BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric 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**

OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY'S MEMORANDUM CONTRA RETAIL ENERGY SUPPLY ASSOCIATION'S MOTION TO STAY THE IMPLEMENTATION OF CERTAIN CHANGES TO RIDER NMB AND THE IMPLEMENTATION OF THE RIDER NMB OPT-OUT PILOT AND MOTION FOR AN EXPEDITED RULING

I. INTRODUCTION

The Retail Energy Supply Association's ("RESA") Motion to Stay (the "Motion") attempts to rehash issues the Commission has already decided. By this Motion, RESA seeks to improperly bypass the rehearing process outlined in R.C. 4903.10. Further, RESA cannot demonstrate that it is likely to prevail on its arguments pending before the Commission. For these reasons, the Motion should be denied.

II. BACKGROUND

The Commission's March 31, 2016 Opinion and Order in this proceeding ("Order") approved the Companies' request to modify existing Rider NMB[1] to include certain additional non-market-based PJM billing line-items. The Companies demonstrated that modifying the

[1] 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 the Companies by the Federal Energy Regulatory Commission or PJM Interconnection, LLC. Order, p. 19 n.7.

existing Rider NMB will lower costs associated with the charges. By having the Companies, rather than SSO suppliers and CRES providers, pay these items, the risk premium added by SSO suppliers and CRES providers will be eliminated.[2] In the Motion, RESA reiterates the unsubstantiated claim that two specific billing line-items to Rider NMB – *i.e.*, PJM Billing Line Item 1375 (Balancing Operating Reserve) and PJM Billing Line Item 1218 (Planning Period Congestion Uplift) – are market-based costs and, as such, should not be billed by the Companies through Rider NMB.[3] The record is otherwise. Mr. Stein showed that charges in these line items were not marketable, controllable or predictable.[4] In fact, witnesses for intervenors – including RESA's own witness – agreed.[5]

The Order also approved the Rider NMB Pilot Program, where the Companies will study the administrative and other costs of allowing customers the option to have their CRES providers pay Rider NMB charges. The Companies will also study whether such a program would result in benefits to both participating and nonparticipating customers.[6] RESA surmises that the Commission ought to stay the implementation of the Rider NMB Opt-Out Pilot for the purpose of conducting an "advanced review and approval of a tariff sheet that details the eligibility, rules and regulations associated with the Pilot."[7]

[2] Order, p. 73.

[3] RESA Mem. In Support of Motion to Stay, pp. 5-6, 8.

[4] *See* Hearing Tr. Vol. V, pp. 941-943; 946-947; 948-949 (Stein Cross).

[5] *See* Hearing Tr. Vol. XXVI, pp. 5255-56 (Campbell Cross); pp. 5346-5347 (Bennett Cross).

[6] Order, pp. 73, 94, 112.

[7] RESA Mem. In Support of Motion to Stay, pp. 6-7.

III. RESA'S MOTION MUST BE DENIED BECAUSE RESA IS ATTEMPTING TO IMPROPERLY CIRCUMVENT THE STATUTORY REHEARING PROCESS.

The procedure for the rehearing process is plainly set forth in R.C. 4903.10. After the Commission enters an order, R.C. 4903.10 affords any party the opportunity to apply for rehearing with respect to any matters determined in the proceeding, so long as the application for rehearing is filed within thirty days after the entry of the order. R.C. 4903.10 provides a clear procedural framework for any party to the proceeding that seeks to reverse, vacate, or modify an order on the grounds that it is unreasonable or unlawful.

Here, the Commission issued its Order on March 31, 2016. On April 29, 2016, consistent with R.C. 4903.10, RESA filed its Application for Rehearing which contested the Order's approval of the revisions to Rider NMB and the Rider NMB Pilot Program.[8] On May 12, 2016, the Companies timely filed their Memorandum Contra Applications for Rehearing. On May 25, 2016, less than two weeks later, RESA filed its Motion while the applications for rehearing are still pending. In the Motion, RESA attempts to re-litigate numerous arguments that the Commission has already thoroughly considered and evaluated in prior briefing and explicitly addressed in its Order. RESA's Motion also rehashes several arguments advanced in its Application for Rehearing.

RESA now improperly seeks a second bite at the apple by filing its Motion during the pendency of the rehearing process. No new evidence or new facts have been developed since RESA filed its Application for Rehearing less than one month ago. Thus, there is no basis upon which RESA can file the Motion while the rehearing process remains ongoing. Simply put, nothing has changed in the last month that would justify the relief RESA is now requesting.

[8] RESA App. for Rehearing, pp. 93-95, 96-102.

RESA is simply unhappy with the Order. That is not grounds for staying any portion of the Order. The Commission should deny the Motion as improper while it considers and evaluates the parties' respective arguments on rehearing.

IV. RESA'S MOTION MUST BE DENIED BECAUSE RESA CANNOT SHOW THAT IT IS LIKELY TO PREVAIL ON ITS ARGUMENTS PENDING BEFORE THE COMMISSION.

RESA claims that a stay is warranted under the circumstances because, among other requirements to obtain a stay, RESA has made a "strong showing" that it is likely to prevail on its arguments pending before the Commission.[9] RESA's claim that it is likely to prevail on its arguments is unavailing.

As an initial matter, RESA simply regurgitates the unfounded assertion that the Commission "did not make an express ruling on the [proposed changes for Rider NMB].[10] RESA is wrong. The Order cited to record evidence, which included the Companies' demonstration that modifying Rider NMB will lower costs.[11]

Next, RESA claims that it will prevail on the merits when explaining why certain PJM billing line-items (*i.e.,* Line Items 1375 and 1218) should not be billed by the Companies through Rider NMB.[12] RESA argues that Line Items 1375 and 1218 are "market-based and thus should not be included in Rider NMB.[13] RESA's unsubstantiated claim flatly contradicts the ample evidence in the record. As explained by the Companies in their Initial and Reply Briefs,[14]

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[9] RESA Mem. In Support of Motion to Stay, pp. 7-8.

[10] RESA Mem. In Support of Motion to Stay, p. 8.

[11] Order, pp. 73-75, 94 (finding that Rider NMB will "provide better price signals to industrial customers and promote job retention and economic development in this region.")

[12] RESA Mem. In Support of Motion to Stay, p. 8.

[13] RESA Mem. In Support of Motion to Stay, p. 5.

[14] Companies' Initial Post Hearing Brief, pp. 99-102; Companies' Post Hearing Reply Brief, pp. 244-247.

Company witness Stein testified that the Companies used four factors to determine whether a PJM charge is non-market based and should be included in Rider NMB instead of being billed to the CRES provider or CBP supplier: (1) marketability, whether a market (such as an intercontinental exchange or a Chicago mercantile exchange or any other market) exists to buy or sell that explicit product or service; (2) controllability, whether there is something at PJM to either elect or select in their various systems; (3) predictability, whether there is a historical level or trend of charge that can be used to predict the future amount of that charge; and (4) transferability, whether a load serving entity has the ability to transfer the charge to the Companies.[15]

Mr. Stein also demonstrated that each of the additional line-items proposed for inclusion in Rider NMB met those criteria.[16] For example, the Planning Period Congestion Uplift charges (*i.e.*, Line Item 1218) meet all of the criteria for *inclusion* in Rider NMB, *i.e.*, they are not marketable, controllable, predictable, or transferable.[17] In fact, Exelon witness Campbell specifically agreed that they are neither controllable nor predictable.[18]

Similarly, Balancing Operating Reserves charges are neither marketable, controllable, nor predictable.[19] These include charges arising from out-of-merit dispatch necessary to maintain reliability of the grid.[20] When such dispatch may occur, which generators will be asked to dispatch these units and what these generators' costs may be are all unknowable – much less,

[15] Hearing Tr. Vol. V, pp. 941-42.

[16] *See* Hearing Tr. Vol. V, pp. 942-943, 946-947, 948-949.

[17] Hearing Tr. Vol. V, pp. 942-43 (Stein Cross).

[18] Hearing Tr. Vol. XXVI, pp. 5255-56. *See* Company Ex. 107, Customer Guide to PJM Billing.

[19] Hearing Tr. Vol. V, pp. 946-47, 948-49 (Stein Cross).

[20] *See* Hearing Tr. Vol. V, pp. 948-949 (Stein Cross).

marketable, controllable or predictable.[21] RESA witness Bennett agreed that the charges included in Balancing Operating Reserves can be volatile and that CRES providers cannot hedge against at least some of the charges in Balancing Operating Reserves.[22] Notably, RESA fails to cite to any record evidence for its proposition that "including Line Item 1375 in Rider NMB would allow the load-serving entities . . . to avoid their own market-based costs and make all FirstEnergy ratepayers directly responsible for it."[23] These unsupported propositions are not record evidence, and the Commission properly disregarded them in the Order.

RESA's latest effort to characterize non-market based costs as market-based costs should once again fall on deaf ears. The Commission already considered and evaluated the ample record evidence demonstrating that PJM billing Line Items 1375 and 1218 are, in fact, non-market based costs that warrant inclusion in Rider NMB. Accordingly, RESA cannot make a strong showing (let alone any showing) that it is likely to prevail on its arguments pending before the Commission.[24] The Commission should deny its Motion to Stay.

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[21] *See* Hearing Tr. Vol. V, pp. 946-947 (Stein Cross).

[22] Hearing Tr. Vol. XXVI, pp. 5346-5347.

[23] RESA Mem. In Support of Motion to Stay, p. 5.

[24] *See, e.g., In the Matter of the Application of The Cincinnati Gas & Electric Company to Modify its Nonresidential Generation Rates to Provide for Market-Based Standard Service Offer Pricing and to Establish an Alternative Competitive-Bid Service Rate Option Subsequent to the Market Development Period*, Case Nos. 03-93-EL-ATA, *et al.*, 2008 Ohio PUC LEXIS 367, *1 (June 11, 2008) (denying motion to stay because the "Commission ha[d] already considered the merits" of movant's arguments "through evidence collected at multiple hearings"); *Re Columbia Gas of Ohio, Inc.*, Case No. 07-478-GA-UNC, Entry on Rehearing at ¶ 24 (June 4, 2008) (denying motion to stay in part because the Commission determined there was "little likelihood of success on the merits"); *In re Investigation into Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing at ¶ 9 (February 20, 2003) (denying motion to stay where movant failed to show, among other factors, that there was a strong showing that movant was likely to prevail on the merits).

V. THE BALANCE OF INTERESTS MILITATES AGAINST A STAY.

Given the overwhelming record evidence and the clear and well-reasoned Commission decision against its position, the fact that RESA will not prevail on the merits should be dispositive of the Motion. But a balancing of the interests here also militates against staying the modifications of Rider NMB or the onset of the NMB opt-out pilot program.

Apart from its "merits" arguments, RESA offers little justification for a stay. Other than its (erroneous and utterly unsupported) view that market participants would somehow improperly benefit by having the Companies pay for PJM Billing Line Items 1375 and 1218, RESA really never addresses why changing Rider NMB is a problem. RESA points to no evidence to contradict the evidence and the Commission's finding that modifying Rider NMB as the Companies propose will lower costs to be recovered from customers.

In fact, a stay would actually be disruptive to the market to the extent NMB pilot participants have procured power plus all transmission services from CRES for June 1st power flow. If there is a stay on the pilot program those NMB pilot participants may end up actually paying twice for the non-market based services. Once contractually through their CRES and again through Rider NMB.

As for the NMB opt-out pilot program, RESA's argument is mere make-weight. Apparently, RESA complains that if the pilot program goes through, its members will have to make adjustments to their contracts and internal systems. But RESA overlooks that the program is voluntary for the customers and for the CRES providers. There is nothing that requires any RESA member to do anything.

RESA also seems confused about what it requests. Towards the end of its memorandum in support, it argues that a stay "of discovery" is in the public interest.[25] Of course, RESA never requested such relief. RESA can't show and hasn't shown that staying the effective date of the modifications of Rider NMB and of the pilot program are in the public interest. Indeed, getting these programs up and running – and saving customers money in the process – is the paramount interest here.

VI. CONCLUSION

For the foregoing reasons, RESA's Motion to Stay and Motion for an Expedited Ruling should be denied.

[25] RESA Mem. In Support of Motion to Stay, p. 11.

Respectfully submitted,

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I certify that this Memorandum Contra was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on this 1st day of June, 2016. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties. Further, a courtesy copy has been served upon parties via electronic mail.

/s/ N. Trevor Alexander
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Summary: Memorandum Contra Retail Energy Supply Association's Motion To Stay The Implementation Of Certain Changes To Rider NMB And The Implementation Of The Rider NMB Opt-Out Pilot And Motion For An Expedited Ruling electronically filed by Mr. Nathaniel Trevor Alexander on behalf of Ohio Edison Company and The Toledo Edison Company and The Cleveland Illuminating Company