

**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

**MEMORANDUM CONTRA OF INDUSTRIAL ENERGY USERS-OHIO TO THE
MOTION TO STAY OF THE RETAIL ENERGY SUPPLY ASSOCIATION**

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I. 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.

II. 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 customers¹ could explore whether they could benefit from opting out of FirstEnergy’s Rider NMB and obtaining, directly or indirectly through a CRES

¹ Generally speaking, the eligible customers are more sophisticated and have more sophisticated metering. Tr. Vol. XXIX at 6082-83.

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.

III. ARGUMENT

A. 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.

B. 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).

C. 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.

D. 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 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.

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.

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).

IV. 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,

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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 *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.

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