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Via Hand Delivery

Ms. Renee Jenkins
 Docketing Division
 Public Utilities Commission of Ohio, 13th Floor
 180 East Broad Street
 Columbus, OH 43215-3793

Re: In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to R.C. § 4928.143 in the Form of an Electric Security Plan; Case No. 08-935-EL-SSO

Dear Ms. Jenkins:

Please find enclosed for filing in the above captioned matter the original and twenty (20) copies of the FPL Energy's Reply Brief. Please date stamp and return the additional copies enclosed herewith.

Very truly yours,

BAILEY CAVALIERI LLC


 Dane Stinson

Enclosures

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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison)	
Company, The Cleveland Electric Illuminating)	
Company and The Toledo Edison Company for)	Case No. 08-935-EL-SSO
Authority to Establish a Standard Service Offer)	
Pursuant to R.C. § 4928.143 in the Form of an)	
Electric Security Plan.)	

**FPL ENERGY'S
REPLY BRIEF**

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**FPL ENERGY'S
REPLY BRIEF**

I. INTRODUCTION AND CONCLUSION

Since the Ohio Legislature enacted Amended Substitute Senate Bill 3 ("S.B. 3") in 1999, it has been the policy of this state to foster the competitive supply of electricity. See section 4928.02, Ohio Rev. Code. Moreover, S.B. 3 made governmental aggregation the cornerstone of its policy, by providing political subdivisions the ability to aggregate their constituents' electric load, negotiate volume discounts with electric suppliers, and pass through such discounts to their constituents in the form of lower electric rates. See section 4928.20, Ohio Rev. Code. As the Commission is well aware, large-scale governmental aggregation has been the engine that has brought competition to Ohio. The Northeast Ohio Public Energy Council ("NOPEC") alone serves approximately 450,000 residential and commercial customers. Joint NOPEC/NOAC Exhibit 1, at 3. As noted in its initial brief, FPL Energy has entered into a letter of intent with NOPEC and stands, ready, willing and able to commit its considerable resources to continue NOPEC's successes as the largest aggregation in the United States.

The sweeping reforms in the electric industry made by Amended Substitute Senate Bill 221 (“S.B. 221”) did not weaken the Legislature’s commitment to customer choice; indeed, the Legislature strengthened its commitment by enacting provisions that ensure the continued vitality of competition – most significantly by requiring that electric distribution utilities’ (“EDUs”) electric security plans (“ESPs”) “encourage and promote” large-scale governmental aggregation. See sections 4928.143(B) and 4928.143(K), Ohio Rev. Code.¹

The Legislature’s rationale is readily apparent. In enacting S.B. 221, it provided two regulatory paradigms – the ESP and the market rate option (“MRO”) – with the ESP being a transitional model to market rates. In fashioning the MRO, the Legislature did not provide the same protections to large-scale governmental aggregations as in the ESP, for the obvious reason that market forces would discipline pricing and behavior. However, wisely recognizing that EDUs could attempt to introduce artificial and anti-competitive prices with an ESP, the Legislature extended safeguards to large-scale governmental aggregations to ensure their viability and preserve customer choice for the future. Thus, the Legislature confirmed that the competitive supply of electric service, and specifically large-scale governmental aggregation, is the vehicle for bringing benefits to electric consumers in this state – such benefits including, *inter alia*, benefits in pricing, product offerings, and the service quality rendered by the provider.

Despite this compelling legislative history, FirstEnergy argues that S.B. 221 permits it to develop an ESP that is specifically structured to eliminate shopping and, in

¹ See, also, section 4928.20(I), Ohio Rev. Code, which protects governmental aggregation customers from paying a deferred generation charge unless they benefitted from the charge; and, section 4928.20(J), Ohio Rev. Code, which protects governmental aggregation customers from paying a standby charge upon the election of the aggregating entity.

the process, eliminate large-scale governmental aggregation. FirstEnergy Initial Brief, at 4-5. To make this argument, FirstEnergy has distorted the standards of review the Commission must undertake in reviewing a proposed ESP, arguing that the Commission's only function is to determine whether the proposed ESP is more favorable in the aggregate than the expected results of an MRO. FirstEnergy Initial Brief, at 5-6. As FPL Energy explained in its initial brief, and as reiterated below, the Commission first must consider the reasonableness and lawfulness of the components of an EDU's ESP. The alleged commitments and other baubles that FirstEnergy dangles in its proposed ESP have nothing to do with this threshold determination. The ultimate standard of review on which FirstEnergy so heavily and improperly relies is only applied after an ESP has been approved, whether it is approved as filed or as modified. See section 4928.143(C)(1), Ohio Rev. Code.

Make no mistake that, through its distorted standard of review, FirstEnergy is seeking the Commission's blessing in eliminating competition, and particularly that brought about by large-scale governmental aggregations such as NOPEC, in favor of its affiliated supplier FirstEnergy Solutions ("FES"). It is asking the Commission to turn a blind eye to the devastating effects that its proposed generation phase-in charge ("GPIC"), minimum default service ("MDS") rider, and nondistribution uncollectible ("NDU") rider would have on large-scale governmental aggregation, and instead asks the Commission only to consider the alleged "benefits" its proposed ESP would provide. Not only is FirstEnergy's approach unlawful (and reversible error), many of the benefits

it claims are illusory.² Moreover, to the extent *any* benefits are provided by the proposed ESP they are borne on the backs of shopping and would-be shopping customers through the unjustified and unnecessary \$1.73 billion MDS charge, which FirstEnergy admits is necessary to provide the “benefits” offered. “Benefits” purchased through the unnecessary and unjustified MDS charge can hardly be deemed “benefits” at all.

FPL Energy requests that the Commission recognize that the Legislature has selected competitive supply choice as the paradigm to bring true benefits to customers, and to modify FirstEnergy’s proposed ESP such that the protections to be afforded large-scale governmental aggregation is enforced during the transitional ESP, as proposed in FPL Energy’s Initial Brief.

II. FIRSTENERGY DISTORTS THE STATUTORY STANDARDS OF REVIEW AND FAILS TO GIVE EFFECT TO THE SAFEGUARDS EXTENDED TO LARGE-SCALE GOVERNMENTAL AGGREGATION IN VIOLATION OF SECTION 1.47, OHIO REV. CODE.

FirstEnergy claims that S.B. 221 authorizes an EDU to include features and benefits in a proposed ESP notwithstanding any other provisions of Ohio Rev. Code Title 49; and, that as long as the proposed ESP is more favorable than the expected results of an MRO, the proposed ESP must be approved. FirstEnergy Initial Brief at 1, 4-6.

² The illusory benefits include, but are not limited to: resolving the distribution rate case in this proceeding, when the Commission already has ordered the rate case to be considered separately; providing \$1 billion in infrastructure improvements, when FirstEnergy is required to provide adequate and reliable service under section 4905.22, Ohio Rev. Code; providing a distribution rate freeze, when distribution rates are subject to deferral and adjustments (indeed Staff witness Fortney referred to this benefit as a “mirage” (Staff Exhibit 5, at 5)); and, providing stable generation rates, when generation rates will increase via the numerous riders proposed.

FirstEnergy could not be more wrong.³

Section 4928.143(C)(1), Ohio Rev. Code, provides the Commission with the authority to “approve or modify and approve” a proposed ESP. Only after the proposed ESP is approved – as filed or as modified – is the Commission required to apply the ultimate standard of review. See section 4928.143(C)(1), which provides that the Commission is to determine whether “the electric security plan *so approved*...is more favorable in the aggregate as compared to the expected results” of an MRO. Emphasis supplied. Thus, it cannot be questioned that the Commission has the authority, indeed the duty, to modify a proposed ESP that is unreasonable and unlawful before applying this ultimate standard of review. See FPL Energy’s Initial Brief, at 6-13. If the Commission were to consider only whether the proposed ESP is more favorable than the MRO, without considering whether the components of the proposed ESP were lawful and reasonable, it would effectively read out of existence the express statutory provisions related to protecting large-scale governmental aggregation. Such a result is unlawful under section 1.47(C), Ohio Rev. Code (“In enacting a statute, it is presumed that: *** [t]he entire statute is intended to be effective.”)

Accordingly, section 4928.20(K), Ohio Rev. Code, imposes a duty upon the Commission to ascertain whether the provisions of a proposed ESP frustrate the policy of this state to encourage and promote large-scale aggregation. See FPL Energy Initial Brief, at 6-13. Indeed, Staff agrees that a proposed ESP that prevents shopping cannot be approved. Staff Initial Brief, at 7.

³ FirstEnergy so misunderstands and distorts the applicable standards of review that it criticizes representatives of governmental aggregation organizations for expressing no opinion of the relative benefits of the proposed ESP versus an MRO. See FirstEnergy Initial Brief, at fn. 5. At its basic level, it is difficult to comprehend how an unreasonable and unlawful ESP could benefit customers and the long-term policy goals of this state.

A. To the Extent that Section 4928.(B)(2)(d), Ohio Rev. Code, Could be Construed to Place Limits on Customer Shopping, Such Provision Does Not Apply to Large-Scale Governmental Aggregation Through the Express Language of Section 4928.143(B), Ohio Rev. Code.

FirstEnergy asserts that customer shopping can be sacrificed as long as the proposed ESP provides benefits to customers. FirstEnergy Initial Brief at 4-6.⁴ FirstEnergy's argument is based upon the premise that section 4928.143(B), Ohio Rev. Code, permits an EDU to include various provisions in its proposed ESP and, specifically, that section 4928.143(B)(2)(d), Ohio Rev. Code, permits an EDU to include provisions limiting customer shopping.

FirstEnergy's argument ignores that, while section 4928.143(B) gives EDUs considerable latitude in what to include in its proposed ESP, it expressly prohibits the EDU from excluding the safeguards applicable to large-scale governmental aggregation in sections 4928.20(I), (J), and (K), Ohio Rev. Code. To the extent that FirstEnergy may argue that the limitation language of section 4928.143(D)(2)(b) must be reconciled with the provisions of sections 4928.20(I), (J), and (K), the rules of statutory construction

⁴ FirstEnergy states in its Initial Brief at pages 4-5:

The State's policy of promoting diversity of suppliers and customer choice must be harmonized with the express statutory accommodation of ESP provisions that may have the effect of limiting customer shopping. *Compare* R.C. § 4928.143(B)(2)(d) with R.C. § 4928.02(C), (E). Several intervenor witnesses in this proceeding criticize the Companies' Plan as having the potential to limit customer shopping options. [FN 4 omitted.] But shopping is only one approach to achieve the goal of favorable pricing for customers – it is not an end to be sought simply in and of itself. [FN 5 omitted.] Indeed, SB 221 expressly authorizes terms, conditions or charges in ESPs relating to limitations on customer shopping. R.C. § 4928.143(B)(2)(d).

As a threshold matter, FPL Energy notes that the Commission rejected a similar argument in its MRO order. The Commission held that it was required to give effect to the policies in section 4928.02, Ohio Rev. Code, based upon Ohio Supreme Court precedent. See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Approval of a Market Rate Offer to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modifications Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, PUCO Case No. 08-936-EL-SSO (Opinion and Order, November 25, 2008), at 13-14 (hereinafter, "MRO Order").

would make the latter provisions control. In the event of a conflict between statutory provisions, the *specific* policies related to large-scale governmental aggregation contained in section 4928.20(I), (J) and (K), control over the *general* policies contained in section 4928.143(D)(2)(b). See section 1.51, Ohio Rev. Code. Thus, if a proposed ESP may include provisions that generally limit shopping, such limitation cannot be applied to the specific provision, section 4928.20(K), Ohio Rev. Code, which requires that *large-scale* governmental aggregation be encouraged and promoted.

Remarkably, FirstEnergy attempts to apply its fabricated standard of review to the Commission's review under section 4928.20(K), Ohio Rev. Code. See FirstEnergy Exhibit 1, at 22, in which FirstEnergy witness Blank claims that the "overall" benefits of the proposed ESP outweigh the imposition of non-bypassable charges on customers. This standard of review has no support in the statutes. As explained in FPL Energy's Initial Brief, at 6-13, the standard requires that the Commission ascertain the effects of the proposed ESP's provisions on the viability of large-scale governmental aggregation. See, also, FirstEnergy Initial Brief, at fn. 5, in which FirstEnergy (oblivious to the Legislature's express policy) states that "governmental aggregation organizations [are] merely an expedient available only to the extent that customers benefit." FirstEnergy completely misses the point – and the reason that FPL Energy was compelled to intervene in this proceeding – that the proposed ESP does not give customers the chance to benefit through large-scale governmental aggregation because the proposed ESP destroys the ability to shop.

B. The Legislature's Policy to Preserve Large-Scale Governmental Aggregation as the Engine to Bring Benefits to Electric Consumers Must be Enforced in this Proceeding.

Unfortunately, FirstEnergy has baldly mischaracterized FPL Energy's position in this proceeding to be that large-scale governmental aggregation must be preserved as an end to itself and at all costs. See FirstEnergy Initial Brief, at 4-5 and fn. 5. FirstEnergy simply fails to recognize, or admit, that the Legislature has made the policy determination to support competitive electric markets as the means to provide consumers benefits, through lower prices, product offerings, and/or the ability to choose a reliable provider. See section 4928.02, Ohio Rev. Code. It further fails to recognize, or admit, that the proven means to bring those benefits to customers is through large-scale governmental aggregation, and that the Legislature enacted the protections in sections 4928.20(I), (J), and (K), Ohio Rev. Code, to meet that end. FPL Energy's legal interest in this proceeding is to assure that the Legislature's policy is enforced.⁵ FirstEnergy simply is attempting to derail the Legislature's long-term policy goal to advance competition in this state by asking the Commission to turn a blind eye to the devastating effects of the proposed GPIC, the MDS rider, and the NDU rider, and to allow the elimination of competition in favor of supply being provided by FES.

III. PROVISIONS OF THE PROPOSED ESP ARE UNLAWFUL AND UNREASONABLE.

A. The Generation Phase-In Charge (GPIC).

FirstEnergy claims that the Commission must accept the GPIC because section 4928.144, Ohio Rev. Code, expressly permits deferrals. It states, "The arguments against

⁵ Contrary to the Industrial Energy Users-Ohio's assertions, FPL Energy's position does focus, squarely, on the larger public interest of this state, as expressed by the Legislature. See IEU-Ohio Initial Brief, at 23.

the permissibility of such phase-in deferrals, and the recovery thereof, are really a quarrel with S.B. 221 as enacted, as opposed to the Plan.” FirstEnergy Brief at 33.

Although it is true that the statute contemplates phase-ins, it does not provide an EDU carte blanche in their structure. Rather, phase-ins must be deemed reasonable by the Commission. Section 4928.144, Ohio Rev. Code, provides, “The public utilities commission by order may authorize any *just and reasonable* phase in...” For the reasons stated in its Initial Brief, FPL Energy urges the Commission to adopt Staff’s recommendation that the GPIC be disallowed.⁶ In the alternative, if the Commission approves the proposed phase-in of rates in this proceeding, its unlawfulness may be remedied by providing a similar phase-in to large-scale governmental aggregation customers, which would be recovered pursuant to section 4928.20(I), Ohio Rev. Code, under the deferred generation credit (“DGC”). See FPL Energy Initial Brief, at 16-18.⁷

B. The Minimum Default Service (MDS) Charge is Unreasonable and Unlawful.

In its Initial Brief, FirstEnergy cites the risks it may incur as the provider of last resort to justify imposing the MDS charge. However, FirstEnergy ignores testimony that the risks actually described by FirstEnergy on brief and in its testimony are no more than the risks faced by any supplier, and should be viewed as a normal business risk for which

⁶ In its initial brief, Staff suggests that FirstEnergy’s proposed GPIC could be replaced with an alternate rate structure, in which generation rates could be adjusted and revenues recovered through a reconciliation mechanism. Staff Initial Brief, at 9. FPL Energy notes that this alternative was not presented at hearing and should be subject to the adjudicatory process if the Commission contemplates adoption. Moreover, FPL Energy notes that the use of a reconciliation adjustment could fail to provide transparency as to SSO rates and harm large-scale governmental aggregations’ ability to structure product offerings to compete with the SSO.

⁷ If the Commission does not accept FPL Energy’s alternative, the Commission specifically should find and order under section 4928.20(I), Ohio Rev. Code, that no large-scale governmental aggregation customer who received CRES service during the ESP period should be required to pay the DGC even if such customer returns to FirstEnergy’s SSO service after the expiration of the ESP period. Such customers should not be required to pay the DGC because they would not have received any benefits from the GPIC.

any supplier would plan. FPL Energy witness Garvin stated that while FirstEnergy may be free to impose such a cost on its SSO customers, there is no economic rationale for making such a charge unavoidable for shopping customers. FPL Energy Exhibit 1, at 13.

Moreover, FirstEnergy attempts to refute the substantial amount of testimony from expert witnesses that the MDS charge should be rejected because it has not been quantified. It reasons that an ESP is not a cost-based vehicle and that such a calculation is not a prerequisite. FirstEnergy Initial Brief, at 49. As FPL Energy stated in its initial brief, by providing the Commission with the broad power to modify proposed ESPs (see section 4928.143(C)(1), Ohio Rev. Code), the Legislature necessarily empowered the Commission to review the reasonableness of a proposed ESP's various provisions. The primary yardstick by which any charge can be deemed reasonable is to undertake a review of the costs it seeks to recover. Because FirstEnergy has provided no documents justifying this charge, this analysis cannot be done upon this record and the MDS rider should be disallowed on this basis alone. FirstEnergy simply has not carried its burden on this issue. Section 4928.143(C)(1), Ohio Rev. Code.

Finally, in its initial brief, FirstEnergy admits that the MDS charge is intended to subsidize SSO rates. FirstEnergy states:

The Companies are able to offer the fixed base generation prices in the Plan only if they can be compensated for the recognized risks via the minimum default service charge.

FirstEnergy Initial Brief, at 49. FirstEnergy seeks an ESP in which large-scale governmental aggregation customers would be required to pay an MDS, even though it lacks any quantitative justification and they received no benefit therefrom, in order to reduce the competing SSO rate, which in turn will destroy shopping and large-scale

governmental aggregation. Clearly, the MDS does not encourage or promote large-scale governmental aggregation and should be disallowed.

C. FirstEnergy Should Follow Duke Energy Ohio's Lead in Procuring Capacity Sufficient to Meet it's Planning Reserve Requirements for All Customers.

In its initial brief, FPL Energy noted that FirstEnergy's proposed Capacity Cost Adjustment ("CCA") rider was nontransparent, thus harming customers' ability to make an informed decision to shop, and CRES providers' ability to make an informed decision to enter the market. FPL Energy Exhibit 1, at 27. As a remedy, FPL Energy recommended that, in order to ensure that there is a level economic playing field for CRES providers, FirstEnergy should be ordered to procure capacity in the market needed to meet planning reserve requirements for all customers in FirstEnergy's service territory for the entire term of the ESP and recover all associated costs through a non-bypassable capacity cost recovery rider. FPL Energy Exhibit 1, at 17-18.

FirstEnergy opposes FPL Energy's recommendation on the basis that no other EDU has undertaken this commitment. See FirstEnergy Initial Brief, at 31. However, FPL Energy notes that Duke Energy Ohio has committed to obtain such capacity for all customers in its service territory. Specifically, Duke Energy Ohio has committed to purchase 115% of capacity necessary to serve all load in its service territory, "whether switched or unswitched [and to] make such purchases to comply with the higher of the Commission's or the Midwest Independent System Operator's (MISO) planning reserve requirements." Duke Energy Ohio will recover its cost through a non-bypassable charge assessed through Rider SRA-SRT. See *In the Matter of the Application of Duke Energy Ohio for Approval of an Electric Security Plan*, PUCO Case No. 08-920-EL-SSO,

(Application, July 31, 2008), at 12-13; Prefiled Testimony of Charles R. Whitlock (filed July 31, 2008), at 16-18. To the extent that FirstEnergy claims it does not have the expertise to implement FPL Energy's proposal, FirstEnergy could enter into a third party agreement to procure the capacity.

Accordingly, FPL Energy renews its request that the Commission adopt its recommendation. Alternatively, if the Commission chooses not to require FirstEnergy to enter into a capacity procurement arrangement as described above, at a minimum the Commission should require FirstEnergy to provide an estimate of MISO DNR capacity that it plans to make available to meet planning reserve requirements and a reasonable forecast of the CCA rider. FPL Energy Exhibit 1, at 18.

D. The Commission Already has Ruled that the Nondistribution Uncollectibles (NDU) Charge Must be Bypassable to Shopping Customers. FPL Energy Agrees, But Recommends that the Commission also Require FirstEnergy to Purchase CRES Providers' Accounts Receivable at 100%, Consistent with the Practice in the Natural Gas Industry.

In its Initial Brief, FPL Energy laid to rest FirstEnergy's arguments that its position as provider of last resort somehow required shopping customers to pay for SSO customers' bad debt. See FPL Energy Initial Brief, at 29-31. Since the time initial briefs were filed, the Commission issued its Opinion and Order in the *MRO Proceeding*, agreeing with FPL Energy, and ordered that the NDU be made bypassable to shopping customers. *MRO Proceeding*, at 27. Staff also recommends that the NDU rider be made bypassable in this proceeding. Staff Initial Brief, at 10.

Although the Commission correctly found in its *MRO Order* that shopping customers should not be required to pay SSO customers' bad debt, it failed to take the next logical step to require that FirstEnergy purchase CRES providers' accounts

receivable at 100%, as is the current practice in the natural gas industry. As FPL Energy states in its Initial Brief, the advantages of adopting the natural gas industry model are many, as it:

- creates uniformity among the practices in the natural gas and electric choice programs, creating an ease of administration for the Commission, utilities, and competitive suppliers alike;
- recognizes the historical policy that all customers in the utility's service territory bear the expense and benefits of uncollectible recovery; and
- encourages and promotes large-scale governmental aggregation by removing the unfair burdens on such aggregations, their suppliers, and customers.

See, FPL Energy Initial Brief, at 32.

FirstEnergy's reluctance to adopt the natural gas model apparently is based upon its belief that the partial payment priority system currently in place⁸ protects CRES providers from incurring bad debt expenses. FirstEnergy Initial Brief, at 51. Although the partial payment priority system results in CRES past due balances being satisfied first when a partial payment is made, CRES providers receive no benefit under the system in instances in which no payment is made and the customer eventually is dropped by the CRES for nonpayment. In that event, the CRES provider is responsible for collecting the bad debt or writing it off. On the other hand, if FirstEnergy's bad debt tracker is approved in this proceeding, it will guarantee recovery of 100% of FirstEnergy's bad

⁸ See *In the Matter of the Complaint of WPS Energy Services, Inc. and Green Mountain Energy Company v. FirstEnergy Corp. Cleveland Electric Illuminating Company, Toledo Edison Company, and Ohio Edison Company*, Case No. 02-1944-EL-CSS (Opinion and Order, August 6, 2003) (hereinafter, "Partial Payment Priority Proceeding").

debt.⁹ As has been recognized in the natural gas industry, the most reasonable manner in which to resolve this inequity is to require the EDU to purchase 100% of the CRES providers' accounts receivable. FPL Energy urges the Commission to so order.

E. FPL Energy Supports Staff's Recommendation that the Fuel Transportation Surcharge be Eliminated.

Staff recommends elimination of the fuel transportation surcharge ("FTS") component of the Fuel Transportation Surcharge and Environmental ("FTE") rider, because FirstEnergy failed to support the FTS with forecasted costs. See Staff Initial Brief, at 20. FPL Energy supports Staff's recommendation, considering that the lack of transparency for the charge would impair customers' decisions whether to shop and CRES providers' decisions whether to enter the market.

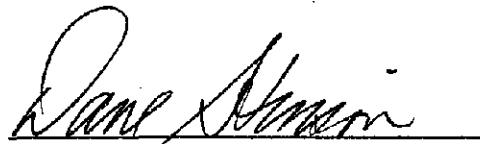
In its initial brief, FirstEnergy attempts to deflect the obvious need for transparency in the FTS by claiming that these costs for 2006 and 2007 have been provided to Staff and that FirstEnergy provided Staff with budgeted amounts. However, FirstEnergy failed to provide estimated costs for 2009-2011, and only provided a budgeted number (\$30 million), without supporting documentation. Tr. IX at 206-207. Indeed, even the budgeted amount was not included in the application but was provided to Staff during discovery. Amazingly, FirstEnergy contends that its submission of 2006 and 2007 cost data and budgeted amounts *to Staff* somehow provides *customers* with the transparency they need to decide to shop – even though these costs have not been

⁹ FirstEnergy unfairly criticizes Competitive Suppliers' witness Ringenbach by claiming that her recommendation that FirstEnergy purchase CRES providers' accounts receivables is a "self-serving" switch from a prior position supporting the partial payment priority process. See FirstEnergy Initial Brief, at fn. 53. FirstEnergy omits that when the partial payment priority process was stipulated in the *Partial Payment Priority Proceeding*, FirstEnergy did not have guaranteed recovery of its bad debt expense through the tracker it seeks here. Approval of the tracker changes the EDU/CRES provider competitive relationship and calls for the EDU to purchase CRES providers' accounts receivables.

developed into a charge for customers' review. FirstEnergy Initial Brief, at 28. Lacking in all logic, FirstEnergy's argument should be rejected out of hand.

If FirstEnergy is claiming that the information provided to Staff is sufficient to develop the FTS charge, then the FTS charge, if allowed, should be based upon the information submitted, so customers can make informed decisions whether to shop and CRES providers can make informed decisions whether to enter the market.¹⁰

Respectfully submitted,



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¹⁰ Unfortunately, FirstEnergy has resorted to mischaracterizing FPL Energy witness Garvin's testimony. On brief FirstEnergy states:

Mr. Garvin admits that FES' fuel transportation costs were important because he has 'a concern that if [Gexa] didn't know the price to beat..., [Gexa] would set [its] price too low.'

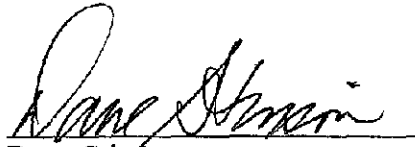
FirstEnergy Initial Brief, at 28. A fair and accurate description of Mr. Garvin's testimony is that the **non-transparency** of the FTS charges affected customers' decisions to shop and CRES providers' decisions to enter the market. FirstEnergy Exhibit 1, at 21-22. Upon his cross examination by FirstEnergy, Mr. Garvin did not state that FPL Energy's "concern" with the lack of transparency was that it would cause FPL Energy to set its rates too low, he merely acknowledged a separate "risk" that if the entire SSO rate were unknown (generation rate plus riders), it could affect the price FPL Energy charged. The correct exchange on cross examination was as follows :

Q. And it's important – it's important certainly to Gexa because you have a concern that if you didn't know the price to beat, so to speak, that you may set your price too low, correct?

A. That is a risk.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of FPL Energy's Reply Brief was served by electronic mail this 12th day of December, 2008, upon the following.


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