

**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 Establish a)	Case No. 23-301-EL-SSO
Standard Service Offer Pursuant to R.C.)	
4928.143 in the Form of an Electric Security)	
Plan)	

**MOTION OF CALPINE RETAIL HOLDINGS, LLC FOR LEAVE TO FILE
CORRECTED INITIAL BRIEF, *INSTANTER***

Counsel for Calpine Retail Holdings, LLC (Calpine) has just learned that the cover page of the Initial Brief filed on January 19, 2024 lists the wrong case caption and was filed in the wrong docket. To correct this error, Calpine respectfully requests leave to file the attached document titled “Initial Brief of Calpine Retail Holdings, LLC (Corrected).” This motion is permitted under Rules 4901-1-12 and 4901-1-13, and no party will be prejudiced by granting it.

Last Friday, January 19, 2024, Calpine filed and served a document intended as its Initial Brief in this proceeding, titled “Initial Brief of Calpine Retail Holdings, LLC.” Calpine’s counsel has learned that this document bears the caption of AEP Ohio’s pending electric security plan (ESP) proceeding, Case No. 23-0023-EL-SSO, and was filed and served accordingly. This was an obvious mistake, as the substantive portions of the document make clear. The document filed last Friday addresses the FirstEnergy Ohio utilities’ pending ESP, not AEP Ohio’s. The attached document corrects the case caption, reflects the correct service list, and bears today’s date, but is otherwise identical to the document filed last Friday.

Given the substantial overlap of the parties in the FirstEnergy and AEP proceedings, service of the brief last Friday to parties in the AEP proceeding gave many of these same parties

notice of Calpine's position in this proceeding. Calpine's brief addresses a narrow set of issues and reply briefs are not due until February 9, so any brief delay in service is not unduly prejudicial. With that said, Calpine has no objection to giving parties additional time to respond to Calpine's Initial Brief.

"[J]ustice is ultimately best served by an attitude of judicial tolerance toward minor errors, made in good faith, which pose no danger of prejudice to the opposing party or to the court's essential functions." *Nat'l Mut. Ins. Co. v. Papenhagen*, 30 Ohio St.3d 14, 16, 505 N.E.2d 980 (1987). This motion is offered in that spirit and should be granted accordingly. Undersigned counsel regrets any inconvenience caused by this error.

Dated: January 22, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed on January 22, 2024. Parties of record will receive notification of this filing through DIS. Courtesy copies have been served this date to the following:

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INITIAL BRIEF OF CALPINE RETAIL HOLDINGS, LLC (CORRECTED)

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I. INTRODUCTION

Exeter & Associates' recent audit of the Companies'¹ Rider NMB reveals a transmission cost recovery mechanism so fundamentally flawed and filled with subsidies that the auditors recommend "[e]liminat[ing] Rider NMB for all customers" and "[a]ssign[ing] PJM transmission charges (and all other PJM billing line items currently included in Rider NMB) to the retail suppliers of these customers."² While the scope of the Exeter audit was prescriptively narrow,³ the Commission should, at a minimum, adopt Exeter's recommendation and clarify with regards to the assignment language that all CRES suppliers must be directly billed all of their PJM billing lines items directly from PJM. This would remove the utility as a middleman and prevent continued subsidization of CRES providers.

Ohio's competitive retail electric market and R.C. 4928.05, R.C. 4928.143, and O.A.C.4901:1-36, provide for customer choice and require that transmission costs for all shopping customers should be the responsibility of those customers' CRES providers. Non-bypassable transmission cost recovery riders that remove the responsibility and associated costs and business risks of CRES providers to manage their own load and wholesale market operations and be directly billed for transmission costs by the regional transmission organization under FERC's jurisdiction is anticompetitive. It picks winners and losers, removes innovative products and services that they may or may not be able to compete with and harms Ohio's businesses, residences, and the market by discriminately subsidizing a small subset of the retail electric

¹ "Companies" refers collectively to Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company.

² OELC Ex. 27, *Review of the Non-Market-Based Service Riders Established by Ohio Edison Company, et al.*, Case. No. 22-391-EL-RDR, July 2023 ("Exeter Report") at 50.

³ In particular, Exeter was not asked to consider the benefits of retail competition prior to implementation of the pilot or harm to retail competition resulting from subsidizing a small subset of certain retail suppliers' business plans.

market. CRES providers should bear the full operational and billing responsibilities of their own management decisions based on their own choices and business plans, which they are already required to do in multiple states in the PJM footprint without being subsidized. To perpetuate the subsidies contrary to Exeter’s recommendation would beg the question of why the Commission solicited independent, third-party expertise in the first place.

Requiring CRES suppliers to take full financial and operational responsibility for their own PJM wholesale transmission charges and ending all transfer of PJM billing line items is long overdue.

II. BACKGROUND

Calpine Retail Holdings, LLC (Calpine) is a competitive retail electric service (CRES) supplier serving industrial, commercial, and residential customers across 20 states, including Ohio. Calpine’s offerings include a variety of demand-related and energy-related products and services beyond basic energy only procurement, including load and risk management and state-of-the art renewable and sustainable energy solutions designed to meet customers’ individualized needs. Rider NMB and the NMB Pilot subsidizes Calpine’s competitors’ business plans and severely hampers access to Calpine’s products and services by Ohio consumers.

A. Regulatory overview

Senate Bill 3 restructured the Ohio electric market by requiring “the three components of electric service — generation, transmission, and distribution — to be separated”⁴ such that each service component would “stand on its own.”⁵ This was done to “[e]nsure the availability of

⁴ *Industrial Energy Users-Ohio v. Pub. Util. Comm.*, 117 Ohio St. 3d 486, 487 (2008).

⁵ *Migden-Ostrander v. Pub. Util. Comm.*, 102 Ohio St. 3d 451, 452-53 (2004).

unbundled and comparable retail electric service that provides consumers with the supplier, price, terms, conditions, and quality options they elect to meet their respective needs [.]”⁶

PJM is the regional transmission organization provider for all load within the PJM footprint, so all LSEs incur transmission charges from PJM. PJM utilizes billing line items to determine the responsibility for transmission costs between load serving entities, including licensed CRES providers. Under PJM's Open Access Transmission Tariff (OATT), billing line items are associated with various manageable components of the transmission service, including but not limited to demand-based charges such as Net System Peak Load (NSPL). These billing line items serve as a mechanism to allocate costs based on the individual unique loads and contributions of each LSE. Prior to the pilot, when suppliers were not required to authorize the utility to act as the agent for their billing line items, these costs were directly billed to the entity that serves as the Load Serving Entity (LSE) for their respective accounts and unique load.⁷

Excusing CRES providers from being directly billed by the RTO eliminates customized products as well as removes any incentive for CRES providers to compete to produce products and services. It reflects the least common denominator of a one size fits all and removes incentives for CRES providers to efficiently manage their specific wholesale transmission costs.⁸ The removal of both operational and financial management responsibility of a CRES provider's individual business costs consequently interferes with customer choice. Indeed, non-discriminatory access to the RTO was envisioned when creating the Open Access Transmission Tariff of PJM and establishing competitive merchant-based transmission companies. The

⁶ R.C. 4928.02(B).

⁷ Calpine Ex. 1 (Merola Direct) at 4.

⁸ *Id.*

adoption of Rider NMB allowed CRES providers in Ohio to receive operational and risk relief for their wholesale transmission costs and eliminated products and services from competitors.⁹

B. History of Rider NMB and NMB Pilot

Approved as part of a stipulation in Case No. 10-388-EL-SSO (“ESP II”), Rider NMB is the vehicle by which certain critical demand-based PJM billing line items are no longer the direct billing responsibility of CRES providers. The PJM charges are collected by the utility from customers through a non-bypassable tariff charge, which enables the utility to act as agent for specific PJM billing line items. This was accomplished by new Supplier Tariff provisions requiring CRES providers to sign Principal Agent Declarations of Authority or execute Billing Line Item transfers, essentially removing products and services for wholesale demand based charges previously direct billed by the CRES provider to its customers in a dual bill (not interfering with the utility billing for its distribution services), thereby forcing the creation of the utility as a billing middleman, something that is unnecessary in the rest of the retail market within PJM.¹⁰ As succinctly stated by Ms. Merola, CRES providers in Ohio “lost their ability to participate fully on behalf of their loads.”¹¹ Although characterized as a “pass through” rider, transmission costs actually can be managed. Unfortunately, under the NMB scheme, transmission costs are a one size fits all, and suppliers that are innovative enough to manage demand and operate their own unique billing at their own cost are still forced to use the utility, irrespective of their own expertise, operational capability, products, and services.

The NMB Pilot was introduced with the stipulation approved in Case No. 14-1297-EL-SSO (ESP IV). This pilot program allowed participating customers to receive transmission

⁹ Calpine Ex. 1 at 4.

¹⁰ *Id.* at 7.

¹¹ *Id.* at 5.

service such that they bypass the NMB and are billed for transmission costs separately.

Proponents of the program promised that the pilot would “lower costs associated with non-market based charges” and “provide improved price signals.”¹² As for non-pilot participants, the ESP IV stipulation expanded the number of PJM demand based billing line items transferred from CRES suppliers to the Companies.¹³ Notably, with the subsidization in place and where the CRES suppliers were no longer responsible for managing their PJM demand based charges, certain CRES suppliers and industrial groups who opposed Rider NMB when introduced suddenly became supporters of the pilot program.

When approving the Rider NMB Pilot Program, the Commission directed the Companies and Staff to review the actual results of the Rider NMB pilot program and report their findings to the Commission.¹⁴ The Commission subsequently retained Exeter to investigate and answer prescriptively, “whether and how much in transmission costs are being shifted to customers not participating in the pilot program, whether the benefits of the pilot program outweigh any costs, and whether Rider NMB results in an overall cost savings to customers.”¹⁵ Exeter filed a report in July 2023 in Case No. 23-391-EL-RDR, which is included in the record of this proceeding by administrative notice.¹⁶

Nothing in the record of the ESP II or ESP IV proceedings suggest that Rider NMB or the pilot program were necessary. The rider and pilot program are simply an inappropriate bargain among the Companies, certain CRES suppliers that were part of the stipulation, and

¹² Case No. 14-1297-EL-SSO, March 31, 2016, Finding and Order (ESP IV Order”) at 73-74.

¹³ *Id.*

¹⁴ Case No. 22-391-EL-RDR, Aug. 10, 2022 Entry ¶ 7.

¹⁵ *Id.* As noted above, this investigation did not extend to assessing the detriment to competition that results from providing a subsidy that allows certain CRES providers to shed their operational risks.

¹⁶ Tr. at 1210.

special interests, that served to remove competitive products and services while at the same time re-bundle and re-monopolize transmission in exchange for subsidies and special privileges.

C. Exeter's recommendation to eliminate Rider NMB and the pilot.

Predictably, the Exeter report highlights a significant cost shift to customers not participating in the NMB Pilot. It indicates that over a seven-year period, there was a \$107.7 million cost shift borne by non-participants, with non-participating large commercial and industrial customers absorbing the majority (76.1%) of this cost shift.¹⁷ As for cost savings, “[i]t is unclear whether Rider NMB, however, results in overall cost savings to customers as compared to eliminating Rider NMB ...” This led to Exeter’s primary recommendation:

Eliminate Rider NMB for all customers. Assign PJM transmission charges (and all other PJM billing line items currently included in Rider NMB) to the retail suppliers of these customers.¹⁸

Importantly, Exeter goes on to clarify that “eliminat[ing] Rider NMB” does *not* mean eliminating the Companies’ ability to recover specific utility default transmissions costs for SSO (standard service offer) customers. Thus, “eliminating” Rider NMB simply means making the rider “entirely bypassable.”¹⁹ In order to make every CRES provider obligated to deal directly with PJM for their own transmission costs, utilities can no longer be an agent for CRES providers. Instead, Ohio needs to return to the prior system. This is easily accomplished in terms of what needs to be done, as it was previously handled this way prior to the carve out scheme and is currently being done in every fully functional retail electric choice state in the PJM footprint, including those where FirstEnergy operates.

¹⁷ Exeter Report at 2.

¹⁸ *Id.* at 50. This would be fully consistent with the system in multiple other states, including Pennsylvania and New Jersey where FirstEnergy owns utilities.

¹⁹ *Id.*

Likewise, reinstating full operational and cost responsibility for PJM transmission charges to the individual CRES providers/LSEs requires no action by PJM other than processing the withdrawal of the previous Declarations of Authority or assignments of multiple billing line items. Implementing Exeter's recommendation would merely involve ending ALL wholesale transmission cost "assignment" from CRES providers to the Companies and restoring the direct billing and operating relationship between CRES providers as LSEs and PJM, as provided in the ordinary course under PJM's OATT.

Neither the Companies nor Staff address Exeter's recommendation. The Companies propose to tweak the Rider NMB rate design by creating two rates, one for commercial and industrial customers with advanced meters (NMB 2) and the other for everyone else (NMB 1). The pilot program would be eliminated but Rider NMB would continue to recover transmission costs for both shopping and non-shopping load on a non-bypassable basis.²⁰ Staff's testimony focuses on the Companies' proposed changes to the Rider NMB rate design, but does not address Exeter's recommendation that the Rider should be eliminated.²¹ As discussed below, the privilege to bypass transmission charges currently reserved for NMB Pilot participants, which discriminates and unjustly subsidizes certain CRES business plans at the expense of other customers and CRES suppliers, should end. In opening the retail electric market, Ohio did not envision bailing out CRES providers of their individual wholesale market cost of doing business. CRES providers are not the default service provider and do not hold the obligation to serve and should not be guaranteed cost recovery from ratepayers of their individual wholesale market charges. CRES providers need to stand on their own two feet and manage their specific

²⁰ Company Ex. 7 (Lawless Direct) at 7.

²¹ Staff Ex. 9 (Baas Direct) at 4.

customers' loads and be responsible for their own unique PJM transmission costs. They need to take full responsibility for costs and risks associated for what, when, where and how they offer products and services to which they have flexibility in the retail electric market to make those choices.

III. ARGUMENT

This proceeding will establish the terms of the Companies' SSO effective on or about June 1, 2024. "The burden of proof in the proceeding shall be on the electric distribution utility." R.C. 4928.143(C)(1). The Commission cannot approve an ESP that violates statutory requirements. "The PUCO, as a creature of statute, has no authority to act beyond its statutory powers."²²

A. Proposals for continuing Rider NMB to remain non-bypassable must be rejected on statutory grounds, independent of Exeter's recommendation.

The Companies propose that Rider NMB remain non-bypassable. That would perpetuate the subsidization which does not follow cost causation. To the extent Staff and other parties have implicitly endorsed this feature of Rider NMB by not objecting to it, their proposals must be rejected along with the Companies'. Ohio law does not permit non-bypassable transmission cost recovery riders nor do the statutes provide for subsidies to excuse CRES recovery of wholesale transmission costs and risks.

R.C. 4928.143(B)(2)(g) authorizes an ESP to include "[p]rovisions relating to transmission . . . *required for the standard service offer*, including provisions for the recovery of any cost of such service" (emphasis added). This has nothing to do with wholesale competitive market transmissions charges. R.C. 4928.143 does not expressly state that any "reconcilable

²² *Disc. Cellular, Inc. v. Pub. Util. Comm.*, 2007-Ohio-53, ¶ 51, 112 Ohio St. 3d 360, 373, 859 N.E.2d 957, 969.

rider” or “provision” for transmission cost recovery must be bypassable because bypassability is an inevitable and implied feature of the post-S.B. 3 market.

Rider NMB fails other legal requirements. First, it is not bypassable, as required by O.A.C. Chapter 4901:1-36. No waiver of this rule has been requested in this proceeding, nor is one justified, nor does the prior approval of Rider NMB excuse the failure to seek a waiver. None of these prior approvals “grandfather” Rider NMB so that it continues forever.

Second, R.C. 4928.05 limits rider recovery to transmission costs “imposed on or charged to” the Companies by FERC or “a regional transmission organization,” which in this context means PJM. Under PJM’s OATT, transmission charges are “imposed on” and “charged to” the Companies for SSO load. But the Companies are *not* and should not be incurring transmission costs for shopping customers because such costs were not foisted on them by PJM. Indeed, PJM maintains separate billing line items so that transmission costs attributable to the load of one LSE are *not* “imposed on” or “charged to” other LSEs. The Companies are only incurring these costs because of their decision to seek changes to the Supplier Tariff mandating the forced assignment of PJM billing line items from CRES suppliers to the Companies. There is a vast distinction between transmission costs “imposed” by a federal regulator for non-shopping customers’ loads and costs related to shopping customers that the Companies voluntarily incurred in furtherance of a scheme to re-monopolize transmission service. The Companies effectively imposed these costs on themselves. They are not paying transmission charges for shopping customers’ load because of any action *by PJM* and this disqualifies these costs for rider recovery.

Third, and relatedly, the ESP statute expressly limits any cost recovery provision to transmission “required for the standard service offer.” Here again, the Companies are not “required,” nor should they be billed for transmission costs incurred by CRES providers; the

Companies incur these costs only because of the forced assignment of PJM billing line items. Nor do these costs pertain to service rendered by or on behalf of the Companies to provide their “standard service offer.” Shopping customers do not take SSO service, so there is no reason shopping customers’ transmission costs should be included in a non-bypassable rider that commingles transmission costs incurred for both SSO and shopping customers.

Ohio reorganized the electric market to unbundle transmission from generation and give customers choices and opportunity to avoid utility costs where beneficial to the customer and feasible. Rider NMB removed this choice and effectively re-bundles these service components. Ohio law forbids the continuation of this non-bypassable cost recovery mechanism.

B. Exeter’s recommendation to make any transmission cost recovery rider “entirely bypassable” is reasonable, consistent with Ohio law, and should be adopted.

Exeter recommends certain actions that Ohio law mandates in any event, for the reasons just explained. Exeter’s recommendation is also warranted as a matter of sound regulatory policy and should be adopted for this reason as well.

Exeter's in-depth analysis highlights discrepancies in cost allocation and a disregard for cost-causation principles. The NMB rate design does not recover costs from customers in the same manner these costs are charged to the Companies by PJM, which works to the benefit of certain CRES providers and customers and the disadvantage of others. The absence of proper price signals makes it next to impossible for customers to understand which category they fall under. Allowing pilot program participants to avoid Rider NMB introduces another category of winners and losers. Concerns were raised when the pilot program was introduced and deliberated about the potential discriminatory impact of allowing limited participation in the pilot, but

rejected on grounds that a limited participation was warranted to “better evaluate the results.”²³

The results are now in, and conclusively demonstrate a \$107 million cost shift from pilot program participants to non-participants during the seven-year existence of the pilot. This \$100+ million cost shift vastly overshadows the \$8.9 million overall benefit of the pilot program during the same period.²⁴

The cost-shifting and lack of cost causation observed by Exeter is the predictable result of the lack of competition. As Ms. Merola explained, “FERC Orders 888 and 2000 mandate open and non-discriminatory access to Transmission service. FERC Order 841 and Order 2222 further this policy by directing the RTOs to remove barriers to the participation of energy storage resources and to allow Distributed Energy Resources to fully participate in the wholesale electricity markets to enhance competition.”²⁵ Requiring each LSE to bear the cost and responsibility of procuring and managing transmission for its own load provides incentives to perform these functions efficiently, avoids cross-subsidies, and promotes customer choice by allowing shopping customers to bypass utility transmission charges.

Rider NMB is flatly inconsistent with these policies. The forced assignment of PJM billing line items creates market power and re-monopolizes and re-bundles transmission products into a vertically integrated incumbent utility.²⁶ Allowing the Companies to play the role of the middleman between CRES suppliers and shopping customers is not only unnecessary, but affirmatively harmful to customers and the competitive market generally. Customers should have more access to competitive products and services, not less, yet CRES providers in Ohio have lost

²³ Exeter Report at 49.

²⁴ *Id.* at 3.

²⁵ Calpine Ex. 1 at 5.

²⁶ *Id.*

the ability to fully engage with their customers to manage transmission costs, as Ms. Merola explained.²⁷ “It is a retrogressive return to a bygone era, where transmission was managed primarily by one vertically integrated utility.”²⁸

The Companies should not be the gatekeeper for wholesale market transmission. Exeter recommends removing them from this role and Calpine agrees wholeheartedly. “The costs for Transmission should be directly billed to CRES providers by PJM, as occurred in the past, prior to FirstEnergy’s ESP II proceeding, when *all* CRES providers were able to participate directly as an LSE and be billed by PJM, as is the case in other PJM states, NYISO and ISO.”²⁹ The recommendation to make all CRES providers follow the OATT and take full operational, financial and management of their own wholesale transmission costs and allow shopping customers to avoid cost-shifting issues would reinstate a path that is more transparent and efficient for both shopping and non-shopping customers alike.

Exeter’s preferred recommendation is also superior to the alternatives it considered. “[E]liminating Rider NMB for all classes addresses several administrative challenges involved in alternative, more limited approaches.”³⁰

The Exeter Report documents serious and systemic problems with Rider NMB and the NMB Pilot. The forced assignment of PJM billing line items, socialization of transmission costs, flawed rate design, blatant discrimination and preferential treatment of certain CRES business plans and inability of all but a select few NMB Pilot participants to bypass Rider NMB has resulted in massive cost-shifting, lack of clear price signals, removal of products and services to

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 4.

³⁰ Exeter Report at 50.

the benefit of a few competitors and administrative efficiency, to name just a few. The Exeter Report represents a call to action and should be treated as such.

C. To the extent Staff's proposals would require Rider NMB to remain non-bypassable, they should be rejected.

Exeter's recommendation to make Rider NMB bypassable would have significant positive implications for shopping customers and the competitive market generally, for all the reasons previously explained. At hearing, Staff's Rider NMB witness acknowledged, "I am not really informed on the competitive market."³¹ This explains Staff's decision to not address the Exeter Report or recommendation in written testimony: Staff is singularly focused on SSO customers and has not thought through how its recommendations (or lack thereof) impact non-SSO customers. To the extent Staff's recommendations are predicated on Rider NMB remaining non-bypassable, they should be rejected.

Whatever is decided regarding SSO, an issue that Calpine takes no position on, has nothing to do with the urgent need to remove subsidies from the competitive market and require all CRES providers to receive ALL their transmission costs and all associated billing directly from PJM, and be responsible for these bills directly to the RTO without any assignment of responsibilities as an LSE. Exeter's recommendation is tailored to addresses the heart of the problem with Rider NMB: the rider subjects all customers to a one-size-fits all approach and ignores customer choice, unfairly subsidizes certain CRES providers specific business plans, and re-bundles and re-monopolizes interstate wholesale transmission. The first step in resolving these issues is to declare Rider NMB—whether it continues to be called "Rider NMB" or something else—bypassable by shopping customers. Cost assignment between the Companies and SSO

³¹ Tr. at 2486.

suppliers can also be handled as it has been in multiple jurisdictions. But for CRES providers, just as when it was set up, it can be easily removed by canceling the requirement for assigning PJM line items and signing declarations of authority, and withdrawing any that are already on file. There is no just cause to delay removing these harmful and discriminatory provisions.

IV. CONCLUSION

For the foregoing reasons, Rider NMB and the associated pilot should be discontinued effective with the commencement of the new ESP, and all CRES providers should be made directly responsible for their own transmission costs, as billed to them directly by PJM, without any subsidies and without the utility acting as a middleman.

Dated: January 22, 2024

Respectfully submitted,

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Summary: Motion Motion of Calpine Retail Holdings LLC. For leave to file corrected initial brief electronically filed by Mr. David Weru on behalf of Calpine Retail Holdings, LLC.