



**FILE**

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of the Application of the Ohio Edison )  
Company, The Cleveland Electric Illuminating )  
Company, and The Toledo Edison Company for )  
Approval of Rider FUEL and Related Accounting )  
Authority. )

Case Nos. 09-21-EL-ATA  
09-22-EL-AEM  
09-23-EL-AAM

**PUCO**

**APPLICATION FOR REHEARING  
OF  
NEXTERA ENERGY RESOURCES, LLC, ET AL.  
[formerly known as FPL Energy, LLC]**

NextEra Energy Resources, LLC;<sup>1</sup> FPL Energy Power Marketing, LLC; Gexa Energy Holdings, LLC; and Gexa Energy – Ohio, LLC (collectively, “NextEra”) seek rehearing of the Finding and Order issued January 14, 2009, pursuant to section 4903.10, Ohio Revised Code, and rule 4901-1-35, Ohio Administrative Code. The Finding and Order grants Cleveland Electric Illuminating Company the authority to accrue and defer for subsequent recovery a portion of its SSO generation costs. For the reasons more fully discussed in the attached memorandum in support, NextEra respectfully submits that the Commission’s Finding and Order is unlawful and unreasonable in the following respects:

- A. The Order Violates the Pro-Competitive Policies of Section 4928.02, Ohio Rev. Code.**
- B. The Order Violates the Non-Discrimination Provisions of Section 4905.35, Ohio Rev. Code.**
- C. The Order Violate Ohio’s Policy to Encourage and Promote Large-Scale Governmental Aggregation Contained in Section 4928.20(K), Ohio Rev. Code.**

<sup>1</sup> NextEra Energy Resources, LLC, was formerly known as FPL Energy, LLC. Its affiliates include FPL Energy Power Marketing, LLC; Gexa Energy Holdings, LLC; and Gexa Energy - Ohio, which are the entities that have intervened in these proceedings and are jointly referred to herein as “NextEra.”

Wherefore, NextEra respectfully requests that the Commission grant this application for rehearing and deny FirstEnergy's<sup>2</sup> request for authority to accrue and defer SSO generation costs. In the alternative, NextEra requests the Commission to provide the deferral to SSO and competitive retail electric service ("CRES") customers alike.

Although NextEra's intervention has yet to be granted, it has been adversely affected by the Commission's January 14, 2009, Finding and Order as discussed in the accompanying memorandum. Accordingly, NextEra has the right to file this application for rehearing pursuant to section 4903.10, Ohio Rev. Code, as the January 14, 2009, Finding and Order was issued in an uncontested proceeding.

Respectfully submitted,



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<sup>2</sup> The applicant electric distribution utilities in these proceedings (Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company) collectively will be referred to as "FirstEnergy."

## MEMORANDUM IN SUPPORT

### **I. INTRODUCTION**

NextEra Energy Resources, LLC, is a nationally recognized supplier of electric power. It is a subsidiary of the FPL Group, a Fortune 500 company that is rated "A" both by Standard & Poors and Fitch Ratings, and operates approximately 40,000 MWs of generation assets in the United States. Its affiliates include:

- Florida Power & Light Company, the largest electric utility in the State of Florida;
- Gexa Energy Holdings, LLC, whose subsidiaries are licensed to provide competitive retail electric service in most of the major deregulated electricity markets in the United States; and
- Gexa Energy Ohio, LLC, a competitive retail electric service ("CRES") provider recently certified to provide CRES in this state.<sup>3</sup>

NextEra has executed a letter of intent to provide electric supply to the Northeast Ohio Public Energy Council ("NOPEC"), a large-scale governmental aggregation in Northeastern Ohio with approximately 600,000 eligible customers in Ohio Edison's and Cleveland Electric Illuminating Company's service territories.<sup>4</sup> NextEra and NOPEC are in the process of finalizing a full requirements power supply agreement to serve NOPEC's load, commencing in April 2009. Because the deferrals authorized in this proceeding will continue indefinitely, *i.e.*, until a new SSO is approved pursuant to sections 4928.142 or 4928.143, Ohio Rev. Code,<sup>5</sup> NextEra's ability to serve NOPEC's customers will be substantially jeopardized if FirstEnergy's authority to defer generation costs applies only to SSO customers.

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<sup>3</sup> See, *In the Matter of the Application of Gexa Energy Ohio, LLC for Authority to Operate as a Competitive Retail Electric Service Provider*, PUCO Case No. 09-1081-EL-CRS (Certificate Issued October 20, 2008).

<sup>4</sup> See *In the Matter of the Application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Establish a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the form of an Electric Security Plan*, Case No. 08-935-EL-SSO (hereafter, "*ESP Proceeding*"), FPL Energy Ex. 1, Attachment A.

<sup>5</sup> See Application, at Paragraph 8.

Indeed, NextEra intervened and actively participated in FirstEnergy's ESP Proceeding to prevent FirstEnergy from adopting a similarly anti-competitive deferral. In the ESP Proceeding, FirstEnergy sought to defer a portion of generation rates for its SSO customers through a generation phase-in credit ("GPIC"), without offering a similar deferral to CRES customers.<sup>6</sup> See ESP Proceeding, FPL Energy Initial Brief, Case No. 08-935-EL-SSO, at 14-19. Fortunately, Commission Staff witness Cahaan recognized the anti-competitive effects of FirstEnergy's generation deferral proposal<sup>7</sup> and the Commission ultimately disapproved it. ESP Proceeding (Opinion and Order, December 19, 2008), at 13-17, 23-25.

Because the Commission modified FirstEnergy's ESP by its Opinion and Order issued December 19, 2008, FirstEnergy subsequently withdrew its application on December 22, 2008. Without an approved MRO in place, the Commission required FirstEnergy to file new tariffs to continue its existing SSO, and directed First Energy to eliminate existing fuel cost recovery riders from the tariffs. The Commission suggested that FirstEnergy apply for the approval of a new rider, pursuant to section 4928.143(C)(2)(b), Ohio Rev. Code, to recover its purchased power costs incurred through its recent competitive bid process. The successful bidders from the auction will provide generation to serve SSO customers through an initial term ending March 31, 2009. ESP Proceeding, Finding and Order (January 7, 2009), at Paragraph 18.

On January 9, 2009, FirstEnergy filed its application to implement a new rider, Rider FUEL, to recover its purchased power costs. Rider FUEL is designed to recover the amount

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<sup>6</sup> NextEra also intervened in FirstEnergy's market rate option ("MRO") proceeding; however, no proposal was made to defer generation costs in that case. The Commission disapproved FirstEnergy's MRO application, requiring it to file another application if it wished to pursue an MRO as the SSO. *In the Matter of the Application of the 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*, Case No. 08-936-EL-SSO (Opinion and Order, November 25, 2008).

<sup>7</sup> In his testimony, Staff witness Cahaan recommended that the GPIC be disallowed, stating that it caused too many difficulties and distortions (Staff Ex. 6, at 3), including the obvious distortions to the SSO price that affects marketers' ability to compete. ESP Proceeding, Tr. IX, at 163.

equal to the difference in the costs First Energy's operating companies incur to purchase power for customers receiving SSO service and the unbundled generation revenues set forth in the operating companies' current rate plan. In its application, FirstEnergy sought authority to accrue and defer for later recovery the under collection of costs (including carrying charges thereon) incurred in the operation of Rider Fuel's reconciliation mechanism. Application, at Paragraph 17. By its Finding and Order of January 14, 2009, the Commission denied FirstEnergy's request for such authority as to Toledo Edison and Ohio Edison; however, it granted authority for the deferral and subsequent recovery of SSO generation costs with respect to Cleveland Electric Illuminating Company ("CEI"), stating:

...we find that CEI should be granted the appropriate accounting authority to defer, with carrying costs, any amount for such purchased power that exceeds the authorized amount in Rider FUEL for future recovery plus the current unbundled generation revenues for CEI's customer classes as set out in the Companies' current rate plan.

See Finding and Order, at Paragraph 11. FirstEnergy made the tariff filing on January 16, 2009.

If the deferrals are authorized only for SSO generation rates, FirstEnergy will succeed in doing in this proceeding what it was prevented from doing in the ESP Proceeding – implementing an anti-competitive deferred generation charge for SSO customers only. The harm to NextEra, and all CRES providers, is immediate and substantial<sup>8</sup> in that the anti-competitive proposal:

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<sup>8</sup> The Commission has indicated that the reasonableness of the deferral and recovery thereof will be examined and addressed in a future proceeding. January 14, 2009 Finding and Order, at Paragraph 12. The immediate and substantial harm that NextEra, and all CRES providers, will suffer if an SSO-only deferral is allowed must be addressed swiftly in the context of clarification or entry on rehearing. See *Ohio Consumers' Counsel v. Pub. Util. Comm.* (2006), 111 Ohio St. 3d 384, 2006 Ohio 5853, 856 N.E.2d 940 (a party may argue that harm resulted from an accounting order that the party claims was unlawful and unreasonable).

- 1) will provide an artificially low SSO price against which CRES providers will be unable to compete, preventing them from entering Ohio's market; and
- 2) place CRES providers at a competitive disadvantage vis-à-vis FirstEnergy's SSO suppliers.

NextEra respectfully requests that the Commission grant this application for rehearing and deny FirstEnergy's request for authority to accrue and defer SSO generation costs. In the alternative, NextEra requests the Commission to provide the deferral to SSO and CRES customers alike.

## **II. ARGUMENT**

- A. The Deferral as Proposed Violates the Pro-Competitive Policies of Section 4928.02(B) and (C), Ohio Rev. Code; the Non-Discrimination Provisions of Section 4905.35, Ohio Rev. Code; and Ohio's Policy to Encourage and Promote Large-Scale Governmental Aggregation Contained in Section 4928.20(K), Ohio Rev. Code.*

The Ohio Legislature has made clear that it is the policy of this state to promote competition in the provision of electric supplies and suppliers. In this regard, section 4928.02, Ohio Rev. Code, provides, in part:

It is the policy of this state to do the following throughout this state :

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(B) Ensure the availability of unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs;

(C) Ensure diversity of electricity supplies and suppliers, by giving consumers effective choices over the selection of those supplies and suppliers and by encouraging the development of distributed and small generation facilities;

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Moreover, the Ohio Legislature has made it the policy of this state to promote and encourage large-scale governmental aggregation. Section 4928.20(K), Ohio Rev. Code, provides in part:

The commission shall adopt rules to encourage and promote large-scale governmental aggregation in this state.

In addition, section 4905.35, Ohio Rev. Code, prevents discrimination by a public utility.

It provides, in part:

(A) No public utility shall make or give any undue or unreasonable preference or advantage to any person, firm, corporation, or locality, or subject any person, firm, corporation, or locality to any undue or unreasonable prejudice or disadvantage.

The deferral of generation charges only for SSO customers would prevent CRES providers from entering Ohio's market, and specifically would prevent NextEra from serving NOPEC's customers. In supplying FirstEnergy's SSO customers, suppliers would obtain their electric supply at market prices, as would CRES providers in serving their customers. However, if FirstEnergy is permitted to discount the SSO market rates by deferring a portion of the generation costs, SSO rates would become artificially lower than the market rates CRES providers would be required to charge. The disparity in pricing would be a barrier to customer shopping, and the absence of customers' willingness to shop would preclude CRES providers from entering Ohio's markets. An SSO-only deferral is anti-competitive and clearly violates sections 4928.02(B) and (C), and section 4928.20(K), Ohio Rev. Code.

Similarly, in authorizing an SSO-only deferral, FirstEnergy would pay its SSO suppliers the market price for their supply, and FirstEnergy would assume the suppliers' obligation to finance and collect the future revenues created by the deferrals. On the other hand, if CRES providers were to attempt to compete with the SSO by matching FirstEnergy's deferrals, they would be required to finance and collect their future revenues. An SSO-only deferral clearly provides a significant economic benefit to SSO suppliers vis-à-vis CRES providers and is anti-competitive and unlawful pursuant to sections 4928.02(B) and (C), and section 4928.20(K), Ohio Rev. Code. Moreover, an SSO-only deferral discriminates against CRES providers vis-à-vis

their SSO supplier-competitors and is unlawful under section 4905.35, Ohio Rev. Code.

NextEra respectfully requests the Commission to grant rehearing and prohibit all FirstEnergy operating companies, including CEI, from accruing and deferring a portion of their SSO generation costs. Significantly, FirstEnergy sought a similar deferral of SSO generation rates in the ESP Proceeding, without offering a similar deferral to CRES customers. Fortunately, Commission Staff witness Cahaan recognized the anti-competitive effects of FirstEnergy's generation deferral proposal, stating that it caused too many difficulties and distortions (ESP Proceeding, Staff Ex. 6, at 3), including the obvious distortions to the SSO price that affects marketers' ability to compete. ESP Proceeding, Tr. IX, at 163. He recommended that the Commission disapprove the proposal, which the Commission ultimately did. ESP Proceeding (Opinion and Order, December 19, 2008), at 13-17, 23-25. NextEra submits that the deferral FirstEnergy proposes in this proceeding is anti-competitive for the same reasons as recognized by Staff witness Cahaan, and urges the Commission to grant rehearing and deny the SSO-only deferral proposal, as it did in the ESP Proceeding.

***B. Alternatively, to Prevent the Anti-Competitive and Discriminatory Effect of the Deferral of SSO Generation Costs, the Deferral of Generation Rates Must be Universally Applied to SSO and CRES Rates Alike.***

Alternatively, to prevent the anti-competitive and discriminatory effect of an SSO-only deferral, the Commission must clarify that the proposed deferral be made universally available to SSO and CRES generation customers. The Commission could do so by ordering FirstEnergy to provide CRES customers with a credit on their bills in the same amount of the SSO deferral, as proposed by NOPEC/NOAC witness Frye in the ESP Proceeding. See ESP Proceeding, Joint NOPEC/NOAC Ex. 1, at 9. The credit amount would be deferred and recovered in the same

manner as the SSO deferrals, as a rider to distribution rates.<sup>9</sup>

NextEra is mindful of section 4928.02(H), Ohio Rev. Code, and the Ohio Supreme Court's decision in *Elyria Foundry Co. v. Pub. Util. Comm.* (2007), 114 Ohio St. 3d 305, 2007 Ohio 4164, 871 N.E.2d 1176 (hereafter, "*Elyria Foundry*"), which preclude the recovery of generation-related costs through distribution rates in certain situations. Neither applies to the NextEra's proposal.

In *Elyria Foundry*, the Commission had issued an order, similar to that in this proceeding, which allowed FirstEnergy to defer fuel costs in excess of those forecast under the fuel cost recovery mechanism. The deferred costs were to be subsequently recovered as part of future distribution rates from all distribution customers, even those that did not take SSO service. The Court found that recovery of SSO generation rates from non-SSO customers constituted an unlawful (*i.e.*, anti-competitive) subsidy of competitive generation rates by a noncompetitive service in violation of section 4928.02(G), Ohio Rev. Code.<sup>10</sup> *Id.*, 114 Ohio St. 3d, at 314-315. Significantly, *Elyria Foundry's* prohibitions do not apply to NextEra's proposal, because non-SSO (*i.e.*, CRES) customers will not be called upon to subsidize SSO generation rates. Rather, because the amounts to be deferred and recovered are the same for SSO and CRES customers, no subsidy, and certainly no *anti-competitive* subsidy, will exit.

After the Court's decision in *Elyria Foundry*, the Ohio Legislature amended section 4928.02, Ohio Rev. Code. Section 4928.02(G), at issue in *Elyria Foundry*, became current section 4928.02(H), which was amended with the italicized language below to codify *Elyria*

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<sup>9</sup> Interestingly, FirstEnergy opposed the NOPEC/NOAC proposal in the ESP Proceeding, claiming that it was not required to "finance" other suppliers' deferrals. See FirstEnergy Reply Brief, ESP Proceeding, at 32. Of course, this is precisely what FirstEnergy is proposing in this proceeding. Having agreed to assume the obligations of SSO suppliers' deferrals, FirstEnergy should not be heard to complain of the supposed burdens of assuming the obligations CRES' deferrals. Indeed, as stated above, not to assume the obligations would be discriminatory and unlawful.

<sup>10</sup> Section 4928.02(G), Ohio Rev. Code, is the forerunner of current section 4928.02(H), Ohio Rev. Code.

*Foundry:*

It is the policy of this state to do the following throughout this state :

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(H) Ensure effective competition in the provision of retail electric service by avoiding **anticompetitive subsidies** flowing from a noncompetitive retail electric service to a competitive retail electric service or to a product or service other than retail electric service, and vice versa, *including by prohibiting the recovery of any generation-related costs through distribution or transmission rates.*

Emphasis supplied. Clearly, the italicized portion of the statute does not impose a blanket prohibition on the recovery of generation-related costs through distribution rates. Rather, when read in the context of the entire statute<sup>11</sup> and the Legislature's intent to codify *Elyria Foundry*,<sup>12</sup> it is readily apparent that the prohibition is triggered only when recovery of generation-related costs through distribution rates creates an anti-competitive subsidy. Under NextEra's proposal, no anti-competitive subsidy exists.

That the Ohio Legislature did not intend for section 4928.02(H), Ohio Rev. Code, to serve as a blanket prohibition on the recovery of generation-related charges through distribution rates is further made evident by the contemporaneously enacted section 4928.144, Ohio Rev. Code, which permits the recovery of deferred charges, including generation charges, from all distribution customers.<sup>13</sup> To the extent that sections 4928.02(H) and 4928.144, Ohio Rev. Code,

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<sup>11</sup> See section 1.47, Ohio Rev. Code ("In enacting a statute, it is presumed that \*\*\* the entire statute is intended to be effective.").

<sup>12</sup> See section 1.49, Ohio Rev. Code.

<sup>13</sup> Section 4928.144, Ohio Rev. Code, provides:

The public utilities commission by order may authorize any just and reasonable phase-in of any electric distribution utility rate or price established under sections 4928.141 to 4928.143 of the Revised Code, and inclusive of carrying charges, as the commission considers necessary to ensure rate or price stability for consumers. If the commission's order includes such a phase-in, the order also shall provide for the creation of regulatory assets pursuant to generally accepted accounting principles, by authorizing the deferral of incurred costs equal to the amount not collected, plus carrying charges on that amount. Further, the order shall authorize the collection of those deferrals through a nonbypassable surcharge on any such rate or price so established for the electric distribution utility by the commission.

conflict, they must be construed such that effect is given to both statutes. See section 1.51, Ohio Rev. Code. The statutes can only be reconciled, and both be given effect, through the construction that the recovery of deferred generation costs through distribution rates is permissible as long as no anti-competitive subsidy is created. As stated above, NextEra's proposal does not create an anti-competitive subsidy. Indeed, the contrary is true – the intent of the universal application of the deferral mechanism is to promote competition.

As NextEra explained in the ESP Proceeding, the Maryland Public Service Commission adopted a similar deferral recovery mechanism by approving a rate stabilization plan that allowed residential customers, including customers served by a competitive retail electric supplier, to choose a pricing option that provides a gradual transition to market rates. The Maryland Commission's order provided for a deferral credit to be applied to the customers' distribution service which would then be managed and administered by the utility, Baltimore Gas & Electric. See *In the Matter of Baltimore Gas and Electric Company's Proposal to Implement a Rate Stabilization Plan Pursuant to Section 7-548 of the Public Utility Companies Article and the Commission's Inquiry Into Factors Impacting Wholesale Electricity Rates*, Case No. 9099, Public Service Commission of Maryland, Order No. 81423, Issued May 23, 2007. See, also, ESP Proceeding, FPL Energy Ex. 1, Attachment B (Fact Sheet on "Optional Rate Stabilization Plan for BGE's Residential Electric Customers," Case No. 9099, Public Service Commission of Maryland, Order 81423, May 23, 2007, Page 2).<sup>14</sup>

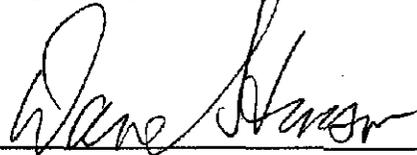
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<sup>14</sup> In its reply brief in the ESP Proceeding, FirstEnergy challenged this statement of the Baltimore Gas & Electric case, citing only the recollection of another marketer as to the Maryland Commission's action. FirstEnergy Reply Brief at 32. NextEra submits that upon a thorough reading of the Maryland decision, the Commission will concur that CRES generation charges were eligible for deferral and subsequent collection in distribution rates.

### **III. CONCLUSION**

NextEra respectfully requests that the Commission grant this application for rehearing and deny FirstEnergy's request for authority to accrue and defer SSO generation costs. In the alternative, NextEra requests the Commission to provide the deferral to SSO and CRES customers alike.

Respectfully submitted,

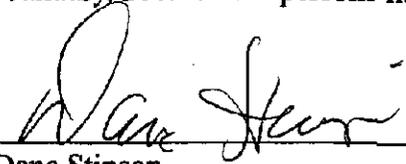


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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing Request for Clarification or, In the Alternative, Application for Rehearing of NextEra Energy Resources, LLC was served by electronic mail this 26<sup>th</sup> day of January, 2009 on the persons listed below.

  
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