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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.	:	

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In accordance with Ohio Administrative Code Section 4901-1-31 and the instructions of the Attorney Examiner, the City of Cleveland (hereinafter, "Cleveland") and WPS Energy Services, Inc. (hereinafter, "WPS") jointly file this Post-Hearing Reply Brief in the above referenced case.

Respectfully submitted,

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REPLY BRIEF

I. Introduction And Jurisdictional Issues

A. Prefatory Comments

Cleveland[1] and WPS initiated this proceeding because FirstEnergy's MSG allocation to Parma violated the Commission's ETP Order and Stipulations, numerous Ohio statutes, and its own allocation Protocol. The evidence of record conclusively demonstrates that Parma did not submit a valid MSG claim and should have been disqualified. Instead, FirstEnergy repeatedly granted undue preferences to Parma that made its selection for MSG as inevitable as it was unfair.

Despite FirstEnergy's misrepresentations to the contrary, this proceeding does not depend upon the validity of Cleveland's initial October 19, 2000 MSG claim for residential customers, or upon Cleveland's ability to file its November claim at an earlier date. *See* FirstEnergy Initial Brief at 10. FirstEnergy violated Ohio law by approving Parma's MSG claim when Parma could not show the requisite "committed capacity sale" and was not in compliance with mandatory statutory requirements, as set forth below. For the reasons that follow, Parma was not "first-come" and it must accordingly move back to its proper position in the MSG queue.

B. Counter Statement of Facts

As stated in the Initial Brief of Cleveland and WPS, the Stipulation of Facts in this case provides numerous and a fairly comprehensive set of facts which will not be repeated in this section except where necessary to correct and clarify statements that are contained in other briefs. Additional corrections and clarifications are contained within the arguments in this Reply Brief.

[1] The abbreviations and citation style explained and adopted in the Cleveland/WPS Initial Brief are used again in this Reply Brief.

The role of Ms. Dinie, the Arthur Andersen employee who was involved in the allocation of MSG to claimants, should be made clear.[2] FirstEnergy states that "Ms. Dinie's role is to verify the factual matters necessary for FirstEnergy to determine the validity of MSG claims." *See* FirstEnergy Initial Brief at 5 (emphasis supplied). Allegheny states that FirstEnergy "engage[d] the services of an independent auditor to review and evaluate all dealings of the various parties." *See* Allegheny Initial Brief at 8 (emphasis supplied). Parma states that "FirstEnergy, in conjunction with the Arthur Anderson [sic] auditor specially hired for this purpose, gathered all the appropriate information relating to Parma's claim, examined the documents and analyzed the information ...." *See* Parma Initial Brief at 12 (emphasis supplied). Each statement materially obscures and/or overstates the actual role that Ms. Dinie played in the MSG allocation process. The record reveals the real, and limited nature of the services provided by Ms. Dinie and the engagement of her employer (Arthur Andersen).

Ms. Dinie testified that FirstEnergy's David Blank previously misrepresented her role as performing an audit of MSG claims (*see* Tr. Vol. I (Dinie) at 112-113) in a letter sent to MSG claimants. *See* Joint Ex. A.41. Mr. Blank's letter, and Allegheny's Initial Brief refer to the engagement of an "independent auditor" (*see* Joint Ex. A.41 at ¶2 and Allegheny Initial Brief at 8), but Ms. Dinie was clear that she was hired for an agreed upon procedures engagement. Thus, Ms. Dinie testified that she was only employed to carry out FirstEnergy's instructions of November 9, 2000 (*see* Dinie Depo Tr. at 56) and FirstEnergy's revised instructions of December 19, 2000 (*see* Tr. Vol. I (Dinie) at 116) and not as an independent auditor.

[2] The importance Arthur Andersen places on the true role of Ms. Dinie is reflected in the earliest contacts with its counsel. *See* Joint Ex. A.23 at ¶4 ("very limited role" which did not include determination of "whether or not Parma was qualified or able to be Parma's Retail Electric Generation provider or satisfied certain certification requirements..., whether or not Parma had authority to act ... beyond 2001..., whether or not Parma satisfied the General Service Agreement requirement," and other matters.)

In spite of suggestions otherwise in the initial briefs of Parma, Allegheny and FirstEnergy, the procedures set forth in the engagement excluded review of numerous relevant facts related to FirstEnergy's allocation of MSG. Many important and relevant matters were not reviewed by Ms. Dinie. Ms. Dinie did not review anything related to compliance with the registration process under the Protocol. *See* Dinie Depo Tr. at 77. Ms. Dinie did not review facts related to Parma's ability to submit its own MSG claims under the Protocol. *See* Dinie Depo Tr. at 157-158. Ms. Dinie did not review the power supply agreement between Allegheny and Parma. *See* Dinie Depo Tr. at 180.

Other important matters were noted by Ms. Dinie, but not "reviewed" in any meaningful sense. Ms. Dinie raised a question about the 2001 language that is contained in Parma's authorizing ordinance (*see* Dinie Depo Tr. at 161-162), but did not thoroughly review the facts related to this issue.[3] *See* Joint Ex. A.14; Tr. Vol. I (Dinie) at 114. Ms. Dinie was a limited fact-finder for FirstEnergy on some, but not all, matters that were connected with the MSG claims and FirstEnergy strictly delineated which factual aspects of its MSG allocation were to be reviewed by Ms. Dinie. This "review" cannot be classified as the function of an "independent auditor" even though Arthur Andersen performs that function in other engagements with FirstEnergy.

Parma also states,[4] again without citation, that Cleveland "did not complete a timely ballot process or a timely opt-out period." *See* Parma Initial Brief at 6. Cleveland completed its ballot process in the November elections (*see* Joint Ex. A at ¶25), the first available date permitted for such a ballot under Revised Code Section 4928.20 as that Section was originally

[3] As indicated in the Complainants' Initial Brief, Mr. Blank pursued the factual questions related to his resolution of the 2001 problem.

enacted. *See* Cleveland/WPS Initial Brief at Section II.A and attachment.[5] Cleveland's opt-out process was completed soon after its residents approved the opt-out aggregation program in order to permit submission of MSG claims on November 28, 2000. *See* Joint Ex. A at ¶29 and 65. Both the ballot process and the opt-out procedure were carried out by Cleveland in a timely manner, consistent with Ohio law and responsible notice of the opt-out program to Cleveland residents.

Finally, Allegheny states that Cleveland "received 105 MWs plus an uncertain additional amount for residential aggregation." *See* Allegheny Initial Brief at 8. Allegheny includes in its number 75 megawatts of power that Cleveland secured in a settlement in which Cleveland gave up certain legal rights. Cleveland's access to that power has no bearing on any issue in this case. This case concerns the allocation of MSG, and in particular residential MSG. The record discloses that, at most, 20-25 megawatts of MSG have been awarded by FirstEnergy for use by Cleveland's own facilities and the actual number is likely even lower. *See* Tr. Vol. I (Giesler) at 241-242.

C. Jurisdictional Issues

The most important conclusion to be drawn from the parties' initial briefing on jurisdictional issues is that the Commission has jurisdiction over all of the issues raised in these proceedings. FirstEnergy and CEI concede that the Commission may properly determine "whether FirstEnergy allocated the MSG on a first-come first-served basis for committed capacity sales, as required under the Stipulation [in the ETP case], and whether FirstEnergy applied the Protocol in a nondiscriminatory manner." *See* FirstEnergy Initial Brief at 9. Parma

[4] Although it is not a counter statement of fact, Cleveland and WPS express their dismay that Parma chose to criticize Cleveland/WPS for not calling an additional witness. *See* Parma Initial Brief at 11. Cleveland and WPS were criticized during the hearing for calling any witnesses.

objects to the Commission's jurisdiction over one of the issues raised in this proceeding on the ground that it would require the Commission to determine the "validity" of a municipal ordinance. *See* Parma Initial Brief at 7. However, in Ohio Edison Company v. Public Util. Comm. (1977), 52 Ohio St. 2d 123, the Ohio Supreme Court upheld the Commission's determination that a municipal ordinance was invalid and therefore that the Commission had authority to set rates for a regulated utility.

Allegheny raises a different objection when it argues that the Commission cannot make orders that "affect" Parma and Allegheny that are "not ... public utilit[ies] within the definition of the General Code." *See* Allegheny Initial Brief at 3. The case cited by Allegheny, Ohio Mining Company v. Pubic Util. Comm. (1922), 106 Ohio St. 138, involved a complaint that was filed at the Commission against two distribution companies and a company that provided power to the distribution companies. The three companies had common ownership. Dismissal of the complaint against the non-distribution company by the Commission was reversed, and the distinction between the operations of the companies was held to be a legal fiction that could not be recognized as a barrier to regulation. *See* Ohio Mining at 150. The present complaint does not name Parma or Allegheny as defendants. As to jurisdiction in cases brought against regulated utilities that affect other entities, such cases are common in Ohio case law. *See e.g.* Cleveland Electric Illuminating Company v. Public Util. Comm. (1996), 76 Ohio St. 3d 521. The Commission was not divested of jurisdiction in this case simply because Parma and Allegheny chose to intervene.

Finally, Allegheny asserts that the Commission lacks any jurisdiction in this matter because Allegheny now has a "vested legal/right asset" in the Parma MSG allocation. Id. at 2-3.

[5] Revised Code Section 4928.20 was later changed – effective June 15, 2000 – to permit adoption of an opt-out aggregation ordinance before 2001. *Id.*

Allegheny offers no explanation or legal authority in support of that argument; obviously, the Commission can remedy violations of its ETP Order and of Ohio statues even if someone has illegally received an "asset" due to the violations.

Accordingly, whether or not the Commission has jurisdiction over the Protocol itself or the instructions to the auditor, it indisputably has jurisdiction to decide the issues raised here: (1) whether Parma qualified as a "municipal aggregator" eligible for MSG when its aggregation ordinance violated the specific timing requirements then mandated by Revised Code Section 4928.20(A); (2) whether Parma qualified under the "committed capacity sale" requirement when its authorizing ballot measure only authorized aggregation for a single year; (3) whether Parma was "first-come" when its claim was submitted by a consultant with no authority to act on its behalf; (4) whether Parma ever complied with the requirements of its own Plan of Governance; (5) whether Parma fulfilled the first-come-first-served with "committed capacity sale" at the time of its claim when it had no certified provider in place that could sell the MSG to the Parma retail customers; (6) whether MSG could be assigned by Parma to Allegheny and whether any such assignment ever took place; (7) whether the affiliate relationships of the E-Group and Allegheny resulted in violation of the Stipulation Documents and the ETP Order; and (8) whether FirstEnergy's actions and procedures exhibit undue or unreasonable preference in favor of Parma..

In fact, it is Respondents who invite the Commission to treat the Protocol as binding here. For example, FirstEnergy duly notes that the Protocol was not specifically approved by the Commission (*id.* at 9), but then repeatedly relies upon a definition of "Generation Service Agreement" found only in the Protocol as if it were the conclusive legal standard in this

proceeding. *Id.* at 13, 15. The conclusive legal standard is established in the Stipulation: that MSG was to be allocated on a first-come-first-served basis for committed capacity sales.

FirstEnergy's allocation of MSG to Parma not only violated the ETP Order, the Stipulation, and numerous Ohio statutes; its conduct also violated FirstEnergy's own Protocol for implementing the allocation of residential MSG under the Order and Stipulation. Most importantly, each of those deviations from the Protocol gave an undue preference to Parma in this "first-come first-served" claim process. Because FirstEnergy developed the Protocol and the auditor's instructions to implement its legal obligations under the Order, Stipulation, and applicable Ohio statutes, this Commission has jurisdiction to determine whether the implementation was conducted in accordance with those legal requirements.

FirstEnergy argues that the Commission "cannot interpret the Protocol or determine whether FirstEnergy properly interpreted the Protocol." Initial Brief, at 21. But the Commission obviously has jurisdiction if FirstEnergy's "interpretation" of the Protocol resulted in allocations of MSG that violated the ETP Order, the Stipulation, and Ohio statutes and rules. FirstEnergy cannot develop a Protocol to implement the Commission's Order, and then claim that its violations of that Order are immunized from review because there is no jurisdiction over the Protocol.

FirstEnergy further objects, and argues:

> Since the MSG is not something that the Commission could have ordered FirstEnergy to provide in the first place, the Protocol -- the document that provides detail for the MSG claim and allocation process -- is not something the Commission can review, modify, or interpret. *See* FirstEnergy Initial Brief at 9.

FirstEnergy initiated its transition plan cases pursuant to Revised Code Section 4928.31, and conducted the FirstEnergy transition plan cases pursuant to Revised Code Sections 4928.33 and 4928.34. FirstEnergy asked the Commission to approve its MSG program as part of the

settlement in those cases. In doing so, FirstEnergy submitted the MSG program to the Commission's jurisdiction. As previously stated, the ETP Order and Ohio's electric supply policy are enforceable by the Commission under its continuing responsibilities under Revised Code Section 4928.36. *See* Cleveland/WPS Initial Brief at 11. The Commission "controls every aspect of this [FirstEnergy transition plan] case and any future interpretations of the transition plan" (*see* ETP Order at 16). It did not abrogate its responsibilities to FirstEnergy under Ohio's statutes by its approval of the Stipulation Documents. It is the Commission, and not FirstEnergy or CEI, that must make the determination whether FirstEnergy's allocation of MSG to Parma was in compliance with the Stipulation, approved transition plan, and Ohio statutes and rules. Any other result would be an abrogation of the Commission's authority under Chapter 4928.

Revised Code Section 4928.36 states that complaints as to conformance with orders related to transition plans may be made to the Commission under the normal complaint procedures. *See* Cleveland/WPS Initial Brief at 6.

> Upon complaint in writing against any public utility by any person ... that any rate, fare, charge, toll, rental, schedule, classification, or service ... is in any respect unjust, unreasonable, unjustly discriminatory, unjustly preferential, or in violation of law, or that any regulation, measurement, or practice affecting or relating to any service furnished by said pubic utility, or in connection with such service, is, or will be, in any respect unreasonable, unjust, insufficient, unjustly discriminatory, or unjustly preferential, ... the commission shall fix a time for hearing .... *See* R.C. 4905.26.

The Protocol and instructions to personnel in connection with the allocation of MSG, including those issued to Ms. Dinie of Arthur Andersen, constitute a "practice affecting or relating to any service furnished by [CEI], or in connection with such service." Id. Cleveland and WPS allege that MSG has been furnished in an "unreasonable, unjust, insufficient, unjustly discriminatory, and unjustly preferential" manner in violation of the ETP Order and Ohio's electricity policy. The evidence in this case demonstrates that FirstEnergy has violated the law by giving an undue

and unreasonable preference to Parma and by subjecting Cleveland to undue and unreasonable prejudice and disadvantage concerning the award of low cost electricity.

As set forth above, however, the Commission can also determine that the MSG allocation to Parma violated the ETP Order, Stipulation, and statutory law without reaching issues specific to the Protocol or audit.

II. The Parma Claim Fails To Comply With The "Committed Capacity Sale" Requirement Of The Stipulation Documents

A. Parma Voters Granted Authority For Only 2001

Complainants pointed out in their Initial Brief that Parma's authority to act as an aggregator was specifically limited by R.C. 4928.20(B) to the ballot language approved by Parma voters on March 7, 2000:

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

(Joint Ex. A.24, at 1; emphasis supplied, brackets in original.) Thus, Parma had no committed capacity sale for its five-year MSG claim.

In response, FirstEnergy claims that the ballot language actually meant "enter into an agreement in the year of 2001 with an electrical supplier . . . for electrical power [in 2001 and every year thereafter]." But the ballot language actually said "enter into an agreement with an electrical supplier . . . for electrical power in the year of 2001." Respondents ask the Commission to "interpret" the "intent" of the drafter, in contradiction to the unambiguous language actually used, when the very legal authorities they cite prohibit that practice.

Most importantly, Respondents cannot rearrange the word order of the ballot measure to suit their current legal strategy. "Referential and qualifying words and phrases . . . refer solely to

the last antecedent." Indep. Ins. Agents of Ohio v. Fabe, 99 Ohio St. 3d 1, 5 (1992), quoting Carter v. Youngstown, 146 Ohio St. 203, 209 (1946). Here, the qualifying phrase "in the year of 2001" modifies its last antecedent -- "electrical power" -- and not, as Respondents' insist, the phrase "enter into an agreement", which appears four phrases earlier. While Parma's Law Director may have believed that this result is "absurd" without the benefit of any detailed legal analysis (*see* Parma Initial Brief at 10), it is nonetheless the law.

Finally, this proceeding illustrates the important reasons that the Commission -- like the judiciary -- cannot consider subjective testimony about a drafter's "true intentions" when the language actually used is clear and unambiguous. The Parma voters did not know what was "in the drafter's mind" when they decided how to vote; they expressed their will as to the language actually used in the only logical and grammatical sense possible: aggregation was limited to the year 2001. Worse, Respondents rely upon contradictory testimony as to what the drafter's "true intent" was; compare Brief of Intervenor City of Parma, at 9 (quoting Mr. Dobek for the "explanation" that "in the year 2001 is when we were to enter into a contract with a supplier"), with Respondents' proffer of testimony, Tr. Vol. II, at 193 (stating Mr. Stover's "explanation" that he meant only that aggregation would occur sometime after the year 2000, without mentioning the "enter into a contract in the year 2001" explanation given by Dobek).

The Commission need not decide between competing versions of the drafter's "true intentions' and it need not "interpret" the ballot language. The qualifying phrase "in the year of 2001" necessarily modifies its last antecedent, "electric power," and that is the language that defines the scope of authority approved by the voters. Accordingly, Parma had no authority to act as an aggregator after the year 2001 and could not make an MSG claim for a committed capacity sale extending beyond 2001.

B. FirstEnergy's Allocation Of MSG Missed The Link Between "Committed Capacity Sale" And "First-Come-First-Served Basis"

The parties agree that the Commission has jurisdiction to determine "whether FirstEnergy allocated the MSG on a first-come first-served basis for committed capacity sales . . . and whether FirstEnergy applied the Protocol in a nondiscriminatory manner." *See* FirstEnergy Initial Brief at 9. The evidence of record shows that FirstEnergy failed on both counts.

FirstEnergy zealously enforced the requirements of the ETP Order when it considered Cleveland's MSG claims. For example, FirstEnergy states that it rejected Cleveland's October 19, 2000 MSG claims because "there is no such thing as a reservation" under the Protocol. *Id.* at 11. Cleveland's October 19, 2000 residential MSG claim was rejected for lack of "specific customer information" under Section 5.3 of the Protocol. *Id.* at 12; Joint Ex. A.12 ("must comply with the rquirements of Section 5.e of the Protocol). The October 19, 2000 MSG claim regarding Cleveland's city load was rejected because there was "no contract at time of claim." *See* Joint Ex. A.19 at 2; Tr. Vol. I (Giesler) at 229.

In short, FirstEnergy enforced the provisions of the Protocol as applied to the Cleveland aggregation program by requiring both a commitment by retail customers to purchase the MSG electricity and a commitment by an entity certified to provide electric power to retail customers, at the time that the MSG claims were made with FirstEnergy. FirstEnergy clearly believed at that time that its Protocol required both a seller and purchaser before a committed capacity sale existed that would support a MSG claim. As set forth in Complainants' Initial Brief, FirstEnergy nevertheless abandoned those requirements when it accepted Parma's MSG claim. Only Parma

was permitted to "make a reservation" under the Protocol and then bring its claim into compliance months after it was made.[6]

FirstEnergy defends its approval of Parma's MSG claims by providing a *post hoc* justification of the approval process based on a stilted analysis of the Protocol's provisions. FirstEnergy states that Parma satisfied Section 4.c of the Protocol by enacting an ordinance and completing an opt-out period. *See* FirstEnergy Initial Brief at 13. FirstEnergy further states that Parma's claim "contained the name of each retail customer from whom Parma had a Generation Service Agreement, as defined by Section 2.f and required by Section 5.d of the Protocol." *Id.* Finally, FirstEnergy states that Parma "filed an application to the Commission to be certified as a CRES and had provided a copy of that application to FirstEnergy" (*id.*), an apparent reference to the requirements of Section 5.a of the Protocol. As clearly demonstrated in Complainants' Initial Brief, the Parma claim does not satisfy the requirements of the Protocol. *See* Cleveland/WPS Initial Brief at Section II.E. Cleveland and WPS will prove herein that FirstEnergy's interpretation and application of its Protocol is inconsistent with its actions and the requirements that are contained in the Commission-approved documents – the Stipulation Documents.

(1) A "Purchasing Agent" Is Not A "Supplier"

FirstEnergy's reading of Section 4.c of the Protocol ignores the inclusion of the word "supplier." "Supplier" cannot mean "purchasing agent" as that term is used by Parma to describe its aggregation program (*see* Joint Ex. A.24, Section 1)[7] or "an agent for aggregated customers" which is the description used for aggregation in CEI's tariffs. *See* Joint Ex. D ("Customer

[6] FirstEnergy's October 26, 2000 communication to WPS sternly states that the "Protocol applies equally to all brokers, marketers and aggregators" and that "[o]ther municipal aggregators have acted in reliance on the requirements of the Protocol." *See* Joint Ex. A.12 at ¶3. Cleveland and WPS have reasonably relied upon the Stipulation Documents and the Protocol and desire in this proceeding to have the same MSG approval process applied to Parma as has been applied to other "brokers, marketers, and aggregators."

Aggregation"). The Protocol's use of the word "supplier" is meaningful under circumstances where the Stipulation Documents require a "**sale** to a retail customer" (Stipulation and Recommendation, p. 6), which is the committed capacity sale, **and** require that to be first in line, such committed capacity sale must exist at the time of the claim for MSG. Such sales to retail customers can only be made by an entity certified for the provision of electric power to the retail customers.

This is the only interpretation of the Stipulation Documents that is consistent with the electric restructuring laws enacted by the legislature and the Commission's rules promulgated as required by those statutes. An important aspect of the new era of electric deregulation is that the Commission has the task of protecting the public. However, what the statutes require the Commission to protect is the sale of electric generation to retail customers. Sales require both a vendor and a buyer. The Commission and FirstEnergy understood this need and, thus, the Stipulation Documents specifically provide that for MSG to be made available there must *first* be a *sale* to *retail customers* and second, the first-come-first-served requirement is applied once a claimant has such sale in place. There can be no question that the Commission could not have approved the Stipulation Documents if they violated Ohio statutes and rules. For a sale of retail electric generation to exist, there must be an entity certified for the provision of electric power to the retail customer.

(2) Registration Is Registration

Section 5 of the Protocol requires that a claimant "submit[] an application to the Public Utilities Commission of Ohio to be certified as a CRES and an application to FirstEnergy for registration...." *See* Joint Ex. A. 3, Section 5.a at 4 of 10. Section 6 of the Protocol provides for

[7] Under Parma's Plan of Operation and Governance, Parma had to be certified as a Retail Electric Generation Provider before it could act as the supplier to the program. *See* Joint Ex. A.28. Parma is not certified as such a

forfeiture of a claimant's place in the MSG queue in the event of "the Supplier's failure to register with the company, which includes EDI testing."[8] *See* Joint Ex. A.3, Section 6.b(ii). Both sections serve a purpose if the "registration" process is that which is described in CEI's supplier tariffs (*see* Ex. C) because those requirements insure that a certified entity is capable of carrying out transactions in electric power to retail customers. This registration requirement is also consistent with statutory obligations imposed by R.C. 4928.08. This section specifies that to provide a competitive retail electric service, such as sales of generation to retail customers, the entity must be certified with the Commission for that service and must provide a financial guarantee sufficient to protect the electric distribution utilities from default. CEI's supplier tariff registration requires such credit information and a demonstration that the supplier will have the necessary expertise. The registration requirement is tied directly to the need to have an entity capable of making retail sales as a party to the committed capacity sale obligation of the Stipulation Documents.

FirstEnergy's "second" registration process -- which permitted Parma to "register" by merely providing a copy of its certification application to FirstEnergy (*see* FirstEnergy Initial Brief at 12-13; . Tr. Vol. 1 (Burnell) at 94; Tr. Vol. I (Fullem) at 57-59) -- does not insure such a capability and therefore does not demonstrate the existence of a commitment to make the sale to retail customers as required by the Stipulation Documents. The Stipulation Documents requirement is unambiguous - - allocation of MSG is based upon who has a committed capacity sale at the time of its claim. Parma was not registered under the supplier tariff at the time of its claim, and thus lacked the ability to make the retail sale occur. Parma did not have a committed

supplier. *See* Joint Ex. A.32.

[8] Use of the capitalized "Supplier" in Sections 6.b.(i) ("certification") and 6.b.(ii) ("registration") refer back to the term "Eligible Supplier" in the introductory sentence of Section 6.b (*see* Joint Ex. A.3), and refute FirstEnergy's assertion that "two different registration requirements exist under the Protocol. *See* FirstEnergy Initial Brief at 12.

capacity sale at the time it submitted its MSG claim. As FirstEnergy so precisely states, there is "no such thing as a 'reservation'" claim under the "first-come" provision of the Stipulation Documents. *See* FirstEnergy Initial Brief at 11; *accord*, Dinie Depo Tr. at 131-132). Therefore, "Allegheny['s] ... compl[iance] with the requirements of CEI's Supplier Tariff by the time Parma's claim was approved" (*see* FirstEnergy Initial Brief at 14) could not establish a position in the MSG queue any sooner than January 8, 2001 which is the date of its contract with Parma.[9] *See* Joint Ex. A, ¶61.

(3) OATT Agreement Requirement

Section 6 of the Protocol also requires that a claimant "agree[] ... to a contract to abide by the terms of the applicable Open Access Transmission Tariff." *See* Joint Ex. A.3, Section 6.a.(v). This section serves a purpose under the Stipulation Documents because those requirements insure that a certified entity is capable of carrying out transactions in electric power to retail customers. Again, there is "no such thing as a 'reservation'" claim under the "first-come" provision of the Stipulation Documents. *See* FirstEnergy Initial Brief at 11; *accord*, Dinie Depo Tr. at 131-132). Therefore, Allegheny's "agree[ment] to a contract to abide by the terms of the applicable Open Access Transmission Tariff" (*see* FirstEnergy Initial Brief at 14) could not establish a position in the MSG queue any sooner than January 8, 2001. *See* Joint Ex. A, ¶61.

(4) FirstEnergy's Attempt to Redefine Committed Capacity Sale

"[U]nder Section 5.d.(i) of the Protocol, or Section 5.e, which incorporates Section 5.d.(i), each MSG claim must contain the 'name of each retail customer for whom the supplier has a Generation Service Agreement.'" *See* FirstEnergy Initial Brief at 14-15. These provisions

[9] MSG is "on the shelf" and not a "committed capacity sale" until a certified supplier is involved who can provide electric power and energy to retail customers. This situation is not hypothetical in this case since arrangements were in place to serve Cleveland residents before they were in place to serve Parma residents and some MSG was not "made available" by FirstEnergy in the interim.

refer to both the seller and buyer of electricity, which must both be in place under the Stipulation Documents before a "committed capacity sale" exists. Any use of a term by the Protocol of a term such as "Generation Service Agreement" that permits a purchasing agent to substitute for an entity that is capable of carrying out transactions in electric power to retail customers is wholly inconsistent with the "committed capacity sales" requirement in the Stipulation Documents. FirstEnergy created a new term, "Generation Service Agreement", in the Protocol in an attempt to redefine committed capacity sale. This redefined term, however, does not meet the requirements of the Stipulation Documents or Ohio statutes and rules and cannot be countenanced by the Commission.

(5) Duration

Finally, FirstEnergy states that the issue concerning its employment of an accountant from Arthur Andersen in the MSG allocation process is "whether the use FirstEnergy made of the Auditor's verification of facts was fair." *See* FirstEnergy Initial Brief at 10. The facts in this proceeding have demonstrated that the Auditor's verification did not create the problem. Rather, the MSG allocation problem was created through FirstEnergy's specific instructions to Ms. Dinie that she was not to investigate, under circumstances that uniquely apply to Parma (*see* Tr. Vol. II (Lanager) at 91), whether there was a timely commitment by an entity that was capable of carrying out transactions in electric power to retail customers. Ms. Dinie did not alert FirstEnergy of the inconsistencies between Parma's supply arrangements and the "committed capacity sales" requirement only because she was instructed to not investigate the matter.[10] *See* Cleveland/WPS Initial Brief at 35. Not only was there no arrangement between Parma and

[10] Ms. Dinie testified that the lack of supply arrangements to transact business with retail customers is the sort of matter that she would report to FirstEnergy (*see* Dinie Depo Tr. at 133-134) because a "generation provider or a supplier cannot make a claim for a duration longer than the contract period that they have." *See* Dinie Depo Tr. at 135, lns. 4-6.

Allegheny until at least January 8, 2001 (*see* Joint Ex. A.38), no commitment has been made by Allegheny or any other entity to transact business in electric power with the retail customers of Parma after 2002. [11] *See* Cleveland/WPS Initial Brief at 35.

C. Allegheny Has No Authority To Supply Parma Residents Using MSG

Allegheny claims that it has been "granted intervention in this proceeding based on it having been assigned the right to supply the residents of the City of Parma ... with MSG electric power for the two-year period beginning in February, 2001." *See* Allegheny Initial Brief at 1. Allegheny has been granted limited intervention status in this case, but the basis upon which it states that it was granted such status is wholly lacking from the Commission's records. *See* Entry (March 29, 2001). The record is clear in this case that no such assignment has ever taken place. *See* Cleveland/WPS Initial Brief at 37 ("As Parma's Legal Director testified ..., the subsequent assignment of the MSG award never took place." *citing* Tr. Vol. II (Dobeck) at 230-232.).

D. Allegations By And About Allegheny

Allegheny couples its compliments of FirstEnergy's practices (*see* Allegheny Initial Brief at 2) with the statement that it may "file similar complaints." *Id.* at 9. The present case involves Parma's "unique" circumstances because it "secured its own MSG" (*see* Tr. Vol. II (Lanager) at 141) coupled with its involvement with FirstEnergy affiliate, the E Group. However, some actions appear to be possible in light of other improper awards of MSG relating to claims for MSG that were submitted in Allegheny's own name. The award of MSG to Allegheny based strictly on its own account (*see* Tr. Vol. II (Lanager) at 108) is a clear violation of the Stipulation Documents under circumstances where Allegheny fails to provide MSG of its own in areas served by Monongahela Power. *See* Cleveland/WPS Initial Brief at Section II.G.

[11] Ms. Dinie reviewed the supply arrangements for other claimants. Ms. Dinie stated her understanding that a claim that extended beyond the length of the contract between supplier and purchaser would be denied entirely rather than

III. FirstEnergy And Intervenors Play The "Blame Game" In Response To Evidence Of Unlawful Discrimination

The Cleveland/WPS Initial Brief and the material appearing in this Reply Brief aptly demonstrate that FirstEnergy has given an undue and unreasonable preference to Parma and has subjected Cleveland to an undue and unreasonable disadvantage because FirstEnergy awarded MSG to Parma in the absence of a committed capacity sale at the time that Parma's claim was submitted. FirstEnergy ignored, overlooked, and/or failed to investigate infirmities in Parma's ordinances, the lack of authority for Parma to act on behalf of Parma, the absence of any authority for Allegheny to obtain MSG to supply Parma residents, and the violation of the affiliate conditions that are stated in the Stipulation Documents. *See* Cleveland/WPS Initial Brief at Section II.

(A) The Blame

FirstEnergy and Parma address allegations of unlawful discrimination in the allocation of MSG by blaming Cleveland and WPS for their failure to act expeditiously[12] and their failure to inquire about FirstEnergy procedures. FirstEnergy claims that "Cleveland switched suppliers" (*see* FirstEnergy Initial Brief at 18) and Parma claims (without citation) that Cleveland "fired Shell." *See* Parma Initial Brief at 4. Both argue that the selection of WPS contributed to Parma's earlier placement in the MSG queue.[13] *See* FirstEnergy Initial Brief at 18 ("further back in the

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in part. *See* Joint Ex. A.17.

[12] FirstEnergy's "blame game" reaches its zenith when it cites the handling of the September 25, 2000 Protocol by the Deputy Director of Cleveland Public Power, brought to the attention of Ivan Henderson, as a lack of concern on the part of Cleveland with the expeditious development of Cleveland's program. *See* FirstEnergy Initial Brief at 18-19. Mr. Henderson testified that he was in a position to know about communications concerning MSG and that he and Mr. Pofok "were the avenues of information to [Director Konicek]." *See* Tr. Vol. II at 24. FirstEnergy apparently begrudges Cleveland any attempt to divide responsibilities among its personnel. Ivan Henderson attended the October 2, 2000 meeting regarding the application of the Protocol. *See* Tr. Vol. II at 14.

[13] FirstEnergy also argues that the choice of WPS made no difference because the opt-out period determined the WPS/Cleveland filing date. *See* FirstEnergy Initial Brief at 18, footnote 5. However, the end of the opt-out period was determined by Cleveland, and was a program feature that Cleveland could have altered (see Tr. Vol. II (Henderson) at 38-39) if Cleveland officials had known that Parma would not need to fulfill the committed capacity sale obligations of contracting with a supplier by the time of its claim. *See* Tr. Vol. II (Henderson) at 21-22.

MSG queue"); Parma Initial Brief at 4 ("delay .. early position in the queue"). Cleveland's negotiations with various suppliers produced a contract with WPS on November 21, 2000. *See* Ex. G at 2, second "bullet." This result was just thirteen days after the November 7, 2000 election that authorized Cleveland's aggregation program and at least forty-nine days before Parma reached this same benchmark. *See* Tr. Vol. II (Lanager) at 114. By means of FirstEnergy's preferential treatment, at the behest of its affiliate the E Group, Parma's claim was approved despite its failure to arrange for a supplier at the time when its claim was submitted to FirstEnergy, and, thus, meet the Stipulation Documents' requirement of committed capacity sale.

FirstEnergy also blames Cleveland and WPS for their failure to inquire about FirstEnergy's MSG procedures. FirstEnergy states, without citation, that "Mr. Henderson apparently never considered asking FirstEnergy whether Cleveland could be an Eligible Supplier"[14] and speculates that the answer to such a question would be the same as that given to the E Group.[15] *See* FirstEnergy Initial Brief at 17. Significantly, FirstEnergy states that "Mr. Burnell received a number of phone calls, from a variety of entities [sic] about matters that were not covered in the October 2 meeting."[16] *See* FirstEnergy Initial Brief at 20, *citing* Tr. Vol. I at 107. Of course, the problem with FirstEnergy's *post hoc* justification of its actions is that the topics covered and the materials that were presented at the October 2, 2000 meeting, especially the topic of "Market Support Generation: FirstEnergy Registration" (*see* Joint Ex. A.2, last two pages) that was presented by Mr. Burnell (*see* Tr. Vol. I (Giesler) at 214; Tr. Vol. II (Henderson)

[14] The form of the hypothetical question, expressed in terms of who may be an "Eligible Supplier" under the Protocol, has been crafted to support FirstEnergy's myopic, *post hoc* interpretation of the Protocol. Cleveland and WPS representatives reasonably relied upon FirstEnergy's presentations at an October 2, 2000 meeting in Akron regarding application of the Protocol that only a supplier capable of carrying out transactions with retail customers (as described in CEI's supplier tariffs) was necessary before access could be gained to the MSG claims process. *See* Tr. Vol. I (Giesler) at 214-215 ("absolute requirement"); Tr. Vol. II (Henderson) at 18-20.

[15] FirstEnergy reiterates that "Cleveland and WPS could have asked ... and they would have gotten the same answer" FirstEnergy Initial Brief at 20. Repeating the same speculation without reference to the record does not make the statement any truer.

at 18), were covered at the October 2, 2000 meeting. The topics that were covered and the materials that were presented made clear to those in attendance that the Protocol could not be interpreted as presently argued by FirstEnergy. *See* Tr. Vol. I (Giesler) at 214-215 ("absolute requirement"); Tr. Vol. II (Henderson) at 18-20. The Stipulation Documents requirements fully support this understanding. *See*, Section II.B.1., infra.

Of course, FirstEnergy's willingness to violate its Protocol, the Stipulation Documents, and the Commission's ETP Order were unknown and unknowable. A distinct difference exists between inquiry concerning the meaning of the Protocol for the allocation of MSG and inquiry, such as the inquiry apparently made by the E Group in its meeting with other FirstEnergy representatives on October 11, 2000 (*see* Tr. Vol. I (Fullem) at 57), concerning changes to the Protocol. This is particularly true when these changes caused FirstEnergy's allocation of MSG to be in breach of the Stipulation Documents.

(B) The Duty

It is patently obvious that FirstEnergy could not and cannot legally allocate MSG in breach of the requirements of the Stipulation Documents and Ohio law. Thus, revisions to the allocation procedures in the Protocol which violate those documents and laws or result in inconsistent application of the Protocol must be prohibited. Assuming, however, that FirstEnergy could make such unlawful revisions, the manner in which FirstEnergy attempted to revise its procedures and practices for the allocation of MSG also violated Commission Orders.

The testimony in this case largely focused on the actions and interactions of Parma and Allegheny with FirstEnergy and not those of Cleveland and WPS with FirstEnergy. Nonetheless, the record contains numerous instances where Cleveland and WPS sought

[16] Cleveland and WPS contributed to those inquiries. *See* Tr. Vol. I (Giesler) at225; Tr. Vol. II (Henderson) at 18.

information concerning the MSG application process. None of these contacts prompted FirstEnergy to reveal separate registration procedures under its Protocol. *See* Tr. Vol. II (Henderson) at 23. None of these contacts prompted FirstEnergy to reveal that its instructions to Ms. Dinie, changed on December 19, 2000, provided a different standard for testing the MSG application submitted in the name of a municipal aggregator (*i.e.* the Parma situation) than for testing the MSG application submitted by a supplier who had contracted with the municipal aggregator (*i.e.* the Cleveland situation). *See* Tr. Vol. II (Henderson) at 33-34.

The record in this case reveals the following investigations and inquiries by Cleveland and WPS concerning the MSG application process:

- WPS representative attended the August 23 workshop (*see* Tr. Vol. I (Giesler) at 211);
- WPS representative attended the October 2, 2000 meeting in Akron (*see* Tr. Vol. I (Giesler) at 212);
- Cleveland learned as much as possible "by attending FirstEnergy discussions. There was a meeting ... in October [that] we sent Cleveland representatives to which was a presentation by FirstEnergy (*see* Tr. Vol. I (Konicek) at 149; *also* Tr. Vol. II (Henderson) at 14);
- "frequent contact, especially in the form of inquiries from me probably to Mr. Burnell" (*see* Tr. I (Giesler) at 225);[17]
- specific WPS contacts regarding the requirements of the Protocol are provided as Joint Exs. A.5, A.6, A.7, A.10, A.17, and A.18;
- "there were follow-up questions [to the October 2 meeting] concerning account names and account numbers and a number of other development type activities" (*see* Tr. Vol. II (Henderson) at 18);
- November 24 letter from Cleveland counsel William Zigli to Denise Dinie concerning Cleveland authority to submit MSG claims under the Protocol (*see* Tr. Vol. II (Henderson) at 26-27 and Ex. F);

[17] WPS' Giesler testified that the information received from FirstEnergy concerning registration under the Protocol was consistent with the information provided at the October 2, 2000 meeting. *See* Tr. Vol. I (Giesler) at 227.

- Henderson inquiries concerning the interpretation of the Protocol (*see* In re FirstEnergy Transition Plan Cases, PUCO Case No. 99-1212-EL-ETP, Joint Emergency Motion of Cleveland and WPS Motion (December 18, 2000), Exhibits 1,3,5);

- Cleveland called a consumer education meeting that involved CEI (see Tr. Vol. II (Henderson) at 49);[18]

- Henderson inquiry into Ms. Dinie's report (see Tr. Vol. II (Henderson) at 33-34);

FirstEnergy certainly had the affirmative duty to reveal to the interested public how entities could submit MSG claims. Anything less would be contrary to the provision in the Stipulation Documents that FirstEnergy was to make MSG "available to suppliers." *See* Stipulation and Recommendation, Section V.1. MSG cannot lawfully be "available to suppliers" if the procedures for obtaining it are only provided to selected or preferred entities such as the E Group.

FirstEnergy's major effort regarding the release of information concerning the Protocol focused around the events of October 2, 2000. On September 25, FirstEnergy invited interested parties to attend "a meeting regarding application of the Protocol" and attached a version of its Protocol dated September 25, 2000. *See* Joint Ex. A.1. The October 2, 2000 meeting dealt with topics such as the registration process under the Protocol (*see* Joint Ex. A.2, last two pages). However, FirstEnergy was unprepared to answer some questions that were posed at the October 2, 2000 meeting concerning procedures for dealing with municipal aggregators. *See* Tr. Vol. II (Henderson) at 17. Thereafter, Cleveland and WPS initiated many contacts with FirstEnergy as partially described in the record of this case.

[18] FirstEnergy states, without citation, that "Cleveland and WPS had their own meeting with FirstEnergy on October 10, 2000." *See* FirstEnergy Initial Brief at 20. FirstEnergy continues in the next sentence, this time with a citation, that "Mr. Blank attended the meeting with Cleveland and WPS." *See* FirstEnergy Initial Brief at 21, *citing* Tr. Vol. II (Henderson) at 50. Mr. Henderson's testimony on page 50 of the transcript addresses Mr. Blank's attendance at a

Under the circumstances of the ETP Order, Cleveland and WPS believe that the Commission must hold FirstEnergy to the standard enunciated in In re White Plastic v. Columbus & Southern Electric Company (September 25, 1984 Order), PUCO Order No. 83-650-EL-CSS and its progeny cases such as In re Ohio Pallet Company v. Columbus Southern Power Company (April 8, 1993 Order), PUCO Case No. 91-394-EL-CSS. The White Plastic family of cases imposes a "duty on the utility to inform a customer regarding alternate rate schedules whenever a customer inquires about the availability of other rates." *See* Ohio Pallet at 10. This Commission does not require "some formula or 'magic words' which a customer must use to convey [its] message." *Id.* at 13. A utility's affirmative obligation to reveal choices that are available under its procedures is essential to combat the grant of undue and unreasonable preferences by the utility.

In this case, the October 2, 2000 meeting concluded with unanswered questions concerning the availability of MSG for customers who would participate in governmental aggregation programs. FirstEnergy knew by frequent contacts that Cleveland/WPS were intensely interested in the MSG allocation process as it relates to governmental aggregation programs. After having received and responded to a request by its affiliate, the E Group, concerning an alternative registration procedure for municipal aggregators under the Protocol, assuming FirstEnergy's alternative was not in breach of the Stipulation Documents (which it was), it would have a duty to inform Cleveland, WPS, and other clearly interested parties[19] of its decision to reduce (or if one believes FirstEnergy, to clarify) the requirements that were stated in the Protocol and that were described at the meeting on October 2, 2000. Similarly, if the

meeting concerning "consumer education" (*see* Tr. Vol. II (Henderson) at 49) and not a meeting on October 10, 2000. *See* Tr. Vol. II (Henderson) at 48 ("I was not at that [October 10, 2000] meeting.").

[19] FirstEnergy had access to the "OSPO@PUCOLISTS.STATE.OH.US" and "OSPODATE@

alternative procedures for evaluating the MSG claims of municipal aggregators in December of 2000 had been consistent with the Stipulation Documents, at the time such revisions were made, FirstEnergy had a duty to inform Cleveland, WPS, and other clearly interested parties of its decision to alter the Protocol's requirements concerning confirmation that arrangements were in place with an entity to transact business in electric power with the retail customers who participate in a municipal aggregation program.

FirstEnergy undeniably breached its duty to inform as well as its duty to comply with the ETP Order and its duty to deal with municipal aggregators in a reasonable and non-discriminatory manner. FirstEnergy convinced its audience on October 2, 2000 that MSG claims could only be made by an entity that had established operating capabilities under the registration requirements of CEI's supplier tariffs. *See* Tr. Vol. I (Giesler) at 214-215 ("absolute requirement"); Tr. Vol. II (Henderson) at 18-20. FirstEnergy failed to communicate its change in position. *See* Tr. Vol. II (Henderson) at 23. Even if only considered a "second" registration process, FirstEnergy had a duty to reveal that second process. In the analogous rate situation: "When a customer who is eligible for more than one rate makes an inquiry about its electric bill, C&SOE has a duty to tell that customer about the existence of the alternate rate and the circumstances under which that alternate rate might become more favorable to the customer. *See* White Plastics at 4. FirstEnergy also changed its instructions to Ms. Dinie for the evaluation of MSG claims associated with municipal aggregation in December of 2000, essentially changing its concept under the Protocol of "committed capacity sales" in connection with municipal aggregation. FirstEnergy also failed to communicate that change to other clearly interested parties. *See* Tr. Vol. II (Henderson) at 33-34.

PUCOLIST.STATE.OH.US" lists at its disposal that were used to transmit the September 25, 2000 invitation to the October 2 meeting (*see* Joint Ex. A.2 at 1) and any lists it created from attendance at that meeting as well as

IV. Conclusion

The remedies available for the unjust, unreasonable, unjustly discriminatory, unjustly preferential treatment exhibited by FirstEnergy in its allocation of residential MSG to Parma rather than to WPS, in violation of Ohio law, are located (among other places) in Ohio Revised Code Section 4928.18. The Commission should also determine that CEI has violated Revised Code Section 4905.35 ("undue advantage").

Cleveland and WPS seek a Commission order that 1) directs FirstEnergy to comply with the Stipulation Documents and to withdraw its allocation of MSG from Parma so that the MSG can be reallocated to others who have properly submitted claims for MSG, 2) amends the ETP Order, due in part to FirstEnergy's apparent discrimination in favor of its affiliate (E Group), to extend the time that FirstEnergy must provide MSG to ensure that a full five years of MSG is provided to proper claimants, 3) grants Cleveland and WPS such other relief as it deems just and necessary to restore the full benefits provided within the Stipulation Documents, and 4) takes any other actions appropriate with[20] the Commission's continuing oversight of electric distribution companies during the market development period.[21]

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Commission documents in order to reach interested parties.
[20] For instance, Revised Code Section 4928.18 provides for forfeitures and loss of transition revenues.
[21] The provision of additional MSG for Cleveland's program, or its financial equivalent, would also be acceptable.

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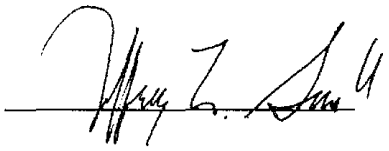
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply Brief Of The City of Cleveland and WPS Energy, Inc.* has been served upon the attorneys for parties and the Commission Staff as listed below, via e-mail, according to the Attorney Examiner's instructions this 4th day of May, 2001.



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