BEFORE
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

COMMENTS ON THE AUDIT REPORT
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

I. INTRODUCTION

Over the course of less than three years, Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's (collectively, the FirstEnergy Utilities) collected more than $450 million from customers through the Distribution Modernization Rider (Rider DMR). Although the Public Utilities Commission of Ohio (Commission) directed the FirstEnergy Utilities to "ensure that such funds are used, directly or indirectly, in support of grid modernization,"[1] they failed to do so. The Audit Report filed by Daymark Energy Advisors, Inc. (Daymark) demonstrates the extent of these pervasive failures to comply with the Commission's directives. Notably, the Auditor made the following findings:[2]

a. Based on Daymark's review, it is impossible to draw a conclusion regarding whether funds collected from Rider DMR eventually made their way to funding H.B. 6.

b. [I]t also cannot be ruled out that these extra funds – with no clear spending requirements – did not allow FirstEnergy to somehow fund the back-channel support of the passage of H.B. 6.

c. Once funds enter the money pool, they lose their identity and can no longer be traced back to any specific rider or tied to specific spending.

---

[1] *See In the Matter of the Application of Ohio Edison Co., the Cleveland Electric Illuminating Co.., and the Toledo Edison CO. 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 (ESP IV Case), Fifth Entry on Rehearing at ¶ 282 (October 12, 2016).

[2] Audit Report at 6-7, 83, 87-88, 93.

d. [G]iven the inability to trace how Rider DMR funds were spent, we cannot rule out with certainty use of Rider DMR funds to support of [sic] the passage of H.B. 6.

e. [T]he projects FirstEnergy categorized as grid modernization during the Rider DMR period were recovered under different riders, suggesting that Rider DMR funds did not fund these grid modernization projects.

f. Given that the intent of Rider DMR was clearly to enable grid modernization, either directly or indirectly, it should have been incumbent on FirstEnergy to track such spending.

g. There was no significant increase in budgeted capital expenditures (capex) for grid modernization with the passage of Rider DMR. In contrast, there was a notable increase in budgeted capex on grid modernization with the passage of Grid Mod I.

h. FirstEnergy Corp. did not reduce its long-term debt obligations during the Rider DMR period. Rather, FirstEnergy Corp. took on an additional $2.4 billion in debt.

i. There was insufficient long-term debt issued by the Ohio Companies during the Rider DMR period to draw any conclusions regarding the Rider DMR impact on the cost of long-term debt. However, the Ohio Companies did pay down approximately $105 million in debt during the Rider DMR period. Given the inability to trace funds, there is no documented evidence that Rider DMR revenues were used to fund this reduction.

j. [T]he Ohio Companies' dividend payout ratio from 2017-2019 (including the second half of 2019 when Rider DMR was not in place) was above peer averages and stands out. Rider DMR funds may have contributed to this dividend, but there is not documented evidence to prove or disprove a conclusion.

k. There is no written policy or formal supporting documentation to justify the equity infusions made to the Ohio Companies during the Rider DMR period.

l. [I]t is reasonable to conclude that the Rider DMR funds likely contributed to the excess earnings.

The lack of supporting documentation regarding the use of the Rider DMR funds is perplexing given that the Commission directed Staff to conduct periodically reviews of the use of the Rider DMR funds when it first approved Rider DMR.[3]

[3] ESP IV Case, Fifth Entry on Rehearing at ¶ 282 (October 12, 2016).

The Commission approved FirstEnergy Utilities' Fourth Electric Security Plan (ESP IV) on March 31, 2016.[4] Thereafter, on rehearing, the Commission authorized the FirstEnergy Utilities to implement Rider DMR.[5] Subsequently, in the above-captioned proceeding, the Commission directed Staff to issue a request for proposal (RFP) for an independent auditor to assist staff with the Rider DMR audit and selected an auditor on January 24, 2018.[6]

After OMAEG and others appealed the implementation of Rider DMR, the Supreme Court of Ohio held that Rider DMR was unlawful and must be removed from the FirstEnergy Utilities' ESP IV.[7] Subsequently, the Commission ordered the FirstEnergy Utilities to file proposed revised tariffs, removing Rider DMR from ESP IV and the FirstEnergy Utilities complied with that directive.[8] Subsequently, the Commission determined that by terminating the DMR, it had also terminated the requirement of a final review of the rider, and dismissed the case before the auditor ever submitted a final report.[9]

On September 8, 2020, the Office of the Ohio Consumers' Counsel (OCC) filed a motion in the above-captioned proceeding requesting Commission action in response to a federal criminal complaint alleging that former Ohio House Speaker Larry Householder and others orchestrated a corrupt enterprise to enact Am. Sub. H.B. 6 (H.B. 6) and oppose the subsequent referendum effort. Specifically, OCC requested, among other actions, that the Commission reopen the audit of the FirstEnergy Utilities' Rider DMR to "ensure that such funds are used, directly or indirectly, in

---

[4] ESP IV Case, Opinion and Order (March 31, 2016).

[5] ESP IV Case, Fifth Entry on Rehearing at ¶ 185 (October 12, 2016).

[6] Entry at ¶ 1 (December 13, 2017); Entry at ¶ 1 (January 24, 2018).

[7] *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 14-219, ¶¶ 14-29.

[8] P.U.C.O. No. 11 Tariff Removal of Rider DMR (October 18, 2019).

[9] Entry at ¶¶ 9-12 (February 26, 2020).

support of grid modernization" as originally ordered by the Commission and to "ensure that there is no unlawful subsidy of the Companies' affiliates."[10]

On December 30, 2020, the Commission determined that "given the unique circumstances at this time and in the interests of both transparency and state policy…good cause exists to grant OCC's motion and initiate an additional review of the entire duration of Rider DMR" and re-open the above-captioned proceeding.[11] As such, the Commission directed the Commission Staff to issue an RFP soliciting the services of an independent auditor to assist Staff with a full audit of the FirstEnergy Utilities' implementation of Rider DMR.[12] Specifically, the Commission tasked the auditor with determining whether funds collected from ratepayers through Rider DMR were used to support H.B. 6 or oppose the subsequent referendum effort.[13] The Commission clarified that the audit was to examine the time period leading up to the passage of H.B. 6 and the subsequent referendum.[14]

On June 2, 2021, the Commission selected Daymark to perform the audit.[15] Daymark filed its final Audit Report on January 14, 2022.[16] The Commission instructed interested parties to submit comments on the Audit Report by April 19, 2022.[17] Accordingly, OMAEG respectfully submits the following comments.

---

[10] OCC Motion for a PUCO Investigation and Management Audit of FirstEnergy, Its Corporate Governance and its Activities Regarding House Bill 6, etc., at 3-6, Case Nos. 17-2474-EL-RDR and 17-974-EL-UNC (September 8, 2020).

[11] Entry at ¶ 22 (December 30, 2020).

[12] *Id.* at ¶ 23.

[13] *Id*.

[14] *Id.*

[15] Entry (June 2, 2021).

[16] Rider DMR Audit Report (Confidential and Public Versions) (January 14, 2022) (Audit Report).

[17] Entry at ¶ 37 (February 18, 2022).

II. COMMENTS

A. The Audit Report demonstrates that the FirstEnergy Utilities failed to comply with the terms of ESP I.

When the Commission first approved Rider DMR, the Commission directed Staff "to periodically review how the Companies, and FirstEnergy Corp., use the Rider DMR funds to ensure that such funds are used, directly or indirectly, in support of grid modernization."[18] More specifically, while the Commission did not explicitly restrict the use of the funds, it clearly detailed its expectations for how the Rider DMR funds were to be used and set up a review process to ensure that the funds were used as expected to support grid modernization:

> Although we will not place restrictions on the use of Rider DMR funds, the Commission directs Staff to periodically review how the Companies, and FirstEnergy Corp., use the Rider DMR funds to ensure that such funds are used, directly or indirectly, in support of grid modernization. The Commission notes that grid modernization initiatives, such as smart grid deployment or utility scale battery technology, may involve very large up-front investments, which will be recovered over a number of years (Rehearing Tr. Vol. Ill at 585-86). Therefore, the Companies may use revenue under Rider DMR to make the large cash up-front investments to fund grid modernization (Co. Ex. 206 at 5-6). On the other hand, we recognize that the Companies and FirstEnergy Corp. may use revenue from Rider DMR to indirectly support grid modernization investments (Co. Ex. 206 at 16). Such steps should lower the cost of borrowing the funds needed to invest in grid modernization and may include reducing outstanding pension obligations, reducing debt, or taking other steps to reduce the long-term costs of accessing capital. The Commission finds that this Staff review will ensure that there is no unlawful subsidy of the Companies' affiliates.[19]

Given this clear directive from the Commission, the FirstEnergy Utilities were aware or should have been aware of the requirement that the Rider DMR funds were to be spent directly or indirectly on grid modernization, and that Staff was to audit the spending, and "it should have been incumbent on FirstEnergy to track such spending" in order to demonstrate that it was following

[18] ESP IV Case, Fifth Entry on Rehearing at ¶ 282 (October 12, 2016).

[19] *Id.*

the Commission's directives.[20] However, it is clear from the audit that the FirstEnergy Utilities did not attempt to track the spending or even demonstrate that the Rider DMR funds were actually used to support grid modernization.

Rather than earmarking funds collected through Rider DMR, the funds were simply placed in a "money pool," where the funds lost all identity and could no longer be traced to any specific revenue stream or spending.[21] FirstEnergy Corp. or the FirstEnergy Utilities did not performed any internal or external audits on the "money pool" in the past five years.[22] However, while the money pool makes it difficult—perhaps by design—to discern how Rider DMR funds were spent, it is nonetheless apparent that the FirstEnergy Utilities did not actually spend the Rider DMR funds on distribution modernization.

Daymark defined what it looked at to determine whether the Rider DMR funds were used directly and/or indirectly to support grid modernization. The auditor explained that direct support would be the use of Rider DMR funds to fund capital projects meeting the definition of grid modernization, while indirect support would consist of actions that lower the cost of capital or improve access to the capital needed to fund grid modernization projects.

After reviewing pertinent documents and conducting interviews with FirstEnergy Corp. employees and the FirstEnergy Utilities, Daymark concluded that "there was a general lack of knowledge on the specifics of Rider DMR," "which suggest[ed] that grid modernization was not a well-communicated priority."[23] In fact, the FirstEnergy Utilities did not reference Rider DMR

---

[20] Audit Report at 6-7.

[21] *Id.* at 7.

[22] *Id.*at 8.

[23] *Id.*at 6.

or grid modernization in corporate and board documents, or appropriately communicate grid modernization to its employees or as regulatory strategy.[24]

The auditor also noted that projects that the FirstEnergy Utilities categorized as grid modernization during the Rider DMR period for purposes of the audit were recovered under different riders, such as Rider AMI, the Toledo LED Lighting pilot, and Rider DCR, suggesting that Rider DMR funds did not fund these grid modernization projects.[25] The auditor also found that even though FirstEnergy categorized capital projects as grid modernization during the Rider DMR period if they "increased the resiliency or intelligence of the Ohio Companies' distribution system,"[26] the FirstEnergy Utilities' SAFI or CAIDI performance metrics did not demonstrate overall improvement during the DMR period.[27]

Additionally, the Audit Report explained that "FirstEnergy did not produce any meaningful analysis to support the dividend payments received from the Ohio Companies. As a result, Daymark was unable to directly observe or validate any driving factor behind the Ohio Companies' increase in dividend payments to FirstEnergy during the Rider DMR period."[28] Daymark concluded that they "cannot rule out the possibility that Rider DMR funds contributed, at least in part, to make this large dividend payment."[29] The Audit Report further highlights the fact that not only did the FirstEnergy Utilities not use Rider DMR funds for grid modernization, but they also did not keep track of how Rider DMR funds were spent. This flies directly in the face of the

[24] Audit Report at 6.

[25] *Id.*at 7, 16.

[26] *Id.*at 7 (citing to FirstEnergy Utilities' data responses (Set 3 DR 2, Set 5 DR 4).

[27] *Id.*at 19-21.

[28] *Id.*at 87.

[29] *Id.*

Commission's ruling authorizing Rider DMR, which called for a review to "ensure that such funds are used, directly or indirectly, in support of grid modernization."[30]

B. The Commission should direct the FirstEnergy Utilities to return the Rider DMR Funds to Customers if they cannot unequivocally demonstrate that the FirstEnergy Utilities did not use Rider DMR funds to support H.B. 6 political spending.

Daymark's Audit Report stated that it was possible that Rider DMR funds were used to support the passage and referendum efforts incumbent for the passage and implementation of the tainted H.B. 6. As noted by the Daymark, "[at] a basic level, recovery under Rider DMR was not based on any specific expense or action, rather, it was a straight collection of funds."[31] As such, based on the information available to Daymark, "it is impossible to draw a conclusion regarding whether funds collected from Rider DMR eventually made their way to funding H.B. 6."[32] At the same time, "it also cannot be ruled out that these extra funds – with no clear spending requirements – did not allow FirstEnergy to somehow fund the back-channel support of the passage of H.B. 6."[33]

Of course, given that the FirstEnergy Utilities intentionally obscured the destination of Rider DMR funds, and given the FirstEnergy Utilities' ongoing resistance to parties' discovery attempts, including efforts to depose former employees with first-hand knowledge, it would be difficult, if not impossible, for an outside party to demonstrate what exactly the Rider DMR funds were ultimately used for within the FirstEnergy entities. Nevertheless, the Audit Report raises a strong inference that the FirstEnergy Utilities not only could have used Rider DMR funds for purposes related to H.B. 6, but that the FirstEnergy Utilities intentionally disguised the ultimate

---

[30] ESP IV Case, Fifth Entry on Rehearing at ¶ 282 (Oct. 12, 2016).

[31] Audit Report at 23.

[32] *Id.*at 88.

[33] *Id.*at 93.

destination of these funds. Given the extent of the current evidence, the difficulty of obtaining proof for outside parties, and the FirstEnergy Utilities' ongoing resistance to discovery, the Commission should direct the FirstEnergy Utilities to return the Rider DMR Funds to customers if they cannot unequivocally present evidence demonstrating that the Rider DMR funds were not used in relation to H.B. 6 or to fund the back-channel support of the passage of H.B. 6 or to oppose the subsequent referendum effort.

C. The Commission should assess sanctions on the FirstEnergy Utilities and order restitution to customers.

Lastly, the FirstEnergy Utilities violated the Commission's October 12, 2016, Fifth Entry on Rehearing when they failed to ensure Rider DMR funds were used directly or indirectly in support of grid modernization, and when they failed to track the spending of Rider DMR funds to enable Staff to review the use of those funds. As such, the Commission should assess sanctions against the FirstEnergy Utilities.

R.C. 4905.54 and Ohio Adm.Code 4901:1-10-30 allow the Commission to impose several penalties for electric distribution utilities that fail to comply with Commission orders. The Commission may assess a forfeiture of up to $10,000 per violation, where each day's continued violation of the relevant Commission ruling constitutes a separate offense.[34] Additionally, the Commission can implement corrective action to effectuate compliance, or direct the utility to provide restitution or damages to the effected customers.[35] Lastly, these forfeitures and other penalties are cumulative.[36]

---

[34] R.C. 4905.54; R.C. 4905.56; Ohio Adm.Code 4901:1-10-30(A)(1).

[35] Ohio Adm.Code 4901:1-10-30(A)(2), (3).

[36] R.C. 4905.64.

The FirstEnergy Utilities harmed consumers to the tune of $450 million dollars when they collected funds purportedly for distribution modernization, but failed to actually spend that money on distribution modernization and failed to properly keep track of the funds. As such, each day's implementation of the Rider DMR contrary to the Commission's October 12, 2016, Fifth Entry on Rehearing constitutes a separate offense. The Commission can, and should, remedy these continued offenses by assessing forfeitures against the Utilities and directing them to provide restitution to their customers.

III. CONCLUSION

The Audit Report filed by Daymark demonstrated that the FirstEnergy Utilities violated the Commission's October 12, 2016, Fifth Entry on Rehearing by failing to ensure Rider DMR funds were used for distribution modernization and for failing to track the funds. The Audit Report also demonstrated the substantial likelihood that the FirstEnergy Utilities used these funds to support H.B. 6 and/or to oppose the subsequent referendum effort. As such, the Commission should direct the FirstEnergy Utilities to take the action recommended herein by OMAEG.

Respectfully submitted,

*/s/ Kimberly W. Bojko*______
Kimberly W. Bojko (0069402)
Jonathan B. Wygonski (0100060)
Carpenter Lipps & Leland LLP
280 North High Street, Suite 1300
Columbus, Ohio 43215
Telephone: (614) 365-4100
Bojko@carpenterlipps.com
wygonski@carpenterlipps.com
(willing to accept service by email)

Counsel for the Ohio Manufacturers' Association Energy Group

CERTIFICATE OF SERVICE

The Public Utilities Commission of Ohio's e-filing system will electronically serve notice of the filing of this document on the parties referenced on the service list of the docket card who have electronically subscribed to the case. In addition, the undersigned hereby certifies that a copy of the foregoing document also is being served via electronic mail on April 19, 2021 upon the parties listed below.

/s/ Kimberly W. Bojko
Kimberly W. Bojko

Counsel for the Ohio Manufacturers' Association Energy Group

steven.beeler@ohioattorneygeneral.gov
mkurtz@BKLlawfirm.com
kboehm@BKLlawfirm.com
jkylercohn@BKLlawfirm.com
scasto@firstenergycorp.com
bknipe@firstenergycorp.com
jlang@calfee.com
khehmeyer@calfee.com
mkeaney@calfee.com
mpritchard@mcneeslaw.com
fdarr@mcneeslaw.com
Maureen.willis@occ.ohio.gov
William.michael@occ.ohio.gov
Angela.obrien@occ.ohio.gov
rdove@keglerbrown.com
mfleisher@dickinsonwright.com
mwise@mcdonaldhopkins.com

Attorney Examiners:

Megan.addison@puco.ohio.gov
Jacqueline.St.John@puco.ohio.gov