

BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of the Ohio)	
Edison Company, The Cleveland Electric)	Case No. 14-1297-EL-SSO
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 a Electric)	
Security Plan)	

NOBLE AMERICAS ENERGY SOLUTIONS LLC'S
POST-HEARING REPLY BRIEF

Respectfully submitted,

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I. INTRODUCTION

Noble Americas Energy Solutions LLC (“Noble Solutions”) is a certified provider of competitive retail electric service (“CRES”) in Ohio under PUCO Certificate No. 01-052E(8) that focuses its marketing efforts on industrial and commercial consumers of electricity. Since nearly the initiation of these proceedings, Noble Solutions has participated in them as a member of The Retail Energy Supply Association (“RESA”) an industry group which moved to intervene in this matter on October 1, 2014, less than two months after this case was first filed.

Recently, however, during the course of negotiations surrounding the Joint Stipulation and Recommendation filed December 1, 2015, in these proceedings (the “Third Supplemental Stipulation,” which incorporates the terms of the December 22, 2014 Stipulation, the May 28, 2015 Supplemental Stipulation, and the June 4, 2015 Second Supplemental Stipulation; collectively, “the Stipulation”) and the Joint Stipulation and Recommendation filed December 14, 2015, in case numbers 14-1693 and 14-1694, initiated by the Ohio operating companies of American Electric Power (collectively, “AEP Ohio”), Noble Solutions’ interests unforeseeably diverged from those of certain members of RESA. When these conflicts arose, Noble Solutions immediately sought separate intervention in these proceedings pursuant to Ohio Revised Code (“R.C.”) Section 4903.221 and Ohio Admin. Code Rule 4901-1-11(F), invoking the exception for extraordinary circumstances and promising to accept the record in this case as it had developed to that point. By this commitment, Noble Solutions assured this Commission and the parties to these proceedings that its late intervention could not be unduly prejudicial to any other party. Noble Solutions is thus unable to introduce testimony of its own and strictly limited to addressing only the evidence introduced by others, the legal arguments raised by those others, and the opinions and positions expressed by said others thereon.

II. STANDARDS OF REVIEW

First, this case involves the application of the Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, the “First Energy Operating Companies,” or “FE”) to this Commission for authority, pursuant to R.C. Section 4928.143, to provide a standard service offer in the form of an electric security plan (“ESP”). Consequently, the statutorily mandated test articulated within R.C. Section 4928.143, known as the “ESP v. MRO” test, requires FE to demonstrate that its proposed ESP, including all terms and conditions thereunder (FE’s “Proposed ESP IV”), is more favorable, *in the aggregate*, than the expected results of a typical market rate offer plan (“MRO”), which, of course, offers service at current market rates.¹

Second, because this Commission has been asked to endorse what is at least nominally a “settlement”—an outcome that a mere handful of the many parties to this case supports—outlined in the Stipulation, the Commission must also consider the three-pronged “just and reasonable test” approved by the Ohio Supreme Court to determine whether a settlement submitted to the Commission for consideration is just and reasonable result in light of the evidence:

1. Is the settlement a product of serious bargaining among capable, knowledgeable parties, where there is diversity of interests among the stipulating parties?

¹ 4928.143 (C) (1) provides, in relevant part:

The burden of proof in the proceeding shall be on the electric distribution utility. . . . Subject to division (D) of this section, the commission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code. Additionally, if the commission so approves an application that contains a surcharge under division (B)(2)(b) or (c) of this section, the commission shall ensure that the benefits derived for any purpose for which the surcharge is established are reserved and made available to those that bear the surcharge. Otherwise, the commission by order shall disapprove the application.

2. Does the settlement package violate any important regulatory principle or practice?
3. Does the settlement, as a package, benefit ratepayers and the public interest?²

Third, although the jurisdiction and decisions of this Commission are targeted and limited to the intrastate, retail market, they must, of course, never undermine policies promulgated by the Federal Energy Regulatory Commission (FERC), which has exclusive jurisdiction over the interstate, wholesale market. Therefore, this Commission must consider the potential impact of Proposed ESP IV and the Stipulation on wholesale capacity rates, and yield to principles of federal preemption.

Finally, because FE's proposed Retail Rate Stability Rider ("Rider RRS") includes an affiliate purchase power agreement ("PPA") in which FE seeks to recover all resulting costs, including a 10.38% return on equity, from ratepayers on a non-bypassable basis, this Commission must, in addition, evaluate a number of specific factors that it previously identified in a prior case involving AEP Ohio:

1. The financial need of the generating plants subject to the PPA;
2. The necessity of the identified generating facilities in light of future reliability concerns, including supply diversity;
3. A description of how the generating plants are compliant with all pertinent environmental regulations and the plan for compliance with pending environmental regulations; and
4. The impact that a closure of the generating plants would have on electricity prices and the resulting effect on economic development within the state.³

III. ARGUMENT

² *Consumers' Counsel v. Pub. Util. Comm.*, 64 Ohio St.3d 123, 126 (1992).

³ *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.142 in the Form of an Electric Security Plan*, Case No. 12-2385-EL-SSO (hereafter, AEP's ESP III), at 25.

A. FE's Proposed ESP IV Is Less Favorable in the Aggregate Than the Expected Results of an MRO and Therefore Must Be Rejected Pursuant to R.C. Section 4928.143, Regardless of the Stipulation.

Under R.C. Section 4928.143, an ESP must be rejected if the expected results of that ESP are less favorable, in the aggregate, than those of an MRO. The signature of certain parties to the Stipulation does not automatically satisfy this requirement. Agreement by a few parties who stand to benefit under the Stipulation cannot be reasonably construed to demonstrate conclusively that Proposed ESP IV would produce a more favorable result *for customers*. Indeed, the evidence in this case amply demonstrates that, although the Proposed ESP IV would be more favorable than an MRO for FE, its prospective benefits for customers who would bear the risks associated with the economically challenged generation assets of FE's generation affiliate, First Energy Solutions, Inc. ("FES"), remain unclear at best.

At the heart of Rider RRS is a blatant and unequivocal fact: FE does not want its shareholders to bear the costs and risks or want it to be held accountable and responsible for its own business decisions associated with FE's Davis-Besse nuclear generation plant, its Sammis coal-fired generation plant, or its interests in two coal-fired Ohio Valley Electric Corp. generation plants. Instead, FE asks this Commission not only to shift its own corporate risk and burdens to its captive Ohio distribution customers but also to require those customers to *guarantee* FES a 10.38% return on equity for each year that FE's Proposed ESP IV would be in effect.

FE and the proponents of the Stipulation nonetheless maintain that, as a package, Proposed ESP IV benefits ratepayers and the public interest, but the evidence belies that assertion. FE itself admits⁴ that, in its own best-case scenario, its customers would be required to

⁴ See Worksheet filed with the December 1, 2015, Fifth Supplemental Testimony of Eileen M. Mikkelsen.

absorb approximately \$363 million in losses over the first three years of its Proposed ESP IV, even after those losses are fully adjusted for the \$50 million in nominal benefits that FE purports to provide but that are unrelated to the core of its Proposed ESP IV.

FE justifies its convenient view of the economics of its ESP IV's projections, however, by using outdated, and greatly inflated, forecasts of future natural gas prices and PJM electricity market prices.⁵ Relying upon much more current – and much more credible – forecasts of future gas and energy prices, those who take a reasonably critical view of FE's ESP proposal instead project that the actual net losses to Ohio consumers from FE's ESP proposal will more likely run somewhere between \$3 Billion and \$4 Billion over the eight year life of FE's proposal.⁶ Moreover the scenarios provided by FE's witness Juda Rose under which customers would receive credits are all predicated on the assumption that natural gas prices are extremely volatile and that volatility, in turn, causes energy prices to be volatile. Moreover, Mr. Rose maintains that this volatility will increase.⁷ Mr. Rose continues by opining that this volatility will lead to even higher gas and energy prices, for the foreseeable future. In fact, he projects that the fastest growth in prices would occur in the first five years of his forecast.⁸

Mr. Rose's assumptions are based on data from 2013, which have not been updated to reflect current market realities. First, gas and energy prices did not increase through 2014 and 2015, as projected by Mr. Rose. In contrast, based upon the expert testimony of economist Dr. Kalt, these outdated price forecasts mean that the Companies' calculations understate the harms to ratepayers in the early years, and overestimate the claimed positive impacts on ratepayers in

⁵ See the Report of the Institute for Energy Economics and Financial Analysis, filed Feb. 16 2016, at 18-19. See also Brief of the Sierra Club, at 18-30, for a detailed discussion of the problems with FE's forecasts.

⁶ *Id.*, at 2. See also Brief of the Ohio Consumers' Counsel/NOPEC and Others, at pg. 52 (predicting "\$3.2 Billion loss to rate payers.") And see, P3/EPSCA Ex. 12, Kalt Second Suppl., at 17 (the confidential version of Kalt's Second Supplemental Testimony is admitted as P3/EPSCA Ex. 13c); OCC/NOPEC Ex. 9, Wilson Second Suppl. at 12 (the confidential version of Wilson's Second Supplemental Direct Testimony is admitted as OCC/NOPEC Ex. 10c).

⁷ See Direct Testimony of Judah Rose, at 21-33.

⁸ *Id.*, at 36.

the later years.⁹ As P3/EPA demonstrates, using NYMEX natural gas future prices in the first three years and then the U.S. Department of Energy's EIA forecast for price increases for the rest of the term suggests a net present value loss of \$793 million to FE's rate payers.¹⁰

Furthermore, by failing to demand that Mr. Rose update his forecasts, FE is able to ignore the sharp declines in market prices of spot and future gas since it filed its Proposed ESP. That collapse in pricing also affects forecasts of future prices, of course.

Therefore, the circumstances under which customers would receive a credit would also cost them far more for natural gas in the first place. Today, if customers want to protect themselves against rising natural gas prices, they can do so without relying on self-dealing and an expensive transaction negotiated at less than arm's length between FE and its affiliate FES. Indeed, both the Ohio Companies Council ("OCC") and the Northeast Ohio Energy Council have even concluded that the FE "subsidy" would cost consumers approximately \$3.9 billion.

B. Even if FE's Proposed ESP IV Were Found to Be More Favorable in the Aggregate Than an MRO, the Stipulation Would Still Fail the Ohio Supreme Court's "Just and Reasonable" Test.

The Stipulation fails all three prongs of the Ohio Supreme Court's "just and reasonable" test. Relatedly, Rider NMB should be eliminated, altogether.

1. The Settlement Is Not A Product of Serious Bargaining Among Capable Knowledgeable Parties Representing a Diversity of Interests.

The Stipulation may represent serious bargaining among capable, knowledgeable parties. It is incorrect, however, to believe that those parties represent a diversity of interests. Those parties for the most part represent their own interests, alone.

In fact, Noble Solutions' direct intervention in this proceeding was prompted by the decision of certain members of its industry group to enter into the Stipulation in this case and in

⁹ Brief of Retail Electric Supply Association, at 36.

¹⁰ RESA Brief, at 39. See also, PJM Power Providers, and Energy Power Suppliers Assoc., Exhibit 12, at 21-22.

AEP Ohio's similar plan seeking a PPA that serves as a blank check against the account of Ohio ratepayers.

In this specific case, Interstate Gas Supply, Inc. ("IGS") acknowledges that it finds competition to be well-developed in the industrial sector and even admits that residential switching has been a "success" in FE's service territory.¹¹ It posits, however, that despite the success of "opt out" governmental aggregation in FE territories, residential competition is somehow deficient because "affirmative" enrollment by residential customers has lagged its hopes.¹² In return for IGS's support of a "remedy" this "deficiency", IGS and FE concocted a scheme whereby, in the near future, they will jointly design a program that is 1) revenue neutral to FE, and 2) provides an incentive to residential shoppers through a yet to be defined "retail competition incentive rider" (Rider ICR).

The Stipulation failed to address any of the fundamental criticisms IGS raised to the PPA scheme. Instead, the Stipulation simply became a vehicle for the award of IGS' withdrawal of its open hostility to the PPA in return for an unrelated concession benefitting IGS. It is significant that the concession will likely benefit the marketing schemes of IGS – the *only* CRES promised rights to participate in designing Rider ICR, with no regard to those of other CRES providers. In return, FE rate payers not only absorb charges associated with the PPA, but as an yet undetermined charge imposed on SSO customers that fail to agree that switching to IGS (or – perhaps – a CRES that chooses to mimic IGS' marketing) constitutes a sufficient *quid pro quo* for the PPA "benefits". This scheme is nothing but a discriminatory and predatory agreement by the utility and a single CRES provider to artificially increase the difference between default SSO service and CRES provider service. This scheme operates for the benefit of exactly two

¹¹ IGS Brief, at 6.

¹² IGS Brief, at 3-4.

parties – the utility, and IGS – without regard to the detriment to customers generally, to other providers, or to any non-signatory parties. That sort of “bargain” does not reflect a general public interest.

2. The Stipulation Violates Important Regulatory Principles and Does Not Benefit Ratepayers or the Public Interest

The fundamental purpose of Amended Senate Bill 3, as later amended by Substitute Senate Bill 221, was to create and encourage competition in the retail electric service market.¹³ It is therefore a fundamental regulatory principle that the operational risks of a utility’s affiliated, unregulated business, including costs, are to be borne by said business unit. It is entirely inappropriate to shift those risks and costs to the captive ratepayers of an affiliated but regulated business.¹⁴

Nonetheless, such a shift of costs and generation-related risks is precisely the goal of FE’s Proposed ESP IV and precisely what the Stipulation permits. The Stipulation requires Ohio ratepayers to shoulder the enormous risk of certain FES generation plants that were intentionally selected specifically because they are economically challenged and yet in addition guarantee that FES will receive a profit on those same unprofitable plants. The Stipulation thereby directly violates the unambiguous regulatory policy against non-bypassable ratepayer subsidization of FES’s unregulated business. The Stipulation is contrary to this fundamental regulatory principle. Equally significantly, it directly violates R.C. Section 4928.02(H) and is therefore unlawful.

As Noble Solutions sees it, FE’s Proposed ESP IV would effectively provide two subsidies. The first subsidy would be created by FES’s ability to predatorily select which plants

¹³ See, e.g., Ohio Rev. Code § 4928.02(H) (stating that it is the policy of Ohio to “[e]nsure effective competition in the provision of retail electric service by avoiding anticompetitive subsidies flowing from a noncompetitive retail electric service to a competitive retail electric service . . . and vice versa. . . .”)

¹⁴ See *id.*; see also Ohio Rev. Code § 4928.17 (discussing the requirement of corporate separation between regulated and unregulated affiliates).

in its generation fleet would be subject to the PPA. In a competitive market, generation owners bear all of the risks of all of their generation plants in total, which appropriately include both profitable and unprofitable plants; to shift the risks associated with FES's unprofitable plants to ratepayers would enable FES to retain only its most profitable generation plants, resulting in a subsidy from ratepayers to FES. The second subsidy would be the guaranteed 10.38% return on equity for those plants. Ultimately, FE's Proposed ESP IV is an obvious attempt to undo the benefits of competition created when Ohio opened the retail market.¹⁵

3. Rider NMB Should Be Eliminated Altogether.

Noble Solutions opposes a utility billing for any non-default service LSE's PJM wholesale costs. In Ohio, Noble Solutions opposes the expansion of FE's Non-Market-Based Rider ("Rider NMB") to include billing item 1375 from PJM and opposes FE's proposal to make item 1375 bypassable on a limited basis. Socializing CRES providers wholesale market costs removes the ability of CRES providers to individually manage such costs for their customers. This inappropriately shifts associated risks to customers. In effect this removes one of the fundamental tenets and benefits of retail competitive market.

Noble Solutions disputes the notion that some PJM charges are "non-market-based," whereas others are not. Such characterizations are made up, arbitrary, subjective, and based on nothing more than the willingness of CRES providers to understand and to either manage or not to manage risks associated with their individual customer load in the wholesale market.

Noble Solutions maintains that it is the role of CRES providers, *inter alia*, to manage these costs for their customers as part of their product and value offering to the retail market. If Rider NMB is permitted to continue and, as requested by FE, to expand to include item 1375, customers also could be subject to a different rate recovery design that FE would impose on the

¹⁵ See Amended Senate Bill 3, as later amended by Substitute Senate Bill 221.

collection of the PJM account charges subject to Rider NMB. For instance, consider an account with a 1 coincident peak cost allocation, whereas the FE recovery of that account is on a demand basis. This changed cost allocation method deprives FE Ohio customers of the benefit of the FERC-approved PJM rate design.

FE purportedly designed Rider NMB to direct-bill PJM costs over which a load-serving entity has no control or influence. PJM item 1375, which FE proposes to collect through Rider NMB, collects operational balancing costs. As RESA's witness Mr. Stephen Bennett testified, however, operational balancing costs can be controlled, to a degree, by load-serving entities, whether CRES or utility. By making better forecasts, a savvy load-serving entity can reduce future imbalances and thus lower PJM operational balancing costs. The benefits of this approach *for the consumer* are real and already form a cornerstone of the *current* competitive retail electricity market in Ohio.

Making better forecasts, of course, requires devoting resources to improving the forecasting process to the benefit of the entire system. Simply passing through the imbalances discourages load-serving entities from making the investments necessary for better forecasting. In sum, placing PJM billing item 1375 or any PJM charge in a nonbypassable utility charge will materially interfere with Ohio retail customers choice, an LSE's Open Access Transmission Tariff ("OATT") right, and the ability to secure FERC Jurisdictional wholesale transmission services directly or through a load serving entity (CRES provider) under the terms set forth in the PJM OATT.

Noble Solutions maintains that, by insulating load-serving entities from responsibility for their individual wholesale costs through Rider NMB, Rider NMB actually discourages load-serving entities from seeking the means to manage those costs. The load-serving entities should

be encouraged to seek the means to manage the costs, and provide additional value to its customers through innovative products and services. Nonbypassable charges circumvent and ignore existing wholesale market structures and shift the risk to the customer and will deprive Ohio consumers of the benefits of competition.

Furthermore, FE's proposal to allow only certain customers to avoid Rider NMB altogether is unduly discriminatory.

C. The Stipulation Also Violates Important Federal Policy That Supports Competitive Retail Electric Competition and Creates Perverse Incentives to Encourage Market Abuse, Implicating The Fact That This Commission Does Not Have Jurisdiction to Approve FE's Requested PPA Rider.

The Stipulation also violates federal policy, as it plainly distorts the wholesale competitive energy markets through the FE ratepayers' subsidization of FES. The return on equity of 10.38% that the Stipulation provides to FES through the PPAs is a subsidy that then allows FES to under-price its competition in the wholesale market.¹⁶ This subsidy disincentivizes construction of new, more efficient generating facilities and creates an uneven playing field for current generation competitors.¹⁷ Even worse, this reduced competition among generators will eventually result in higher prices for ratepayers in the long term as wholesale suppliers are priced out of the market due to the subsidization provided by the PPA rider to one wholesale market participant – FES.

This Commission should carefully heed the warnings of the PJM Independent Market Monitor (the "IMM"). The IMM warns of problematic issues beyond merely shifting costs and risks from FE shareholders to captive rate paying customers. The PPA Rider has the perverse effect of *encouraging* FES to further distort PJM's capacity market auctions for its own additional benefit. First, the PPA Rider distorts the incentives to make competitive offers in the

¹⁶ See Independent Market Monitor for PJM's Brief, at 5–8; and OMAEG's Brief, at 24–25.

¹⁷ OMAEG Ex. 29, at 12–13 (Dr. Hill Direct Testimony).

PJM Capacity Market by encouraging FES to make offers below the competitive level in the PJM Capacity Market.¹⁸ More importantly, PJM's capacity market works, in part, by demanding transfer payments from those units that are committed to run during the capacity auction but then fail to run when called upon to other units that do satisfy their capacity commitments.¹⁹ FE's PPA Rider, however, requires ratepayers to pay any performance penalties imposed by PJM associated with the assets included in the PPA Rider. FES will have been declared immune from such penalties *by action of this Commission*.

Even worse, FES retains any revenues earned by other FES units that are not included in the PPA Rider, even if those revenues result from penalties paid by ratepayers on one of the PPA "assets."²⁰ On a fundamental level, the PPA Rider presents a separate asymmetrical allocation of risks and rewards in which ratepayers bear the economic risk of Capacity Performance penalties for capacity-providing units that fail to run when called upon but such generation, potentially including FES, that does run receives those penalty dollars. Thus, the Stipulation not only requires ratepayers to guarantee the profitability of FES' uneconomic plants, but also could result in ratepayers guaranteeing the profitability of FES' economic facilities that are not part of this proceeding. The conflict of interest is not merely obvious, it is completely inappropriate.

This Commission also cannot ignore the specter of federal pre-emption that so obviously surrounds the PPA/Rider RRS proposals. The jurisdiction of this Commission is strictly limited by the Ohio statutes which create it, and also by the Constitutions of the State of Ohio and of the United States. This Commission must, therefore, recognize federal preemption concerns when they arise.

¹⁸ See the February 16, 2016 *Brief of the IMM*, at 2–3.

¹⁹ See also Testimony of Stephen Bennett, at 3.

²⁰ *Id.*

This Commission should therefore carefully review recent decisions by the United States Courts of Appeals for the Third and Fourth Circuits that unambiguously held that state efforts to promote otherwise legitimate state interests through schemes almost identical to FE's Proposed ESP IV, (schemes in which state-approved wholesale purchase power agreements were to be subsidized through state-preapproved retail rate commitments) threaten to distort FERC's wholesale markets and are thus "field preempted" and unlawful. See *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014) and *PPL Energyplus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014).²¹

IV. CONCLUSION

In return for authority to impose on FE's captive ratepayers generation-related costs and risks that should belong to FES, FE offers only the remote possibility that those customers will receive an ill-defined benefit in the future. In this regard, Rider RRS as proposed by FE appears to be structured not as a valuable service provided in exchange for payment but as a mechanism for extracting extra revenue from customers to the detriment of Ohio's competitive retail market and their customers for the sole benefit of First Energy Corp. The objections of the IMM warrant special consideration, as does the alternative economic analysis performed by OCC and the Institute for Energy Economics and Financial Analysis. For the foregoing reasons, the Commission should reject the Stipulation.

²¹ The United States Supreme Court granted *certiorari* in these cases and heard oral arguments on February 24, 2016. See docket of the United States Supreme Court, *sub nom. Hughes et al. v. Talen Energy Marketing, et al.*, and *CPV Maryland LLC et al. v. Talen Energy Marketing, et al.* Cases No. 14-614, 14-623, 14-634 and 14-694. Industry accounts of those arguments strongly suggest that the Court appears inclined to affirm the decision of the appellate courts. See, e.g., <http://www.rtoinsider.com/supreme-court-cpv-md-22483/>.

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I hereby certify that true and accurate copies of the foregoing were served via electronic transmission upon the persons listed below this February 26, 2016

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