

Public Utility Commission of Texas

Memorandum

TO: Chairman Donna L. Nelson
Commissioner Brandy Marty Marquez

FROM: Commissioner Kenneth W. Anderson, Jr.

DATE: October 6, 2016

RE: **October 7, 2016 Open Meeting, Agenda Item No. 15;** Docket No. 42750, –
*Matters Pertaining to or Arising Out of the Chapter 11 Bankruptcy of Energy
Future Holdings*

Originally I had intended to file a memorandum expanding upon my comments at the last Open Meeting of the Commission. Subsequently, however, NextEra Energy, Inc. ("NEE") and Energy Future Holdings Corp. ("EFH") sent a letter, dated September 25, 2016 (the "Debtors and Purchaser Letter"), to the United States Bankruptcy Court, District of Delaware. The Debtors and Purchaser Letter purports to clarify certain provisions of the Agreement and Plan of Merger, dated as of July 29, 2016 (the "Merger Agreement"), among NEE, EFH and Energy Future Intermediate Holding Company L.L.C. ("EFIH"), as they relate to the circumstances under which the payment of a \$275 million dollar fee (the "Termination Fee") must be made to NEE. The next morning at a hearing held Monday, September 26, 2016, the Honorable Christopher Sontchi, U.S. Bankruptcy Judge, District of Delaware, commented on our open meeting discussion.¹ After reviewing and considering the contents of the Debtors and Purchaser Letter and the transcript of the Judge Sontchi's comments, I decided not to file the detailed memorandum that I originally intended and, upon the advice of counsel, will not comment in any substantive way upon the Merger Agreement. I file this memorandum instead to let my colleagues know the reason for not filing a different memorandum, thus avoiding unnecessarily occupying my colleagues' time at Friday's open meeting of the Commission.

First, as a preliminary matter, I wish to acknowledge fully that issues around the Merger Agreement are and remain the exclusive province of the Bankruptcy Court.² As to issues arising out of the Merger Agreement, as Judge Sontchi pointed out at the September 26th hearing, this problem is and will remain his problem³ and the problem of the EFH/EFIH creditors. I agree completely with his Honor on this point and respect that fact. To the extent it is relevant, we must

¹ *Energy Future Holdings Corp., et al.*, United States Bankruptcy Court, District of Delaware, Case No. 14-10979 (CSS), Tr. at 11:6 – 16:1 (Judge Sontchi remarks) (September 26, 2016). In addition to being an effort to respond to the Commission's discussion, presumably the Debtors and Purchaser Letter was also sent to the Court to correct a misstatement made to the Judge at the hearing held September 19, 2016. At that hearing counsel for EFH inaccurately described certain aspects of the Termination Fee. *See id.*, Tr. at 83:13 – 84:10 (Husnick) (September 19, 2016).

² I will observe in passing that the Debtors and Purchaser Letter did little to assuage my concerns.

³ Note 1, Tr. at 14:2 – 14:7 (Judge Sontchi remarks) (September 26, 2016).

take the Merger Agreement as it stands; as just one among the many facts and issues that we will have to consider and evaluate as we make the public interest determination in the prospective change of control proceeding to be filed by NEE and Oncor Electric Delivery Company, LLC ("Oncor").

Second, I want to state clearly on the record that I share my colleagues concern about persons controlling Oncor, also owning or controlling substantial Texas competitive affiliates⁴ within the Electric Reliability Council of Texas, Inc. ("ERCOT"). This will be among the central issues to be resolved in the expected change of control proceeding.

As a last matter, I wish to call my colleagues' attention to a portion of Judge Sontchi's remarks at the hearing held on September 26, 2016, in Delaware.⁵ Furthermore, I wish to express my personal appreciation to Judge Sontchi for taking time out of his crowded schedule during that hearing to put on the record that Oncor and its ratepayers will be insulated from any financial effect arising out of the payment of the Termination Fee, regardless of however we may decide the change of control proceeding that NEE and Oncor may file.⁶ Finally, I would note that under Judge Sontchi's stewardship, the competitive affiliates of EFH have successfully emerged from bankruptcy as the largest independent power producer and among the largest competitive retail electric providers within the ERCOT competitive market. That in and of itself is no mean feat and a major accomplishment for the Bankruptcy Court. The Court is to be congratulated.

There is no need to discuss this memorandum at the open meeting of the Commission unless one of my colleagues is so inclined.

⁴ See 16 Tex. Admin. Code §25.5(15).

⁵ Id. Tr. at 14:8 – 15:24 (Judge Sontchi remarks) (September 26, 2016).

⁶ Id. Tr. at 14:8 – 14:19 (Judge Sontchi remarks) (September 26, 2016).