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 OHIO EDISON COMPANY, THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, AND THE TOLEDO EDISON COMPANY

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I. INTRODUCTION

The Companies' initial Comments demonstrate that there is more than sufficient support to conclude that the Companies complied with the Commission's directive in the Companies' fourth electric security plan[1] ("ESP IV") to use Rider DMR funds, directly or indirectly, in support of grid modernization.[2] Indeed, Daymark Energy Advisors' Audit Report of the Ohio Companies' Rider DMR (the "Audit Report") shows that the Companies' and FirstEnergy Corp.'s expenditures toward Commission-approved uses of Rider DMR funds far exceeded the amounts collected under the rider.[3]

The comments submitted by OCC and OMAEG (collectively, the "Intervenors") ignore the terms under which the Commission approved Rider DMR, as well as the realities of cash management. They assert positions that contradict those they took in ESP IV, and ultimately ask the Commission for remedies that have no basis in law or fact. OCC and OMAEG urge the Commission to impose debilitating amounts of damages, as well as fines, because specific dollars recovered under Rider DMR cannot be distinguished from other cash, nor traced to any given grid modernization-related expenditure (or any other specific uses). OMAEG goes so far as to argue that the Companies "intentionally disguised" the destination of Rider DMR funds by placing them in the Money Pool.[4]

To the contrary, Rider DMR dollars, like other dollars that come into the Companies, were never intended to be marked for any specific expenditures or traced to any ultimate use. And the

[1] *See* Case No. 14-1297-EL-SSO ("ESP IV").

[2] *See* Case No. 17-2474-EL-RDR, Comments of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company ("Companies Comments") (April 19, 2022), at 5-12.

[3] *Id.* at 10-12.

[4] Case No. 17-2474-EL-RDR, Comments on the Audit Report of Ohio Manufacturers' Association Energy Group ("OMAEG Comments") (April 19, 2022), at 8.

Commission twice rejected segregating Rider DMR revenues from other funds collected by the Companies. These fundamental aspects of Rider DMR have been known for years to all parties who participated in the Companies' ESP IV, including the Intervenors, but none of that comes through in the Intervenors' comments. The Companies have not, in OCC's words, made Rider DMR "unauditable."[5] Had the Audit Report found an insufficient amount of funds used, directly or indirectly, in support of grid modernization, the report could have concluded that the Companies did not follow the Commission's ESP IV directives This makes Rider DMR quite auditable.

Further, the Intervenors' penalty recommendations ignore the $306 million in benefits to customers of the recently approved unanimous Global Stipulation.[6] As explained below, the Global Stipulation already ensures consumers are receiving ample protection in connection with Rider DMR revenues.

OCC's and OMAEG's recommendations should be rejected. The Companies respectfully ask the Commission to find that the Companies complied with all requirements of Rider DMR.

II. REPLY COMMENTS

A. The Companies Complied with the Commission's Orders—There Was No Violation.

Every supposed violation of the Commission's ESP IV orders alleged by the Intervenors hinges on the fact that Rider DMR funds—like all other monies collected by the Companies—cannot be traced to specific spending. OMAEG argues, for example, that the Companies ran afoul of the Commission's directive that Rider DMR funds be used "directly or indirectly" in support of

[5] Case No. 17-2474-EL-RDR, Initial Comments by Office of the Ohio Consumers' Counsel ("OCC Comments") (April 19, 2022), at 3.

[6] *See, generally*, Case No. 20-1034-EL-UNC, et al., Opinion and Order (Dec. 1, 2021) ("Global Stipulation").

grid modernization[7] because "[r]ather 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."[8] OCC raises a nearly identical argument, claiming that the Companies violated the Commission's order by not "tracking" Rider DMR funds to specific uses, placing the funds in the Money Pool, and therefore supposedly becoming "unauditable."[9]

The Companies' initial Comments explain at length why these alleged violations find no support in the Commission's ESP IV rehearing Entries or elsewhere in the ESP IV record, and the Companies will not belabor all those points here. Rider DMR's purpose, as proposed by Staff and approved by the Commission, was to provide credit support to incentivize grid modernization.[10] And in recognition of that purpose, the Commission did not require the Companies to invest funds from Rider DMR revenues directly in grid modernization projects or otherwise restrict their use.[11] Nor did the Commission require Rider DMR funds to be separately tracked or to be treated differently from all other revenues collected by the Companies.[12] To the contrary, the Commission rejected these approaches.[13] Given the realities of cash management, the intent of this review of Rider DMR spending was never to track the use of specific dollars. Rather, the Commission's intent was to see that the Companies and FirstEnergy Corp., while receiving Rider DMR, were taking affirmative steps to shore up their credit ratings, to avoid falling below investment grade,

[7] *See* ESP IV, Fifth Entry on Rehearing ("Fifth Entry on Rehearing") (Oct. 12, 2016), at 127-28.

[8] OMAEG Comments at 6.

[9] OCC Comments at 12-17.

[10] Companies Comments at 5-6.

[11] *Id.* at 6.

[12] *Id.* at 7-9.

[13] *Id.*

and to be in a position to implement a distribution grid modernization program upon obtaining Commission approval. Indeed, during oral argument before the Ohio Supreme Court, the Commission's counsel was asked to confirm that there was "no specific requirement" that the Companies spend Rider DMR revenues on grid modernization.[14] Commission counsel responded: "Actually, at this point, I don't think they would spend it on modernization. I think they would spend it on improving their financial position—their credit ratings."[15]

Thus, the only sensible measure of compliance with the Commission's ESP IV directive 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.[16] Under that analysis, there is no question that the Companies complied with the Commission's order: the Audit Report and the Companies' initial Comments demonstrate the direct and indirect expenditures made by or on behalf of the Companies toward the permissible uses of Rider DMR funds identified by the Commission far exceeded the amount of Rider DMR revenue.[17]

For all these reasons, every Intervenor claim that the Companies somehow violated the Fifth Entry on Rehearing fails. The extensive litigation in ESP IV clearly demonstrated that specific Rider DMR dollars, like other dollars that come into the Companies, would not—and could not—be traced to specific uses. The record was replete with testimony on that point. A Staff witness explained, "The [Rider DMR] monies aren't going to be marked . . . We are not

[14] *See In re Ohio Edison Co.*, Nos. 2017-1444 and 2017-1664, Oral Argument, at 24:20-24:33, available at https://ohiochannel.org/video/supreme-court-of-ohio-1-9-2019-case-nos-2017-1444-2017-1664-in-re-application-of-ohio-edison-co.

[15] *Id.*

[16] Companies Comments at 10-12.

[17] *Id.*

going to mark those dollars as DMR money."[18] And the same witness later reiterated that "the money for the DMR is not going to be marked different than any other money that Ohio Edison were to receive"[19] and also that the "dollars are kind of fungible . . . we are not going to mark this dollar and say it's got to go to any certain purpose . . . ."[20] Moreover, the Commission twice rejected intervenor calls to "earmark" Rider DMR dollars and to set those dollars aside in a separate account (or accounts), holding that these limitations "would defeat the purpose of Rider DMR."[21]

What's more, OCC and OMAEG based their arguments for the Ohio Supreme Court to reverse the Commission's authorization of Rider DMR on the fact that the Commission *did not impose* such requirements. In its merit briefing, OMAEG complained that Rider DMR "is a form of credit support for the Companies to allow them to access the capital markets" and that the "PUCO even recognized there was no requirement that the revenue collected under Rider DMR be used to modernize or invest in the grid."[22] OCC similarly argued, with emphasis, that "*[t]here is no requirement that FirstEnergy spend any of the $204 million per year collected from customers on grid modernization.*"[23] OCC went on to assert that "the rider simply provides money . . . for FirstEnergy Corp. to strengthen its balance sheet" and "whether the utilities actually spend [the] money to modernize the grid is . . . not required by the PUCO."[24] Given these arguments,

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[18] ESP IV, Rehearing Tr. Vol. III at 580:1-8.

[19] *Id.* at 584:13-18.

[20] *Id.* at 648:17-24.

[21] Fifth Entry on Rehearing at 86-87, 127; *see also* Eighth Entry on Rehearing at 36-37 (explaining an intervenor's arguments that, among other things, "all Rider DMR revenues be set aside in a separate account(s) within the Companies and [the Commission should] restrict disbursements from this account(s)" were "already raised" and "rejected by this Commission").

[22] *In re Ohio Edison Co.*, Nos. 2017-1444 and 2017-1664, Merit Brief of Appellant the Ohio Manufactures' Association Energy Group ("OMAEG Merit Brief"), at 28-29 (Feb. 26, 2018).

[23] *In re Ohio Edison Co.*, Nos. 2017-1444 and 2017-1664, Merit Brief of Appellants, the Office of the Ohio Consumers' Counsel and the Northwest Ohio Aggregation Coalition and Individually by its Member Communities ("OCC Merit Brief") at 19 (Feb. 26, 2018) (emphasis added).

[24] *Id.*

the unambiguous record in ESP IV, and the similarly plain terms of the Commission's orders, OCC and OMAEG cannot now reasonably argue that the Companies should be penalized for supposed noncompliance with requirements that the Commission not only never imposed, but directly rejected.

For the same reasons, OCC's claim today that the Companies should be fined for "fail[ing] to use distribution modernization rider charges *directly* in support of grid modernization"[25] contradicts the positions OCC previously took before this Commission and the Ohio Supreme Court. Likewise, given that the Companies' Grid Mod I program received Commission approval after the Ohio Supreme Court struck down Rider DMR, there can be no dispute that the Companies did not even have Commission authorization, and therefore opportunities for direct investment, to implement large scale grid modernization investments during the rider's term.[26]

In short, there has been no violation. The Audit Report shows expenditures toward permissible uses of Rider DMR funds well in excess of the revenues received, which in turn demonstrates the Companies' compliance with the Fifth Entry on Rehearing. In truth, Intervenors' complaints concern the form in which Rider DMR was initially approved; their arguments have nothing to do with any failure by the Companies to abide by the terms of the Commission's approval.

B. The Remedies Sought By OCC And OMAEG Are Inappropriate.

On the basis of their misplaced allegations of violations, OCC and OMAEG ask the Commission to impose damages, as well as forfeitures.[27] They also seek refunds[28]—which, as

[25] OCC Comments at 12.

[26] *See* Companies Comments at 14-16.

[27] OCC Comments at 17-21; OMAEG Comments at 9-10.

[28] OMAEG Comments at 8-9.

these Intervenors have long recognized—are prohibited by Ohio law, as well as contrary to the basis on which the Supreme Court of Ohio ruled that the Commission lacked authority to approve Rider DMR in ESP IV.[29] At the outset, however, none of these remedies is appropriate here because the Companies have complied with the Commission's directives. There is no violation. But even setting that aside, there are numerous flaws fatal to OCC's and OMAEG's demands.

1. OCC and OMAEG Ignore the Significant Customer Benefits Provided in the Recent Settlement that Resolved the Companies' SEET Cases.

OMAEG's and OCC's requests for refunds of Rider DMR revenues, discussed further below, ignore that the Companies are already returning to customers hundreds of millions of dollars that represent the resolution of all consumer protections available under Ohio law for ESP IV and Rider DMR revenues. Under Ohio law, consumer protection related to ESP IV is provided through the significantly excessive earnings test ("SEET"),[30] and the quadrennial review.[31] As the Commission is aware, the Companies, OCC, OMAEG, and numerous other parties recently reached a unanimous Global Stipulation resulting in benefits to the Companies' customers totaling $306 million in the form of bill credits and future rate reductions.[32] Among other matters, that settlement resolved the Companies' SEET cases for years 2017-2020, and their quadrennial review.[33] As noted in the Global Stipulation, one of the factors that led to the settlement was the December 1, 2020 Ohio Supreme Court decision that held that Rider DMR revenue must be included in the Commission's annual SEET review.[34] OCC and another intervenor, NOPEC,

[29] *See infra* at Section II.B.4.

[30] R.C. 4928.143(F).

[31] R.C. 4918.143(E).

[32] *See, generally*, Case No. 20-1034-EL-UNC, et al., Opinion and Order (Dec. 1, 2021).

[33] *See id.*

[34] *Id.* at ¶ 12.

acknowledged that decision as a basis for the settlement in their press release explaining the Global Stipulation's benefits for Ohio consumers.[35] Accordingly, the $306 million settlement reflects the unanimous resolution of issues regarding the Companies' historic and prospective earnings, which included the impact of all Rider DMR revenues. Thus, the Global Stipulation has already ensured consumers are protected in connection with Rider DMR revenues.

2. The Commission Should Reject OCC's and OMAEG's Flawed Claims for Damages or Restitution.

OCC, showing no consideration of its recommendations' effects on the safety and reliability of utility service, urges the Commission to award treble damages under R.C. 4905.61 of more than $1.3 billion.[36] OCC claims the Companies violated R.C. 4905.22, arguing that "FirstEnergy consumers were denied . . . 'necessary and adequate service and facilities' that are 'in all respects just and reasonable.'"[37] For reasons both procedural and substantive, OCC's request is patently improper and must be rejected.

First, "an action for treble damages, under R.C. 4905.61, which is predicated upon a failure of a public utility to comply with R.C. 4905.22, must be preceded by the successful prosecution of a complaint under R.C. 4905.26."[38] There has been no complaint and no due process under R.C. 4905.26. Second, any right to damages must be determined in a civil suit filed in common

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[35] *OCC and NOPEC Advocate for Record $306 Million in Consumer Refunds* (Jan. 22, 2022), https://www.nopec.org/newsroom/post/occ-and-nopec-advocate-for-record-306-million-in-consumer-refunds/ (last visited April 27, 2022). There, OCC, referring to the Ohio Supreme Court's decision, stated that the Court "threw out [the] PUCO decision shielding FirstEnergy from refunding profits," and now under the Global Stipulation, "[c]onsumers are to get $306 million of justice." *Id.*

[36] OCC Comments at 18.

[37] *Id.*

[38] *North Ridge Inv. Corp. v. Columbia Gas of Ohio, Inc.*, 49 Ohio App.2d 74, 76, 359 N.E.2d 443, 445 (9th Dist. 1973); *see also Satterfield v. Ameritech Mobile Communications, Inc.*, 155 Ohio St.3d 463, 2018-Ohio-5023, ¶ 20 ("[B]efore a suit may be brought for treble damages [in state court], there must have been a prior declaration by the PUCO that the public utility violated one of the statutes enumerated within R.C. 4905.61 or an order of the PUCO.").

pleas court, which may only be pursued after the Commission has found a violation.[39] The Commission itself does not award the monetary damages.[40] Third, R.C. 4905.61 "limits recovery of treble damages to the 'person, firm, or corporation' *directly injured* as a result of the 'violation, failure, or omission' found by the PUCO."[41] OCC nowhere articulates how it (or anyone else) was "directly injured" in the amount of $456 million. OCC's damages theory is ostensibly that the collection of every dollar of Rider DMR revenue by the Companies caused a legal injury. But the Companies collected those funds in accordance with Commission-approved tariffs, which simply does not and cannot constitute a redressable legal injury for which damages are justified.

For similar reasons, OMAEG's demand for restitution must be rejected. OMAEG argues the Commission should "order restitution to customers" under Ohio Adm. Code 4901:1-10-30(A)(3), claiming the Companies have "harmed consumers to the tune of $450 million."[42] Again, however, there has been no violation here nor any due process through an enforcement proceeding. Additionally, all Rule 4901:1-10-30(A) provides is that, when utilities fail to comply with Commission rules or orders, they "may be subject to any and all remedies *available under the law*" including "restitution or damages" to customers.[43] Nothing about that rule puts the claim for monetary relief before the Commission. OMAEG does not even attempt to point to any statute or

[39] *See, e.g.*, *Satterfield*, 2018-Ohio-5023 at ¶ 20; *Lahke v. Cincinnati Bell, Inc.*, 1 Ohio App.3d 114, 115 (1st Dist. 1981).

[40] *See, e.g.*, *Lahke*, 1 Ohio App.3d at ¶ 1 of the syllabus ("The Public Utilities Commission of Ohio has no power to grant money damages"); *In the Matter of the Complaint of Delmer Smith v. Dayton Power & Light Company*, Case No. 03-2544-EL-CSS, Entry (Jan. 29, 2004), 2004 WL 1813877, at ¶ 3. And to the extent a party alleges monetary harm as a result of inadequate service, "the request is equivalent to a request for damages and, thus, is beyond the jurisdiction of the Commission." *Smith*, 2004 WL 1813877, at ¶ 3.

[41] *Satterfield*, 2018-Ohio-5023 at ¶ 26 (emphasis added).

[42] OMAEG Comments at 9-10.

[43] O.A.C. 4901:1-10-30(A) (emphasis added).

Commission precedent that would permit monetary restitution here.[44] For all these reasons, OCC's and OMAEG's recommendations that the Commission should award damages or restitution must be rejected.

3. OCC's and OMAEG's Requests for Forfeitures Under R.C. 4905.54 Must Also Be Rejected.

OCC's and OMAEG's requests for "tens of millions of dollars in forfeitures" under R.C. 4905.54 for "each day's implementation of Rider DMR" also suffer from fatal defects.[45] To begin, there can be no forfeiture under R.C. 4905.54 when, as here, there has been no violation of statute or a Commission order. Furthermore, OCC and OMAEG seek to jettison all due process with their forfeiture requests, failing to point to any statute allowing for the Commission to assess forfeitures under R.C. 4905.54 in these circumstances. For example, R.C. 4905.54 and R.C. 4905.57 require a finding of a violation under Chapters 4901, 4903, 4905, 4907, and 4909 or failure to comply with a Commission order after "due notice." Such circumstances enumerated in R.C. 4905.54 are not implicated here. As explained above, there are no grounds for finding, as OCC argues, that the Companies should be subject to a $10,000 forfeiture for each and every day between when Rider DMR was first implemented and today.[46] The Companies were expressly authorized by the Commission to collect Rider DMR revenues between January 1, 2017 and July 1, 2019, when the Ohio Supreme Court struck down the rider.[47] The Companies' treatment of Rider DMR funds—

[44] *See In the Matter of the Complaint of Direct Energy Business, LLC v. Duke Energy Ohio, Inc.*, Case No. 14-1277-EL-CSS, Opinion and Order (April 10, 2019), at ¶ 31 (denying complainant's request for restitution, noting that "[i]t is well established that the Commission lacks authority to award monetary damages" and that restitution is only available in limited circumstances not applicable here), *rev'd on other grounds*, *In re Complaint of Direct Energy Bus., L.L.C. v. Duke Energy Ohio, Inc.*, 2020-Ohio-4429, 161 Ohio St. 3d 271, 271, 162 N.E.3d 764, 765.

[45] OCC Comments at 21; OMAEG Comments at 9-10.

[46] OCC Comments at 21.

[47] *In re Ohio Edison Co.*, 2019-Ohio-2401, 157 Ohio St. 3d 73, 78, 131 N.E.3d 906, 914, at ¶¶ 22-23.

consistent with the way in which all dollars collected by the Companies are handled—was transparent, understood by the parties, and approved by the Commission.

Relatedly, the Eighth Amendment prohibits the imposition of "excessive fines," U.S. Const. amend. VIII,[48] and applies to civil forfeiture actions.[49] When forfeitures move beyond a remedial purpose to a punitive one, they are "subject to the limitations of the Excessive Fines Clause." *Austin*, 509 U.S. at 610. Ohio law treats forfeitures similarly. Ohio Const. Art. 1, Section 9.[50] Damages and forfeitures are "excessive" fines within the meaning of United States and Ohio constitutional law when they are "grossly disproportional to the gravity" of the violation. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998); *see also State v. McShepard*, 2007-Ohio-6006, ¶ 16 (applying a proportionality test to determine whether fines comport with the Ohio Constitution). This analysis considers whether the forfeiture serves "no remedial purpose" and is "clearly punishment," *Bajakajian*, 524 U.S. at 343-44; "the degree of the defendant's reprehensibility or culpability;" "the relationship between the penalty and the harm"; and "the sanctions imposed in other cases for comparable misconduct," *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 425 (2001).

Here, the forfeitures sought by OCC are plainly punitive and grossly disproportional to any supposed violation. OCC cannot dispute either that the Companies were allowed to collect Rider DMR revenues or that the Companies and FirstEnergy Corp. spent far more on permissible uses

[48] The Excessive Fines Clause of the Eighth Amendment is incorporated by the Due Process Clause of the Fourteenth Amendment and thus is applicable to the states. *Timbs v. Indiana*, 139 S. Ct. 682, 686-87 (2019).

[49] *See Austin v. United States*, 509 U.S. 602, 608 (1993).

[50] "[T]he question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment." *State v. McShepard*, 2007-Ohio-6006, ¶ 16. Further, under Ohio law, "forfeitures are not favored in law or in equity . . . [and] will be strictly construed. *Rice v. Logan Cty. Bd. of Commrs.*, 114 Ohio App. 3d 198, 203, 682 N.E.2d 1106, 1109 (1996) (citing *State v. Lilliock* (1982), 70 Ohio St.2d 23, 25, 24 O.O.3d 64, 65, 434 N.E.2d 723, 724–725). As a result, forfeiture of property that functions as a "punishment for a specified offense" "constitutes a fine for purposes of Section 9, Article I of the Ohio Constitution and the Eighth Amendment to the United States Constitution." *Id*.

during Rider DMR's term than was recovered from ratepayers. The facts that money is fungible and specific Rider DMR dollars cannot be tracked to specific uses are no basis for forfeitures. These facts were, again, well understood during ESP IV. These forfeiture demands should be rejected out of hand.

4. OCC and OMAEG Seek Impermissible Refunds of Rider DMR Dollars.

OCC's and OMAEG's recommendations for damages or restitution tellingly seek remedies equal to the amount collected through Rider DMR. Further, OCC suggests that "an approach to redress for consumers could be using up to $456 million of DMR charges to offset other FirstEnergy charges to consumers for grid modernization."[51] For its part, OMAEG seeks a "return" of Rider DMR funds to customers if the Companies "cannot unequivocally demonstrate that the [Companies] did not use Rider DMR funds to support H.B. 6 political spending."[52] At bottom, these requests are demands for refunds. As explained above, the unanimous Global Stipulation already resolved all consumer protections available under the law in connection with ESP IV and Rider DMR revenues.[53] Further, making Rider DMR subject to refund contradicts the decision of the Supreme Court of Ohio, which ruled that the Commission could not approve Rider DMR in ESP IV precisely because Rider DMR is not refundable. The Court based its decisions on arguments by OCC and OMAEG, who are judicially estopped from now demanding refunds. If Rider DMR was not refundable then, it is not refundable now.

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[51] OCC Comments at 17.

[52] OMAEG Comments at 8. OMAEG recklessly argues that the "Audit Report raises a strong inference that [the Companies] not only could have used Rider DMR funds for purposes related to H.B. 6, but that [the Companies] intentionally disguised the ultimate destination of these funds." That accusation finds no support whatsoever in the Audit Report or any other record.

[53] *See supra* Section II.B.1.

In striking down Rider DMR, the Ohio Supreme Court held that the rider did "not serve as an incentive within the meaning of" R.C. 4928.143(B)(2)(h).[54] The Court reasoned that Rider DMR did not function as an incentive because (1) the "companies [were] not required to make any investments to modernize the distribution grid in exchange for DMR revenues," and (2) the Commission did not "place any effective condition or penalty on the companies' receipt of revenues if the DMR funds did not serve the intended purpose."[55] That ruling accepted the positions put forth by the Appellants, namely OCC and OMAEG.

Indeed, during oral argument, the Court asked whether there would be a violation if the Companies did not spend money on grid modernization.[56] In response, counsel speaking on behalf of both OMAEG and OCC argued that the Commission did not put any restriction on the use of funds, and, in fact, the Commission said the money would not be subject to refund.[57] So, according to OMAEG and OCC, there was no recourse: even if the Companies did not spend the money as they claimed they would, consumers cannot get the money back recovered under the rider.[58] Ultimately, the Court "agree[d] with appellants that there [were] no discernable consequences or repercussions if FirstEnergy faile[d] to comply with the conditions imposed for receiving DMR funds" because "the commission did not make the DMR subject to refund if FirstEnergy [did] not meet the required conditions."[59]

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[54] *In re Ohio Edison Co.*, 2019-Ohio-2401, 157 Ohio St. 3d 73, 76, 131 N.E.3d 906, 912-13.

[55] *Id.* at 913-14.

[56] *See In re Ohio Edison Co.*, Nos. 2017-1444 and 2017-1664, Oral Argument, at 8:13-9:28, available at https://ohiochannel.org/video/supreme-court-of-ohio-1-9-2019-case-nos-2017-1444-2017-1664-in-re-application-of-ohio-edison-co.

[57] *Id.* at 9:28-10:03.

[58] *Id.*

[59] *In re Ohio Edison Co.*, 2019-Ohio-2401, 157 Ohio St. 3d 73, 76, 131 N.E.3d 906, 914.

The Intervenors cannot reconcile their arguments that Rider DMR is not refundable, and therefore must end, with their current demand for refunds. In fact, because OCC and OMAEG prevailed on their arguments before the Ohio Supreme Court, they are judicially estopped from claiming that Rider DMR should be subject to refund now.[60] For all these reasons, OCC's and OMAEG's recommendations for the return of value to customers equating to the amount collected through Rider DMR should be rejected.

C. Other OCC Recommendations Are Misplaced.

OCC provides several recommendations that either go beyond the scope of the Audit Report or are unrelated to the Companies' compliance with Rider DMR's requirements. None should be adopted.

1. OCC's Money Pool Recommendations are Redundant and Eliminate Economic Benefits.

"Based on the fact that the Ohio Utilities are generally net lenders to the Money Pool," OCC questions the Companies' participation in the Money Pool.[61] It argues a supplemental audit of the Money Pool is necessary to determine whether the Companies "would benefit from an Ohio-only Money Pool."[62] OCC's recommendation is redundant. The Audit Report already recommended audits of the Money Pool should occur at least every five years.[63] As explained in their initial comments, the Companies believe the Audit Report recommendation to be constructive.[64] Thus, OCC's recommendation is unnecessary.

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[60] *Greer-Burger v. Temesi*, 2007-Ohio-6442, ¶ 25, 116 Ohio St. 3d 324, 330, 879 N.E.2d 174, 183 ("The doctrine of judicial estoppel forbids a party from taking a position inconsistent with one successfully and unequivocally asserted by the same party in a prior proceeding.").

[61] OCC Comments at 30-31.

[62] *Id.*

[63] Audit Report at 8.

[64] Companies Comments at 3.

In addition, OCC's recommendations lack a sound basis and display a fundamental misunderstanding of the Money Pool. The Companies' participation in the Money Pool is not "a subsidy from the Ohio Utilities to the non-Ohio Utilities."[65] As the Audit Report recognizes, "[t]he money pool arrangement allows the Ohio Companies, as well as other FirstEnergy subsidiaries, to benefit from FirstEnergy's scale."[66] It provides tangible benefits for the Companies and ratepayers because, by aggregating the dollars, all participants can lend and borrow at rates generally more attractive than otherwise would occur outside of the Money Pool.[67] Segregating the Companies' funds in an Ohio-only Pool, (or eliminating the Companies' participation in a Money Pool altogether), will serve only to reduce (or eliminate) these benefits to the Companies and their customers.

And, in any event, the Commission annually reviews and approves the Companies' participation in the Money Pool.[68] In approving the Companies' 2022 participation, the Commissioned noted "that the amount of the short-term borrowings under the Money Pool, the terms thereof, and the probable cost to Applicants" were "no less favorable than the terms described in the Applications [and] do not appear to be unjust or unreasonable."[69] Moreover, in providing approval, the Commission acknowledged that "the purposes to which the proceeds from the borrowings through the participation in the Money Pool shall be applied, appear reasonably to

[65] OCC Comments at 31.

[66] Audit Report at 28.

[67] *In the Matter of the Application of Ohio Edison Co. for Auth. to Issue Short-Term Notes & Other Evidences of Indebtedness*, Case No. 21-930-EL-AIS *et. al*, 2021 WL 6011066, at *1 (Dec. 15, 2021) ("The Money Pool allows utilities to lend short-term funds to the Money Pool and receive interest income or borrow short-term funds from the Money Pool at rates generally more attractive than those obtained through outside financing.")

[68] *See, e.g.*, *id.*, at *3.

[69] *Id.*

be required by Applicants to meet their present and prospective obligations to provide utility service."[70] OCC's recommendations and speculation are without merit.

2. The Companies Are Already Working to Implement a Dividend Policy.

The Companies agree with Daymark's recommendation to implement a dividend policy and are already at work to craft that policy. Thus, OCC's recommendations on this topic are redundant and unnecessary. Further, OCC's recommendation to cap dividends based on out-of-state regulations should be set aside.[71] OCC asks that any "dividend policy should limit the FirstEnergy Utilities' dividend payout to 85% or less of net income unless they obtain written approval from the PUCO for a higher payout through a public application."[72] Not only does such a policy limit the Companies' ability to manage cash and retained earnings balances at their discretion, but requiring written approval from the Commission also impermissibly usurps the Companies' ability to manage their own operations.[73] OCC's recommendations, therefore, limit the Companies' financial flexibility.

3. The Commission Has Already Rejected OCC's Request for Supplemental Audits.

Finally, OCC's request for a management or supplemental audit should be denied. OCC, in conclusory fashion, renews its arguments for an expansive management audit but does not explain the purpose or the need for an additional Rider DMR audit considering the *two* previous

[70] *Id.*

[71] OCC Comments at 29-30.

[72] *Id*. at 30.

[73] *See Elyria Tel. Co. v. Pub. Util. Comm.*, 158 Ohio St. 441, 447-448, 110 N.E.2d 59 (1953) (utility "is subject to extensive control and regulation" but "is still an independent corporation and possesses the right to regulate its own affairs and manage its own business"); *City of Cleveland v. Pub. Util. Comm.*, 102 Ohio St. 341, 131 N.E. 714 (1921), syllabus para. 2 (a public utility "has the right to control its own affairs and manage its own business, so long as it does not injuriously affect the public or exceed its charter powers.").

audits of the former rider.[74] OCC's requests are unfounded for two primary reasons. First, the Commission has already rejected OCC's request. Second, OCC does not explain how the prior two audits in this proceeding were insufficient.

To start, the Commission already considered and rejected OCC's calls for a management audit in this case. OCC, in an omnibus motion filed on September 8, 2020, requested an expansive management audit relating to a broad array of matters, including "whether any money collected from consumers" from "distribution modernization charge money[] was improperly used for any activities in connection with House Bill 6 instead of for electric utility service."[75] The Companies, in opposition, argued that there is no specific statute or rule authorizing OCC to seek an expansive management audit in this case, and this remains true. OCC relied, and presumably still relies upon, R.C. 4909.154. But R.C. 4909.154 applies to regulated public utilities when fixing base distribution rates for utility service under R.C. 4909.15.[76] It has no application here.

The Commission ultimately granted OCC's motion and initiated an additional review of the entire duration of Rider DMR through a third-party auditor.[77] OCC never challenged the scope of the ordered audit here—either through an Application for Rehearing or at any other time. Instead, OCC improperly includes in its comments a "renewed" request for a management audit, without offering meaningful support or explanation for yet another audit in this case. Rider DMR has undergone two audits and has not been in effect for nearly three years. Customers are receiving $306 million in value under a settlement with OCC, OMAEG and other parties that included resolution of the Companies' 2017-2019 SEET cases, which included Rider DMR revenue. There

[74] OCC Comments at 17, 22.

[75] Case No. 17-2474-EL-RDR, OCC Motion for a PUCO Investigation and Management Audit of FirstEnergy (Sept. 8, 2020), at 3-4.

[76] *See* Case No. 17-2474-EL-RDR, Companies' Memorandum Contra (Sept. 23, 2020), at 9-12.

[77] Case No. 17-2474-EL-RDR, Entry (Dec. 30, 2020), at ¶ 22, 23.

is nothing left to be done. The Commission should move toward a final resolution of this proceeding.

III. CONCLUSION

For the reasons above and those explained in their initial Comments, the Companies respectfully restate their request that the Commission find that the Companies complied with all applicable requirements regarding Rider DMR.

Dated: May 4, 2022 Respectfully submitted,

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On behalf of the Companies

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was filed electronically through the Docketing Information System of the Public Utilities Commission of Ohio on May 4, 2022. The PUCO's e-filing system will electronically serve notice of the filing of this document on counsel for all parties.

/s/ Shalini B. Goyal
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Summary: Reply Comments electronically filed by Mrs. Shalini B. Goyal on behalf of Ohio Edison Company and The Cleveland Electric Illuminating Company and The Toledo Edison Company