February 22, 2011

Via Electronic Submission

David A. Stawick, Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

Re: Further Definition of "Swap Dealer," "Security-Based Swap Dealer," "Major Swap Participant," "Major Security-Based Swap Participant" and "Eligible Contract Participant" (RIN 3038–AD06)

Dear Mr. Stawick:

NextEra Energy Resources, LLC ("NextEra") respectfully submits these comments in response to the notice of proposed rulemaking ("Proposed Rule") issued by the Commodity Futures Trading Commission ("CFTC" or "Commission") and the Securities and Exchange Commission ("SEC") on December 21, 2010 (RIN 3038-AD06).[1] The Proposed Rule seeks to define with further detail key terms in Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), including "swap dealer," "major swap participant," and "eligible contract participant." NextEra is providing comments, including information specifically related to the wholesale electricity market, to assist the Commission in adopting a final rule which recognizes that commodity market participants, like NextEra, whose regular business is owning and operating assets that use and produce physical commodities, and that enter into swap transactions either to hedge commercial risk or ancillary to their regular business, are not "swap dealers" under the Dodd-Frank Act.

I. Interest of NextEra in the Proposed Rule

As the owner of electricity generation assets in 26 states and Canada, NextEra has a natural long position in electric power (*i.e.*, it has a large quantity of power to sell) and a natural short position in fuel, particularly natural gas (*i.e.*, it needs large quantities of fuel to run its physical power generation). To manage the commercial risks associated with its natural long and short commodity positions, NextEra enters into a variety of physical and financial transactions. Those transactions provide stable cash flows and earnings that help to attract investment capital. They also involve NextEra in a large number of ongoing commercial relationships with electricity customers and other physical market participants who also have natural long and short positions in energy commodities. The volatility of power prices and the

[1] 75 Fed. Reg. 80,174 (Dec. 21, 2010).

technical challenges involved in distributing electricity, including the fact that electricity cannot be stored, make it particularly important for these long and short market participants to be able to transact with one another to hedge the risks associated with their commercial operations and to adjust to rapidly changing supply and demand conditions.

NextEra enters into the vast majority of its swaps that hedge commercial risk with financial institution swap dealers. However, NextEra sometimes enters into swaps with other physical commodity market customers who are hedging their own commercial risks. When NextEra enters into a swap with a commercial customer, the swap is ancillary or incidental to its regular business of owning and operating electricity generation assets. Indeed, NextEra only enters into swaps that are related to its regular business as a producer and user of physical commodities, *i.e.*, swaps based on energy commodities with price references at delivery points in regions where it owns physical assets.

NextEra does not believe that its swap-related activities fall within the Commission's proposed definition of a swap dealer. However, if NextEra and similarly situated physical commodity market participants were classified as swap dealers, they would become subject to a number of regulatory requirements, including mandatory capital, margin, and clearing requirements. They also would need to invest in information technology infrastructure to comply with new recordkeeping and reporting requirements. The substantial costs of complying with a new regulatory regime designed to apply to financial institutions would tie up or consume large amounts of capital that NextEra and other physical commodity market participants could otherwise invest productively in, among other things, building additional energy infrastructure and generation, developing renewable energy and clean energy technologies and other energy job-creating activities. Moreover, at least some of these costs, if applied to physical commodity market participants such as NextEra, would inevitably be passed onto consumers, manufacturers and employers.

NextEra respectfully suggests that further clarification of the proposed swap dealer definition would help to ensure that physical market participants are not inadvertently classified as swap dealers, even though their regular business activities differ materially from the swap dealing activities of financial institutions whose ordinary business is providing financial intermediary services to profit from the spread between the prices at which their counterparties buy and sell swaps. To assist the Commission in implementing Congress' intent to regulate swap dealing activity to reduce systemic risks to the U.S. financial system, and, at the same time, preserve the ability of commodity market participants to use swaps to manage the risks associated with owning and operating physical assets in a cost-efficient manner, NextEra proposes specific amendments to the proposed definition of swap dealer for the Commission's consideration.

II. Summary of NextEra's Comments and Recommendations

NextEra supports the Commission's efforts to implement the requirements of the Dodd-Frank Act. Nevertheless, NextEra respectfully recommends that the Commission make the following modifications to the definition of swap dealer, and to the Congressionally-mandated exceptions to that definition, in order to provide market participants with commercially practical guidance about how their activities will be characterized under the Commission's regulations:

- The definition of swap dealer should provide market participants with guidance about the types of activities that do not constitute "dealing" activities. NextEra recommends that the Commission specifically exclude from the definition of swap dealer activities related to swaps that are hedges, proprietary trades for profit, executed on a designated contract market ("DCM") or a swap execution facility ("SEF") (unless executed by a person that holds itself out as a dealer or market-maker), or options to make or receive delivery of physical commodities. NextEra also recommends that the Commission define "market-maker" as a person who quotes bids and offers (*i.e.*, makes a two-way market) for the purpose of responding to customer demand for swaps rather than to execute trades to benefit from future price changes.

- The definition of swap dealer should be applied in a manner that does not preclude physical market participants with natural long and short positions from transacting with each other even when they elect, for reasons of commercial convenience, to enter into a financially-settled, rather than a physically-settled, transaction.

- The exception from the swap dealer definition for a company that enters into swaps for its own account "but not as part of a regular business" should apply to a non-financial entity that produces, processes, uses, or merchandizes a physical commodity, or the products or by-products thereof, to the extent that it enters into a swap for its own account that is ancillary or incidental to its regular business.

- The exception from the swap dealer definition for *de minimis* swap dealing activity should focus on the notional quantity of an entity's swap dealing activity relative to the size of the swap market, rather than on the gross notional dollar amount of an entity's swaps, or the number of its swaps or swap counterparties.

III. Recommended Revisions to the Definition of Swap Dealer

The Commission's proposed definition of swap dealer is identical to the definition in Section 721(a)(49) of the Dodd-Frank Act. The four-part statutory definition of swap dealer is very broad and does not explain how swap dealing concepts – like market-making and regularly entering into swaps "as an ordinary course of business" – will apply to physical commodity-

based swaps. The Commission's proposed "interpretive approach" in the preamble to the proposed rule, focuses on the "functional role [that swap dealers] fulfill in the swap markets."[2] According to the Commission, swap dealers "are those persons whose function is to accommodate demand for swaps from other parties and enter into swaps in response to interest expressed by other parties."[3]

NextEra respectfully submits that the Commission's proposed function-based interpretive approach to identifying swap dealers would benefit from additional explication in the text of the proposed rule. Accordingly, in order to provide market participants with practical guidance about which activities fall within or outside of the proposed definition, NextEra recommends that the Commission "further define" swap dealer as contemplated by Congress and as stated by the Commission in the preamble to the Proposed Rule.[4] NextEra's proposed enhancements to the definition of swap dealer are set forth below in the underlined text.[5]

17 C.F.R. 1.3(ppp) *Swap Dealer.*

(1) In general. The term "*swap dealer*" means any person who:

(i) Holds itself out as a dealer in swaps;

(ii) Makes a market in swaps;

(a) "Makes a market" means regularly quoting bid and offer prices for, and standing ready to enter into, a swap for a person's own account for the purpose of responding to customer demand for swaps.

(iii) Regularly enters into swaps with counterparties as an ordinary course of business for its own account; or

(iv) Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in swaps.

provided, however, that in no event shall an entity be considered to be a swap dealer to the extent that it offers to enter into, or enters into, a swap:

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2 75 Fed. Reg. at 80,177.

3 *Id.*

4 *See* Section 712(d) of the Dodd-Frank Act; 75 Fed. Reg. at 80,175.

5 For the convenience of the Commission and Staff, NextEra has attached as Appendix A the complete text of NextEra's proposed modifications to the definition of swap dealer and the exceptions thereto.

(a) to hedge or mitigate commercial risk, as defined in § 1.3(ttt);

(b) for the purpose of benefiting from future changes in the price of the underlying commodity;

(c) on a designated contract market or swap execution facility; or

(d) that is an option to make or receive delivery of a physical commodity.

NextEra's recommended revisions to the proposed regulatory text of the swap dealer definition would not limit or otherwise affect its applicability to those persons who hold themselves out as swap dealers and who make markets in swaps as their regular business.

NextEra recommends that the Commission explicitly identify in the text of the proposed regulation specific activities typically engaged in by physical commodity market participants that do not constitute swap dealing. First, although nothing in the Commission's proposed definition or its related interpretive guidance suggests that entering into swaps to hedge commercial risk constitutes swap dealing, the industry would benefit from an explicit statement to that effect in the proposed regulation. This is particularly true for swaps between two physical market participants with opposite long and short physical positions that act as a hedge for both parties.

Second, NextEra recommends that the Commission explicitly exclude trading swaps for the purpose of making a profit, not from the bid-ask spread, but rather from future changes in the price of the underlying commodity. Such an exclusion would ensure that the proposed rule would capture only activity by participants acting as intermediaries rather than as traders.[6]

Third, NextEra recommends that the Commission specifically exclude entering into swaps executed on a DCM or a SEF (unless executed by a person that holds itself out as a dealer or market-maker) from the definition of swap dealer. Executing swaps on a DCM will be

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[6] Congress addressed the potential systemic risk arising from substantial trading positions in swaps expressly by requiring the registration and regulation of major swap participants. *See* Dodd-Frank Act § 731 (to be codified as CEA § 4s). In contrast, neither the statutory definition of swap dealer nor the proposed regulatory definition suggests that swap "trading" constitutes dealing activity. However, unlike the SEC, the CFTC did not indicate in its interpretive guidance that it will rely on the dealer-trader distinction as "an important analytical tool to assist in determining whether a person is a ['swap dealer']" (75 Fed. Reg. at 80,178) even though the proposed regulation does not distinguish between types of swaps for other purposes. For example, the proposed rule does not distinguish between different types of swaps for purposes of distinguishing *de minimis* dealing from other dealing activities. 75 Fed. Reg. at 80181. The Commission has a long history of recognizing the difference between dealing and trading activity. For example, in the preamble to the proposed rule implementing the end-user clearing exception, the Commission explained that swap positions held for the purpose of trading are those held primarily "to take an outright view on the direction of the market." *See* End-User Exception to Mandatory Clearing of Swaps, 75 Fed. Reg. 80,747, 80,752 n.23 (Dec. 23, 2010). Such activity does not involve accommodating the demand of third parties for swaps. The Commission should eliminate any ambiguity in how it intends to interpret the swap dealer definition by explicitly excluding trading swaps for a person's own account for the purpose of profiting from future changes in the price of the underlying commodity.

functionally equivalent to executing futures contracts, an activity that has not historically been characterized as dealing activity because a futures trader does not know if its futures transaction is accommodating the demand of a third party for an opposite transaction. The same should be true for executing swaps on a SEF except by a person that holds itself out as a market-maker.

Fourth, NextEra recommends that the Commission exclude entering into options to make or receive delivery of physical commodities – even if they are defined as swaps – as an activity that could cause a physical market participant to be a swap dealer. Although the statutory definition of swap includes options on physical commodities, and the Commission has indicated that it intends to define such options as swaptions, the Commission should bear in mind that owners of physical commodity assets, particularly power generation assets, hold the economic equivalent of an option. In the electric power industry, when a power plant owner offers to sell capacity, it is hedging commercial risk, not "acting as a point of interconnection"[7] in the swap market, making a market in swaps, or accommodating demand for swaps. There is no compelling regulatory reason to regulate physical market participants as swap dealers solely because they sell electric capacity and other physical commodity options.

Finally, NextEra recommends that the Commission define "makes a market" as quoting a two-way market for the purpose of responding to the demand of third-parties for swaps. Many traders who enter into swaps to benefit from future price changes quote bid and ask prices so as not to disclose to counterparties the prices at which they are prepared to transact. Our proposed definition of "makes a market" would enable traders to continue to quote bid and ask prices as long as their purpose is trading rather than accommodating demand for swaps.

IV. The CEA Excepts From The Definition Of A Swap Dealer Market Participants That Enter Into Swaps That Are Ancillary Or Incidental To Their Regular Physical Commodity Business

A. Congress Limited the Definition of Swap Dealer to Entities that Engage in Swap Activity as Their Regular Business

Section 1a(49)(C) of the CEA, as amended by the Dodd-Frank Act, excepts from the definition of swap dealer "a person that enters into swaps for such person's own account, . . . but *not as part of a regular business*."[8] As the Commission recognized, this exception should be read in conjunction with the language of Section 1a(49)(A)(iii), which, in contrast, includes within the definition of swap dealer a person who "regularly enters into swaps with counterparties *as an ordinary course of business* for its own account."

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7 *See* 75 Fed. Reg. 80,177.

8 7 U.S.C. § 1a(49)(C), as amended by Dodd-Frank Act (emphasis added).

Because Congress did not define "regular" and "ordinary" in the Dodd-Frank Act, the Proposed Rule should give effect to the common meaning of the words that Congress chose to use in Section 727(a)(49) of the Dodd-Frank Act.[9] Thus, the word "regular" in Section 1a(49)(C) of the CEA should be construed to mean "usual, customary, normal or general."[10] Similarly, the word "ordinary" in Section 1a(49)(A)(iii) of the CEA should be read to mean "*regular*; usual; normal; common; often recurring; . . . [or] customary."[11] In other words, if a person's usual or normal business is entering into swaps to accommodate demand and profit on the bid-ask spread (or engaging in other financial intermediary activities typically conducted by financial institutions), it is a swap dealer. If a person's usual or normal business is not entering into swaps to accommodate demand and profit from the bid-ask spread, it is excepted from the definition of swap dealer.

B. NextEra's Proposed Explication of the "Not Part of a Regular Business" Exception

With the goal of providing market participants with further guidance about the contours of the "not part of a regular business" exception to the definition of swap dealer, NextEra requests that the Commission consider revising the proposed regulation as follows (additional language is underlined):

(2) Exception. The term "swap dealer" does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(i) A non-financial entity that produces, processes, uses, or merchandizes, a physical commodity, or the products or by-products thereof, is not a swap dealer to the extent that it enters into a swap for its own account that is ancillary or incidental to its regular business.[12] A swap is ancillary or incident[al] to a non-financial entity's regular business if it is:

(a) between persons that have the capacity to make or take delivery of the underlying commodity;

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9 "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37 (1979).

10 *Gerald v. American Cas. Co. of Reading, Pa.*, 249 F. Supp. 355, 357 (D. M.D. NC 1966); *Black's Law Dictionary* 1398 (9th ed. 2009) (means the same as "ordinary course of business").

11 *Black's Law Dictionary* 1209 (9th ed. 2009).

12 A non-financial entity is a person that is not a "financial entity" as defined in Section 723(h)(7)(C)(i) of the Dodd-Frank Act.

(b) a substitute for a transaction or position that could have been made or taken in a physical marketing channel; and

(c) at least one of the parties thereto is hedging or mitigating commercial risk.

(ii) "Regular Business" means a usual and significant business activity of a person as measured by, among other things, revenues, profits, volume, VaR, exposure and resources devoted to the business.

NextEra's proposal would provide a narrow exception to the swap dealer definition available only to non-financial entities that are participants in the physical commodity markets, and only to the extent that they enter into swaps, for their own account that are ancillary or incidental to their regular physical business.[13] We propose a three-part, conjunctive test for identifying swaps that are ancillary to a non-financial entity's regular business. First, consistent with the Commission's long-standing forward contract interpretation, the swap must be between commercial participants that have a demonstrable capacity to make or take delivery of the commodity underlying the swap.[14] Second, consistent with the new definition of hedging transaction in Section 4a(c)(2) of the CEA, the swap must be a substitute for a transaction or position that could have been made or taken in a physical marketing channel. And third, at least one of the parties must be entering into the swap to hedge or manage commercial risk.

NextEra proposes a number of objective factors that the Commission could consider in determining whether a person's regular (usual) business is something other than swap dealing and is significant, *i.e.*, a meaningful or measurably large activity.[15] For example, the Commission could consider, among other factors, overall revenue relative to revenue generated by the swap activity, total profits relative to profits earned from the swap activity; total business volume relative to the volume, VaR and exposure associated with the swap activity, total resources devoted to the business relative to resources devoted to swap activity, and ownership or control (or lack thereof) of physical assets in the specific market or region to which the swap activity is tied. This type of objective analysis would enable the Commission to effectuate the Congressionally-mandated distinction between: (1) swap activity that is undertaken as a regular business; and (2) swap activity that is ancillary or incidental to a regular business.

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[13] Ancillary generally means supplementary or subordinate. *Black's Law Dictionary* 101 (9th ed. 2009); Congress used the term "incidental" to exclude certain advisory activity from the definition of a Commodity Trading Advisor in Section 1a(12)(C) of the CEA.

[14] *Statutory Interpretation Concerning Forward Transactions*, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,925 (CFTC Sept. 25, 1990).

[15] Definition of "significant," Merriam-Webster Online Dictionary *available at* http.//www.merriam-webster.com (Feb, 15, 2011).

In the Proposed Rule, the Commission stated that it believes that "persons who enter into swaps as a part of a 'regular business' are those persons *whose function* is to accommodate demand for swaps from other parties and enter into swaps in response to interest expressed by other parties."[16] NextEra respectfully submits that this interpretation is difficult to apply in the energy and other physical commodity markets, and could cause participants in those markets inadvertently to be classified as swap dealers, even though their swap activities, unlike those of financial entities, are not part of their regular business. For example, in the wholesale power and other physical commodity markets, parties often discuss a number of alternative ways to structure transactions based upon their specific business needs and cost concerns. Their negotiations may start with a discussion of a potential physical transaction, but ultimately a customer may decide that it prefers to enter into a swap rather than a physical transaction because a financial transaction may be more credit efficient, or involves fewer operational issues and costs.

NextEra recommends, therefore, that the Commission qualify its observation to refer to persons "whose [usual] function" is to accommodate demand for swaps or provide other financial intermediary services. This revision of the Commission's interpretative guidance would make clear that physical market participants whose usual business involves the production, processing, distribution, merchandizing, or commercial use of electricity or other physical commodities, and who enter into swaps with other end-users for their own account that are ancillary or incidental to their physical business, are excepted from the definition of swap dealer.

By excluding from the swap dealer definition swap activity that is ancillary or incidental to the physical business of a commodity market participant, the Commission would ensure that electric utilities, generators, and other physical market participants could continue to enter into swaps with load-serving entities or other end-users – that is, continue their commercial activities unimpeded as Congress intended – without being categorized as a swap dealer. Moreover, by employing a regular business / ancillary business dichotomy, the Commission would provide market participants with practical guidance that is reasonably easy to apply to most commercial operations.

V. The *De Minimis* Exception from the Swap Dealer Definition Should Focus on the Notional Amount of a Company's "Swap Dealing" Activity Relative to the Total Notional Amount of Swaps in the United States Swap Market

Section 1a(49)(D) excepts from the definition of swap dealer "an entity that engages in a *de minimis* quantity of swap dealing in connection with transactions with or on behalf of its customers."[17] In the Proposed Rule, the Commission explained that its "proposed factors for the *de minimis* exception seek to focus the availability of the exemption toward entities for which

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16 75 Fed. Reg. at 80,177 (emphasis added).

17 Dodd-Frank Act § 721 (to be codified as CEA § 1a(49)(D)).

registration would not be warranted . . . in light of the limited nature of their dealing *activities*."[18] The Commission also recognized that a number of "alternative approaches [to implementing the *de minimis* exception] may be reasonable."[19]

NextEra recommends that the Commission adopt an alternative approach to implementing the *de minimis* exception that focuses on a level of dealing activity that poses little or no risk to the U.S. financial system. To accomplish this objective, NextEra recommends that the Commission define the *de minimis* exception as follows (revised text underline):

> (4) *De minimis* exception. A person shall not be deemed to be a swap dealer as a result of swap dealing activity involving counterparties ~~that meets each of the following conditions: (i) The~~ if the swap positions connected with those activities into which the person enters, as of the last day of each calendar quarter, ~~over the course of the immediately preceding 12 months~~ did not exceed one thousandth of one percent (.001%) of the total notional amount of swaps in the United States. For purposes of this paragraph, if the stated notional amount of a swap is leveraged or enhanced by the structure of the swap, the calculation shall be based on the effective notional amount of the swap rather than on the stated notional amount.

According to the CFTC, "the largest 25 bank holding companies currently have $277 trillion notional amount of swaps," which is approximately 92% of the U.S. market.[20] By regulating these entities as swap dealers, the Commission will oversee the vast majority of entities that potentially could pose a system risk to the U.S. financial system. Under NextEra's proposal, the CFTC would set a *de minimis* threshold at an amount below the notional percentage of swaps that could pose a systemic risk to the financial system.

As Chairman Gensler has emphasized repeatedly in Congressional testimony, unlike financial entities whose swap dealing activities and interconnectedness potentially pose systemic risks to the U.S. economy, non-financial entities' swap activities are much smaller and do not pose the same risks to the financial system.[21] By adopting NextEra's proposed measure of *de minimis* swap dealing activity, the Commission would ensure that swap dealer registration is "warranted" for only a small number of non-financial entities because of the "nature of their dealing activities."

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18 75 Fed. Reg. at 80,180 (emphasis added).

19 75 Fed. Reg. at 80,180.

20 Testimony of CFTC Chairman Gary Gensler before the House Committee on Agriculture (February 10, 2011) *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-68.html.

21 *See, e.g.*, Testimony of CFTC Chairman Gary Gensler before the House Committee on Financial Services (February 15, 2011) *available at* http://www.cftc.gov/PressRoom/SpeechesTestimony/opagensler-69.html.

There are several advantages to NextEra's proposed *de minimis* threshold. First, it would be based upon a direct relationship between the appropriateness of swap dealer registration and the notional amount of a person's swap dealing activity relative to the total market for swaps. Second, it would balance the benefits of registration in terms of reducing systemic risk with the burdens and costs of complying with the regulatory requirements applicable to swap dealers. Third, and perhaps most importantly, NextEra's proposal would enable the CFTC to phase in and calibrate its regulation of swap dealers. Persons who qualify for the *de minimis* threshold still will be required to maintain a record of, and report, their swaps to a swap data repository or the Commission. Based upon reported swap data and its oversight of the market, the Commission could adjust the *de minimis* percentage threshold after some specified time period or periods to a level that would include a set number of additional persons as swap dealers if the Commission determines that the benefits of registering more persons as swap dealers to reducing systemic risk outweigh the additional regulatory burdens imposed on such new registrants.

Finally, NextEra recommends that the Commission adopt its proposal as an alternative to measuring *de minimis* swap dealing activity by reference to the number of swaps or swap counterparties a person has over a rolling 12-month period. These measures do not provide an accurate proxy for a level of dealing activity that has a likelihood of increasing systemic risk to the U.S. financial system.

VI. Request for Open Comment Period

Because of the complexity and interconnectedness of all of the rulemakings implementing Title VII of the Dodd-Frank Act, and their transformational impact on over-the-counter derivatives markets, NextEra, like many other interested industry groups and companies, requests that the Commission hold open or reopen the comment period on all of its proposed implementation rules until at least 30 days after all such rules have been published for public comment. That way, market participants and the Commission will be able to consider the entire new market structure and the interconnection between all of the proposed rules when drafting comments on the proposed rules. For example, market participants are commenting on the swap dealer definition even though the proposed definition of swap and the capital and margin rules have not yet been published. Allowing all interested parties to provide comprehensive comments will help the Commission to better understand how its proposed rules will affect the swap markets. In addition, holding open or reopening the comment periods would be consistent with the President's January 18, 2011, Executive Order for Improving Regulation and Regulatory Review.

VII. Conclusion

NextEra thanks the Commission for considering its comments regarding the Proposed Rule. For the foregoing reasons, NextEra respectfully requests that the Commission ensure that physical electricity market participants generally will not fall within the proposed definition of swap dealer or, at a minimum, qualify for the statutory exceptions that Congress included in the definition of swap dealer.

Respectfully submitted,

F. Mitchell Davidson
President and Chief Executive Officer

cc: Honorable Gary Gensler, Chairman
Honorable Michael Dunn, Commissioner
Honorable Jill E. Sommers, Commissioner
Honorable Bart Chilton, Commissioner
Honorable Scott O'Malia, Commissioner
Dan Berkovitz, General Counsel
Terry Arbit, Deputy General Counsel
Mark Fajfar, Assistant General Counsel
Julian E. Hammar, Assistant General Counsel
David E. Aron, Counsel

APPENDIX A
TO NEXTERA COMMENT LETTER

17 C.F.R. 1.3(ppp) *Swap Dealer.*[1]

(1) In general. The term "*swap dealer*" means any person who:

(i) Holds itself out as a dealer in swaps;

(ii) Makes a market in swaps;

(a) "Makes a market" means regularly quoting bid and offer prices for, and standing ready to enter into, a swap for a person's own account for the purpose of responding to customer demand for swaps.

(iii) Regularly enters into swaps with counterparties as an ordinary course of business for its own account; or

(iv) Engages in any activity causing it to be commonly known in the trade as a dealer or market maker in swaps.

provided, however, that in no event shall an entity be considered to be a swap dealer to the extent that it offers to enter into, or enters into, a swap:

(a) to hedge or mitigate commercial risk, as defined in § 1.3(ttt);

(b) for the purpose of benefiting from future changes in the price of the underlying commodity;

(c) on a designated contract market or swap execution facility; or

(d) that is an option to make or receive delivery of a physical commodity.

(2) Exception. The term "swap dealer" does not include a person that enters into swaps for such person's own account, either individually or in a fiduciary capacity, but not as a part of regular business.

(i) A non-financial entity that produces, processes, uses, or merchandizes, a physical commodity, or the products or by-products thereof, is not a swap dealer to the extent that it enters into a swap for its own account that is ancillary or incidental to its regular business.[2] A swap is ancillary or incident[al] to a non-financial entity's regular business if it is:

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[1] Additional text is underlined; deleted text is shown as strike-through text.

[2] A non-financial entity is a person that is not a "financial entity" as defined in Section 723(h)(7)(C)(i) of the Dodd-Frank Act.

(a) between persons that have the capacity to make or take delivery of the underlying commodity;

(b) a substitute for a transaction or position that could have been made or taken in a physical marketing channel; and

(c) at least one of the parties thereto is hedging or mitigating commercial risk.

(ii) "Regular Business" means a usual and significant business activity of a person as measured by, among other things, revenues, profits, volume, VaR, exposure and resources devoted to the business.

(3) *Scope*. [No proposed changes.]

(4) *De minimis* exception. A person shall not be deemed to be a swap dealer as a result of swap dealing activity involving counterparties ~~that meets each of the following conditions: (i) The~~ if the swap positions connected with those activities into which the person enters, as of the last day of each calendar quarter, ~~over the course of the immediately preceding 12 months~~ did not exceed one thousandth of one percent (.001%) of the total notional amount of swaps in the United States. For purposes of this paragraph, if the stated notional amount of a swap is leveraged or enhanced by the structure of the swap, the calculation shall be based on the effective notional amount of the swap rather than on the stated notional amount.

[Remainder of subsection (i) and subsections (ii) and (iii) deleted.]