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 Authority to Provide for a Standard Service Offer Pursuant to R.C. 4928.143 in the Form of an Electric Security Plan.	))))))))	**Case No. 14-1297-EL-SSO**

MOTION TO STAY THE IMPLEMENTATION OF CHANGES TO RIDER NMB AND THE IMPLEMENTATION OF THE RIDER NMB OPT-OUT PILOT AND MOTION FOR AN EXPEDITED RULING BY THE RETAIL ENERGY SUPPLY ASSOCIATION

Pursuant to Rule 4901-1-12, Ohio Administrative Code, the Retail Energy Supply Association ("RESA")[1] respectfully requests that the Public Utilities Commission of Ohio ("Commission") stay the implementation of two aspects of the fourth electric security plan ("ESP IV") of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (collectively, "FirstEnergy"). First, the Commission should stay the addition of two PJM billing line-items to Rider NMB because those items are market-based charges that do not belong in Rider NMB. Second, the Commission should not implement the Rider NMB Opt-Out Pilot program until after the Commission rules on RESA's application for rehearing and, if applicable, reviews and approves a tariff sheet for the Pilot.

[1] The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of the Association. Founded in 1990, RESA is a broad and diverse group of more than twenty retail energy suppliers dedicated to promoting efficient, sustainable and customer-oriented competitive retail energy markets. RESA members operate throughout the United States delivering value-added electricity and natural gas service at retail to residential, commercial and industrial energy customers. More information on RESA can be found at www.resausa.org.

As more fully described in the accompanying memorandum in support, RESA's members and other suppliers should not be required to make the many system changes and procedural changes necessary to accommodate the two charges that may be added to Rider NMB as well as the Rider NMB Opt-Out Pilot until the Commission rules on rehearing. It is very likely the Commission will rule in RESA's favor on rehearing on both the Rider NMB additions and the new Pilot program. As well, with other arguments pending against FirstEnergy's ESP IV, it is very likely that FirstEnergy will withdraw its ESP IV in its entirety. That uncertainty should be resolved. The Commission should stay the implementation of both the addition of two PJM billing line-items to Rider NMB and the Rider NMB Opt-Out Pilot until the Commission rules on the pending applications for rehearing and, if applicable, reviews and approves a tariff sheet for the Pilot.

Due to the Commission's impending consideration of those proposed tariff sheets and in light of the impending June 1, 2016 effective date for the ESP IV, RESA requests an expedited ruling on its Motion to Stay, pursuant to Rule 4901-1-12(C), Ohio Administrative Code.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF THE MOTION TO STAY THE IMPLEMENTATION OF CHANGES TO RIDER NMB AND THE IMPLEMENTATION OF THE RIDER NMB OPT-OUT PILOT BY THE RETAIL ENERGY SUPPLY ASSOCIATION

I. INTRODUCTION

Through the attached motion, the Retail Energy Supply Association ("RESA") seeks a stay of the implementation of the change of PJM billing line-items within the Non-Market Based Services Rider ("Rider NMB") and a stay of the the Rider NMB Opt-Out Pilot until the Public Utilities Commission of Ohio ("Commission") rules on RESA's pending application for rehearing and, if applicable, reviews and approves a tariff sheet for the Pilot.[2] Rider NMB is supposed to recover only "**non-market-based** costs, fees or charges imposed on or charged to the Company by FERC or a regional transmission organization * * *."[3] However, FirstEnergy would instead seek to alter the billing for certain market-based charges, as well. The Pilot program will allow certain customers to opt out of Rider NMB and instead require suppliers to implement new systems and

[2] RESA's Application for Rehearing addresses Rider NMB and the Rider NMB Opt-Out on pages 93-100.

[3] *See*, Ohio Edison Company Tariff, P.U.C.O. No. 11 at Sheet 119.

accounts with PJM in order to purportedly charge PJM line items to the customers participating in the Pilot.

The Commission did not expressly rule on any of the substantive arguments raised by RESA and others during the hearing about Rider NMB, and has not yet ruled on the pending applications for rehearing, which includes arguments about both the addition of changes to PJM billing line-items within Rider NMB and the new Rider NMB Opt-Out Pilot. The applications for rehearing before the Commission also assert jurisdictional issues, which when ruled upon could lead FirstEnergy to withdraw its ESP IV in its entirety. Thus, it is unreasonable for FirstEnergy and suppliers in FirstEnergy's service territories to make the changes necessary for Rider NMB when the Commission has not ruled on rehearing and the future of FirstEnergy's ESP IV is uncertain. Similarly, RESA and other parties should not be required to endure more expense and cost in this proceeding related to necessary preparations for the Rider NMB Opt-Out Pilot while it too is under consideration on rehearing and may never go into effect if FirstEnergy withdraws its ESP IV. Customers have been informed that they are eligible for the program, and are seeking action from their supplier. However, FirstEnergy has not even filed a proposed tariff for the opt-out pilot, and suppliers have not had the opportunity to comment on the potential shortcomings of those proposed tariffs.

The public interest lies in granting this stay to allow the Commission to carefully consider all arguments on rehearing and, if applicable, review and approve a tariff sheet for the Pilot program (which has not been filed). After that, the Commission will have provided the necessary clarity to the affected parties on what charges should be included in Rider NMB and how, if at all, the Rider NMB Opt-Out Pilot program should proceed. Additionally, in light of the upcoming consideration of proposed tariffs and the June 1, 2016 effective date for the ESP IV, an expedited ruling on this Motion to Stay should be issued pursuant to Rule 4901-1-12(C), Ohio Administrative Code.

II. ARGUMENT

A. Background on Rider NMB and the Rider NMB Pilot

1. *Rider NMB is designed to recover PJM non-market based transmission costs.*

Rider NMB is a nonbypassable rider designed to recover **non-market-based** transmission-related costs, such as Network Integration Transmission Service charges, which are charged to FirstEnergy by the Federal Energy Regulatory Commission or PJM Interconnection, LLC.[4] Suppliers currently are responsible for market-based transmission related costs billed by PJM.

2. *FirstEnergy proposed adding additional PJM line-item costs to Rider NMB in its ESP IV that should not be added.*

As part of the ESP IV, FirstEnergy proposed to modify Rider NMB by changing the billing responsibility for certain costs imposed by PJM. Under its proposal, FirstEnergy would become responsible for several billing line items for which it currently is not responsible. RESA has argued, in particular, that the evidence demonstrates that PJM Billing Line Item 1375 (Balancing Operating Reserve) and PJM Billing Line Item 1218 (Planning Period Congestion Uplift) should **not** be billed by FirstEnergy through Rider NMB.[5]

The first billing item, PJM Billing Line Item 1375 (Balancing Operating Reserves), involves costs for deviating from what the load-serving entity schedules into PJM and what the load-serving entity's customers need.[6] Load-serving entities can influence the Balancing Operating Reserve costs, and therefore, RESA considers Line Item 1375 to be a classic market-based cost. As a result, including Line Item 1375 in Rider NMB would allow load-serving entities like FirstEnergy Solutions Corp. to avoid their own market-based costs and make all FirstEnergy ratepayers directly responsible for it.

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[4] Opinion and Order at 19.

[5] RESA Ex. 2 (Bennett Direct Testimony) at 12; Exelon Ex. 1 (Campbell Direct Testimony) at 27-29.

[6] RESA Ex. 2 (Bennett Direct Testimony) at 12.

The second billing line-item, PJM Billing Line Item 1218 (Planning Period Congestion Uplift), involves payments from one set of Financial Transmission Rights ("FTR") holders to other FTR holders and involves the economic decision to enter into an FTR position at PJM. The Planning Period Congestion Uplift charge is the "participant's share of the allocated costs of providing the Uplift credits" and "charges are allocated to FTR holders in proportion to their net positive total FTR Target Credits for the planning year."[7] The related Planning Period Congestion Uplift credit is a "make-whole" congestion credit to FTR holders to satisfy any previously unfulfilled FTR Target Credits that remain at the end of the planning year. There are alternative options that mitigate the risk of underfunding/make-whole payments to FTR holders. Therefore, RESA argued that this market-based cost should remain with the market participant, instead of being shifted to the utility. There is no evidence that billing of these, or any other PJM line items, should be changed from the current Rider NMB construct.

3. *FirstEnergy proposed Rider NMB Pilot is an opt-out program from Rider NMB that impacts suppliers.*

FirstEnergy's Rider NMB Opt-Out Pilot is a program for certain large customers to obtain non-market based transmission services outside of Rider NMB.[8] The Rider NMB Opt-Out Pilot is available only to a select group of customers: (a) members of IEU, (b) members of Ohio Energy Group, (c) Nucor Steel Marion, Inc., (d) Material Sciences Corporation and (e) five General Service-Transmission ("Rate GT") customers. Participating customers will be able to obtain all transmission and ancillary services from their respective supplier.[9] This change will require suppliers to set up new subaccounts at PJM to accommodate the Pilot program, subaccounts that FirstEnergy will not have access to regarding the charges between the supplier and the customer.

[7] Exelon Ex. 1 (Campbell Direct Testimony) at 28-29.

[8] Opinion and Order at 94.

[9] FirstEnergy Ex. 3 (Supplemental Stipulation and Recommendation) at 3.

Additionally, customer contracts will need to be adjusted to accommodate the changes for billing and risk that CRES providers would take on under the new pilot program.

Arguments involving the Rider NMB Opt-Out Pilot are pending a Commission ruling on rehearing and are deserving of a ruling before the parties and customers implement changes (system changes, PJM subaccounts, etc.) and administer the customers differently. On a practical level, FirstEnergy has not presented a tariff sheet for this Pilot. FirstEnergy filed proposed sheets on May 13, 2016, but none of those sheets involves the Rider NMB Opt-Out Pilot. This offering should not be permitted to become effective without advanced review and approval of a tariff sheet that details the eligibility, rules and regulations associated with the Pilot. This Pilot is expected to be in effect for a lengthy period of time (eight years) and warrants a corresponding **pre-approved** tariff. FirstEnergy presented a proposed tariff sheet for the other experimental offering contained in the Stipulation and Recommendation in this proceeding – the High Load Factor Experimental Time-of-Use program[10] – but failed to do so for the Rider NMB Opt-Out Pilot.

B. The Commission Should Stay Implementation of FirstEnergy's Changes to Rider NMB and the Rider NMB Opt-Out Pilot.

The Commission has adopted a four-factor test that has been deemed appropriate by courts when determining whether to stay an administrative order pending judicial review.[11] Those factors are:[12]

- Whether there has been a strong showing that the parties seeking the stay is likely to prevail on the merits;

[10] *See, e.g.*, FirstEnergy's proposed Ohio Edison Company Tariff, P.U.C.O. No. 11 at Attachment 2, Sheet 130 (filed May 13, 2016).

[11] *In re Northeast Ohio Public Energy, Council, v. Ohio Edison Company and The Cleveland Electric Illuminating Company*, Case No. 09-423-EL-CSS, Entry at ¶6 (July 8, 2009) ("the Commission has adopted a four-factor test to determine whether a stay should be granted in a Commission proceeding"); *In re Investigation into Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at ¶9 (February 20, 2003).

[12] *Intrastate Access, supra.*

- Whether the parties seeking the stay has shown that it would suffer irreparable harm absent the stay;

- Whether the stay would cause substantial harm to other parties; and

- Where lies the public interest.

A stay is warranted when applying these four factors to the Rider NMB issues raised by RESA through this motion.

1. RESA is likely to prevail on its arguments pending before the Commission.

RESA is likely to prevail on its arguments as to the PJM Billing Line Items that are proposed to be included in Rider NMB as well as the Rider NMB Opt-Out Pilot. First, the Commission, at pages 73 and 74 of its March 31 decision, described the proposed changes for Rider NMB and the other parties' positions but did not make an express ruling on the arguments. This was an error by the Commission. *In re Application of Columbus S. Power Co.*, Slip Opinion No. 2016-Ohio-1608 at ¶66 (remanding an issue after finding that the Commission "never offered a response to AEP's claims and thus failed to explain its decision. This was error.")

The Commission can correct that mistake by addressing the arguments raised on rehearing. Until then, however, suppliers should not be required to implement the new changes to Rider NMB. Moreover, as to the merits, there is strong evidence explaining why PJM Billing Line Item 1375 (Balancing Operating Reserve) and Billing Line Item 1218 (Planning Period Congestion Uplift), in particular, should **not** be billed by FirstEnergy through Rider NMB. These are not non-market-based costs and should not be included in Rider NMB.

As to the Rider NMB Opt-Out Pilot, RESA has raised arguments on rehearing that highlight the inadequacies of the Pilot program versus any benefits. Moreover, implementing an eight-year Pilot program while rehearing is pending and without a tariff sheet for guidance creates the risk that suppliers and customers will be impacted by a start and stop of that program. RESA's members and other suppliers deserve a ruling on rehearing prior to the Pilot's implementation.

There is another reason why RESA's arguments are likely to prevail. FirstEnergy itself as recently as Monday, May 23, 2016, indicated that it is still considering withdrawing its ESP IV in its entirety.[13] This will likely happen given the jurisdictional arguments that have been raised on FirstEnergy's application for rehearing and the fact that the Federal Energy Regulatory Commission has effectively ended FirstEnergy's proposed Rider RRS construct. If FirstEnergy withdraws its ESP IV – an event that is very likely to happen - RESA's arguments on both the Rider NMB Pilot and the proposed changes to Rider NMB will be successful by default.

There is no reason to rush to implement PJM account changes, internal systems and adjust customer contracts for changes and a program that FirstEnergy will eventually pull.

2. *RESA and the competitive market will suffer irreparable harm absent a stay on implementation.*

If a stay on implementation for these items is not granted, RESA's members and other suppliers would be required to incur significant expenses and to commit extensive time and resources for changes to Rider NMB and a Pilot that the Commission may subsequently reverse. As noted above, suppliers must adjust contracts, create new PJM subaccounts and make adjustments to internal systems for the changes to Rider NMB and to accommodate the Rider NMB Pilot Opt-Out. Resources must be committed on an on-going basis to implement and monitor these changes/programs. The commitment of resources and money to accommodate these changes/programs constitutes sufficient harm that warrants a stay, especially if FirstEnergy is going to withdraw its ESP IV.

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[13] *See* page 9 of FirstEnergy's opposition to the interlocutory appeal filed by OCC and NOAC (filed May 23, 2016).

Additionally, the addition of PJM Billing Line Items 1375 and 1218 will result in FirstEnergy being assigned the responsibility for **market-based** costs and then assessing those costs among all ratepayers (shopping and non-shopping) via the non-bypassable Rider NMB. This will create the opportunity for certain market participants to deflect costs. The appropriate assignment of responsibility for market-based and non-market-based costs needs to be retained so that the appropriate incentives exist in the market. These proposed changes to Rider NMB will upset that existing balance, harming the competitive market.

3. A stay on discovery will not substantially harm any other party.

FirstEnergy and perhaps other stipulation signatories may not like a stay on the implementation of Rider NMB and the Rider NMB Opt-Out Pilot, but a stay on implementation will not result in *substantial* harm to other parties. The two PJM Billing Line Items proposed for Rider NMB are currently being paid by suppliers – and not through Rider NMB. Thus, continuing this practice during the pendency of a stay will cause no harm. Likewise, the Rider NMB Opt-Out Pilot has not been implemented, and given that this proceeding has been pending for almost two-years, a delay on implementation until the Commission rules on rehearing will not harm any other parties. Also, FirstEnergy has raised arguments in its application for rehearing, confirming its right to withdraw its ESP IV. In light of those arguments, it is also reasonable to stay the implementation of both the changes to Rider NMB and the Rider NMB Opt-Out Pilot until the Commission has ruled on rehearing and it is clear that FirstEnergy's ESP IV will not be withdrawn.

Indeed, parties and customers would all benefit from a stay until the Commission reached its final determinations on rehearing because implementation activities will be avoided until if and when the Commission rules on RESA's application for rehearing. Note, RESA is not advocating for the Commission to delay its ruling on rehearing. Rather, RESA seeks a final Commission determination on these issues *before* their implementation begins. Given the customer impact of these aspects of the ESP IV, the parties will not be substantially harmed by a final Commission determination being reached prior to any resulting implementation.

4. A stay on discovery is in the public interest.

Granting a stay is in the public interest. First, the public interest is served so that RESA's members are not subject to needless time, expense and resources to prepare for changes that may very well not be part of the ESP IV. Second, a stay allows the Commission to fully evaluate the issues raised with Rider NMB and the Rider NMB Opt-Out Pilot prior to implementing these programs. Third and most importantly, it is in the public interest to allow the Commission sufficient time to consider the RESA's application for rehearing on the Rider NMB changes and the Rider NMB Opt-Out Pilot to avoid impacts on customers – that would be doubled if the Commission rules in RESA's favor through rehearing. A stay on implementation is in the public interest and should be granted.

C. An Expedited Ruling on this Motion to Stay Implementation is Just and Reasonable.

An expedited ruling on this motion is necessary to save parties the time and expense of preparing and implementing Rider NMB and the Rider NMB Opt-Out Pilot. Without an expedited ruling on this motion for a stay of implementation, RESA members and retail customers will be compelled to undertake numerous activities for these aspects of the ESP IV when the Commission has not fully evaluated them and there is a risk that FirstEnergy will not implement the proposals. This places RESA and the others in an unjust and unreasonable position that can be easily be remedied by granting the motion to stay.

RESA cannot certify that all parties do not object to the issuance of an immediate ruling.

III. CONCLUSION

For all of the foregoing reasons, RESA requests that the Commission issue an expedited ruling and impose a stay on the implementation of the changes to Rider NMB and the implementation of the Rider NMB Opt-Out Pilot in this proceeding until the Commission rules on the related grounds for rehearing and, if applicable, reviews and approves a tariff sheet for the pilot program.

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CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned certifies that a courtesy copy of the foregoing document is also being served (via electronic mail) on the 25th day of May 2016 upon all persons/entities listed below.

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