

THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF THE REVIEW OF THE
DISTRIBUTION MODERNIZATION RIDER
OF OHIO EDISON COMPANY, THE
CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON
COMPANY.

CASE NO. 17-2474-EL-RDR

ENTRY

Entered in the Journal on December 30, 2020

I. SUMMARY

{¶ 1} The Commission grants the motion of the Ohio Consumers' Counsel to reopen this proceeding and directs Staff to issue a request for proposal soliciting the services of a third-party auditor to assist Staff with an additional review of the Distribution Modernization Rider.

II. DISCUSSION

A. *Procedural History*

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy) are electric distribution utilities (EDUs) as defined by R.C. 4928.01(A)(6), and public utilities as defined in R.C. 4905.02, and, as such, are subject to the jurisdiction of this Commission.

{¶ 3} R.C. 4928.141 provides that an electric distribution utility shall provide consumers within its certified territory a standard service offer of all competitive retail electric services necessary to maintain essential electric services to customers, including firm supply of electric generation services. The SSO may be either a market rate offer, in accordance with R.C. 4928.142, or an electric security plan (ESP), in accordance with 4928.143.

{¶ 4} On March 31, 2016, in Case No. 14-1297-EL-SSO, the Commission approved FirstEnergy's application for an ESP. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., and*

the Toledo Edison Co. for Authority to Provide for a Std. Serv. Offer Pursuant to Section 4928.143, Revised Code, in the Form of an Elec. Security Plan, Case No. 14-1297-EL-SSO, Opinion and Order (Mar. 31, 2016) (*ESP IV Case*). Further, on October 12, 2016, the Commission issued the Fifth Entry on Rehearing in the *ESP IV Case*. On rehearing, the Commission authorized FirstEnergy to implement a distribution modernization rider (Rider DMR). *ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶185. Additionally, the Commission ruled that Staff will review the expenditure of Rider DMR revenues to ensure that Rider DMR revenues are used, directly or indirectly, in support of grid modernization. *ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶282.

{¶ 5} Thereafter, by Entry issued on December 13, 2017, in this proceeding, the Commission directed Staff to issue a request for proposal (RFP) for a third-party monitor to assist Staff in the review of Rider DMR, consistent with the Commission's previous directives. *ESP IV Case*, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶113. On January 24, 2018, the Commission selected Oxford Advisors, LLC (Oxford) to serve as the third-party monitor.

{¶ 6} In the *ESP IV Case*, the Commission directed the monitor to file a final report of its review of Rider DMR within 90 days after its termination or extension. *ESP IV Case*, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶113.

{¶ 7} Numerous parties appealed the Commission's decision in the *ESP IV Case*, challenging Rider DMR and other aspects of the Commission's orders.

{¶ 8} On June 19, 2019, the Supreme Court of Ohio issued its decision in those appeals, affirming the Commission's order in part, reversing it in part as it relates to Rider DMR, and remanding with instructions to remove Rider DMR from FirstEnergy's ESP. *In re Application of Ohio Edison Co. v. Pub. Util. Comm.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906 at ¶¶ 14-29.

{¶ 9} On August 22, 2019, pursuant to the *Ohio Edison* decision, the Commission directed the Companies to immediately file proposed revised tariffs setting Rider DMR to \$0.00. The Companies were further directed to issue a refund to customers for monies collected through Rider DMR for services rendered after July 2, 2019, subject to Commission review. Once the refund had been appropriately issued, the Companies were instructed to file proposed, revised tariffs removing Rider DMR from the Companies' ESP. *ESP IV Case*, Order on Remand (Aug. 22, 2019) at ¶¶ 14-16.

{¶ 10} The Companies complied with the Commission's directives as instructed in the Order on Remand and filed tariffs removing Rider DMR from their ESP on October 18, 2019.

{¶ 11} At Staff's request, the attorney examiner granted an extension to Oxford, and ordered the final report to be filed in this docket by March 31, 2020, unless otherwise ordered by the Commission.

{¶ 12} On February 26, 2020, the Commission issued an Entry in which the Commission stated that the provisions for a final review of Rider DMR were an essential part of the terms and conditions related to Rider DMR in ESP IV. *ESP IV Case*, Fifth Entry on Rehearing at ¶282, Eighth Entry on Rehearing at ¶113, Ninth Entry on Rehearing (Oct. 11, 2017) at ¶¶ 17-20. Additionally, the Commission cited the Court's objections in *Ohio Edison* to the usefulness of the proposed final review after the Court questioned the lack of an effective remedy resulting from such review. *Ohio Edison* at ¶26. As such, the Commission found that, when the provisions of Rider DMR were eliminated, so too were the provisions requiring a final review of the rider. The Commission then dismissed and closed the case of record.

{¶ 13} No applications for rehearing the Commission's February 26, 2020 Entry were subsequently filed.

{¶ 14} Thereafter, on September 8, 2020, Ohio Consumers' Counsel (OCC) filed a motion requesting that the Commission reopen this proceeding and initiate an audit of Rider DMR. FirstEnergy filed a memorandum contra on September 23, 2020, to which OCC filed a reply on September 20, 2020.

B. Summary of the Pleadings

{¶ 15} On September 8, 2020, the OCC filed a motion requesting Commission action on several fronts in response to the recent federal criminal complaint filed against the former Ohio House Speaker and others, including, but not limited to, a request that the Commission reopen this proceeding. *United States of America v. Larry Householder, Jeffrey Longstreth, Neil Clark, Matthew Borges, Juan Cespedes, and Generation Now*, Case No. 1:20-MJ-00526 (U.S. Dist. S.D.) (July 17, 2020). Specifically, OCC requests that the Commission open the proceeding to initiate an audit of FirstEnergy's Rider DMR, or, in the alternative, that the Commission incorporate an audit of the Rider DMR in a more all-encompassing independent audit of the management and corporate governance of FirstEnergy, including whether any money collected from ratepayers was improperly used in connection with H.B. 6. The OCC notes that the Rider DMR appeared to be benefitting non-Ohio regulated companies and some funds have been used to pay dividends to FirstEnergy, which they argue should be investigated and addressed now. The OCC also notes that the Commission never ruled on whether FirstEnergy complied with the directive to use the funds for grid modernization. The OCC notes that good cause exists for reopening the case because the criminal complaint regarding H.B.6 was not filed until after the Commission dismissed this case.

{¶ 16} On September 23, 2020, FirstEnergy filed its memorandum contra to the OCC's motion requesting that the Commission reopen this proceeding. As a threshold matter, FirstEnergy initially asserts that the Commission lacks jurisdiction to review any expenditures made by FirstEnergy Corp. because it is not a public utility. FirstEnergy also argues that the Commission lacks jurisdiction to review any H.B.6 spending or donations to 501(c)(4) entities unless the funds came from rates charged to customers.

{¶ 17} As to the more specific request to reopen this proceeding and initiate an audit of FirstEnergy's Rider DMR, FirstEnergy argues that there is no good cause to grant the motion and that it would be unreasonable to prolong it because it has already been extensively litigated. FirstEnergy also emphasizes that the Commission ordered the case to be closed, so it should not be reopened. The Companies argue that the motion is effectively an application for rehearing, and the Commission does not have the authority to consider an application for rehearing filed more than 30 days after an order, pursuant to R.C. 4903.10.

{¶ 18} On September 30, 2020, the OCC filed its reply to FirstEnergy's memorandum contra, emphasizing that good cause exists to reopen the proceeding in order to verify that money collected from customers through Rider DMR were used lawfully and in compliance with Commission orders, given the recent developments associated with the criminal investigation surrounding the enactment of H.B. 6, and, thus, cannot be categorized as an untimely application for rehearing. As explained by OCC, customer charges associated with Rider DMR could have been improperly diverted in the efforts to enact H.B. 6 or defeat to the subsequent referendum. OCC notes that this review is even more crucial since the findings of Oxford from the original audit were never addressed in a Commission order. Finally, contrary to FirstEnergy's position that the case has been closed, OCC contends that, pursuant to Ohio Adm.Code 4901-1-02(E) and (E)(1), the case is still open as shown on the Commission docket.

C. *Commission Conclusion*

{¶ 19} As noted in OCC's reply memorandum, on September 15, 2020, the Commission opened a proceeding to review whether any political and charitable spending by the Companies in support of H.B. 6 and the subsequent referendum effort was included, directly or indirectly, in any rates or charges paid by ratepayers in this state. *In re the Review of the Political and Charitable Spending by Ohio Edison Co., The Cleveland Elec. Illum. Co., and The Toledo Edison Co.*, Case No. 20-1502-EL-UNC.

{¶ 20} While the Commission is aware of reports containing allegations against FirstEnergy Corp. regarding its conduct in the passage of H.B. 6 and the subsequent referendum, we are determined to act in a deliberate manner, based upon facts rather than speculation, and with due consideration to the limits on our statutory authority over FirstEnergy Corp. and over the political and charitable activity of all public utilities in this state. *In re Ohio Edison Co., The Cleveland Elec. Illum. Co., The Toledo Edison Co.*, Case No. 17-974-EL-UNC, Entry (Nov. 4, 2020) at ¶ 17.

{¶ 21} The Commission should “respect its own precedents in its decisions to assure the predictability which is essential in administrative law.” *In re Application of Ohio Power Co.*, 144 Ohio St.3d 1, 2015-Ohio-2056, 40 N.E.3d 1060 at ¶ 16 (quoting *The Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 42 Ohio St.2d 402, 431, 330 N.E.2d 1 (1975), superseded on other grounds by statute as recognized in *Babbitt v. Pub. Util. Comm.*, 59 Ohio St.2d 81, 89, 391 N.E.2d 1376 (1979)). This does not mean, however, that the Commission may never revisit a particular decision, only that if the Commission does change course, we must explain why. *In re Application of Columbus S. Power Co.*, 128 Ohio St.3d 512, 2011-Ohio-1788, 947 N.E.2d 655, ¶ 52, citing *Util. Serv. Partners, Inc. v. Pub. Util. Comm.*, 124 Ohio St.3d 284, 2009-Ohio-6764, 921 N.E.2d 1038, ¶ 18.

{¶ 22} We also note that it is the policy of this state to ensure the availability to consumers of adequate, reliable, safe, efficient, nondiscriminatory, and reasonably-priced retail electric service. Therefore, given the unique circumstances at this time, and in the interests of both transparency and state policy, we find good cause exists to grant OCC’s motion and initiate an additional review of the entire duration of Rider DMR. FirstEnergy concedes our legal basis for retaining an auditor in this proceeding in its memorandum contra filed on September 23, 2020. Although we are not persuaded by OCC’s arguments regarding the “open” status of this case, the Commission has discretion to manage its dockets, including the discretion to decide how it may best proceed to manage and expedite the orderly flow of business, and we will exercise that discretion and reopen this proceeding. *In re Columbus S. Power Co. and Ohio Power Co.*, Case Nos. 11-346-EL-SSO et al., Opinion and

Order (Aug. 8, 2012) at 24 (citing *Duff v. Pub. Util. Comm.* (1978), 56 Ohio St. 2d 367, 379; *Toledo Coalition for Safe Energy v. Pub. Util. Comm.* (1982), 69 Ohio St. 2d 559, 560.

{¶ 23} Accordingly, at this time, we direct Staff to issue an RFP to solicit the services of a third-party auditor to assist Staff with the full review of Rider DMR, as contemplated by ESP IV. For clarity, the audit to be conducted should also include an examination of the time period leading up to the passage of H.B. 6 and the subsequent referendum, in order to ensure funds collected from ratepayers through Rider DMR were only used for the purposes established in ESP IV. *ESP IV Case*, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶282. While this case does complement the Commission's actions and efforts in Case No. 20-1502-EL-UNC, we will not be consolidating the two proceedings at this time.

III. ORDER

{¶ 24} It is, therefore,

{¶ 25} ORDERED, That Staff issue an RFP in this proceeding to solicit the services of a third-party auditor to assist Staff with the full review of Rider DMR, as directed in Paragraph 23. It is, further,

{¶ 26} ORDERED, That a copy of this Entry be served upon all parties of record.

COMMISSIONERS:

Approving:

M. Beth Trombold
Lawrence K. Friedeman
Daniel R. Conway
Dennis P. Deters

MJA/hac

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Case No(s). 17-2474-EL-RDR

Summary: Entry granting the motion of the Ohio Consumers' Counsel to reopen this proceeding and directs Staff to issue a request for proposal soliciting the services of a third-party auditor to assist Staff with an additional review of the Distribution Modernization Rider electronically filed by Heather A Chilcote on behalf of Public Utilities Commission of Ohio