**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 ) Case No. 14-1297-EL-SSO

For a Standard Service Offer Pursuant to )

R.C. 4928.143 in the Form of an Electric )

Security Plan. )

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**Memorandum Contra of Industrial Energy Users-Ohio to the Motion to Stay of the Retail Energy Supply Association**

Samuel C. Randazzo

(Counsel of Record) (Reg. No. 0016386)

Frank P. Darr (Reg. No. 0025469)

Matthew R. Pritchard (Reg. No. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

(willing to accept service by e-mail)

fdarr@mwncmh.com

(willing to accept service by e-mail)

mpritchard@mwncmh.com

(willing to accept service by e-mail)

**May 27, 2016 Attorneys for Industrial Energy Users-Ohio**

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**Memorandum Contra of Industrial Energy Users-Ohio to the Motion to Stay of the Retail Energy Supply Association**

# INTRODUCTION

On March 31, 2016, the Public Utilities Commission of Ohio (“Commission”) issued its Opinion and Order modifying and approving the Application and several Stipulations and Recommendations concerning the next electric security plan (“ESP”) for the FirstEnergy electric distribution utilities, The Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (“FirstEnergy”). Under the terms and conditions of the approved ESP, FirstEnergy was authorized to amend its transmission tariff, Rider NMB, so that FirstEnergy bills two wholesale transmission line items under the Rider in addition to the line items that were previously billed customers under the Rider. The Commission also approved the NMB Pilot Program that offers to participating customers the opportunity to contract for transmission service directly from PJM Interconnection, LLC (“PJM”) or indirectly from a competitive retail electric service (“CRES”) provider under the terms and conditions of the applicable federal transmission tariff instead of taking that service under Rider NMB. On May 13, 2016, FirstEnergy filed its compliance tariffs. On May 25, 2016, the Commission approved the compliance tariffs. The FirstEnergy ESP is scheduled to commence under the approved tariffs on June 1, 2016.

On May 25, 2016, the Retail Electric Supply Association (“RESA”) sought a stay of the Commission’s orders implementing the changes to Rider NMB and the NMB Pilot Program. 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 (May 25, 2016) (“Motion to Stay”). RESA’s Motion, however, fails to present sufficient claims and supporting facts to justify a stay of the Commission’s orders approving the Rider NMB changes and the NMB Pilot Program. Accordingly, the Commission should deny the Motion to Stay.

# Background

In its Application, FirstEnergy requested a modification to its nonbypassable transmission rider, Rider NMB, which would permit it to bill and collect under the Rider two additional items billed by PJM. Application at 15-16 (Aug. 4, 2014). Subsequently, FirstEnergy and several parties entered into Stipulations and Recommendations that recommended approval of the Application with modifications, including the change to Rider NMB. The Stipulations also contained additional recommendations proposing items not presented in the Application. One proposal was for the authorization of a transmission pilot program, the NMB Pilot Program. Under the proposal, a group of commercial and industrial customers[[1]](#footnote-1) could explore whether they could benefit from opting out of FirstEnergy’s Rider NMB and obtaining, directly or indirectly through a CRES provider, all transmission and ancillary services through the Open Access Transmission Tariff (“OATT”) and other governing documents of PJM that are approved by the Federal Energy Regulatory Commission (“FERC”), and are applicable to the zone in which the end user is located. The Stipulations specified the customers and accounts eligible to participate in the NMB Pilot Program and the process by which eligible customers may participate or discontinue participation. The Stipulations also stated that participating customers must commit to obtain and pay for all transmission and ancillary services through the otherwise applicable OATT. Cos. Ex. 3 at 3-5 and Cos. Ex. 154 at 17.

The Commission issued its Opinion and Order in this matter on March 31, 2016. Opinion and Order (Mar. 31, 2016). In the Opinion and Order, the Commission modified and approved the application for an ESP to be effective June 1, 2016 and directed FirstEnergy to file tariff sheets in compliance with the Commission’s decision. *Id*. at 122. In the Opinion and Order, the Commission approved the modification of Rider NMB and the proposal for the NMB Pilot Program. *Id*.

After the Commission issued its Opinion and Order, RESA (as well as FirstEnergy and several other parties) filed an application for rehearing. In its application for rehearing, RESA argued that the Commission erred in approving the requested modification to Rider NMB and the authorization of the NMB Pilot Program, repeating the same claims it had presented to the Commission as part of its case in chief. *Compare* Initial Brief of the Retail Energy Supply Association at 49-51 (Feb. 16, 2016) (“RESA Initial Brief”) *with* Application for Rehearing of the Retail Energy Supply Association at 6 (“RESA Application for Rehearing”) (Apr. 29, 2016).

In response to the applications for rehearing, the Commission granted rehearing for further consideration of the applications for rehearing on May 11, 2016. Entry on Rehearing (May 11, 2016).

While the matters discussed above were transpiring, FirstEnergy sought an extension of the order to file tariff sheets that complied with the Opinion and Order. Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company’s Motion For Extension of Time to File Tariffs (Apr. 29, 2016). On May 10, 2016, the Attorney Examiner directed FirstEnergy to file tariff sheets that complied with the Commission’s Opinion and Order by May 13, 2016. Entry (May 10, 2016).

FirstEnergy submitted the compliance filing on May 13, 2016. The tariff sheets and related standard agreements with CRES providers and successful bidders in the standard service offer (“SSO”) auctions provide that FirstEnergy will bill and collect pursuant to Rider NMB the two PJM related line items to which RESA objects. Letter from Eileen Mikkelsen to Barcy McNeal on Behalf of the Ohio Edison Company, Attachment 2, Tariff Sheet 119 (cross-referencing the charges set out in the Electric Generation Supplier Coordination Tariff and the Master Supply Agreement) (May 13, 2016). (Similar filings were made on behalf of the other two electric distribution utilities.)

On May 20, 2016, the Staff of the Commission filed a letter stating that it had reviewed the tariff sheets filed by FirstEnergy and concluded that the sheets appear to be in compliance with the Commission’s Opinion and Order. Letter from Tamara Turkenton and David Lipthratt to Docketing Division (May 20, 2016).

On May 25, 2016, the Commission issued a Finding and Order approving the tariffs filed by FirstEnergy, to become effective on June 1, 2016. Finding and Order at 1 (May 25, 2016). That same day, RESA filed its Motion to Stay. In the Motion to Stay, RESA argues that the Commission should stay its authorization of the inclusion of the two PJM billing items in Rider NMB because it is improper to include those charges in the Rider. It also argues that the Commission should stay the implementation of the NMB Pilot Program until the Commission addresses issues on rehearing and approves a tariff sheet for it. Motion to Stay at 1.

# argument

## RESA must make a strong showing that it is entitled to an order staying the Commission orders

To be successful, a party seeking a stay of a Commission order must make a strong showing that it is likely to prevail on the merits, that it would suffer irreparable harm if a stay is not ordered, that a stay would not cause substantial harm to other parties, and that a stay is in the public interest. *Northwest Ohio Public Energy Council v. Ohio Edison Co.*, *et al*., Case No. 09-423-EL-CSS, Entry at 2 (July 8, 2009). In its Motion, RESA has failed to demonstrate that it is likely to prevail on the merits or that it will suffer an irreparable harm if Rider NMB as amended or the NMB Pilot Program becomes effective June 1, 2016. Further, a stay would cause injury to other parties and the public interest. Accordingly, the Commission should deny RESA’s Motion to Stay.

## RESA has not demonstrated that it is likely to succeed on the merits of its claims that the Commission’s authorizations of changes to the NMB Rider and the NMB Pilot Program are unlawful

Initially, RESA claims that it will be successful on the merits of its claim that the authorization of changes to the NMB Rider are unreasonable because the Commission failed to make an express ruling on RESA’s objections to those changes. It further alleges that the Commission will likely reverse itself because RESA has demonstrated the inadequacies of the NMB Pilot Program. RESA Motion at 8-9. Neither claim has merit.

The first claim concerning the Commission’s failure to address RESA’s objections to the NMB Rider presents only a procedural issue. There is no question that the Commission was aware of RESA’s objections to the change in Rider NMB. Opinion and Order at 73-74. By approving the change, the Commission rejected those objections. That the Commission may not have addressed each element of RESA’s objections is a problem that the Commission can address in the entry on rehearing, as RESA concedes. *Id*. at 8. Since the Commission has rejected RESA’s arguments previously, and RESA offers no new argument for reversing the authorization of the change to Rider NMB, RESA has failed to demonstrate that it is likely to succeed on the merits of its objection to the change to the Rider.

Further, it is not likely that RESA will fare any better at the Supreme Court if it appeals the Commission’s decision concerning the change to Rider NMB. The Commission’s determination of which PJM charges are a part of Rider NMB is a finding to which the Court will likely defer to the Commission’s discretion, so long as the determination is supported by the record. *In re Columbus Southern Power Co*., Slip Op. 2016-Ohio-1608 at ¶¶ 57-59 (Apr. 21, 2016) (Court gives the Commission “great deference” on matters of rate design).

In support of its assertion that it will be successful on the merits of its challenge to the NMB Pilot Program, RESA relies on the same claims it has previously made that it asserts “highlight the inadequacies of the Pilot program versus any benefits.” Motion to Stay at 8. As previously presented in its post-hearing brief, RESA asserted that the NMB Pilot Program is unduly limiting because all interested parties do not have an opportunity to participate in the NMB Pilot Program and that the Pilot was not properly designed. Initial Brief of the Retail Energy Supply Association at 49-51 (Feb. 16, 2016) (“RESA Initial Brief”). In its application for rehearing, RESA advanced the same claims. RESA Application for Rehearing at 97-99. In its Motion to Stay, RESA offers nothing new to address the Commission’s rejection of its arguments.

The Commission has already considered and rejected RESA’s claims. In its Opinion and Order, the Commission held, “The nature of any pilot program is to keep the number of participants manageable in order to make some determination of the efficacy of the program being tested. … RESA cites to no evidence in the record that any customers who wish to participate in, and would benefit from, the Rider NMB pilot program cannot do so because of the limits on the size of the pilot program.” Opinion and Order at 112.

Because RESA has not raised any new argument or claims that the Commission has not already considered and rejected in the Opinion and Order, there is no basis to find that the Commission is likely to reverse its order approving the NMB Pilot Program. Additionally, the Supreme Court is unlikely to find that a pilot limited to a reasonable customer group unlawfully discriminates against other customers. *Weiss v. Pub. Utils. Comm’n of Ohio,* 90 Ohio St.3d 15 (2000).

## RESA has failed to demonstrate that its members will suffer irreparable harm if modified Rider NMB and the NMB Pilot Program are implemented as ordered

RESA also asserts that its members will suffer irreparable harm if the Commission permits Rider NMB and the NMB Pilot Program to become effective because RESA members will be required to bring their billing systems into compliance with the Commission’s orders in this case. Motion to Stay at 9. RESA also complains that the changes in the NMB Rider will allow “certain market participants to deflect costs.” *Id*. at 10. Although it complains that its members will be injured, RESA does not provide any support for that claim.

 Claims of injury need some sort of record support. *Sasaki v. McKinnon*, 124 Ohio App.3d 613, 619 (8th Dist. Ct. App. 1997) (“It is an elementary proposition that the burden of proof in any motion hearing rests, initially, with the party seeking relief or a remedy.”) *See, also, In the Matter of the Commission's Investigation Into the Modification of Intrastate Access Charges*, Case No. 00-127-TP-COI, Entry on Rehearing (Feb. 20, 2003). Because RESA does not provide a citation to the record or any supporting affidavit for its claim that RESA members will suffer irreparable harm if Rider NMB is implemented as authorized, RESA has failed to provide the strong showing that the Commission requires.

Moreover, RESA’s complaint that its members may suffer some additional cost to modify their billing systems does not amount to an injury that warrants a stay. The cost of modifying billing systems is one that all marketers incur as a cost of business, and RESA’s members have been aware of the proposed changes and the Commission order for a sufficient amount of time to take action to bring their billing systems into compliance or elect to not enter into new contracts with customers. *In the Matter of the Application of Columbia Gas of Ohio, Inc., for Approval of Tariffs to Recover, Through an Automatic Adjustment Clause, Costs Associated with the Establishment of an Infrastructure Replacement Program and for Approval of Certain Accounting Treatment*, Case No. 07-478-GA-UNC, Entry on Rehearing at 21 (June 4, 2008) (stay not granted when order provided sufficient time for notifications to be provided under implementation schedule). Thus, RESA has not demonstrated that there is an irreparable harm resulting from the Opinion and Order that justifies a stay.

## A grant of the stay will injure other customers and the public interest

While RESA highlights the concerns its members may have in arranging their billing systems to accommodate Rider NMB changes and the NMB Pilot Program, it discounts the material injury to customers (that presumably some of RESA’s members are assisting to secure cost-effective solutions for their energy needs) that a stay will impose. Motion to Stay at 10-11. According to RESA, a stay of implementation will not result in substantial harm to other parties because it only presents additional delay after the nearly two years that this case has been pending. *Id*. at 10.

If the stay is granted, however, customers that relied on the Commission’s order will be adversely affected. In reliance on the Commission Opinion and Order, customers have taken steps to enter into new contracts and revise existing ones with CRES providers to reduce their energy bills by taking advantage of the NMB Pilot Program. Others have relied on the Opinion and Order to enroll in other programs such as the economic load response program. See Memorandum Contra Interlocutory Appeal of Ohio Energy Group at 3-4 (May 20, 2016). A stay would disrupt contractual arrangements for those taking advantage of the NMB Pilot Program without any demonstration of a legal reason for doing so. A stay also would chill interest in other challenged programs because a stay of the NMB Pilot Program may signal other unexpected deviations from the terms and conditions of the ESP authorized by the Opinion and Order.

The delay in the processing of this case, moreover, is irrelevant to the prospective injury that a stay would cause. The Opinion and Order approves an ESP with a proposed effective date of June 1, 2016. Real and substantial injury will occur if the orders approving the NMB Pilot Program on which parties reasonably relied are stayed. To claim as RESA does that a delay in implementation will not cause customer injury simply ignores that customers are making real decisions based on the content of the Commission’s orders with the expectation that those orders will remain in effect. Any delay in reaching this point is irrelevant to that reliance.

RESA also makes unsupported claims that a stay would benefit the public interest, but ignores the harm to the public that a stay would cause.

RESA makes two claims in support of its argument that a stay is in the public interest.[[2]](#footnote-2) First, it asserts that its members should not be required to comply with the Commission’s order regarding changes to the NMB Rider due to the costs they would incur. Second, RESA asserts that the Commission should have additional time to reconsider its decision approving the changes to the NMB Rider and NMB Pilot Program to avoid adverse impacts on customers. Motion to Stay at 11.

The first claim, that RESA members should not be required to comply with the Commission’s orders regarding the NMB Rider, simply repeats RESA’s claim that its members will be injured if they are required to modify their billing systems. *Id*. As noted above, that claim is without merit: RESA has failed to offer any proof to support it or demonstrate an irreparable injury.

RESA’s second claim, that the Commission should grant a stay to consider further the merits of RESA’s application for rehearing, assumes that the issues presented in RESA’s application have some merit, but as discussed above they do not.

Moreover, RESA ignores the injury to the public that a stay would cause. Under the NMB Pilot Program, participating customers may secure a lower delivered cost of electricity if they can manage effectively their system transmission peaks. Tr. Vol. XXXIV at 7021-22. While participating customers benefit by lowering their electricity costs, non-participating customers also will benefit from increased reliability. Tr. Vol. XXVI at 5325-26. *See, also,* Initial Brief in Support of ESP IV Stipulation by Nucor Steel Marion, Inc. at 26-28 (Feb. 16, 2016) (“Nucor Initial Brief”). A stay, however, would delay or prevent customers that can lower their electric bills from doing so, and the reliability benefits will be lost for the duration of the stay. Because the public interest would be injured, an order granting a stay is not justified. *In the Matter of the Application Seeking Approval of Ohio Power Company's Proposal to Enter into an Affiliate Power Purchase Agreement for Inclusion in the Power Purchase Agreement Rider*, Case Nos. 14-1694-EL-RDR, *et al*., Opinion and Order at 20 (Mar. 31, 2016).

# Conclusion

Before the Commission will stay one of its orders, the Commission requires the moving party to make a strong showing that demonstrates that the party is likely to succeed on the merits of its objection to the order, that the party will suffer irreparable harm if the stay is not ordered, that a stay will not cause substantial injury to others, and that a stay is in the public interest. RESA has failed to meet any of the four requirements. Accordingly, the Commission should deny RESA’s Motion to Stay.

Respectfully submitted,

 */s/ Frank P. Darr*

Samuel C. Randazzo

(Counsel of Record) (Reg. No. 0016386)

Frank P. Darr (Reg. No. 0025469)

Matthew R. Pritchard (Reg. No. 0088070)

McNees Wallace & Nurick LLC

21 East State Street, 17TH Floor

Columbus, OH 43215

Telephone: (614) 469-8000

Telecopier: (614) 469-4653

sam@mwncmh.com

(willing to accept service by e-mail)

fdarr@mwncmh.com

(willing to accept service by e-mail)

mpritchard@mwncmh.com

(willing to accept service by e-mail)

**Certificate of Service**

In Accordance with Rule 4901-1-05, Ohio Administrative Code, "The PUCO's e‑filing system will electronically serve notice of the filing of this document upon the following parties." In addition, I hereby certify that a service copy of the foregoing *Memorandum Contra of Industrial Energy Users-Ohio to the Motion to Stay of the Retail Energy Supply Association* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following parties of record this 27 day of May 2016, *via* electronic transmission.

*/s/ Frank P. Darr*

 Frank P. Darr

James W. Burk

(Counsel of Record)

Carrie M. Dunn

FIRSTENERGY SERVICE COMPANY 76 South Main Street

Akron, Ohio 44308

burkj@firstenergycorp.com

cdunn@firstenergycorp.com

James F. Lang

N. Trevor Alexander

CALFEE, HALTER & GRISWOLD LLP

The Calfee Building

1405 East Sixth Street

Cleveland, Ohio 44114

jlang@calfee.com

talexander@calfee.com

David A. Kutik

JONES DAY

901 Lakeside Avenue

Cleveland, Ohio 44114

dakutik@jonesday.com

**COUNSEL FOR OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY**

**THE TOLEDO EDISON COMPANY**

Michael L. Kurtz, Esq.

Kurt J. Boehm, Esq.

Jody Kyler Cohn, Esq.

BOEHM, KURTZ & LOWRY

36 East Seventh Street, Suite 1510

Cincinnati, Ohio 45202

mkurtz@BKLlawfirm.com

kboehm@BKLlawfirm.com

jkylercohn@BKLlawfirm.com

**COUNSEL FOR THE OHIO ENERGY GROUP**

Steven T. Nourse

Matthew J. Satterwhite

Yazen Alami

American Electric Power Service Corporation

1 Riverside Plaza 29th Floor

Columbus, Ohio 43215

stnourse@aep.com

mjsatterwhite@aep.com

yalami@aep.com

**COUNSEL FOR OHIO POWER COMPANY**

Bruce J. Weston

Ohio Consumers' Counsel

Larry S. Sauer

(Counsel of Record)

Maureen R. Willis

Kevin F. Moore

Ajay K. Kumar

William J. Michael

Assistant Consumers' Counsel

Office of the Ohio Consumers' Counsel

10 West Broad Street – Suite 1800

Columbus, Ohio 43215

Larry.sauer@occ.ohio.gov

maureen.willis@occ.ohio.gov

William.Michael@occ.ohio.gov

Kevin.moore@occ.ohio.gov

Ajay.kumar@occ.ohio.gov

**COUNSEL FOR THE OFFICE OF THE OHIO CONSUMERS' COUNSEL**

Barth E. Royer

Bell & Royer Co., LPA

33 South Grant Avenue

Columbus, Ohio 43215-3927

barthroyer@aol.com

Adrian Thompson

Taft Stettinius & Hollister LLP

200 Public Square, Suite 3500

Cleveland, Ohio 44114

athompson@taftlaw.com

**COUNSEL FOR CLEVELAND MUNICIPAL SCHOOL DISTRICT**

Marilyn L. Widman

Widman & Franklin, LLC

405 Madison Ave., Suite 1550

Toledo, Ohio 43604

Marilyn@wflawfirm.com

**COUNSEL FOR IBEW LOCAL 245**

Richard C. Sahli (0007360)

Richard Sahli Law Office, LLC

981 Pinewood Lane

Columbus, OH 43230-3662

rsahli@columbus.rr.com

Michael Soules

Earthjustice

1625 Massachusetts Ave. NW,

Suite #702

Washington, DC 20036

msoules@earthjustice.org

Shannon Fisk

(Counsel of Record)

Earthjustice

1617 John F. Kennedy Blvd.,

Suite #1675

Philadelphia, PA 19103

sfisk@earthjustice.org

Tony G. Mendoza

Kristin Henry

Sierra Club

85 Second Street, Second Floor

San Francisco, CA 94105-3459

tony.mendoza@sierraclub.org

kristin.henry@sierraclub.org

**COUNSEL FOR THE SIERRA CLUB**

Jennifer L. Spinosi (0089162)

(Counsel of Record)

Direct Energy

21 East State Street, 19th Floor

Columbus, Ohio 43215

jennifer.spinosi@directenergy.com

**COUNSEL FOR DIRECT ENERGY SERVICES, LLC, DIRECT ENERGY BUSINESS, LLC AND DIRECT ENERGY BUSINESS MARKETING, LLC**

Colleen L. Mooney

(Counsel of Record)

Ohio Partners for Affordable Energy

231 West Lima Street

Findlay, Ohio 45839-1793

cmooney@ohiopartners.org

**COUNSEL FOR OHIO PARTNERS FOR AFFORDABLE ENERGY**

Joseph E. Oliker

(Counsel of Record)

IGS Energy

6100 Emerald Parkway

Dublin, Ohio 43016

joliker@igsenergy.com

**COUNSEL FOR IGS ENERGY**

Celia M. Kilgard

Devin D. Parram

Taft Stettinius & Hollister LLP

65 East State Street, Suite 1000

Columbus, Ohio 43215

ckilgard@taftlaw.com

dparram@taftlaw.com

**COUNSEL FOR THE KROGER CO.**

Richard L. Sites

Ohio Hospital Association

155 East Broad Street, 15th

Columbus, Ohio 43215

ricks@ohanet.org

Thomas J. O'Brien

Bricker & Eckler LLP

100 South Third Street

Columbus, Ohio 43215

tobrien@bricker.com

**COUNSEL FOR THE OHIO HOSPITAL ASSOCIATION**

Michael K. Lavanga

Garrett A. Stone

Stone Mattheis Xenopoulos & Brew, P.C.

1025 Thomas Jefferson Street, N.W.

8th Floor, West Tower

Washington, D.C. 20007-5201

mkl@smxblaw.com

gas@smxblaw.com

**COUNSEL FOR NUCOR STEEL MARION, INC.**

Barbara A. Langhenry

Harold A. Madorsky

Kate E. Ryan (Counsel of Record)

City of Cleveland

601 Lakeside Avenue – Room 106

Cleveland, Ohio 44114

blanghenry@city.cleveland.oh.us

hmadorsky@city.cleveland.oh.us

kryan@city.cleveland.oh.us

**COUNSEL FOR THE CITY OF CLEVELAND**

Kimberly W. Bojko

Danielle M. Ghiloni

Carpenter Lipps & Leland LLP

280 Plaza, Suite 1300

280 North High Street

Columbus, Ohio 43215

Bojko@carpenterlipps.com

ghiloni@carpenterlipps.com

**COUNSEL FOR OMAEG**

Lisa M. Hawrot

Spilman Thomas & Battle, PLLC

Century Centre Building

1233 Main Street, Suite 4000

Wheeling, West Virginia 26003

lhawrot@spilmanlaw.com

Derrick Price Williamson

Spilman Thomas & Battle, PLLC

1100 Bent Creek Blvd., Suite 101

Mechanicsburg, Pennsylvania 17050

dwilliamson@spilmanlaw.com

Carrie M. Harris

Spilman Thomas & Battle, PLLC

310 First Street, Suite 1100

Roanoke, Virginia 24002-0090

charris@spilmanlaw.com

**COUNSEL FOR WAL-MART STORES EAST, LP AND SAM’S EAST, INC.**

Joseph P. Meissner

Attorney at Law

1223 W. 6th Street – 4th Floor

Cleveland, Ohio 44113

meissnerjoseph@yahoo.com

**COUNSEL FOR CITIZENS COALITION, CONSUMER PROTECTION ASSOCIATION, CLEVELAND HOUSING NETWORK, AND THE COUNCIL FOR ECONOMIC OPPORTUNITIES IN GREATER CLEVELAND**

Thomas R. Hays

8355 Island Lane

Maineville, Ohio 45039

trhayslaw@gmail.com

**COUNSEL FOR LUCAS COUNTY**

**BOARD OF COMMISSIONERS**

Leslie Kovacik

Counsel for the City of Toledo

420 Madison Avenue

Toledo, Ohio 43604

lesliekovacik@toledo.oh.gov

**COUNSEL FOR THE CITY OF TOLEDO**

Glenn S. Krassen

(Counsel of Record)

Bricker & Eckler LLP
1001 Lakeside Ave., Suite 1350

Cleveland, Ohio 44114

gkrassen@bricker.com

Dane Stinson

Dylan Borchers

Bricker & Eckler LLP

100 South Third Street

Columbus, Ohio 43215

dstinson@bricker.com

dborchers@bricker.com

**COUNSEL FOR NORTHEAST OHIO PUBLIC ENERGY COUNCIL; OHIO SCHOOLS COUNCIL; AND, POWER4SCHOOLS**

M. Howard Petricoff (0008287)

(Counsel of Record)

Michael J. Settineri (0073369)

Gretchen L. Petrucci (0046608)

Vorys, Sater, Seymour and Pease LLP

52 E. Gay Street

Columbus, Ohio 43215

mhpetricoff@vorys.com

mjsettineri@vorys.com

glpetrucci@vorys.com

**COUNSEL FOR DYNEGY INC.**

Matthew R. Cox

Matthew Cox Law, Ltd.

88 East Broad Street, Suite 1560

Columbus, Ohio 43215

matt@matthewcoxlaw.com

**COUNSEL FOR THE COUNCIL OF SMALLER ENTERPRISES**

Madeline Fleisher

Staff Attorney

Environmental Law & Policy Center

21 W. Broad St., Suite 500

Columbus, OH 43215

mfleisher@elpc.org

**Counsel for the Environmental Law & Policy Center**

Trent Dougherty

1145 Chesapeake Avenue, Suite I

Columbus, OH 43212

tdougherty@theOEC.org

John Finnigan

128 Winding Brook Lane

Terrace Park, Ohio 45174

jfinnigan@edf.org

**COUNSEL FOR THE OHIO ENVIRONMENTAL COUNCIL AND ENVIRONMENTAL DEFENSE FUND**

M. Howard Petricoff

Michael J. Settineri

Gretchen L. Petrucci

Vorys, Sater, Seymour and Pease LLP

52 East Gay Street

Columbus, Ohio 43216-1008

mhpetricoff@vorys.com

mjsettineri@vorys.com

glpetrucci@vorys.com

Cynthia Brady

Exelon Business Services

4300 Winfield Rd.

Warrenville, Illinois 60555

Cynthia.brady@exeloncorp.com

David I. Fein

Exelon Corporation

10 South Dearborn Street – 47th Fl.

Chicago, Illinois 60603

David.fein@exeloncorp.com

Lael E. Campbell

Constellation NewEnergy, Inc. and Exelon Corporation

101 Constitution Ave., NW

Washington, DC 20001

Lael.campbell@exeloncorp.com

**COUNSEL FOR EXELON GENERATION COMPANY, LLC AND CONSTELLATION NEWENERGY, INC.; PJM POWER PROVIDERS GROUP; THE ELECTRIC POWER SUPPLY ASSOCIATION; AND, RETAIL ENERGY SUPPLY ASSOCIATION**

Glen Thomas

1060 First Avenue, Suite 400

King of Prussia, Pennsylvania 19406

gthomas@gtpowergroup.com

Laura Chappelle

201 North Washington Square - #910

Lansing, Michigan 48933

laurac@chappeleconsulting.net

**ON BEHALF OF PJM POWER PROVIDERS GROUP**

Christopher J. Allwein

Margeaux Kimbrough

Kegler Brown Hill and Ritter LPA

65 East State Street – 1800

Columbus, Ohio 43215

callwein@keglerbrown.com

mkimbrough@keglerbrown.com

**COUNSEL FOR HARDIN WIND LLC, CHAMPAIGN WIND LLC AND BUCKEYE WIND LLC**

Todd M. Williams

Shindler, Neff, Holmes, Worline & Muhler, LLP

300 Madison Avenue

1200 Edison Plaza

Toledo, Ohio 43604

twilliams@snhslaw.com

Jeffrey W. Mayes

Monitoring Analytics, LLC

2621 Van Buren Avenue, Suite 160

Valley Forge Corporate Center

Eagleville, Pennsylvania 19403

Jeffrey.mayes@monitoringanalytics.com

**COUNSEL FOR INDEPENDENT MARKET MONITOR FOR PJM**

Sharon Theodore

Electric Power Supply Association

1401 New York Ave. NW 11th fl.

Washington, DC 20001

stheodore@epsa.org

**ON BEHALF OF THE ELECTRIC POWER SUPPLY ASSOCIATION**

Margeaux Kimbrough

Kegler Brown Hill and Ritter LPA

65 East State Street – 1800

Columbus, Ohio 43215

mkimbrough@keglerbrown.com

**COUNSEL FOR HARDIN WIND LLC, CHAMPAIGN WIND LLC AND BUCKEYE WIND LLC**

Kevin R. Schmidt

Energy Professionals of Ohio

88 East Broad Street, Suite 1770

Columbus, Ohio 43215

Schmidt@sppgrp.com

**COUNSEL FOR THE ENERGY PROFESSIONALS OF OHIO**

Christopher L. Miller

Gregory H. Dunn

Jeremy M. Grayem

Ice Miller LLP

250 West Street

Columbus, Ohio 43215

Christopher.miller@icemiller.com

Gregory.dunn@icemiller.com

Jeremy.grayem@icemiller.com

**COUNSEL FOR THE ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES OF OHIO**

Craig I. Smith

Material Sciences Corporation

15700 Van Aken Blvd. – Suite 26

Shaker Heights, Ohio 44120

wttpmlc@aol.com

**COUNSEL FOR Material Sciences Corporation**

Joel E. Sechler

Carpenter Lipps & Leland

280 N. High Street, Suite 1300

Columbus, Ohio 43215

sechler@carpenterlipps.com

Gregory J. Poulos

EnerNOC, Inc.

471 E. Broad Street – Suite 1520

Columbus, Ohio 43054

gpoulos@enernoc.com

**COUNSEL FOR ENERNOC, INC.**

David J. Folk

Assistant Director of Law

City of Akron

161 S. High Street - Suite 202

Akron, OH 44308

dfolk@Akronohio.Gov

**COUNSEL FOR THE CITY OF AKRON**

Daniel W. Wolff

Richard LehFeldt

Crowell & Moring LLP

1001 Pennsylvania Ave., N.W.

Washington, DC 20004

dwolff@crowell.com

rlehfeldt@crowell.com

**COUNSEL FOR CPV SHORE, LLC**

Thomas McNamee

Thomas Lindgren

Attorney General's Office

Public Utilities Commission of Ohio

30 E. Broad Street, 16th Floor

Columbus, Ohio 43215-3793

thomas.mcnamee@ohioattorneygeneral.gov

thomas.lindgren@ohioattorneygeneral.gov.

**COUNSEL FOR THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO**

Gregory Price

Mandy Willey Chiles

Attorney Examiner

Public Utilities Commission of Ohio

180 E. Broad Street

Columbus, Ohio 43215

Gregory.price@puc.state.oh.us

Mandy.chiles@puc.state.oh.us

**ATTORNEY EXAMINERS**

1. Generally speaking, the eligible customers are more sophisticated and have more sophisticated metering. Tr. Vol. XXIX at 6082-83. [↑](#footnote-ref-1)
2. RESA lists three claims in its brief, but the second and third are substantively the same: that a stay would afford the Commission additional time to consider RESA’s application for rehearing. Motion to Stay at 11. [↑](#footnote-ref-2)