

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company and The Toledo)
Edison Company for Authority to Provide)
For a Standard Service Offer Pursuant to)
R.C. 4928.143 in the Form of an Electric)
Security Plan.)

Case No. 14-1297-EL-SSO

REPLY BRIEF OF INDUSTRIAL ENERGY USERS-OHIO

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I. INTRODUCTION

In this proceeding, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (“Companies”) seek authorization of an Electric Security Plan (“ESP”) with a term beginning June 1, 2016. Cos. Ex. 1 (“Application”). The Companies have entered into several stipulations that recommend modifications and approval of the Application. Cos. Ex. 2, 3, 4, and 154 (“Stipulations”).

In addition to the recommendations concerning the Retail Rate Stability Rider (“Rider RRS”), the Stipulations recommend authorization of a pilot program that would permit customers to secure certain transmission services directly from PJM Interconnection, LLC (“PJM”) or indirectly from a competitive retail electric service (“CRES”) provider (“NMB Pilot Program”). Under the NMB Pilot Program set out in Section V.A.2 of the Supplemental Stipulation, the Companies would “deploy a small-scale pilot program providing an alternative means for customers to obtain and pay for services otherwise provided by or through the Non-Market-Based Services Rider (“Rider NMB”).” Cos. Ex. 3 at 3-5 and Cos. Ex. 154 at 17.

Additionally, the Stipulations recommend that the Commission authorize the continuation of the economic load response program (“ELR Program”) with some modifications. Cos. Ex. 2 at 7-8, Cos. Ex. 3 at 1-3, and Cos. Ex. 154 at 14. An ELR Program would be available to existing economic load response (“ELR”) customers and customers that have historically been eligible for the ELR Program, but are not currently taking service under the current program. The Stipulations also provide that eligible customers taking service under the ELR Program would continue to be permitted to opt out of the costs and benefits of any portfolio plan under the temporary and permanent provisions of Substitute Senate Bill 310 (“SB 310”). Cos. Ex. 2 at 8.

The Commission reviews the Application and Stipulations under the traditional three-prong test. Under the three-prong test, the Commission addresses whether the stipulations are the product of serious bargaining among capable and knowledgeable parties, whether the stipulations, as a package, benefit ratepayers and the public interest, and whether the stipulations violate any important regulatory principles. *Office of the Consumers’ Counsel v. Pub. Utils. Comm’n of Ohio*, 64 Ohio St.3d 123, 126 (1992).

Several parties in their Initial Briefs ask the Commission to find that provisions of the Stipulations violate one or more prongs of the test. In particular, the Retail Energy Supply Association (“RESA”) argues that the NMB Pilot Program is unduly limiting and discriminatory. Initial Brief of the Retail Energy Supply Association at 49 (Feb. 16, 2016) (“RESA Initial Brief”). The Office of the Ohio Consumers’ Counsel and the Northwest Ohio Aggregation Coalition (collectively, “OCC”) and Ohio Manufacturers’ Association Energy Group (“OMAEG”) argue that the ELR Program is too expensive because it does not benefit all customers. Initial Brief of the Office of the Ohio Consumers’ Counsel and

Northwest Ohio Aggregation Coalition at 98 (Feb. 16, 2016) (“OCC Initial Brief”); Initial Brief of the Ohio Manufacturers’ Association Energy Group at 67 (Feb. 16, 2016) (“OMAEG Initial Brief”). Taking a narrower position than OCC and OMAEG, the Ohio Hospital Association (“OHA”) recommends elimination of the economic development rider (“EDR”) credit or expansion of the customer groups subject to the EDR(e). Post-Hearing Brief of the Ohio Hospital Association at 7 (Feb. 16, 2016) (“OHA Initial Brief”). The Environmental Law and Policy Center, Environmental Defense Fund, and Ohio Environmental Council (collectively, “ELPC”) argue that the provision concerning the right of customers taking service under the ELR Program to forgo (opt out of) the benefits and costs of the Companies’ economic efficiency and peak demand reduction (“EE/PDR”) mandates compliance plans would violate R.C. 4928.6613. Initial Brief of the Environmental Law and Policy Center, Environmental Defense Fund and Ohio Environmental Council at 59 (Feb. 16, 2016) (“ELPC Initial Brief”).

Contrary to the arguments and claims of these parties, the NMB Pilot Program and the continuation of the ELR Program, as modified by the Stipulations, provide significant benefits and do not violate any important regulatory principles. Accordingly, the Commission should reject the arguments presented by RESA, OCC, OMAEG, ELPC, and OHA.

II. THE NMB PILOT PROGRAM SEEKS OUTCOMES THAT REDUCE THE COSTS OF ELECTRICITY FOR PRICE SENSITIVE CUSTOMERS WITHOUT INCREASING THE TOTAL REVENUE REQUIREMENT

Section V.A.2 of the Supplemental Stipulation calls for the Companies “to deploy a small-scale pilot program providing an alternative means for customers to obtain and pay for services otherwise provided by or through the Non-Market-Based Services Rider

("Rider NMB")." Cos. Ex. 3 at 3. Under the NMB Pilot Program, a group of commercial and industrial customers¹ could explore whether they could benefit from opting out of the Companies' 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 PJM governing documents approved by the Federal Energy Regulatory Commission ("FERC"), in effect from time to time, as modified by FERC, and applicable to the zone in which the end user is located. The Stipulations specify the customers and accounts eligible to participate in the NMB Pilot Program and the process by which eligible customers may participate or discontinue participation. They also state 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.

Among other things, the NMB Pilot Program will permit participating customers to test their ability to "manage their transmission peak, which is a one-hour peak."² Using the zonal coincident peak for purposes of developing responsibility for transmission-related cost will provide a signal to these customers to reduce their demand coincident with that peak. By reducing the demand of participating customers, they may reduce their total delivered price of electricity. This reduction in demand then may help to effectively engage customers to address reliability objectives that will provide system benefits of increased system stability and reliability. Tr. Vol. XXVI at 5325, 5326.

¹ Generally speaking, the eligible customers are more sophisticated and have more sophisticated metering. Tr. Vol. XXIX at 6082, 6083.

² Tr. Vol. XXXIV at 7021. See also Tr. Vol. XXVI at 5321, 5322. The state policy contained in R.C. 4928.02(E) encourages, among other things, cost-effective and efficient access to information regarding the operation of the transmission system.

Though its members would not suffer an injury if the Commission approves the NMB Pilot Program (and would likely benefit from increased transmission system reliability), RESA argues that the NMB Pilot Program is unduly limiting because it excludes participation by other interested parties. RESA Initial Brief at 49-50. It also claims that the NMB Pilot Program is not properly designed. *Id.* at 50. These claims do not justify rejection or modification of the NMB Pilot Program and ignore the positive benefits the NMB Pilot Program provides.

A. The NMB Pilot Program is not unduly discriminatory

Initially, RESA asserts that the NMB Pilot Program is unduly limiting because all interested parties do not have an opportunity to participate in the NMB Pilot Program. Equal participation, however, is not required, and RESA is not prejudiced if the Commission approves the NMB Pilot Program.

The Ohio Supreme Court and this Commission have long recognized that an electric utility may enter into pilot program rates that may not be uniformly available to all customers. In *Weiss v. Pub. Utils. Comm'n of Ohio*, 90 Ohio St.3d 15 (2000), for example, the Court approved a Commission order permitting The Cleveland Electric Illuminating Company to adjust rates to meet competition through competitive response contracts. Rejecting a customer's complaint that the pilot rate program was unduly discriminatory under various provisions of Chapter 4905 because the customer did not have facilities in an area covered by the pilot rate program, the Court held that "a discriminatory classification is not prohibited if it is reasonable." *Id.* at 16. The Court went on to find that it was reasonable to defer to the Commission's classification of customers based on the existence of a competitive alternative for electric service. *Id.* at 17-18.

As in *Weiss*, the question is not whether there is a classification because the Commission may classify customers in such a way that some may participate and others are excluded. Rather, the question is whether the classification is reasonable.

In this case, it is reasonable to limit the availability of the NMB Pilot Program because the limitation properly reflects the experimental nature of the pilot. The NMB Pilot Program is presented for the purpose of determining if there is value in permitting certain customers with the expertise and metering capability the opportunity to secure transmission service either directly from PJM or through a CRES provider. The parties that will participate are of sufficient size and sophistication and have the metering capability to determine if the NMB Pilot Program offers an opportunity for them to reduce their total energy bills. Tr. Vol. XXIX at 6082-83. Because the proposed limitation is reasonable, the classification of customers is not unduly discriminatory.

Moreover, RESA has not demonstrated any prejudice that justifies rejection of the NMB Pilot Program. While it claims that the NMB Pilot Program excludes participation of other interested stakeholders or customers (RESA Initial Brief at 49-50), RESA's members can elect to offer electric services to NMB Pilot Program participants at the same rates contained in Rider NMB. Tr. Vol. XXVI at 5357. Alternatively, RESA's members can also elect not to offer electric services to program participants. *Id.* In either case, RESA members cannot validly argue that they will be injured by the Commission's authorization of the NMB Pilot Program. Since RESA's members have no claim that they are injured, the Commission can reject RESA's claim that the NMB Pilot Program is unduly limiting. *Weiss*, 90 Ohio St.3d at 18-19. See, also, *Holladay v. Pub. Utils. Comm'n of Ohio*, 61 Ohio St.2d 335, 337 (1980) ("We need not consider the standards included in

[R.C. 4905.33 and 4905.35] since the appellant has not demonstrated that the classification has resulted in higher electric bills or that appellant has otherwise been prejudiced.”) *and Ohio Edison Co. v. Pub. Utils. Comm’n of Ohio*, 173 Ohio St. 478, 497 (1962) (no ground to appeal where the effect of the alleged error does not prejudice the appellant).

B. The design of the NMB Pilot Program allows customers to determine if securing transmission service directly or through a CRES provider is cost-effective

RESA also asserts that the NMB Pilot Program is poorly designed because it will not provide information for the Commission to determine if the pilot was justified on a cost-causation basis or if it violated rate change gradualism. RESA Initial Brief at 50. RESA, however, has not provided any support for its assertion that there may be a problem with the assignment of costs or rate effects of the NMB Pilot Program, and the record demonstrated that RESA’s witness had little understanding of the workings of the PJM OATT and Rider NMB. Tr. Vol. XXVI at 5317-25.³ In the absence of analysis, it is not appropriate for the Commission to accept RESA’s claim that there may be a problem. *In the Matter of the Application of Ohio Power Company for Authority to Establish a Standard Service Offer Pursuant to R.C. 4928.143, in the Form of an Electric Security Plan*, Case Nos. 13-2385-EL-SSO, *et al.*, Opinion and Order at 68 (Feb. 25, 2015) (“*AEP-Ohio ESP III*”).

³ The witness had not reviewed the supplier tariff to prepare his testimony, did not know the entity that would provide transmission service under the supplier tariff, and did not know how conflicts between the supplier tariff and federal rules was resolved by the tariff. Tr. Vol. XXVI at 5317-18. The witness did not indicate any familiarity with the manner in which the Companies bill retail customers for transmission service. Tr. Vol. XXVI at 5323-24.

Moreover, the Commission should approve the program because it may provide positive benefits for both participating and non-participating customers. For participating customers, the program may produce a lower delivered cost of electricity if they can manage effectively their system transmission peaks. Tr. Vol. XXXIV at 7021-22. If participating customers better manage their system transmission peaks, non-participating customers 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”). On balance, therefore, the NMB Pilot Program may provide demonstrated benefits that outweigh any undocumented concerns raised by RESA. Accordingly, RESA’s complaint about the project design is unjustified.

III. THE COMMISSION SHOULD AUTHORIZE THE CONTINUATION OF THE ELR PROGRAM WITH THE PROPOSED MODIFICATIONS

Under the Companies’ current ESP, the ELR Program is available to only non-shopping customers that previously participated in the Companies’ interruptible tariff programs, but there is no limit on the amount of load that may be included in the ELR Program. Under the current ELR Program, customers receive a credit of \$10/kW-month through the ELR Rider and the EDR(b) Rider for Curtailable Load. The current program also includes a provision under which the Companies may assess a participating customer an Economic Buy-Through Charge during an Economic Buy-Through Option Event that is assessed on the portion of the customer’s load that exceeds its pre-established contract Firm Load for any and all hours during such events (“EBT Charge”). The Companies offset the credits provided to eligible customers through the DSE1 and

EDR(e) Riders. See, e.g., Cleveland Electric Illuminating Company, Schedule of Rates for Electric Service, Sheets 101, 115, and 116.⁴

Under the recommendations contained in the Stipulations, the ELR Program would be continued and be available to existing ELR Program customers and customers that have historically been eligible for the ELR Program, but are not currently taking service under the current program. Eligible customers could take generation service from either the Companies or a CRES provider, but load eligible to participate in the ELR Program would be capped at current enrollment levels and up to an additional 136,250 kW. The provisions of the current ELR Program for economic buy-through would be removed, but customers would be required to reduce load in response to emergencies called by the Companies, American Transmission Systems Inc. ("ATSI"), or PJM. Participating customers would receive a credit of \$5/kW per month by unit of Curtailable Load under the ELR Rider, with the credit recovered through the DSE1 component of the Demand Side Management and Energy Efficiency Rider ("Rider DSE"). The EDR(b) Rider credit would be \$5/kW per month by unit of Curtailable Load as defined by ELR Rider, and the EDR(b) Rider credit would be recovered in the EDR(e) Rider, in the same manner as the credit is recovered in the Companies' current ESP. Cos. Ex. 2 at 7-9, Cos. Ex. 3 at 1-3, and Cos. Ex. 154 at 14.

Despite the benefits that the continuation of the ELR Program would provide to both participating and other customers, OCC claims that the ELR Program is too costly because not all customers benefit. OCC Initial Brief at 98. Similarly, OMAEG argues that

⁴ The tariffs are available and may be viewed at: <http://www.puco.ohio.gov/emplibrary/files/docketing/tariffs/Electric/The%20Cleveland%20Electric%20Illuminating%20Company,%20FIRSTENERGY/PUCO%2013%20Schedule%20of%20Rates%20for%20Electric%20Service.pdf>.

the ELR Program “may provide benefits to those few participating customers taking service under Rider ELR, [but] it is not widely available, not uniformly applied, and thus, not beneficial to all customers.” OMAEG Initial Brief at 93. In a more limited argument, OHA asserts that the Commission should reject Rider EDR because it does not provide value to other customers; in the alternative, it argues that the customers subject to Rider EDR(e) should be expanded. OHA Initial Brief at 7.

A modified ELR Program would provide benefits to existing and potential customers, nonparticipating customers, and the Companies. These benefits include increased system reliability and stability, the prevention of load shedding (*i.e.*, rolling blackouts) during emergency events, and job retention. See citations to transcript in the Post Hearing Brief of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company at 108 and nn.521-23 (Feb. 16, 2016) (“Cos. Initial Brief”); Post-Hearing Brief of the Ohio Energy Group at 24-25 (Feb. 16, 2016) (“OEG Initial Brief”); and Nucor Initial Brief at 12-15. By providing eligible customers a means of reducing their electric generation expenses, continuation of a modified ELR Program would also further Ohio industrial companies’ effectiveness in the global economy. Cos. Initial Brief at 148. As the record demonstrates, an interruptible rate program advances “numerous benefits, including the promotion of economic development and the retention of manufacturing jobs.” *AEP-Ohio ESP III*, Opinion and Order at 40.

Because the arguments of OCC, OMAEG and OHA are not supported by the record in this case, the Commission should reject them.

IV. THE COMMISSION SHOULD REJECT ELPC'S ARGUMENT THAT THE PROVISION OF THE STIPULATIONS PERMITTING ELR CUSTOMERS TO OPT OUT OF THE COSTS AND BENEFITS OF THE COMPANIES' PORTFOLIO PLANS VIOLATES PROVISIONS OF SB 310

The Stipulations contain a provision stating that “ELR customers may opt out of the opportunity and ability to obtain direct benefits from the Companies’ EE/PDR Portfolio Plans as provided by S.B. 310.” Cos. Ex. 2 at 8. ELPC argues that this provision is unlawful because R.C. 4928.6613 prohibits a customer to take service under the ELR Program and at the same time to opt out of the costs and benefits of the Companies’ EE/PDR program under R.C. 4928.6611.⁵ ELPC Brief at 59. ELPC, however, incorrectly assumes that the ELR Program is a part of the EE/PDR plan. Moreover, its argument, if accepted, would reduce the incentive for customers with demand response capabilities to make those capabilities available to the Companies. Such a result would injure other customers and system reliability.

Initially, it is incorrect to assume, as ELPC does, that the ELR Program is part of the Companies’ EE/PDR plan such that a customer taking service under the program cannot elect to opt out. The current ELR Program is a provision of the Companies’ tariffs that was approved as part of the current ESP, not as part of their portfolio plans. *In the Matter of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company for Authority to Provide for a Standard Service Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Electric Security Plan*, Case No.

⁵ Under R.C. 4928.6611, eligible customers served by electric distribution companies state-wide will be eligible to opt out under R.C. 4928.6611 beginning January 1, 2017. Under Section 7 of SB 310, however, eligible customers of the Companies could opt out beginning January 1, 2015 because the Companies elected to amend their portfolio plans. *In the Matter of the Application of The Cleveland Electric Illuminating Company, Ohio Edison Company, and The Toledo Edison Company for Approval of Their Energy Efficiency and Peak Demand Reduction Program Plans for 2013 through 2015*, Case Nos. 12-1290-EL-POR, *et al.*, Finding and Order (Nov. 20, 2014). The Stipulations recognize the Companies’ eligible customers’ current right to elect to opt out under Section 7.

12-1230-EL-SSO, Opinion and Order *passim* (July 18, 2012). The proposed ELR Program is an extension of the same program with some modifications and is a provision of the proposed ESP, not the Companies' EE/PDR Portfolio Plans.

Additionally, the benefits of the ELR Program extend beyond the Companies' compliance with EE/PDR requirements. As noted above, the ELR Program enhances system reliability and stability, reduces the likelihood of load shedding, and assists in job retention.

Because the ELR Program is not approved as a part of the Companies' Portfolio Plans and provides benefits that extend beyond compliance with EE/PDR requirements, a customer electing to take service under the ELR Program should not be deemed to be taking a benefit of the EE/PDR plan. Accordingly, the provision of the Stipulations making explicit that a customer taking service under the ELR Program may elect to opt out of the Portfolio Plans does not violate the limitation contained in R.C. 4928.6613.⁶

Taking ELPC's argument concerning the availability of the opt-out provided under SB 310 to its logical conclusion, moreover, would encourage customers to not offer their demand response capabilities to the Companies. An opt-out customer could use its demand response to reduce its capacity obligation without loss of the statutory opt-out right. These customers could benefit from reducing their capacity charges and have no obligation to offer those capabilities to the Companies. If the customer participates in the ELR Program, however, that customer would be subject to unlimited emergency interruptions by the Companies, ATSI, and PJM. Tr. Vol. III at 494. The customer gives

⁶ For the same reason, the provision of the Stipulation that ELPC finds objectionable would not violate Section 10 of SB 310. Section 10 provides that no account properly identified in a notice of intent to opt out by an eligible customer shall be subject to any cost recovery mechanism under R.C. 4928.66 or eligible to participate in or directly benefit from the amended portfolio plan.

up its right to use emergency-related demand response as it may see fit, and the Companies are then able to use this demand response capability to address emergency circumstances that might otherwise cause involuntary interruptions of service to other non-interruptible customers.

If the Commission accepted ELPC's argument, however, customers with demand response capabilities would be deterred from taking service under the ELR Program since they would not be permitted to opt out of the EE/PDR costs and benefits under SB 310. As a result, the Companies and its other customers would not receive the full collective benefit of larger customers' demand response.

Establishing barriers to securing demand response resources should not be an outcome of the Commission's review of the Application and Stipulations. Accordingly, the Commission should reject ELPC's argument that the provision of the Stipulations recognizing that ELR Program customers have the right to opt out violates SB 310.

V. CONCLUSION

The NMB Pilot Program and continuation of the ELR Program will provide positive benefits to the Companies, those customers eligible to participate in the programs, and the balance of customers. Accordingly, the Commission should reject the claims by various parties that challenge these parts of the Stipulations.

Respectfully submitted,

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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 *Reply Brief of Industrial Energy Users-Ohio* was sent by, or on behalf of, the undersigned counsel for IEU-Ohio, to the following parties of record this 26th day of February 2016, via electronic transmission.

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