

**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)	
Edison Company, the Cleveland Electric)	Case No. 19-361-EL-RDR
Illuminating Company, and the Toledo)	
Edison Company for an extension of the)	
Distribution Modernization Rider.)	
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**APPLICATION FOR REHEARING OF THE OHIO MANUFACTURERS'
ASSOCIATION ENERGY GROUP**

Pursuant to R.C. 4903.10 and Ohio Adm. Code 4901-1-35, the Ohio Manufacturers' Association Energy Group (OMAEG) hereby respectfully requests rehearing of the Public Utilities Commission of Ohio's (Commission) November 21, 2019 Opinion and Order (Order) issued in the above-captioned matter. OMEG contends that the Order is unlawful, unjust, and unreasonable in the following respect:

The Commission Erred in Eliminating the Requirement to File a New Distribution Rate Case at the Conclusion of FirstEnergy's Current ESP.

As further explained in the Memorandum in Support attached hereto, OMAEG respectfully requests that the Commission grant this Application for Rehearing.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

On August 4, 2014, FirstEnergy filed an application pursuant to R.C. 4928.143 for approval of an electric security plan (ESP) in Case No. 14-1297-EL-SSO (ESP IV Case). On March 31, 2016, the Commission approved FirstEnergy's application and stipulations (ESP Stipulations) with several modifications (ESP Order). On October 12, 2016, the Commission issued its Fifth Entry on Rehearing in the ESP IV Case, adopting a distribution modernization rider (Rider DMR). The Commission limited the DMR Rider and collection thereunder to three years with a possible extension of two years.¹ On February 1, 2019, FirstEnergy filed a separate application in the above-captioned proceeding to extend Rider DMR for an additional two years.

OMAEG and others appealed the Commission's decision in the ESP IV Case, challenging Rider DMR and other aspects of the Commission's ESP orders. On June 19, 2019, the Supreme Court of Ohio reversed the Commission's decision in part as it relates to Rider

¹ ESP IV Case, Fifth Entry on Rehearing at ¶210 (Oct. 12, 2016).

DMR, and remanded the case to the Commission with instructions to remove Rider DMR from FirstEnergy's ESP. Specifically, the Court held that Rider DMR does not qualify as an incentive under R.C. 4928.143(B)(2)(h) and the conditions placed on the recovery of Rider DMR revenues were not sufficient to protect ratepayers. *In re Application of Ohio Edison Co.*, 2019-Ohio-2401 at ¶¶ 14-29 (*Ohio Edison*).

In light of the Court's decision in *Ohio Edison* and the removal of the DMR from the current ESP, on November 21, 2019, the Commission denied FirstEnergy's application in this proceeding to extend Rider DMR for an additional two years as moot. In the November 21, 2019 Order, the Commission also modified its previous ESP Order in Case No. 14-1297-EL-SSO, without a hearing and without factual support:

Further, the Commission notes that Rider DMR was adopted in the Fifth Entry on Rehearing in the ESP IV Case as part of a package of provisions related to the Companies' distribution service. The other elements of the package included the extension of the Companies' delivery capital recovery rider and a directive to file a distribution rate case at the end of the ESP. ESP IV Case, Fifth Entry on Rehearing (Oct. 12, 2016) at ¶¶ 189, 249-251, 327, 343, 346, 358-359, Eighth Entry on Rehearing (Aug. 16, 2017) at ¶ 89, 91, 94. In light of the changed circumstances, with termination of revenues recovered through Rider DMR, as well as the elimination of any possibility for an extension of Rider DMR, **we find that it is no longer necessary or appropriate for the Companies to be required to file a new distribution rate case at the conclusion of the Companies' current ESP. Nonetheless, the Companies' commitment to freeze distribution rates will remain in place as this commitment preceded the adoption of Rider DMR.** ESP IV Case, Opinion and Order at 92- 93, 119, Fifth Entry on Rehearing at ¶¶ 88.

Order at ¶17 (November 21, 2019) (emphasis added). The Commission's modification to the ESP Order issued in a separate proceeding was unjust, unreasonable, and in violation of Ohio law.

II. ARGUMENT

Assignment of Error: The Commission Erred in Eliminating the Requirement to File a New Distribution Rate Case at the Conclusion of FirstEnergy's Current ESP.

It should be noted at the outset that the Commission's decision to reject the Rider DMR application to extend the DMR by two years as "moot" was just and reasonable, accords with the clear directives of the Supreme Court of Ohio, and should be upheld. However, nothing about denying the case as moot, consistent with the Supreme Court of Ohio's decision with regard to the lawfulness of Rider DMR in the ESP IV Case, renders circumstances changed with regards to the Commission finding that FirstEnergy should file a new distribution rate case at the end of the current ESP. Removing Rider DMR consistent with recent Court precedent and not extending the unlawful rider, does not and should not affect other provisions of the Commission's ESP IV orders, particularly a provision that was added to the ESP Stipulations when approving and modifying the Stipulations to make them more favorable, beneficial to ratepayers, and in the public interest. And any modifications to the prior ESP IV orders in light of the Court's reversal of Rider DMR goes beyond the Commission's authority. The Court only remanded the ESP IV Case to remove Rider DMR. Any other action taken by the Commission (i.e., modifying the ESP IV orders to remove a provision from the ESP IV) would be beyond the authority granted to the Commission.

Additionally, it is clear from the ESP IV orders that Rider DMR approval was separate and distinct from the issue of a distribution rate freeze and the need for filing a new distribution rate case. The Fifth Entry on Rehearing states:

The Commission finds that Rider DMR is authorized under R.C. 4928.143(B)(2)(h). Under this statutory provision, an electric security plan may include: 'Provisions regarding the utility's distribution service, including, without limitation and notwithstanding any provision of Title XLIX of the Revised Code

to the contrary, provisions regarding single issue ratemaking, **a revenue decoupling mechanism or any other incentive ratemaking**, and provisions regarding distribution infrastructure and modernization incentives for the electric distribution utility.’ R.C 4928.143(B)(2)(h) (emphasis added).

Fifth EOR at ¶189. In Section III.C., beginning in paragraph 118, the Commission discusses Rider DMR. (Fifth EOR at page 51). In Section III.C.3., beginning in paragraph 185 and continuing through paragraph 213, the Commission discusses the lawfulness of Rider DMR and its decision to approve Rider DMR. (Fifth EOR at page 87).

In the next Section III.D. (after the concluding section of Rider DMR), the Commission discusses that “[t]he Stipulations, as modified by the Commission, continue to meet the three-prong test for the consideration of stipulations.” Fifth EOR at ¶230 (Fifth EOR at page 106). In the following sections, the Commission explains how the Stipulations, as modified, meet the Commission’s three criteria. Under the section describing how the modified Stipulations, as a package, benefit ratepayers and the public interest, the Commission discusses the distribution rate freeze and Rider DCR. Fifth EOR at ¶246 (Section III.D.2.a.iv.; EOR at page 113). In discussing arguments raised by OMAEG and others regarding extending and increasing Rider DCR and whether the distribution rate freeze is a true benefit to customers or whether a base rate distribution rate case would be more appropriate, the Commission recognized the concerns raised about the necessity of needing a rate case as it will have been 17 years since FirstEnergy’s last rate case if the Commission accepts the distribution rate freeze provision as part of the ESP IV Stipulations. The Commission stated:

The Commission finds that arguments raised by OCC/NOAC and OMAEG questioning whether the distribution base rate freeze and the increases in the DCR caps are in the public interest should be rejected. In the Order, we noted that continuation of the distribution rate freeze will provide rate certainty, predictability and stability for customers (Order at 92,119; Co. Ex. 154 at 13). We affirm that finding here. Base distribution rates will remain frozen until June 1,

2024. Although there will be rate increases under Rider DCR, those increases are capped annually, ensuring predictability of rate increases. Elimination of the distribution rate freeze, on the other hand, exposes customers to known expenses which will be recovered, such as rate case expense, and unquantifiable risks that the rate base, rate of return and expenses may be greater than in the current revenue requirement.

In addition, we note that the Commission, the Companies, Staff and other stakeholders have now had ample experience with the Rider DCR mechanism, which was first approved by the Commission in the FirstEnergy ESP II. Rider DCR ensures that the Companies can make necessary investment in the distribution infrastructure to maintain reliability by reducing the regulatory lag for recovery of those investments (Staff Ex. 10 at 4; Tr. Vol. XX at 3926-29). See also FirstEnergy ESP III, Second Entry on Rehearing (Jan. 30, 2013) at 23. The record is clear that the Companies have been meeting their reliability standards (Staff Ex. 4 at 9-10). Further, elimination of regulatory lag promotes cost causation by ensuring that customers using distribution service are paying the costs of such distribution service. Rider DCR is also audited annually, ensuring that the investments are reasonable. Finally, Rider DCR promotes gradualism. It is well established that, over the long run, recovery of the costs of distribution investments will be equivalent through Rider DCR or through base distribution rates. FirstEnergy ESP III Order at 55-56, Second Entry on Rehearing (Jan. 30, 2013) at 22-23. However, Rider DCR ensures that revenue increases are spread out over time, rather than risking rate shock when increased through a distribution rate case. FirstEnergy ESP III, Second Entry on Rehearing (Jan. 30, 2013) at 23. Accordingly, all assignments of error related to Rider DCR should be denied.

We do note, however, that, by the end of ESP IV, it will have been 17 years since the Companies' last distribution rate case, and we direct the Companies to file a distribution rate case at that time.

Fifth EOR at ¶¶249-51 (emphasis added).

In the Fifth Entry on Rehearing, the Commission set forth clear reasons for the requirement that FirstEnergy file a rate case, namely that allowing FirstEnergy to continue its current rates beyond a certain point would be against the public interest. No reference to rider DMR was made in Section III.D.2.a.iv. where the modification to the ESP IV Stipulations was made. Rather, the requirement that FirstEnergy file a new rate case was tied to the approval of the distribution rate freeze for the term of ESP IV and the continuation of Rider DCR, which

allows FirstEnergy to make investments in its distribution system without going through the traditional regulatory ratemaking process (i.e., without a rate case).

The tie to the distribution rate freeze and Rider DCR was clear. In fact, on rehearing by FirstEnergy, FirstEnergy challenged the modification and necessity to require it to file a distribution rate case at the end of ESP IV, noting that the distribution rate freeze provision was a benefit to customers and that a future rate case may not be.² The Commission affirmed its requirement that FirstEnergy file a rate case at the end of its current ESP as sound regulatory practice:

In its application for rehearing, FirstEnergy alleges that it was premature for the Commission to direct the Companies to file a distribution rate case at the end of ESP IV, noting that there was no evidence to justify such an order and arguing that a more reasonable alternative would be to allow the Companies to file their next SSO application and determine, at that time, whether a distribution rate case would be appropriate. The Companies also assert that the distribution rate freeze was considered a benefit to customers in the Order and the Fifth Entry on Rehearing (Order at 92-93,119; Fifth Entry on Rehearing at 115), and the SEET mechanism would ensure the Companies would not recover excessive earnings.

NOPEC asserts this assignment of error should also be rejected by the Commission, noting that any continued distribution rate freeze under a future ESP would be illusory, just as it is in this proceeding. Further, NOPEC again asserts that the base distribution rate case was held in 2007 and financial circumstances have changed significantly since that time, specifically noting the capital costs have reached historic lows. OMAEG also remarks on the Commission's broad authority to modify ESPs and stipulations based on the evidence in the record and argues that the Commission acted reasonably and within its authority when determining that a base distribution rate case should be filed upon the conclusion of ESP IV. NOPEC, OMAEG, and OCC/NOAC urge the Commission to affirm its decision and allow an opportunity to have the Companies' authorized rate of return properly scrutinized, citing the reasoning conveyed by Staff witness McCarter when she stated "Staff believes it is a prudent regulatory practice to gain a holistic understanding of the regulated distribution company on a regular basis." (Staff Ex 6 at 13).

² See also Fifth EOR at n.12 wherein the rate freeze was listed as one of the five qualitative benefits.

The Commission finds that our decision to require FirstEnergy to file a distribution case should be affirmed. The Opinion and Order in FirstEnergy's last distribution rate case was issued on January 21, 2009. In re FirstEnergy, Case No. 07-551-EL-AIR et al.. Opinion and Order (Jan. 21, 2009). **Although mechanisms such as FirstEnergy's Rider DCR reduce regulatory lag and promote gradualism in setting distribution rates, we agree with Staff witness McCarter that it is sound regulatory practice to conduct regular distribution rate cases. Accordingly, rehearing on this assignment of error should be denied.**

Eighth EOR at ¶¶89-91 (emphasis added). Again, in the subsequent Entry on Rehearing, there was no tie to Rider DMR in the Commission's discussion or approval of the requirement to file a distribution rate case at the end of ESP IV. As such, the Commission was in error in this proceeding when it found that it is "no longer necessary or appropriate for the Companies to be required to file a new distribution rate case at the conclusion of the Companies' current ESP." Order at ¶17.

To be sure, Ohio's statutory framework allows for considerable flexibility in the regulation of utilities, and the Commission may order those regulated utilities to file a new distribution rate case under its statutory authority. But modifying its previous order issued in the context of an entire ESP and deciding now that FirstEnergy need not file a distribution rate case in this separate proceeding is improper. All Commission orders must, among other things, be reasoned and must be based upon proper factual predicates. R.C. 4928.143(C)(1) provides that "the [C]ommission by order shall approve or modify and approve an application filed under division (A) of this section if it finds that the electric security plan so approved, including its pricing and all other terms and conditions, including any deferrals and any future recovery of deferrals, is more favorable in the aggregate as compared to the expected results that would otherwise apply under section 4928.142 of the Revised Code." The Commission may only

modify and approve an ESP if it concludes that the ESP, including its pricing and all other terms and conditions, is more favorable in the aggregate as compared to a MRO. The requirement that FirstEnergy file a distribution rate case was a litigated issue in FirstEnergy's ESP case and it was made a part of ESP IV and was approved as a package. The case before us is not an ESP proceeding and there is no ESP application pending. That case concluded, was appealed, and remanded.

The case before the Commission is an application to extend Rider DMR--it is the sole issue before the Commission. The application pending is not an ESP application, or even an application to modify its ESP IV. Without due process, the Commission cannot unwind the package in this separate proceeding and remove a provision that was added to an ESP in a prior proceeding as a public interest benefit without, at the very least, making a separate finding that the new ESP is still more favorable in the aggregate as compared to an MRO. R.C. 4928.143(C)(1).

Moreover, the Supreme Court of Ohio has held that, at a minimum, "[s]ome factual support for commission determinations must exist in the record, an obligation which the commission itself has recognized in its orders." *Tongren v. Pub. Util. Comm.*, 1999-Ohio-206, 85 Ohio St. 3d 87, 89–90, 706 N.E.2d 1255, 1257. Further, the Court has stated that "[t]he Public Utilities Commission must base its decision in each case upon the record before it." *Id.* R.C. 4903.09 provides that:

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

R.C. 4903.09.

From the Order and record before us in this proceeding, it is not clear what factual support there is for the Commission's finding that "changed circumstances" have led it to determine that "it is no longer necessary or appropriate" for FirstEnergy to be required to file a new distribution rate case. A mere statement that such exists without record support is insufficient under R.C. 4903.09. An order devoid of factual findings is not a lawful one: "Where an opinion and order of the Public Utilities Commission fails to state specific findings of fact, supported by the record, and fails to state the reasons upon which the conclusions in the commission's opinion and order were based, such order fails to comply with the requirements of R.C. 4903.09, and is, therefore, unlawful." *Tongren v. Pub. Util. Comm.*, 1999-Ohio-206, 85 Ohio St. 3d 87, 89–90, 706 N.E.2d 1255, 1257.

A review of recent events and "changed circumstances" would actually lead to a different conclusion and demonstrates the need for a distribution rate case in order to protect customers. R.C. 4928.471 was enacted as part of Am. Sub. H. B. 6 (HB 6), which was signed into law on July 23, 2019 and went into effect on October 22, 2019. R.C. 4928.471 authorizes an electric distribution utility to file an application to implement a decoupling mechanism within thirty days of the effective date of the new law. The decoupling mechanism will recover an amount equal to the base distribution revenue and revenue resulting from implementation of R.C. 4928.66 as of the twelve-month period ending on December 31, 2018. The decoupling mechanism will remain in effect until the utility applies for and the Commission approves new base distribution rates for

the utility. On November 21, 2019, FirstEnergy filed an application for approval of a decoupling mechanism pursuant to R.C. 4928.471 that is pending before the Commission.³

As such, assuming the decoupling mechanism will be approved by the Commission, FirstEnergy will be able to recover an amount equal to the base distribution revenue and revenue resulting from implementation of R.C. 4928.66 as of the twelve-month period ending on December 31, 2018 through the decoupling mechanism until FirstEnergy's next distribution rate case. At the time HB 6 was passed, FirstEnergy's next distribution rate case was scheduled to be filed after the conclusion of its ESP IV, or after May 2024. The Commission has now extended that filing deadline, changing the import of R.C. 4928.471, and possibly the intent of the General Assembly, to limit the collection of the decoupling mechanism for FirstEnergy through approval of its next rate case, which was scheduled to occur in approximately 2025.⁴ The Commission's action eliminating the requirement to file a new distribution rate case has the effect of allowing FirstEnergy's decoupling mechanism to continue in perpetuity (or at least for a very long time as FirstEnergy may not have a need to file for a rate case if they receive their base distribution revenue plus the decoupling rider).

³ See *In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of a Decoupling Mechanism*, Case Nos., 19-2080-EL-ATA, et al., Application (November 21, 2019).

⁴ Assuming FirstEnergy filed its rate case at the conclusion of its ESP IV in June 2024 and a decision was issued within 275 days of the application as set forth in R.C. 4909.18.

III. CONCLUSION

For the above-stated reasons, FirstEnergy should be required to file a new distribution rate case at the end of its ESP IV as required by the Commission in its Fifth and Eighth Entries on Rehearing as part of the ESP IV package approved in Case No. 14-1279-EL-SSO. OMAEG requests that the Commission grant rehearing and reinstate the requirement for FirstEnergy to file a new distribution rate case as was approved as part of FirstEnergy's ESP IV.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all parties of record via electronic mail on December 23, 2019.

/s/ Kimberly W. Bojko
Kimberly W. Bojko

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Summary: Application Application for Rehearing of The Ohio Manufacturers' Association Energy Group electronically filed by Mrs. Kimberly W. Bojko on behalf of OMA Energy Group