

**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 ) Case No. 14-1297-EL-SSO  
Company for Authority to Provide a Standard )  
Service Offer Pursuant to R.C. 4928.143 in )  
the Form of an Electric Security Plan. )

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**MEMORANDUM CONTRA  
OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING  
COMPANY, AND THE TOLEDO EDISON COMPANY'S  
APPLICATION FOR REHEARING OF THE EIGHTH ENTRY ON REHEARING  
ON BEHALF OF THE  
OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP**

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**I. INTRODUCTION AND PROCEDURAL HISTORY**

On October 12, 2016, the Public Utilities Commission of Ohio (Commission) issued its Fifth Entry on Rehearing rejecting the Ohio Edison Company, the Cleveland Electric Illuminating Company and the Toledo Edison Company’s (Companies or FirstEnergy) proposed modified retail rate stability rider (Rider RRS) and adopted Staff’s proposed distribution modernization rider (Rider DMR) with some modifications.<sup>1</sup> Additionally, the Commission addressed several issues raised by intervening parties on rehearing, including issues related to the Companies’ Stipulated fourth electric security plan, whereby it directed Staff to review how the Companies and FirstEnergy Corp. use the Rider DMR funds to ensure that such funds are used, directly or indirectly, in support of grid modernization.<sup>2</sup> The Commission also removed

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<sup>1</sup> Fifth Entry on Rehearing at 1 (October 12, 2016) (Fifth EOR).

<sup>2</sup> Id. at 127-128.

the 50 basis point adder as it was no longer necessary and appropriate in conjunction with the Commission's approval of Rider DMR.

On November 14, 2016, the Companies filed an application for rehearing of the Fifth EOR challenging the Commission's removal of the 50 basis point adder.<sup>3</sup> Notably, the Companies failed to object to Staff's review of Rider DMR. On August 16, 2017, the Commission issued its Eighth Entry on Rehearing wherein it denied the FirstEnergy AFR of Fifth EOR and affirmed its decision in its Fifth EOR to remove the 50 basis point adder.<sup>4</sup> The Commission also denied all intervenors' pending assignments of error resulting in a final appealable order to the Supreme Court of Ohio.

Attempting to delay the intervenors' legal right to appeal the Commission's opinion and order and subsequent entries on rehearing issued in this case while the Companies continue to collect unlawful charges from customers, the Companies erroneously filed an application for rehearing of the Commission's Eighth EOR.<sup>5</sup> The arguments raised by the FirstEnergy AFR of Eighth EOR have already been considered by the Commission and rejected in its Eighth EOR. The FirstEnergy AFR of Eighth EOR is nothing more than a stall tactic, contains no meritorious arguments, and should be denied.

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<sup>3</sup> Companies' Application for Rehearing of the Fifth EOR at 31-34 (November 14, 2106) (FirstEnergy AFR of Fifth EOR).

<sup>4</sup> Eighth Entry on Rehearing at ¶ 145 (August 16, 2017) (Eighth EOR).

<sup>5</sup> Companies' Application for Rehearing of Eighth EOR (September 15, 2017) (FirstEnergy AFR of Eighth EOR).

## II. ARGUMENT

### **A. Staff's Review of Rider DMR is Necessary to Protect Customers and to Ensure Rider DMR Revenues Will be Used to Support Grid Modernization.**

Although the Commission required Staff to review how the Companies expended Rider DMR funds in its Fifth EOR, the Companies failed to timely challenge the Commission's directive and further failed to set forth specific grounds on how Staff's review, quarterly reports, and real time monitoring are unreasonable or unlawful as required by R.C. 4903.10(B). Regardless, it is the Commission's duty and prerogative to assure, through careful Staff review, that the \$612 million to \$1 billion dollars the Companies collect from customers for credit support is used appropriately.

In its Fifth EOR, the Commission "direct[ed] Staff to periodically review how the Companies, and FirstEnergy Corp., use Rider DMR funds to ensure that such funds are used, directly or indirectly, in support of grid modernization."<sup>6</sup> The Commission found "that this Staff review will ensure that there is no unlawful subsidy of the Companies' affiliates."<sup>7</sup> Although the Companies objected to the Commission's "sufficient progress" language in the FirstEnergy AFR of Fifth EOR, the Companies acknowledged "Staff's review to assure that Rider DMR funds be reasonably related to Rider DMR"<sup>8</sup> and failed to take issue with the Commission's directive.

In response to the FirstEnergy AFR of Fifth EOR, the Commission in its Eighth EOR clarified that the "sufficient progress" language did not mean Rider DMR revenues were limited directly to the deployment of grid modernization programs. The Commission also reaffirmed

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<sup>6</sup> Fifth EOR at 127-28; see Eighth EOR at ¶ 113.

<sup>7</sup> Fifth EOR at 128.

<sup>8</sup> FirstEnergy AFR of Fifth EOR at 24.

its directive for Staff to review Rider DMR to ensure that Rider DMR revenues are used, directly or indirectly, in support of grid modernization and explained that Staff's review will be in "real time" and will include updates on the use of Rider DMR revenues.<sup>9</sup> The Commission further directed Staff to engage a third party monitor to assist Staff in the ongoing Rider DMR review established in the Fifth EOR. The Commission's reaffirmation of its decision to have a Staff review of Rider DMR and its directive for Staff to hire a third party monitor to assist Staff in this review does not add or subtract from the Commission's directive in its Fifth EOR mandating Staff's review.

Although the Commission's directive for Staff's review of Rider DMR is the same in its Eighth EOR as it was in its Fifth EOR, the Companies only now object. First, the Companies object to the Commission's directive for Staff to enlist the assistance of a third party monitor for the review.<sup>10</sup> As the Commission explained, the third party monitor is directed to "assist Staff and work with FirstEnergy and FirstEnergy Corp. to ensure that Rider DMR funds are expended appropriately."<sup>11</sup> Other than claiming Rider DMR dollars cannot be "painted" to allow tracking<sup>12</sup> and that a monitor is not "necessary,"<sup>13</sup> the Companies make no argument or showing how this directive is inconsistent with the Commission's Fifth EOR directive mandating a Staff review, which notably, the Companies failed to oppose.

Further, the Companies fail to even allege how the enlistment of a monitor to assist Staff is unreasonable or unlawful as required by Ohio law. Under R.C. 4903.10(B), the FirstEnergy AFR of Eighth EOR must "set forth specifically the ground or grounds on which the applicant

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<sup>9</sup> Eighth EOR at ¶ 113.

<sup>10</sup> FirstEnergy AFR of Eighth EOR at 3-8.

<sup>11</sup> Id. at ¶ 113.

<sup>12</sup> FirstEnergy AFR of Eighth EOR at 3.

<sup>13</sup> Id. at 4.

considers the order to be unreasonable or unlawful.” Instead of setting forth specifically the grounds on which the Companies consider the enlistment of a monitor to be unreasonable or unlawful, the Companies merely allege that the monitor is not “necessary.”<sup>14</sup> The Commission regularly enlists the assistance of third-parties to assist Staff in reviewing and evaluating public utilities’ financial records and business practices to ensure that customer funds are expended appropriately and prudently.<sup>15</sup> The Companies fail to show how the Commission’s directive in its Fifth EOR, reaffirmed in its Eighth EOR, is unlawful or unreasonable, or even inconsistent with Commission precedent. Therefore, the Commission should deny the Companies’ challenge to a third-party assisting Staff in its review.

Second, the Companies object to quarterly reviews of Rider DMR revenues as impractical and unnecessary.<sup>16</sup> In its Eighth EOR, the Commission explained that it intended the Rider DMR review to be ongoing and conducted in real time.<sup>17</sup> To effectuate this intent, the Commission required the monitor to make quarterly interim updates on the use of Rider DMR to Staff, a mid-term report if the Companies seek an extension, and a final report after termination of Rider DMR or its extension.<sup>18</sup> Again, as required by R.C. 4903.10(B), the

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<sup>14</sup> FirstEnergy AFR of Eighth EOR at 4.

<sup>15</sup> See e.g., *In the Matter of the Application of the Dayton Power and Light Company for an Increase in its Electric Distribution Rates, et al.*, Case No. 15-1830-EL-AIR, et al., Entry (March 22, 2017) (directing Staff to issue a request for proposal to enlist an independent auditor to assist Staff); *In the Matter of the Review of the Alternative Energy Rider Contained in the Tariffs of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company*, Case No. 11-5201-EL-RDR, Entry at 2 (January 18, 2012) (directing Staff to work with an auditor to “develop and incorporate into the audit report a range of alternative methodologies to determine the Companies’ status relative to the 3 percent provision contained within Section 4928.64(C)(3), Revised Code, including an analysis of the impact of renewable generation on market prices and the electric distribution utilities’ renewable procurement costs.”); *In the Matter of the Commission’s Review and Adjustment of the Fuel and Purchased Power and System Reliability Tracker Component of Duke Energy Ohio, Inc. and Related Matters*, Case No. 07-723-EL-UNC, Finding and Order (June 27, 2007) (enlisting an auditor to “analyze, interpret and make specific recommendations with respect to the structure, policies, and procedures of the company’s fuel procurement, fuel utilization, power purchases, capacity purchases, and related functions.”).

<sup>16</sup> FirstEnergy AFR of Eighth EOR at 5-6.

<sup>17</sup> Eighth EOR at ¶ 113.

<sup>18</sup> *Id.*

Companies fail to allege how the quarterly reports are unreasonable or unlawful and merely state that they “will serve no purpose” and “would be busy-work” for the third-party monitor assisting Staff.<sup>19</sup> However, this position is contrasted with the Companies’ admission that “dollars collected under Rider DMR cannot be tracked as they pass through the Companies’ regulated money pool” and “the Companies will either use funds from the money pool to further the purposes of Rider DMR – or the Companies will not do so. And the anticipated expenditures or usage of funds to further the purposes of Rider DMR likely will not occur regularly, i.e., on an hourly, daily or even monthly basis.”<sup>20</sup> The function of the third-party assisting Staff is to specifically protect against the Companies not using the funds to further the purposes of Rider DMR. This function can hardly “serve no purpose” or be considered “busy-work.” The Companies’ arguments should be rejected.

Lastly, the Companies argue that Staff’s real time review of Rider DMR places restrictions on how the Companies use Rider DMR funds and interferes with their management role. This argument lacks merit. The Commission in its Fifth EOR stated: “[a]lthough we will not place restrictions on the use of Rider DMR funds, the Commission directs Staff to periodically review how the Companies, and FirstEnergy Corp., use the Rider DMR funds *to ensure that such funds are used, directly or indirectly, in support of grid modernization.*”<sup>21</sup> The Commission was clear that Rider DMR funds must be used in support of grid modernization. Neither the Commission’s Fifth EOR, nor its Eighth EOR, limit or restrict how the Companies may use Rider DMR funds to support grid modernization. Staff’s ongoing and real time review is merely necessary to protect customers and ensure this directive is followed.

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<sup>19</sup> See FirstEnergy AFR of Eighth EOR at 5-6.

<sup>20</sup> Id.

<sup>21</sup> Fifth EOR at 127-128 (emphasis added).

The Companies rely on *Elyria Tel. Co. v. Pub. Util. Comm.* for the proposition that Staff's review usurps the Companies' right to regulate its own affairs and manage its own business.<sup>22</sup> The Companies' reliance on *Elyria* is misplaced. The applicable facts in *Elyria* revolved around whether the Commission had authority to require approval before the utility can declare and pay dividends even though the utility had a large earned surplus.<sup>23</sup> The facts here are clearly distinguishable. Here, the Commission approved Rider DMR under the incentive ratemaking statute R.C. 4928.143(B)(2)(h) and directed Staff to review Rider DMR to ensure collected funds were in fact incentivizing grid modernization. The Commission did not say how management must use Rider DMR funds to serve this purpose. Unlike securing approval to declare and pay dividends in *Elyria*, the Commission here issued no order that required the Companies to secure approval before they could "lower the cost of borrowing the funds needed to invest in grid modernization" including "reducing outstanding pension obligations, reducing debt, or taking other steps to reduce long-term costs of accessing capital."<sup>24</sup> Further, the issue of a utility's ability to pay dividends is miles apart from ensuring that the Companies meet the conditions attached to the Commission's approval of Rider DMR.

Accordingly, the Companies' objection to Staff's (and a third-party) review of Rider DMR, to protect customers and ensures Rider DMR revenues will be used to support grid modernization, should be rejected and the Companies' assignment of error on these grounds should be denied.

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<sup>22</sup> See FirstEnergy AFR of Eighth EOR at 7-8 (citing *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447-48, 110 N.E.2d 59 (1953)).

<sup>23</sup> *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447-49, 110 N.E.2d 59 (1953).

<sup>24</sup> Fifth EOR at 128.



**B. The Commission Considered and Rejected the Companies' Argument to Restore the 50 Basis Point Adder in its Eighth Entry on Rehearing.**

The Commission's Eighth EOR did not eliminate the 50 basis point adder – the Commission's Fifth EOR did. Not only would the Companies' arguments here be untimely, they are the exact same arguments raised in the FirstEnergy AFR of Fifth EOR<sup>25</sup> and rejected by the Commission in its Eighth EOR. Accordingly, the Commission should reject the Companies' *second* request to reinstate the 50 basis point adder.

Although the Commission improperly approved Rider DMR in its Fifth EOR, the Commission did correctly recognize that the 50 basis point adder was no longer appropriate in light of the fact that customers will already pay the Companies approximately \$204 million per year, for up to five years, under Rider DMR for grid modernization.<sup>26</sup> In its Fifth EOR, the Commission held that “[i]n light of the fact that the purpose of the 50 basis point adder has been supplanted by Rider DMR, we find that the 50 basis point adder is no longer necessary or appropriate, and we will modify the Stipulation to remove this provision.”<sup>27</sup> In the FirstEnergy AFR of Fifth EOR, the Companies exclaimed: “[t]his is wrong” and argued that “Rider DMR will provide up-front cash to improve the Companies’ ability to access capital for grid modernization, [but] the 50 basis point adder ensures that grid modernization projects earn a more favorable return than other competing investments, including investments in the transmission system, over the lives of the grid modernization investments.”<sup>28</sup> The Companies further argued that the 50 basis point adder was required for grid modernization because “[t]he opportunity to earn more favorable returns on certain grid modernization projects will likely

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<sup>25</sup> FirstEnergy AFR of Fifth EOR at 31 -34.

<sup>26</sup> Fifth EOR at 108.

<sup>27</sup> Id.

<sup>28</sup> FirstEnergy AFR of Fifth EOR at 31-32.

prove a highly influential factor favoring planning and funding grid modernization projects.”<sup>29</sup> In its Eighth EOR, the Commission considered these arguments and rejected them.<sup>30</sup> Nonetheless, the Companies raise the *same* arguments again in the FirstEnergy AFR of Eighth EOR.<sup>31</sup>

Although the Companies allege that Rider RRS and the 50 basis point adder were separate grid modernization incentives,<sup>32</sup> it is undisputed that the Commission originally approved Rider RRS and the 50 basis point adder under different statutory authority. The Economic Stability Program and Rider RRS were authorized under R.C. 4928.143(B)(2)(d).<sup>33</sup> In contrast, Rider DMR was authorized under R.C. 4928.143(B)(2)(h) as incentive ratemaking.<sup>34</sup> As explained in its Eighth EOR, the Commission authorized both the 50 basis point adder and Rider DMR under R.C. 4928.143(B)(2)(h), “both intended to incent the Companies to take the same action: to invest in grid modernization.”<sup>35</sup> The Companies are remiss to assert that Rider RRS and Rider DMR are equivalent and that Rider DMR did not supplant the 50 basis point adder. Because Rider DMR and the 50 basis point adder were both authorized under R.C. 4928.143(B)(2)(h) to incentivize grid modernization, Rider DMR supplanted the need for the 50 basis point adder as the Commission found,<sup>36</sup> and the Commission properly modified the stipulation to remove this term.

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<sup>29</sup> Id. at 33.

<sup>30</sup> See Eighth EOR at ¶¶ 143-145.

<sup>31</sup> See FirstEnergy AFR of Eighth EOR at 9.

<sup>32</sup> Id. at 8-9.

<sup>33</sup> Opinion and Order at 110.

<sup>34</sup> Eighth EOR at ¶ 114.

<sup>35</sup> Id. at ¶ 145.

<sup>36</sup> Eighth EOR at ¶ 114.

The Companies have failed to raise any new facts or material issues not adequately considered and properly decided in the Commission's Eighth EOR. Even if the Companies did raise new arguments why the 50 basis point adder should be reinstated, which they did not, such arguments would be untimely and waived because they failed to raise them in their application for rehearing after the Commission issued its Fifth EOR removing the 50 basis point adder. Accordingly, the Commission should deny this assignment of error in the FirstEnergy AFR of Eighth EOR.

### **III. CONCLUSION**

The FirstEnergy AFR of Eighth EOR is nothing more than a stall tactic designed to delay appeal. Accordingly, OMAEG respectfully requests that the Commission deny the FirstEnergy AFR of Eighth EOR as the Companies' requests are untimely and have already been considered by the Commission and rejected.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the following parties via electronic mail on September 25, 2017.

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