

**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)	Case No. 14-1297-EL-SSO
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)	

**OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING
COMPANY, AND THE TOLEDO EDISON COMPANY’S MEMORANDUM IN
OPPOSITION TO THE MOTION BY THE OFFICE OF THE OHIO CONSUMERS’
COUNSEL AND OHIO MANUFACTURERS’ ASSOCIATION ENERGY GROUP TO
REJECT RIDER DMR TARIFFS OR, IN THE ALTERNATIVE, MOTION TO STAY
COLLECTION OF RIDER DMR OR MOTION FOR FIRSTENERGY TO COLLECT
RIDER DMR SUBJECT TO REFUND**

I. INTRODUCTION

In an attempt to relitigate the Commission’s approval of the Distribution Modernization Rider (“Rider DMR”), the Office of the Ohio Consumers’ Counsel (“OCC”) and the Ohio Manufacturers’ Association Energy Group (“OMAEG”) have filed three consolidated motions seeking to prevent the rider from taking effect.¹ First, they claim that the Rider DMR tariffs filed by Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (the “Companies”) and recommended for approval by Staff should be rejected for failing to comply with the Commission’s Fifth Entry on Rehearing. In the alternative, they

¹ Their filing is styled: Motion to Reject FirstEnergy’s Distribution Modernization Rider Tariffs or, in the Alternative, Motion to Stay FirstEnergy’s Collection of the Rider from Customers or Motion for FirstEnergy to Collect Distribution Modernization Rider Subject to Refund by the Office of the Ohio Consumers’ Counsel and Ohio Manufacturers’ Association Energy Group (Dec. 8, 2016). This motion and its accompanying Memorandum in Support are collectively referred to herein as the “Motion.” Specific page citations refer to the pages of the Memorandum in Support.

assert that the Commission should either: (1) stay collection of Rider DMR; or (2) order that Rider DMR revenues be collected subject to refund.

OCC and OMAEG are wrong on all three fronts. Their arguments for rejecting the Companies' Rider DMR tariffs and for staying the collection of Rider DMR funds or making such recovery subject to refund rely on a fundamental misunderstanding of the Fifth Entry on Rehearing. They also rely upon positions that the Commission has already considered and rejected. OCC and OMAEG fail to provide any reasonable basis to support the relief they seek. Simply put, their Motion is a needless dilatory procedural tactic. The Companies respectfully request that the Motion be denied.

II. BACKGROUND

On October 12, 2016, the Commission issued its Fifth Entry on Rehearing. In that Entry, the Commission approved Rider DMR and ordered the Companies to file proposed tariffs consistent with the Commission's decision.² On November 3, the Companies, in compliance with the Fifth Entry on Rehearing, filed tariffs including Rider DMR with an effective date of January 1, 2017.³ Staff filed its Review and Recommendation of the Companies' compliance tariffs on December 6, finding that "[the compliance tariffs] appropriately reflect the Commission's orders" and recommending that the tariff sheets "be approved and become effective on a service rendered basis beginning January 1, 2017."⁴ OCC and OMAEG filed their Motion two days later.

² Fifth Entry on Rehearing, pp. 87-88 (adopting Rider DMR), 183 (ordering the Companies to file "proposed tariffs consistent with this Fifth Entry on Rehearing.").

³ Ohio Edison Company's Tariff Filing in Compliance with Entry, at Sheet 132 (Nov. 3, 2016); The Cleveland Electric Illuminating Company's Tariff Filing in Compliance with Entry, at Sheet 132 (Nov. 3, 2016); The Toledo Edison Company's Tariff Filing in Compliance with Entry, at Sheet 132 (Nov. 3, 2016).

⁴ Staff Review and Recommendation (Dec. 6, 2016).

III. ARGUMENT

A. The “Sufficient Progress” Review Ordered By The Commission Is Not A Barrier To The Approval Of The Rider DMR Tariffs.

OCC and OMAEG contend that the Commission should reject the Companies’ Rider DMR tariffs because the Companies have not demonstrated “sufficient progress on grid modernization and deployment.”⁵ According to OCC and OMAEG, the Commission established “three conditions that had to be met before [the Companies] could begin to collect [Rider DMR] revenues from customers.”⁶ One of these purported “pre-conditions” is “a demonstration of sufficient progress in the implementation and deployment of grid modernization programs approved by the Commission.”⁷ OCC and OMAEG argue that since the Companies have not yet demonstrated “sufficient progress” – and likely cannot do so before January 1, 2017 – the Companies cannot collect revenues under Rider DMR.⁸ This is an absurd mischaracterization of the Fifth Entry on Rehearing.

To be sure, the Commission attached three conditions to Rider DMR:

(1) continued retention of the corporate headquarters and nexus of operations of FirstEnergy Corp. in Akron, Ohio; (2) no change in “control” of the Companies as that term is defined in R.C. 4905.402(A)(1); and (3) a demonstration of sufficient progress in the implementation and deployment of grid modernization programs approved by the Commission.⁹

But none of those conditions triggers the Companies’ immediate ability to begin collecting under Rider DMR. Rather, these are conditions on the Companies’ *continued* recovery of Rider DMR

⁵ Motion at 1.

⁶ *Id.* at 2 (citing Fifth Entry on Rehearing at 96).

⁷ *Id.* (quoting Fifth Entry on rehearing at 96).

⁸ *See generally* Motion at 1-6.

⁹ Fifth Entry on Rehearing at 96.

funds. Indeed, the first two conditions refer to events that could only happen in the future, if at all. As for the third, the Commission left no doubt that the “sufficient progress” condition relates to Rider DMR’s continuation, not to its implementation: “*for purposes of the continuation of Rider DMR*, ‘sufficient progress’ will be determined at the sole discretion of the Commission.”¹⁰ Thus, arguing that the Companies must demonstrate sufficient progress in the implementation and deployment of their grid modernization programs *before* collecting any funds under Rider DMR deliberately disregards what the Commission actually said.

Further, reading the “sufficient progress” condition as a trigger to collect Rider DMR revenues is illogical and would defeat the purpose of the rider. In the Fifth Entry on Rehearing, the Commission determined: “Rider DMR will provide a needed incentive to the Companies to focus innovation and resources on grid modernizations” and “will address a demonstrated need for credit support for the Companies in order to ensure that the Companies have access to capital markets in order to make investments in their distribution system.”¹¹ This holding was based, in part, upon the Commission’s finding that the evidence “establish[ed] that a downgrade of the Companies’ credit rating is a serious risk.”¹² It would make no sense for the Commission to approve a mechanism to address an immediate, serious need for credit support and then to place a condition on that mechanism ensuring that the Companies will recover no funds under it for some indeterminate time in the future. Rider DMR is intended to provide credit support to the Companies in order to enable them to fund grid modernization. The “sufficient progress” review

¹⁰ *Id.* at 97 (emphasis added).

¹¹ *Id.* at 87.

¹² *Id.* at 91.

is intended to monitor the success of Rider DMR in doing so.¹³ The latter must follow the former. This is the only reasonable interpretation of the condition imposed by the Commission.

The practical consequences of arguments raised by OCC and OMAEG further demonstrate why the Motion should be rejected. These intervenors claim that the Companies cannot begin collecting under Rider DMR immediately because “sufficient progress cannot be made until implementation of grid modernization is ordered.”¹⁴ This merely restates a position that OMAEG took in past briefing, where it argued that Rider DMR should not be implemented without a requirement to simultaneously commence grid modernization.¹⁵ But not implementing Rider DMR until the Companies access the capital markets – i.e., when the Commission approves a grid modernization plan – will be too late to obtain financing on the favorable terms the Commission envisioned in approving Rider DMR. As Ms. Mikkelsen explained:

If the Companies . . . must wait to collect Rider DMR until they need immediate access to capital for grid modernization, Rider DMR revenues will have no effect on the Companies’ financing of grid modernization projects. This would defeat the purpose of Rider DMR.¹⁶

B. OCC And OMAEG Have Failed To Show That The Commission Should Stay Collection Under Rider DMR.

Should the Commission approve the Rider DMR tariffs, OCC and OMAEG alternatively assert that the Commission “should stay the collection of [Rider DMR] pending the outcome of

¹³ To be sure, there are numerous issues regarding the “sufficient progress” review, as demonstrated in the Companies’ Application for Rehearing of the Fifth Entry on Rehearing. Companies’ Application for Rehearing of Fifth Entry on Rehearing (Nov. 14, 2016), pp. 22-24. The Companies still assert that the condition should be removed altogether. But whatever the condition’s flaws, it in no way operates to preclude the Companies from beginning to collect Rider DMR revenues.

¹⁴ Motion at 4.

¹⁵ OMAEG Initial Post-Rehearing Brief (Aug. 15, 2016), p. 49.

¹⁶ Rehearing Rebuttal and Surrebuttal Testimony of Eileen M. Mikkelsen (“Mikkelsen Rehearing Rebuttal Test.”), p. 16.

any appeals associated with the charge.”¹⁷ This argument is procedurally improper and amounts to nothing more than a renewed attack on the wisdom of the Commission’s decision in the Fifth Entry on Rehearing. What is more, staying collection of Rider DMR “pending the outcome of any appeals associated with [it]” would divest the rider of its benefits for the Companies and for customers.

As an initial matter, the Motion should be rejected because it is procedurally improper. OCC and OMAEG claim that the Commission’s four-factor test for considering a motion to stay governs here.¹⁸ But, as the Commission held in denying a recent motion to stay filed by OCC and OMAEG in another case, it is improper for parties to seek a stay prior to the Commission issuing an opinion and order deciding the contested issues.¹⁹ In that case, the Commission noted that the four-factor test applies when “determin[ing] whether to stay an order *pending appeal*.”²⁰ Here, there is no order pending appeal. On December 7, 2016, the Commission issued its Sixth Entry on Rehearing, granting the Applications for Rehearing filed by the Companies and several intervenors for further consideration.²¹ Most of the arguments raised in those applications concern Rider DMR. There will be no “order pending appeal” at least until the Commission issues a substantive opinion on those applications. The Commission should deny the Motion to Stay on this ground alone.

¹⁷ Motion at 7-10.

¹⁸ Motion at 7.

¹⁹ *In the Matter of the Application Seeking Approval of Ohio Power Company’s Proposal to Enter into an Affiliate Purchase Power Agreement for Inclusion in the Power Purchase Agreement Rider*, Case No. 14-1693-EL-RDR, Opinion and Order (March 31, 2016), p. 20 (denying intervenors’ motion to stay filed before the issuance of the Commission’s opinion and order).

²⁰ *Id.* (emphasis added).

²¹ Sixth Entry on Rehearing (Dec. 7, 2016), p. 3.

Even if the four-factor test did apply, OCC and OMAEG would fail to satisfy it. The test considers: (1) whether there has been a strong showing that the movant is likely to prevail on the merits; (2) whether the party seeking the stay has shown that it would suffer irreparable harm absent the stay; (3) where the public interest lies; and (4) whether the stay would cause substantial harm to other parties.²²

Concerning the first factor, OCC and OMAEG claim that they are likely to prevail on the merits because the Companies cannot begin collecting Rider DMR where they “[have] made no progress (and no ‘sufficient progress’) on the implementation and deployment of grid modernization programs.”²³ This argument merely highlights why the four-factor test does not apply. The first factor requires OMAEG and OCC to show that they are likely to prevail on the merits of an appeal. Because there is no appeal here, OCC and OMAEG must resort to reiterating the argument they make in support of their motion to reject the Rider DMR tariffs. Regardless, for the reasons noted above, OCC and OMAEG cannot prevail because the “sufficient progress” condition relates to the continuation of Rider DMR. This is enough to deny the Motion to Stay. As the Commission held in rejecting another motion to stay filed by OCC: “[Since] OCC has not satisfied the first part of the four-factor test, the Commission [need not] address the remainder of the test.”²⁴

OCC and OMAEG fare no better on the remaining three factors. On the second and third factors, they claim that customers would suffer irreparable harm absent a stay because Rider

²² Case No. 14-1693-EL-RDR, Opinion and Order (March 31, 2016), p. 19.

²³ Motion at 8.

²⁴ *In the Matter of the Application of Columbus Southern Power Company for Approval of a Mechanism to Recover Deferred Fuel Costs Ordered Under Section 4928.144, Ohio Revised Code*, Case No. 11-4920-EL-RDR, Entry (Aug. 22, 2012), p. 4.

DMR is an “unlawful charge” which will not be refunded if it is overturned on appeal and that, for this same reason, granting their motion is in the public interest.²⁵ The Commission has, however, already determined that Rider DMR is not an unlawful charge,²⁶ and OCC and OMAEG have failed to raise any argument demonstrating otherwise. Further, the record amply demonstrates that modernizing the grid will benefit all customers²⁷ and that a credit downgrade would adversely affect the Companies and their customers.²⁸ If the Companies are precluded from collecting Rider DMR revenues until any appeal of Rider DMR is resolved, Rider DMR will not assist the Companies in accessing capital at favorable terms, and will therefore not enable them to jumpstart their grid modernization plans. These are the very reasons underpinning the Commission’s approval of Rider DMR.²⁹ OCC and OMAEG, seeking to relitigate Rider DMR, merely assert arguments that the Commission has considered and rejected.

As for the fourth factor, OCC and OMAEG argue that the Companies will suffer no substantial harm because “[a] delay in collecting money does not constitute harm to the utility.”³⁰ Again, OCC and OMAEG disregard the record and reality. There is much more at stake here than a simple delay in collecting revenue. The Commission found ample evidence that: (1) the Companies are at serious risk of a credit downgrade that would have adverse effects

²⁵ Motion at 8-10.

²⁶ *See generally* Fifth Entry on Rehearing (finding, among other things, that Rider DMR is authorized under R.C. 4928.143(B)(2)(h), is in the public interest, and violates no important regulatory principle or practice).

²⁷ *Id.* at 88-89 (summarizing the benefits to all customers of grid modernization).

²⁸ *See* Mikkelsen Rehearing Rebuttal Test., p. 7 (explaining the adverse consequences for the Companies and their customers resulting from a credit downgrade of the Companies).

²⁹ Fifth Entry on Rehearing, pp. 88-89.

³⁰ Motion at 10.

upon the Companies' ability to access the capital markets;³¹ (2) the Companies would suffer adverse consequences as a result of a downgrade;³² (3) Rider DMR is intended to provide credit support to the Companies in order to avoid a downgrade;³³ and (4) maintaining the Companies' current ratings will allow the Companies to access capital markets in order to fund grid modernization investments.³⁴ If the Companies are precluded from collecting under Rider DMR until whenever it is that any appeal is finally resolved, Rider DMR will have failed to address the Companies' immediate credit issues and, consequently, will not provide the intended credit support to help the Companies fund grid modernization investments. This is nothing less than "substantial harm." OCC and OMAEG fail the fourth factor as well.

In sum, OCC and OMAEG cannot justify the extraordinary relief of a stay. Not only is their Motion procedurally improper, it is also substantively deficient because it fails to satisfy the Commission's four-factor test. The Commission should reject OCC and OMAEG's arguments, which seek only to revisit the Commission's approval of Rider DMR.

C. The Commission Should Again Reject The Argument That Rider DMR Should Be Subject To Refund.

As a last resort, OCC and OMAEG resurrect an argument that has been briefed, considered, and resolved, namely that Rider DMR should be collected subject to refund.³⁵ The Commission acknowledged that argument in the Fifth Entry on Rehearing³⁶ and rejected it, stating, "Making Rider DMR subject to refund would be counterproductive and impose

³¹ Fifth Entry on Rehearing, p. 126.

³² *Id.* at 127.

³³ *Id.*

³⁴ *Id.*

³⁵ Motion at 11-13.

³⁶ Fifth Entry on Rehearing, p. 75.

additional risks on the Companies.”³⁷ In an attempt to distance their Motion from the Commission’s unequivocal ruling, OCC and OMAEG cite to a few cases in which the Commission ordered rates collected subject to refund “to explore the reasonableness of rates in light of events that occurred after the issuance of its orders.”³⁸ Those cases are inapposite; there has been no “event” since the Commission issued the Fifth Entry on Rehearing that would justify revisiting the Commission’s decision to not make Rider DMR subject to refund.³⁹ OCC and OMAEG do not even attempt to point to such an event or to any case in which the Commission ordered a rider to be collected subject to refund upon its initial implementation.⁴⁰

In any event, the Companies have already explained, twice, that making Rider DMR subject to refund would: (1) require the Commission to engage in unlawful retroactive ratemaking; and (2) defeat one of Rider DMR’s purposes by injecting the risk that the credit

³⁷ *Id.* at 97.

³⁸ Motion at 11.

³⁹ In one case cited by OCC and OMAEG, the Commission ordered certain rates collected subject to refund when, shortly after the Commission issued its original opinion and order, the Nuclear Regulatory Commission halted construction at a plant for which the Commission had included a rate base allowance for construction work in progress. Motion at 11-12. The second case concerns the Commission ordering funds collected subject to refund when, after the Commission’s initial order, legislation was enacted that changed Ohio’s ratemaking formula. *Id.* at 12-13. In the third cited case, the Commission ordered AEP’s retail stability rider to be collected subject to refund pending the completion of proceedings on remand from the Ohio Supreme Court. *Id.* at 13. Even a cursory review of the intervenors’ arguments on these cases reveals that they have no application here.

⁴⁰ The lack of authority is not surprising. The Commission generally authorizes monies to be collected subject to refund in very limited circumstances, none of which apply here. *See, e.g., In the Matter of the Commission Review of the Capacity Charges of Ohio Power Co.*, Case No. 10-2929-EL-UNC, 2016 Ohio PUC LEXIS 477, Entry, at *7 (May 18, 2016) (finding that going-forward revenues collected under AEP’s retail stability rider should be recovered subject to refund pending the completion of proceedings on remand from the Supreme Court); *In the Matter of the Application of Akron Thermal, Ltd. P’ship for an Emergency Increase in its Steam & Hot Water Rates & Charges*, Case No. 00-2260-HT-AEM, 2001 Ohio PUC LEXIS 1071, Opinion and Order, at *12-13 (Jan. 25, 2001) (approving stipulation establishing emergency surcharge subject to refund in the event that the percentage increase granted in the permanent rate case was less than the emergency relief agreed to by the company and staff in the stipulation); *In re the Matter of the Inclusion of Take or Pay Costs in the Gas Cost Recovery Rates of Dayton Power and Light Co. & Related Matters*, Case No. 88-1446-GA-UNC, 1988 Ohio PUC LEXIS 952, Finding and Order, at *1-2 (Oct. 12, 1988) (permitting a utility to recover subject to refund certain natural gas costs related to FERC-approved pass-through take-or-pay pending the outcome of the Commission’s investigation into the treatment of such charges).

support revenues provided by the rider would be returned, thereby making it less likely that the ratings agencies would treat Rider DMR as a credit positive.⁴¹ OCC and OMAEG have failed to provide any reasonable basis for the Commission to depart from its ruling in the Fifth Entry on Rehearing. The Motion should be denied.

IV. CONCLUSION

For the foregoing reasons, the Commission should deny OCC and OMAEG's Motion.

⁴¹ See Companies' Post Rehearing Reply Brief (Aug. 29, 2016), pp. 158-61; Companies' Memorandum Contra the Intervenors' Applications for Rehearing of Fifth Entry on Rehearing (Nov. 25, 2016), p. 36.

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Respectfully submitted,

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Summary: Memorandum Contra OCC and OMAEG's Motion to Reject Distribution Modernization Rider Tariffs or, in the Alternative, Motion to Stay Collection of the Rider or Motion to Collect Distribution Modernization Rider Subject to Refund electronically filed by MR. DAVID A KUTIK on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company