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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

CITY OF CLEVELAND Office of Aggregation	:	
and	:	
WPS ENERGY SERVICES, INC.	:	
Complainants,	:	
v.	:	Case No. 01-174-EL-CSS
CLEVELAND ELECTRIC ILLUM- INATING COMPANY and FIRSTENERGY CORP.	:	
Respondents.	:	

APPLICATION FOR REHEARING AND MEMORANDUM IN SUPPORT BY CITY OF CLEVELAND AND WPS ENERGY SERVICES, INC.

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APPLICATION FOR REHEARING
BY CITY OF CLEVELAND AND WPS ENERGY SERVICES, INC.

The City of Cleveland and WPS Energy Services, Inc., ("Complainants") respectfully apply for rehearing of the February 14, 2002, Opinion and Order ("Order') in this case. That Order affirmed FirstEnergy Corp.'s unlawful allocation of MSG to FirstEnergy's affiliate's client - the City of Parma, denied the lawful claim of Complainants for that MSG, and dismissed the complaint in this case.

Complainants submit that the Order began by properly identifying the Commission's authority under R.C. 4905.26 and 4928.36 to determine whether FirstEnergy Corp.'s allocation of MSG to FirstEnergy's affiliate's client - the City of Parma - complied with Ohio statutes and rules, the stipulation documents ("Stipulation Documents") for settling FirstEnergy's electric transition plan ("ETP") case , and the Commission's order approving that settlement. But instead of applying these objective rules of law, the Order violated those rules of law and relied

upon subjective interpretations of FirstEnergy and the unwritten intentions of persons interested in the dismissal of this complaint.

The Order was unreasonable and unlawful on the following specific grounds:

1. The Order unlawfully allowed Parma to adopt its aggregation program resolution on December 20, 1999, and to conduct its aggregation voter referendum on March 7, 2000, in violation of the express limitation of R.C. 4928.20 that such a resolution not be adopted and such a referendum not be conducted before January 1, 2001.

2. The Order violated Ohio law and the Ohio Constitution in order to make the subsequent legislative amendment of R.C. 4928.20, which was effective June 15, 2000, retroactive to December 20, 1999, for the purpose of validating Parma's invalid aggregation program.

3. The Order violated Ohio law in order to transform the plain language of Parma's one-year voter referendum into a five-year commitment by the voters of Parma.

4. The Order unlawfully replaced the objective rule of law with FirstEnergy's subjective interpretation of extraneous events not before the voters of Parma, to transform Parma's one-year voter referendum into a five-year commitment by the voters of Parma.

5. The Order's finding at pages 9 and 14 "that governmental aggregators have a committed capacity sale when the opt out period ends, and may then file a claim for MSG" contradicts the record and ignores FirstEnergy's obligations under R.C. 4905.35.

6. The Order unlawfully violated the Stipulation Documents and the Commission order adopting them by finding that when FirstEnergy's affiliate had reserved MSG for its client - Parma, it had not "reserved, directly or indirectly," MSG.

7. The Order relied upon contradiction, first to find that Parma had assigned its MSG claim to Allegheny, in order for Allegheny to sell MSG to Parma, and then to find that Parma had not assigned its MSG claim to Allegheny, in order to retain Allegheny's place in the MSG queue. As a result, the Order effectively amended the Stipulation Documents and the Commission order adopting them.

As a result of its unreasonable and unlawful findings and conclusions, the Order affirmed FirstEnergy's unlawful allocation to Parma of MSG for the full five-year term of MSG, denied the lawful claim of Complainants for that MSG, and dismissed this complaint case. The order is unreasonable, unlawful, unjust and unwarranted. It violates Ohio Constitution, statute and rule;

it violates the Stipulation Documents for settling FirstEnergy's ETP cases and the Commission order adopting them.

Complainants, City of Cleveland and WPS Energy Services, Inc., respectfully request rehearing, abrogation and modification of the February 14 Order.

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MEMORANDUM IN SUPPORT
OF APPLICATION FOR REHEARING
BY CITY OF CLEVELAND AND WPS ENERGY SERVICES, INC.

The City of Cleveland and WPS Energy Services, Inc., ("Complainants") respectfully submit this Memorandum in Support of their Application for Rehearing the February 14, 2002, Opinion and Order ("Order') in this case. That Order affirmed FirstEnergy Corp.'s unlawful allocation of MSG to FirstEnergy's affiliate's client - the City of Parma, denied the lawful claim of Complainants for that MSG, and dismissed the complaint in this case.

The specific grounds of Complainants' Application and the reasons and law supporting that Application are as follows:

1. The Order unlawfully allowed Parma to adopt its aggregation program resolution on December 20, 1999, and to conduct its aggregation voter referendum on March 7, 2000, in violation of the express limitation of R.C. 4928.20 that such a resolution not be adopted and such a referendum not be conducted before January 1, 2001.

The law authorizing municipal, automatic aggregation of electric consumers did not authorize a municipality to adopt an aggregation ordinance or resolution or to submit an automatic aggregation issue to voter referendum before January 1, 2001. The Order's finding to the contrary is unlawful, contradicts the record of this case, and must be reversed.

The statute authorizing municipal aggregation did not allow the adoption of an aggregation ordinance or resolution until "on or after January 1, 2001":

> (A) On or after the starting date of competitive retail electric service, the legislative authority of a municipal corporation may adopt an ordinance ... under which it may aggregate in accordance with this section...

R.C. 4928.20(A). The "starting date of competitive retail electric service" is defined by the statute as January 1, 2001. R.C. 4928.01(A)(29).

The voter referendum on automatic aggregation could not be conducted until after such an ordinance or resolution had been lawfully adopted:

> (B) If an ordinance or resolution adopted under division (A) of this section specifies that aggregation will occur automatically, as described in that division, the ordinance or resolution shall direct the board of elections to submit the question of the authority to aggregate to the electors ... at a special election on the day of the next primary or general election in the municipal corporation...

R.C. 4928.20(B).

However, on December 20, 1999, more than a year before it had legal authority to do so, the Parma City Council approved Resolution 363-99, initiating its aggregation program. *See* Exh. 24 of Jt. Ex. A. Section 1 of that resolution directed the board of elections to submit the aggregation question to the voters of Parma; and on March 7, 2000, the voters of Parma approved the aggregation referendum. Jt. Ex. A at para. 39. As noted at page 15 of Complainants' Initial Brief in this case, Parma city officials knew they had jumped the gun.[1]

Lacking any authority under R.C. 4928.20, the Parma resolution and referendum were invalid. As of December 20, 1999, and March 7, 2000, there was no legal authority for Parma's Resolution 363-99 or for Parma's March 7 referendum. *See* Columbus v. Cole, 16 Ohio Dec. 212, 213 (C.P. 1905). Since Resolution 363-99 was enacted under R.C. 4928.20, Parma's Municipal Home Rule powers do not fill the gap of Parma's lack of statutory authority. *See* Finding (13) of Nov. 15, 2001, Entry on Rehearing in PUCO Case No. 00-2394-EL-ORD, now on appeal in City of Maumee, et al, v. Pub. Util. Comm., Sup. Ct. Case No. 02-52.[2]

The February 14 Opinion and Order ("Order") tried to circumvent this invalidity at page 16 and Finding (9) by finding that the program approved by the voters as a result of Parma

[1] Parma councilman, John Stover, testified that he "was aware at the time that the ordinance was enacted that there may be a question relative to its timing." Tr. Vol. II (Stover) at 188-189.

[2] In its November 15, 2001 Entry on Rehearing, the Commission distinguished between a municipality's exercising the option to serve as an aggregator under R.C. 4928.20 as opposed to a municipality's serving as a public utility

Resolution 363-99 "did not take effect until after the beginning of 2001 as required by Section 4928.20(A), Revised Code." But that finding misses the mark. Pursuant to the statute, Parma first had to adopt an ordinance in compliance with R.C. 4928.20. It never did so. The ordinance adopted by Parma preceded the date specified by statute by more than a year and was, therefore, not in compliance.

The record of this case makes the invalidity of Parma Resolution 363-99 absolutely clear. At Section 6, Resolution 363-99 declared,

> That this Resolution is hereby declared to be an emergency measure necessary ... in order to present the question to voters in the Primary Election of 2000, and this Resolution shall become immediately effective...

Exh. 24 of Jt. Ex. A, at Section 6. Contrary to the Order's Finding (9), R.C. 4928.20 did not limit when an aggregation ordinance would take effect. It limited when the city "may adopt an ordinance;" and the Parma ordinance was adopted December 20, 1999, as an emergency matter taking effect immediately – more than a year before R.C. 4928.20(A) authorized a municipality to take such action.

Even if the statute had used different words to limit not when an ordinance may be adopted but when it may take effect, Parma's resolution and referendum were still invalid; for the ordinance took effect immediately to direct the board of elections to submit the aggregation question to the voters of Parma in the Primary Election of 2000. Indeed, that election was held March 7, 2000 - many months before there was legal authority to hold it under R.C. 4928.20.

The Commission's February 14 Order at pages 14-16 and at Finding (9) ignored and tried unlawfully to circumvent Parma's lack of authority by relying upon Parma's invalid resolution and referendum to dismiss the complaint. Because Parma had no valid ordinance or referendum,

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under home rule authority. There is no doubt that when adopting the ordinance, Parma was exercising its option to serve as an aggregator under the statute.

there was no aggregation program or aggregator to claim the MSG for Parma under the Stipulation Documents and Commission order adopting them. The Order's finding was unlawful and contradicted the record of this case. It requires that the Order be reheard, abrogated and modified.

2. The Order violated Ohio law and the Ohio Constitution in order to make the subsequent legislative amendment of R.C. 4928.20, which was effective June 15, 2000, retroactive to December 20, 1999, for the purpose of validating Parma's invalid aggregation program.

In another effort to evade the invalidity of Parma's aggregation resolution and referendum, the February 14 Order concluded at page 16 and Finding (9) that a subsequent amendment of R.C. 4928.20 retroactively cured the invalidity. As discussed at pages 15-16 of the Cleveland/WPS Initial Brief, this conclusion violates Ohio law.

The General Assembly amended R.C. 4928.20 to allow municipal aggregation to be initiated prior to January 1, 2001; but that amendment did not take effect until June 15, 2000 - several months after Parma's resolution and referendum were adopted. Section 28 of Article II of the Ohio Constitution expressly prohibits retroactive laws:

> The general assembly shall have no power to pass retroactive laws...

In applying this constitutional prohibition, the Ohio Supreme Court has confirmed that a statute may not be applied retroactively:

> Clearly, this statute contains no express provision that it be applied retrospectively... The calculation of time ... begins upon the effective date of the amended [statute].

See State, ex rel. Battin v. Bush (1988), 40 Ohio St. 3d 236, at 240, 242.

The amendment of R.C. 4928.20 made no provision for retroactivity; so the expanded time period for initiating municipal aggregation could not take effect until the June 15, 2000, the

effective date of the amendment. *See also* State, ex. rel. McGinty v. Cleveland City School Dist. Bd. Of Ed. (1998), 81 Ohio St. 3d 283, at 288-289; R.C. 1.48.

As of June 15, 2000, Parma had no "existing municipal ordinance in conformance with this state program." At the time Resolution 363-99 was adopted and later when Parma's aggregation referendum occurred, there was no statutory authority for such actions. Thus, the ordinance and referendum were invalid under R.C. 4928.20. The subsequent amendment of that statute cannot retroactively cure that invalidity. Because Parma had no valid ordinance or referendum, there was no aggregation program or aggregator to claim the MSG for Parma under the Stipulation Documents and Commission order adopting them. The Order's finding to the contrary violated Ohio law and requires that the Order be reheard, abrogated and modified to comport with law.

3. The Order violated Ohio law in order to transform the plain language of Parma's one-year voter referendum into a five-year commitment by the voters of Parma.

In order to affirm FirstEnergy's allocation of five years of MSG to Parma, the Order at pages 16-17 and Finding (10) unlawfully construed Parma's voter referendum as a five-year commitment by the voters of Parma. As discussed at pages 17-19 of Complainants' Initial Brief and at pages 13-14 of their Reply Brief, that construction is unlawful and must be reversed.

The language in the aggregation referendum is critical for measuring the commitment of a municipality's citizens to automatic aggregation. Ohio law limits that commitment of a municipality's citizens to what the voters of the municipality approve:

> ... No ordinance or resolution adopted under Division (A) of this section that provides for an election under this division [B] shall take effect unless approved by a majority of the electors voting upon the ordinance or resolution at the election held pursuant to this division.

R.C. 4928.20(B).

> Upon the applicable requisite authority under divisions (A) and (B) of this section, the legislative authority or board shall develop a plan of operation and governance for the aggregation program so authorized...

R.C. 4928.20(C).

Here's what the voters of Parma approved:

> Shall the City have the authority to act as an aggregator (purchasing agent) and enter into an agreement with an electric supplier on behalf of the residents of the City for electrical power in the year 2001?

The voters of Parma were voting on the City's authority "for electrical power in the year 2001". They approved and committed themselves to only that limited, one year authority. They didn't approve or commit themselves to any other authority - for five years, two years or any other time limit.

At page 17 and Finding (10) the Order ignores the voter referendum and instead focuses upon the purpose of Resolution 363-99 to approve an "interpretation" that relies upon irrelevant, and mostly after-the-fact, actions of Parma.[3]

The law of Ohio compels limiting Parma's aggregation authority to one-year. Words and phrases are to be construed according to the rules of grammar and common usage. R.C. 1.42. The prepositional phrase at the end of the ballot issue, "in the year 2001", modifies the prior antecedent – "electrical power." "Referential and qualifying words and phrases ... refer solely to the last antecedent." *See* Indep. Ins. Agents of Ohio v. Fabe (1992), 99 Ohio St. 3d 1, 5, quoting Carter v. Youngstown (1946), 146 Ohio St. 203, 209; State, ex. rel. Avon Convalescent Center, v. Bates (1976), 45 Ohio St. 2d 53. The limitation at the end of the ballot issue to "in the year

[3] The Commission makes reference to "the purpose of the ballot resolution". It should be noted that this ballot resolution was adopted more than three months before MSG was even suggested and five months prior to final approval of the ETP Stipulation, which created the MSG Program. Even if the "purpose of the ballot resolution" were relevant, which it is not, and considering the contradictory testimony of the drafters (discussed at page 14 of Complainants' Reply Brief), it could be equally concluded that in 1999 the purpose of the ballot resolution was for a 1-year test program, as expressly provided in Section 2 of Resolution 363-99. Only later could it have realized the additional value of the 5 year MSG Program.

2001" is not a dangling prepositional phrase that skips over the prior four antecedents to modify only the reference at the beginning of the clause to "enter into an agreement."

The February 14 Order ignores this express limitation upon the aggregation authority of Parma. The Commission's Order violates Ohio law, as noted above and in the Complainants' Initial and Reply Briefs. The Commission's approval of FirstEnergy's five-year allocation of MSG to Parma in the face of this 1-year limitation is unlawful and should be reheard, abrogated and modified.

4. The Order unlawfully replaced the objective rule of law with FirstEnergy's subjective interpretation of extraneous events not before the voters of Parma, to transform Parma's one-year voter referendum into a five-year commitment by the voters of Parma.

In spite of the invalidity of the ordinance and referendum and the 1-year limitation upon Parma's aggregation authority, at page 17 and Finding (10) the Commission adopts FirstEnergy's interpretation that "one year is illogical based on the purpose of the ballot resolution, the two year opt-out period and Parma's contract with its consultant." The Order does not explain how these extraneous factors were available to the voters on March 7, 2000, or how they could override the express words of the issue on the ballot.

Who knows what the thousands of Parma voters understood or intended on March 7, 2000? There is nothing in the record concerning that understanding or intention. Such understanding or intention is unknown and unknowable.

Certainly, the voters did not have a consistent understanding of the purpose of the ballot resolution; for not even the Parma city officials could agree on that. *See* the contradictory testimony of the drafter's true intent, discussed at page 14 of Complainants' Reply Brief. Nor can the Commission assume that the thousands of Parma voters all answered consistently the novel legal question of whether the two-year opt-out period authorized at R.C. 4928.20(D)

(which hardly could have been known to them when they voted) made a one-year limited authority "illogical". And of course the voters had no knowledge about Parma's consultant contract with FirstEnergy's affiliate, since that contract was not even signed until October 11, 2000 - more than seven months after the March 7, 2000, vote. *See* Exhs. 26 and 27 of Jt. Ex. A.

There is no record in this case of the intentions or understandings of the 17,285 Parma voters voting for the aggregation referendum on March 7, 2000. There is no record in this case to support any voter intention or understanding to reject as "illogical" the plain language of the ballot issue. That ballot issue expressly limited the commitment "of the residents of Parma for electrical power in the year 2001." Nor is there any record to support five years, two years, or any time limit other than "the year 2001", which was expressly provided in the plain language of the ballot issue.

Without known or knowable evidence and without any record support, the February 14 Order's unlawful finding that the one year limitation was "illogical" and that five years should be substituted for the one year supported by the record and by Ohio law is reversible error. Ohio Bell Tel Co. v. Pub. Util. Comm. (1937), 301 U.S. 292. The Order must be reheard, abrogated and modified.

5. The Order's finding at pages 9 and 14 "that governmental aggregators have a committed capacity sale when the opt out period ends, and may then file a claim for MSG" contradicts the record and ignores FirstEnergy's obligations under R.C. 4905.35.

In order to find a "committed capacity sale" and therefore to affirm FirstEnergy's allocation of MSG to Parma, the February 14 Order also had to address the failure of Parma's MSG claim to include a supplier. The Order did so by accepting FirstEnergy's argument that a supplier was unnecessary for claiming MSG:

> Although a certified entity must be in place before the power may flow to the ultimate customers, we agree that governmental aggregators have a committed capacity sale when the opt out period ends, and may then file a claim for the MSG.

Order, page 9 and Finding (6).

Because of this finding Parma no longer had to be certified by the Commission as a supplier, no longer had to be registered under the FirstEnergy Protocol as a supplier, and no longer had to be qualified under FirstEnergy's supplier tariff as a supplier. Furthermore, the supply arrangement Parma ultimately secured on January 8, 2001, did not even have to have a term as long as Parma's five-year claim; two years was just fine for supporting a five year "committed capacity sale.":

> Therefore, even though there would be no contract with a five-year term, Parma's claims for five years of MSG may still be considered valid.

Order, pages 6-14.

As demonstrated at pages 21-36 of Complainants Initial Brief and pages 15-21 of their Reply Brief, the Order's finding contradicts the record of this case. Furthermore, FirstEnergy's December 19, 2000, deletion of supplier requirements for evaluating MSG claims like that of its affiliate's client - Parma - and retention of those requirements for evaluating MSG claims like Cleveland's demonstrates FirstEnergy's discriminatory evaluation of MSG claims.

Further demonstrating the fallacy of the Order's finding that suppliers are unnecessary is what actually happened in this case: After completion of the opt out periods, the MSG claims of Parma and Cleveland were submitted to FirstEnergy on November 24 and 28 respectively. Jt. Ex. A at para. 53 and 29. If completion of the opt out periods was all that was required, why weren't the claims promptly approved? And after FirstEnergy changed the rules on December 19, 2000, to relieve Parma of having to meet supplier requirements, why wasn't its claim promptly approved?

In fact, FirstEnergy didn't approve Parma's MSG claim until January 10, 2001 – the day after Parma had completed its supplier requirements for supporting its MSG claim. *Compare* Jt. Ex. A para. 63 *with* Exhs. 38 and 39 of Jt. Ex. A. So while the Order accepted FirstEnergy's argument that supplier compliance by Parma was irrelevant, the record of Parma's and FirstEnergy's actions confirm that they both believed at the time that supplier compliance was still required.

In the meanwhile, it is interesting to note that even though Cleveland's claim had supplied all of the required supplier information on December 11, 2000, and even though FirstEnergy acknowledged that compliance on January 3, 2001, FirstEnergy never got around to approving Cleveland's November 28, 2000, MSG claim until February 23, 2001. *Compare* Exhs. 18 and 20 of Jt. Ex. A *with* Exh. 22 of Jt. Ex. A. The contrast of FirstEnergy's leisurely review of the Cleveland claim with FirstEnergy's prompt approval of the claim of its affiliate's client - Parma – within one day after Parma satisfied its supplier requirements, further demonstrates FirstEnergy's discriminatory evaluation of MSG claims.

In order to affirm FirstEnergy's allocation of MSG for Parma's unlawful claim, the Order found that supplier compliance was unnecessary for satisfying the "committed capacity sale" requirement of the Stipulation Documents and the Commission's order approving that ETP case settlement. However, after the Order found at page 6 that the implementation of the MSG Program could not violate the Revised Code, the Commission apparently ignored FirstEnergy's obligations not to give an undue or unreasonable preference or advantage to any person, in order to reach its findings at pages 9 and 14. *See* R.C. 4905.35, contra; *See also,* Complainants' Reply Brief at pages 24-28.

When the "person" receiving the undue preference is the client of FirstEnergy's affiliate, the E Group, even closer scrutiny is required. This is particularly the case in the nascent stages of a competitive marketplace. As Complainant's Initial and Reply Briefs showed, the record is replete with FirstEnergy's unduly preferential treatment of its affiliate's client. The Commission's findings at pages 9 and 14 unlawfully contradict this record and require that the Order be reheard, abrogated and modified.

6. The Order unlawfully violated the Stipulation Documents and the Commission order adopting them by finding that when FirstEnergy's affiliate had reserved MSG for its client - Parma, it had not "reserved, directly or indirectly," MSG.

A critical element of the Stipulation Documents was to achieve the jumpstart on competition promised by MSG. If FirstEnergy or its affiliates could control the allocation of MSG, competition would be compromised. Therefore, the first paragraph of the Supplemental Settlement materials required that,

> Any Market Support Generation described in Section V(1) of the Stipulation and reserved, directly or indirectly, by a FirstEnergy affiliate will be made available on a first-come, first-served basis to marketers or brokers, it the 1,120 MW is otherwise fully subscribed...

But in this case, a FirstEnergy affiliate guided the MSG claim of its client - Parma - from start to finish. *See generally* Jt. Ex. A, starting at para. 40. Even though FirstEnergy's affiliate lacked contractual authority to do anything more than provide "consulting services" and "shall not have the authority to bind, represent or commit" Parma to anything (Exhs. 26 at page 1 and 27 at page 2, of Jt. Exh. A), the FirstEnergy affiliate presented to FirstEnergy a claim for MSG on behalf of its client, and FirstEnergy granted that claim. Tr. Vol I (Fullem) at 30-31 and 33-34. And after reserving MSG for the claim presented by its affiliate, FirstEnergy refused to comply with its Supplemental Settlement obligation quoted above.

Once again, the February 14 Order agreed with FirstEnergy. The Order at page 18 and Finding (11) dismissed the objective, contractual limitations on FirstEnergy's affiliate imposed by the Supplemental Settlement and by Parma's contract and ordinance authorizing the E Group contract, in favor of a subjective standard of what FirstEnergy believed its affiliate could do. And at page 22 and Finding (15) the Order found that FirstEnergy's affiliate's reservation of MSG for its client, "did not constitute direct or indirect reservation of MSG" by the affiliate.

Under the Order's reasoning, FirstEnergy's affiliate could have presented on behalf of its clients claims for all 1,120 MW of MSG and FirstEnergy could have awarded all 1,120 MW of MSG to clients of its affiliate. If such affiliate participation in MSG awards does not satisfy the "directly or indirectly" standard of the Stipulation Documents, then the standard means nothing.

The Order's finding has gutted the Stipulation Documents and corrupted the goal of MSG to jumpstart competition. By deleting the requirement that MSG be used by non-affiliated competition, the Order has unilaterally and unlawfully modified the Stipulation Documents and the Commission's FirstEnergy ETP case order incorporating those documents. The Order must be reheard, abrogated and modified.

7. The Order relied upon contradiction, first to find that Parma had assigned its MSG claim to Allegheny, in order for Allegheny to sell MSG to Parma, and then to find that Parma had not assigned its MSG claim to Allegheny, in order to retain Allegheny's place in the MSG queue. As a result, the Order effectively amended the Stipulation Documents and the Commission order adopting them.

As discussed at pages 38-40 of Complainants' Initial Brief, the Stipulation Documents prohibit an affiliate of a utility other than FirstEnergy from claiming MSG for competing in FirstEnergy territory unless the other utility makes a similar product available for FirstEnergy to use for competing in the other utility's territory. Stipulation and Recommendation V.1. This

prohibition was demanded by FirstEnergy and also incorporated in its MSG Protocol at Sections 4. and 6.b.(ix).

Parma's supplier, Allegheny Energy Supply Company, is the very kind of utility affiliate for which this prohibition was designed. FirstEnergy's MSG Protocol expressly requires that if such a utility affiliate does not make capacity similar to MSG available within the utility's service area, the affiliate "... shall forfeit its place in the queue" for MSG. Jt. Ex. A.3 (Protocol) at Section 6.b.(ix).

But in this case, involving the allocation of MSG to its affiliate's client, FirstEnergy chose not to impose this punishment. The February 14 Order agreed at page 22 and in Finding (14), finding that "... Parma is the party who has the rights to the MSG and, therefore, any restriction on utility affiliates obtaining MSG from FirstEnergy are not applicable."

One of the problems with the Order's rationalization that Parma has the MSG is that it is contradicted at page 20 and Finding (13) of the Order, where the Commission found that,

> "It is obvious to this Commission that Parma and Allegheny have behaved as if an assignment of the MSG has occurred. The record is clear that the two parties to the agreement concur that such an assignment was accomplished."

Which way is it? Does Parma have the MSG, as the Commission found on page 22 and in Finding (14); or does Allegheny have the MSG, as the Commission found on page 20 and in Finding (13)? If Parma has it, the Commission must change its finding on page 20 and Finding (13); if Allegheny has it, the Commission must change its finding on page 22 and Finding (14). The order must be reheard, abrogated and modified to conform with law, the record and itself.

CONCLUSION

As a result of its unreasonable and unlawful findings and conclusions, the Order affirmed FirstEnergy's unlawful allocation to Parma of MSG for the full five-year term of MSG, denied

the lawful claim of Complainants for that MSG, and dismissed this complaint case. The order is unreasonable, unlawful, unjust and unwarranted. It violates Ohio Constitution, statute and rule; it violates the Stipulation Documents for settling FirstEnergy's ETP cases and the Commission order adopting them.

Complainants, City of Cleveland and WPS Energy Services, Inc., respectfully request rehearing, abrogation and modification of the February 14 Order.

Respectfully submitted,

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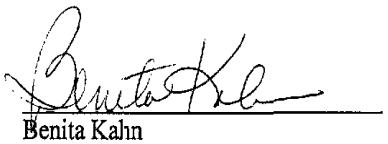
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Application for Rehearing and Memorandum in Support was served via U.S. Mail, postage prepaid, upon all parties listed below, on this 18th day of March,2002.



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