow participants to move in and out of the group also fails. While this may be an acceptable practice for a non-MSG aggregation group, the Stipulation is clear: for MSG there must be a committed capacity sale for each specific end use customer. FirstEnergy elaborated on that by requiring the commitment be for the same duration as the MSG claim for each customer. Ms. Dinie's review process was to confirm a commitment of the same duration existed for each end use customer for which a claim was submitted. See Dinie Deposition at 61, ln. 24 through 62, ln. 6 and Dinie Deposition Exhibit 1, p. 6. FirstEnergy's argument does not coincide with the Stipulation requirements for MSG or FirstEnergy's own review requirements.

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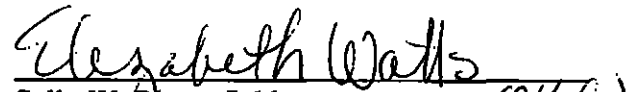

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Reply Brief of Complainants, Enron Energy Services, Inc., Exelon Energy Company, Strategic Energy, LLC, AES Power Direct, LLC and MidAmerican Energy Company has been served upon the attorneys for the parties and the Commission Staff as listed below via U.S. Mail, prepaid, this 28th day of November, 2001.

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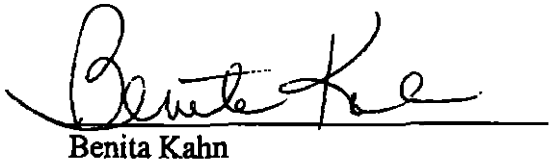

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