

**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 Approval of Rider FUEL and Related Accounting Authority.

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

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY AND THE TOLEDO EDISON COMPANY’S MEMORANDUM CONTRA NEXTERA ENERGY RESOURCES, LLC, ET AL.’S APPLICATION FOR REHEARING

I. INTRODUCTION

The Application for Rehearing filed by NextEra Energy Resources, LLC, et al. (“NextEra”) challenges the propriety of the Commission’s order deferring the purchased power costs incurred by The Cleveland Electric Illuminating Company (“CEI”). In their own Application for Rehearing, Ohio Edison Company (“OE”), CEI and The Toledo Edison Company (“TE”) (collectively, the “Companies”) also challenged the January 9 Order which reflected the Commission’s ordering deferrals (rather than current recovery) with respect to Rider FUEL for CEI. To the extent, however, that NextEra believes that the proper remedy for this error is anything other than to order the collection of these costs by CEI in a manner similar to the way in which these costs are being recovered for OE and TE, NextEra is wrong. Indeed, NextEra’s proposal to have the Companies and their customers, in essence, loan NextEra and other Competitive Retail Electric Service (“CRES”) suppliers a price break is without any legal authority or factual support.

II. ARGUMENT

For the reasons stated in the Companies' Application for Rehearing, the Commission improperly disallowed CEI to implement the current cash collection of purchased power costs and required CEI to defer a portion of these costs. (Companies' Reh'g App., p. 14.) If, as both the Companies and NextEra believe, the deferral ordered by the Commission for CEI was an error, then the remedy, as the Companies pointed out, should be to reverse that part of the order in this case and allow CEI to pursue current cash collection of purchased power costs. It is unclear whether NextEra supports this remedy. What is clear is that NextEra has proposed, either as the sole remedy or as an alternate remedy, that CEI be required to defer certain generation charges incurred by shopping customers. This suggested remedy is wrong for at least two reasons. First, the Commission lacks authority to do what NextEra requests. Second, there is no sound basis in policy or fact to implement the type of deferral suggested by NextEra.

A. **The Commission Has No Authority to Order that Generation Charges to CRES Providers Be Deferred.**

In its discussion of its proposal to defer certain CRES generation charges, NextEra fails to cite any authority that would allow the Commission to issue such an order. This is not surprising. There is no authority. Notably, although S.B. 221 specifically provided for the phase-in and deferral of generation charges by electric distribution utilities, R.C. 4928.144, it did not provide for the deferral of such charges by CRES providers. Absent statutory authority, the Commission cannot act.¹ *Discount Cellular, Inc. v. Pub. Util. Comm.* (2007), 112 Ohio St.3d 360, 373 ("The PUCO, as a creature of statute, has no authority to act beyond its statutory powers.").

¹ And NextEra's reference to the broad and often conflicting policy provisions set out in the statute is no substitute for such specific statutory authority.

B. There is No Policy or Factual Justification for a Deferral of CRES Charges.

To justify its proposal, NextEra contends that creating a deferral for CEI is anti-competitive and thus that a deferral for CRES charges will somehow even the playing field. Apparently, according to NextEra, two wrongs make a right. Apart from the fact that the deferral of CEI charges is unwarranted to begin with, there is nothing about the existence of a deferral of CEI's charges that requires a deferral for CRES charges.

As the Commission is aware, the proposal to create a deferral for CRES charges is not new. NextEra (then FPL) and other CRES providers floated the idea in the Companies' ESP Application proceeding, Case No. 08-935-EL-SSO. As in that case, NextEra here attempts to justify the potential deferral of CRES charges on the grounds that it is needed to make CRES suppliers competitive and promote shopping. (*Compare* NextEra Reh'g App., Case No. 09-21-EL-ATA, p. 8 ("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") *with* FPL Init. Br., Case No. 08-935-EL-SSO, p. 17 ("if the Commission were to approve the GPIC, it must make the credit at least competitively neutral . . . [by ordering] large-scale governmental aggregation customers [to] receive a credit to their bills in the same amount as the GPIC.")) But just as in the ESP case, NextEra provides no basis for that argument.

To begin, there is no evidence that CRES providers cannot compete without a deferral. As was the case in the ESP proceeding, NextEra provides no analysis or proof to show that it cannot meet CEI's SSO rates, even with the deferral of purchased power costs.² Indeed, to the

² The only evidence cited by NextEra is the testimony of Staff witness Richard Cahaan in the ESP case. (*See* NextEra Reh'g App., p. 8.) NextEra, however, overstates and mischaracterizes that testimony. Mr. Cahaan's opposition to the deferral of generation charges proposed by the Companies arose from his belief that deferrals whose recovery extended well beyond the period of their accrual would cause too many difficulties and distortions. (Case No. 08-935-EL-SSO, Staff Ex. 6, p. 3.) Nowhere in his testimony did Mr. Cahaan testify suggest anything about any alleged anti-competitive effect caused by the deferrals proposed by the Companies nor did he say anything in support of any deferral of CRES charges.

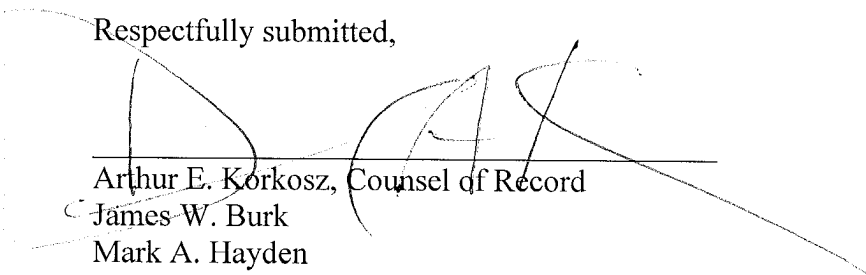
extent that the deferral of CEI's purchased power costs (as erroneous as that may be) lowers the price that CRES providers must beat, customers who obtain CRES supply will benefit from those lower prices. In fact, given that NextEra has no factual support for the view that the absence of a deferral for CRES charges is anticompetitive, its discussion of the statutory policies to promote competition for generation services and to prohibit discrimination in customer charges is beside the point.

Moreover, NextEra's competitive arguments overlook that CRES providers in many ways stand in a better competitive position than the Companies. Unlike the Companies, CRES providers can pick and choose who their customers are. Unlike the Companies, CRES providers are not subject to the Commission's credit and collection rules or shutoff moratoria. Unlike the Companies, CRES providers receive preference to receive payment against a customer's arrearages when the customer makes only partial payment on the bill. Thus, NextEra's complaint that it may be (or is) at a competitive disadvantage rings hollow.

III. CONCLUSION

For the foregoing reasons, to the extent that NextEra proposes anything other than the cash collection of purchased power costs for CEI, NextEra's application for rehearing should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following via regular U.S. Mail, this 5th day of February, 2009. A copy was also served via electronic mail on those parties with e-mail addresses listed below.

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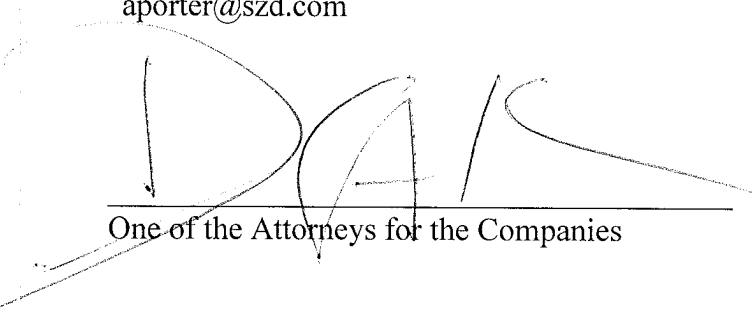
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Summary: Memorandum Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company's Memorandum Contra NextEra Energy Resources, LLC, et al.'s Application for Rehearing electronically filed by Mr. David A Kutik on behalf of FirstEnergy Corp. and Cleveland Electric Illuminating Company and Ohio Edison Company and Toledo Edison Company