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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. )

**NEXTERA ENERGY RESOURCES' AND  
THE NORTHEAST OHIO PUBLIC ENERGY COUNCIL'S  
JOINT MEMORANDUM CONTRA  
FIRSTENERGY SOLUTIONS' MOTION TO INTERVENE**

FPL Energy Power Marketing, LLC, Gexa Energy Holdings, LLC (collectively, "NextEra"),<sup>1</sup> and the Northeast Ohio Public Energy Council ("NOPEC") by their attorneys and pursuant to Rule 4901-1-12(B)(1), Ohio Admin. Code, hereby oppose the motion to intervene filed by FirstEnergy Solutions Corp. ("FES") on February 23, 2009, in the above-captioned case.

**I. INTRODUCTION**

FES first was certified to provide competitive retail electric service ("CRES") (retail generation and power marketer services) in the state of Ohio effective November 2, 2000. See Case No. 00-1742-EL-CRS.

On July 31, 2008, FES's affiliates, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, "FirstEnergy"), filed alternative applications for a standard service offer pursuant to section 4928.141, Ohio Rev. Code. One application was for a market rate option ("MRO") in accordance with section

<sup>1</sup> FPL Energy Power Marketing, LLC, and Gexa Energy Holdings, LLC, have intervened in this proceeding. At the time of intervention, each was an affiliate of FPL Energy, LLC, and were jointly referred to as "FPL Energy." FPL Energy recently changed its name to NextEra Energy Resources, LLC. Thus, the intervening parties will be referred to jointly as "NextEra."

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4928.142, Ohio Rev. Code,<sup>2</sup> and the other was filed in this proceeding for an electric security plan ("ESP") in accordance with section 4928.143, Ohio Rev. Code. Hearing commenced in the MRO proceeding on September 16, 2008, and concluded on September 22, 2008. Hearing commenced in the ESP proceeding on October 16, 2008, and concluded on October 31, 2008.

By Opinion and Order issued November 25, 2009, the Public Utilities Commission of Ohio ("Commission") disapproved FirstEnergy's MRO application, from which FirstEnergy subsequently has sought rehearing. FES did not seek to intervene and participate in the proceedings leading to the Commission's November 25, 2008, MRO Order, nor has it sought to participate on rehearing.

By Opinion and Order issued December 19, 2008, the Commission approved FirstEnergy's ESP application with certain modifications. On December 22, 2008, First Energy exercised its right pursuant to section 4928.143(C)(2)(a), Ohio Rev. Code, to withdraw and thereby terminate its application for an ESP. FES did not seek to intervene and participate in the proceedings leading to the Commission's December 19, 2008 ESP Order.

By Entry issued in this proceeding on January 29, 2009, the Commission directed Staff to develop a proposal to establish an ESP for FirstEnergy and circulate it among the parties to the case as quickly as possible; that parties seriously consider Staff's proposal to determine if an agreement could be reached regarding an ESP; and that FirstEnergy reconsider its withdrawal of its ESP application. The Commission further noticed a conference to be conducted on February 5, 2009 to consider Staff's proposal. FES did not seek to intervene at that point or to participate in the February 5, 2009 conference and subsequent negotiations to reach an acceptable ESP.

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<sup>2</sup> 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 Option to Conduct a Competitive Bidding Process for Standard Service Offer Electric Generation Supply, Accounting Modification Associated with Reconciliation Mechanism, and Tariffs for Generation Service*, Case No. 08-936-EL-SSO.

On February 19, 2009, FirstEnergy filed an amended ESP application with the Commission in this proceeding and a partial stipulation seeking approval of the amended ESP application. Significantly, no CRES provider that had intervened and participated in this proceeding supported the stipulation.

On February 20, 2009, FES attempted to intervene in this proceeding by facsimile transmission to the Commission's Docketing Division. FES's motion to intervene was properly received by the Commission's Docketing Division on Monday, February 23, 2009.<sup>3</sup> FES has not stated the legal position it will advance, or whether it will support or oppose the stipulation, when the Commission considers the stipulation, other than to state its intent to protect its interests in FirstEnergy's wholesale energy procurement processes.

***II. FES'S MOTION TO INTERVENE IS UNTIMELY, IS NOT THE RESULT OF EXTRAORDINARY CIRCUMSTANCES, AND MUST BE DENIED.***

Ohio law is clear. A motion to intervene must be filed five days prior to the scheduled date of hearing in a proceeding or it will be considered untimely. Section 4903.221(A), Ohio Rev. Code; Rule 4901-1-11(E), Ohio Admin. Code. Hearing was scheduled to commence, and in fact commenced, on October 16, 2008. FES's motion to intervene was filed more than four months after the date hearing was scheduled and, thus, was untimely. Indeed, FES does not contest that its filing is untimely, and urges the Commission to grant intervention under the strict and limited "extraordinary circumstances" exception provided by rule 4901-1-11(F), Ohio Admin. Code. The rule provides:

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<sup>3</sup> FES attempted to file its motion to intervene by facsimile on Friday, February 20, 2009. However, filing by facsimile is available only to "parties" to a proceeding. FES cannot be considered a "party" to a proceeding because it has not yet been granted intervention. See Rule 4901-1-10(A)(4), Ohio Admin. Code. Therefore, its motion to intervene must be deemed filed when received by the Commission's Docketing Division on Monday, February 23, 2009. Thus, any argument that FES's motion to intervene was timely filed because it was filed five days before hearing commenced on the stipulation must also fail.

A motion to intervene which is not timely will be granted *only* under *extraordinary* circumstances. (Emphasis supplied.)

As extraordinary circumstances, FES alleges that, by the Entry of January 29, 2009, the Commission established an “aggressive schedule” to reach a stipulation in the ESP proceeding and that the Commission’s further consideration of the stipulation will affect its interests in FirstEnergy’s future wholesale power purchases. FES’s assertions cannot constitute extraordinary circumstances when it had notice, since July 31, 2008, of the MRO and ESP applications, in which FirstEnergy’s future wholesale power purchases were placed in issue. For whatever reasons, FES felt no compulsion to protect its interests at that time. FES’s sudden interest in its sister companies’ wholesale power purchases at this late date rings hollow. That the Commission’s January 29, 2009 entry merely encouraged the parties to continue their efforts in this lengthy proceeding to arrive at an ESP acceptable to all parties does not create the exigent or “extraordinary circumstance” required to permit intervention at this late date.

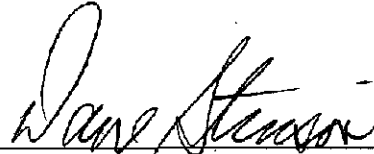
Moreover, to permit FES to intervene at this late date will prejudice existing parties. In its motion, FES makes clear that it is in a position to contribute significantly to the factual development of the record. Intervention would invite FES to file additional testimony on the stipulation and would prejudice parties who have not had the opportunity to depose FES’s witnesses or otherwise conduct discovery as to its position. The parties should not be placed in the position to do so during the condensed schedule ordered by the entry issued February 19, 2009.

### ***III. CONCLUSION***

For the foregoing reasons, NextEra and NOPEC respectfully request that FES’s motion to

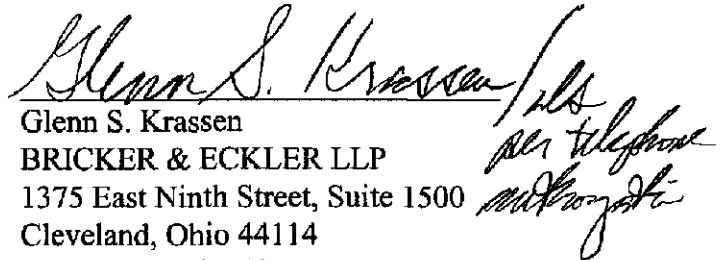
intervene in this proceeding be denied.

Respectfully submitted,



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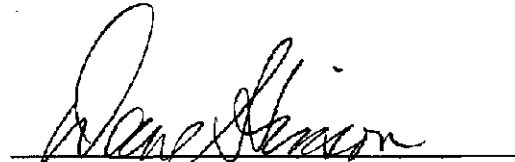
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing *NextEra Energy Resources' and the Northeast Public Energy Council's Joint Memorandum Contra FirstEnergy Solution's Motion to Intervene* was served by electronic mail this 25<sup>th</sup> day of February, 2009 on the persons listed below.

  
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