

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ELECTRIC POWER
SUPPLY ASSOCIATION, et al.,
Petitioners,
v.
FEDERAL ENERGY
REGULATORY COMMISSION,
Respondent.
No. 11-1486, et al.

PETITIONERS' RESPONSE TO
RESPONDENT'S MOTION TO STAY ISSUANCE OF MANDATE

This Court previously granted the Commission a stay for the maximum 90-day period permitted under Rule 41(d) — until December 16 — to file a petition for certiorari with the U.S. Supreme Court. Instead of meeting that deadline, the Commission now seeks to extend the stay by a further 30 days. But the Commission's request does not comply with the rules. In particular, the Commission has not made the "good cause" showing required under Rule 41(d)(2)(B) to be entitled to an extension of the 90-day stay. Nor has it identified any harm — much less irreparable harm — that would result from denying its request. In contrast, extending the stay will result in unnecessary harm to both

petitioners and the nation's power markets. The Commission's motion should be denied.

ARGUMENT

I. The Commission Has Not Made The “Good Cause” Showing Required Under The Rules.

A request to stay the mandate pending a petition for certiorari is a form of extraordinary equitable relief that may be granted only in limited circumstances and traditionally only when needed to prevent irreparable injury. *See Nken v. Holder*, 556 U.S. 418, 432-34 (2009). Precisely because a stay is an exception to ordinary procedures, the rules require that a “stay *must not* exceed 90 days, unless the period is extended for *good cause* or unless the party who obtained the stay files a petition . . . within the period of the stay.” Fed. R. App. P. 41(d)(2)(B) (emphasis added). The good cause standard “requires the ‘party seeking relief to show that the deadlines cannot reasonably be met despite [its] diligence.’” *Capitol Sprinkler Inspection, Inc. v. Guest Servs., Inc.*, 630 F.3d 217, 226 (D.C. Cir. 2011); *see also Lujano v. Omaha Pub. Power Dist.*, 30 F.3d 1032, 1035 (8th Cir. 1994) (good cause requires at least excusable neglect, which in turn requires a good faith effort to comply and a reasonable basis for noncompliance) (citing cases).

The Commission has not made the “good cause” showing that the rules require. It argues only that an extension is warranted because “the Court has already granted one 90-day stay.” FERC Mot. 3. That cannot possibly be an

adequate justification for *extending* the stay. The Commission's reasoning would read the "good cause" requirement out of Rule 41(d)(2)(B). The question under Rule 41(d)(2)(B) is not whether the Commission made the showing necessary to obtain a stay in the first instance; rather, the question is whether the Commission acted diligently but nonetheless could not reasonably file a petition within 90 days — the maximum time ordinarily permitted under the rules.

On that issue, the Commission's motion is fatally silent. The Commission cites no authority suggesting that a party's bare assertion that it needs more time to "prepare and print" a petition is sufficient to satisfy the showing required to extend Rule 41(d)'s 90-day stay period. Because the Court decided this case more than six months ago, the government has had ample time to prepare its petition.

II. The Commission Has Not Identified Any Irreparable Harm That Would Result From Denying Its Extension Request.

The Commission's motion should also be denied because the Commission has made no showing that extending the maximum 90-day period is needed to prevent irreparable harm. In fact, extending the stay will harm petitioners and the nation's power markets. Whatever the merits of the Commission's initial stay request, it is now essential that the Commission comply with the Court's judgment and that the markets be returned to the status quo ante — unless and until the government is able to convince the Supreme Court to grant review and reverse on

the merits. There is no reason that the Commission cannot file its petition for certiorari while also complying with the Court's mandate.

Significantly, the Commission has abandoned any argument challenging the Court's decision striking down as arbitrary and capricious Order 745's unlawful compensation scheme, which requires utilities to pay retail customers the full wholesale rate (LMP) for not consuming energy at retail. *See* Slip Op. 14–15 (describing “Commissioner Moeller’s reasonable (and persuasive) arguments . . . that Order 745 will result in unjust and discriminatory rates”). The Commission went out of its way not to challenge that part of the Court's decision on rehearing, *see* FERC Ltr. (July 11, 2014), and two of the four sitting Commissioners — Commissioner Moeller in his dissent and Commissioner Clark in a press statement — have publicly acknowledged that Order 745's compensation scheme is unlawful. *See, e.g.*, Statement of Comm'r T. Clark (June 11, 2014) (“the court was wholly correct in its assessment of the pricing mechanism adopted by the Commission”), *available at* <http://www.ferc.gov/media/statements-speeches/clark/2014/06-11-14-clark.asp#.VIfEV9EtAuU>. More importantly, the Commission has never argued or made any showing that the Court's decision on this issue raises a substantial question warranting Supreme Court review. *See* Fed. R. App. P. 41(d).

Accordingly, at a minimum, the stay should not be extended with respect to that part of the Court's judgment. There is no reason that the unjust and

discriminatory rates resulting from Order 745's unlawful compensation scheme should remain in effect while the government seeks review on the separate issue of whether the Federal Power Act grants the Commission authority to regulate retail rates and sales in the form of "demand response." As long as the stay remains in place, tariffs subject to the Commission's jurisdiction will continue to require the payment of excessive compensation and provide an unjustified windfall to demand response providers, thereby distorting the markets and harming other market participants. There is no reason the Commission should not be required to take immediate action to remedy that problem and comply with the Court's decision.

More broadly, the Commission is not entitled to an extension of the stay beyond the maximum 90-day period because it has made no showing that denying its extension request and issuing the mandate will cause any harm, much less any irreparable harm, to either the agency or to the markets. That failure is not surprising because all sides agree that the Commission has broad authority — acting within the proper scope of its jurisdiction — to regulate the wholesale rates charged to load-serving entities to reflect agreements to curtail wholesale purchases. *See, e.g., Kentucky Utilities Co.*, 15 FERC ¶ 61,002 (1981) (wholesale rate reduced to reflect wholesale customer's agreement to curtail purchases during hours of supplier's choosing). Those agreements, of necessity, would require load-serving entities to contract with *their* retail customers and to offer those customers

incentives to reduce demand. All sides also agree that the States can create incentives for demand-side resources through appropriate retail rate regulation. Indeed, as EnerNOC, a large demand response provider and intervenor has acknowledged, notwithstanding this Court's decision holding that the Commission lacks authority to regulate end user "demand response" as a wholesale service, state regulators "have traditionally been significant supporters" of demand response and, under their authority, "demand response solutions will continue to deliver major economic benefits to consumers of electricity." EnerNoc, Inc., Press Release (May 27, 2014), *available at* <http://investor.enernoc.com/releasedetail.cfm?ReleaseID=850532>. The Court should not assume harm, much less irreparable harm, will result from denying the extension request when the Commission itself is unwilling to say what, if anything, that harm might be.

* * * *

Because the Commission did not file its petition within the 90-day-deadline, because the Commission offers no "good cause" for extending that deadline, and because the Commission has made no showing that denying an extension would cause harm (much less irreparable harm), the Commission's request for an extension of the stay should be denied. Instead, the Court should issue its mandate, which would require the Commission to return the markets to the status quo ante — where they successfully developed before the Commission made its unlawful

decision to regulate retail rates and sales as “demand response” and to grant demand response providers an unjustified windfall. In the very unlikely event the Commission obtains certiorari and the Supreme Court ultimately reverses this Court’s jurisdictional ruling, the Commission can always decide then to reinstate Order 745. In the meantime, the distortions caused by the Commission’s improper compensation scheme and jurisdictional violations should not be allowed to stand.

CONCLUSION

The motion seeking to extend the stay should be denied.

Respectfully submitted,

/s/ Ashley C. Parrish

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DATED: December 12, 2014

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that I have this 12th day of December 2014, served a copy of the foregoing documents electronically through the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Ashley C. Parrish

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