

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

NINTH ENTRY ON REHEARING

Entered in the Journal on October 11, 2017

I. SUMMARY

{¶ 1} The Commission finds that the application for rehearing of the Eighth Entry on Rehearing should be denied.

II. DISCUSSION

{¶ 2} Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company (collectively, FirstEnergy or the Companies) are electric distribution utilities as defined in 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 customers within its certified territory a standard service offer (SSO) 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 R.C. 4928.143.

{¶ 4} On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.141 to establish an SSO to provide generation pricing for the period of June 1, 2016, through

May 31, 2019. The application is for an ESP, in accordance with R.C. 4928.143 (*FirstEnergy ESP IV*).

{¶ 5} On March 31, 2016, the Commission issued its Opinion and Order in *FirstEnergy ESP IV*, approving FirstEnergy's application and stipulations with several modifications (Opinion and Order). As part of that Opinion and Order, the Commission approved a modified version of FirstEnergy's original proposal for a retail rate stability rider (Rider RRS).

{¶ 6} On October 12, 2016, the Commission issued its Fifth Entry on Rehearing in this proceeding (Fifth Entry on Rehearing), rejecting the Companies' proposal to modify Rider RRS and adopting Staff's alternative proposal to establish a distribution modernization rider (Rider DMR). The Commission also elected to make additional modifications to the stipulations approved in the Opinion and Order.

{¶ 7} Subsequently, on August 16, 2017, the Commission issued its Eighth Entry on Rehearing (Eighth Entry on Rehearing), granting, in part, and denying, in part, applications for rehearing submitted by numerous parties with respect to the Fifth Entry on Rehearing.

{¶ 8} R.C. 4903.10 states that any party who has entered an appearance in a Commission proceeding may apply for rehearing with respect to any matters determined in that proceeding, by filing an application within 30 days after the entry of the order upon the journal of the Commission.

{¶ 9} On September 15, 2017, FirstEnergy filed an application for rehearing of the Eighth Entry on Rehearing.

{¶ 10} The Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition (OCC/NOAC) jointly filed a memorandum contra the application for rehearing on September 25, 2017. The Ohio Manufacturers' Association Energy Group (OMAEG) also filed a memorandum contra the application for rehearing on September 25, 2017.

{¶ 11} In its application for rehearing, FirstEnergy raises two assignments of error. In its first assignment of error, the Companies contend that the Eighth Entry on Rehearing is unreasonable and unlawful because it would require Staff to retain a monitor to ensure that funds collected under Rider DMR are expended appropriately.

{¶ 12} In support of this assignment of error, FirstEnergy claims that the directive to use a third-party monitor is wrong because, as the Commission had previously noted, the Commission and Staff are fully capable of making such an assessment. FirstEnergy also contends that Rider DMR revenues cannot be tracked in “real time.” The Companies note that there is no way to “paint” Rider DMR dollars so that those dollars can be directly tracked to eventual use in support of grid modernization (Rehearing Tr. Vol. X at 1605-06). Instead, the Companies can report to Staff on payments in support of grid modernization, pension obligations, debt service obligations, and taxes, among other things. Further, FirstEnergy claims that the Commission has ample controls available to ensure no affiliate cross-subsidization will occur. FirstEnergy notes that the Companies are required to publically report dividends, loans and equity infusions and to report to the Commission on a quarterly basis on their participation in the FirstEnergy Corp. utility money pool arrangement. *In re Am. Transm. Sys. Inc., Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.*, Case Nos. 16-2050-EL-AIS et. al, Finding and Order (December 21, 2016) (*Money Pool Order*).

{¶ 13} The Companies also contend that quarterly reviews are impractical and unnecessary. The Companies claim that anticipated expenditures or use of funds in support of grid modernization will not occur regularly. Thus, the Companies argue that quarterly interim reports effectively would be “busy-work.” Instead, the Companies propose to provide Staff annually with a list of what funds have been expended to further the purposes of Rider DMR, which the Staff could audit at its convenience.

{¶ 14} Finally, the Companies posit that “real-time” monitoring could restrict the use of Rider DMR funds. The Companies claim that the third-party monitor will have

strong incentives to insert itself in the decision-making process or to seek opportunities to second-guess utility management. The Companies note that, since utilities are privately-owned and operated, regulators cannot and should not usurp the management role. *Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447-448, 110 N.E.2d 59 (1953).

{¶ 15} In its memorandum contra, OMAEG contends that Staff's review of Rider DMR is necessary to protect customers and to ensure that funds collected under Rider DMR will be used to support grid modernization. OMAEG alleges that, other than claiming that Rider DMR dollars cannot be painted to allow tracking and that a monitor is not necessary, the Companies make no argument or showing how the use of a third-party monitor is inconsistent with the Commission's directive in the Fifth Entry on Rehearing mandating that Staff review the use of Rider DMR funds, which the Companies did not oppose. Further, OMAEG claims that the Companies fail to allege how the employment of a third-party monitor to assist Staff is unreasonable or unlawful as required by R.C. 4903.10(B). OMAEG notes that the Commission regularly uses third parties to assist Staff in reviewing and evaluating a public utility's financial records and business practices to ensure that customer funds are expended appropriately and prudently. OMAEG also argues that the Companies have failed to allege how the quarterly interim reports to Staff are unreasonable or unlawful; OMAEG claims that FirstEnergy merely asserts that the quarterly reports will serve no purpose and would be busy-work for the third-party monitors. Finally, OMAEG disputes the Companies' claim that a real time review of Rider DMR places restrictions on how the Companies use Rider DMR funds and interferes with their management role. OMAEG argues that, although neither the Fifth Entry on Rehearing nor the Eighth Entry on Rehearing limit or restrict how the Companies may use Rider DMR funds to support grid modernization, the Commission was clear that Rider DMR funds must be used to support grid modernization. Fifth Entry on Rehearing at 127-128. OMAEG argues that Staff's ongoing and real time review is necessary to protect customers and ensure that this directive is followed.

{¶ 16} OCC/NOAC, in their memorandum contra, claim that the plan for third-party monitors adopted by the Commission is intended to provide oversight on the use of Rider DMR funds. OCC/NOAC contend that the purpose of the using a third-party monitor is to ensure that Rider DMR revenues are being used to address credit quality and related goals accepted by the Commission. OCC/NOAC claim that existing financial and other self-reporting is useful but is not an adequate substitute for the third-party monitors contemplated by the Commission. OCC/NOAC also notes that existing regulatory mechanisms regarding affiliate transactions are not specifically directed to the objectives of Rider DMR. OCC/NOAC dismisses FirstEnergy's claims that the third-party monitors will usurp the Companies' management authority, noting that the third-party monitors will not have the authority to operate the utility, preempt utility management decisions or restrict financial flexibility. OCC/NOAC concludes that, if FirstEnergy finds the scrutiny and regulatory oversight of the third-party monitor so objectionable, the Companies can avoid such scrutiny and oversight by forgoing collection of funds under Rider DMR, a result which OCC/NOAC would support.

{¶ 17} The Commission finds that rehearing on this assignment of error should be denied. With respect to FirstEnergy's contention that Staff is fully capable of confirming whether the Companies (and FirstEnergy Corp.) have used funds collected to support grid modernization, we agree. Staff is fully capable of making this determination. However, in balancing the workload of Staff, the Commission frequently uses third parties to conduct audits or reviews on Staff's behalf. *See, In re Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.*, Case No. 17-974-EL-UNC (*Corporation Separation Audit Case*), Entry (July 5, 2017) (auditor selected for corporate separation audit). *See also, In re Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.*, Case No. 16-2041-EL-RDR, Entry (December 7, 2016) (auditor selected for 2016 review of delivery capital recovery rider); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.*, Case No. 15-1739-EL-RDR, Entry (December 9, 2015) (auditor selected for 2015 review of delivery capital recovery rider); *In re Ohio Edison Co., The Cleveland Elec. Illum. Co. and The*

Toledo Edison Co., Case No. 14-1929-EL-RDR, Entry (December 10, 2014) (auditor selected for 2014 review of delivery capital recovery rider). This case is no different. We have determined, in this case, that the periodic reviews would be better conducted by a third-party monitor on behalf of Staff. FirstEnergy has not presented any compelling arguments why this decision to use a third party on behalf of Staff is different than any other decision to use a third party on behalf of Staff or how the Companies are prejudiced by the use of a third party rather than Staff.

{¶ 18} We are also not persuaded by FirstEnergy's claims that existing controls ensure that there is no unlawful subsidy of the Companies affiliates in the use of Rider DMR funds. The audit in the *Corporate Separation Audit Case* has a different scope than the review of the use of Rider DMR revenues and, in any event, is due to be completed by February 28, 2018; *Corporate Separation Audit Case*, Entry (May 17, 2017), Request for Proposal No. RA17-CA-2 at 3. Thus, the auditor would not be able to review any transactions entered into in 2018 after February 28, 2018, or any transactions entered into in 2019. Likewise, the reporting requirements contained in Commission orders authorizing utilities to issue debt, while important in their own right, have a different scope than the review at issue here. *In re Am. Transm. Sys. Inc., Ohio Edison Co., The Cleveland Elec. Illum. Co. and The Toledo Edison Co.*, Case Nos. 16-2050-EL-AIS et al., Finding and Order (December 21, 2016).

{¶ 19} FirstEnergy also claims that quarterly reviews are impractical and unnecessary. We disagree. The Commission notes that, in the Fifth Entry on Rehearing, we directed the Staff to "periodically review" how the Companies (and FirstEnergy Corp.) use Rider DMR funds. The quarterly interim reports are simply part of the detailed instructions the Commission provided Staff for terms and conditions to include in the request for proposals (RFP) for the third-party monitor. As this is an ongoing review, we have determined that the third-party monitor should provide interim reports to the Staff on a quarterly basis so that Staff can remain informed on the progress of the ongoing review. Therefore, the Commission directed the Staff to include this provision as part of

the RFP. This is also not an unusual provision. In the *Corporate Separation Audit Case*, the auditor is required to provide *monthly* status updates to Staff regarding the audit. *Corporate Separation Audit Case*, Entry (May 17, 2017), Request for Proposal No. RA17-CA-2 at 4. The requirement for quarterly interim reports in the Eighth Entry on Rehearing simply provides direction on the third-party monitor's obligations to Staff during the review, and the Companies have not shown any prejudice by this requirement.

{¶ 20} The Commission also rejects FirstEnergy's claim that real-time monitoring will somehow restrict the use of funds collected under Rider DMR. As OMAEG correctly observed, the Commission directed in the Fifth Entry on Rehearing that Rider DMR funds be used, directly or indirectly, in support of grid modernization. The Commission noted that the Companies may use Rider DMR funds directly in support of grid modernization, by using the funds for the large up-front cash investments necessary for grid modernization. The Commission also noted that the Companies may use Rider DMR funds indirectly in support of grid modernization by taking steps to lower the cost of borrowing the funds necessary to invest in grid modernization; these steps may include reducing outstanding pension obligations, reducing debt, or taking other steps to reduce long-term costs of accessing capital. Fifth Entry on Rehearing at 127-128. Nothing in the Eighth Entry on Rehearing explicitly changed these findings, and we are not persuaded by FirstEnergy that these findings were implicitly changed by our guidance that the review be done by a third party rather than Staff or that the review be ongoing, in real-time, rather than "periodically." Accordingly, rehearing on this assignment of error should be denied.

{¶ 21} In its second assignment of error, FirstEnergy alleges that the Eighth Entry on Rehearing is unlawful and unreasonable because the Commission failed to restore the 50 basis point adder to the return on equity calculation for the Advanced Metering Infrastructure/Modern Grid Rider (Rider AMI) previously approved by the Commission.

{¶ 22} OMAEG and OCC/NOAC reply that the Eighth Entry on Rehearing did not eliminate the 50 basis point adder. Instead, OMAEG and OCC/NOAC note that the

Fifth Entry on Rehearing eliminated the 50 basis point adder. OMAEG claims that the Companies raised the exact same arguments in their application for rehearing of the Fifth Entry on Rehearing and that the Commission rejected those arguments in the Eighth Entry on Rehearing. OCC/NOAC claim that the Companies seek a second bite at the apple. Both OMAEG and OCC/NOAC conclude that the arguments raised by FirstEnergy in the September 15, 2017 application for rehearing are untimely and that the Commission should reject this second request to reinstate the 50 basis point adder.

{¶ 23} The Commission finds that, with respect to its second assignment of error, FirstEnergy improperly seeks rehearing on rehearing. The Commission approved the 50 basis point adder as part of our approval of the stipulations originally filed in this proceeding. Opinion and Order at 22-23, 95, 111. In the Fifth Entry on Rehearing, the Commission reversed the decision to approve the 50 basis point adder. Fifth Entry on Rehearing at 106-108. In the Eighth Entry on Rehearing, the Commission affirmed the ruling in the Fifth Entry on Rehearing and denied rehearing on FirstEnergy's assignment of error related to the 50 basis point adder. Eighth Entry on Rehearing 67-68. Now, the Companies seek rehearing of that denial of rehearing. It is well established that it is improper to seek rehearing of a denial of rehearing on the same issue.

{¶ 24} In *Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, the Commission squarely addressed this question, holding that R.C. 4903.10 does not allow persons who enter appearances to have "two bites at the apple" or to file rehearing upon rehearing of the same issue. *Ormet Primary Aluminum Corp. v. South Central Power Co. and Ohio Power Co.*, Case No. 05-1057-EL-CSS, Second Entry on Rehearing (September 13, 2006) at 3-4 (citing *In re The East Ohio Gas Co. and Columbia Gas Co.*, Case Nos. 05-1421-GA-PIP, et al., Second Entry on Rehearing (May 3, 2006) at 3). See also *In re Ohio Power Co. and Columbus Southern Power Co.*, Case No. 10-2929-EL-UNC, Entry on Rehearing (January 30, 2013) at 4-5. Accordingly, rehearing on this assignment of error should be denied.

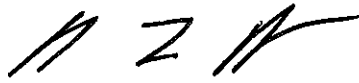
III. ORDER

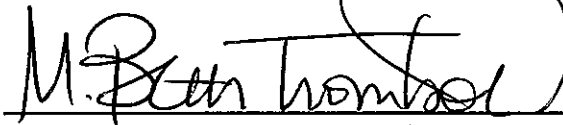
{¶ 25} It is, therefore,

{¶ 26} ORDERED, That the application for rehearing filed by FirstEnergy be denied.
It is, further,

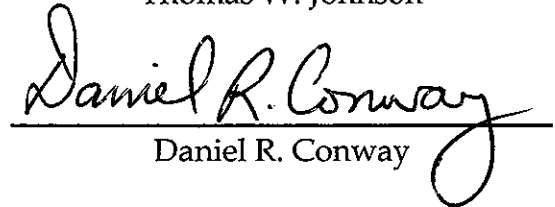
{¶ 27} ORDERED, That a copy of this Ninth Entry on Rehearing be served upon all parties of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO



Asim Z. Haque, Chairman

M. Beth Trombold

Thomas W. Johnson

Daniel R. Conway

Lawrence K. Friedeman

GAP/sc

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OCT 11 2017

Barcy F. McNeal
Secretary