

In the Matter of the Review of the :
Distribution Modernization Rider of : Case No. 17-2474-EL-RDR
Ohio Edison Company, The Cleveland :
Electric Illuminating Company, and
The Toledo Edison Company

On October 20, 2021, the Office of the Ohio Consumers’ Counsel (“OCC”) filed a Motion for a Subpoena of the PUCO’s Never-Filed “Final” Audit Report and Related Documents Regarding FirstEnergy’s Infamous Distribution Modernization Rider and Motion for a Waiver of O.A.C. 4901-1-25(D) (If Necessary. OCC’s Motion seeks to Subpoena a former auditor to produce a report that was neither completed nor filed. The Staff of the Public Utilities Commission of Ohio (“Staff”) opposes OCC’s Motion for the reasons addressed herein.

Respectfully submitted,

Dave Yost
Ohio Attorney General

John Jones
Section Chief

/s/ Thomas G. Lindgren

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**On Behalf of the Staff of the
Public Utilities Commission of Ohio**

MEMORANDUM IN SUPPORT

Through its Motion, OCC seeks to compel production of a “final” report that was never filed in this case involving review of the FirstEnergy companies’ distribution modernization rider (Rider DMR). Such a report does not exist, in draft form or otherwise. Even if it did exist, the Commission’s rules do not permit a subpoena to compel production of documents by a Commission-selected auditor.

As demonstrated in the attached affidavit by Paul Corey of Oxford Advisors, LLC (the firm originally selected to conduct the DMR audit), Oxford did not prepare any report, in any form, including interim updates to the Commission Staff, regarding FirstEnergy’s Rider DMR subsequent to the filing of the mid-term report on June 14, 2019. Nor did Oxford prepare any drafts of any such reports subsequent to the filing of the mid-term report on June 14, 2019.¹ Because the requested documents do not exist, a subpoena for their production would be a useless act. Furthermore, any records provided to staff by the auditor that had not previously been shared and are referenced in this affidavit, shall be produced as a supplement to OCC’s public records request following review, to the extent such records are not otherwise exempt from disclosure under R.C. 149.43(A)(1)(v).

¹ Following the Supreme Court of Ohio’s June 19, 2019 finding Rider DMR unlawful, the Commission on July 2, 2019 determined that Rider DMR should be subject to refund. On August 22, 2019, the Commission ordered that the DMR be set to zero. On September 12, 2019, Staff filed a review and recommendation regarding updated tariffs. On September 26, 2019, the Commission approved the updated tariffs. On October 18, 2019, the Companies filed the updated tariffs.

Even if the records OCC seeks did exist, the Commission's rules do not permit a subpoena to compel production of documents by Commission-selected auditor that is assisting in a Staff investigation. Ohio Adm.Code 4901-1-25(D) provides that "A subpoena may require a person, *other than a member of the commission staff*, to attend and give testimony at a deposition, and to produce designated books, papers, documents, or other tangible things within the scope of discovery set forth in rule 4901-1-16 of the Administrative Code." Ohio Adm.Code 4901-1-25(D) (emphasis added). The Commission Staff is explicitly exempted from this rule, and the auditor was operating as an extension of Staff.

In an Entry issued on December 13, 2017, the Commission directed Staff to issue a request for proposals for a third-party monitor *to assist Staff* in the review of Rider DMR. *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 (DMR Case)*, Case No. 17-2474-EL-RDR (emphasis added). On January 24, 2018, the Commission issued an Entry selecting Oxford to assist Staff in its review. That Entry provided that "Oxford will execute its duties pursuant to the Commission's statutory authority to investigate and acquire records, contracts, reports, and other documentation under R.C. 4903.02, 4903.03, 4905.06, 4905.15, and 4905.16." *DMR Case* (Entry at ¶10) (January 24, 2018). Oxford was thus operating as an extension of the Commission Staff and is entitled to the same exemption from discovery as applies to Staff. While Staff is not exempt from a subpoena to compel testimony at a hearing, that is

not what OCC seeks in this motion. OCC seeks to compel the production of documents in advance of any hearing, and that is improper under the Commission's rules.

For the reasons explained above, OCC's Motion should be denied. The reports OCC seeks do not exist, and the Commission's rules do not permit a subpoena for a Commission-designated auditor to produce records.

Respectfully submitted,

Dave Yost
Ohio Attorney General

John H. Jones
Section Chief

/s/ Thomas G. Lindgren

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**On Behalf of the Staff of the
Public Utilities Commission of Ohio**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **Memorandum Contra to the Motion for Subpoena for Audit Report and Related Documents**, on behalf of the Staff of the Public Utilities Commission of Ohio, has been served upon the below-named counsel via electronic mail, this 4th day of November, 2021.

/s/ Thomas G. Lindgren

Thomas G. Lindgren
Assistant Attorney General

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COUNTY OF HARTFORD
STATE OF CONNECTICUT

)
)SS **AFFIDAVIT OF PAUL J. COREY**
)

Paul J. Corey, Affiant, being first duly sworn states and attests as follows based on his personal knowledge:

1. I, Paul J. Corey, am the Managing Director of Oxford Advisors LLC ("Oxford"), a financial, regulatory and energy advisory firm focused on the energy industry.
2. Oxford was selected as the third-party Monitor to assist the Commission and its Staff with the review of FirstEnergy's distribution modernization rider ("Rider DMR"). I was responsible for leading the Oxford team in its review of FirstEnergy's Rider DMR.
3. In the course of its investigation, Oxford, in cooperation with the Commission Staff, conducted discovery upon FirstEnergy, both formally and informally, including in person visits and interrogatories.
4. As the Monitor, Oxford was directed to provide interim quarterly updates to Staff on the use of Rider DMR funds, docket a mid-report on the Rider DMR within 60 days after the filing of an application for extension, and docket a final report of Rider DMR 90 days after the termination of the Rider DMR or an extension of the rider.
5. FirstEnergy filed its Rider DMR extension request on February 1, 2019.
6. The Commission granted an extension for the filing of Oxford's mid-report, originally due April 1, 2019, until April 29, 2019. Additional extensions were granted to May 31, 2019, and June 14, 2019. The mid-report was filed in this matter on June 14, 2019.
7. On June 19, 2019, the Ohio Supreme Court issued a decision ordering the Commission, in part, to remove Rider DMR from FirstEnergy's electric security plan ("ESP"). The Court denied reconsideration of that decision on August 20, 2019.
8. On August 27, 2019, the Commission Staff informed Oxford that it would need to generate a final report.
9. In January, 2020, Oxford, in cooperation with the Commission Staff, resumed discovery upon FirstEnergy through formal interrogatories.
10. On February 18, 2020, the Commission Staff filed a motion for extension of the due date until March 31, 2020 for the final audit report.
11. On February 26, 2020, the Commission issued an Entry dismissing this case. In its Entry, the Commission found that there was no longer a need for a final review of Rider DMR.
12. Oxford did not prepare any report, in any form, including interim updates to the Commission Staff, regarding FirstEnergy's Rider DMR subsequent to the filing of

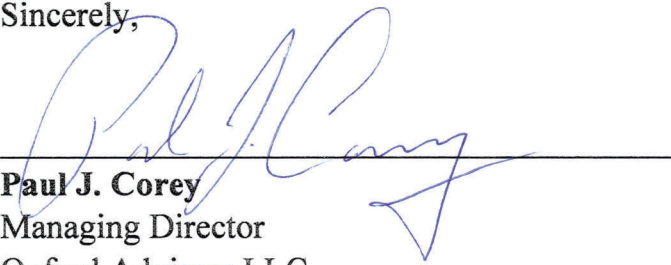
the mid-report on June 14, 2019. Nor did Oxford prepare any drafts of any such reports subsequent to the filing of the mid-report on June 14, 2019.

13. I have made a thorough review of all communications between Oxford and FirstEnergy and/or the Commission Staff, and have provided all such documents to Staff as of this date.

FURTHER AFFIANT SAYETH NAUGHT.

Sworn to before me and subscribed in my presence this 4th day of November, 2021.

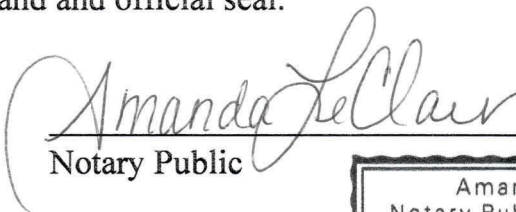
Sincerely,

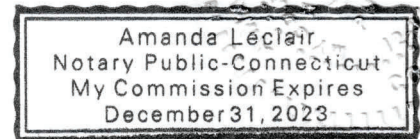

Paul J. Corey
Managing Director
Oxford Advisors LLC

COUNTY OF Hartford)
) :SS
STATE OF CONNECTICUT)

On this, the 4th day of November, 2021, before me a notary public, the undersigned officer, personally appeared Paul J. Corey, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument, and acknowledged that he executed the same for the purposes therein contained.

In witness hereof, I hereunto set my hand and official seal.


Notary Public



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in

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

Summary: Memorandum Contra to the Motion for Subpoena for Audit Report and
Related Documents electronically filed by Mrs. Kimberly M. Naeder on behalf of
PUCO