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

REPLY COMMENTS
OF
THE OHIO MANUFACTURERS' ASSOCIATION ENERGY GROUP

Respectfully submitted,

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I. INTRODUCTION

The Audit Report filed by Daymark Energy Advisors, Inc. (Daymark)[1] demonstrates that for nearly four years, The Cleveland Electric Illuminating Company, and The Toledo Edison Company's (collectively, the FirstEnergy Utilities) brazenly violated the directives of the Public Utilities Commission of Ohio (Commission). During the audit period, as part of their Fourth Electric Security Plan (ESP IV), the FirstEnergy Utilities collected charges through the Distribution Modernization Rider (Rider DMR) from customers. In exchange, the FirstEnergy Utilities were to spend that money either directly or indirectly in support of grid modernization.[2] But the FirstEnergy Utilities failed to do so despite collecting more than $450 million from customers through Rider DMR before the Supreme Court of Ohio found the charge to be unlawful..

The Commission initially approved the FirstEnergy Utilities' ESP IV on March 31, 2016,[3] and authorized the FirstEnergy Utilities to implement Rider DMR after rehearing.[4] However,

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

[2] *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 (Oct. 12, 2016).

[3] ESP IV Case, Opinion and Order (Mar. 31, 2016).

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

following an appeal from the Ohio Manufacturers' Association Energy Group (OMAEG) and other parties, the Supreme Court of Ohio struck down Rider DMR, and the Commission subsequently ordered the FirstEnergy Utilities to remove the charge from ESP IV.[5]

In response to a federal criminal complaint alleging orchestration of a corrupt enterprise to ensure the passage of Am. Sub. H.B. 6 (H.B. 6) and oppose the subsequent referendum effort, the Ohio Consumers' Counsel (OCC) requested that the Commission reopen the Rider DMR audit to "ensure that such funds are used, directly or indirectly, in support of grid modernization" and "that there is no unlawful subsidy of the Companies' affiliates."[6] Subsequently, the Commission stated: "[G]iven the unique circumstances at this time, and in the interests of both transparency and state policy, we find good cause exists to…initiate an additional review of the entire duration of Rider DMR" and re-open the above-captioned proceeding.[7]

The Commission ultimately selected Daymark to assist Staff with a full audit of Rider DMR, including determining whether the FirstEnergy Utilities improperly used funds collected from ratepayers through Rider DMR to support H.B. 6 or oppose the subsequent referendum effort.[8] Daymark subsequently filed its final Audit Report on January 14, 2022.[9] In its Audit Report, Daymark laid out the following findings in pertinent part:[10]

> a. [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.

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[5] *In re Application of Ohio Edison Co. v. Pub. Util. Comm.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶¶ 14-29; P.U.C.O. No. 11 Tariff Removal of Rider DMR (Oct. 18, 2019).

[6] 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 (Sept. 8, 2020).

[7] Entry at ¶ 22 (Dec. 30, 2020).

[8] *Id.* at ¶ 23.

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

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

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.

d. [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.

e. 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.

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 Commission instructed interested parties to submit comments on the Audit Report by April 19, 2022, and reply comments by May 4, 2022.[11] Subsequently, OMAEG,[12] OCC,[13] and the FirstEnergy Utilities[14] each filed initial comments on April 19, 2022.

Accordingly, OMAEG respectfully submits the following reply comments.

II. REPLY COMMENTS

A. FirstEnergy Utilities intentionally misstate the purpose of Rider DMR.

The FirstEnergy Utilities attempt to discredit the Audit Report by misrepresenting the purpose of Rider DMR. The FirstEnergy Utilities also attempt to portray the Auditors as misunderstanding the terms and purpose of Rider DMR. As stated by Daymark in the Audit Report, "the intent of Rider DMR was clearly to enable grid modernization."[15]

However, the FirstEnergy Utilities apparently disagree with this statement, and don't seem to think they had any obligation to do anything with customers' money to support grid modernization or benefit customers. According to the FirstEnergy Utilities:

> the Audit Report at times confuses Rider DMR with the first phase of the Companies' distribution grid modernization program….While the Audit Report suggests, based on a perceived lack of familiarity with Rider DMR among employees, that grid modernization is not a priority of the Companies, this finding appears to be based on the incorrect assumption that Rider DMR was a grid modernization program.[16]

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

[12] Comments On The Audit Report Of The Ohio Manufacturers' Association Energy Group (Apr. 19, 2022) (OMAEG Comments).

[13] Initial Comments by Office of the Ohio Consumers' Counsel (Apr. 19, 2022) (OCC Comments).

[14] Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company (Apr. 19, 2022) (FirstEnergy Comments).

[15] Audit Report at 7.

[16] FirstEnergy Comments at 4.

Throughout their comments, the FirstEnergy Utilities state their belief that "Rider DMR was not a 'grid modernization program.'"[17] The FirstEnergy Utilities attempt to distinguish between a grid modernization program and "credit support intended to incentivize grid modernization."[18] This distinction is meaningless.

An incentive, as determined by the Supreme Court of Ohio, "is generally conditioned upon completion of a particular action."[19] The Supreme Court, when reviewing Rider DMR, noted that "[a]n incentive generally serves to induce someone to take some action that otherwise would not be taken but for the incentive."[20] Moreover, the DMR is a financial incentive and 'it is inherent in an incentive payment that the recipient must do something to be paid.'[21] Therefore, whether Rider DMR is a program designed to collect money from customers to incentivize the FirstEnergy Utilities to spend that money and invest in modernizing its grid or whether Rider DMR is credit support or a direct incentive for FirstEnergy Utilities to modernize its grid is a distinction without a difference. Accordingly, the FirstEnergy Utilities' argument is a red herring and should be rejected.

Nonetheless, regardless of whether Rider DMR was a 'program' or an 'incentive' (or perhaps more accurately, a 'ratepayer-funded bailout'), to the extent the Commission attached terms to the receipt of money from customers through Rider DMR, the FirstEnergy Utilities were obligated to comply with those terms. The Commission explicitly attached terms to its approval of Rider DMR. In its Entry on Rehearing initially approving the DMR charge, the Commission

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[17] FirstEnergy Comments at 13.

[18] *Id.* at 14.

[19] *In re Application of Ohio Edison Co. v. Pub. Util. Comm.*, 157 Ohio St.3d 73, 2019-Ohio-2401, 131 N.E.3d 906, ¶ 16.

[20] *Id.*

[21] *Id.*, *citing Len Stoler, Inc. v. Volkswagen Group of America, Inc.*, 232 F.Supp.3d 813, 822 (E.D.Va.2017).

noted that Commission Staff was to "to ensure that such funds are used, directly or indirectly in support of grid modernization."[22] Moreover, the Commission clearly delineated the purpose of Rider DMR:

> As proposed by Staff, Rider DMR is a distribution modernization incentive for the Companies. The testimony in the record makes it clear that Rider DMR is related to distribution….The rehearing testimony demonstrates that Staff intends for Rider DMR to jump start the Companies' grid modernization efforts. Accordingly, we find that the record demonstrates that Rider DMR is intended to stimulate the Companies to focus their innovation and resources on modernizing their distribution systems. Therefore, Rider DMR is a distribution modernization incentive.[23]

Given the Commission's directives and conditions on receiving funds from customers, the FirstEnergy Utilities' argument that "there is a fundamental difference between *paying* for grid modernization projects and *receiving* credit support *to access* capital to fund such projects,"[24] is simply irrelevant. The evidence uncovered by Daymark shows that the FirstEnergy Utilities failed to do either.

B. The FirstEnergy Utilities violated the Fifth Entry on Rehearing by failing to use DMR funds directly or indirectly in support of grid modernization.

The FirstEnergy Utilities could not produce evidence that they directly spent Rider DMR funds on grid modernization. Rather, Daymark found contrary evidence—they found evidence that the FirstEnergy Utilities did not spend money directly on grid modernization. Further, the FirstEnergy Utilities did not achieve any significant investments in grid modernization during that time, casting significant doubt on their claim the funds were used for the proper purpose.

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

[23] ESP IV Case, Fifth Entry on Rehearing at ¶ 190 (Oct. 12, 2016). (citations omitted).

[24] FirstEnergy Comments at 6.

Additionally, despite the purported investments, the Audit Report concluded that the FirstEnergy Utilities did not demonstrate overall improvement in reliability metrics.[25]

More specifically, as part of its investigation, Daymark asked the FirstEnergy Utilities to "identify any projects that were related to grid modernization."[26] Despite claims that the Rider DMR funds were used directly for grid modernization, the Audit Report concluded that "no significant investments in grid modernization until 2020, driven by the approval of Grid Mod I."[27] Moreover, the Audit Report noted that "projects that 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 mod projects."[28] Therefore, the Audit Report concluded, Rider DMR did not fund these projects.[29] Furthermore, the lack of improvement to the FirstEnergy Utilities' operating metrics "is generally indicative of an insufficient level or generally unfocused level of reliability focused investment in the distribution system."[30]

The evidence uncovered by Daymark shows that the FirstEnergy Utilities also failed to use the Rider DMR funds in *indirect* support of grid modernization. As the Audit Report noted, during the period that Rider DMR was in effect, FirstEnergy Corp.'s long-term debt and leverage both increased.[31] As such, "it does not appear that Rider DMR funds were used to reduce FirstEnergy Corp.'s long-term debt in any significant way."[32] The FirstEnergy Utilities attempt to argue that

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[25] Audit Report at 19-21.

[26] Audit Report at 24.

[27] Audit Report at 21.

[28] Audit Report at 94.

[29] Audit Report at 17 ("If all of these costs were recovered separately, then Rider DMR did not directly fund these grid modernization projects.").

[30] Audit Report at 21.

[31] Audit Report at 55-56.

[32] *Id.* at 56.

essentially, absent Rider DMR, FirstEnergy Corp. would have been forced to take on *even more debt*.[33] Of course, the FirstEnergy Utilities do not provide any analysis as to the amount of this hypothetical debt that Rider DMR avoided.

Additionally, the FirstEnergy Utilities point to capital expenditures, including "work on reliability projects, system reinforcement, aging infrastructure, and storm restoration."[34] However, as discussed above, the funds from customers for these projects were actually recovered through separate riders. As such, the Rider DMR funds were not used for these purposes, unless the FirstEnergy Utilities now admit to double-recovery.

The Audit Report also casts doubt on the FirstEnergy Utilities' argument that Rider DMR was properly used to support the FirstEnergy Utilities' credit rating, or the credit rating of their parent company, FirstEnergy Corp.[35] In fact, Daymark found that "Moody's actually upgraded the Ohio Companies" after Rider DMR was removed.[36] Additionally, other credit agencies "made no significant change" to the credit ratings of the FirstEnergy Utilities, or their parent, FirstEnergy Corp., following the end of Rider DMR.[37] The FirstEnergy Utilities complain that the Audit Report "does not conclude that this improvement sufficiently demonstrates credit support as intended."[38] However, this is not a mistake by Daymark. It is a recognition that no evidence exists to reach that conclusion, since the FirstEnergy Utilities did not maintain the requisite records.

[33] FirstEnergy Comments at 20 ("missing from its analysis is any mention that Rider DMR eliminated, or at least delayed, the need to access *new* debt") (emphasis original).

[34] FirstEnergy Comments at 20.

[35] FirstEnergy Comments at 21-22.

[36] Audit Report at 40.

[37] *Id.*

[38] FirstEnergy Comments at 4.

Despite arguments from the FirstEnergy Utilities, a lack of tracking as to how the FirstEnergy Utilities spent customer dollars does not meet the FirstEnergy Utilities' burden to demonstrate how the customer funds were actually used. In their comments, the FirstEnergy Utilities claim that "the best measure of compliance with the Commission's ESP IV directives on the use of Rider DMR funds is to compare the amount of funds used, directly or indirectly, in support of grid modernization to the amount of Rider DMR revenue the Companies collected."[39] Essentially, their argument is that since they collected DMR funds during the audit period, and arguably spent some money on indirect support of grid modernization (albeit there is no evidence of such), the FirstEnergy Utilities argue they used the DMR funds for grid modernization. According to the FirstEnergy Utilities, comparing "the amount of Rider DMR revenues to expenditures by the Companies that were directly or indirectly in support of grid modernization… demonstrates compliance with the Rider DMR directives."[40] But the FirstEnergy Utilities do not provide any facts purportedly linking any specific source of funds to any specific spending. In fact, the FirstEnergy Utilities claim it would be impossible to do so.[41]

This same analysis, based on the exact same facts, could be applied to signal that *any* source of funds to FirstEnergy Corp.'s moneypool could be tied to *any* spending the FirstEnergy Utilities made during the same period. Following this logic, comparing "the amount of Rider DMR revenues to expenditures by the Companies" for a purpose ties the DMR funds to that purpose.[42] For example, during the Audit Period, while the FirstEnergy Utilities collected DMR funds, the

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[39] FirstEnergy Comments at 9.

[40] FirstEnergy Comments at 4.

[41] FirstEnergy Comments at 9 ("Therefore, it is not possible to specifically determine the 'use of Rider DMR funds.' Generally, the only way to determine whether customers paid for a given cost is to identify the cost, and analyze whether that cost was included in rates paid by customers. Since Rider DMR was not a cost-based recovery mechanism, any such analysis is moot.").

[42] FirstEnergy Comments at 4.

FirstEnergy Utilities' parent corporation provided political contributions in support of the tainted H.B. 6 and paid illegal bribes to former Commission Chairman Sam Randazzo.

Daymark stated that despite a lack of direct evidence, "given the inability to trace how Rider DMR funds were spent [Daymark] cannot rule out with certainty use of Rider DMR funds to support of the passage of H.B. 6."[43] The FirstEnergy Utilities claim that the fact that it collected DMR funds at the same time it made certain payments supports the claim that those funds were used for those payments. If that is the case, then the Audit Report supports the notion that the FirstEnergy Utilities spent the DMR funds on political support in favor of H.B. 6. Due to the FirstEnergy Utilities' attempts to obfuscate the source of funds in the money pool, the Audit Report did not uncover concrete evidence that those funds were spent on anything in particular. There is just as much evidence connecting the DMR funds to H.B. 6 as there is to distribution modernization.

The FirstEnergy Utilities also later contradict their own argument, complaining that "the Audit Report subsumes any potential benefits of the rider into other events and assumes without further analysis that these other events were the cause of improvements."[44] Again, the FirstEnergy Utilities complain that Daymark makes assumptions based on circumstantial evidence, despite making its own assumptions based on even weaker circumstantial evidence.

The Audit Report demonstrates that the FirstEnergy Utilities failed to use the Rider DMR funds to directly or indirectly support distribution modernization, and therefore violated the Commission's Fifth Entry on Rehearing approving Rider DMR. Contrary to what the FirstEnergy Utilities assert, a lack of evidence tying Rider DMR funds to any specific spending does not satisfy

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[43] Audit Report at 7

[44] FirstEnergy Comments at 19, *citing* Audit Report.

the Commission's requirements and conditions. Moreover, the lack of specific evidence results from the FirstEnergy Utilities' failure to track the Rider DMR funds—another violation of the Commission's Fifth Entry on Rehearing approving Rider DMR.

C. The FirstEnergy Utilities violated the Fifth Entry on Rehearing by failing to track DMR funds.

As OMAEG,[45] Daymark,[46] and OCC[47] each noted, the Commission's Fifth Entry on Rehearing establishing Rider DMR plainly required the FirstEnergy Utilities to track the use of Rider DMR funds. The FirstEnergy Utilities failed to do so. As Daymark noted, "it should have been incumbent on FirstEnergy to track such spending."[48]

The FirstEnergy Utilities did not earmark funds collected through Rider DMR. Instead, they simply placed the DMR funds in a "money pool," which was available to each of the utilities owned by FirstEnergy Corp., including utilities in other states.[49] In the money pool, the DMR funds lost all identity and could no longer be traced to any specific revenue stream or spending.[50] Additionally, FirstEnergy Corp. or the FirstEnergy Utilities did not perform any internal or external audits on the "money pool" in the past five years.[51]

In addition to not keeping track of the source of funds from Rider DMR, the FirstEnergy Utilities did not specifically track how much money they spent on grid modernization. Employees did not notice an increase in available capital with the approval of Rider DMR.[52] Nor was there a

[45] OMAEG Comments at 5-8.

[46] Audit Report at 6-7.

[47] OCC Comments at 15-17.

[48] Audit Report at 7.

[49] Audit Report at 27-34.

[50] *Id.* at 7.

[51] *Id.*at 8.

[52] *Id.* at 16.

specific budget line item set aside for Rider DMR. In fact, personnel at the FirstEnergy Utilities were not even aware of a standard company definition of grid modernization.[53] As such, the FirstEnergy Utilities failed to track the use of Rider DMR funds, or the amount of money spent on grid modernization in violation of the Commission's Fifth Entry on Rehearing.

D. The Commission should not allow FirstEnergy to use its noncompliance as a shield from liability.

The FirstEnergy Utilities attempt to mischaracterize their failure to track DMR funds as an unavoidable reality of the cash management process.[54] The failure to track the use of DMR funds cannot shield them from wrongdoing, as the failure to do so constitutes wrongdoing in and of itself. The FirstEnergy Utilities' "inability to distinguish Rider DMR funds from the rest of the Companies' cash on hand"[55] directly violated the Commission's explicit directive to "ensure that such funds are used, directly or indirectly, in support of grid modernization."[56] As noted by OCC, the "FirstEnergy Utilities' decision not to track DMR funds—making itself essentially unauditable—should not be allowed as a shield against any repercussions from its fiscal irresponsibility."[57]

Rather than contesting the findings of the Audit Report, the FirstEnergy Utilities again attempt to argue that the Audit Report, and the comments filed by OCC and OMAEG, simply misunderstand the situation. The FirstEnergy Utilities claim that the Audit Report's findings do "not recognize how other programs of the Companies relate to, or are different than, Rider DMR,

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[53] *Id.* at 7.

[54] *See* FirstEnergy Comments at 5-9.

[55] *Id.* at 19.

[56] *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, Fifth Entry on Rehearing at ¶ 282 (October 12, 2016) (ESP IV DMR Entry).

[57] OCC Comments at 11.

or the realities of how the cash management process works."[58] The FirstEnergy Utilities appear to argue that any objections to their failure to comply with the Commission's clear directive only result from misunderstandings about how the FirstEnergy Utilities operate.[59] The issue is not that OMAEG, Daymark, or OCC misunderstand how the utilities operate. The issue is that the FirstEnergy Utilities operated in a way that violated the clear directive of the Commission, used Rider DMR funds for unknown purposes, and intentionally obscured evidence of where the funds were going and made themselves unauditable.

Without possessing the ability "to distinguish Rider DMR funds from the rest of the Companies' cash on hand,"[60] it would be impossible for Commission Staff (or any other party, such as an independent auditor) to ensure, in any way, how the funds are used. This is not a "misunderstanding" by Daymark, OMAEG, or OCC about how the FirstEnergy Utilities' cash management process works; rather, it is an objective fact that the FirstEnergy Utilities' cash management process worked in a way that, either negligently or intentionally, directly conflicted with the express terms of the approval of Rider DMR and the Commission's Fifth Entry on Rehearing.

E. The Commission should direct the FirstEnergy Utilities to demonstrate its compliance with the Fifth Entry on Rehearing.

The FirstEnergy Utilities operated in a way that made it impossible to track whether or not Rider DMR funds were spent directly or indirectly in support of grid modernization. Company policies, such as the all-utility, multi-state money pool, or the lack of budgeting for grid

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[58] FirstEnergy Comments at 3.

[59] *Id.* at 5 ("The Companies believe these issues and others in the Audit Report are largely attributable to the unique nature of Rider DMR and a misunderstanding of how Rider DMR relates to, or is different from, other programs of the Companies.").

[60] FirstEnergy Comments at 3.

modernization capital expenditures directly conflict with the FirstEnergy Utilities' obligations to spend these funds on grid modernization and track their usage. As noted by Daymark, "it should have been incumbent on FirstEnergy to track such spending."[61]

Moreover, the evidence uncovered by Daymark, demonstrates the lack of improvement to the FirstEnergy Utilities' reliability metrics, the lack of impact from the DMR funds on the FirstEnergy Utilities' or FirstEnergy Corp.'s credit ratings, the lack of increase in spending on grid modernization, and the fact that costs for grid modernization were actually recovered from other riders. It is clear that the FirstEnergy Utilities did not spend all of the Rider DMR funds on direct or indirect support of grid modernization. Ultimately, Daymark noted that, "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."[62]

Therefore, 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 in fact 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. The Audit Report has cast significant doubts on the use of these funds. It should be incumbent on the FirstEnergy Utilities and FirstEnergy Corp. to answer these doubts.

F. The Commission should broaden the scope of the investigation into the FirstEnergy Utilities.

The Audit Report prepared by Daymark in this case is ultimately only one piece of the puzzle regarding the broad range of legal and compliance violations perpetrated by the FirstEnergy Utilities, their parent company, FirstEnergy Corp., and its affiliates and subsidiaries. As OCC

[61] Audit Report at 7.

[62] *Id.* at 93.

noted, the Commission is currently "conducting four separate investigations into FirstEnergy's H.B. 6 activities."[63] Each of these issues is, to a certain degree, related.

While the Audit Report did not and could not answer every question regarding the use of the Rider DMR funds, it certainly raised additional questions as to how the FirstEnergy Utilities spend money recovered from ratepayers. Rather than being the end of the inquiry, this Audit Report should lead to further investigations into those issues, either in this proceeding, other investigations into various FirstEnergy Corp. affiliates and subsidiaries, or in a new Commission-ordered investigation.

For example, while the Audit Report found that funds in the all-utility money pool were used to increase dividend payments to FirstEnergy Corp.,[64] it also highlighted the fact that the FirstEnergy Utilities have no written dividend policy.[65] Other non-Ohio FirstEnergy utilities, however, do.[66] As such, OMAEG supports OCC's request that the Commission "should examine through a supplemental audit whether FirstEnergy Corp. directly or indirectly used Rider DMR funds to pay bankruptcy obligations related to FirstEnergy Solutions" as a result of these increased dividend payments.[67] The Commission should also examine whether these dividend payments were ultimately channeled to the H.B. 6 funding.[68] This includes an explanation as to the source of the funds that FirstEnergy Corp. used to illegally bribe public officials.[69]

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[63] OCC Comments at 11.

[64] Audit Report at 19.

[65] Audit Report at 68; *See also* OCC Comments at 27-30.

[66] *Id.*

[67] OCC Comments at 27-28.

[68] *See* OCC Comments at 25-27.

[69] *Id*.

Moreover, the Commission should investigate the use of the all-utility, multi-state money pool. During the DMR period, the FirstEnergy Utilities tended to be net lenders to the money pool:

> During the Rider DMR period from 2017 to 2019, Ohio Edison was a net lender into the money pool for all but one month. Toledo Edison went from being mostly a net borrower in 2015 to mostly a net lender between 2016 and 2019. Cleveland Electric Illuminating was split between being a net borrower and a net lender in the pool over the Rider DMR period. It is difficult to draw any specific significance from these money pool positions since the Ohio Companies had many other sources of cash besides Rider DMR.[70]

This finding by the auditors raises questions as to whether the Rider DMR funds from Ohio customers acted as an improper subsidy to non-Ohio utilities who were net borrowers from the all-utility money pool during this time.[71] While the Audit Report acknowledged this concern, it determined that such a question was outside the scope of the Audit.[72] The Commission should not let this be the end of the inquiry. Instead, it should further investigate the use of the all-utility, multi-state money pool funds.

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

The Commission should assess sanctions against the FirstEnergy Utilities as a consequence for their failure to comply with the Commission's October 12, 2016, Fifth Entry on Rehearing. As discussed above, the Audit Report demonstrates how the FirstEnergy Utilities improperly failed to spend Rider DMR funds on grid modernization and failed to track the source and use of the funds.

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[70] Audit Report at 32.

[71] *See* OCC Comments at 30-31.

[72] Audit Report at 32.

As noted by OMAEG[73] and OCC,[74] the Commission, based on the findings of the Audit Report, should assess sanctions against the FirstEnergy Utilities. First, 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.[75] Second, if a utility "omits to do any act or thing required by provisions of those chapters, or by order of the public utilities commission, the public utility or railroad is liable to the person, firm, or corporations injured thereby in treble the amount of damages sustained in consequence of the violation, failure or omission."[76] Third, the Commission can implement corrective action to effectuate compliance, or direct the utility to provide restitution or damages to the effected customers.[77] Each of these forfeitures, alongside any other penalties the Commission may impose, are cumulative.[78] The Commission should utilize its authority to assess sanctions against the FirstEnergy Utilities and order restitution to customers.

III. CONCLUSION

The FirstEnergy Utilities, their parent company, and its affiliates each played a part in a wide-ranging scheme to extract more money from customers. The Audit Report filed by Daymark demonstrates how the FirstEnergy Utilities improperly used Rider DMR funds. The Audit Report sheds new light on the scope of this wrongdoing, but not the full extent of it. Pursuant to the comments filed by OMAEG and OCC in this proceeding, the Commission should not let this Audit Report be the end of the investigation into the Companies' use of Rider DMR funds or the multi-state, multi-utility money pool.

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[73] OMAEG Comments at 9-10.

[74] OCC Comments at 17-22.

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

[76] R.C. 4905.61.

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

[78] R.C. 4905.64.

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 issue refunds to customers and take the other action recommended herein by OMAEG.

Respectfully submitted,

*/s/ Kimberly W. Bojko*______

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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 May 4, 2022 upon the parties listed below.

/s/ Kimberly W. Bojko
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